IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: **No. CR-525-2012**
	:
WILLIAM J. KEMP,	:
Defendant	:

OPINION AND ORDER

This matter came before the court on Defendant's post sentence motion. The relevant facts follow.

In the evening of February 13, 2012, Kirsten Radcliffe, Michael Updegraff, and Thomas Schmitt were drinking at the Fifth Avenue Tavern in Williamsport. Updegraff and Radcliffe, who were boyfriend and girlfriend, got into a disagreement. Radcliffe left the Tavern and walked away down Fifth Avenue, ending up outside Defendant's apartment.

Defendant was inside his apartment fixing a computer and drinking with his girlfriend when he heard a female crying outside. He went outside, saw Radcliffe, and, although he did not know her, he brought her into his apartment. Twenty to thirty minutes later, Defendant gave Radcliffe a ride to the residence she shared with Updegraff at 1017 Franklin Street.

Defendant went inside the residence with Radcliffe. When Updegraff came downstairs and saw Defendant, he asked who the hell Defendant was. Radcliffe explained that Defendant had given her a ride home. Updegraff told Defendant to get out of his house, but Defendant refused to leave. Radcliffe apologized for Updegraff's behavior and told Defendant that he should just leave.

Updegraff grabbed Defendant and pushed or shoved him into a wall and then out the door. Updegraff and Schmitt followed Defendant outside and part way down the driveway. Updegraff stopped at the end his van and Schmitt continued walking for several feet so that he was approximately midway between the end of the van and Defendant's vehicle, which was parked on Franklin Street. Throughout, Updegraff and Schmitt continued yelling at Defendant to keep going, get off the property and leave.

Defendant continued walking quickly down the driveway to his vehicle. Instead of leaving, however, Defendant opened the door of his vehicle and grabbed his handgun. He turned back towards Updegraff and Schmitt and began firing shots as he moved towards them. One shot struck Schmitt in the neck and another was a contact or near contact shot to the back of his head.

Updegraff and Radcliffe tried to wrest the firearm away from Defendant. While doing so, they punched and kicked Defendant repeatedly. Various neighbors saw and/or heard the gunshots and commotion and called 911. Within minutes, the police arrived and took Defendant into custody.

On September 17, 2013, after a trial by jury, Defendant was convicted of third degree murder, two counts of aggravated assault, possession of instrument of crime, and two counts of recklessly endangering another person.

On January 29, 2014, the court sentenced Defendant to 20 to 40 years' incarceration in a state correctional institution. Defendant filed a timely post sentence motion in which he contested numerous evidentiary rulings, challenged the weight and

sufficiency of the evidence and asserted that his sentence was excessive.

Defendant first asserts that the court erred in precluding the defense forensic expert, Dr. Eric Vey, from testifying that this was not an "execution-style" shooting. The court cannot agree.

On February 6, 2013, the Commonwealth filed a motion in limine seeking to preclude Dr. Vey's opinion that the head wound to the victim was not an execution style shooting because "execution style shooting" is not a legal term and such an opinion was not the proper subject of expert testimony, was not addressed in forensic pathology, and was a matter for the jury to determine based on the evidence concerning the shooting and the arguments presented in this case. In an order entered March 15, 2013, the Honorable Nancy L. Butts granted the Commonwealth's motion and stated:

> As the term 'execution style shooting" is neither a legal nor forensic pathology term and the use of such a term, which Dr. Vey states is 'predominantly a sensationalist media construct,' may cause confusion or mislead the jury when used by an expert witness, Dr. Vey shall not be permitted [to] use the term in his testimony. <u>See</u> Pa.R.E. 403. Dr. Vey is not precluded from testifying as an expert witness and may testify to the specific details of his findings (i.e.[,] how the shooting may have occurred).

