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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Opinions

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COMMONWEALTH OF PENNSYLVANIA v. KOLBRIN HOLYFIELD

Sufficiency of the Evidence—Self-Defense

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CC No. 2017-7654. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—July 20, 2022.

OPINION

This is a direct appeal from the judgment of sentence entered on October 26, 2021, following a non-jury trial on the charge of Criminal Homicide that took place between July 20, 2021 and July 23, 2021. At the conclusion of trial, the Defendant was found guilty of First-Degree Murder. Sentencing was deferred to allow for the preparation of a Pre-Sentence Report ("PSR"). On October 26, 2021, the Defendant was sentenced to life imprisonment without the possibility of parole. The Defendant received 1,590 days of time credit, and he was ordered to comply with DNA registration.

A timely post-sentence motion was filed thereafter. After careful review, the court denied the motion on February 17, 2022.[1] This timely appeal then followed. On April 11, 2022, pursuant to this court's 1925(b) Order, the Defendant filed a Concise Statement of Errors Complained of on Appeal ("Concise Statement"), which raised the following six (6) issues for review:

I. The evidence of record is insufficient as a matter of law to support Mr. Holyfield's conviction for first-degree murder where:

a. the Commonwealth failed to prove beyond a reasonable doubt that Mr. Holyfield possessed the specific intent to kill and acted with malice when he shot Dahrique Smith ("Smith"). Stated differently, the Commonwealth failed to prove beyond a reasonable doubt that Mr. Holyfield committed a willful, deliberate, and premeditated killing; and /or

b. the Commonwealth failed to disprove beyond a reasonable doubt that Mr. Holyfield acted in justifiable, self-defense when he used deadly force against Smith, such that an acquittal was warranted; and/or

c. the Commonwealth failed to disprove beyond a reasonable doubt that Mr. Holyfield acted in "imperfect" self-defense – or under an unreasonable belief that the circumstances of the killing were justified – when he used deadly force against Smith, such that a conviction for voluntary manslaughter was warranted.

II. The verdict of guilty as to first-degree murder was so contrary to the evidence as to shock one's sense of justice, and the award of a new trial was imperative so that right may have been given another opportunity to prevail. Accordingly, for the following reasons, this Court erred by denying Mr. Holyfield's post-sentence motion for a new trial on the grounds that the verdict rendered was against the weight of the evidence.

a. Mr. Holyfield provided credible testimony, much of it corroborated, that he reasonably feared Smith, who was known to carry firearms; who was involved in the murder of Mr. Holyfield's brother, and the shooting and wounding of three of their friends, in retaliation for the release of a disparaging rap song; and who was going around saying that Mr. Holyfield was "next." Against this backdrop, and in light of Smith's displays of aggression toward Mr. Holyfield immediately preceding the shooting, the weight of the evidence demonstrates that Mr. Holyfield held a bona fide belief – either reasonably or unreasonably – that deadly force was necessary to protect himself from death or serious bodily injury.

b. The evidence demonstrated that Mr. Holyfield made exceptional efforts to avoid Smith, both on the night in question and in general. Further, no evidence demonstrated that Mr. Holyfield intended to encounter Smith on the night of the shooting or that he knew Smith would be at the bar. Mr. Holyfield's presence on the South Side was incidental, he avoided interaction with Smith while inside of the bar, and the encounter between the two men occurred at Smith's provocation. These facts weigh heavily against a finding of premeditation, a specific intent to kill, and the existence of malice.

c. Mr. Holyfield fired two shots at Smith in quick succession, and did not continue shooting as Smith ran away. This fact weighs against a finding that Mr. Holyfield possessed the specific intent to kill.

d. Mr. Holyfield, who had no record of criminal convictions, lawfully purchased the firearm used in the shooting and lawfully carried it for self-protection. Even if it is to be accepted that Mr. Holyfield repositioned the firearm when he stepped outside of the Rowdy Buck, it is unreasonable to infer or conclude from this fact that Mr. Holyfield planned to kill Smith. Mr. Holyfield's fear of Smith makes it such that Mr. Holyfield would want his firearm to be accessible in the event that he needed to defend himself.

e. Mr. Holyfield did not violate a duty to retreat merely because he reentered the Rowdy Buck after learning that Smith was present inside. Mr. Holyfield's bona fide belief that that deadly force was necessary to protect himself from imminent danger did not arise until Smith made aggressive gestures toward Mr. Holyfield and then aggressively approached him. After observing Smith's aggressive gestures, Mr. Holyfield attempted to proceed to the nearest known exit and, trapped by a congested crowd, was met by Smith along the way.

f. Several character witnesses testified that Mr. Holyfield has a reputation in the community for being honest, truthful, a "peacemaker," and non-violent.

III. This Court erred by permitting Detective Garrett Spory to "interpret" the video surveillance which captured the incident by contemporaneously providing his "opinions" about what the video depicted. Spory's opinions included, but were not limited to (a) the fact that, based on Spory's "training and experience," there was a bulge present on the left side of Mr. Holyfield's waistband indicative of a firearm when Mr. Holyfield reentered the bar; (b) that the firearm used in the incident "had a laser grip on it [ ]" and that there was "a laser dot on the back of [Smith] as he's being shot and running out of the bar"; and (c) that Spory did not "see any weapons in [Smith's] hands." Spory's opinions about what the video depicted were irrelevant and prejudicial, and such opinion testimony improperly invaded the province of the fact-finder.

IV. This Court erred in denying Mr. Holyfield's request for a mistrial after Detective Garrett Spory informed this Court that that Mr. Holyfield had "previously been arrested with a firearm." Such evidence was irrelevant, extremely prejudicial, and deprived Mr. Holyfield of a fundamentally fair trial.

V. This Court erred in granting the Commonwealth's motion to admit Commonwealth's Exhibit 67 by not requiring the Commonwealth to lay a foundation for its admission or properly authenticate it.

VI. In a case in which Mr. Holyfield's credibility was of paramount importance, this Court erred when it denied a request for Mr. Holyfield to remove his COVID-19 mask while testifying in his own defense at trial.

(Concise Statement, pp. 1-3) (internal footnote omitted).

The Defendant's contentions lack merit. The court respectfully requests that the Defendant's conviction and sentence be upheld for the reasons that follow.

I. FACTUAL BACKGROUND

On May 21, 2017, at approximately 12:40 a.m., the Defendant shot and killed Dahrique Smith at the Rowdy Buck bar located on the South Side of Pittsburgh before immediately fleeing the scene. (Trial Transcript ("TT"), held 7/20/21-7/23/21, pp. 13-16, 18, 20, 23, 34, 51, 107, 177-78) (Verdict Transcript ("VT"), held 7/30/21, p. 7). Mr. Smith received first aid treatment from a responding officer within less than a minute of being shot, and, although medics arrived approximately three (3) to five (5) minutes later to transport him to Mercy Hospital, Mr. Smith ultimately succumbed to the two (2) gunshot wounds that he sustained to his chest, which had lacerated his lungs and aorta. (TT, pp. 15, 17-18, 52, 91-92, 113-17, 247, 382).

The evidence presented at trial established that the Defendant shot Mr. Smith while they were inside of the Rowdy Buck, and that Mr. Smith stumbled outside and collapsed on the corner of East Carson and South 14th Street. (TT, pp. 15, 18-19, 35-36, 39, 52, 70, 74-75, 115). No weapons were found on Mr. Smith's person or within his vicinity, and the officers on scene did not observe anyone removing anything from Mr. Smith while he was lying in a pool of his own blood on the sidewalk. (TT, pp. 17, 21, 28-32, 44-46, 117). The crime scene investigation led to the discovery of two (2) spent shell casings "immediately inside of the threshold of the [bar] door" next to a beer cooler. (TT, pp. 18, 35-36, 39-40, 42-46, 76-77). Subsequent analysis of the casings revealed that they were discharged from a Glock 17 firearm with a laser grip, bearing Serial Number YCL923. (TT, pp. 92-93). The Glock 17 was registered to the Defendant and in his possession as of August 15, 2016.[2] (TT, pp. 92-93).

