IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**No. 615-2007**
	:	**CRIMINAL**
JAVIER CRUZ-ECHEVARRIA,	**:**	
Defendant	**:**	

OPINION AND ORDER

Beginning May 5, 2008 and ending May 14, 2008, a jury trial was held before this Court, at which the Defendant was found guilty of Murder of the First Degree at 18 Pa.C.S. § 2501 and Criminal Conspiracy to commit First Degree Murder at 18 Pa.C.S. § 903(a) (1). Following the jury's verdict, the Court imposed a concurrent sentence of life imprisonment without the possibility of parole. Defendant's Post Sentence Motion was timely filed on May 27, 2008. Argument on Defendant's Motion was held on July 15, 2008. Defendant raises thirteen issues in his motion which will be addressed seriatim.

Background

On March 31, 2007 at approximately 1:56 a.m., Officer Thomas Bortz (Bortz) and his partner, Officer Jimmie Rodgers (Rodgers), were patrolling the west end of the City of Williamsport in a marked patrol unit. Bortz was driving with the windows down on the patrol car, going westbound on Park Ave towards a stop sign at High Street, at the northeast corner of the Textron Lycoming grounds, when he heard a shotgun blast, and then a few seconds later a second one. Bortz then flipped out the lights on his patrol unit and radioed Lycoming County Control that there was a shotgun blast northwest from him in the small unnamed alley, which

extends from Dale Place to High Street. He believed the shots were very close to him, as close as 50 yards away, and at the time wondered if they were shooting at him.

He testified at the time of the shotgun blasts, all was quiet, with no one around and then within about ten seconds a blue Mercury Mountaineer SUV came out of the unnamed alley. Upon exiting the unnamed alley, the vehicle turned east, coming in front of his patrol unit, at which time, Bortz flipped on his headlights, and saw what appeared to be two black males looking directly south at his patrol unit. He followed the vehicle as it turned south on Krouse Ave, turned east onto Park Ave, went past Wildwood Boulevard to Cemetery St., at which point he believed he activated his in-car camera. He observed the vehicle stop at the stop sign, turn south down to Memorial Ave, and then east, traveling to Fifth Ave. Once there, two units arrived, a Pennsylvania College of Technology patrol unit and a city patrol unit. Bortz then activated the siren and overhead lights to effectuate a traffic stop. Since the Mountaineer did not stop, they continued to follow the vehicle from the Memorial Ave and Fifth Ave intersection, and then turned north onto Third Ave, where the driver signaled he was turning onto Waltz Place. Throughout this time, the Mountaineer did not speed or violate any other traffic laws. Bortz followed the vehicle onto Waltz Place where he turned the siren off and over the loud speaker, at least twice, ordered the driver to stop.

Bortz described that once the vehicle came to a stop, the passenger side door opened, the barrel of a shotgun came out along with the passenger. The passenger quickly got out and ran east, away from the officers. As the passenger was running, he lost his footing and the shotgun fell to the ground with a pair of gloves. Bortz testified he and Rodgers approached the vehicle checking inside for individuals. As he approached the driver's side, Bortz stated he was about a foot away and looking through the closed window at the driver, later identified as Javier Cruz-

Echevarria (Defendant). Defendant was seated with his hands up and a cell phone in his hand. Bortz also noted "matter kind of sprayed up the side of the vehicle" which Trooper Robert Brown of the PSP Forensic Services Unit identified as blood, skin and tissue. Bortz then opened the door and as the Defendant began to ease his leg out, Bortz eased it back in and asked Defendant to lean forward, forehead on the steering wheel with hands behind his back. Defendant was then handcuffed while still seated in the SUV. After placing him under arrest, Bortz did a search and took possession of the cell phone. Bortz testified Defendant and his passenger were escorted back to the police station where their clothes were removed and samples taken from the Defendant and passenger for the presence of gun shot residue.

Bortz also testified regarding his former employment with Textron Lycoming. Through his employment, he was familiar with the security video surveillance in and around the Textron plant. Bortz contacted Textron to obtain video of the High Street area between March 30, 2007 and early March 31, 2007.