The court agrees with this rationale. The admission of expert testimony is a matter for the discretion of the trial court and should not be disturbed unless there is a clear abuse of discretion. <u>Commonwealth v. Zook</u>, 532 Pa. 79, 615 A.2d 1, 11 (1992). "Expert testimony is permitted only as an aid to the jury when the subject matter is distinctly related to a science, skill or occupation beyond the knowledge or experience of the average layman." <u>Commonwealth v. Counterman</u>, 553 Pa. 370, 719 A.2d 284, 302-03 (1998), quoting

Commonwealth v. O'Searo, 466 Pa. 224, 229, 352 A.2d 30, 33 (1976). By Dr. Vey's own account, "execution style shooting" was not a forensic pathology term. It was a media construct. As such, it was not beyond the knowledge of the average layperson; it was a term created for the average layperson by the media.

Defendant also contends this ruling precluded him from rebutting the Commonwealth's evidence at trial. The court cannot agree.

Defendant was free to present evidence to rebut the fact that the range of fire for the shot to the back of the victim's head was ½ inch or less, making it a contact or near contact gunshot wound. Dr. Vey, however, could not rebut that fact, because he reached the same conclusion. Instead, the defense wanted to present testimony over semantics about a term that was neither a legal term nor a term of art in forensic pathology and for which there was no standardized definition.

Defendant next contends the court erred in denying the defense motion to preclude the Commonwealth introduction of the term "execute" during trial. Again, the court cannot agree.

The Commonwealth did not use the term "execute" at trial. The prosecutor did, however, use the term "execution" in his closing argument. N.T., September 13, 2013 at p. 83.

In arguing against Defendant's claim of self-defense, the prosecutor claimed that Defendant's version of the events was not supported by the testimony of any other witnesses or the physical evidence. He also contended the evidence showed that Defendant

shot the victim at point blank range in the throat, dropping the victim to his knees and then Defendant pressed the muzzle to the back of the victim's head and fired again. Nobody witnessed any altercation between Defendant and the victim at the moment the deadly shots were fired, and nobody, not even Defendant, put a weapon in the victim's hands. Then the prosecutor said, "That, ladies and gentlemen, is not self-defense. That is an execution."

It is well-settled that a prosecutor is free to present his or her arguments with logical force and vigor. Commonwealth v. Hutchinson, 611 Pa. 280 611 Pa. 280, 25 A.3d 277, 306 (Pa. 2011). Furthermore, comments that constitute "oratorical flair" are not objectionable. Id. at 307. The use of the term "execution" in this context was not objectionable; it was merely oratorical flair.

Defendant's arguments regarding the terms "execution style shooting" or "execute" are akin to a DUI case where the experts agree that an individual blood alcohol content was above .20% and the individual was intoxicated, but the defense wanted to present expert testimony that the individual was not "wasted" and wanted to preclude the Commonwealth and its witnesses from using that term. The range of fire and the blood alcohol content would be beyond the knowledge of the average layperson and subject to expert testimony. The terms "execution style shooting" or "wasted", however, would not. Both instances involve undefined, subjective terms that are not beyond the grasp of a layperson.

Defendant avers that the court erred in precluding testimony by toxicologist Lawrence Guzzardi that: Defendant's blood alcohol concentration at the time of the incident

was in the range of .16% - .20%; Defendant experienced altered mental status due to alcohol consumption or a closed head injury or a combination of both conditions; and either alcohol intoxication at that level or a concussion can cause transient loss of memory and inappropriate thought process and conduct. Defendant also claims that the court erred by precluding testimony from Dr. Richard Dowell that Defendant suffered a concussion or had symptoms of a concussion and a concussion can cause memory loss and by denying the defense request during trial to permit Dr. Dowell's testimony (see N.T., September 16, 2013, at pp. 212-215, 219-220).