On June 20, 2017, a month after the shooting, the Defendant was arrested at his residence by the United States Marshals Fugitive Taskforce. (TT, pp. 129-131, 137, 142-47). The Defendant had been apprehended after officers pieced together his identity through witness interviews and video surveillance from the Rowdy Buck and surrounding establishments. (TT, pp. 218-224).

The surveillance footage from the Rowdy Buck shows that the Defendant initially entered the bar with three (3) individuals and remained there for approximately 26 minutes. (TT, pp. 201-02, 225-27). The video then depicts the Defendant leaving the bar for approximately one minute and 30 seconds and then reentering, but this time with the bulge of a firearm visible in his front waistband. (TT, pp. 201, 203-06, 227-28). Approximately one minute and six (6) seconds later, the Defendant is seen firing his laser-grip Glock 17 at Mr. Smith, and Mr. Smith is shown "being shot and running out of the bar." (TT, pp. 211, 228-29). Immediately prior to the shooting, the video shows Mr. Smith "walking over to the direction where the shooting [wa]s about to occur . . . ." (TT, p. 214). From what can be seen on the video, Mr. Smith was not carrying a gun in his hands, only a cell phone in his left hand and a drink in his other hand. (TT, p. 214). The video shows Mr. Smith being shot, and it then captured the Defendant running out of the bar, chasing after Mr. Smith, with his Glock 17 still in his left hand. (TT, p. 208).

A search of the Defendant's residence, which was conducted on the same day as his arrest, led to the recovery of the maroon T-Shirt, Nike Shoes, and tan cargo shorts that the surveillance footage shows the Defendant wearing on the night of the shooting. (TT, pp. 130-37, 216). Although officers recovered a Glock 23 firearm and ammunition in the residence, the weapon that the Defendant used to kill Mr. Smith - - a Glock 17 bearing Serial Number YCL923 - - was never found. (TT, pp. 92-93, 162, 164-65, 211). The search of the Defendant's home revealed that the Defendant had purchased the Glock 23 firearm on June 3, 2017, just two (2) weeks after the shooting, at a pawnshop in North Versailles. (TT, pp. 163, 166-67, 303).

The Defendant ultimately did not dispute his identity as the shooter at trial. Rather, the Defendant took the stand and testified that he killed Mr. Smith in self-defense. (TT, pp. 261-330). According to the Defendant, he had been in fear of Mr. Smith since the fall of 2015, after the Defendant helped his own brother record a rap song that contained "disrespectful" lyrics about Mr. Smith. (TT, pp. 265, 267-69, 306-07). The Defendant testified that he tried to dissuade his brother, Trillzee, from releasing the song, but Trillzee released the song over the Defendant's objections. (TT, pp. 268-69).

A few weeks after the song's release, the Defendant was informed by Trillzee that Mr. Smith "had a hit out on" them. (TT, pp. 269-70). According to the Defendant, this news led him to "drastically change[]" his lifestyle and he "stopped going out" as a result. (TT, pp. 271, 338). The Defendant became "very cautious" about which artists he would work with in his music recording business, and he and Trillzee stopped doing shows that were "immediately in the city" for fear that they would encounter Mr. Smith. (TT, p. 271). Trillzee warned the Defendant to "stay away" from Mr. Smith if he ever saw him because Mr. Smith was "dangerous" and was known to carry a gun. (TT, pp. 272-73) (emphasis added).

The Defendant explained that, on November 20, 2015, Trillzee and three (3) other members of their rap group were shot at Trillzee's home recording studio, and Trillzee was "killed on the scene." (TT, pp. 273-74). The Defendant testified that, at Trillzee's funeral, he was informed by an unnamed individual who had been present at Trillzee's murder that Mr. Smith had carried out the shooting and killing. (TT, pp. 274-75, 308). This same individual warned the Defendant that he could "be next" and that he had to "be safe." (TT, p. 275) (emphasis added). The Defendant was told that he "can't be out living a regular life out in public[] and expect certain people not to try to do anything." (TT, p. 275)(emphasis added).

At the time of Trillzee's funeral, the Defendant already owned a firearm, but he obtained his concealed carry permit in June of 2016. (TT, pp. 276-78). The Defendant testified that he was "scared of being shot to death" by Mr. Smith so he "quarantined" himself and only went to work and spent time with his girlfriend because he was "very concerned" for his life. (TT, pp. 277-79) (emphasis added). The Defendant avoided going out at night because he "was briefed on who Dahrique Smith actually was" and he "was told that he was a party goer" so the Defendant "naturally stayed away." (TT, pp. 279, 310).

According to the Defendant, the night of Mr. Smith's murder was the first time that he had gone out in the South Side since his brother died. (TT, pp. 279, 310). The Defendant testified that "he made an exception" and went out that evening because he was invited to watch his friend, Joel Kellem, perform at the Drip Lounge on Warrington Avenue. (TT, pp. 280-81, 331). The Defendant did not own a car at that time, so his mother dropped him off at the show at around 10:00 p.m. He was expecting Mr. Kellem to drive him home after the show because Mr. Kellem had promised to do so. (TT, pp. 280-82, 310-11, 332). The Defendant

carried his gun "all day, every day" for his "safety," so he had it in his possession that evening. (TT, p. 281).

After the show, Mr. Kellem told the Defendant that "something came up with his girlfriend," and he could no longer drive the Defendant home. (TT, p. 282, 332). The Defendant did not want to call his mother because it was 11:00 p.m., and she was asleep, and he was afraid she would be angry if he called her. (TT, pp. 282, 311). The Defendant's friend, Aneesa Fulton, offered to take him home, and he agreed. (TT, p. 283). As the Defendant tells it, after he was already in the car with Ms. Fulton and her friend Jimika, the girls decided to go to bars on Carson Street in the South Side, and the Defendant testified that he felt like he had no option but to go because he did not "want to be a party pooper." (TT, pp. 283, 310-11).

After arriving in the South Side, the Defendant testified that he attempted to get a tattoo to avoid barhopping, but he could not get one because his phone had died, and the tattoo shop did not have a phone charger so he was unable to show the tattoo artist the specific design that he wanted. (TT, pp. 283-85, 311-13). The Defendant knew that Ms. Fulton and Jimika were going to the Rowdy Buck, and, even though it was a bar that he was "terrified" to go to because of Mr. Smith, he followed the girls there and never attempted to arrange for another ride home. (TT, pp. 285-86, 313-14).

The Defendant entered the Rowdy Buck with Ms. Fulton, Jimika, and their friend Ron, who they had unexpectedly encountered while they were waiting in line. (TT, p. 286). The video surveillance showed that, at the time of his initial entry into the bar, the Defendant did not have a firearm visible in his front waistband. The Defendant was in the bar for "about 20 minutes" before he "realized" who he was in the bar with. (TT, pp. 287, 315, 330). The Defendant testified that he "instantly left" as soon as he saw Mr. Smith because he was afraid, and his "first reaction was to get out [of] the bar . . . ." (TT, pp. 287, 315). The Defendant testified that he went outside and walked "past the establishment" to look for the girls because he knew that they had ventured outside to smoke a cigarette. (TT, pp. 286-89, 314-15).

When the Defendant did not see his friends outside, he testified that he thought that they had reentered the bar without him noticing. (TT, pp. 286-89, 314-15). After waiting outside for approximately 90 seconds, the Defendant reentered the Rowdy Buck in the hopes that he "would be able to get back in and grab the girls and leave before" Mr. Smith "noticed" him, even though the Defendant did not expect the girls to be ready to leave since he knew that they wanted to barhop and they had only been at the bar for about 30 minutes. (TT, pp. 290, 292, 296, 315, 330). The Defendant reentered the bar that he felt that he "might die in", given his knowledge of Mr. Smith's presence inside, except this time, when he entered the bar, he had the bulge of a firearm protruding from his front waistband, a bulge that was not there during his initial entry into the bar. (TT, pp. 203-05, 316).

