Franklin County Legal Journal

Vol. 28, No. 3, pages 8 - 15

Commonwealth v. Rose

COMMONWEALTH OF PENNSYLVANIA
v. IAN MICHAEL ROSE, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action — Law, No. 1420–2009

*Criminal Law, Appellate Review, Sufficiency of the Evidence, Conflicting Evidence; Reckless Endangerment, Elements, Creation of Danger; Criminal Law, Self Defense, Burden of Proof, Affirmative Proof, Continuing or Escalating Altercation, Unreasonable and Excessive Force; Criminal Law, Appellate Review, Weight of the Evidence, Waiver*

1. Under Rule 606(A)(7) of the Pennsylvania Rules of Criminal Procedure, a Defendant may raise a challenge to the sufficiency of the evidence for the first time on appeal. The Court must determine whether, viewing all the evidence admitted at trial, there is sufficient evidence to allow the fact-finder to find every element of the crime beyond a reasonable doubt.

2. The Court may not substitute its judgment for that of the fact-finder. Rather, doubts regarding guilt must be resolved by the jury 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. If the verdict is based on substantial, if conflicting, evidence, it is conclusive on appeal.

3. The facts and circumstances established by the Commonwealth need not preclude all possibility of innocence, and the elements of an offense may be found by means of wholly circumstantial evidence.

4. To be found guilty of recklessly endangering another person under 18 Pa. C.S.A. §2705 (2010), the evidence must show the Defendant recklessly engaged in conduct that placed or may have placed another person in danger of death or serious bodily injury. All four elements must be proven to sustain a conviction.

5. The Commonwealth must also prove the Defendant had an actual present ability to inflict harm and not merely the apparent ability to do so, as the creation of danger is a requirement for conviction.

6. The evidence presented by the Commonwealth at trial was clearly sufficient for the jury to find the Defendant recklessly endangered the life of Mr. Blough. Though conflicting evidence was presented, the finder of fact performed the duty of settling such conflicts, and resolved the disparate accounts of the quarrel against the Defendant.

7. Both men exited their vehicles in anger after both men engaged in a chase during which both men violated numerous traffic laws and which involved multiple risky behaviors. Mr. Blough testified the Defendant took the tire billy from him, and hit him with it even after he fell to the ground, while Blough was attempting to shield himself from the blows. Blough was observed by a witness down on his knees with the Defendant over him with a stick in his hand beating him continuously. Rose continued to beat Blough until the witness began honking his horn, at which point the Defendant stopped, dropped the tire billy, and left the scene. There was testimony Mr. Blough remained on the ground, face down, bleeding profusely.

8. As the Defendant claimed his use of force was in self defense, the Commonwealth was further required to disprove such justification defense beyond a reasonable doubt.

9. The Commonwealth may not disprove justification solely on the fact finder's disbelief of the defendant's testimony. Rather, the Commonwealth must adduce some affirmative proof that the denied fact existed.

10. There was sufficient evidence to disprove self defense, the foremost of which was the observation of the witnesses arriving at the scene that the Defendant was acting as the aggressor. Even if Defendant's contention that Blough cast the first blow were deemed by the finder of fact to be credible, there was sufficient evidence to show the Defendant continued

the altercation, or escalated it. There was also clearly evidence that the amount of forced used by the Defendant was unreasonable and excessive in light of the totality of the circumstances.

11. To successfully allege the verdict was against the weight of the evidence, the verdict must be shown to be so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative.

12. Under Pennsylvania Rule of Criminal Procedure 607, a claim that the verdict is against the weight of the evidence must be raised with the trial judge in a motion for a new trial. The motion may be made orally on the record or by written motion at any time before sentencing. The issue may also be raised by way of a post-sentence motion.

13. The Superior Court has stated the Rule contains a clear requirement that such a claim be raised initially by a motion to the trial court, and the failure to do so "compels" a finding the issue has been waived.

14. The Defendant failed to raise the weight of the evidence on the record at the conclusion of trial or subsequently prior to sentencing, nor did he raise the issue in any written post-trial motion. Inclusion of the issue in Defendant's 1925(b) statement is not sufficient to preserve the issue for appellate review absent an earlier motion.

