IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-708-2013**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
GLENN JACKSON,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's judgment of sentence dated October 5, 2015, which became final when the court denied Appellant's post sentence motion in an opinion and order filed on November 16, 2015. The relevant facts follow.

In an Information filed on June 3, 2013, Appellant Glenn Jackson was charged with criminal homicide, aggravated assault, possessing instruments of a crime, abuse of a corpse, simple assault, and tampering with or fabricating physical evidence.

Following a lengthy trial in June 2015, the jury found Appellant not guilty of first degree murder and third degree murder. The jury, however, found Appellant found guilty of voluntary manslaughter, two counts of aggravated assault, possession of instruments of a crime, abuse of a corpse, simple assault, and tampering with or fabricating physical evidence.

On October 5, 2015, the court sentenced Appellant to serve an aggregate term of incarceration in a state correctional institution, the minimum of which was 82 months and the maximum of which was 25 years.

On October 8, 2015, Appellant filed a post sentence motion in arrest of judgment and for a new trial, which the court denied in an opinion and order filed on November 16, 2015.

Appellant filed a timely appeal, in which he asserts the following issues:

> (1) The evidence presented at trial was insufficient to prove voluntary manslaughter and both counts of aggravated assault in that the Commonwealth failed to disprove self-defense; specifically, that Appellant's belief was not reasonable.
>
> (2) The evidence was insufficient to prove aggravated assault (inflicting serious bodily injury), because the evidence failed to establish malice as required by circumstances manifesting extreme indifference to human life.
>
> (3) The trial court erred by excluding testimony from Dr. Terri Calvert, a psychiatrist who was prepared to testify on Appellant's behalf.
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> (4) The trial court erred by excluding evidence that the victim's wife had obtained a PFA against the victim.
>
> (5) The trial court erred by limiting June Wagner's testimony to exclude the proffer that the victim had refused to leave her residence until police were called on a previous occasion.
>
> (6) The trial court erred by limiting the testimony of New Mexico police officers concerning their interactions with the victim.

Appellant first contends that the evidence was insufficient to disprove his claim of self-defense. The court cannot agree.

> In reviewing the sufficiency of the evidence, [the court] must determine whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as the verdict winner, was sufficient to enable the fact finder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt. The Commonwealth may sustain its burden by means of wholly circumstantial evidence. Further, the trier of fact is free to believe all, part, or none of the evidence.

Commonwealth v. Woodward, 129 A.3d 480, 489-90 (Pa. 2015).

"When the defendant introduces evidence of self-defense, the Commonwealth bears the burden of disproving such a defense beyond a reasonable doubt." ***Commonwealth v. Rivera***, 983 A.2d 1211, 1221 (Pa. 2009).

> The Commonwealth sustains this burden if it establishes at least one of the following: (1) the accused did not reasonably believe that he was in danger of death or serious bodily injury; (2) the accused provoked or continued the use of force; or (3) the accused had a duty to retreat and the retreat was possible with complete safety. The Commonwealth need only prove one of these elements beyond a reasonable doubt to sufficiently disprove a self-defense claim.

Commonwealth v. Ventura, 975 A.2d 1128, 1143 (Pa. Super. 2009)(citations omitted), appeal denied, 987 A.2d 161 (Pa. 2009).

Issues of whether a defendant has acted out of an honest, bona fide belief that he was in imminent danger and whether such belief was reasonable are questions properly resolved by the finder of fact. ***Commonwealth v. Hill***, 629 A.2d 949, 952 (Pa. Super. 1993), appeal denied, 645 A.2d 1313 (Pa. 1994). The conviction in this case must be upheld if, accepting as true all the evidence which could properly have been the basis for the verdict, the finder of fact could reasonably find that Appellant's claim of self-defense had been disproved beyond a reasonable doubt. ***Commonwealth v. Coronett***, 455 A.2d 1224, 1228 (Pa. Super. 1983).

> In applying [this] test, [the court] may not weigh the evidence and substitute [its] judgment for the fact-finder. In addition, … the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover,… the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of

the evidence produced is free to believe all, part or none of the evidence. ***Commonwealth v. Gray***, 867 A.2d 560, 567 (Pa. Super. 2005), appeal denied, 879 A.2d 781 (Pa. 2005)(quoting ***Commonwealth v. Nahavandian***, 849 A.2d 1221, 1229-1230 (Pa. Super. 2004)(citations omitted)).