According to the Defendant, the Defendant walked to the opposite side of the bar from where he had last seen Mr. Smith in order to avoid him. (TT, pp. 290, 316-17). The Defendant testified that the "bar was crowded," and that there were "[p]robably more than" 50 people in the dance area. (TT, p. 289-91). As a result, "he c[ould not] really just walk from one point to another without, you know, trying to get around people." (TT, p. 291).

The Defendant testified that he saw Mr. Smith for the second time as the Defendant was heading towards the "congested" dance floor to look for his friends. (TT, pp. 294-96). Notwithstanding the fact that the Defendant was over "six feet away" from Mr. Smith, on a crowded dance floor with "loud music playing," and "a lot of people talking," the Defendant testified that he was able to clearly hear Mr. Smith say "[y]ou're next." (TT, pp. 295, 318-19) (emphasis added). The Defendant then testified that Mr. Smith turned quickly and then "proceeded to scream as he was coming, 'I'm sending you to Trillzee.'" (TT, pp. 296-97).

The Defendant testified that he was frightened and that "a full shot of adrenaline shot through" his body at this point. (TT, p. 297). The Defendant testified that, as Mr. Smith started to approach him, the Defendant's "only option was to go forward" because of the crowd of people behind him. (TT, p. 297). The Defendant claimed that he was "trapped to the nearest entrance", but the video clearly showed that the front entrance area of the bar was not nearly as congested as the dance floor and that the Defendant's path to the front exit was not blocked by a swarm of people. (TT, p. 323).

Instead of attempting to run away from Mr. Smith and exiting from the main door of the Rowdy Buck that he had already used twice, the Defendant drew his weapon "to go forward" in "anticipation" of Mr. Smith confronting him. (TT, p. 297, 322). The Defendant then testified:

> I draw my weapon, try to open the door. As I started to move, I hear someone scream by my far right side I guess you can say. And I lose sight of him for a split second. And when he comes back in sight, he's sideways. I heard that it all happened all at once. I thought it was a gun. I thought he had a gun, so I shot.
>
> (TT, p. 298).

According to the Defendant, "everything got hazy" after he fired the first shot, and the next thing that he remembered was being outside "looking for the girls." (TT, pp. 299-300, 323). The video evidence showed that after he shot Mr. Smith, the Defendant continued to run after Mr. Smith, who fled through the side door of the Rowdy Buck and out onto the street through the Beehive coffee shop. (TT, pp. 322-24). The Defendant chased Mr. Smith even though he testified that he believed that Mr. Smith was going to return fire, despite seeing that Mr. Smith was running "in full stride away from" him. (TT, pp. 324-25). The video evidence clearly showed that the Defendant chased Mr. Smith with the laser dot still focused on Mr. Smith's back as he was running away. (TT, pp. 211, 215).

The Defendant testified that he never intended to confront Mr. Smith when he reentered the bar and that he did not intend to kill Mr. Smith when he shot him twice. (TT, pp. 296, 299). The Defendant claimed that he thought that Mr. Smith had a gun because his "right hand" was out of sight. (TT, p. 299). The Defendant further claimed that his only intention was to "make [Mr. Smith] go away" and "get away" from him so that the Defendant could "go home." (TT, p. 299).

Once outside, the Defendant saw the girls "standing in front of a storefront," and he testified that, "we just started to walk" to the car. (TT, p. 300). However, Ms. Fulton's testimony contradicted the Defendant's account. She testified that the women had just finished their cigarettes when they heard gunshots. (TT, p. 177). She testified that she saw people running away from the Rowdy Buck, and she started running in the same direction with them. (TT, p. 177). As she was running, she looked over her shoulder and saw that the Defendant "was behind" her "running too." (TT, pp. 177-78) (emphasis added).

Although Ms. Fulton saw the Defendant running behind them, and although the whole point of the Defendant's reentry into the bar was to find Ms. Fulton for a ride home, the Defendant testified that he did not follow the women to the car because he went to look for his friend Ron, despite having a dead phone. (TT, p. 300). The Defendant testified that he made arrangements with Ms. Fulton about where they would meet after she retrieved the car, but Ms. Fulton testified that she had no idea where the Defendant had disappeared to and that he did not say anything to her before he separated from her. (TT, pp. 181, 326).

According to the Defendant, "the crowd was too thick," and he realized that "it was a lost cause" so he gave up his search for Ron and "waited around where the girls left me at to get the car." (TT, p. 300-01). He thought Ron was safe because of the

police presence in the area, and he testified that he "left the area so [Mr. Smith] would not return fire." (TT, pp. 301, 325).

The Defendant testified that he did not realize that he had actually shot Mr. Smith because he "had no clue" that his aim was so good. (TT, pp. 301, 325). The Defendant went to sleep when he got home, and he did not learn that Mr. Smith had been killed until the next morning when he saw the postings on social media. (TT, p. 301). The Defendant testified that he told his mother what happened that morning and that he went to stay with his father for a few weeks after the shooting because he was "more fearful [of retaliation] after that situation" than he was after his brother died. (TT, pp. 301-02). According to the Defendant, his father took his phone and his gun to keep him safe. (TT, p. 302).

The Defendant testified that he did not call the police after the shooting because he was afraid. (TT, p. 303). He stated that he purchased his new Glock 23 firearm afterwards because he was "very much in fear" of his life. (TT, p. 303). The Defendant also admitted that, after Trillzee's murder, he never went to the police with the information that he had received about Mr. Smith being his brother's killer. (TT, pp. 308-09). The Defendant also never contacted the police after he learned that Mr. Smith was "looking for" him and had "a hit out" on him following the song release. (TT, pp. 270, 309). Trillzee's murder remained unsolved as of the date of the Defendant's trial. (TT, pp. 308-09).

II. DISCUSSION

A. The evidence was more than sufficient to convict the Defendant of First-Degree Murder because the evidence proved beyond a reasonable doubt that the Defendant had the specific intent to kill and that the killing was not a product of either perfect or imperfect self-defense.

The Defendant first claims that the Commonwealth failed to prove beyond a reasonable doubt that the Defendant had the specific intent to kill and that the killing was willful, deliberate and premeditated. (Concise Statement, p. 2). This court very much disagrees.

The standard of review applicable to a sufficiency claim is well-settled. Our appellate court has explained the standard as follows:

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. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Antidormi, 84 A.3d 736, 756 (Pa. Super. 2014) (internal quotations and citations omitted) (emphasis added). "This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt." Antidormi, supra, at 756. "Although a conviction must be based on more than mere suspicion or conjecture, the Commonwealth need not establish guilt to a mathematical certainty." Commonwealth v. Gainer, 7 A.3d 291, 292 (Pa. Super. 2010) (internal citations and quotations omitted).

(i) The Evidence Was Sufficient to Establish Malice and a Specific Intent to Kill.

Viewing the evidence in the light most favorable to the Commonwealth and drawing all of the reasonable inferences in its favor as verdict-winner, this court remains steadfast in its belief that the evidence was more than sufficient to establish that the Defendant acted with malice and possessed the specific intent to kill Dahrique Smith on May 20, 2017.

As our Supreme Court has explained:

"The elements of first-degree murder are that the defendant unlawfully killed a human being, the defendant killed with malice aforethought, and the killing was willful, deliberate, and premeditated." Commonwealth v. Wesley, 753 A.2d 204, 208 (Pa. 2000); Commonwealth v. Cox, 728 A.2d 923, 929 (1999), cert. denied, 533 U.S. 904 (2001); see also 18 Pa. C.S. § 2502(a) and (d). The willful, deliberate, and premeditated intent to kill is the element that distinguishes first-degree murder from other degrees of murder. Commonwealth v. Wilson, 672 A.2d 293, 297 (Pa. 1996), cert. denied, 519 U.S. 951 (1996). "[T]he Commonwealth can prove the specific intent to kill through circumstantial evidence." [Commonwealth v. Weiss, 776 A.2d 958, 963 (Pa. 2001)]. "The use of a deadly weapon on a vital part of the victim's body may constitute circumstantial evidence of a specific intent to kill." Id.; Commonwealth v. Bond, 652 A.2d 308, 311 (Pa. 1995).