Appearances:

Christopher F. Schellhorn Jr., Esquire, *Assistant District Attorney*

Christopher L. Reibsome, Esquire, *Assistant Public Defender*

OPINION sur Pa.R.A.P. 1925(a)

Van Horn, J., May 19, 2010

Statement of the Case

The instant case calls to mind the old adage, variously phrased but universally recognized, that "it takes two to tango." On June 19, 2009, the two "dancers" involved herein were driving their respective vehicles northbound on a local highway. Both agree that the Defendant, Ian Rose, illegally passed the vehicle of the "victim," Michael Blough. After what can only be described as a reckless vehicle chase on a busy roadway, Mr. Blough pulled his vehicle in front of the Defendant's, forcing him to halt, and exited the car. Mr. Rose similarly exited his vehicle. Mr. Blough maintains Mr. Rose punched him first, to which he responded by clubbing the Defendant with his tire billy, a heavy wooden club Blough took with him when exiting his car. Mr. Rose maintains Mr. Blough began the physical altercation by hitting him with the wooden club, to which he responded by taking the club and striking Mr. Blough.

Regardless of who initiated the quarrel, the dispute ended with the Defendant above the victim, beating him "continuously" with the tire billy while the victim attempted to protect himself on the ground. The Defendant ceased his onslaught when onlookers began honking their horns and shouting. Thereafter, the Defendant went to his vehicle and drove away, leaving Mr. Blough face down on the ground, attempting to rise. Both the Defendant and witnesses at the scene called the Chambersburg Police Department. Both men received treatment at a local hospital, each having received various injuries during the altercation. The victim herein was originally charged with aggravated assault, later accepting a negotiated plea and receiving a probationary sentence.

By information filed October 5, 2009, the Commonwealth charged the Defendant with reckless endangerment of another person, under 18 Pa. C.S.A. §2705. The Defendant waived formal arraignment, and proceeded to a pretrial conference, held January 7, 2010. A jury was selected January 11, 2010, with trial occurring thereafter, on January 25, 2010. Testimony was taken from Mr. Blough, Mr. Rose, and various witnesses to the fight. After deliberation, the jury found the Defendant guilty of the crime charged. See 18 Pa. C.S.A. §2705 (2010). The Defendant was sentenced March 10, 2010, to a restrictive intermediate punishment sentence of twenty-four (24) months, beginning with electronic monitoring, proceeding to intensive supervision, and finishing with regular supervision. As part of the sentence, the Court required the Defendant to participate in anger management, despite his assertions such counseling was not required.

On April 1, 2010, the Defendant filed Notice of Appeal. Uncertain of the basis, by Order dated April 9, 2010 this Court directed the filing of a Concise Statement of Matters Complained of on Appeal. The Defendant timely filed such statement April 29, 2010. The statement raises two issues for review, both of which reflecting Mr. Rose's assertion, repeated often

throughout this case, that Mr. Blough bears the ultimate responsibility for the altercation. First, the Defendant maintains the Commonwealth failed to present sufficient evidence to prove reckless endangerment under Section 2705, similarly failing to present sufficient evidence to disprove his claim of self defense. Second, the Defendant maintains his conviction was against the weight of the evidence. The Defendant having timely filed his 1925(a) statement, the Court will address each issue in turn.

Discussion

**A. Sufficiency of the Evidence**

1. Standard of Review

The Defendant alleges his conviction was not supported by sufficient evidence. Under the Rules of Criminal Procedure, this assertion may be raised for the first time on appeal. See Pa. R. Crim. P. 606(A)(7) (2010). The standard of review is well established:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.

Commonwealth v. Reynolds, 835 A.2d 720, 725-26 (Pa. Super. Ct. 2003). A challenge to the sufficiency of the evidence is a question of law. See id. at 726. The appellate court may not substitute its judgment for that of the fact-finder. See Commonwealth v. Mack, 850 A.2d 690, 693 (Pa. Super. Ct. 2004). Rather, doubts regarding guilt must be resolved by the jury 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." Id.