When reviewing the evidence as a whole in a light most favorable to the Commonwealth, the court found that the Commonwealth met its burden of disproving Appellant's self-defense claim. Specifically, the evidence was sufficient to prove that Appellant did not reasonably believe that he was in danger of death or serious bodily injury at the time he killed the victim. Further, the evidence was sufficient to prove that Appellant continued the use of force.

Appellant and Jackie Reed were incarcerated in the Lycoming County Prison and housed in the same block for at least three days from October 6, 2014 to October 8, 2014. Jackie Reed testified that Appellant explained to him in detail what occurred in connection with the killing.

Appellant told Mr. Reed that a fight broke out between Appellant and Michael Krauser (hereinafter "the Victim"). During the fight, Appellant "popped" the Victim with an ashtray. He apparently "just turned around" and swung the ashtray "cracking" the victim with it "real, real hard." Appellant said the victim "went down and didn't get back up." Appellant then took a sword from an umbrella can near the door and stabbed the Victim. N.T., June 3, 2015, at 52-53.

Mr. Reed testified that Appellant said he wasn't going to let the Victim get the upper hand on him by letting him get up. N.T., June 3, 2015, at 69. Significantly, Appellant initially told Mr. Reed that the Victim never got up; he stabbed the Victim while he lay on

the floor. It was not until after he knew Mr. Reed was talking to the police, however, that Appellant told Mr. Reed the Victim was still standing and fighting back when he stabbed him. N.T., June 3, 2015, at 52-53, 67.

Appellant also told Mr. Reed how he disposed of the body by wrapping it in trash bags and plastic, tying some yellow rope around it, and burying it in the crawl space under his house. He also put dust and dirt over the floor boards so no one would realize they had been removed to dispose of the body. Appellant also admitted disposing of evidence that could be used against him. He put the ashtray stand in a garbage bag, wrapped yellow rope around it, and took it to the Love Center. He also burned a pallet and took the watermelon box to recycling. N.T., June 3, 2015, 56-61.

Appellant also told Mr. Reed that he did not think that law enforcement authorities had anything on him. "A lot of the stuff was already gone." N.T., June 3, 2015, at 48, 70.

The Commonwealth also presented the testimony of Jennifer Seltzer, who was a neighbor and friend of Appellant.

On March 6, 2013, Appellant went to Ms. Seltzer's house. He was very nervous and did not seem himself. Ms. Seltzer noticed no bruising or scratching on Appellant. He indicated to Ms. Seltzer that "shit was going to hit the fan." Ms. Seltzer asked Appellant if he knew where the Victim was and Appellant replied "he's in my basement." N.T., June 1, 2015, at 129-133.

Appellant told Ms. Seltzer that he and the Victim were in a fight. The Victim apparently had him around the throat and made some threatening remarks. Appellant was able to get the Victim off of him by bending back one of the Victim's fingers. Appellant then

grabbed an ashtray, swung it and hit the Victim with it. Defendant indicated to Ms. Seltzer that he knocked the Victim down and "knocked him out." N.T., June 1, 2015, at 133-134, 151-153.

Apparently, the Victim sunk down into a "puppy bed." Appellant then went and got a sword and stabbed the Victim three times. According to Appellant, the incident happened "pretty quickly." N.T., June 1, 2015, at 134, 153, 159-160.

Ms. Seltzer asked Appellant why he stabbed the Victim if he was unconscious. Defendant indicated "he lost it, he had enough." When pressed by Ms. Seltzer about possibly being arrested, Appellant indicated he would "plead nutty, do the insanity thing." N.T., June 1, 2015, at 135, 137.

The forensic evidence sufficiently established that the Victim died as a result of the stab wounds to his neck. One of the stabs actually sliced the Victim's carotid artery in half causing him to bleed to death within minutes. N.T., June 2, 2015, at 108-109; N.T., June 3, 2015, at 12-14.

As well, there was abundant circumstantial evidence to prove Appellant's consciousness of guilt. Appellant lied to law enforcement officials about whether he had any contact with the Victim. When a search warrant was executed on Appellant's home and Appellant was advised by a State Trooper who they were looking for, Appellant "dropped his head."

