IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-1412-2014**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
RASHAWN WILLIAMS,	:	
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 May 5, 2016, which became a final order when the court denied Appellant's post sentence motion on October 6, 2016.

On June 1, 2014, Appellant Rashawn Williams shot and killed Aaron Lowry outside the Lamplight Hookah Lounge on West Fourth Street in Williamsport Pennsylvania and then fled to High Point North Carolina. On June 6, 2014, when law enforcement officers attempted to apprehend the Appellant in High Point, he fled from an apartment and was pursued into a wooded area by a law enforcement canine, which bit him and caused some injuries to his face and left ankle that were treated at a local hospital. Appellant was extradited back to Pennsylvania and charged with homicide, aggravated assault, possession of a firearm without a license, person not to possess a firearm, possession of an instrument of crime (firearm), simple assault, terroristic threats, and flight to avoid apprehension or prosecution.

A jury trial was held April 12-18, 2016. The jury convicted Appellant of all the charges, including first degree murder. On May 5, 2016, the court sentenced the Defendant

to life in prison.

On May 9, 2016, Appellant filed a post sentence motion. Appellant challenged the sufficiency and weight of the evidence and asserted that the trial court made numerous erroneous evidentiary rulings. The court denied Appellant's post sentence motion on October 6, 2016, and issued an opinion explaining its reasoning on October 11, 2016.

Appellant filed a timely notice of appeal. Appellant asserts sixteen (16) issues on appeal.

Appellant first avers the trial court erred by failing to suppress or exclude evidence contained in Appellant's medical records from High Point Hospital when the Commonwealth improperly obtained them through out of state subpoena process.

On October 6, 2014, the attorney for the Commonwealth sent a subpoena to the Hospital requesting Appellant's medical records for the dates 6/4/2014-6/8/2014. The subpoena also noted that Appellant was a fugitive wanted for homicide charges in Lycoming County, Pennsylvania, and he was arrested by U.S. Marshals in High Point and brought to the Hospital for treatment. After receiving the subpoena, the attorney for the Hospital spoke with the attorney for the Commonwealth by telephone and outlined the procedure that the Commonwealth needed to follow before the records would be released. Based on that telephone conversation, the Commonwealth presented President Judge Nancy Butts with a petition for a certificate directing an out-of-state witness to produce medical records, as well as a praecipe. Judge Butts signed the certificate, which requested that a North Carolina judge compel the record's custodian to release certified medical records to the Lycoming County District Attorney's Office. A judge in Guilford County, North Carolina issued an order directing the record's custodian to deliver Appellant's medical records to the Lycoming

County District Attorney's office.[1]

When Appellant's counsel was notified that the Commonwealth had obtained an order for the release of Appellant's medical records, counsel filed a motion to quash.

Appellant asserted that the Commonwealth violated or failed to comply with HIPAA by requesting his medical records pursuant to the Uniform Act to Secure Out of State Witnesses. Appellant contended that he was entitled to notice and an opportunity to be heard prior to the Commonwealth receiving his medical records pursuant to 45 C.F.R. §164.512(e).

The court found that the Commonwealth had not violated HIPAA for several reasons.

First, the Commonwealth was not a "covered entity" subject to the provisions of HIPAA. A "covered entity" is: (1) a health plan; (2) a health care clearinghouse; or (3) a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter. 45 C.F.R. §160.103. A district attorney's office is not a covered entity. ***State v. Downs***, 923 So.2d 726, 731 (La. App. 1 Cir. 2010).

Second, the notice provisions in section 164.512(e)(2)(ii) did not apply in this case. The Hospital did not disclose Appellant's medical records until after it received an order of court. The notice provisions of section 164.512(e)(2)(ii) only apply if the covered entity responds "to a subpoena, discovery request, or other lawful process, **that is not accompanied by an order of a court** or administrative tribunal." 45 C.F.R. §164.512(e)(2)(ii)(emphasis added).

Instead, the court found that the applicable provisions were the ones related to disclosure for law enforcement purposes contained in section 164.512(f), which state in

[1] The subpoena, petition, praecipe, certificate, and court order were attached as exhibits to the Commonwealth's brief.

relevant part:

> A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.
>
> (1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:
>
> (ii) In compliance with and as limited by the relevant requirements of:
> (A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer.

45 C.F.R. §164.512(f)(1)(ii)(A).

The definition of law enforcement official includes county prosecutors and assistant district attorneys. 45 C.F.R. §164.103 ("Law enforcement official means an officer or employee of any agency or authority of … a political subdivision of a State or territory … who is empowered to … [p]rosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law."). There is no notice requirement under this law enforcement exception. See ***United States v. Elliott***, 676 F. Supp. 2d 431, 438 (D. Md. 2009)(the judicial and administrative proceedings exception (45 C.F.R. §164.512(e)) does require that in certain circumstances that notice be provided to the person whose records are being sought; the law enforcement exception contains no such requirement).

Moreover, the Commonwealth complied with the requirements of the law enforcement exception. The Commonwealth obtained a court order for release of the records and the paperwork that resulted in the issuance of the order limited the records sought to those related to the injuries Appellant sustained between June 4 and June 8, 2014 when he was apprehended.

