IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 98-11,316

VS :

RUSSELL LINDSTROM :

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

Defendant appeals from the sentence imposed by this Court on August 7, 2000, after he was found guilty following a jury trial of aggravated assault, serious bodily injury caused, and aggravated assault with a deadly weapon.[1] For the conviction of aggravated assault, serious bodily injury caused, the Defendant was sentenced to undergo incarceration in a state correctional institution for a minimum of sixty (60) months and a maximum of ten (10) years. For the conviction of aggravated assault with a deadly weapon, the Defendant was sentenced to undergo incarceration for a minimum of fifteen (15) months and a maximum of thirty (30) months, concurrent to the previous sentence. The following is a summary of the evidence presented at the trial.

Jeremy Darrow (Darrow) came to the Williamsport area in June of 1998. Approximately June 20, 1998, Patrick Creasey was approached by a friend asking if Creasey would allow Darrow to stay in his room for a few nights. Creasey agreed.

[1] The Defendant was acquitted of third degree murder and voluntary manslaughter.

Darrow stayed with Creasey in his one room apartment at the Genetti Hotel for approximately a week until Creasey left the hotel unexpectedly.[2],[3] (N.T. 4/10/00, p. 342)

The Defendant testified that Darrow approached him in the hallway of the Genetti Hotel on June 30, 1998. Darrow asked if the Defendant could hold onto his backpacks while he looked for another place to stay. The Defendant agreed.[4] (N.T. 4/13/00, p. 103) The Defendant testified that Darrow did not come back the first night. The following night, Darrow came to the Defendant's room between 2:00 and 3:00 a.m.. Darrow stated that he had no place to stay the night, and asked if he could sleep in the Defendant's recliner. Darrow slept in the Defendant's room Tuesday through Friday of that week. The Defendant testified that he never offered for Darrow to stay in his room, but had permitted him to stay when he showed up at such a late hour.

On Friday morning, July 3, 1998, the Defendant called Barry Eck, a friend who works as a general contractor and real estate developer, in an attempt to get Darrow a job. Eck testified that the Defendant called and asked if he had any openings for a friend. Eck testified that he talked with Darrow on the phone, and told him that he would call him the following day. (N.T. 4/10/00, p. 300) Darrow left the Defendant's room in

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[2] Creasey was arrested for criminal trespass, terroristic threats, and disorderly conduct as a result of an incident that occurred at a restaurant that was operated by Creasey's father.

[3] Creasey testified that he had actually asked Darrow to leave the morning before his arrest. He testified that Darrow had said several things that concerned him. Creasey testified that on one occasion Darrow had a knife out, and had said that he was willing to stick the knife to someone's throat to get money. (N.T. 4/10/00, p. 339) Creasey also testified that Darrow had expressed an interest in whether there were valuables in the Defendant's room. (Id., p 341) Creasey testified that Darrow expressed an interest in getting enough money to be able to visit his young daughter for her birthday.

[4] The Defendant had met Darrow while he stayed with Creasey. The Defendant's room was across the hall from Creasey's.

the early afternoon. That evening, the Defendant walked to *The Pub*. The Defendant testified that he arrived at *The Pub* as the fireworks began, so he sat outside the establishment until the conclusion of the fireworks. He went inside between 9:00 and 10:00 p.m.. (N.T. 4/13/00, p. 107) Over the course of a few hours, the Defendant consumed 3-4 drinks of rum and coke. Both Stanley Helt, II, and Troy Knapp, who were bartending at *The Pub* that evening testified that when the Defendant left between 12:00 and 1:00 a.m., he did not appear to be visibly intoxicated.

The Defendant arrived back at the hotel to find Darrow in the lobby of the hotel with security guards. Steve Felix, a security officer with Tactical Security, testified that earlier in the evening, he had reports of Darrow pounding on the door of one of the rooms. Felix investigated the report. When Darrow saw Felix approach, he fled. Felix later learned that Darrow had been pounding on the door of the Defendant's room. Felix saw Darrow in the hotel parking lot approximately 45 minutes later. Felix informed Darrow that the Defendant would not be returning to his room until approximately 2:00 – 2:30 a.m., and instructed him not to return until that time. (N.T. 4/10/00, p. 8)[5]