After killing the Victim, Appellant took substantial steps to hide any evidence of the crime. He obtained assorted coverings including plastic and wrapped up the body very carefully. He then buried the body in a crawl space in the basement. To get to the crawl space, he had to essentially clean out a closet and lift up floorboards. Following the burying

of the body, he replaced the floorboards and all of the contents of the closet. He told one witness that he wanted to make the closet look dirty like nothing had ever been moved.

He purchased cleaning materials and cleaned up the area where the incident occurred in order that there could be no traces of anything. He hid the sword in a golf bag. He took the ashtray that was broken, wrapped it up in a dogfood bag and plastic and gave it to another individual to hide in a storage unit of another building.

The box in which the Victim fell after being struck with the ashtray was eventually taken by Appellant to a burn pit. Appellant actually told Mr. Reed that he had "taken the pallet that had the blood and stuff over by a burn pit."

As well, Appellant took certain incriminating items, including a book entitled "The Stiff", and hid them in an area of the floor and/or wall underneath a lazy Susan where "nobody would find it."

Appellant's own testimony was sufficient to disprove self-defense. He admitted burying the Victim four feet down. He also admitted to striking the Victim with the ashtray. Furthermore, Appellant admitted that while the Victim was down, he walked away, grabbed the sword and then stabbed the Victim. Appellant's demeanor as well could be interpreted as inconsistent with a reasonable self-defense claim. He was somewhat evasive, hesitant in answering questions, non-committal and somewhat purposefully confused. He gratuitously added information, went off on different tangents and simply didn't answer some questions.

Moreover, in explaining the incident, he indicated that after he obtained the sword and contrary to what he allegedly told Ms. Seltzer and Mr. Reed, the Victim came toward him. As a result, he had to stab him with the sword as well as a knife that he obtained

from the kitchen. He was, however, interviewed by Terri Calvert at some point prior to the trial and after the incident, he explained that he used a sword to kill the Victim, but never said anything about a knife.

In viewing all of this evidence in a light most favorable to the Commonwealth, the court concluded that the evidence was sufficient to disprove Appellant's self-defense claim.

Appellant next avers that the evidence was insufficient to prove aggravated assault (inflicting serious bodily injury) because the evidence failed to establish malice as required by circumstances manifesting extreme indifference to human life. The court does not believe Appellant ever raised this issue before the trial court; therefore, this issue is waived. PA. R. APP. P. 302(a)("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

Even if this issue is not waived, it lacks merit. A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 PA. CONS. STAT. ANN. §2702(a). Circumstances manifesting extreme indifference to human life are not required in this case, because Appellant intentionally or knowingly caused serious bodily injury to the Victim. See ***Commonwealth v. Nichols***, 692 A.2d 181, 186 n.4 (Pa. Super. 1997)(the phrase "under circumstances manifesting extreme indifference to the value of human life" only modifies "recklessly;" it does not modify "intentionally" or "knowingly" as intentionally or knowingly causing or attempting to cause serious bodily injury is sufficient to establish malice).

Viewed in the light most favorable to the Commonwealth as the verdict

winner, the evidence established that, while the Victim was lying unconscious on the floor as a result of Appellant hitting him in the head with an ashtray stand, Appellant walked away, picked up a sword and a knife, walked back over to the Victim and stabbed him multiple times in the neck, injuring his carotid artery and causing him to bleed to death. There were no defensive wounds on the Victim's body as one would expect if the Victim was conscious and fighting back. There were no injuries to the Victim's fingers to corroborate Appellant's claim that he had to bend one of the Victim's fingers backwards until it snapped or cracked to release the Victim's chokehold on him. Furthermore, Appellant did not call emergency personnel to get help for the Victim or to report that the Victim had attacked him. Instead, he buried the Victim's body in a crawl space beneath his house, he destroyed and concealed evidence, and he lied to the police and told them he hadn't seen the Victim. He also changed his story multiple times. He admitted to Ms. Seltzer that the Victim was unconscious when he stabbed him. He initially told Mr. Reed that the Victim was on the floor when he stabbed him. Then, after he knew that Mr. Reed was telling the police what he was saying, he told Mr. Reed that the Victim was standing and fighting back when he stabbed him. This evidence was sufficient to defeat Appellant's self-defense claim and establish that he intentionally or knowingly caused serious bodily injury to the Victim.