The court also rejected Appellant's allegation that the Commonwealth was on a fishing expedition. Appellant was charged with criminal homicide, flight to avoid apprehension, and other related offenses. He fled to High Point, North Carolina, where he was apprehended by authorities and treated at the Hospital. Appellant's flight and conduct during his apprehension was clearly relevant to the charge of flight to avoid apprehension, trial or punishment. It also was relevant and admissible to show Appellant's consciousness of guilt for criminal homicide and the other related charges.

During his flight and apprehension, Appellant sustained injuries. It was reasonable for the Commonwealth to expect the records to contain information to support its contention that Appellant fled from the authorities and that such flight evinced consciousness of guilt. The injuries themselves and the manner in which they were sustained could support its contentions. Moreover, medical personnel typically take a history and ask a patient how he sustained his injuries. Statements made for purposes of medical diagnoses and treatment and statements of an opposing party are recognized exceptions to the hearsay rule. Pa.R.E. 803(4) and (25). Therefore, it was reasonable for the Commonwealth to expect that evidence relevant to the charges in this case would be in Appellant's medical records. In fact, there are multiple references to dog bites to the patient's face and left ankle, and a nurse's note indicated that the patient was brought in by the High Point Police Department (HPPD) for a dog bite by a police dog. More importantly, however, there was a chart which, in addition to the information contained in the nurse's note, indicated that Appellant stated "he was hiding in the bushes when he was bitten by the dog and has a lot of scrapes to the face and body from that."

Generally for medical records or any other business record to be admissible at trial,

the records custodian must testify or certify the authenticity of the records. Pa.R.E. 901; Pa.R.E. 902(11). Therefore, as stated in the certificate signed by Judge Butts, the Hospital's records custodian, Karen Gammons, was a necessary and material witness in the reproduction of the certified medical records.

Finally, even if there was a violation of HIPAA, the court found that Appellant was not entitled to the remedy of suppression. HIPAA violations are punished through the imposition of civil and criminal penalties against covered entities. 42 U.S.C. §§1320d-5, 1320d-6. There is no right to private action or relief for HIPAA violations. ***Dominic J. v. Wyoming Valley West High School***, 362 F. Supp. 2d 560, 573 (M.D. Pa. 2005). Furthermore, although the Pennsylvania appellate courts have not addressed this issue, numerous other jurisdictions have held that suppression is not an appropriate remedy for HIPAA violations. ***Elliott***, supra; ***United States v. Zamora***, 408 F.Supp.2d 295 (S.D. Tex. 2006); ***State v. Carter***, 23 So.3d 798, 800-801 (Fla. Ct. App. 2009); ***State v. Yenzer***, 195 P.3d 271 (Kan. Ct. App. 2009); ***State v. Bauer***, 931 N.E.2d 1283, 1292 (Ill. Ct. App. 2010); ***State v. Eichhorst***, 879 N.E. 2d 1144, 1154-1155 (Ind. Ct. App. 2008); ***State v. Straehler***, 745 N.W.2d 431 (Wis. Ct. App. 2007).

Appellant also contended that the Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings (42 Pa.C.S.A. 5961, et seq.) was not the proper procedure for the Commonwealth to obtain his medical records. According to Appellant, neither this Act nor any other specific Act in Pennsylvania permits obtaining documents; therefore the proper procedure would be to first obtain the records pursuant to HIPAA regulations. Since the court found that the records were obtained pursuant to the law enforcement exception contained in the HIPAA regulations, Appellant was not entitled to

relief on his claim that the records were improperly obtained pursuant to the Uniform Act.

The court also noted that the records were not obtained in response to the Commonwealth's subpoena, but rather the judges' certificate and order. While a court can compel the release of records to a party, a subpoena can only compel production of records at a hearing or other judicial proceeding. Pa.R.Crim. P. 107 ("A subpoena in a criminal case shall order the witness named to appear before the court at the date and time specified, and to bring any items identified or described."); see also Pa.R.Civ.P. 234.1(c)("A subpoena may not be used to compel a person to appear or produce documents or things ex parte before an attorney, a party or a representative of a party.")

On a different matter, Appellant submits that the trial court erred by excluding Dr. Vey's proposed testimony, especially when the Commonwealth argued during closing arguments that the victim would not, with broken ribs, holes in his lungs and mortally wounded, fold up a knife and put it in his pocket.

In his expert report, Dr. Vey noted that the gunshot wound (GSW) sustained by the victim caused a perforation of his left upper and lower lung lobes, but did not cause any damage to his heart. Dr. Vey opined that "[c]ontrary to popular belief, aside from certain GSWs to the brain, physical activity of a person that has been fatally shot does not necessarily cease immediately after injury. GSWs to the heart and lung are often associated with extended activity until blood loss causes shock, followed by death." Dr. Vey noted several examples from the medical literature where individuals were capable of walking upstairs and lying down in bed, returning fire, and dialing an old fashioned rotary telephone after sustaining GSWs to vital organs. He then further opined: "Given the preceding, relatively prolonged physical activity on the part of [the victim], after having been shot, it is

not unreasonable, and it is conceivable that he may have been capable of closing a pocket knife and returning it to his pocket after having been shot, but prior to his collapse." Dr. Vey also opined, based on the absence of soot and powder stippling, that the range of fire in this case was no closer than 18-24 inches. Near the end of his report, Dr. Vey states: "The preceding conclusions are based on my knowledge, training and experience, which encompasses the foregoing discourse, and the medical and scientific journal article citations and treatises pertaining thereto; and are given to a reasonable degree of medical and scientific certainty."