Felix testified that as he reported the incident to the front desk, the Defendant entered through the front door. Felix asked the Defendant if he knew Darrow, and explained to the Defendant what had happened. (N.T. 4/13/00, p. 110) Felix asked the Defendant if he wanted Darrow to accompany him to his room. Felix testified that the Defendant did not answer at first. Felix asked the Defendant a couple more times, and

the Defendant reluctantly agreed. (N.T. 4/10/00, p. 8) Felix testified that he was concerned that the Defendant did not answer him at first, so he made a point to tell the Defendant that that he and the other officer would escort Darrow out of the hotel if he was not welcome. (Id., p. 10) Felix testified that Darrow appeared to be trying to convince the Defendant to allow him to go up to his room. Felix testified that as the two left the hotel lobby, he could hear the Defendant saying "this sucks." (Id., p. 11)

The Defendant testified that he and Darrow were in his room approximately five minutes when he told Darrow that he wanted him to gather his belongings and leave. (N.T. 4/13/00, p. 111) The Defendant testified that he was not happy with the fact that he came home from a night out drinking, and was greeted by armed security guards asking him questions. (Ibid.) The Defendant stated that as he started pushing Darrow toward the door, he heard a knife clip open, and saw the knife coming at him in a "stabbing motion." (Id., p. 112) The Defendant testified that he put his hand out to block the knife, and was cut. The Defendant testified that he backed up, putting his hands in the air. The Defendant testified that as he backed away from him, Darrow demanded that he give him the money from his wallet. The Defendant cooperated, and handed Darrow the cash from his wallet.[6] Darrow instructed that the Defendant sit in the chair while he retrieved some rope from the Defendant's desk and tied the Defendant's wrists together.[7]

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[5] Felix testified that Darrow appeared to be under the influence and very nervous. After Darrow left the parking lot, Felix noticed a pool of blood on the ground where Darrow had been standing. Later, while in the lobby of the hotel, Felix saw that Darrow had a cut on his hand.

[6] Cash in the amount of $177.00 was found in the pocket of Darrow's clothing obtained from the hospital. One of the bills had a spot of blood that was tested by Joseph Holleran, a Forensic Scientist of the Pennsylvania State Police, and was confirmed to be the Defendant's blood. (N.T. 4/10/00, p.217)

[7] The clerk at the front desk of the hotel, and officers who responded to the scene testified that the Defendant's hands were still tied together the next morning. By the following morning, the Defendant's hands had swelled, and started to discolor from the lack of circulation. Officer Brett Williams, of the

For approximately two and one half-hours, Darrow paced around the room, looking for things of value, and piercing the furniture and lampshade with the knife. The Defendant testified that he tried on different occasions to summon help. He testified that he yelled for help on one occasion, but that Darrow put a knife to his throat, and tied a pillowcase around his mouth as a gag. (N.T. 4/13/00, p. 118) The Defendant testified that he was gagged for approximately a half-hour. He testified that Darrow removed the gag when he motioned for a cigarette. The Defendant and Darrow drank some alcohol.[8] On another occasion, when Darrow stepped into the bathroom, the Defendant attempted to call down to the front desk. The Defendant stated that Darrow came back into the room before the call was completed, and held the knife to his throat.[9] The Defendant testified that when he got up on a second occasion to attempt to call, but he never made it to the phone. The Defendant testified that because of the small nature and congested setup of his room, he was unable to escape the room without being seen by Darrow, even when Darrow stepped into the bathroom. (N.T. 4/13/00, p. 121)

The Defendant testified that he told Darrow on several occasions just to take the money and leave. He testified that Darrow appeared to be nervous. The Defendant

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Williamsport Bureau of Police cut the ropes off from the Defendant's wrists. He testified that the ropes were tied several times around each wrist, then the rope was wrapped and tied around the rope, parallel to the wrists. (N.T. 4/10/00, p. 106)

[8] The Defendant testified that he did not drink very much of the drink, and that he was still able to recall the events, and was capable of making decisions. (N.T. 4/13/00, p. 134)

[9] Brian Lewis, the night auditor of the Genetti Hotel testified that he did receive a call from the Defendant's room between 2:30 and 3:00 a.m.. He testified that the Defendant's room number flashed on his caller identification, but when he picked up, the line disconnected. (N.T. 4/10/00, p. 22)

testified that "he didn't want to just take the money, he was telling me, he didn't know what to do, he at that time he – was trying to figure out a plan on what to do." (N.T. 4/13/00, p. 118) The Defendant testified that at some point Darrow began talking about taking him to the ATM to get more money. (N.T. 4/13/00 p. 117) The Defendant testified that Darrow made a phone call.[10],[11] After speaking with the person, Darrow hung up the phone, and cut the phone lines.[12] The Defendant testified that he didn't get the whole conversation, but Darrow said that his brother was coming. (N.T. 4/13/00, p. 154) The Defendant testified that Darrow started gathering up his things, and wiped down the room for fingerprints. (Id., p. 125) Darrow then told the Defendant go into the bathroom and wash the blood from his hand and his legs. The Defendant testified that he believed that Darrow "wanted to clean me up so he could try to get me out the back door of the hotel without there—there's a security camera, I thought it was he wanted me to look as if nothing happened." (Id., p. 126)