The court recognizes that Appellant's acquittal of third degree murder and his conviction for aggravated assault may be logically inconsistent, because both require malice. Such does not require reversal of Appellant's aggravated assault conviction, however, because consistent verdicts are not required. ***Commonwealth v. Moore***, 103 A.3d 1240, 1246 (Pa. 2014); ***Commonwealth v. Miller***, 35 A.3d 1206, 1213 (Pa. 2012); ***Commonwealth v. Frisbie***, 889 A.2d 1271, 1273 (Pa. Super. 2005). Moreover, the court cannot make any

factual findings based on the acquittal for third degree murder. As the Pennsylvania Supreme Court explained in ***Moore***:

> Federal and Pennsylvania courts alike have long recognized that jury acquittals may not be interpreted as specific factual findings with regard to the evidence, as an acquittal does not definitively establish that the jury was not convinced of a defendant's guilt. Rather, it has been the understanding of federal courts as well as the courts of this Commonwealth that an acquittal may merely show lenity on the jury's behalf, or that the verdict may have been the result of compromise, or of a mistake on the part of the jury. Accordingly, the United States Supreme Court has instructed that courts may not make factual findings regarding jury acquittals and, thus, cannot upset verdicts by speculation or inquiry into such matters.

Moore, 103 A.3d at 1246 (citations and internal quotation marks omitted).

Appellant next asserts the trial court erred by excluding testimony from Dr. Terri Calvert, a psychiatrist who was prepared to testify on Appellant's behalf.

Appellant underwent a psychiatric evaluation by Dr. Terri Calvert on October 17, 2014. Dr. Calvert prepared a written report on December 21, 2014. The report concluded that Appellant "did reasonably believe that he was in imminent danger of death or great bodily harm during the clash with [the Victim], causing him to lash back at [the Victim] with a weapon, ending in [the Victim's] death."

The Commonwealth filed a motion to preclude the testimony of Dr. Calvert because it was being offered solely to buttress the credibility of the Appellant and did not indicate that Appellant had any psychological issues at the time of the incident.

Appellant argued that Dr. Calvert's expert testimony was admissible to establish Defendant's state of mind for purposes of presenting a theory of self-defense.

Both parties asserted that the case law supported their respective positions. The court reviewed the case law and then granted the Commonwealth's motion.

In ***Commonwealth v. Light***, 458 Pa. 328, 326 A.2d 288 (1974), the Supreme Court of Pennsylvania concluded that it was error for the trial court to exclude a psychiatrist's testimony "in so far as it pertained to [the defendant's] subjective belief" that he was in imminent danger and acting in self-defense when he shot the two victims, but "because of the unique circumstances of [the] case" the error did not require reversal. 326 A.2d at 291.

The Court detailed the elements relating to self-defense noting that, among other things, the "slayer must have reasonably believed that he was in imminent danger of death, great bodily harm, or some felony and that there was a necessity to kill in order to save himself therefrom…." ***Id.***, quoting ***Commonwealth v. Roundtree***, 440 Pa. 199, 204, 269 A.2d 709, 712 (1970).

This belief, however, encompasses two elements. "First, the defendant in fact must have acted out of an honest, bona fide belief that he was in imminent danger. Second, the belief must be reasonable in light of the facts as they appeared to him." ***Light***, 326 A.2d at 292, citing ***Murray v. Commonwealth***, 79 Pa. 311, 317 (1875). The Court concluded that psychiatric testimony should be admissible as to the subjective element of the defendant's state of mind at the time of the occurrence. ***Light***, supra.

In both ***Commonwealth v. O'Searo***, 466 Pa. 224, 352 A.2d 30 (1976) and ***Commonwealth v. Battle***, 289 Pa. Super. 369, 433 A.2d 496 (1981), the Courts were confronted with what, on their face, appeared to be the identical issues as in ***Light***, but reached different conclusions.

In ***O'Searo***, the defendant was convicted of first degree murder. During the trial, he proffered a clinical psychologist as an expert witness who was to testify, among

other things, that during the scuffle with the victim he became fearful of a heart attack and drew the gun to get away from the victim.