Dr. Vey provided the defense with a second report in which the only change or difference appeared to be removal of the word "conceivable" and replacement with the phrase "it may have been possible" in Dr. Vey's opinion regarding the victim's ability to close a pocket knife and return it to his pocket after having been shot, but prior to his collapse.

The Commonwealth filed a motion in limine to preclude Dr. Vey from testifying at trial. The Commonwealth noted that the victim traveled a distance in excess of 125 feet before collapsing and the eyewitness did not realize the victim had been shot. The Commonwealth sought to preclude Dr. Vey's opinions on the following grounds: (1) Dr. Vey's testimony would not assist the jury because it was obvious that one who walked a distance of greater than 125 feet was capable of performing physical activity and could fold a knife and put it in his pocket; (2) Dr. Vey's opinion was not an appropriate subject for expert testimony as it was not based on specialized knowledge beyond the knowledge possessed by the average layperson; (3) Dr. Vey's opinion regarding the victim's ability to close a pocket knife and put it in his pocket was speculative and did not meet the standard for expert

testimony; and (4) Dr. Vey's opinion regarding the range of fire in this case was cumulative because it was the same as the testimony that would be provided by the Commonwealth's pathologist.

Appellant asserted that Dr. Vey's opinions were relevant and admissible to his self-defense claim. Furthermore, his opinions were not speculative because Dr. Vey stated toward the end of his report that his conclusions were given to a reasonable degree of medical and scientific certainty.

The court granted the Commonwealth's motions because Dr. Vey's opinion, as stated in his expert reports, regarding the victim's ability to close a pocket knife and put it in his pocket was not sufficiently definite and did not meet the standard for expert testimony.

The way the court understood Dr. Vey's opinion, it was *conceivable that the decedent may have been capable* of closing the pocket knife or *it may have been possible* for the decedent to close a pocket knife and return it to his pocket after having been shot, but prior to his collapse. These italicized terms were too indefinite. To the court, Dr. Vey's opinion was no more definite than maybe the victim could do it and maybe he couldn't. Although an expert need not use "magic words" or hold his opinion to an absolute certainty, an opinion based on mere possibilities is not competent evidence. ***Commonwealth v. Gonzalez***, 109 A.3d 711, 727 (Pa. Super. 2015); ***Gillingham v. Consol Energy, Inc.***, 51 A.2d 841, 849 (Pa. Super. 2012).

The court acknowledged that it may have misunderstood or misconstrued Dr. Vey's reports. If Dr. Vey meant that the decedent had the capability of closing a knife and placing it in his pocket for a period of time immediately after being shot and gradually lost that capacity due to blood loss but he could not pinpoint the exact moment that the decedent lost

this capacity, or if Dr. Vey meant the decedent could close the knife and place it in his pocket under certain circumstances and he could state what those circumstances would be, Dr. Vey could author an amended report stating such. Based on the expert reports that Appellant provided to the court, however, the court could only guess or speculate what the victim's capabilities were. Dr. Vey never issued a more definitive report. The court also noted that the parties did not provide the court with any facts or circumstances from which the jury could conclude that the victim ever had the knife out of his pocket. Therefore, the court precluded Dr. Vey from rendering any expert opinion regarding the victim's ability to close a pocket knife and place it in his pocket after he was shot.

The Commonwealth's closing argument did not change the fact that Dr. Vey's expert report was not sufficiently definite. Furthermore, the Commonwealth did not argue that the victim was incapable of folding the knife and putting it in his pocket, but rather that it would not make sense for the victim to do so. The prosecutor stated:

> Think about this. Mr. Miele made it sound like a totally likely scenario, but for you to believe the defendant's story, you would have to believe that as Mr. Lowry was walking to his death with two broken ribs, blood pouring into his chest cavity from two holes in his lungs, his brain slowly being starved of oxygen, he took the time and care to fold up this knife, and put it away, and slip it nicely into his pocket. Why would anyone do that who is fatally shot, who is basically walking to their death? Yes, he did walk about 150 feet, but he walked 150 feet and dropped dead on the sidewalk. Who would do that under those circumstances, under that level of physical distress? I don't think it makes any sense, ladies and gentlemen. I don't think it makes any sense. And it makes even less sense when you consider the fact that the gunman is still there. You've just been shot, let's assume that it's out, this is your only means of defense, hey I'm going to fold up the only thing that I have to defend myself, because that going to make me feel safer. That doesn't make any sense either, ladies and gentlemen. The reason it doesn't make any sense is because it didn't happen, that's why.

N.T., April 18, 2016, at 136.

Appellant next asserts that the trial court erred by precluding the defense from presenting the victim's prior conviction for aggravated assault with a deadly weapon. The defense sought to introduce the victim's 2003 conviction in North Carolina for a misdemeanor charge of assault with a deadly weapon for which he was sentenced to 4 years of supervision. The incident occurred on January 1, 2002 and involved the victim brandishing a wooden stick to take another individual's wallet.