Williamsport Bureau of Police, Officer Jeremy Brown (Brown) testified he gave chase to the Mountaineer's passenger, later identified as Sean Durrant, when Durrant exited the vehicle. Brown testified that after he had Durrant in custody and escorted him back to Waltz Place, he retraced Durrant's steps and recovered a cell phone and a dark blue jean jacket. Brown also testified that he went to Dale Place and the unnamed alley to look in the area of the shotgun blasts. Brown observed a white van parked in the alley. Brown then observed a black male, later identified as the victim, Eric Sawyer, lying on his back with a river of blood coming from the wound on his head. Brown testified he observed two dispensed shotgun shells at the scene, one that was on Sawyer's lap or belt buckle and another slightly west of the first but relatively close to the victim's body.

Lieutenant Arnold Duck, Jr. (Duck) and Officer Edward Lucas (Lucas) of the Williamsport Bureau of Police then arrived on the scene. Duck was called to process the scene, which included taking photographs. Duck then removed from the victim what appeared to be shotgun wadding from his back. Lucas stated he collected a cell phone that was pulled out of Sawyer's pocket by the County Coroner, Charles Kiessling, Jr. He also testified that he collected the two spent shotgun shells and a receipt for a cellular prepaid phone card.

Kevin DeParlos, the Warden of the Lycoming County Prison testified that inmates at the Prison have access to telephones while incarcerated. For an inmate to make a call he or she would pick up the phone, be prompted to enter their inmate ID number and then the telephone number of the person they are calling. DeParlos related that all inmate telephone calls and correspondence are monitored. In the event staff believes a conversation being reviewed suggests criminal activity, staff drafts a synopsis of the call. He testified Maurice Patterson (Patterson) was an inmate at the County Prison in March of 2007 and made telephone calls while incarcerated there. Specifically, DeParlos related a call was made by Patterson on March 30, 2007 to 570-777-1933. He also testified that on March 26, 2007, Patterson mailed a letter to Durrant. The records also reflect the Defendant mailed out a letter on October 15, 2007 to Boo Durrant, Sean Durrant's wife, Nicole.

Justina Gordner testified that on March 30, 2007 she went to Teresa Matthews' house. She testified when she got to the home around 9:00 p.m., Matthews, her husband, her daughter, her boyfriend Quinton, Durrant, and the Defendant were all there. Gordner testified Durrant and the Defendant went upstairs into a spare bedroom where they were making a lot of noise. She then testified she fell asleep for a while and after waking, the Defendant asked her if he could use her cell phone; her cell phone number was 570-337-7548. She remembered the Defendant asked

everyone in the house to listen on the scanner for his vehicle. When Matthews asked Defendant if he was going to get into trouble, she remembered he stated he was not going to do anything stupid. Gordner testified she later heard over the scanner something about shots fired on High Street and they were following the same type of vehicle as the Defendant's down Memorial Ave and into an alley. Finally, Gordner testified she witnessed Durrant ingest some drugs and then put some drugs that were in a sandwich bag into his sock.

Wayne Dority testified he was acquainted with an individual known as Bop, also known as Eric Sawyer. He also related Bop had obtained his cell phone when he left it in Sawyer's vehicle. Dority had never seen the phone since Bop borrowed it.

Kristy Potter testified she is a retail store manager for AT & T and was offered as a custodian of the cell phone records for phone number 570-506-1873, which was assigned to Dority. She testified that on March 30, 2007, at 22:34 hours, the phone in the victim's possession made and received several calls from the phone in the Defendant's possession. Next, Phillip John Vansmeak, Jr., custodian of records for Verizon testified regarding cell phone number 570-337-7548, which was subscribed to by Justina Gordner. He testified that on March 31, 2007, that phone received two incoming calls from 570-777-1933. Lynn Cooper, the Operations Coordinator for Immix Wireless, testified 570-777-1933 was the Defendant's cell phone number. On March 30, 2007 at 10:35 p.m., the phone was used to make and receive calls from 506-1873 as well as 337-7548, all at or near the time of the shooting.

Agent Stephen Sorage of the Williamsport Bureau of Police testified he assisted Agent/Detective Leonard Dincher in executing a search warrant at 846 Memorial Ave, which was the Matthews' residence. He testified that in the second floor bedroom, in the top drawer of a little stand, there were four twelve-gauge shotgun shells and a file.

Jill Cramer, a forensic DNA analyst at Orchid Cellmark testified she did DNA testing on samples of blood and tissue obtained from the victim and compared them to the samples of blood and tissue taken from the driver's side window of the Mountaineer along with some clothing. Results identified the left shoe worn by Durrant along with the samples from the vehicle matched the victim's. Some of the Defendant's clothing was also tested and all the screenings were either inconclusive or negative.