The next time Darrow went into the bathroom, the Defendant reached for a dresser drawer where he kept a gun. The Defendant testified that he picked up the gun, and as he turned around, Darrow appeared across the bed from him. The Defendant testified that Darrow startled him. He testified that Darrow had the knife in his hand, and

[10] Phone records obtained from the hotel indicated that at 4:06 a.m., a call was placed from the Defendant's room to a number in Elmira, New York. The hotel phone records indicated that the duration of the call was eight tenths of a minute. Joseph Fisher, the General Manager of the hotel, thestified that their system is set up so that after the phone rings seven times, the customer is charged for six tenths of a minute. (N.T. 4/10/00, p. 150) The hotel was not charged for the call by the long distance carrier.
[11] The number recorded on the hotel records was to the residence of Darrow's lifelong friend, Louis Murray. Murray testified that the two referred to each other as brothers. Both Murray and his father testified that no calls were received at their residence from Darrow at that time.(Id., p. 168) Murray testified that Darrow was approximately six feet tall, and weighed approximately 200 pounds. His head was clean-shaven. His nickname was "The Beast." Darrow had a tattoo depicting the words "The Beast."
[12] Among the evidence obtained from the room by Agent Ritter was a severed phone cord. (N.T. 4/10/00 p. 122)

it appeared as though he was coming toward him.[13],[14] The Defendant fired two shots at Darrow. He testified that he hesitated, then fired a third shot.[15] By the time he pulled the trigger the third time, Darrow was down. The Defendant testified that he did not intend to kill Darrow, he just planned to immobilize Darrow so that he could escape. The Defendant testified that he had no idea where he had hit Darrow. He testified "it was the weirdest thing I've ever – I shot, it was like blanks, there was no blood, outward sign of blood anywhere, that's why the two quick shots, it was like nothing happened, and he was down, and I shot again and it still – I didn't see any bullet holes or blood to indicate where I had hit him, and he – he went down beside the bed." (Id., p. 127)

The Defendant testified that he hesitantly made his way around Darrow and out the door. He yelled for help as he made his way to the elevator. In the lobby, he went to the front desk where Brian Lewis, the night auditor sat. Mr. Lewis testified that between 5:00 and 5:30 a.m., the Defendant came to the desk, laid a gun on the counter, and said that he had shot someone. (N.T. 4/10/00, p. 27) Lewis testified that the Defendant appeared to be slightly disheveled, his hands were tied, and he was bleeding. The Defendant did not appear to be frightened or scared. The Defendant told Lewis to call the police. (Ibid) The Defendant then walked over and sat on one of the benches in the hotel lobby as Lewis called the police[16].

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[13] On several occasions shortly after the incident, the Defendant stated to officers and media that Darrow was not attacking him when he shot him.

[14] When questioned by officers after the incident whether Darrow said anything as he came out of the bathroom, the Defendant replied that he didn't give him a chance, he just fired three times. (N.T. 4/10/00, p. 127)

[15] Dr. Samuel Land, a forensic pathologist, testified that the victim suffered three gunshot wounds. The first was to the back, in the left shoulder; the second was in the left upper chest; and the third was to the lower left chest. Dr. Land testified that all three shots were potentially lethal. (N.T. 4/10/00 p. 184)

[16] Officers and emergency medical personnel testified that the Defendant appeared to be calm as he sat on the bench. Gary Place, a paramedic for the Williamsport Hospital, and personal acquaintance of the Defendant testified that when he entered the lobby and saw the Defendant, the Defendant stated "Hi, how are you doing Gary?" (4/10/00, p. 202-203)

Officers arrived on the scene, secured the Defendant in handcuffs in the lobby, and proceeded to the room. Darrow was found face up on the floor. He had a backpack on his back, and he held a knife loosely in his hand. Paramedic Wendy Hastings, of the Williamsport Hospital testified that Darrow had a very decreased level of consciousness, and he never opened his eyes. (N.T. 4/10/00, p. 62) Darrow was transported to Williamsport Hospital, where he died a short time later.