> 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. An abuse of discretion will not be found based on a mere error of judgment, but rather occurs when 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. Woodward, 129 A.3d 480, 494 (Pa. 2015)(citations omitted).

When a claim of self-defense is properly at issue, evidence of the victim's prior convictions for aggression may be admitted for two limited purposes: (1) to corroborate the defendant's knowledge of the victim's violent character to show that the defendant reasonably believed he was in danger, or (2) as character/propensity evidence to show that the victim was the aggressor. ***Commonwealth v. Mouzon***, 53 A.3d 738, 741 (Pa. 2012). Not every conviction, however, is admissible for these purposes. Instead, only those crimes that are similar in nature and not too distant in time will be relevant and admissible. ***Id.*** Furthermore, the determination as to similar nature and remoteness rests within the sound discretion of the trial judge. ***Id.***

The court found that the conviction was too remote and not similar enough to shed any light on whether the victim was the initial aggressor in this case. The victim's conviction occurred more than ten years before this incident and approximately thirteen (13) years

before Appellant's trial. The victim did not possess or use a knife, but rather a wooden stick. Furthermore, there was nothing to indicate that Appellant was aware of this conviction, and the uncontested evidence presented at trial showed that the victim punched or attempted to punch Appellant before the victim was shot. Therefore, this evidence was not probative of any issue in this case.

Appellant also alleges the trial court erred by precluding the defense from introducing evidence that the victim had THC and benzodiazepines, in addition to alcohol, in his blood at the time of the autopsy. The toxicology results in the autopsy report of Dr. Starling-Roney showed in the victim's femoral blood: 46.5 ng/ml of benzodiazepines; 5.7 ng/ml of Delta-9-THC; 2.9 ng/ml of 11-Hydroxy-Delta-9-THC; and 28.5 ng/ml of Carboxy-Delta-9-THC.

Evidence of alcohol consumption is not admissible unless it reasonably establishes intoxication. See ***Commonwealth v. Small***, 741 A.2d 666, 677 (Pa. 1999); ***Commonwealth v. McGuire***, 448 A.2d 609, 613 (Pa. Super. 1982). "The same reasons for excluding evidence of alcohol consumption where intoxication is not proved, apply with equal, if not added, force to situations involving the use of [drugs]." ***Hawthorne v. Dravo Corp., Keystone Div.***, 508 A.2d 298, 303 (Pa. Super. 1986).

The court precluded this evidence because it was not relevant, especially where the defense did not have any testimony to say that the amount of drugs in the victim's system caused him to be intoxicated or to act in a certain way. N.T., April 12, 2016, at 93-95. Absent such testimony, evidence that the victim had controlled substances in his system was not admissible and would only smear the victim.

Appellant next asserts the trial court erred by finding that the defense opened the door to Christofer Smith testifying that he had escorted Appellant and his baby's mother out of the

Cellblock at some date prior to the shooting at the Hookah Lounge. During cross-examination and re-cross examination of Mr. Snyder, defense counsel made it seem like Mr. Snyder did not recognize and could not identify Appellant or his baby's mother at the time of the incident. N.T., April 12, 2016, at 124-134, 141-142. The prosecutor requested a sidebar and argued that defense counsel opened the door to the prior contacts between Mr. Snyder and Appellant at the Cell Block. *Id*. at 142-158.

The court permitted very limited questioning of Mr. Snyder about the reasons why he was unwilling to pick out Appellant in a line-up. Mr. Snyder testified that he was scared to pick out Appellant in a line-up due to an altercation that he had with him at the cell block. The altercation basically consisted of Appellant and his ex (his baby's mother) having an argument inside the Cell Block and Cell Block employees, including Mr. Snyder, having to escort them outside the premises a little more physically than they should have. The incident at the Cell Block was the first time that Mr. Snyder saw Appellant. *Id*. at 156-160. The court offered to give the jury a cautionary instruction, but the defense declined that offer. *Id*. at 156, 160.

The court does not believe it committed an abuse of discretion in admitting this limited evidence. The evidence was relevant and admissible to rebut the arguments and inferences defense counsel was suggesting in his cross-examination of Mr. Snyder. The evidence also was not unduly prejudicial. It was just an argument that resulted in Appellant and his baby's mother being kicked out of a bar; it was not any type of assaultive behavior by Appellant on his baby's mother or Mr. Snyder. If the evidence truly were unduly prejudicial, defense counsel would have wanted the court to give the jury a cautionary or curative instruction limiting their use of this evidence.

Appellant also claims the trial court erred by admitting intercepted phone calls/visits during the Commonwealth's case-in-chief, including one with "Clint" from June 7, 2014 where Appellant discussed being attacked by the police canine; and one from June 16, 2014 with his mother (Commonwealth Exhibit 110, June 16, 2014, from 30:48 to 31:18 minutes) where he discussed Sheriah Worthy bringing the victim and Bell to the Hookah Lounge. Appellant contends the calls were irrelevant to the charges and the June 16 call was triple hearsay.