Commonwealth v. Drumheller, 808 A.2d 893, 908 (Pa. 2002).

While this case did not involve a movie plot set of facts where the Defendant went to the South Side for the specific purpose of effectuating a revenge killing against Mr. Smith, that storyline is not a prerequisite for a first-degree murder conviction. Caselaw makes clear that "the design to kill can be formulated in a fraction of a second," and that no level of planning and premeditation is required beyond that. Commonwealth v. Jordan, 65 A.3d 318, 323 (Pa. 2013) (emphasis added).

For the Defendant, that fraction of a second occurred when he caught sight of Mr. Smith inside of the Rowdy Buck. Starting with the Defendant's voluntary reentry into a crowded bar that housed his brother's killer and ending with the Defendant's immediate flight from the scene, failure to report the shooting, and disposal of the murder weapon, the Commonwealth proved beyond a reasonable doubt that the murder of Dahrique Smith was a malicious, willful, and deliberate killing borne out of means and opportunity.

The Reentry

Had this case involved a scenario where Mr. Smith caught the Defendant off-guard in a public place and left him no time to react before immediately approaching, and had this case not involved the Defendant's knowing and intentional decision to reenter the bar when he knew Mr. Smith was inside, then perhaps the Defendant's sufficiency and weight arguments would hold more water. But that was not the case that was tried before this court.

The facts presented to this court unequivocally established that the Defendant made the decision to walk back into the proverbial lion's den, despite having had the opportunity to safely leave the area when he first realized that he was in the same bar with the "dangerous" "killer" who murdered his brother and wanted him dead. (TT, pp. 269-70, 272, 297). The Defendant could have prevented the fatal encounter that he had allegedly feared for years if he had simply never walked back into the Rowdy Buck. Instead, the Defendant returned to the bar with full awareness of Mr. Smith's presence inside, and he did so after he moved his

loaded firearm to his front waistband for easy access. The Defendant's decision to reenter the bar after relocating his firearm, knowing full well that Mr. Smith was inside, spoke volumes about his true intent and carried more authenticity and credibility than anything to which he testified.

To be sure, the Defendant spent considerable time during his testimony trying to establish that he had an intense, years-long fear of Mr. Smith, presumably to prop up his self-defense claim. His testimony painted a portrait of substantial fear and paranoia that ruled and hindered his life for years. For instance, the Defendant described how, prior to his brother's murder, his brother had specifically instructed him to "go the other way" if he ever saw Mr. Smith because Mr. Smith would "try to get" him because of the rap song that the Defendant helped his brother create. (TT, pp. 272-73). The Defendant testified that, after his brother's murder in 2015, he was told that he could "be next," and he was warned that he could not "be out living a regular life out in public" and "expect certain people not to try to do anything." (TT, pp. 274-75, 308) (emphasis added). The Defendant recounted the ways he "drastically changed" his life after learning that Mr. Smith had a hit out on him, testifying that he: (i) abandoned his nightlife because he was told that Mr. Smith was always on the "party scene"; (ii) turned down certain work if it involved his presence in the city, and (iii) "quarantined himself before corona", all because he was in such fear of being "shot to death" by Mr. Smith. (TT, pp. 270-273, 277-79).

However, notwithstanding the Defendant's testimony that Mr. Smith was a dangerous killer who had a "hit" out on him, and the specific warnings he had received to "go the other way" if he saw Mr. Smith because Mr. Smith would go after him, and notwithstanding the fact that the Defendant "fully believed" that Mr. Smith was armed, the Defendant voluntarily reentered the bar that he felt that "he might die in" given Mr. Smith's presence and put himself in the very situation that he allegedly had taken pains to avoid for multiple years. (TT, pp. 270-272, 297, 316). That can hardly be called an "exceptional effort" to avoid Mr. Smith. (See Concise Statement, p. 3).

Ultimately, despite the great lengths to which the Defendant went to describe the history between the Defendant and Mr. Smith so that he could explain the danger that Mr. Smith posed to his life and show that he was in legitimate fear of him at the time of the shooting, his testimony cannot be reconciled with his actions on the night of the murder. Indeed, if the Defendant truly held a bona-fide belief that he would be murdered if he ever came within close proximity to Mr. Smith, he would have never knowingly put himself back in the same room with him, unless, of course, he had another agenda.

The Defendant's reentry contradicted any claim of legitimate fear, and showed, instead, that the Defendant was preparing for a fatal encounter, which he initiated one minute and six seconds later, when he shot and killed Mr. Smith, who had barely made his way around to the Defendant's general vicinity at the time of the first shot. (TT, pp. 203-05, 211, 228-29, 265-72, 275-79, 291, 296-97, 306-07, 316, 321-22). The fact that the Defendant repositioned his loaded firearm to his front waistband before walking back into the bar only further demonstrated his expectation of immediate use, further establishing a specific intent to kill.

Circumstances Surrounding the Shooting itself

In addition to the Defendant's reentry, other evidence presented at trial further supported the conclusion that the Defendant had the specific intent to kill Mr. Smith. For example, the Defendant was not just armed -- he used a laser grip firearm during the shooting, an additional tool used to ensure target precision. (TT, pp. 92, 211, 215). Furthermore, the Defendant fired at Mr. Smith not once, but twice, and he shot Mr. Smith in his chest, a vital part of his body. (TT, pp. 205,). See Commonwealth v. Predmore, 199 A.3d 925, 931 (Pa. Super. 2018) ("[I]t is axiomatic that [s]pecific intent to kill may be inferred from the use of a deadly weapon on a vital part of the victim's body.") (internal quotations and citation omitted).

Although the Defendant claimed that his only intention in shooting his firearm was to "make [Mr. Smith] go away" and then "get away" from him so that the Defendant could "go home," the Defendant's actions, again, did not correlate with that stated intention. Mr. Smith was not pointing a weapon at the Defendant at any point during the night, including, more specifically, during the one minute and six seconds that preceded the shooting. The Defendant immediately started firing at Mr. Smith when Mr. Smith was merely walking towards his general vicinity.

If the Defendant was truly trying to encourage Mr. Smith to leave him alone, the Defendant could have attempted to use non-lethal tactics to scare him away. (TT, p. 299). For instance, the Defendant could have brandished his weapon and provided Mr. Smith with the opportunity to at least register the fact that he was in his crosshairs. The Defendant could have fired warning shots at the ceiling or floor, or, he could have aimed at Mr. Smith's leg or other non-vital part of the body. The Defendant claimed that he did not know that he had actually shot Mr. Smith, but the court did not find that to be credible given the fact that he used a laser grip firearm, ensuring his ability to see exactly where he was aiming. The Defendant aimed at center mass as he executed Mr. Smith without hitting a single bystander in the crowded bar, demonstrating a level of precision that further evinced a specific intent to kill. The fact that no bystanders were hit also highlights the fact that the Defendant's path to the front exit was not blocked by people.

Furthermore, although the Defendant testified that he was afraid that Mr. Smith would return fire, the video evidence shows that, right after the shooting, the Defendant chased directly after Mr. Smith, who exited from the side door of the Beehive, further demonstrating that the Defendant was not in legitimate fear of Mr. Smith either during or after the shooting. (TT, pp. 324-25).

Consciousness of Guilt

The Defendant's actions after the shooting highlighted a strong consciousness of guilt, further reinforcing the conclusion that he had the specific intent to kill Mr. Smith. There is no dispute that the Defendant immediately fled from the scene and did not report the shooting or otherwise contact the authorities at any point in the month leading up to his arrest. The Defendant did not even mention his involvement in the shooting to his friend, Ms. Fulton, who drove him home that night. Once again, the Defendant's own conduct was wholly inconsistent with his attempt to portray himself as an innocent gun owner who was forced to discharge his lawfully possessed weapon in a justified shooting. His flight and failure to report his involvement in the shooting, combined with his failure to retain the murder weapon, all strongly demonstrated that the Defendant had the specific intent to kill Mr. Smith.