Sean Durrant testified he pled guilty to third degree murder and conspiracy to commit third degree murder in the death of Sawyer. He also testified he conspired with the Defendant and Patterson to commit this murder. Durrant related that along with his guilty plea he agreed to provide complete and truthful testimony and cooperation with regard to the involvement of the Defendant and Patterson. He testified that in his agreement he will receive a sentence of 25 to 60 years for his cooperation and in exchange for his testimony the Commonwealth has agreed to not pursue the charges of first degree murder, conspiracy to commit first degree murder, and felon in possession of a firearm.

Durrant testified he met Patterson in 1998 at the State Correctional Institution at Huntingdon; Patterson was serving time on a third degree murder conviction. Durrant testified it was some time in 2006 he saw Patterson in Williamsport and Patterson introduced him to the Defendant. Patterson referred to the Defendant as his "little brother." Durrant testified he was introduced to Sawyer one day when Patterson, the Defendant, and Sawyer all came by to his house to try to hook up with him to go to Jersey to get some heroin, but Durrant refused to go. He testified that he did make some connections in Philadelphia for Patterson and the Defendant to purchase some cocaine. Sometime after that, Patterson and the Defendant's relationship with Sawyer soured. He testified the Defendant relayed the message from Patterson, who was in the

Lycoming County Prison, that Sawyer was ready to go to court and testify against somebody and was supposedly working with the police and setting up a drug buy on them. Durrant related the Defendant said Patterson said "he would have to be dealt with. He would have to be killed because they didn't want us to get locked up or fall down about some organization." N.T. 5/8/08, p. 50. Durrant testified he was told this sometime around the week of March 25, 2007.

Durrant testified that on March 27, 2007 he received a letter from Patterson sent from the Lycoming County Prison. Durrant testified the letter referred to both him and the Defendant; specifically Durrant related the letter said "Jav, you're my little brother" and also talked about Durrant (referred to as Radar), as Patterson's little big brother. Durrant testified the letter talked about their drug dealing business and also talked about killing Sawyer. Durrant related killing Sawyer was only business as far as the street code goes because Sawyer was supposedly setting them up on drug buys and was going to court to testify. The letter makes reference to the Defendant knowing what to do as "Little Man."

Several phone calls from Patterson at the Lycoming County Prison were played for the jury. In the first, Durrant testified he received a call on March 27, 2007. The jury heard Patterson speaking to both Durrant and the Defendant. Durrant told Patterson in the conversation that he was going to Lowe's to get a hacksaw and break the shotgun down. Patterson says in the call "when that's taken care of we all can breath a lot easier because, you know, I did business with that chump." Id. at 67. Durrant testified a second call was made by Patterson (also known as "Banks") to the Defendant on March 30, 2007 at 8:53 p.m. Durrant explains that when the Defendant says to Patterson "about that other king that's going to be handled tonight and Maurice Patterson says, which one? Javier Cruz laughs and says . . . the fake one," he was referring to killing Sawyer. Id. at 71 Durrant also testified the call stated "be seen but not seen,"

which means "[n]o witnesses, you know just taking care of business but doing it in a way, discrete, where nobody else would know and nothing would come back on us." Id. at 72. A third phone call was made by Patterson from the Lycoming County Prison to the Defendant on March 30, 2007 at 9:27 a.m. During the conversation Patterson says, "[i]f it ain't clicking tonight don't force it. You hear what I'm saying? . . . We don't need no unnecessary mistakes 'cause right now – and Jav says, no, no, no. And he says, the boy will knock on your door, not mine." Id. at 77. Durrant testifies the conversation is about killing Sawyer, to make sure it is done where no one is around, and to make sure it's taken care of, otherwise Sawyer will be knocking on their door, not on his.

Durrant also testified he received a shotgun about a week before the murder from the Defendant. Durrant related the Defendant came by one day with it rolled up in a black jacket and they went straight upstairs where he sawed the barrel of the shotgun off with a hack saw and filed it down. About two days before this incident they purchased the shotgun shells from K-Mart.