During the June 7th call, Appellant tells "Clint" that he would not have surrendered to the police if it wasn't for the dog biting him. After "Clint" and Appellant discussed the number of staples and stitches Appellant received for his injuries, Appellant stated, "That John was tearing me up, bull. I wouldn't have gave (sic) up but that dog, bull. I wouldn't have gave (sic) up, but that dog that mother f—r bite he make (sic) me give up."

This call was clearly relevant to the charge of flight to avoid apprehension or prosecution. It also tended to rebut Appellant's claims that he went to North Carolina for reasons other than to avoid apprehension for his charges. If that were true or if Appellant was not aware that the victim had died at the time he left Pennsylvania, he would not have fled from law enforcement officers in North Carolina before the officers even had a chance to tell him why they were there. The evidence was also relevant and admissible to show Appellant's consciousness of guilt.[2]

As far as the court can tell, the June 16 visitation recording between Appellant and his mother or a female relative was not admitted during the Commonwealth's case-in-chief;

[2] For the sidebar discussion about the admissibility of this call, see N.T., April 14, 2016, at 53-55. The call was played during Agent Kevin Stiles testimony in the Commonwealth's case in chief. *Id.* at 100-101.

instead, it was played during cross-examination of Appellant. N.T., April 15, 2016, at 142.

During direct examination, Appellant stated that he left the Hookah Lounge, saw his daughter's mother (Shariah Worthy) outside on the sidewalk and asked her if she had a ride. She said yes she was waiting for her brother, and before Appellant could respond he was punched in the right side of his face. *Id*. at 57. On cross examination, the prosecutor asked Appellant why Shariah walked out of the Hookah Lounge that night. The Defendant answered, "I asked her to go home."

The June 16, 2014 recording was admitted to impeach Appellant's testimony and show that Appellant kicked Ms. Worthy out of the Hookah Lounge and his interaction with her was not as amicable as he made it seem.

The transcript of the recording from between 30:48 and 31:18 (contained in Commonwealth Exhibit 110, along with several other calls and visitations) consisted of the following statement by Appellant:

> You brought them there, you brought them there, you brought them there, because they told her, they told her, this what they told her: we're not going to let him do nothing. I don't put my hands on her. Know what I'm saying? But I do, when she's in certain clubs, we can't be in, we can't party together. I kicked her out. And, they told her we're not going to let him to (sic) nothing to you. So she was telling them that I was doing something to her, which, you're my daughter's mom, I'm not going to put my hands I have to.

This issue was discussed during a lengthy sidebar conference. N.T., April 15, 2016, at 128-137. Appellant's statements fell within the hearsay exception in Rule 803(25) of the Pennsylvania Rules of Evidence. The statements of other people were not offered for the truth of the matter asserted.

Moreover, immediately after the recording was played the court gave the jury a

cautionary instruction about the use of this evidence. *Id*. at 142-143. Appellant's counsel then requested another sidebar, during which he requested a further instruction to the jury. *Id*. at 144-147. The court then gave an additional instruction specifically explaining to the jury that the first portion of the statement about what other people said could not be considered for the truth of the matter asserted. *Id*. at 147-148.

Appellant next avers the trial court erred by admitting, over defense objection, the testimony of Amelia Nance that Erica Lambert borrowed money from her on June 1, 2014. Appellant contends that the entirety of Ms. Nance's testimony was inadmissible hearsay. The court did not agree.

Hearsay is defined as a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) the party offers in evidence to prove the truth of the matter asserted in the statement. Pa.R.E. 801(c).

Ms. Nance's testimony was not hearsay. Generally, Ms. Nance did not testify about statements Erica Lambert made to her. Instead, she testified about actions she herself took in response to a phone call from Erica Lambert. Ms. Nance testified that sometime between 7:00 and 8:00 a.m. on June 1, 2014 she met Ms. Lambert at a Sheetz gas station in Chambersburg PA. Appellant, who she knew as Dewboy, was with Ms. Lambert. Ms. Lambert and Appellant were in a champagne or gold colored car. N.T., April 13, 2016 at 91-94.

The only reason the contents of the phone call were discussed was to show how Ms. Nance knew to go to that particular Sheetz gas station. The prosecutor asked, "How did you know to go to that spot?" In response to that question, Ms. Nance replied, "Okay so she [Erica Lambert] called me and she asked if she could meet me at the Sheetz to borrow a

hundred dollars at that particular Sheetz." This statement was not offered to show its truth, i.e. that Ms. Lambert called to borrow a hundred dollars or even that she actually borrowed that amount of money. It was offered to show how Ms. Nance knew to meet Ms. Lambert at that location. Therefore, the discussion of the contents of the phone call was not hearsay.

Appellant also asserts the trial court erred by admitting the victim's jean shorts into evidence during the Commonwealth's rebuttal when it failed to introduce this evidence in its case-in-chief. The court did not agree.