The defendant in ***Battle*** was convicted of involuntary manslaughter. He proffered during the trial a clinical psychologist to establish that at the time of the killing, the defendant was acting out of an honest, bona fide belief that he was in imminent danger. Specifically, the defendant's expert was to testify that based on the history of domestic problems between the Battles and the crisis situation before the defendant at the time of the shooting, the defendant acted out of a belief that he was in danger for purposes of establishing the defense of self-defense.

In both cases, the trial court refused to allow the proffered expert testimony and in both cases the decision on appeal was affirmed.

In ***O'Searo***, the Supreme Court, while not even referencing ***Light***, concluded that the proffered testimony was not admissible as expert testimony because its only purpose was to buttress the credibility of the defendant as to his version of the critical events and did not touch upon the psychological likelihood of the defendant's behavior under a given stimulus. ***O'Searo***, 352 A.2d at 30. The Court explained that expert testimony is inadmissible where it involves a matter of common knowledge and that the determination of credibility is within the sole province of the factfinder. ***Id***.

In ***Battle***, the Superior Court addressed both the ***Light*** and ***O'Searo*** decisions. The Court noted that there is "no clear basis for distinguishing ***Light*** and ***O'Searo***." ***Battle***, 433 A.2d at 497. The Court referenced that in ***O'Searo***, the psychiatric testimony was not permitted despite the pronouncement in ***Light*** holding that psychiatric evidence was relevant to whether a homicide, otherwise unjustified, could be said to have been justifiable because

of the defendant's fear for his life. ***Id***. at 497 (citing ***Light***, 326 A.2d at 292). Despite not being able to distinguish the holdings in ***Light*** and ***O'Searo***, the Superior Court in ***Battle*** followed the holding in ***O'Searo*** for two reasons. First, the Superior Court concluded that it was the latest pronouncement by the Supreme Court and secondly, it noted that it was consistent with those Supreme Court cases upon which ***Light*** relied.

In the case at bar, the court concluded that Dr. Calvert's proposed testimony was not admissible under any of these cases.

Expert testimony is permitted 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. ***Commonwealth v. Auker***, 545 Pa. 521, 681 A.2d 1305 (1996); citing ***O'Searo***, 352 A.2d at 32. However, any analysis of the admissibility of a particular type of evidence must start with the threshold inquiry as to its relevance and probative value. ***Commonwealth v. Dunkle***, 529 Pa. 168, 602 A.2d 830 (1992)(citing ***Commonwealth v. Walzack***, 468 Pa. 210, 218, 360 A.2d 914, 918 (1976)). The credibility of witnesses is within the sole province of the jury. ***Commonwealth v. Hampton***, 462 Pa. 322, 341 A.2d 101 (1975). If the purpose of testimony classified as expert testimony is solely to buttress the credibility of the defendant as to his version of the events, it is clearly not relevant or permissible.

As in ***O'Searo*** and ***Battle***, the proposed testimony of the expert in this case simply restated Appellant's version of the events and what caused him to defend himself. Dr. Calvert noted, for example, that Appellant appeared to be a very good historian, there was no evidence that he was embellishing for secondary gain, and that there was no evidence that he was not truthful in relaying the events. Dr. Calvert did not address any mental health issues

that impacted Appellant's behavior under a given stimulus. In fact, defense counsel admitted Dr. Calvert was not saying that Appellant had a mental illness of any type. N.T., April 2, 2015, at 5.

Dr. Calvert's report also revealed that Appellant's cognition was above-average, there was no evidence of psychosis and that he was in alcohol dependence, in forced remission. Her proposed testimony did not "touch upon" any psychological likelihood of Appellant's behavior under a given stimulus. In short, the testimony did nothing more than buttress the credibility of the Appellant, which is prohibited.

Furthermore, pursuant to ***Light***, psychiatric testimony is only admissible regarding the *subjective* element of the defendant's state of mind at the time of the occurrence, i.e, that the defendant had an honest, bona fide belief that he was in imminent danger. The objective element, i.e., whether the defendant's belief was reasonable, and the defendant's credibility are for the jury to determine. Dr. Calvert did not indicate that Appellant was acting out of a bona fide belief that he was in imminent danger, rather she noted that he "reasonably believed that he was in imminent danger." This conclusion goes to the objective element of self-defense, not the subjective element. Therefore, even under ***Light***, Dr. Calvert's proposed testimony was not admissible.