In reaching its verdict, the court wishes to be clear that it did so after meaningful consideration of the Defendant's testimony. The court paid careful attention to the Defendant's reasons for his reentry into the bar, his immediate flight, and his failure to report what he claimed to be a justified shooting. However, the court found that his testimony was self-serving, not credible, contradictory, and not supported by other credible evidence or sheer logic.

For instance, the Defendant testified that he "did not feel like it was an option" to say no to going to the South Side because that plan was spontaneously created by Ms. Fulton and Jimika in the car after she had agreed to drive him home, and he did not "want to be a party pooper." (TT, pp. 283, 310-11). However, Ms. Fulton directly rebutted that claim when she testified that her,

Jimika, and the Defendant "all had planned to go [to the South Side] from the show" and that they "all decided to go down there." (TT, p. 183) (emphasis added).

Next, the Defendant claimed that he was "scared" after seeing Mr. Smith inside of the Rowdy Buck, but he reentered the bar so that he could "grab the girls and leave." (TT, pp. 290, 292, 296, 315, 330). However, on cross-examination, the Defendant admitted that he did not have any expectation that his friends would be ready to leave because they had only been at the bar for approximately 30 minutes, and he knew that they wanted to barhop that night. (TT, pp. 283, 288-92, 315). The Defendant's admission that he never expected to be able to get a ride home, even if he found the girls back inside of the bar, shows that his stated reason for reentry was nothing more than an after-the-fact fabrication designed to provide an innocent explanation for his reentry into the Rowdy Buck.

Indeed, if the Defendant's true aim was to get home, he could have sought out multiple different avenues to accomplish that goal. The Defendant could have borrowed a phone from someone outside of the bar to call his mother for a ride since they lived together. (TT, p. 310). The Defendant made sure to mention that, after his brother's death, his mother was extremely concerned about his safety and would call him multiple times a day to check on him. (TT, p. 279). However, the Defendant's testimony was essentially that he was more fearful of his mother than Mr. Smith, since he testified that he would have "gotten an earbeating" if he called his mother to pick him up. (TT, p. 311). This is just another instance where the Defendant's testimony was incredible and illogical, as the court is quite sure that his mother would have rather been woken from her sleep to safely retrieve her son than risk losing another child, especially if the Defendant had communicated that he believed that he was in danger. (TT, p. 311).

In any event, the Defendant's mother was not his only chance at rescue. He could have sought the assistance of the various police officers who were patrolling the area. He could have paid for a bus ride, taxi, or a jitney, given that he had sufficient money with him, as he had indicated that he had planned to get a tattoo instead of going to a bar. Tattoos are certainly more expensive than any of those forms of transportation. Even without his phone, he could have gotten a ride, either by borrowing someone else's phone to call or by hailing a ride on Carson Street. Regardless of whether the Defendant's phone was dead, the Defendant made no attempt to leave the South Side after seeing Mr. Smith, and his continued presence at the bar was not for the purpose of asking for a ride home because he essentially admitted that he expected any such request to be futile. (TT, pp. 277-79).

Much was made of the fact that the Defendant went to the "opposite side" of where Mr. Smith was standing when he reentered the Rowdy Buck. (TT, pp. 290, 316-17). This fact carried little weight in light of Detective Spory's testimony, who explained that,"although [Mr. Smith was] on the far side" of the bar from where the Defendant was located, "when you go to the right side [of the bar], you could make a circle to go towards that bar" where Mr. Smith was standing. (TT, pp. 229-230). Stated differently, the bar had a circular layout, so even if the Defendant walked toward the "opposite side" of the bar from where Mr. Smith was located when he reentered, he was still entirely capable of approaching Mr. Smith from the back side of the bar. (TT, p. 229). Contrary to the Defendant's testimony, there is no objective or conclusive evidence that he made any "exceptional effort" to distance himself from Mr. Smith upon his reentry. The very fact of his reentry, coupled with his moving of his firearm and the admission that he never expected to obtain a ride home from the girls even if he found them, all show that he reentered the bar with malicious intentions.

Other portions of the Defendant's testimony regarding certain events after the shooting were also inconsistent with other, more credible evidence. For instance, the Defendant testified that he saw the girls "standing in front of a storefront" and that they all "just started to walk" down the street after the shooting. (TT, p. 300). However, Ms. Fulton, a witness who, if anything, could be said to be biased towards the Defendant due to their friendship, testified that her and Jimika were already running down the street and, when she looked behind her shoulder, she saw that the Defendant was running behind them too. (TT, pp. 177-78). The Defendant then testified that he told Ms. Fulton that he was going to look for Ron while they were running outside and that he designated a specific location to meet her, but Ms. Fulton testified that the Defendant did not say anything to her before he briefly disappeared. (TT, pp. 180-81, 190). She testified that she just noticed that he was not behind her anymore and that she had to drive around looking for him. (TT, pp. 180-81, 190-91).

The Defendant's claim that he separated from Ms. Fulton to look for Ron was completely incredible, and, instead, the evidence well supported a finding that he discarded the weapon during his disappearance. Although the Defendant testified that his father took his firearm to keep him "safe," his father did not testify at trial to corroborate that testimony. The Defendant testified that he was even more fearful for his life after the shooting and it defies logic to think that an innocent citizen would discard a lawfully possessed firearm, especially when, as the Defendant claimed, it was discharged during a purportedly justified shooting. (TT, p. 302). For the same reason, the court disbelieved that the Defendant's flight and failure to report the shooting was a product of fear and found instead that it was because he knew he went into that bar to kill Mr. Smith and he did not want to get caught. (TT, pp. 177-78, 302-03).

"Premeditation and deliberation exist whenever the assailant possesses the conscious purpose to bring about death." Drumheller, supra, at 910. For all of the aforementioned reasons, the evidence was more than sufficient to support a finding that the Defendant had the conscious purpose to bring about the death of Dahrique Smith on May 20, 2017 and that he did formulate a plan to kill him even if that plan came together in a fraction of a second. The evidence viewed in the light most favorable to the Commonwealth, and all of the reasonable inferences drawn therefrom, was sufficient to sustain the Defendant's conviction for First-Degree Murder. Thus, the Defendant's allegation of error that the evidence was insufficient to support the verdict should, respectfully, be rejected on appeal.

(ii) The Evidence was Sufficient to Disprove Self Defense Beyond a Reasonable Doubt

Pursuant to 18 Pa. C. S. § 505, "[t]he 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." Our appellate court has explained that:

"When a defendant raises the issue of self-defense, the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt." Commonwealth v. Bullock, 948 A.2d 818, 824 (Pa. Super. 2008). The Commonwealth sustains this burden if it establishes at least one of the following: (1) the accused did not reasonably believe that he was in danger of death or serious bodily injury; (2) the accused provoked or continued the use of force; or (3) the accused had a duty to retreat and the retreat was possible with complete safety. Commonwealth v. McClendon, 874 A.2d 1223, 1230 (Pa. Super. 2005). The Commonwealth need only prove one of these elements beyond a reasonable doubt to sufficiently disprove a self-defense claim. Commonwealth v. Burns, 765 A.2d 1144, 1149 (Pa.Super.2000).

Commonwealth v. Ventura, 975 A.2d 1128, 1143 (Pa. Super. 2009) (emphasis added).

The Defendant claims that he acted in self-defense. He argues that he had only a "generalized fear" of Mr. Smith upon his reentry, and that it did not materialize into a more "specific fear of death or serious bodily injury" until Mr. Smith provoked the encounter by verbally threatening the Defendant and walking to his location. (Post Sentence Motion, filed 11/5/21, ¶ 22). The Defendant contends that he attempted to retreat but could not safely do so. (Id.). Contrary to the Defendant's contentions, the Commonwealth met its burden of disproving his self-defense claim beyond a reasonable doubt.