Sufficiency of Evidence - Self Defense

On appeal, Defendant first alleges that the Court erred in refusing to enter a judgement of acquittal on the basis that the evidence produced at trial established that the Defendant was justified in using deadly force to protect himself. When ruling upon a post-verdict motion for judgment of acquittal, "a trial court is limited to determining the presence or absence of that quantum of evidence necessary to establish the elements of the crime." *Commonwealth v. Feathers,* 442 Pa.Super. 490, 660 A.2d 90, 94 (1995) (*en banc*), *aff'd,* 546 Pa. 139, 683 A.2d 289 (1996). To determine the legal sufficiency of evidence supporting a jury's verdict of guilty, the Court must view the evidence in the light most favorable to the Commonwealth as verdict winner, and draw all reasonable inferences in its favor.

The Court must then determine whether the evidence is sufficient to permit a jury to determine that each and every element of the crimes charged has been established beyond a reasonable doubt. It is the function of the jury to pass upon the credibility of the witnesses and to determine the weight to be accorded the evidence produced. The jury is free to believe all, part or none of the evidence introduced at trial. See:

Commonwealth v. Guest, 500 Pa. 393, 396, 456 A.2d 1345, 1347 (1983). See also: *Commonwealth v. Rose,* 463 Pa. 264, 268, 344 A.2d 824, 826 (1975); *Commonwealth v. Verdekal,* 351 Pa.Super. 412, 419-420, 506 A.2d 415, 419 (1986). The facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence, but the question of any doubt is for the jury unless the evidence is so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances. Commonwealth v. Chiari, 741 A.2d 770, (Pa Super 1999).

18 Pa.C.S. § 505(a) addresses the use of force in self-protection.

> (a) Use of force justifiable for protection of the person.--The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
> (b) Limitations on justifying necessity for use of force.--
> . . .
> (2) The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:
> (i) the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or
> (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:
> (A) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work

the actor knows it to be;

(emphasis added)

When there is any evidence at trial that killing may have been done in self- defense, the Commonwealth must prove beyond reasonable doubt at least one of the following: that defendant did not reasonably believe he was in danger of death or serious bodily injury; that defendant provoked use of force; or that defendant had duty to retreat, and that retreat was possible with complete safety. Commonwealth v. Upsher, 497 Pa. 621, 444 A.2d 90 (1982); citing Commonwealth v. Gillespie, 434 A.2d 781, (Super. 1981); Commonwealth v. Fisher, 491 Pa. 231, 420 A.2d 427 (1980); Commonwealth v. Eberle, 474 Pa. 548, 379 A.2d 90 (1977). Issues of whether defendant acted out of honest, bona fide belief that he was in imminent danger and whether such belief was reasonable are questions properly resolved by finder of fact. Commonwealth v. Hill, 427 Pa.Super 440, 629 A.2d 949 (1993), appeal denied 538 Pa. 609, 645 A.2d 1313.

In the instant case, the conviction 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 defendant's claim of self-defense had been disproved beyond a reasonable doubt. Commonwealth v. Coronett, 455 A.2d 1224, 309 Pa.Super. 558, (1983). The Commonwealth proceeded with the theory that the Defendant did not reasonably believe that the use of force was *immediately necessary a*t the time that he fired the shots at the victim. There was evidence presented by the Defendant with regard to the circumstances immediately surrounding the shots being fired. The Defendant testified that the victim was coming out of the bathroom and was across the room from him at the time that he fired the shots. The Defendant had stated on previous occasions that although the victim held the knife in his hand, the victim was not

attacking him at the time he fired the shots. The Defendant had also stated that the victim said nothing to the Defendant to indicate that he was going to attack him at the time that he fired the shots. Under these facts, the Court finds that the jury could have concluded that the Defendant's claim of self-defense had been disproved beyond a reasonable doubt.

Judgment of Acquittal

Defendant next alleges that the Court erred by refusing to grant a judgment of acquittal on the charge of Aggravated Assault- Serious Bodily Injury Caused. 18 Pa.C.S.A. 2702 provides that 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. Therefore, the conviction 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 have reasonably found that the Defendant intentionally caused serious bodily injury to the victim in this case. The Court finds that there was evidence presented – specifically the use of a deadly weapon on a vital part[17] of the victim – for the jury to have concluded that the Defendant intentionally caused serious bodily injury to the victim in this case.