This evidence was proper rebuttal evidence. In its case-in-chief, the Commonwealth presented evidence that the victim was not brandishing a knife during the incident and that a knife was found in the victim's pocket. There also was evidence that the victim's blood was on the knife. The defense presented evidence that the victim had a knife in his hand before Appellant shot him. The Commonwealth realized that, based on the defense testimony that the victim had a knife in his hand, the defense would argue that the blood on the knife would corroborate the testimony of the defense witnesses. The Commonwealth introduced the victim's jean shorts to show that the pocket was soaked with blood. This evidence was admitted to rebut the defense evidence and show that the victim's blood seeped through the shorts and was transferred from the pocket to the knife while the knife was in the victim's pocket. See N.T., April 15, 2016 at 173-175.

Appellant also avers the trial court erred by admitting the testimony of Alisa Jackson, in rebuttal, that she told Sheriah Worthy that the victim was deceased at 3:41 a.m. on June 1, 2014, because that testimony was entirely hearsay.

This evidence was not being offered for the truth of the matter that the victim actually died at 3:41 a.m., but rather as a link in the chain of circumstantial evidence to show that

Appellant was made aware of the victim's alleged death before he fled from Pennsylvania to High Point, North Carolina.

Appellant claims the trial court erred by denying the defense request to present testimony in surrebuttal that it is not uncommon for witnesses to be uncooperative. The evidence the defense wanted to present was testimony from Greta Davis, another attorney in the Public Defender's Office. See N.T., April 18-19, 2016 at 48-49. What was relevant in this case was not some vague generalization regarding why some individuals might not cooperate with law enforcement, but rather why the particular witnesses in this case did not speak with law enforcement. The proffer regarding Ms. Davis' testimony was not specific to the defense witnesses in this case.

Appellant next contends the trial court erred by failing to give a heat of passion voluntary manslaughter jury instruction when the evidence would have supported such a charge.

As the Pennsylvania Supreme Court explained in ***Commonwealth v. Hutchinson***:

> 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 of 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.

25 A.3d 314-315 (Pa. 2011).

This case was purely a self-defense claim. The defense did not present any evidence that Appellant acted out of any kind of sudden rage, terror, resentment or any other passion or emotion.

Appellant testified that the victim and one or two others attacked him from behind. He was being punched in the head, grabbed by the neck and collar of his shirt, and "rag-dolled." He was trying to block punches when he heard something to the effect of I'm going to kill you and he saw the guy going in his pocket. He thought the guy was going for a gun, so Appellant had to get his arm loose so he could get the gun he had in his right pocket. As Appellant was trying to reach his gun, he saw a knife in the hands of the guy who said he was going to kill him. Appellant pulled out his gun, pointed it in the guy's direction and fired. Once the gun was fired, everybody kind of stopped. Appellant pointed the gun and told all three guys to back up. Appellant then walked to his car and drove away. N.T., April 15, 2016, at 57-62.

Since there was no evidence that Appellant was overcome by a sudden and intense passion, a heat of passion jury instruction was not appropriate in this case. ***Commonwealth v. Taylor***, 876 A.2d 916, 925 (Pa. 2005)("It is settled that a trial court should not instruct the jury on legal principles which have no application to the facts presented at trial. Rather, there must be some relationship between the evidence presented and the law upon which an instruction is requested."). Therefore, the court did not err in failing to give such an instruction.

Appellant next asserts that the verdict was contrary to the weight of the evidence. Again, the court did not agree.

> A verdict is not contrary to the weight of the evidence because of a conflict in testimony or because the reviewing court on the same facts might have arrived at a different conclusion than the fact[-]finder. Rather, a new trial is warranted only when the jury's verdict is so contrary to the evidence that it shocks one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

Commonwealth v. Morales, 91 A.3d 80, 91 (Pa. 2014)(quoting ***Commonwealth v. Tharp***, 830 A.2d 519, 528 (Pa. 2003)). A verdict is contrary to the weight of the evidence such that it shock's one's conscience when "the figure of Justice totters on her pedestal" or the verdict causes the trial judge to "lose his breath, temporarily, and causes him to almost fall from the bench." ***Commonwealth v. Boyd***, 73 A.3d 1269, 1274-1275 (Pa. Super. 2013)(citing ***Commonwealth v. Cruz***, 919 A.2d 279, 282 (Pa. Super. 2007), appeal denied, 928 A.2d 1289 (Pa. 2007)).

Although the court might have arrived at a different conclusion than the jury with respect to the premeditation and deliberation and/or the specific intent to kill necessary for a first degree murder conviction because the victim was the initial aggressor and Appellant did not have any prior history with him, the jury's verdict did not shock the court's conscience. The standard is not whether the court would reach the same conclusion as the jury, but rather whether the jury's verdict made Justice totter on her pedestal or took the court's breath away. It did not. Appellant's claims regarding the victim brandishing a knife or saying that he was going to kill Appellant came across as concocted, especially in light of the statements Appellant made in his phone conversations with his girlfriend, friends and relatives in which he asserted that he was not even there and he did not possess a gun (which

he admitted at trial were untrue) and the fact that in these phone conversations Appellant never mentioned the victim having a knife in his hand. Therefore, the court was not at all surprised that the jury rejected Appellant's claim that he was justified in using deadly force in this case. Furthermore, the jury could, and apparently did, infer that Appellant had the specific intent to kill from his use of deadly weapon on a vital part of the victim's body.

Appellant next contends that the evidence was insufficient to prove specific intent to kill necessary for first degree murder.