Judge Butts addressed the admissibility of Dr. Guzzardi's and Dr. Dowell's testimony in her March 15, 2013 order as follows:

> The expert testimony of Dr. Lawrence Guzzardi and Dr. Richard Dowell, Jr. shall not be admitted for the purpose of explaining the Defendant's statements, lack of statements, and/or the manner in which the statements were made to police, as the credibility [of] the Defendant and his statements are to be assessed by the jury and are not within the domain of expert witnesses. See Commonwealth v. Crawford, 718 A.2d 768 (Pa. 1998)(finding that expert testimony to explain revival of repressed memory and how it affected a witness's statement and his credibility was within the exclusive province of the jury and should have been excluded); see also Commonwealth v. Gallagher, 547 A.2d 355 (Pa. 1988); Commonwealth v. Dunkle, 602 A.2d 830 (Pa. 1992); Commonwealth v. Constant, 925 A.2d 810 (Pa. Super. 2007). Expert testimony on intoxication, however, is not precluded from being presented to show that the Defendant was incapable of forming a specific intent to kill. See Commonwealth v. Blakeney, 946 A.2d 645 (Pa. 2008).

During trial, the court felt constrained by the coordinate jurisdiction. The coordinate jurisdiction rule states that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions. Commonwealth v. Starr, 541 Pa. 564, 664

A.2d 1326, 1331 (1995). Once a matter has been decided by a trial judge the decision should remain undisturbed, unless the order is appealable and an appeal therefrom is successfully prosecuted. Golden v. Dion & Rosenau, 600 A.2d 568, 570 (Pa. Super. 1991). Departure from the coordinate jurisdiction rule "is allowed only in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or the evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed." Commonwealth v. Hernandez, 39 A.3d 406, 412 (Pa. Super. 2012)(citations omitted).

There was no intervening change in the law or the facts that would justify altering Judge Butts' decision. Although this court may not have exercised its discretion in the same manner that Judge Butts did with respect to Dr. Dowell's proposed testimony, the court cannot say that Judge Butts' decision was clearly erroneous. It is not as if there is a case directly on point that holds such evidence is admissible in all cases. Furthermore, abandoning Judge Butts' decision in the middle of trial would have been prejudicial to the Commonwealth who, in reliance on that decision, did not retain an expert to rebut Dr. Dowell's proposed testimony.

The court also does not believe that the lack of this evidence deprived Defendant of a fair trial. Intoxication and its effects are within the knowledge of the average layperson. In fact, lay witnesses are permitted to give opinion testimony regarding intoxication. Commonwealth v. Smith, 904 A.2d 30, 37 (Pa. Super. 2006); Commonwealth v. Reynolds, 389 A.2d 1113, 1119 (Pa. Super. 1978). The average juror also is able to

recognize, without the assistance of expert testimony, that head trauma can cause memory issues. The jury heard ample evidence to show that Defendant was intoxicated, he suffered head trauma, and he could not remember everything from the night in question. There was testimony that Defendant and his girlfriend had consumed three-quarters of a fifth of Knob Creek bourbon, and Defendant readily admitted he was intoxicated. The jury heard testimony from Defendant, Updegraff and Radcliff about the altercation inside the residence and the blows inflicted on Defendant in their attempts to disarm him, which was largely undisputed. The jury also heard testimony from the emergency personnel who treated Defendant and saw several photographs of Defendant's injuries. Although the defense was precluded from using the word concussion, the court permitted the defense to make any argument it wished to the jury that Defendant's memory issues were due to his intoxication and the head injuries that he suffered. Furthermore, the Commonwealth's evidence was strong. In fact, the court commented at sentencing that Defendant was fortunate that the jury did not find him guilty of first degree murder. N.T., January 29, 2014, p. 46. A defendant is entitled to a fair trial, not a perfect trial. Commonwealth v. Hairston, 84 A.2d 657, 671 (Pa. 2014). In light of the foregoing, the court finds that Defendant received a fair trial and even if it was error to preclude this evidence, the error was harmless. Therefore, Defendant is not entitled to a new trial.