The court is mindful that "when the defendant's own testimony is the only evidence of self-defense, the Commonwealth must still disprove the asserted justification and cannot simply rely on the [fact-finder]'s disbelief of the defendant's testimony." Commonwealth v. Smith, 97 A.3d 782 (Pa. Super. 2014) (citing Commonwealth v. Reynolds, 835 A.2d 720, 731 (Pa. Super. 2003) (internal citations omitted). A trial court's "statement that it did not believe [the defendant's] testimony is no substitute for the proof the Commonwealth [i]s required to provide to disprove the self-defense claim." Id. With that said, this court's rejection of the Defendant's self-defense claim was based on both evidence as well as its finding that the Defendant's self-serving testimony was not credible and was inherently inconsistent.

The first prong of the self-defense inquiry - - whether the Defendant reasonably believed that he was in imminent danger of death or serious bodily injury - - encompasses both an objective and subjective component. Commonwealth v. Mouzon, 53 A.3d 738, 752 (Pa. 2012). Here, the Defendant claimed that, given their history, it was objectively reasonable for him to believe that he was in imminent danger when Mr. Smith threatened him and started walking in his direction. The Defendant's testimony regarding the threat requires this court to first accept that Mr. Smith was able to immediately recognize the Defendant in a dark, loud, and crowded bar when the only evidence that Mr. Smith even knew what the Defendant looked like was the Defendant's testimony that Mr. Smith was "probably going to recognize" him because he and Trillzee were half siblings who looked alike. (TT, p. 272). Prior to the Rowdy Buck, the Defendant had never seen Mr. Smith in real life. The Defendant, however, very much knew what Mr. Smith looked like, as he had seen "well over a few hundred" pictures of Mr. Smith on various social media platforms. (TT, p. 272) (emphasis added).

The court notes that there also was no evidence that Mr. Smith noticed the Defendant at the time when the Defendant first saw Mr. Smith. (TT, p. 287). The Defendant simply testified that, at some point, the Defendant "realized" who he was in the bar with and that he had "spotted" Mr. Smith by the bar talking to a man. (TT, p. 287). The court found that it strained credibility to believe that Mr. Smith would be able to almost instantly recognize the Defendant upon seeing him for the first time in a dark room, on a dance floor that had over 50 people dancing, unless the Defendant made sure to put himself in his clear view. (TT, p. 289).

Even accepting that Mr. Smith was able to recognize the Defendant, threaten him, and walk over to him all in the course of barely a minute, the details of the threat are also highly incredible. The Defendant testified that Mr. Smith looked at him from six feet away, told the Defendant, "you're next," then started coming towards him as he was screaming "I'm sending you to Trillzee." (TT, pp. 294-96). However, there was ample testimony that the bar was dark, loud, and crowded, with music playing and people dancing. (TT, pp. 295, 318-20). The Defendant testified multiple times that he actually "heard" Mr. Smith verbally threaten him, but the court found it completely incredible that the Defendant would be able to clearly hear Mr. Smith say anything from that far away, especially in light of the Commonwealth's Exhibit 67 which depicted an image of the Defendant speaking directly into someone's ear so that she would be able to hear him since the bar was so loud. (TT, pp. 294-96, 320).

The video evidence also did not capture any image where Mr. Smith could be seen directly engaging with the Defendant. While the video showed Mr. Smith "utter[] one or two words" and then move his head sharply prior to walking over to the Defendant's direction, the video only captured Mr. Smith's movements, and the Defendant was not visible in the video at the same time as these threats were allegedly being made. (TT, pp. 238-241). So, while the Defendant can argue that Mr. Smith was the one threatening the Defendant, the evidence is also entirely consistent with the conclusion that the Defendant was the one who made his presence known to Mr. Smith first.

In any event, even if the evidence supported a finding of objective reasonableness, it is the subjective aspect of the inquiry that the Defendant cannot satisfy. Indeed, the Defendant "must have acted out of an honest, bona fide belief that he was in imminent danger, which involves consideration of the defendant's subjective state of mind." Mouzon, supra, at 752 (internal quotation omitted). This court has already discussed why the evidence of the Defendant's reentry with his repositioned firearm proved beyond a reasonable doubt that the shooting occurred because of the Defendant's willful and deliberate decision to kill Mr. Smith and not because the Defendant was in legitimate, subjective fear for his life that evening. The failure to meet that first prong is sufficient to foreclose the Defendant's self-defense claim.

As for the issue of provocation, the Defendant argues that Mr. Smith was the one who provoked the incident when he threatened the Defendant and began walking towards his general vicinity. This court disagrees. The court finds that the Defendant's reentry and continued presence in the bar also constituted provocation given his testimony that he was all but certain a fatal confrontation would ensue if he ever ended up in the same room with Mr. Smith since Mr. Smith had "money on his head." (TT, p. 270). Thus, it can fairly be said that the Defendant's reentry had the effect of "continuing the difficulty which resulted in the killing," which constitutes provocation. Commonwealth v. Nau, 373 A.2d 449, 451 (Pa. 1977).

In Commonwealth v. Bayard, our Supreme Court found that self-defense was inapplicable where the defendant "voluntarily placed himself in a position where it was likely that he would become a participant in an affray that could reasonably have been expected to escalate to a 'gang war.'" Bayard, 309 A.2d 579, 582 (Pa. 1973). The court found that the defendant could not argue "that the escalation which occurred under the appellant's version was unforeseeable when appellant agreed under these circumstances to participate in a street fight with a member of a rival gang in the presence of the members of the respective hostile groups." Id. at 582.

While Bayard is factually distinguishable in a sense, the central takeaway makes clear that, where the Defendant "voluntarily placed himself in a position where it was likely that he would become a participant in an affray that could reasonably have been expected to escalate" into a shooting or assault of some kind, the Defendant cannot then argue that the encounter was "unforeseeable" as he had made a knowing decision to place himself in a dangerous and volatile situation. The Defendant undoubtedly knew the danger thar he was putting himself in by reentering that bar, and not only was the ultimately fatal encounter entirely foreseeable (as he proved when he relocated his loaded weapon to his waistband), it was also completely preventable if he had just remained outside.

Even assuming that the reentry itself was not sufficient to find provocation, the court nevertheless found that the Defendant unnecessarily provoked the use of deadly force against Mr. Smith by opening fire in response to vague "threats," that were verbal or accomplished through body language (a head jerk). Assuming for the sake of argument that Mr. Smith's behavior

alarmed the Defendant, it nevertheless did not justify the Defendant's use of deadly force. As noted, the court did not believe that the Defendant could hear any actual verbal threats being articulated on that dark, loud dance floor. Second, even though there was testimony that Mr. Smith made an "aggressive gesture" with that sharp head jerk, it was nevertheless a vague head movement. (TT, p. 346). Mr. Smith never brandished a firearm or weapon; he never pointed a finger at the Defendant; and he never made any other gesture that is widely recognized as an "I'll kill you" or "you're dead" communication, such as sliding one's finger across one's throat.

Moreover, Mr. Smith was walking towards the Defendant's general vicinity, not charging at him at full speed. The Defendant had already prepared himself for the shooting as soon as he saw Mr. Smith start walking, and he started shooting while Mr. Smith was several feet away from him and not even close to arms-length at the time that he was shot. (TT, pp. 297-98).

Finally, the evidence proved beyond a reasonable doubt that the Defendant violated his duty to retreat. "The use of deadly force, cannot be used where there is an avenue of retreat, if the defendant knows the avenue of retreat is available." Ventura, supra, at 1143. Although the Defendant testified that he drew his weapon and tried to "open the door", before the shooting, the video evidence showed that the Defendant was not within arms-reach of any door at the time that he drew his weapon or at any time immediately prior to the shooting. (TT, p. 298).

The Defendant used deadly force even though there is no doubt that it could have been avoided altogether if the Defendant had never reentered the bar or if he had attempted to leave the bar through the front entrance from which he had already twice entered, which was neither at some great distance nor blocked. In fact, there were two different exits at the front of the bar that the Defendant could have utilized, and the video evidence shows that, at the time of the shooting, that front area of the bar near the two entrances was fairly open and not nearly as congested as the dance floor area that he was in. The Defendant could have run out of either door while brandishing his weapon to communicate that he was armed, and he could have immediately sought the assistance from one of the police officers who were on patrol that evening. The Defendant did neither of those things, choosing instead to draw his weapon and move forward "in anticipation" of Mr. Smith's approach, readying himself for an execution that he had been anticipating from the moment of his reentry.

