Commonwealth v. Shepard

Appeals Court of Massachusetts

April 11, 2022, Entered

20-P-1104, 20-P-1325

Reporter
2022 Mass. App. Unpub. LEXIS 267 *; 100 Mass. App. Ct. 1132; 2022 WL 1073020

COMMONWEALTH *vs.* JAWONE SHEPARD (and a companion case[1]).

Notice: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace* v. *Curran*, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008).

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Disposition: Judgments affirmed.

Judges: Meade, Blake & Neyman, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The codefendants, Jawone and Jaquan Shepard, were each charged with first degree murder, possession of a firearm without a license in violation of G. L. c. 269, § 10 (*a*), and possession of a loaded firearm without a license in violation of G. L. c. 269, § 10 (*n*).[2] Following a jury trial, Jawone was acquitted of first-degree

[1] Commonwealth v. Jaquan Shepard.

[2] For purposes of clarity in our decision, we refer to each codefendant by his first name.

murder, but was found guilty of both gun offenses. Jaquan was also found guilty of each of the gun offenses; however, Jaquan was also found guilty of the lesser included offense of voluntary manslaughter. Both defendants timely appealed. On appeal, Jawone challenges the sufficiency of the evidence of his knowledge that the firearm was loaded. Jaquan instead argues that the judge provided an incomplete self-defense instruction, resulting in a substantial risk of a miscarriage of justice. We affirm.

Discussion. 1. *Sufficiency of the evidence*. Jawone challenges the sufficiency of the evidence as to his knowledge that the firearm was loaded, claiming the judge erred in denying his motion for required finding of not guilty. We disagree.

"When analyzing whether the record evidence is sufficient to support a conviction, an appellate court is not required to [*2] 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [citation omitted] . . . Rather, the relevant 'question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' *Commonwealth* v. *Latimore*, 378 Mass. 671, 677, 393 N.E.2d 370 (1979), quoting from *Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)." *Commonwealth* v. *Rocheteau*, 74 Mass. App. Ct. 17, 19, 903 N.E.2d 598 (2009). Sufficiency of the evidence "must be reviewed with specific reference to the substantive elements of the offense." *Id.* In order to convict the defendant for unlawful possession of a loaded firearm, the Commonwealth must prove: (1) the defendant knowingly possessed a firearm, (2) the firearm was loaded with ammunition, and (3) the defendant knew the firearm was loaded when he possessed it. See *Commonwealth* v. *Silvelo*, 96 Mass. App. Ct. 85, 90, 132 N.E.3d 1050 (2019). Jawone challenges only the sufficiency of the Commonwealth's proof as to the third element, namely his knowledge that the firearm was loaded when he possessed it.

Here, on the day of the shooting, Jawone texted his brother, Jaquan, to retrieve a blue bag containing a firearm from Jawone's residence. Shortly after those text messages, video surveillance showed Jaquan enter the residence and leave with a blue bag. During [*3] the text message exchange, Jawone warned his brother to "[k]eep cool," as the bag contained the "blamy."[3]

Later that evening, Jawone arrived at his residence in his car with Jaquan, who exited the passenger side of the vehicle, retrieved the same blue bag from the

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[3] Jawone's half-brother, whose phone Jawone used to text Jaquan, testified that the term "blamy" meant firearm.

trunk, and handed something to Jawone to leave in the vehicle. Jaquan then entered the residence to drop off the blue bag and returned to the vehicle.

Thereafter, Jawone drove with Jaquan to Bowdoin Street in Dorchester and parked the car, where the two men met with their half-brother. While parked, the three men smoked marijuana, until the victim walked past Jawone's car. Both Jawone and Jaquan appeared to quickly become scared, as they recognized the victim to be a rival gang member, who knew where they lived, and had been "after" them. At this time, Jawone and Jaquan instructed their half-brother to exit the vehicle, as they planned to "move on" the victim.[4] Shortly thereafter, Jaquan exited the vehicle, engaged with the victim, and shot him. Jawone remained in the car nearby, until hearing gunshots, after which he drove somewhat erratically, fleeing the scene in the same direction as Jaquan.[5]

When analyzing whether the [*4] evidence was sufficient to support a conviction, the inferences to support such conviction "need only be reasonable and possible; [they] need not be necessary or inescapable" (citations and quotations omitted). *Commonwealth* v. *Santos*, 95 Mass. App. Ct. 791, 798, 132 N.E.3d 118 (2019). Knowledge that a gun is loaded may be inferred solely from circumstantial evidence. See *Commonwealth* v. *Brown*, 479 Mass. 600, 608, 97 N.E.3d 349 (2018). However, the jury may not rely upon mere "surmise, conjecture, or guesswork" (citation and quotation omitted). *Commonwealth* v. *Ashford*, 486 Mass. 450, 455, 159 N.E.3d 125 (2020).