Appellant next avers that the trial court erred in excluding evidence that the Victim's wife had obtained a PFA against the Victim. Appellant sought to introduce a Protection From Abuse (PFA) order entered against the Victim on December 5, 2011. Appellant also sought to introduce evidence of the Victim's conviction for harassment on September 28, 2012, as a result of this choking incident. On January 21, 2015, Appellant's counsel filed a motion in limine to permit the defense to introduce evidence regarding the

Victim's reputation for violence and Appellant's knowledge of the Victim's violent tendencies, including the PFA order from December 5, 2011.

The court held a hearing and argument on May 15, 2015 on this motion in limine and several other motions. The Commonwealth objected to this evidence because the PFA order was entered through an agreement of the parties without any factual findings. The Commonwealth, however, did not have any objection to Appellant presenting testimony from the Victim's wife about the choking incident. N.T., May 21, 2015, at 86-89.

The court permitted Appellant to present testimony from the Victim's wife about the choking incident and the Victim's harassment conviction arising out of that incident, but precluded Appellant from introducing the PFA order or petition unless the Victim's wife testimony was inconsistent with the PFA order or petition, at which point Appellant's counsel could impeach the Victim's wife with those documents. Opinion and Order, May 22, 2015 at 13.

The Victim's wife testified at trial that the Victim choked her during a domestic dispute in November of 2011, she called the police and he was charged with and pled guilty to harassment. N.T., June 1, 2015, at 91-92, 109-112.

In order to show that the court erred in precluding the PFA order, Appellant must show that the court's ruling was an abuse of discretion. Although the standard is well settled, the Pennsylvania Supreme Court recently reiterated it as follows:

> The admission of evidence is solely within the discretion of the trial court, and a trial court's evidentiary rulings will be reversed on appeal only upon an abuse of that discretion. ***Commonwealth v. Reid***, 627 Pa. 151, 99 A.3d 470, 493 (Pa. 2014). An abuse of discretion will not be found based on a mere error of judgment, but rather occurs where the court has reached a conclusion that overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice,

bias or ill-will. ***Commonwealth v. Davido***, 106 A.2d 611, 645 (Pa. 2014). ***Commonwealth v. Woodward***, 129 A.3d 480, 494 (Pa. 2015).

The court did not abuse its discretion in precluding evidence of the PFA order. During the PFA proceedings, the Victim did not admit that he choked his wife. The relevant evidence was the Victim's violent and tumultuous behavior when he was intoxicated. That behavior was choking his wife; it was not the entry of a PFA order without any findings of fact. The fact that the PFA order was based on the choking incident was cumulative of the more probative evidence that the court permitted, i.e., the testimony from the Victim's wife about the choking incident and the fact that the Victim admitted his involvement in this incident when he pled guilty to the harassment charge.

Rule 403 of the Pennsylvania Rules of Evidence permits the court to preclude cumulative evidence. PA. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is outweighed by a danger of … wasting time, or needlessly presenting cumulative evidence."). Therefore, the court did not abuse its discretion when it precluded Appellant from presenting evidence that the Victim's wife obtained a PFA order against him.

Even if the court committed error by precluding this evidence, any such error was harmless. An error is harmless if it could not have contributed to the verdict. ***Commonwealth v. Poplawski***, 130 A.3d 697, 716 (Pa. 2015). The jury was aware that the Victim choked his wife in November of 2011. In light of the evidence that was admitted regarding the choking incident, the fact that the Victim's wife obtained a PFA order would not have affected the outcome in this case. Where, as here, the evidence was cumulative of other properly admitted evidence and the alleged error did not prejudice the defendant, any alleged error was harmless. ***Id***.

Appellant also contends the court erred by limiting June Wagner's testimony to exclude the proffer that the Victim had refused to leave her residence until police were called on a previous occasion. When the court addressed this issue in response to Appellant's post sentence motions, the court did not have the trial transcripts. The court assumed that it precluded Ms. Wagner's proposed testimony and explained such testimony was not relevant because it did not show the Victim's violent propensities. Furthermore, there was an abundance of evidence admitted regarding the Victim's violent propensities such that the proposed testimony would be minimally relevant and entirely cumulative. Opinion and Order filed November 16, 2015 at 8-9.