The facts and circumstances established by the Commonwealth need not preclude all possibility of innocence. See id. Further, the elements of an offense may be found by means of wholly circumstantial evidence. See id. The court must review the entire record, and "all evidence actually received must be considered." Id. The trier of fact, in passing upon the credibility of witnesses, is free to believe all, part or none of the evidence. See id. As a result, the uncorroborated testimony of a victim, if believed, is sufficient to convict a defendant. See id. Finally, our appellate courts have established that "it is the function of the jury to evaluate evidence adduced at trial" so that if "the verdict is based on substantial, if conflicting evidence, it is conclusive on appeal." Reynolds, 835 A.2d at 726 (citations omitted).

2. The Evidence Presented Is Sufficient to Sustain the Conviction

The Defendant was found guilty of recklessly endangering another person. See 18 Pa. C.S.A. §2705 (2010). As such, the evidence must show that Mr. Rose recklessly engaged in conduct that placed or may have placed another person, here Mr. Blough, in danger of death or serious bodily injury. See id. Our appellate courts have described four elements which must be proven to sustain such a conviction. First, the crime requires a mens rea of recklessness, a "conscious disregard of a known risk of death or great bodily harm to another person." Commonwealth v. Peer, 684 A.2d 1077, 1080 (Pa. Super. Ct. 1996). Serious bodily injury is that which "creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." 18 Pa. C.S.A. §2301. Second, there must be an actus reus of "some conduct," and third, causation "which places" another person into danger, the final element and required result of the Defendant's acts. Reynolds, 835 A.2d at 727.

To sustain a conviction under this section, the Commonwealth must prove the Defendant had an "actual present ability to inflict harm and not merely the apparent ability to do so," as the creation of danger is a requirement for conviction. Commonwealth v. Hopkins, 747 A.2d 910, 915-16 (Pa. Super. Ct. 2000) (citing In re Maloney, 636 A.2d 671, 674 (Pa. Super. Ct. 1994)). The statute is directed against "reckless conduct entailing a serious risk to life or limb out of proportion to any utility the conduct might have." Reynolds, 835 A.2d at 727 (citations omitted).

The evidence presented by the Commonwealth at trial was clearly sufficient for the jury to find the Defendant recklessly endangered the life of Mr. Blough. Though conflicting evidence was presented, the finder of fact performed the duty of settling such conflicts, and resolved the disparate accounts of the quarrel against the Defendant. The victim, Mr. Blough, testified as to his version of the incident, accepting responsibility as half of the duo required for such a brawl to occur. See Transcript of Proceedings, Monday, January 25, 2010 [hereinafter T.P., 1/25/10], at 14:9-30:16. The Commonwealth next presented the testimony of Mr. Henry Crider, an individual unknown to either Rose or Blough, who testified credibly to witnessing the altercation. Crider testified that upon rounding a bend in the road, he observed Blough "down on his knees" and the Defendant "over him with a stick in his hand beating him continuously." Id. at 31:19-22, 32:4-5, 33:16-19.

Crider testified Rose continued to beat Blough until the witness began honking his horn, at which point the Defendant stopped, dropped the tire billy, and left the scene. See id. at 32:8-11. There was testimony Mr. Blough remained on the ground, face down, bleeding profusely. See id. at 32:12-17, 35:22-24, 48:20-22.

The testimony of both Rose and Blough established both men exited their vehicles in anger after both men engaged in a chase during which both men violated numerous traffic laws and which involved multiple risky behaviors. Id. at 14-16, 17-18, 51-53. Mr. Blough testified that when exiting his vehicle, Mr. Rose stated he "F'd with the wrong guy" and was going to kill him. Id. at 17:2-6. Mr. Blough testified the Defendant took the tire billy from him, and hit him with it even after he fell to the ground, while Blough was attempting to shield himself from the blows. See id. at 19:15-20:9. The photographs admitted in evidence as the Commonwealth's Exhibit Numbers one (1) through five (5) show the injuries inflicted upon Mr. Blough were serious, and indeed did cause permanent scarring. See Commonwealth Exhibit Nos. 1-5; T.P., 1/25/10, at 20-26, 27:12-23. The jury thus had ample evidence from which to conclude the elements of Reckless Endangerment were proven beyond a reasonable doubt.