In reviewing a sufficiency of the evidence claim the court must view the evidence in the light most favorable to the Commonwealth as the verdict winner. ***Commonwealth v. Haney***, 131 A.3d 24, 33 (Pa. 2015).

The evidence presented clearly established that Appellant possessed a firearm, which he was not licensed to carry concealed on his person. In fact, Appellant was prohibited from possessing a firearm due to a prior conviction for robbery. Appellant, according to his own testimony, took the firearm out of his pocket, pointed it at the victim and fired it. N.T., April 15, 2016, at 59-60.

The victim suffered a gunshot wound to the chest. N.T., April 12, 2016, at 86. The bullet was fired from at least 18 inches away. *Id*. at 96. The bullet injured the victim's upper and lower lobes of the left lung, which is a vital organ, as well as the victim's sternum, ribs, and the pericardium or sack surrounding the victim's heart. *Id*. at 89, 91. Those injuries led to bleeding which eventually led to a lack of oxygen to the brain and the heart. *Id*. at 91-92.

Specific intent to kill may be inferred from the use of a deadly weapon on a vital organ. ***Commonwealth v. Galvin***, 985 A.2d 783, 790 (Pa. 2009). Since the evidence clearly established that Appellant used a firearm on a vital organ of the victim's body, the evidence

was sufficient to establish specific intent to kill necessary for first degree murder. Furthermore, Appellant's possession and use of a firearm for which he had no license to carry is additional evidence of his intention to commit the crime. 18 Pa.C.S. §6104.

Appellant also alleges that the evidence was insufficient to prove malice as required for third degree murder and aggravated assault causing serious bodily injury.

> Malice in Pennsylvania has a special meaning. It does not mean simple ill will. Malice is a shorthand way of referring to the three different mental states that the law requires as being bad enough to make a killing murder. Thus, a killing is with malice if the killer acted, first, with an intent to kill, or second, an intent to inflict serious bodily harm, or third, a wickedness of disposition, hardness of heart, cruelty, recklessness of consequence, and a mind regardless of social duty indicating an unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life.

Commonwealth v. Overby, 836 A.2d 20, 24 (Pa. 2003); see also ***Commonwealth v. Ludwig***, 874 A.2d 623, 631-632 (Pa. 2005). As with specific intent to kill, the jury may infer malice based on a defendant's use of a deadly weapon on a vital part of the victim's body. ***Commonwealth v. Hitcho***, 123 A.3d 731, 746 (Pa. 2015)(citing ***Commonwealth v. Arrington***, 86 A.3d 831, 840 (Pa. 2014), cert. denied, 135 S.Ct. 479 (2014)). As previously noted, the evidence clearly established that Appellant used a deadly weapon on a vital part of the victim's body; therefore, the evidence was sufficient to establish malice for third degree murder and aggravated assault.

Appellant avers the Commonwealth failed to disprove self-defense beyond a reasonable doubt where all uncontested evidence established that the victim and at least one friend jumped Appellant. The evidence was not uncontested. The Commonwealth presented evidence that although the victim approached Appellant neither the victim nor his friend punched Appellant or jumped him. Archie Bell testified that neither he nor the victim

punched Appellant and on one else was with them at the time. N.T., April 12, 2016, at 36-37. Christofer Snyder testified that he saw Appellant, his baby's mother (Shariah Worthy), and two Indian/Native American-looking men (the victim and Archie Bell) discussing something loudly or having an irritable moment . N.T., April 12, 2016 at 104-105, 118. They were just at the end of the building talking. *Id.* at 116. He didn't see the two men running down the street toward the end of the building. *Id*. He didn't see any altercation; he heard noises and he heard them talking loudly. *Id.* at 119. He also didn't see the shooting but he heard what he initially thought was a firecracker and then he saw the girl running across the street saying "he's got a gun." *Id*. at 107, 110.

Even assuming for the sake of argument that the evidence was uncontested that the victim and/or one of his friends threw the first punch or "jumped" Appellant, the evidence was not uncontested with respect to the victim or any of his friends displaying a knife. In other words, even if the evidence had been uncontested that Appellant would have been justified in using non-deadly force, it was not uncontested that Appellant was justified in using deadly force.

Appellant was not entitled to stand his ground and use deadly force in this case, because he illegally possessed the firearm. Pennsylvania's self-defense statute states:

> An actor who is not engaged in a criminal activity, who is not in illegal possession of a firearm and who is attacked in any place where the actor would have a duty to retreat under paragraph (2)(ii) has not duty to retreat and use force, including deadly force if:
>
> (i) the actor has a right to be in the place where he was attacked;
>
> (ii) the actor believes it is immediately necessary to do so to protect himself against death, serious bodily injury, kidnapping or sexual intercourse by force or threat; and
>
> (iii) the person against whom the force is used displays or otherwise uses:
>
> (A) a firearm or replica of a firearm as defined in 42 Pa.C.S. §9712 (related to offenses committed with firearms); or

(B) any other weapon readily or apparently capable of lethal use.

