

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

STATE OF DELAWARE,	:	
	:	ID NO. 1002011017
_____ v. _____	:	
	:	
JUAN RESTREPO-DUQUE,	:	
	:	
Defendant.	:	

Submitted: April 7, 2014

Decided: April 15, 2014

***Upon Consideration of Defendant's Motion for Judgment
of Acquittal Pursuant to Superior Court Rule 29(c)***

DENIED

ORDER

Jason C. Cohee, Esquire, and Dennis Kelleher, Esquire, Deputy Attorneys General,
Department of Justice, Dover, Delaware for the State of Delaware.

Robert B. Mozenter, Esquire, Attorney at Law, Philadelphia, Pennsylvania, and Jayce
R. Lesniewski, Esquire, The Eaby Firm, LLC, Dover, Delaware for Defendant.

Young, J.

SUMMARY

This concerns four Motions for Judgment of Acquittal filed by Defendant following his conviction of one count each of Murder in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, Theft of a Motor Vehicle, and Carrying a Concealed Dangerous Instrument.

Because the evidence as to each conviction was sufficient to establish that crimes were committed in which Kenton Wolf was the victim, and that Defendant was the perpetrator of each, all of Defendant's Motions are **DENIED**.

DISCUSSION

Count 1: Murder in the First Degree

Defendant asserts that he is entitled to a Judgment of Acquittal because the State failed to prove beyond a reasonable doubt either of the two elements relevant to a conviction of Murder in the First Degree in this case: that Defendant caused the death of Kenton Wolf or that Defendant acted intentionally.

Defendant states that the knife located where Defendant, in the interrogation, indicated that he discarded it, had a blade of "eight or nine inches" in length, whereas the wound described by witness McDonough as the fatal wound was "over twelve inches long." That argument fails for a number of reasons. First, and foremost, and sufficient in itself to overcome that argument, is that the Medical Examiner witness also testified, without refute, that the body, from the point of entry of the knife to the ending point in the lung, is composed largely of soft tissue. Soft tissue, he testified, is compressible. Hence, the distance covered from entry to conclusion, during the course of the infliction of the wound, could

well have been significantly less than the measurement, post mortem, between the same two points. Thus, the evidence submitted by the prosecution relative to the cause of death was entirely sufficient to permit a jury to find beyond a reasonable doubt that Defendant caused the death of the victim Wolf.

Next, Defendant asserts that the trial produced insufficient evidence for a jury to determine, beyond a reasonable doubt, that Defendant intended, that is that it was Defendant's conscious objective and purpose, to cause victim Wolf's death in order to satisfy the requisites of Murder in the First Degree. This is a much closer question. Yet, the consideration is not what any Court reviewing the matter might, *ab initio*, have concluded, of course.

_____The evidence, viewed in a light most favorable to the prosecution, shows that, while the only wound which turned out to be fatal in and of itself was the stab entering the victim's arm and ultimately puncturing his lung, there were other wounds. There was testimony that one or more of them eventually could have produced a sufficient loss of blood to cause the victim's death. Moreover, the gruesome slash to the victim's throat, although evidently immediately insufficient to cause death, could very well have evidenced the very *intent* to cause the death which the lung puncture wound, whether it was administered before or after the throat slashing, actually *accomplished*. _____

_____The Defendant argues that "a rational jury could have found that...the Defendant was acting recklessly." That is absolutely true in this case. It is, though, absolutely beside the point. Although Defendant did say at one point that "I sliced him," he did in the course of his interrogation by the police, state that his (at least

initial) intent was – with knife in hand – “to hit” the victim. The verb “hit” has a variety of denotations, particularly in the vernacular. Yet, even viewed in the relatively benign sense argued by Defendant, it could well have been taken by the jury as an attempt to mitigate the description given by Defendant when discussing the event with the police; or simply have been disbelieved.

_____ Defendant suggests that the knife wielding was all in an initial frenzy of recklessness, followed by Defendant’s leaving the immediate scene; leaving the bedroom; then, presumably with a cooler head, returning to the bedroom to re-assault the victim merely with a BB gun, which arguably could not cause death. To begin with, the chronology of all of the wounds by the different weapons is far from established. Moreover, even if the events occurred as Defendant would now have it, the BB shots could be considered as suggestive of an intent to kill; or as a showing of egregious “icing”; or not considered at all, given the stab wounds.

Hence, the issue is whether or not the State produced sufficient evidence to get to a jury on a charge of intentional killing; and whether or not, given that evidence, a jury could rationally have convicted Defendant of Murder in the First Degree. The answer to each question is in the affirmative.

Finally, leaving the “intent” issue aside, Defendant argues that a verdict of guilty was not possible. This is based on the jury’s failure to convict Defendant of forgery in the alleged use of the victim’s credit card. Whether or not Defendant used that credit card has no bearing on whether or not Defendant killed the victim. The argument that an acquittal on the forgery charge requires an acquittal on the murder charge is a *non sequitur*. They are not inter-related charges. Moreover,

while it is not consequential, it should be noted that, of course, the jury did *not* find “that the Defendant did not use the credit card.” It found merely that the State failed to prove beyond a reasonable doubt that Defendant *did* use the victim’s credit card.

Accordingly, Defendant’s Motion for Judgment of Acquittal of Murder in the First Degree is **DENIED**.

Count 2: Possession of a Deadly Weapon During the Commission of a Felony

The foregoing discussion describes how a jury could properly have concluded that Defendant attacked the victim with a knife, a deadly weapon. Indeed, the Defendant himself described having done so. If the jury had found, as it did, that Defendant committed Murder in the First Degree, or if it had found that the assault by Defendant upon the victim had been Murder in the Second Degree or Manslaughter, the predicate felony to this charge would have attached. Whether Defendant used the knife entered into evidence or any other knife is immaterial. A knife constituting a deadly weapon was used.

The evidence presented to the jury was certainly sufficient to produce a conviction on the basis that Defendant, while committing a felony, possessed a deadly weapon.

Thus, Defendant’s Motion for Judgment of Acquittal of Possession of a Deadly Weapon During the Commission of a Felony is **DENIED**.

Count 3: Theft of a Motor Vehicle

Defendant argues that no evidence was presented to the jury that the victim owned a certain Volkswagen Jetta or that Defendant misappropriated it.

Defendant, therefore, asserts that the State failed to introduce any evidence of the victim's owning a Volkswagen Jetta.

However, Defendant, in his discussion with the police, which was played to the jury as the jury was handed transcriptions, described his leaving the scene. He said that he couldn't find the keys to Defendant's pick-up truck, so he grabbed keys that operated the victim's car. Later testimony by Detective Ryde indicated that the Jetta had the license plate #533333 belonging to the victim, though that was not essential. Defendant in his interrogation, went on to say that he still had the keys in his pants hanging in his room. In fact, the police did locate them there, a photo of which was entered into evidence. Further, Defendant described how he drove the car until he got it stuck in the snow, following which he abandoned it.

Hence, ample evidence was produced that the victim owned the described vehicle, which was appropriated by Defendant.

Defendant asserts further that a jury *could* have concluded that Defendant had permission to use the Jetta, in as much as the victim arguably used another vehicle primarily. While that possibility exists, theoretically, it certainly is no more than one arguable possibility for the jury to accept or to reject in favor of a felonious taking.

Accordingly, Defendant's Motion for Acquittal of Theft of a Motor Vehicle is **DENIED**.

Count 4: Carrying a Concealed Dangerous Instrument

Finally, Defendant urges the Court to find that Defendant be acquitted of this charge on the basis that the BB pistol referred to in this case was not proved to have been possessed by Defendant or that it was a dangerous instrument.

To be a dangerous instrument, the item involved, pursuant to the statutory definitions in 11 *Del. Code* § 222, must be readily capable of causing death or serious and prolonged disfigurement or impairment. One need go no further than be aware of the many children sustaining significant eye injury to accept what a BB gun is capable of doing. Additionally, as was stated in *Defillipo vs. Quarles*, (Del. Super. - 2011) 2011 WL 5299649, this Court has held: “...it is well settled that a BB gun is a dangerous instrumentality...” (citations omitted).

As to Defendant’s possession thereof, Defendant stated in the interrogation, in reference to the BB gun: “I had it on me in my pocket.” That, certainly, is evidence that it was concealed.

Therefore, Defendant’s Motion for Acquittal of Carrying a Concealed Dangerous Instrument is **DENIED**.

CONCLUSION

For the reasons discussed in the foregoing, all four of Defendant’s Motions for Judgment of Acquittal are **DENIED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBV/lmc
oc: Prothonotary
cc: Counsel
Opinion Distribution