Even if the rulings on this issue were erroneous, the error was harmless. Although the court may have made a comment during trial suggesting otherwise, after hearing all of the evidence, the court is convinced that the result of the trial would not have

been any different if the experts in question had been permitted to testify. The Commonwealth's evidence in this case was strong. In fact, the court commented at sentencing that Defendant was fortunate that the jury did not find him guilty of first degree murder. N.T., January 29, 2014, p. 46. Defendant's claim of self-defense simply was not supported by the evidence in this case. The testimony of the neighbors was consistent and unbiased. All of the neighbors testified that they thought the incident was over when Defendant reached his vehicle. Defendant never saw the victim in possession of a gun or a knife. Nonetheless, Defendant grabbed his gun, turned around and began firing shots and proceeded back onto the property toward the victim. Defendant then proceeded to shoot the victim in the neck and in the back of the head at point blank range.

Defendant next avers that the court erred in denying a defense request for a mistrial due to Dr. Marianne Hamel's care for a juror during trial.

> It is well-settled that the review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will … discretion is abused. A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. A mistrial is not necessary where cautionary instructions are adequate to overcome prejudice.

<u>Commonwealth v. Chamberlain</u>, 612 Pa. 107, 30 A.3d 381, 422 (2011)(internal quotation marks and citations omitted).

The Commonwealth called Dr. Hamel, a forensic pathologist, to testify

regarding the autopsy she performed on the victim and the gunshot wounds that killed him. During her testimony, photographs of the victim were shown to the jury. One of the jurors began sweating and having problems breathing, which another juror brought to the court's attention. Dr. Hamel went over and talked to the juror who was having difficulties to assess the situation. The court sent the rest of the jurors to the jurors' lounge and cleared the courtroom, and EMS personnel were called. The juror was okay; he simply suffered what's known as a vasovagal reaction, an emotional physical response, to viewing the photographs.

The juror was excused without objection from either party, but the defense requested a mistrial on the basis that the juror's observations of Dr. Hamel's aid to the excused juror would enhance her credibility in the eyes of the remaining jurors. The Commonwealth opposed the request for a mistrial, because there wouldn't be any differences between the expected testimony of the Commonwealth and defense pathologists in the opinions of the gunshot wounds and manner or cause of death; there would only be minor differences in their testimony regarding the injuries they observed on the victim's hands.

The court denied the request for a mistrial. The court noted that Dr. Hamel was a witness, not a party, and the care she provided was nothing more than talking to the juror and assuring him that he was okay. The defense then asked the court to give the jury a cautionary instruction. The court granted this request and instructed the jury that it could not factor Dr. Hamel's assistance to the juror into its decision. N.T., September 9, 2013, pp. 104-110.

Under the facts and circumstances of this case, a mistrial was not necessary.

The court gave the jury an appropriate cautionary instruction. "The law presumes that the jury will follow the instructions of the court." Commonwealth v. Brown, 567 Pa. 272, 786 A.2d 961, 971 (2001). Therefore, Defendant is not entitled to a new trial on this issue.

Defendant next contends that the court erred in denying the defense request during trial to permit Dr. Dowell's testimony. See N.T., September 16, 2013, at pp. 212-215, 219-220. Due to the coordinate jurisdiction rule, the court was precluded from granting the defense request when Judge Butts had already issued an order precluding such testimony in response to a motion in limine filed by the Commonwealth.

Defendant asserts the court erred in precluding defense expert, Michael Doane, from testifying that the knife found on the ground near the victim's feet was an offensive weapon and the basis for that opinion. The court cannot agree.

Defense counsel argued that the fact that the knife was an offensive weapon was relevant to Defendant's justification defense. The court respectfully disagreed.