Here, "[i]t is reasonable to infer that one who brings a gun to a location knows whether or not it is loaded." *Commonwealth* v. *Mitchell*, 95 Mass. App. Ct. 406, 419, 126 N.E.3d 118 (2019). "It is [also] certainly a reasonable inference . . . that a person who plans and participates with others in an assault on a victim by means of a handgun . . . would know whether the [firearm was] loaded before carrying out the assault" (citation omitted). *Santos*, 95 Mass. App. Ct. at 801. Therefore, when viewing the evidence in the light most favorable to the Commonwealth, it was entirely reasonable for the jury to infer that Jawone had knowledge that the firearm was loaded when he possessed the firearm and supplied it to his brother, who then by agreement, used the loaded firearm as part of a joint venture attack on the victim. See *Mitchell*, 95 Mass. App. Ct. at 419. See also *Santos*, 95 Mass. App. Ct. at 801. Contrast *Ashford*, 486 Mass. at 455-456 (Commonwealth's broad, generalized inference [*5] that drug dealers more likely to carry *loaded* firearm for

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[4] Jaquan knew the victim to be a member of a rival gang and had previously threatened to "move on" him, or "fuck him up."

[5] Cell site location information was introduced to show Jawone and Jaquan together, back in the vicinity of Jawone's residence, after the shooting at approximately 7:18 to 7:40 P.M.

"protection" was not a reasonable inference to prove that firearm was loaded, where defendant did not handle, use, or even threaten to use his gun). Thus, there was no error.

2. *Self-defense instructions*. Jaquan argues that the judge provided an incomplete self-defense instruction by omitting instructions for the jury on certain evidentiary considerations, thus creating a substantial risk of a miscarriage of justice. We disagree. Where the defendant failed to object to the self-defense instructions at trial, we review for a substantial risk of a miscarriage of justice. See *Commonwealth* v. *Diaz*, 100 Mass. App. Ct. 588, 599, 180 N.E.3d 467 (2022). A substantial risk of a miscarriage of justice exists only when an appellate court has a serious doubt whether the result of the trial might have been different had the error not been made. See *Commonwealth* v. *Alphas*, 430 Mass. 8, 13, 712 N.E.2d 575 (1999).

It is the Commonwealth's burden to prove that the defendant did not act in lawful self-defense. See *Commonwealth* v. *Grassie*, 476 Mass. 202, 209-210, 65 N.E.3d 1199 (2017). To do so, the judge must instruct the jury that the Commonwealth must prove at least one of the following beyond a reasonable doubt: "(1) the defendant did not actually believe that he was in immediate danger of death or serious bodily harm from which he could save [*6] himself only by using deadly force; (2) a reasonable person in the defendant's position would not reasonably have believed that he was in immediate danger of death or serious bodily harm from which he could save himself only by using deadly force; (3) the defendant did not use or attempt to use all proper and reasonable means in the circumstances to avoid physical combat before resorting to the use of deadly force; or (4) the defendant used more force than was reasonably necessary in all the circumstances." *Id.* at 210. See also Model Jury Instructions on Homicide 17-18 (2018).

In considering the first two elements of self-defense, the judge may also instruct the jury that they may consider: (1) evidence of the victim's reputation as a violent or quarrelsome person, if such reputation was known to the defendant; (2) evidence of other instances of the victim's violent conduct, if such conduct was known to the defendant; and (3) evidence of threats of violence made by the victim against the defendant, if the defendant was aware of such threats. See Model Jury Instructions on Homicide at 19-20. Jaquan relies upon *Commonwealth* v. *Mitchell*, 95 Mass. App. Ct. at 412, to claim that where the judge instructed the jury on only one [*7] of these three evidentiary considerations, the judge's instructions were incomplete and created a substantial miscarriage of justice. However, such reliance is misplaced.