Durrant testified that early on the day of March 30, 2007, he was helping his sister-in-law, Denise Bondy move stuff out of her house on 1520 High Street, directly at the entrance of the unnamed alley. Durrant testified he and the Defendant had driven around for a while to find a secluded area to kill Sawyer, Durrant picked the area behind Bondy's house because he knew it was really dark, with no light back there and he thought it looked like a perfect place. Durrant related he was present when the Defendant called Sawyer and asked him if he had any heroin, because he had some people who wanted to buy it from him. He testified Sawyer called back and said he did not have any heroin but he was waiting on some, and would call him back to let him know. Finally, Sawyer called and told the Defendant the deal was a go. The plan was to meet at

the Shamrock Bar and Sawyer would follow the Defendant in his own car to an area near High Street. Durrant had the Defendant drop him off at Bondy's house and call when he was close so he (Durrant) could get in position. While waiting for the meet with Sawyer, Durrant and the Defendant were hanging out at the Matthews' house. He brought cocaine to the house for Boyles and snorted some himself. Before they left in the Mountaineer, Durrant sent the Defendant back into the Matthews' house to get a cell phone from Gordner. Durrant confirmed the phone the Defendant gave him was the same phone he dropped when he was running from the police after the shooting. The shotgun he used was wrapped in the Defendant's coat on the back seat of the Mountaineer.

Durrant was shown the photographs taken from the Textron security camera. He showed in the first three photographs the Defendant's Mountaineer turning up Dale Place and then turning back around when the Defendant dropped him off with the shotgun and then went to meet Sawyer. He testified the Defendant called when he was on his way back to where he hid and waited. Durrant testified the second set of photographs show the Defendant's vehicle approaching the alley, turning in, and Sawyer's white van behind him. The time of the last set of pictures was 1:53 a.m. Defendant stayed in the vehicle so Sawyer would get out to come to him. Both Durrant and the Defendant were wearing gloves that night as to not leave fingerprints on the shotgun. Durrant testified that once outside the vehicle, he shot Sawyer in the side of the head and once down, in the head again. While the shooting took place, Defendant was outside the vehicle watching.

Durrant described his arrest that evening and his initial story to the police. Durrant related he did not immediately tell the police the truth, but did say that a third party was in the vehicle and had jumped out. After about 15 to 20 minutes, when Agent Dincher told him he did not

believe the story because the other officers did not see a third person, he then told the police of his involvement in the murder. Durrant related he lied to the police about the Defendant's involvement claiming that he was following the "code of the street"; once caught you do not tell on your friends and do not implicate other people. He also did not reveal Defendant's involvement because he believed at the time that Sawyer was a rat and was going to testify in court the following Monday.

Durrant testified while in prison he ultimately learned Sawyer was not going to testify against Patterson, the Defendant, and himself. Durrant later found out the real reason why Sawyer was killed was because the Defendant and Patterson had problems with Sawyer. Patterson was coming onto Sawyer's girlfriend, Michelle Kieffer, and she told Sawyer about it. According to Durrant, Sawyer approached Patterson and told him he was going to hurt him if he came around Kieffer again. He related he agreed to testify because Sawyer's mother needed to know the truth of why Sawyer was killed, what for, and who played a part in it. He also agreed to testify because he was lied to by both Patterson and the Defendant.

Dincher testified he was contacted at home in the early morning hours of March 31, 2007 regarding a homicide investigation. He responded to both crime scenes: the 1500 block of High Street and Waltz Place and Second Ave. Dincher testified that he first went to the 1500 block of High Street where he saw a white caravan, Sawyer's body, and a two spent 12 gauge shotgun shells. Dincher then went to Second Ave and Waltz Place. He observed a Mountaineer with what he believed to be human tissue on the side of it, a sawed off shotgun and a pair of gloves in the middle of the roadway. Dincher then conducted an ATF/NTC, which is an alcohol, tobacco, firearms national trace and determined that the shotgun belonged to David Lehman.

Dincher went back to City Hall to book the Defendant. Dincher testified as part of the booking process, Defendant was asked to give his name and his cell phone number. Defendant gave his name as Javier S. Cruz and did not give a phone number. Dincher described the Defendant's demeanor as indifferent or stoic. At some point the Defendant's clothing was removed and bagged, then placed in evidence.