Other evidence in the case tended to show that a knife with the blade open and exposed was found near the victim's feet and the victim was known to carry such a knife. The knife was introduced into evidence and the jury had the opportunity to see it. Furthermore, it was apparent that the Commonwealth was going to argue, based on Updegraff's testimony, that the knife had fallen from a window that Updegraff and the victim had been working on in the house. Therefore, the court permitted Mr. Doane to testify that the knife was not weathered and it was not a work tool to show that the knife had not been laying in the yard for a significant period of time and to rebut the Commonwealth's argument

that the knife had fallen from the window. The fact, however, that Mr. Doane believed the knife was an offensive weapon, however, was not relevant. If the victim wielded **any** knife at the time of the shooting, it would support Defendant's claim of self-defense. It did not matter whether the knife was a kitchen paring knife or a prohibited offensive weapon. Furthermore, there was no testimony or evidence to support that Defendant saw the knife or realized that it was particularly dangerous because it was an offensive weapon. Under these circumstances, it was not error to precluded Mr. Doane from referring to the knife as an offensive weapon or providing an explanation why he believed the knife was an offensive weapon.

Defendant also contends that the court erred in denying the defense request to permit Mr. Doane to open the knife found at the victim's feet so the jury could hear the sound it makes when it is being opened. Defendant argues that the sound of the knife would provide the entire picture to the jury to understand the sounds Defendant would have heard prior to the shooting. Unfortunately, there is no support in the record for Defendant's arguments. There is nothing in the record to suggest that the knife was closed, the victim opened it or that Defendant heard the sound of the knife opening prior to the shooting. Therefore, the court did not err in precluding Mr. Doane from opening the knife.

Defendant next asserts that the court erred in precluding the introduction of Michael Updegraff's criminal record. Judge Butts granted the Commonwealth's motion to preclude this evidence in an opinion and order entered on August 12, 2013. The court would rely on pages two through four of that opinion and order. Although the court acknowledges

that Updegraff was the victim of one count of recklessly endangering another person, the convictions are inadmissible nonetheless, because Defendant was not aware of Updegraff's assaultive history and the convictions are too remote.

Defendant's reliance on Commonwealth v. Rush, 646 A2.d 557 (Pa. 1994) is misplaced. Although the commission of the crimes was separated by eight years in Rush, the defendant was incarcerated for all but eighty-four days of that time period. Here, there was more than seven years between the date of the current offenses and the date of Updegraff's most recent conviction during which Updegraff was not incarcerated.[1]

Defendant avers that the court erred in permitting the Commonwealth to introduce Defendants' statements from a December 24, 2009 Clinton County Children and Youth hearing. Defendant, however, opened the door to this evidence.

In the Children and Youth hearing, Defendant testified that he normally drove with guns in his car. When the judge asked him why, Defendant responded, "Well, honestly, because I have the right to; and I feel like I should exercise it. And what's the point in having the guns and the permit to carry if you're not going to make use of it?" Defendant then stated that he carries a weapon routinely. He stated, "If I don't have the .45 on my hip, I would have a knife in my pocket at almost all times." He also said, "And that's why I tend to carry weapons. I don't have any desire to get into a fight that I can't win."

The court originally granted a defense motion in limine to preclude this evidence. During trial, though, defense counsel asked Defendant's former girlfriend, Kristen

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[1] Defendant's argument in paragraph 130 of his motion that Updegraff's prior convictions were admissible to

Smith, why Defendant kept his firearm in his automobile. Ms. Smith testified that the weapon was not permitted in her residence. This opened the door for the Commonwealth to rebut this evidence with Defendant's own statements about why he kept guns in his vehicle.[2] The court was not going to permit the defense to mislead the jury into believing that Defendant was forced to keep his firearm in his vehicle due to his girlfriend's aversion to having weapons in her residence when Defendant, by his own admission, voluntarily and routinely carried weapons in his vehicle.

Defendant contends the court erred in precluding him from presenting photographs marked as defense exhibits 16, 18, 19, 20, 21, and 22 to show the extent of the injuries he suffered that evening, which would also explain how Defendant's memory was affected. The court cannot agree.

The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error. Commonwealth v. Malloy, 579 Pa. 425, 856 A.2d 767, 776 (Pa. 2004) (citing Commonwealth v. Freeman, 573 Pa. 532, 827 A.2d 385, 405 (Pa. 2003)). Although relevant, the court may preclude a party from "needlessly presenting cumulative evidence." Pa.R.E. 403.