Although the Defense argues that the Defendant was acting out of fear for his safety, and not out of malice, the Court finds that there was evidence—as is discussed in the previous section – for the jury to have found that Defendant's claim of self defense had been disproved beyond a reasonable doubt.

Weight of the Evidence

Defendant next alleges that the Court erred in denying his motion for a new trial based upon his allegation that the verdict was against the weight of the evidence. A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745 (2000), *citing* *Commonwealth v. Whiteman,* 336 Pa.Super. 120, 485 A.2d 459 (1984). The Widmer Court noted:

> Thus the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs v. Florida,* 457 U.S. 31, at 38, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown ,* 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. The trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice."
>
> Widmer, supra., *citing* *Thompson v. City of Philadelphia,* 507 Pa. 592, 493 A.2d 669, 673 (1985).

In the instant case, the Court finds that the verdict was not against the weight of the evidence. The uncontradicted evidence from the Defendant himself, was that although his hands were tied for some time, the Defendant shot the victim as he was coming out of the bathroom. The victim had neither threatened nor attempted to attack the Defendant at the

[17] The shot was fired at close range, at the torso area of the victim.

time of the shooting. There was no testimony that the shots were immediately necessary to stop the victim from inflicting harm upon the Defendant. A finding by the jury, therefore, that the Commonwealth had disproved the Defendant's claim of self-defense beyond a reasonable doubt did not shock the Court's sense of justice under the facts of this case.

Evidentiary Error

Defendant next alleges that the Court erred in refusing to allow evidence pertaining to the victim's prior bad acts and character.

Victim's character for dishonesty and violence

Defendant argues that the Court erred in refusing to allow evidence with regard to the victim's character for dishonesty and violence. In a trial for homicide, where self-defense is asserted, the defendant may introduce evidence of the turbulent or dangerous character of the decedent. Commonwealth v. Dillon, 528 Pa. 417, 598 A.2d 963, (1991), *citing* *Commonwealth v. Tiffany*, 121 Pa. 165, 15 A. 462 (1888). This type of character evidence is admissible on either of two grounds: 1) to corroborate the defendant's alleged knowledge of the victim's violent character in an effort to show that the defendant reasonably believed that her life was in danger; and/or 2) to prove the allegedly violent propensities of the victim to show that the victim was in fact the aggressor. Dillon, supra., *citing* *Commonwealth v. Clemmons,* 505 Pa. 356, 479 A.2d 955 (1984); *Commonwealth v. Amos,* 445 Pa. 297, 284 A.2d 748 (1971). In the instant case, the Defense wished to introduce the testimony to show that he reasonably

believed that his life was in danger.

Where this character evidence is proffered to corroborate the defendant's state of mind, the defendant must demonstrate knowledge of the decedent's character or reputation in order to establish a proper foundation for her claim that such knowledge put her in fear. *Commonwealth v. Stewart,* 483 Pa. 176, 180 n. 2, 394 A.2d 968, 970 n. 2 (1978); II Wigmore, Evidence § 246. In the instant case, the Defense offered no evidence to establish that he had knowledge of the decedent's character or reputation. The Court therefore found that the evidence should not be admitted.

Victim's prior record and specific prior acts not leading to convictions

Defendant argues that the Court erred in refusing to allow testimony with regard to the victim's prior record, and other specific prior bad acts not leading to convictions. Where the evidence sought to be admitted is a prior act of violence not reduced to a criminal conviction, the law requires that the violent act or acts be known to the defendant at the time of the homicide. Commonwealth v. Stewart, 436 Pa.Super. 262, 647 A.2d 597 (1994), *citing* *Commonwealth v. Dillon,* 528 Pa. 417, 598 A.2d 963 (1991) (victim's prior acts of beating defendant admissible to corroborate defendant's knowledge of victim's violent character); *Commonwealth v. Ignatavich,* 333 Pa.Super. 617, 482 A.2d 1044 (1984) (where appellant was not aware of victim's prior arrest for assault, evidence of assault inadmissible).

In the instant case, the Defendant sought to introduce testimony that the decedent had attacked his girlfriend approximately a week prior to the incident, and testimony from the decedent's friend regarding specific acts that had not led to

convictions. The Defendant produced no evidence, however, that he had any knowledge of any incidents prior to the incident in this case. The Court therefore found that the evidence should not be admitted.