18 Pa.C.S. §505(b)(2.3). Appellant admitted in his own testimony that he possessed the gun in his pocket, he had convictions for robbery and criminal trespass, and he had the firearm illegally concealed on his person. N.T., April 15, 2016, at 49, 59, 106. Moreover, Pennsylvania law prohibits individuals with robbery convictions from possessing firearms. 18 Pa.C.S. §6105. Since Appellant clearly was in illegal possession of the firearm, he could not stand his ground and use deadly force.

Appellant's illegal possession of the firearm meant he had a duty to retreat if he could safely do so. See 18 Pa.C.S. §505(b)(2)(ii). Archie Bell testified that there was nothing blocking Appellant from running down the sidewalk. N.T., April 12, 2016, at 37. Although defense witness Rashawn Ruley testified that three guys jumped on Appellant's back "like attacking him," when asked when in relation to the fighting that the gunshot went off, Ruley replied "Like probably, like I would say probably after –after the altercation, after he got hisself (sic) together or something because it was three guys and it was just him." N.T., April 14, 2016, at 148. Therefore, Appellant was not entitled to use deadly force; instead, he had a duty to retreat.

Furthermore, the evidence viewed in the light most favorable to the Commonwealth established that the victim did not display or otherwise use the knife. Archie Bell testified that the victim did not have anything in his hands. N.T., April 12, 2016 at 32-33. The knife was found in the victim's pocket as opposed to on the sidewalk or in the victim's hands. The Commonwealth also presented evidence that the victim's blood on the knife was a transfer stain from the victim's blood seeping through the pocket of his jeans shorts onto the knife.

Additionally, the testimony from the defense witnesses that the victim displayed a

knife was not persuasive. Appellant repeatedly talked about his case in recorded telephone conversations with his girlfriend, friends, and family. Appellant's stories about the incident constantly changed. Initially he claimed he was not even present at the scene that night. Later, he claimed that he did not have a gun; the victim or one of his friends did. At no point in these conversations, however, did Appellant claim that the victim had a knife.

Rashawn Ruley also testified that the victim had a sharp object in his right hand, but that was after Mr. Ruley heard a shot and Appellant, who he knew as "Dewboy," walked past him. Mr. Ruley heard the victim's friends say call the cops because the victim just got shot and then the victim collapsed. N.T., April 14, 2016, at 138-139. This testimony puts the knife in the victim's hands after Appellant shot him.

Finally, the jury could have inferred from the evidence presented that Appellant concocted his story about the victim displaying a knife after his girlfriend read Pennsylvania's self-defense law to him in one of the phone conversations. Appellant never mentioned the knife in his phone conversations; the first time he mentioned the victim wielding a knife was in his trial testimony. His witnesses, Rashawn Ruley and Rasheem Johnson, were his friends or acquaintances who did not come forward and provide the information to the police, were drunk or had been drinking that night, were not willing to be interviewed and were incarcerated with Appellant for periods of time during the pendency of this case.

When all of the evidence presented at trial is viewed in the light most favorable to the Commonwealth as the verdict winner, it was sufficient to disprove Appellant's self-defense claim beyond a reasonable doubt.

Appellant's final assertion is that "the jury's verdict was improperly based solely on

presumptions and consciousness of guilt, not the evidence, thereby resulting in a verdict based on speculation; this is based upon the Commonwealth arguing in its closing that the jury could ignore the evidence when deciding the case."

The court does not know what Appellant is referring to when he claims that the Commonwealth argued in its closing that the jury could ignore the evidence when deciding the case. The Commonwealth made some alternative arguments, including one to the effect that even if the jury found that the victim or Mr. Bell took a swing at or punched Appellant, such did not justify Appellant's use of deadly force. That argument, however, did not ask the jury to ignore the evidence. It asked the jury to rely on certain evidence presented by the Commonwealth, such as the fact that the knife was found in the victim's pocket, to find that Appellant was not defending himself from the use of deadly force and to follow the law that deadly force can only be used when an individual reasonably believes he is in danger of death or serious bodily injury, and not merely bodily injury from a punch.

Simply put, the jury's verdict was not based solely on presumptions and consciousness of guilt. It was based on ample evidence that Appellant shot the victim in the chest, the bullet struck his left lung, and the victim died as a result. Appellant's own testimony established that he pulled a firearm out of his pocket, ***pointed it at the victim who was only a few feet away from him***, ***and fired it***. The verdict was also based on evidence, such as the fact that the knife was found in the victim's pocket and testimony from the Commonwealth's witnesses that the victim did not have a knife in his hand, which showed that Appellant was not confronting deadly force but, at most, a punch with a closed fist. Therefore, Appellant did not reasonably believe that he was imminent danger of death or serious bodily injury.

This evidence was supplemented with inferences that Appellant committed the killing with malice and a specific intent to kill based on his use of a deadly weapon on a vital organ of the victim, and evidence of Appellant's consciousness of guilt, such as his flight from Pennsylvania to North Carolina, his flight from the law enforcement officers and their canine in North Carolina, and his inconsistent and ever-changing stories (none of which mentioned the victim possessing a knife) in his recorded telephone conversations.

In sum, the jury's evidence was based on the evidence and the inferences that could be drawn from the evidence in this case, and not speculation as argued by Appellant.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Nicole Spring, Esquire (ADA)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)