Upon review of the trial transcripts, however, it appears that Appellant's assertion is factually incorrect. When Appellant's counsel first made the proffer regarding June Wagner, the court was inclined to preclude it. N.T., June 8, 2015, at 34-35, 38-40. Later in the day, however, after the court received a more detailed proffer from Brian Wagner, Appellant's counsel again made a proffer regarding June Wagner. N.T., June 8, 2015, at 127-130. The proffer made by counsel was that the Victim was still at the Wagner residence when Ms. Wagner came home, she asked him to leave, he refused, she called the police and the Victim left as the police were arriving. The Commonwealth objected, but the court allowed Ms. Wagner to testify over the Commonwealth's objection. N.T., June 8, 2015, at 130-131.

Although the court permitted Ms. Wagner to testify, her testimony did not comport with counsel's proffer. Ms. Wagner testified that: the Victim was not allowed to be at her house; her son, Brian, called her and told her the Victim was at her house; the Victim was **not** there when she got home, but he came back to her house after she got there;

she told the Victim that he was supposed to leave and that the police had been called; and the Victim started to leave, but the police arrived and stopped him. N.T., June 8, 2015, at 137-139.

Since the court actually permitted both Ms. Wagner and her son, Brian Wagner, to testify regarding this incident that occurred at Ms. Wagner's residence, see N.T., June 8, 2015 at 131-139, this issue clearly lacks merit.

Appellant's final assertion is the court erred by limiting the testimony of New Mexico police officers concerning their interactions with the Victim. The Victim had been charged with committing criminal offenses in the state of New Mexico on December 31, 2005 and June 4, 2006.

This issue was highly contested during the trial. N.T., June 5, 2015, at 102-130. Indeed, the court took in-camera testimony from both officers so that the court would have a factual basis prior to deciding the issue. N.T., June 5, 2015, at 112-127.

At the in-camera hearing, Sgt. Ryan Tafoya of the Bernalillo County Sheriff's Department in Albuquerque, New Mexico, testified that in December 2005 he came in contact with the Victim. Sgt Tafoya attempted to remove the Victim from his vehicle. When he opened the door, the Victim kicked at him twice, striking Sgt. Tafoya's left knee and then his left hand. Sgt. Tafoya indicated that conduct would constitute battery, not assault. The assault occurred after Sgt. Tafoya placed the Victim in a prone position. The Victim lunged at Sgt. Tafoya in an aggressive manner or attempted to strike him. N.T., June 5, 2015, at 113-116.

Officer Morgen McBrayer of the Albuquerque Police Department also testified at the in-camera hearing. Officer McBrayer testified that on June 4, 2006 he was

dispatched to an area because security guards had told the Victim to leave the area but he refused. Officer McBrayer arrived and placed the Victim in the back of his police car pending investigation. Officer McBrayer then spoke to the security guards who informed him that the Victim did not pull a knife on them, but he was holding a knife. The security guards advised the Victim to leave, but he refused. Security did not want to press charges.

Officer McBrayer took the Victim out of his police car and told him that he could leave. The Victim refused to leave, stating he wanted his knife back. Officer McBrayer told the Victim that he was going to tag his knife into evidence for safekeeping because the Victim was too intoxicated and Officer McBrayer did not want him to hurt anyone with it. The Victim swore at Officer McBrayer and demanded the return of his knife. Officer McBrayer told the Victim he could get the knife back later from the evidence unit. He told the Victim to leave or he was going to be arrested. The Victim told him to go ahead and arrest him. Officer McBrayer then tried to physically escort the Victim away from the area to get him on his way, but the Victim actively refused. The Victim became very aggressive and pulled away from Officer McBrayer. The Victim then took a fighting stance and balled his hands into fists. Officer McBrayer grabbed the Victim and took him to the ground using an arm-bar technique. The Victim refused to give Officer McBrayer his other arm, so Officer McBrayer used a wrist-lock technique to secure the Victim's other arm and take him into custody.

The incident involving Sgt. Tafoya resulted in the Victim pleading guilty to one count of assault on a peace officer and the other charges, including battery, were dismissed. The incident involving Officer McBrayer resulted in the Victim pleading guilty to one count of refusing to obey a peace officer. The court permitted the officers to testify

concerning the crimes for which the Victim pled guilty and also to the underlying facts constituting those crimes; however, the court did not permit the officers to testify as to any other violent, tumultuous or aggressive conduct of the Victim for which the Victim may have been charged but not convicted.