The Defendant also could have, at the very least, attempted to weave his way through the back of the dance floor when he saw Mr. Smith start walking around the front bar towards his general direction. Although the Defendant claimed that his "only option was to go forward," the court found that this testimony was not credible because it was highlighted on cross-examination that the Defendant had space to maneuver behind him. (TT, pp. 295, 297, 318-19, 323).

The Defendant contended in his post-sentence motion that this court "misapprehend[ed]" the relevant time in evaluating when the Defendant's duty to retreat was triggered. (Post-Sentence Motion, filed 11/5/21, ¶ 22). The court responds by noting that the duty to retreat is premised upon the notion that one must attempt to "avoid the necessity of using [deadly] force" by avoiding known danger where one knows that he may do so with complete safety. 18 Pa.C.S.A. § 505(a)-(b). Given the Defendant's detailed recitation of how fearful he was of Mr. Smith and of the immense danger that he believed Mr. Smith posed to his life and wellbeing, the Defendant violated his duty to retreat when he chose to put himself back into the same room as Mr. Smith because the use of deadly force would have been wholly unnecessary had the Defendant stayed outside of the bar and abided by his duty to avoid what he very much knew would be a fatal confrontation.

The evidence is entirely consistent with a situation where the Defendant was all but hoping Mr. Smith would recognize him upon reentry and make a move to approach him so that the Defendant could finally extinguish a threat and avenge his brother. The Defendant certainly readied himself for battle when he decided to trap himself in a crowded bar with his brother's killer, armed with a firearm he repositioned for easy access and with exact knowledge of Mr. Smith's location in the bar. While the Defendant claimed that he was the one essentially caught in a mousetrap, the evidence well supports the finding that he was the one who set the trap, enabling himself to eliminate Mr. Smith while hiding behind the veil of self-defense.

Accordingly, the Commonwealth's evidence proved beyond a reasonable doubt that the Defendant did not legitimately fear for his life, that he provoked the encounter, and that he could have avoided the fatal encounter altogether had he retreated, which he himself demonstrated that he was safely able to do well before he was "forced" to draw his weapon.

(iii) The Evidence was Sufficient to Disprove Imperfect Self Defense Beyond a Reasonable Doubt

Pursuant to 18 Pa.C.S.A. § 2503(b), voluntary manslaughter is "an intentional killing ... committed as a result of an unreasonable belief in the need for deadly force in self-defense." Commonwealth v. Washington, 692 A.2d 1024, 1029 (Pa. 1997); 18 Pa.C.S.A. § 2503(b). The defense of "imperfect self-defense," which reduces the crime of murder to voluntary manslaughter, exists where the defendant actually, but unreasonably, believed that deadly force was necessary to protect himself or another against the use of unlawful force. Commonwealth v. Truong, 36 A.3d 592, 599 (Pa. Super. 2012). In order to establish this defense, "all other principles of self-defense must still be met[.]" Id. (emphasis added).

Although the Defendant argues that he legitimately but unreasonably believed his life to be in danger, and that this court should have found that imperfect self-defense applied, the court finds that the evidence proved beyond a reasonable doubt that the Defendant did not possess a legitimate fear of Mr. Smith, as demonstrated by his reentry into the bar. The Defendant claims he could not see what Mr. Smith had in his hand because it was out of view, but it is the court's position that the Defendant did not shoot out of fear that an armed Mr. Smith was coming after him. It is this court's position that the Defendant was not afraid of Mr. Smith, and he was not afraid of Mr. Smith coming after him, because if he had such a terrible fear he would have never reentered the bar. The Defendant shot Mr. Smith because he wanted to, not because he was protecting himself from some danger or wanted to get himself out of harm's way. If getting out of harm's way was the goal, he would have stayed outside of the bar when he had the chance just a minute and six seconds prior. (TT, pp. 244-47).

For all of the reasons already discussed, the evidence also proved beyond a reasonable doubt that the Defendant provoked the encounter and violated a duty to retreat, thereby foreclosing an imperfect self-defense claim on those grounds as well.

B. This court did not abuse its discretion in finding that the verdict was not against the weight of the evidence

The Defendant contends that this court abused its discretion in finding that the verdict was not against the weight of the evidence. This contention also lacks merit.

It is well-established that a challenge to the weight of the evidence "concedes that there is sufficient evidence to sustain the verdict." Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000). In reviewing claims that the verdict was against the weight of the evidence, our appellate courts have explained that

[t]he weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact.

Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Lewis, 911 A.2d 558, 565 (Pa. Super. 2006) (emphasis added); Commonwealth v. Torres, 578 A3d 1323, 1326 (Pa. Super. 1990). Indeed, "appellate review of a trial court's decision on a weight of the evidence claim is extremely limited." Torres, supra, at 1326. Courts have reasoned that

[b]ecause the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence.

Widmer, supra, at 753. Stated differently, "[o]ne of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice." Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa. 2013) (quoting Widmer, supra, at 753).

Because this court denied the challenge to the weight of the evidence raised in the post-sentence motions, the question is not whether the verdict was actually against the weight of the evidence, but rather whether this court abused its discretion in finding that it was not. Lewis, supra, at 565. In determining whether a trial court abused its discretion in denying a motion for a new trial based on a claim that the verdict was against the weight of the evidence, our Supreme Court has cautioned that

[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. [Widmer, supra, at 751-52]. 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] at 752 (citation omitted). It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." [Commonwealth v. Brown, 648 A.2d 1177, 1189 (Pa. 1994)].

Clay, supra, at 1055 (emphasis added).

Contrary to the Defendant's contentions, the verdict was not against the weight of the evidence, and this court did not abuse its discretion in finding such. Rather, the weight of the evidence readily supported a finding of First-Degree Murder for all of the aforementioned reasons. As noted, this court sat as the factfinder in this case. As such, it was charged with the duty of analyzing and weighing the evidence, resolving any discrepancies and inconsistencies raised by such evidence, and assessing the credibility of witnesses. The Defendant's weight claim is, essentially, an argument that this court should have accepted as true the Defendant's testimony in the case. However, credibility determinations and resolution of conflict in the evidence were solely matters for the factfinder to consider and resolve. The Defendant's challenge to the weight of the evidence is, at its core, an invitation for the appellate court to reweigh the evidence and second-guess the credibility determinations made by this court as factfinder in this case. Respectfully, the reviewing court should decline to accept such an invitation because "[i]t was the function of [ ] the finder of fact to evaluate the evidence and determine the weight it should be given", and the court must not question the credibility determinations made by the finder of fact. Lewis, supra, at 566.

Based on the foregoing discussion of the evidence, this court's assessment of the evidence and its credibility determinations did not shock its sense of justice in any way such that a motion for a new trial should have been granted based on the weight of the evidence. Indeed, there were no facts in this case that were "so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." Clay, supra, at 1055.

In making its finding, the court notes that it did consider the testimony of the Defendant's character witnesses who testified that the Defendant had a reputation in the community for being truthful and honest and peaceful and non-violent. (TT, pp. 334, 339, 349). Ultimately, however, the Defendant's character testimony did not outweigh the other, more compelling pieces of evidence which established a specific intent to kill. Accordingly, this court did not abuse its discretion when it denied the Defendant's motion for a new trial, and his weight claim should be rejected on appeal.

C. This court did not err by allowing Detective Spory to testify about the images captured on the surveillance video.

Contrary to the Defendant's contention that this court erred by allowing Detective Spory to interpret the surveillance video, his testimony was permissible as a lay opinion under Pa. R. E. 701 because it was rationally based on his perception, helpful to clearly understanding his testimony and determining facts in issue, and not based on any specialized knowledge. (TT, pp. 200). Detective Spory has been employed as a Pittsburgh Police Officer since 2009 and has been in the Homicide unit since 2017. (TT, p. 196). His opinions as to the bulge in the Defendant's waistband, laser grip on his firearm, and whether Mr. Smith was unarmed were based on his perceptions and experience, and his overall testimony was helpful to the fact finder's "understanding of the timing, the actors, and the location of events depicted in the video." Commonwealth v. Cole, 135 A.3d 191, 196 (Pa. Super. 2016). Detective Spory's testimony also "did not cause unfair prejudice or undue delay, confuse the issues, mislead the [factfinder], or needlessly present cumulative evidence." Id. at 196.