Four photographs of Defendant's injuries were introduced in evidence: Commonwealth Exhibit 11 and Defendant's Exhibits 14, 15 and 17. The court precluded the defense from introducing exhibits 16, and 18 through 22, because these photographs were

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furnish the context or complete story of the events surrounding the crime is utterly frivolous.

cumulative. N.T., September 11, 2013, pp. 67-71. The defense then utilized the admitted photographs during Officer Ananea's testimony. N.T., September 11, 2013, pp. 72-73. The court also notes that photographs of Defendant's hands were utilized during Dr. Vey's testimony (N.T., September 13, 2013, pp. 120-121) and a photograph of Defendant's injuries was utilized during Defendant's testimony (N.T., September 16, 2013, p. 46). Since multiple photographs of Defendant's injuries were admitted into evidence and utilized by the defense, Defendant was not prejudiced by the court's preclusion of the other six photographs.

Defendant next asserts the court erred in limiting the defense introduction of Defendant's possible concussion at trial. Specifically, Defendant complains the court precluded him from presenting testimony from Dr. Alhashimi that Defendant suffered a "possible concussion" and precluded defense counsel from using the word concussion during his closing arguments, but the court denied the defense request to preclude the Commonwealth from introducing evidence regarding Defendant's mental state on February 13, 2012 and from arguing that Defendant was fabricating his testimony at trial and such was consciousness of guilt simply because Defendant did not remember certain things or make certain statements to Agent Kontz when he was interviewed the night of the incident which was prejudicial in that Defendant's possible concussion and/or traumatic head injury would explain his memory loss on the night of the incident.

The court precluded the defense from presenting testimony from Dr. Alhashimi that Defendant suffered a "possible concussion" for several reasons. First, Dr.

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[2] The argument on this issue can be found in the transcript from September 16, 2013 at pp. 15-32.

Alhashimi never diagnosed Defendant as actually having suffered a concussion. Second, "possible" does not meet the requisite certainty for expert testimony. See Cohen v. Albert Einstein Medical Center, Northern Div., 405 Pa. Super. 392, 5921 A.2d 720, 723-24 (1991). Third, the medical records were not sufficient to put the Commonwealth on notice that Dr. Alhashimi would testify Defendant suffered a "possible concussion." Although Dr. Dowell's report was more definitive, Judge Butts precluded Dr. Dowell's testimony. For these reasons, the Commonwealth didn't retain the expert with whom they were consulting on this issue. It would have been prejudicial to the Commonwealth to permit any testimony about a concussion or possible concussion when Judge Butts had precluded such evidence and the Commonwealth had reasonably relied on that ruling. See N.T., September 12, 2013, pp. 6-16.

Defendant asserts the court erred in denying Defendant's request to instruct the jury on voluntary manslaughter and heat of passion. The court instructed the jury on voluntary manslaughter based on an unreasonable belief the killing was done in self-defense. N.T., September 17, 2013, pp. 129-131. The court did not instruct the jury on voluntary manslaughter based on a heat of passion because the evidence did not support such an instruction.

Section 2503(a) of the Crimes Code, which governs voluntary manslaughter based on heat of passion, states:

> (a) *General rule.* --A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

> (1) the individual killed; or
>
> (2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

18 Pa.C.S. §2503(a). The Pennsylvania Supreme Court described the heat of passion defense as follows:

> A heat of passion defense, like the diminished capacity defense, is a partial defense, focused on the element of intent. A defendant accused of murder may establish that he or she is guilty, not of murder, but rather of voluntary manslaughter, by proving that, at the time of the killing, he or she was acting under a sudden and intense passion resulting from serious provocation by the victim. Emotions encompassed by the term 'passion' include 'anger, rage, sudden resentment or terror which renders the mind incapable of reason.' Whether the provocation by the victim was sufficient to support a heat of passion defense is determined by an objective test: whether a reasonable man who was confronted with the provoking events would become 'impassioned to the extent that his mind was incapable of cool reflection.' 'To reduce an intentional blow, stroke, or wounding resulting in death to voluntary manslaughter, there must be sufficient cause of provocation and a state of rage or passion without time to cool, placing the [defendant] beyond the control of his reason, and suddenly impelling him to the deed. If any of these be wanting--if there be provocation without passion, or passion without a sufficient cause of provocation, or there be time to cool, and reason has resumed its sway, the killing will be murder.'