In a homicide trial, where self-defense is asserted, a defendant may introduce evidence of the turbulent or dangerous character of the decedent. ***Commonwealth v. Carbone***, 707 A.2d 1145, 1154 (Pa. Super. 1998). The defendant need not have knowledge of the victim's prior conviction if it is being offered to prove the victim was the aggressor. ***Commonwealth v. Christine***, 125 A.3d 394, 398-99 (Pa. 2015). Where the evidence sought to be admitted is a prior act of violence not reduced to a criminal conviction, though, the law requires that the violent act or acts be known to the defendant at the time of the homicide. ***Commonwealth v. Stewart***, 647 A.2d 597, 598 (Pa. Super. 1994); ***Commonwealth v. Ignatavich***, 482 A.2d 1044, 1047 (Pa. Super. 1984).

Obviously, and as conceded by Appellant, he had no prior knowledge of any New Mexico incidents with the police. But, where a previous violent act has been reduced to a conviction, a defendant may use that conviction, regardless of whether he had previous knowledge of it, to prove the violent propensities of the victim and to establish that the victim was the aggressor. ***Christine***, 125 A.3d at 398-99; ***Commonwealth v. Amos***, 445 Pa. 297, 284 A.2d 748 (1971).

Accordingly, the court at trial precluded Appellant from introducing any testimony with regard to the New Mexico incidents unless they had resulted in a conviction. The court remains of the opinion that it did not err in reaching this decision.

In reviewing the record and the relevant case law, however, the court believes

in hindsight that it may have erred, but in favor of Appellant. In ***Christine***, which was decided several months after the trial occurred in this case, the Pennsylvania Supreme Court overruled ***Commonwealth v. Beck***, 485 Pa. 475, 402 A.2d 1371 (Pa. 1979) to the extent it stood for a bright-line rule that all assault convictions are sufficiently similar to demonstrate the victim's violent propensities. ***Christine***, 125 A.3d at 400 n.9. Instead, the trial court is permitted to determine on a case-by-case basis whether the prior conviction is "similar in nature and not too distant in time." 125 A.3d at 399-400.

In hindsight, the Victim's conviction for assault or attempted assault of a peace officer was not sufficiently similar and too remote in time, especially where the court permitted other incidents, which were more similar and closer in time to the Victim's death.

The incident with Sgt. Tafoya occurred over seven (7) years prior to the Victim's death. It also was not factually similar to Appellant's version of the incident with the Victim that led to his death. Both Appellant and the Victim had been drinking. Appellant claimed that the Victim got into a verbal argument with him about ownership of Appellant's microwave and a $20 debt. Appellant denied that the microwave belonged to the Victim or his wife or that he owed the Victim anything, and he asked the Victim to leave. The Victim became angry and aggressive. He put Appellant in a headlock and was choking him. He told Appellant he was going to be "his seventh zero" which, based on prior conversation with the Victim in which he stated he had previously killed six people, Appellant understood to mean he was going to be the Victim's seventh kill. Appellant punched the Victim and bent back one of his fingers to get away from him. Although the Victim continued to come at him, Appellant grabbed a glass and metal ashtray stand and struck the Victim in the head with it, which knocked the Victim to the ground. Appellant then grabbed a sword and a knife and

stabbed the Victim in the neck.

The choking incident between the Victim and his wife was more similar factually and it occurred in November 2011, which was much closer in time to the Victim's death in February 2013. The Wagner incident also was more similar factually and closer in time. Although the Victim did not choke Brian Wagner, because their dispute occurred over the telephone, the Victim refused to leave June Wagner's residence and threatened to kill Brian Wagner using the same or similar references to killing six other people in the past and having gotten away with it.

Similarly, the incident with Officer McBrayer occurred approximately six years prior to the Victim's death and did not show the Victim's propensity for violence, but rather his bellicosity and intransigence when he is intoxicated.

Furthermore, as argued by the Commonwealth at the argument on Appellant's post sentence motion, the court agrees in retrospect as follows: (1) the evidence would have been cumulative, (2) if the court erred, any error was harmless in light of the overwhelming evidence in support of the verdict, and (3) any error was harmless because the jury found that the Victim was the aggressor.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Nicole Spring, Esquire (APD)

Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)