In allowing his testimony, the court made clear that it was the factfinder and that it would make its own determinations as to what it believed the images on the video depicted. (TT, pp. 200). The court further reinforced that it was aware that any testimony regarding the video was "his [Detective Spory's] opinion", further stating that the court would "only take it as his opinion, not as a conclusion" and that the court would "reserve whether or not" it agreed with the testimony when it viewed the video. (TT, pp. 200-01). Accordingly, this contention is without merit.

D. This court did not err by denying a request for a mistrial following Detective Spory's statement regarding Defendant's prior arrest.

The court did not err when it denied the request for a mistrial based on an isolated statement regarding the Defendant's prior arrest. (TT, pp. 208-09). "[W]hen the court is sitting as fact-finder it is presumed that inadmissible evidence is disregarded and that only relevant and competent evidence is considered." Commonwealth v. Gonzalez, 609 A.2d 1368, 1371 (Pa. Super. 1992) (citing Commonwealth v. Kevin Davis, 421 A.2d 179 (Pa. 1980)). "In a non-jury trial, the court is presumed to have disregarded evidence too prejudicial to be considered by a jury, thus assuming that the court in a bench trial would follow the very instructions which it would otherwise give to a jury." Id. at 1371. Since this court was the factfinder, it was certainly capable of disregarding the prejudicial statement and not allowing it to factor into its deliberations.

Moreover, the court was already aware that a gun had been taken away from the Defendant by law enforcement and returned to him at a later time because the parties had previously stipulated to that fact. (TT, pp. 92-93). Unlike an average juror,

the court was very much able to surmise why a firearm would be removed by law enforcement and then returned, so Detective Spory's testimony did not introduce a fact that was previously unknown to the court. (TT, pp. 208-09). However, any knowledge of a prior arrest was completely disregarded and wholly unrelated to any finding this court has made. As the court stated at the time of the objection:

I'm assuming that any arrest did not lead to a conviction, because they gave him back his gun. So that is my assumption at this point in time. The police would not have taken the gun and given it back to him unless he was not convicted of those charges. And I don't know what those charges are. That's my frame of mind right now so you understand. (TT, p. 209).

Defense counsel then provided more context to the circumstances surrounding the arrest, making clear that the charge was nolle prossed and that the Defendant has "no prior record whatsoever." (TT, p. 210). The court then stated its understanding that "[p]eople are charged and they're not convicted. That doesn't go against him in any way, shape or form." (TT, p. 210). Accordingly, the Defendant was not prejudiced in any way by Detective Spory's testimony about a prior arrest so a mistrial was not warranted and this contention must, too, fail.

E. The Defendant waived any objection to Commonwealth's Exhibit 67 because there was no specific objection to its admission based on lack of foundation or authenticity.

The Defendant's contention regarding this court's error in admitting Commonwealth's Exhibit 67 should be deemed waived. Our appellate court has explained that:

To preserve a claim of error for appellate review, a party must make a specific objection to the alleged error before the trial court in a timely fashion and at the appropriate stage of the proceedings; failure to raise such an objection results in waiver of the underlying issue on appeal. Commonwealth v. May, 584 Pa. 640, 887 A.2d 750 (Pa. 2005), cert. denied, 549 U.S. 832 (2006) (reiterating absence of specific and contemporaneous objection to error waives issue on appeal); Commonwealth v. Arroyo, 723 A.2d 162 (Pa. 1999) (explaining if ground upon which objection is based is specifically stated, all other reasons for its exclusion are waived).

Additionally, it is well-settled that this Court "will not consider a claim which was not called to the trial court's attention at a time when any error committed could have been corrected." Fillmore v. Hill, 665 A.2d 514, 516 (Pa. Super. 1995). "The principle [sic] rationale underlying the waiver rule is that when an error is pointed out to the trial court, the court then has an opportunity to correct the error ... By specifically objecting to any obvious error, the trial court can quickly and easily correct the problem and prevent the need for a new trial." Id. (citations omitted). see also Commonwealth v. Montalvo, 641 A.2d 1176, 1184 (Pa. Super. 1994) (citation omitted) (to preserve an issue for review, a party must make a timely and specific objection at trial, for this Court will not consider claim on appeal not called to trial court's attention at a time purported error could have been corrected).

Commonwealth v. Padilla, 270 A.3d 1143 (Pa. Super. 2021) (emphasis added).

Here, defense counsel's only objection to Commonwealth's Exhibit 67 was based on relevance. (TT, p. 355). Indeed, when the court asked whether there was any objection to the exhibit, defense counsel simply stated that he did not "see any relevance of that, Judge. I would object to that." (TT, p. 355). Then, after the court explained that it was "relevant during cross-examination to [the issue of] credibility and whether things can be heard. Do you have any problems with its admission?", defense counsel responded, "I'm objecting to it." (TT, p. 355). No further discussion regarding Exhibit 67 was had.

Accordingly, since defense counsel never made a timely and specific objection based on lack of foundation and/or authenticity, which are the grounds raised in the Concise Statement, the court never had an opportunity to address those specific arguments, and the issue cannot be raised for the first time on appeal. As such, this contention should be deemed waived.

Regardless, the court notes that the Defendant himself authenticated the exhibit when he confirmed the image that it depicted during both his cross and redirect. (TT, pp. 329, 355). On redirect, the Defendant confirmed that the exhibit reflected the Defendant "down there in the corner yelling in that young lady's ear so that she's able to hear you[.]" (TT, p. 320). As such, any objection to Exhibit 67 based on foundation or authenticity is without merit.

F. The Defendant waived the issue regarding not allowing the Defendant to testify without a mask and, even if not waived, this court did not abuse its discretion when it denied a request to remove the Defendant's mask during testimony.

The Defendant's allegation of error regarding testifying in a mask must also be deemed waived for failure to make a specific and timely objection. Immediately before the Defendant's testimony, defense counsel asked, "May I ask that he be permitted to pull that mask down," without any follow up response let alone objection after the court stated that the jail regulations prevented him from removing the mask. (TT, p. 260). There was absolutely no discussion of how the mask would impair this court's ability to make credibility determinations, and defense counsel's request for permission for the Defendant to testify without a mask is not tantamount to an objection for being required to wear one. (TT, p. 260). Accordingly, this issue should be deemed waived.

Even if not waived, this court retained discretion to require the use of masks pursuant to the July 1, 2021 Emergency Operations Order. (See Order of Court, dated 7/1/21, "In Re: Resumption of Normal Court Operations") ("The wearing of masks or face coverings may be required in court proceedings at the discretion of the presiding judge."). Ultimately, the Defendant's rights were not violated because this court was the factfinder and it sat not even two (2) feet away from the Defendant while he was testifying. The court had no difficulty whatsoever observing his demeanor and facial expressions as well as his tone and mannerisms, factors which are relevant to credibility and which were completely unimpaired by the mask mandate.

III. CONCLUSION

The Defendant's contentions on appeal are without merit. Based on the foregoing discussion, the evidence was sufficient to sustain the Defendant's conviction for First-Degree Murder, the conviction was not against the weight of the evidence, and this court did not abuse its discretion or otherwise err in its evidentiary rulings.

BY THE COURT:
/s/Lazzara, J.

Date: July 20, 2022

[1] In an email dated February 15, 2022, Counsel for the Defendant informed the court that a hearing on the motion was unnecessary.
[2] On August 15, 2016, the Glock 17 firearm was returned to the Defendant after it had been confiscated by Detective McGee of the City of Pittsburgh Police Department on January 24, 2015. (TT, pp. 92-93).