In *Mitchell*, we employed a two-prong analysis to determine whether an omission from a jury instruction created a substantial risk of a miscarriage of justice. See 95 Mass. App. Ct. at 411-412. Such analysis focused primarily on: (1) whether, in order to find the defendant guilty, the jury were required to find a particular, essential element on which they were not instructed, and (2) whether the jury's verdict, in light of the omission, nevertheless compelled the conclusion that the jury must have necessarily found the essential element on which they were not instructed. See *id.* In *Mitchell*, the judge failed to properly instruct the jury on an *essential element* of the crime, namely the element of the defendant's knowledge that the firearm was loaded. 95 Mass. App. Ct. at 411. Here though, the judge did not omit an essential element from the self-defense instructions; rather, the judge's instructions properly contained all four elements of self-defense. See *Grassie*, 476 Mass. at 210. Thus, where the judge's instructions did not omit an essential element, we discern no error in light of *Mitchell*. See 95 Mass. App. Ct. at 411-412.

Moreover, while [*8] we review a judge's self-defense instruction by viewing the evidence in the light most favorable to the defendant, see *Commonwealth* v. *Teixeira*, 486 Mass. 617, 622-623, 160 N.E.3d 1179 (2021), even when viewed in that light, we discern no error in the judge's subsequent instructions on the jury's evidentiary considerations for the first two elements of self-defense. Here, the only evidence relevant to Jaquan's belief that he was in immediate danger of death or serious bodily harm, and whether such belief was reasonable, were statements made by Jaquan himself immediately before the shooting. While in his brother's car, immediately after the victim had walked by, Jaquan said to his brother that the victim was "after [them]." He said, "[The victim] knows where we live. He knows where our family lives." Such evidence arguably falls squarely within the third evidentiary consideration, namely "evidence of threats of violence made by the deceased against the defendant . . . only if the defendant was aware of such threats." See Model Jury Instructions on Homicide at 19-20. At bottom, where the judge's instruction properly contained all four elements of self-defense, and the judge further instructed the jury on the one evidentiary consideration that most closely [*9] aligned with the evidence presented at trial, we discern no error when viewing the judge's instructions in their entirety. See *Commonwealth* v. *Hoose*, 467 Mass. 395, 412, 5 N.E.3d 843 (2014) ("We consider the constitutional adequacy of jury instructions based on the 'over-all impact' of the instructions as interpreted by a reasonable juror" [citations omitted]).

However, even assuming error, there exists no substantial risk of a miscarriage of justice. Jaquan was convicted of the lesser included offense of voluntary manslaughter, rather than first degree murder. In the circumstances of this case, where the jury reached a verdict of voluntary manslaughter, they could have done

so only by finding the defendant exercised his right to self-defense, but used excessive force in doing so. See *Grassie*, 476 Mass. at 210 (jury can return verdict for voluntary manslaughter only where Commonwealth fails to meet burden on first three elements of self-defense, but does meet its burden on fourth element of excessive force). See also *Commonwealth* v. *Santos*, 454 Mass. 770, 776, 912 N.E.2d 985 (2009) (where defendant uses excessive force, jury *must* return guilty verdict for manslaughter). For the jury to have even reached the issue of excessive force, it must have necessarily first found that the defendant did act in self-defense. See *id.* at 775 (jury cannot [*10] reach verdict of voluntary manslaughter by excessive force unless they decide defendant has exercised right of self-defense in first place). Therefore, given the jury's verdict, the jury must have necessarily found that the Commonwealth failed meet its burden of proof on the first two elements of self-defense, namely proof that Jaquan did not immediately fear death or serious bodily injury, and proof that his belief was not reasonable.[6] See *Grassie*, 476 Mass. at 210. Where the two omitted evidentiary considerations concern only the first two elements of self-defense, which the jury necessarily decided in Jaquan's favor, we have no serious doubt that the result of the trial might have been different had the claimed error not been made, and thus, no substantial risk of a miscarriage of justice. See *Commonwealth* v. *Azar*, 435 Mass. 675, 687, 760 N.E.2d 1224 (2002). See also Model Jury Instructions on Homicide at 19-20 (three evidentiary considerations concern only first two self-defense elements).

Judgments affirmed.

By the Court (Meade, Blake & Neyman, JJ.[7]),

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[6] The evidence at trial also supported the jury's verdict of voluntary manslaughter by way of excessive force where the defendant shot the victim seven times, including multiple times from behind as the victim fled.

[7] The panelists are listed in order of seniority.