This does not end the inquiry however, as in the instant case the Defendant claimed his use of force was in self defense, requiring the Commonwealth to disprove such justification defense beyond a reasonable doubt.[1] See Commonwealth v. Torres, 766 A.2d 342, 344 (Pa. 2001). The use of force against another person is justified where the actor believes the force is "immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person." Torres, 766 A.2d at 345. See 18 Pa. C.S.A. §505(a). If the Commonwealth is able to establish either that the defendant did not reasonably believe he was in danger of death or serious bodily injury, or that the amount of force used was unreasonable under the circumstances, or that there was a duty to retreat, the burden to disprove justification is sustained. See Commonwealth v. McClendon, 874 A.2d 1223, 1230 (Pa. Super. Ct. 2005); Commonwealth v. Burns, 765 A.2d 1144, 1149 (Pa. Super. Ct. 2000). Additionally, self defense is not proper where the conduct of the defendant evidences the intent to use unlawful force against the victim, and by such conduct he provoked the use of force against himself. See McClendon, 874 A.2d at 1149.

The Commonwealth may not disprove justification solely on the "fact finder's disbelief of the defendant's testimony." Torres, 766 A.2d at 345. Rather, the Commonwealth must adduce some "affirmative proof that the denied fact existed." Id. (citing Commonwealth v. Graham, 596 A.2d 1117, 1118 (Pa. 1991)). In the instant case, there was clearly sufficient evidence for the jury to find the Defendant was not free from fault in provoking or continuing the altercation, or alternatively that the amount of force was unreasonable under the circumstances.

Wanda Andrews, called by the defense, was driving in front of Mr. Rose and Mr. Blough, and saw both driving erratically, each infuriated by the other. T.P., 1/25/10, at 47:21-48:10. Andrews did not see the melee commence, observed the fracas from a substantial distance, and drove from the scene during the tussle, returning thereafter due to concern for the wrangling duo. See id. at 47-48. Thus, her testimony was likely given less weight than that of the witness Henry Crider, who testified credibly to turning a corner on the road and observing the Defendant acting as the aggressor. Cf. Commonwealth v. Gray, 867 A.2d 560, 568 (Pa. Super. Ct. 2005) (stating there was sufficient evidence to disprove self defense, the "foremost" of which was the observation of officers arriving at the scene that the defendant was "acting as the aggressor."). Coupled with the credible testimony of Blough, made more believable by his honest admission of guilt for his part in the clash, these witnesses gave the Commonwealth's version of events substantial support. Even if Defendant's contention that Blough cast the first blow were deemed by the finder of fact to be credible, there was sufficient evidence to show the Defendant continued the altercation, or escalated it. And indeed, just as the jury was free to believe Rose's testimony relating to self defense, the fact finder was also free to disbelieve such evidence. See Commonwealth v. Bracey, 662 A.2d 1062, 1066 (Pa. 1995).

There was also clearly evidence that the amount of forced used by the Defendant was unreasonable and excessive in light of the totality of the circumstances.[2] Rose's testimony established he was twenty-nine (29) years of age at the time of the fight, standing six (6) feet tall, whereas Blough was age sixty-three (63), and visibly shorter in stature. See T.P., 1/25/10, at 65:12, 14:14. The testimony by Henry Crider that the Defendant was so immersed in beating the victim with the tire billy he did not cease once Blough went to his knees, or fell to the ground, supports a determination by the jury that the amount of force utilized was unreasonable. Indeed, only in the face of cries by onlookers, and the blaring of car horns, was the Defendant impelled to cease his onslaught. After turning back to the scene, Andrews testified she witnessed the Defendant driving away, albeit blood soaked, but that upon her return saw Mr. Blough still "lying on the ground facedown trying to get up." See id. at 48:20-21.