Where a previous violent act has been reduced to a conviction, the 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. *See* *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1971). In the instant case, Defense counsel indicated that through their investigations they had found evidence that the victim had been involved in a prior assault, and evidence that he may have been involved in a larceny. Defense counsel admitted, however, that they could not say for certain whether they had resulted in convictions. The Court held that Defense counsel would not be permitted to introduce testimony with regard to the incidents unless they could show that they had resulted in a conviction. (see N.T. 4/10/00, p. 176).

Evidence with regard to the victim's tattoos

Defendant argues that the Court erred in refusing to allow evidence of the victim's tattoos. After a review of the tattoos, the Court found, with the exception of the tattoo displaying the words "the Beast," the tattoos on the victim's body were not relevant or admissible. The Court reasoned that the mere presence of tattoos on the victim's body, without more, was not probative of the possibility that victim possessed a known violent character which in turn would have been relevant to defendant's alleged state of fear of serious bodily harm at time of shooting for purposes of establishing fact

that shooting was in self-defense.

"Interest of Justice"

Defendant next alleges that the Court erred in not granting a new trial in the "interest of justice." Defendant argues that it was obvious that the jury was concerned not with the guilt or innocence of the Defendant, but with the punishment that should be imposed. Defendant argues that this was evidenced by the fact that during deliberations, the jury questioned the Court with regard to the seriousness of the offenses. The rationale "in the interest of justice," employed to rectify errors which would otherwise result in unfairness, is deeply rooted in both federal jurisprudence and the common law of Pennsylvania. In the federal system this aspect of judicial discretion is evidenced in Rule 33 of the Federal Rules of Criminal Procedure. The first sentence of the Rule provides, "[T]he court on motion of a defendant may grant a new trial to him if required in the interest of justice." Fed.R.Crim.P. 33. , Commonwealth v. Powell, 527 Pa. 288, 590 A.2d 1240 (1991).

The federal system has recognized that this power is not without restriction, especially when the action taken potentially intrudes upon the domain of the jury. In *Tennent v. Peoria & P.V. Ry. Co.,* 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944), the United States Supreme Court stated, "Courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." If, however, a trial court determines that the process has been unfair or prejudicial, even where the prejudice arises from actions of the court, it may, in the

exercise of its discretionary powers, grant a new trial "in the interest of justice." Powel, supra, at 294. In the instant case, the Court could not find that the proceedings in this case had been unfair or prejudicial, by the mere fact that the jury had questioned with regard to the seriousness of the offenses.

Bail pending Appeal

Defendant next argues that the Court erred in refusing to grant bail pending appeal in this matter. Prior to conviction, an accused has a constitutional right to bail which is conditioned only upon the giving of adequate assurances that he or she will appear for trial. Pa.Const., Art. 1, sec. 14. Absent evidence that the accused will flee, the importance of the presumption of innocence, the principle that punishment should not be imposed prior to conviction, and the need to provide an accused an unhampered opportunity to prepare a defense, dictate that bail should be granted prior to trial. Commonwealth v. Bonaparte, 366 Pa.Super. 182, 530 A.2d 1351 (1987), *citing* *Commonwealth v. Truesdale,* 449 Pa. 325, 335-36 & n.13, 296 A.2d 829, 834-35 & n. 13 (1972).

Following a verdict of guilt, however, a defendant has no state or federal constitutional right to bail. Bonaparte, supra. *Citing* *Commonwealth v. Fowler,* 451 Pa. 505, 304 A.2d 124 (1973); *Commonwealth v. Caye,* 447 Pa. 213, 290 A.2d 244 (1972); *Commonwealth v. Keller,* 433 Pa. 20, 248 A.2d 855 (1969). After conviction, and pending final disposition of all direct appeal proceedings, allowance of bail in non-capital cases is left to the discretion of the trial court. *See* *Commonwealth v. Keller, supra,* 248 A.2d at 856; *Commonwealth v. Meyers,* 137 Pa. 407, 409, 21 A. 246, 247 (1891). The

provisions of Pa.R.Crim.P. 4010 set forth the procedural rules governing the exercise of this discretion. *See* *Commonwealth v. Fowler, supra*, 304 A.2d at 127 & n.*6.*. In the instant case, considering the seriousness of the case, and the length of the sentence, the Court found it appropriate to deny bail pending the outcome of his appeal.

Dated:

By The Court,

Nancy L. Butts, Judge

xc: Peter Campana, Esquire
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges