IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	
	:	
v.	**:**	**No. 627-2005**
	:	**CRIMINAL DIVISION**
JOSEPH E. McCLOSKEY, JR.,	**:**	
Defendant	**:**	**APPEAL**

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

The eleven issues the Defendant raises on appeal invoke challenges to five broader issues: the Court's failure to instruct the jury on several varied points for charge submitted by the Defendant; the Court's limitations imposed on the Defendant's expert firearms witness; the Court's failure to permit individual voir dire of jurors who admitted having knowledge of the case; the Court's entry of a verdict that was against the weight of the evidence; and a general assertion that there was insufficient evidence for the verdict entered. For the following reasons, this Court finds that the issues raised in the Defendant's appeal are without merit.

I. Background

The record indicates that shortly after 4:00 P.M., on March 23, 2005, the Defendant shot and killed the victim, his girlfriend, Christine Montgomery, out in front of the victim's home. The Defendant's friend, Jeffrey English, witnessed the shooting. Mr. English testified at trial that the Defendant had called him sometime before 4:00 P.M. on March 23, 2005 and asked him to "come up and get the guns out of the house before he shot her [the victim]," N.T. 05/15/06, p.48. Sensing the seriousness of the Defendant's request, Mr. English drove to the victim's home. A short time after arriving, Mr. English proceeded to the front door of the victim's

residence and was greeted by the Defendant before he (Mr. English) ever made his way to the front door. The Defendant approached Mr. English carrying two firearms one of which, the shotgun, he handed to Mr. English. While Mr. English was checking the shotgun to determine if it was loaded, the victim exited the residence, told Mr. English to "take care of him [the Defendant]", N.T. 05/15/06, p.55, and proceeded to the driveway. Before reaching the driveway, the victim said something to the Defendant, which Mr. English could not make-out, and then the Defendant "took the gun down, cocked it, said I have fucking bullets in it and brought it up pointed it out and shot," N.T. 05/15/06, p.55. Mr. English further testified that he grabbed the firearm from the Defendant and would have immediately left the property but for the Defendant who followed Mr. English and asked for the firearm so that he could shoot himself; Mr. English refused and then left the property. After pulling out of the driveway, Mr. English testified that, in his rearview mirror, he saw the Defendant dragging the victim's body back on the driveway towards the garage. Mr. English proceeded directly to the Old Lycoming Police Department where he related the aforementioned events to Chief R. Mark Lusk and Corporal William C. Solomon. Almost immediately, Chief Lusk and Mr. English returned to the victim's residence where it was determined that the Defendant had fled the scene on foot. At that time, police began a search for the Defendant, and at 9:00 P.M., after two local residents notified officers that they had seen tracks in the snow, Agent Stephen J. Sorage of the Williamsport Bureau of Police apprehended the Defendant in a trailer less than one mile away from the scene of the crime.

After a four-day trial in May 2006, the jury found the Defendant guilty of first-degree murder. On August 15, 2006, the Court sentenced the Defendant to the mandatory, life imprisonment without the possibility of parole. That same date, the Defendant filed a Post-Sentence Motion for a new trial and/or an arrest of judgment which, in December 2006, pursuant

to Pa.R.Crim.P. No. 702(B)(3)(a), was denied by operation of law. On December 22, 2006, the Defendant filed his Notice of Appeal, and pursuant to this Court's Order of January 3, 2007, filed a Concise Statement of Matters Complained of on Appeal on January 10, 2007.

II. Discussion

A. *The Court did not err when it failed to instruct the jury as to the Defendant's requested points for charge*

The Defendant challenges six specific points for charge that he requested the Court instruct the jury on and which he now contends the Court errantly failed to give; the Court will address each challenge individually.

1. *The Court did not err by refusing to give the jury an instruction on voluntary manslaughter as requested by the Defendant*

A Defendant is guilty of voluntary manslaughter if, at the time of the killing, he/she is acting under a sudden and intense passion resulting from serious provocation by the victim. 19 Pa.C.S. § 2503. The test for "serious provocation" is "whether a reasonable [person] confronted by the same series of events, would become impassioned to the extent that his mind would be incapable of cool reflection." *Commonwealth v. Kim*, 2005 Pa. Super. 383, P17, 888 A.2d 847, 852 (Pa. Super. Ct. 2005) citing *Commonwealth v. Galloway*, 336 Pa. Super. 225, 485 A.2d 776, 783 (Pa. Super. Ct. 1984). A Defendant is entitled to a jury instruction on voluntary manslaughter only "where the offense has been made an issue in the case and where the evidence would reasonably support such a verdict." *Kim*, 2005 Pa. Super. at P16, 888 A.2d at 852 (Pa. Super. Ct. 2005) citing, *Commonwealth v. Thomas*, 552 Pa. 621, 717 A.2d 468, 478 (Pa. 1998).

Instantly, the Court properly refused to charge the jury regarding voluntary manslaughter. Other than a brief statement made by the victim immediately before the Defendant shot her, which was inaudible to the eye witness and to which there was no evidence presented as to what the statement was, at no point during the proceedings did the Defendant present evidence of provocation by the victim that which would warrant a voluntary manslaughter charge. Although several Commonwealth witnesses testified that they heard what they believed to be the Defendant and the victim arguing prior to the shooting, the Defendant calmly[1] telephoned his friend, Mr. English, and asked him to "come up there [to the victim's home] and get the guns before [he] shot her [the victim]", N.T. 05/15/07, p. 48. Assuming the Defendant and victim were arguing prior to shooting, the Defendant had time to "cool-off" before shooting the victim. The Court finds this scenario lacking sufficient evidence of provocation so as to warrant a jury charge on voluntary manslaughter.

2. ***The Court did not err by refusing to give the jury instructions on allegedly inflammatory photographic evidence as requested by the Defendant. Nor did the Court err by refusing to give the jury alternative instructions on reasonable doubt, malice, and intent as requested by the Defendant.***

"The trial court has wide discretion in phrasing jury instructions, and absent an abuse of discretion or an inaccurate statement of law, there is no reversible error." *Commonwealth v. Wesley*, 562 Pa. 7, 18, 753 A.2d 204, 210 (Pa. 2000) citing, *Commonwealth v. Hawkins*, 549 Pa. 352, 701 A.2d 492, 511

[1] Mr. English testified that the Defendant's voice during the phone call was "quiet" and that he [the Defendant] "wasn't real angry." N.T. 05/15/07, p. 48.

(Pa. 1997). Additionally, the Court is not required to charge the jury per the Defendant's request, "[t]he [Court is] free to select its own form of expression. *Commonwealth v. Wiggins*, 472 Pa. 95, 108, 371 A.2d 207, 213 (Pa. 1977) (citations omitted). The aforementioned standards apply to four of the Defendant's challenges to the Court's jury instructions: (1) the Court's failure to instruct the jury regarding allegedly inflammatory photographic evidence; (2) the Court's decision to utilize Pa. SSJI (Crim.) 7.01, first alternative, regarding reasonable doubt instead of the second alternative as requested by the Defendant; (3) the Court's decision to instruct the jury, as to the definition of malice, from Pa. SSJI (Crim.) 15.2502C instead of the manner in which it was defined/explained in *Commonwealth v. Seibert*, 424 Pa. Super. 242, 622 A.2d 361 (Pa. Super. Ct. 1993), as requested by the Defendant; and (4) the Court's decision to charge the jury, with respect to specific intent, in the context of its instruction on first degree murder from Pa. SSJI (Crim.) 15-2502A instead of how it was defined/explained in *Commonwealth v. Austin*, 394 Pa. Super. 146, 575 A.2d 141 (Pa. Super. Ct. 1990), as requested by the Defendant.

All of the Defendant's aforementioned challenges, less his challenge to the Court's failure to instruct the jury in anyway regarding inflammatory photographs, do not contend that the Court's chosen jury instruction constituted an abuse of discretion or misstatement of the law; therefore, the Court finds these challenges to be without merit. As for the Defendant's challenge that the Court errantly refused to charge the jury regarding allegedly inflammatory photographs, the Court refused this particular Defense requested point for charge because it did

not believe that any of the admitted photographic evidence would "cause strong feelings of anger, indignation, other types of upset, or tend to stir the passions", BLACK'S LAW DICTIONARY 782 (7th ed. 1999) (i.e. definition of inflammatory). The photographic evidence at issue was autopsy photographs of the victim and crime scene photographs, none of which distorted the facts of the case or were anymore, if at all, graphic than necessary. Nonetheless, the Court did instruct the jury regarding the effect of emotions on their deliberations and decision: "[a] case of this nature can generate strong emotional feelings. You may not base your decision upon feelings of sympathy for or prejudice against anyone involved. . . ," N.T. 05/18/06, p. 307. Accordingly, the Court finds the Defendant's challenge regarding its failure to give his requested jury instruction regarding inflammatory photographs to be without merit.

3. ***The Court did not err when it summarized the elements of first-degree murder; specifically, when it instructed that jury that in what context it may presume malice***

The Defendant's last challenged point for charge attacks the following instruction, which was the first of the Commonwealth's requested points for charge: "[i]f a gun discharges and the bullet strikes the victim, the intentional act of pointing a gun and aiming it at a vital part of the human body creates the *presumption* of malice. . .," N.T. 05/18/06, p. 317 (emphasis added)[2]. Specifically, the Defendant argues that the instruction incorrectly instructed the jury that they could presume (as opposed to infer) malice from the act of the

[2] The Commonwealth lifted this particular requested point for charge directly from *Commonwealth v. Payne*, 2005 Pa. Super. 62, P15, 868 A.2d. 1257, 1261 (Pa. Super. Ct. 2005).

Defendant aiming a gun at a vital part of the victim's body; while the Court acknowledges the above-cited instruction, on its face, appears to be a misstatement, the Court finds to the contrary.

The Court cannot, in its instruction(s) to the jury, relieve the Commonwealth of its burden to prove each essential element of the crime charged beyond a reasonable doubt by creating a mandatory presumption regarding any of said essential elements of the crime charged. In order to determine whether the challenged instruction infected the entire charge, so as to render the verdict irreversibly harmed, the nature of the presumption must be analyzed (i.e. did the challenged instruction create a mandatory presumption or a permissive inference). The Pennsylvania Supreme Court explains:

> [a] mandatory presumption instructs the jury that it must infer the presumed fact if the state proves certain predicate facts. On the other hand, a permissive inference suggests to the jury a possible conclusion to be drawn if the state proves predicate facts, but does not require the jury to draw that conclusion. In determining whether a mandatory presumption or a permissive inference has been created, a reviewing court must assess the challenged instruction from the viewpoint of a reasonable juror and declare it to create a "mandatory presumption" if such a juror could reasonably believe that proof of the predicate facts automatically shifts the burden of persuasion on the relevant element to the defendant.

Commonwealth v. Kelly, 555 Pa. 382, 387, 724 A.2d 909, 911 (Pa. 1999). In *Kelly*, the trial court gave the following instruction, which the appellate court deemed to create a mandatory presumption thereby rendering the verdict unconstitutional: ". . . [i]f you believe that [the defendant] was armed with a firearm or if you believe that a firearm was used or attempted to be used and that person had no license to carry the same that *shall* be evidence of his intention to

commit said crime of violence", *Id*. at 388, 912 (Pa. 1999) (emphasis added). In contrast, this Court's challenged instruction was as follows: "[i]f a gun discharges and the bullet strikes the victim, the intentional act of pointing a gun and aiming it at a vital part of the human body creates the *presumption* of malice," N.T. 05/18/06, p. 317 (emphasis added). Although an admittedly strained distinction, the Court believes that, in the mind of a reasonable juror, this Court's "creates the presumption of malice" instruction does not create a mandatory presumption in the same way the trial court's instruction in *Kelly*'s "shall be evidence" instruction does.

Even if this Court's instruction did create a mandatory presumption, said instruction still does not render the verdict irreversibly harmed. The *Kelly* Court states that, if it is determined that the Court's instruction created a mandatory presumption, "we must next examine this presumption on its face determine the extent to which the basic facts and the elemental facts truly coincide", *Kelly*, 555 Pa. at 390, 724 A.2d at 913 (Pa. 1999) citing *Ulster County Court v. Allen*, 442 U.S. 140, 60 L.Ed. 2d 777 (1979). In *Kelly*, the basic fact (i.e. that the Defendant was carrying an unlicensed firearm) was linked to the elemental fact that the Defendant intended to commit murder; a link that the Supreme Court of Pennsylvania found to be too tenuous and therefore violative of the Defendant's constitutional rights. *Kelly*, 555 Pa. at 390, 724 A.2d 913 (Pa. 1999). Instantly, the Court's instruction linked the basic fact of the Defendant intentionally pointing a firearm and aiming it at a vital part of the victim's body with the elemental fact that the Defendant had the requisite malice to be found guilty of

first degree murder; obviously, this connection in comparison to the connection made by the *Kelly* trial court is stronger. First, unlike the basic-elemental factual connection in *Kelly* (i.e. possession of an unlicensed firearm being connected to an element of the crime of murder), where one item does not ever logically flow from the next, the instant basic-elemental factual connection (i.e. intentionally pointing a firearm and aiming it at a vital part of the victim's body being connected to an element of the crime of murder) does flow logically. In other words, while the possession of an unlicensed firearm does not logically lead to a conclusion that said possession is evidence of one's intent to commit murder, intentionally pointing a firearm and aiming it at a vital part of the victim's body does, almost instinctually, logically lead to an inference that one possesses the requisite malice to be found guilty of murder. Second, Pennsylvania case law is clear that a jury may infer malice from the act of pointing a firearm and aiming it at a vital part of the victim's body, (see, *inter alia, Commonwealth v. Seibert,* 424 Pa. Super. 242; 622 A.2d 361 (Pa. Super. Ct. 1993); however, this Court has found no inference in Pennsylvania case law regarding the connection between possession of an unlicensed firearm and the element(s) of murder.

For the above noted reasons, the Court believes that the Defendant's instant challenge is without merit.

B. ***The Court did not err by limiting the Defendant's firearms expert from testifying about the murder weapon possibly malfunctioning and subsequent safety features of the murder weapon***

"An expert cannot base his opinion upon facts which are not warranted by the record. No matter how skilled or experienced the witness may be, he will not

be permitted to guess or to state a judgment based on mere conjecture." *Collins v. Hand,* 431 Pa. 378, 390, 246 A.2d 398, 404 (Pa. 1968) (citations omitted). Although several exceptions to this rule have been carved out since 1968, the foundation of the rule, as cited, remains and is acutely applicable to the case *sub judice*. In *Collins*, the Pennsylvania Supreme Court reversed the lower court's decision to allow a plaintiff to call an expert witness to testify that she sustained injuries from excessive restraint(s) during electroshock therapy; however, there was no evidence offered to show that restraints had ever been used. Similarly, the Defendant here contends that the Court should have permitted his expert to testify that the murder weapon malfunctioned one time during the expert's examination of that weapon even though there was absolutely no evidence presented that the weapon had ever malfunctioned or, more importantly, that it had malfunctioned on the day in question. Accordingly, the Court respectfully suggests that this contention is without merit.

The Court similarly suggests that the Defendant's second contended error, with regard to this expert witness, the subsequent safety measures on that type of weapon, is also meritless. The Defendant's expert witnesses' supplemental report mentioned that the weapon at issue is now fitted with a manual safety feature not available when the Defendant acquired the firearm. Because this evidence is irrelevant without reference to evidence that the murder weapon may or may not

have cause to malfunction (see previous paragraph), the Court respectfully suggests that this challenged issue on appeal is also without merit.[3]

C. ***The Court's refusal to permit individual voir dire of jurors who had knowledge of the case from outside sources was not an error***

Pennsylvania Rule of Criminal Procedure No. 631(E) provides that, in non-capital cases, whether to permit individual voir dire of prospective jurors is left to the discretion of the trial judge. *See also, Commonwealth v. Herron*, 243 Pa. 319, 365 A.2d 871 (Pa. 1976). Furthermore, our Supreme Court has held that, "only a palpable error resulting in abuse of discretion justifies reversal of a denial of individual voir dire," *Commonwealth v. Wesley* 562 Pa. 7, 18, 753 A.2d 204, 210 (Pa. 2000) *citing, Commonwealth v. Hawkins*, 549 Pa. 352, 701 A.2d 492 (Pa. 1997), and unlike the facts in *Commonwealth v. Johnson,* 440 Pa. 342, 269 A.2d 752 (Pa. 1970), where the Supreme Court reversed the trial court's denial of the Defendant's request for individual voir dire in a non-capital case because "pre-trial publicity was so inflammatory as to create the possibility that the trial could be prejudiced", *Johnson* 440 Pa. at 350, 269 A.2d at 757, the facts of the instant matter do not lead to the same result. Here, although there was pre-trial publicity, the Court is not aware of any inflammatory publicity; instead, such publicity merely recounted the facts leading up to the trial, which the *Johnson* court stated does not support a finding of prejudice, *Commonwealth v. Rovinsi,* 704 A.2d 1068 (Pa. Super. Ct. 1997), *citing Johnson,* 440 Pa. 342, 269 A.2d 752 (Pa. 1970).

[3] The Court also notes that, although not generally applicable in criminal matters, Pa.R.E. No. 407, which provides that evidence of subsequent remedial measures that, if taken previously, would have made the injury or harm less likely to occur, are inadmissible, also supports the Court's decision to prohibit the Defendant's firearms expert from testifying regarding subsequent safety features added to the make and model of weapon the Defendant used to murder the victim.

Additionally, in consideration of the instant issue, the Court did permit liberal questions, by both the Defense and the Commonwealth, to those prospective jurors who indicated that they had seen/heard stories of the instant matter in the media or elsewhere.

Consequently, the Court finds the Defendant's challenge to its refusal to permit individual voir dire to be without merit.

D. ***The jury's verdict was not against the weight of the evidence presented at trial***

"The question of weight of the evidence is one reserved exclusively for the trier of fact who is free to believe all, part, or none of the evidence and free to determine the credibility of witnesses. *Commonwealth v. Champney*, 574 Pa. 435, 832 A.2d 403, 408 (Pa. 2003)." *Commonwealth v. Solano*, 588 Pa. 716, 726, 906 A.2d 1180, 1186 (Pa. 2006). The test to determine whether the jury's verdict was against the weight of the evidence is not whether the trial judge, based on the same facts, would have arrived at the same conclusion, but rather, "whether the jury's verdict is so contrary to the evidence so 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. Edwards*, 588 Pa. 151, 168903 A.2d 1139, 1148 (Pa. 2006) (citations omitted).

Instantly, the jury's verdict, in light of the eyewitness testimony, forensic evidence, and the Defendant's statements made to witness English, does not shock the Court's sense of justice. Consequently, the Court suggests that the Defendant's contention that the jury's verdict of guilt was against the weight of the evidence is not justified.

E. ***There was sufficient evidence presented at trial for the jury to find the Defendant guilty beyond a reasonable doubt***

In a criminal matter, the test utilized regarding a contention that there was insufficient evidence to convict the defendant, is "whether the evidence, and all reasonable inferences taken from the evidence, viewed in the light most favorable to the Commonwealth, as verdict-winner, were sufficient to establish all the elements of the offense beyond a reasonable doubt." *Commonwealth v. Maloney*, 2005 PA Super 206, P15, 876 A.2d 1002, 1007 (Pa. Super. Ct. 2005) citing *Commonwealth v. Lawson*, 2000 PA Super 242, 759 A.2d 1 (Pa. Super. Ct. 2000). The elements of first-degree murder are that the defendant willfully, deliberately, and with premeditated malice aforethought unlawfully killed a human being. 18 Pa.C.S. § 2502. "The specific intent to kill can be established through circumstantial evidence such as the use of a deadly weapon upon a vital part of the victim's body." *Commonwealth v. Walker*, 540 Pa. 80, 656 A.2d 90 (Pa. 1995); *Commonwealth v. Ramos*, 575 Pa. 605, 827 A.2d 1195 (Pa. 2003); and *Commonwealth v. Austin*, 2006 PA Super 226; 906 A.2d 1213 (Pa.. Super. Ct. 2006).

Instantly, the Defendant specifically contends that the Commonwealth failed to prove specific intent; the Court respectfully disagrees. During the course of the trial, the Commonwealth presented eyewitness testimony that the Defendant "took the gun down, cocked it, said I have fucking bullets in it and brought it up pointed it out and shot," N.T. 05/15/06, p.55. The "shot" struck the victim's neck and went through her trachea and spinal cord causing her death

within minutes of being shot. N.T. 05/15/06, pp. 110-16. The same eyewitness also testified as to the Defendant's "consciousness of guilt"; i.e. the Defendant dragging the victim's body from the scene of the crime. Viewed in a light most favorable to the Commonwealth, the Court finds that, in coordination with the Commonwealth case as a whole, and in particular, the above-cited evidence, there was sufficient evidence for the jury to find the Defendant had the specific intent to kill the victim and, in addition to the other elements of the charge, guilty of first-degree murder.

III. Conclusion

As none of the Defendant's contentions appear to have merit, it is respectfully suggested that the Defendant's conviction and sentence be affirmed.

By the Court,

Dated: _____

_____
Nancy L. Butts, Judge

xc: DA
PD
Judges
Honorable Nancy L. Butts
Gary L. Weber, Esq.
Laura R. Burd, Law Clerk