Commonwealth v. Hutchinson, 611 Pa. 280, 25 A.3d 277, 314-315 (2011)(citations omitted).

It is clear from both the statute and Hutchinson that the victim must be the person who seriously provoked the defendant. In his post sentence motion, Defendant relies on the fact that he and Updegraff got into a verbal argument and Updegraff assaulted Defendant in the residence and on the porch. The victim, however, was Mr. Schmitt, not Updegraff. Defendant also was not trying to kill Updegraff when he shot Schmitt.

The only acts or attributes that Defendant attributed to Schmitt were that he had “crazy eyes” and he was running down the driveway towards him. This is not sufficient provocation for a reasonable man to become so impassioned that he was incapable of cool reflection and would just start shooting at Schmitt. Therefore, Defendant was not entitled to a heat of passion instruction.

Defendant next asserts that the evidence was insufficient to support all of the jury’s guilty verdicts because the evidence was insufficient to disprove self-defense. The court cannot agree.

Although Defendant asserted that he acted in self-defense, the Commonwealth presented ample evidence to prove otherwise. Defendant was not in imminent danger of death or serious bodily injury when he shot the victim, he was not free from fault in provoking the difficulty which culminated in the slaying and he violated a duty to retreat.

The evidence presented by the Commonwealth showed that Defendant was told to leave the residence but he refused to do so. An argument erupted between Updegraff and Defendant, and Updegraff grabbed Defendant and physically removed him from the residence. Updegraff and Schmitt then escorted Defendant partway down the driveway. Updegraff stopped at the end of his van and Schmitt stopped halfway between the end of the van and Defendant’s vehicle, which was parked facing the wrong way on Franklin Street. Defendant proceeded to his vehicle. It appeared that the altercation was over and Defendant was going to leave. Instead of leaving, however, Defendant grabbed his pistol and pulled the slide. He admittedly ascertained the situation. He turned around toward Schmitt and began

firing shots and walking in Schmitt's direction.

The testimony of neighbors who heard the commotion and looked outside supported Updegraff's testimony that he stopped at the end of his van and Schmitt stopped about halfway between the van and Defendant's vehicle. The neighbors' testimony and the location of the shell casings also refuted Defendant's claims that Schmitt ran down the driveway toward him before he began shooting and Schmitt charged him from a three-point stance in the yard.

Schmitt suffered a contact gunshot wound to the neck and a contact or near contact wound to the back of the head. Updegraff testified that when the first of those shots hit Schmitt he turned around toward Updegraff and fell to his knees, which is supported by the location of the wounds on different sides of Schmitt's body.

Although Defendant claimed he heard someone say the word gun when he was on the porch, the police arrived while Updegraff and Radcliff were trying to get Defendant's gun away from him and they did not find any other gun.

Defendant argued that since a knife with the blade open and exposed was found near the victim's feet after the incident, it supports his claim that the victim was trying to kill him and he was acting in self-defense. Defendant, though, never saw the victim wielding a knife, and Updegraff testified that he and Schmitt had been working on a window in the house and the knife could have fallen into the yard when they were working on the window. Moreover, the jury instruction on self-defense requires that the person against whom deadly force was used either display or use a weapon readily or apparently capable of

lethal use. There was absolutely no evidence that Schmitt displayed or used the knife in question.