There was clearly more than the testimony of the victim to support the finding by the jury that the Defendant's use of force was unreasonable. Contra Torres, 766 A.2d at 345. Though Mr. Rose, throughout the proceedings in this matter, has attempted to minimize, rationalize, depreciate, excuse, and justify his decision to tango with Mr. Blough, a jury of his

peers determined beyond a doubt that he, too, bore responsibility for the quarrel. As the determination is clearly supported by sufficient evidence of record, appeal on this ground should be dismissed.

**B. Complaint as to the Weight of the Evidence Has Been Waived**

Defendant also alleges the verdict was against the weight of the evidence, the verdict being "so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative." Commonwealth v. Hudson, 955 A.2d 1031, 1035 (Pa. Super. Ct. 2008). Even if this contention had merit [3], the issue has been waived by the failure of the Defendant to adhere to the Pennsylvania Rules of Criminal Procedure. Under Rule 607, a claim that the verdict is against the weight of the evidence must be raised with the trial judge in a motion for a new trial. See Pa. R. Crim. P. 607 (A). The motion may be made orally on the record or by written motion at any time before sentencing. See id. at (A)(1), (2). The issue may also be raised by way of a post-sentence motion. See id. at (A)(3).

The Superior Court has stated the Rule contains a clear requirement "that such claim be raised initially by a motion to the trial court," and the failure to do so "compels" a finding the issue has been waived. Commonwealth v. Washington, 825 A.2d 1264, 1266 (Pa. Super. Ct. 2003). See also, e.g., Commonwealth v. Mack, 850 A.2d 690, 694 (Pa. Super. Ct. 2004); Commonwealth v. Little, 879 A.2d 293, 301 (Pa. Super. Ct. 2005), appeal denied by 890 A.2d 1057 (Pa. 2005).

Instantly, the Defendant failed to raise the weight of the evidence on the record at the conclusion of trial or subsequently prior to sentencing, nor did he raise the issue in any written post-trial motion. Inclusion of the issue in Defendant's 1925(b) statement is not sufficient to preserve the issue for appellate review absent an earlier motion. See Commonwealth v. Sherwood, 982 A.2d 483, 494 (Pa. 2009). As the claim has been waived, this Court will not address the assertion on the merits, and appeal on this ground should also be dismissed.

Conclusion

The Commonwealth clearly produced sufficient evidence for the jury to find the Defendant guilty of the crime of recklessly endangering another person. Additionally, the Commonwealth, through photographs and the testimony of disinterested witnesses, clearly presented sufficient evidence for the jury to find beyond a reasonable doubt self defense was not applicable to the facts. Finally, as the Defendant failed to first raise the weight of the evidence with this Court, as required by the Pennsylvania Rules of Criminal Procedure, appellate review of the issue has been waived. Both men made the choice, in anger, to use violence against one another, neither electing to desert the skirmish. Each must now bear responsibility for the consequences of his actions.

ORDER OF COURT

May 19, 2010, pursuant to Pa. R.A.P. 1931(c), it is hereby ordered that the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion sur Pa. R.A.P. 1925(a).

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[1] In order to properly make justification an issue at trial, there must be some evidence to justify the finding of self defense. See Torres, 766 A.2d at 345. If there is evidence from any source which will support such a claim, the issue is properly before the fact finder. See id. Instantly, as the above discussion will demonstrate, Defendant's testimony brought the issue properly before the jury, who apparently resolved the conflicting testimony in favor of the Commonwealth.

[2] Indeed, in sentencing, in considering the nature of the offense, the extreme amount of force utilized by the Defendant was considered by this Court to be unreasonable, and was in part the reason for its application of the Deadly Weapon Enhancement.

[3] Indeed, even if Defendant had procedurally allowed review, the record reveals the verdict is not against the weight of the evidence and does not shock the conscience. The jury, based on the evidence presented and evaluating the credibility of the witnesses before them, determined either that an excessive amount of force was used or that Defendant was the aggressor, a determination with ample support in the record.

[1]