In summary, the Commonwealth's evidence showed Defendant provoked or continued the difficulty by refusing to leave Updegraff's property, he did not reasonably believe he was in imminent danger of death or serious bodily injury because he never saw Schmitt in possession of a gun or the knife, and he violated a duty to retreat by going after Schmitt instead of driving away or running away after Updegraff and Schmitt stopped in the driveway and Defendant safely reached his vehicle. Therefore, the Commonwealth established that Defendant did not act in self-defense and the evidence was sufficient to support the jury's verdicts.

Defendant also asserts that the jury's verdicts were against the weight of the evidence due to his claim of self-defense.

An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. Commonwealth v. Sullivan, 820 A.2d 795, 805-806 (Pa. Super. 2003). A challenge to the weight of the evidence concedes that there is sufficient evidence to support the verdict. Commonwealth v. Widmer, 560 Pa. 308, 774 A.2d 745, 751(2000). Therefore, the court is not obligated to view the evidence in the light most favorable to the verdict winner. Id. Nevertheless, a new trial is awarded only when the "verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." Sullivan, 820 A.2d at 806 (citation omitted). The evidence must be so tenuous, vague and

uncertain that the verdict shocks the conscience of the court. Id.

A defendant is not entitled to relief on a weight claim merely because there is a conflict in testimony. Commonwealth v. Sanchez, 614 Pa. 1, 36 A.2d 24, 39 (2011). "Conflicts in the evidence and contradictions in the testimony of any witnesses are for the factfinder to resolve." Commonwealth v. Lofton, 57 A.3d 1270, 1273 (Pa. Super. 2012), citing Commonwealth v. Tharp, 574 Pa. 202, 830 A.2d 519, 528 (2003). Indeed, the "weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." Commonwealth v. Small, 559 Pa. 423, 435, 741 A.2d 666, 672 (1999), citing Commonwealth v. Johnson, 542 Pa. 384, 394, 668 A.2d 97, 101 (1995), cert. denied, 519 U.S. 827, 117 S. Ct. 90 (1996). Simply put, the role of the court in a weight claim is to determine whether "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or give them equal weight with all the other facts is to deny justice." Lofton, 57 A.3d at 1273, citing Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 752 (2000).

The jury's verdict did not shock the court's conscience. The jury was not required to believe Defendant's version of the events. Quite frankly, given the fact that Defendant's version of the incident was contradicted by Updegraff, Radcliff, all of the neighbors, and the location of the shell casings, as well as the fact that Defendant never saw the victim wielding either a gun or a knife, the court would have been shocked if the jury accepted Defendant's claim of self-defense.

Defendant's final claim is that court's sentence was excessive. While the

court's sentence was at the top of the standard guideline range, it was not excessive under the facts and circumstances of this case. The court considered the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. The court reviewed a pre-sentence investigation, letters from the victim's family members, and letters that were submitted on Defendant's behalf. The court noted Defendant's lack of prior criminal history, that he was doing good things at the prison, and that his involvement in the situation started out with him being a good Samaritan by giving Ms. Radcliffe a ride home. What the court could not ignore, however, was Defendant's lack of remorse, and the fact that the whole incident could have been avoided if Defendant had left when he had the opportunity to do so. The court noted the danger to the community from senseless, escalating gun violence. The court also noted the specific facts of this case. Contrary to Defendant's claims of self-defense, the victim did not come at Defendant or his body would have been lying near Defendant's vehicle. Instead, Defendant went to the victim and, without seeing the victim in possession of any deadly weapon, he shot him at point blank range in the neck and in the back of the head halfway down the driveway. Defendant then continued firing and emptied the clip in the direction of Updegraff and his residence. The community was fortunate that more people were not killed or seriously injured in this incident. The court also saw in Defendant a man who blames everyone else. Under all of the circumstances, the court concluded that a sentence of 20 to 40 years' of incarceration was appropriate. See N.T., January 29, 2014, pp. 41-48.

ORDER

AND NOW, this ___ day of June 2014, the court DENIES Defendant's post sentence motion.

By The Court,

____

Marc F. Lovecchio, Judge

cc: Eric Linhardt/Kenneth Osokow, Esquire
William Miele/Robert Cronin, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file