Dincher testified that as part of his investigation he requested Nicole Durrant, Sean Durrant's wife, to provide any correspondence received at the house from the Defendant while he was incarcerated at the Lycoming County Prison. Nicole provided Dincher with a letter dated October 14, 2007, to Boo Durrant from the Defendant. The letter asked Nicole how she and the kids were doing and also stated he was depressed. The letter went on to say that "[m]y lawyer and me are looking for new motions to file . . . How did his motion go? . . . Write . . . me back soon and be careful what you write. Much Love. Love Javier. . . . I'm just mad I want to hurt someone, but I'm scared of my case. I'm just mad. . . . Id. at 98.

Dincher testified that he also reviewed the cell phone records with respect to the cell phones obtained from the various parties. On March 30, 2007, at 10:35 p.m., the phone found on the Defendant called the phone found on Sawyer. At 11:38 p.m. the phone found on Sawyer called the phone found on the Defendant. On March 31, 2007 at 1:26 a.m., the phone found on the Defendant called the phone found on Sawyer, at 1:27 a.m. the phone found on the Defendant called the phone found on Sawyer, at 1:45 a.m. the phone found on the Defendant called the phone found in the foot pursuit of Durrant, at 1:46 a.m. the phone found on the Defendant called the phone found on Sawyer, then at 1:49 a.m. the phone found on Sawyer called the phone found on the Defendant, and finally at 1:53 a.m. the phone found on the Defendant calls the phone found in the foot pursuit of Durrant. Dincher also testified the phone found on the Defendant

called the phone found on Sawyer on March 2, 2007 two times. Dincher related further the records indicated the phone found on the Defendant also called the phone found on Sawyer twice on March 27, 2007. Dincher testified the phone found on the Defendant had in its contact list the names and cell phone numbers for Sawyer, Durrant, and Marion Diemer, girlfriend of Lehman, the owner of the shotgun used. Dincher testified the 1999 Mercury Mountaineer was registered to the Defendant with the address of 1450 Kaiser Avenue, South Williamsport, PA. He related the address belonged to Maurice Patterson's step mom. He also determined that Sawyer was not a cooperating witness. Dincher finally testified as to the information provided by Durrant. Dincher related Durrant informed him the ruse to get Sawyer to come to the unnamed alley was a heroin deal. He testified no heroin was found on Sawyer's clothing, no heroin was found in the white van, and no alcohol or other drugs were found in Sawyer's blood. Dincher then testified he was not surprised Sawyer did not come with heroin that night.

Michelle Kieffer testified she lived in Williamsport for the past five years with Sawyer. She related she worked at Ruby Tuesday and on the night of March 30, 2007, Sawyer picked her up at work at 9:30 p.m. Kieffer related she was acquainted with the Defendant and Patterson. Sawyer, Defendant, and Patterson called each other brothers, but sometime after Christmas they had stopped associating with each other. She related Patterson had made a comment to a neighbor that Sawyer did not treat her right and if he did not watch his back Patterson was going to take her from Sawyer. Kieffer testified Sawyer did not hear from Patterson after that but spoke with the Defendant on at least two occasions during the month of March before March 30, 2007. Kieffer testified that on the night of the murder, after Sawyer picked her up from work they got something to eat and came home. While Sawyer took a shower his phone rang and she answered. Kieffer testified she recognized the voice as that of the Defendant's. Once out of the shower

Kieffer told Sawyer the Defendant had called and then the phone rang again. After the call, Sawyer told her he had to leave to go meet his Old Head because his car broke down. Around 1:45 a.m. Sawyer called to tell her he was five to ten minutes away from the house and would be home. Kieffer related she then fell asleep waiting for Sawyer who never did return home. She did not know Sawyer was a heroin dealer, or involved with, or dealing any other drugs. Kieffer testified that after the murder of Sawyer she became aware of the fact that Sawyer was involved with drugs, specifically marijuana and cocaine.

Teresa Matthews testified she was acquainted with Durrant and the Defendant. Matthews related on March 30, 2007 she contacted Durrant to buy cocaine. When Durrant came over he came with Defendant, got the money, and they left to purchase the cocaine. After splitting the drugs up, she remembered Durrant stuck a small piece in the edge of a baggy and placed it in his sock. While there, Durrant asked to move in because he was fighting with his wife. She told Durrant he could use the upstairs room, at which point both Defendant and Durrant went upstairs. Matthews related she thought they were moving stuff around because she heard them moving around. Matthews testified when the Defendant and Durrant got ready to leave Defendant asked for a cell phone and Gordner said he could borrow hers.

David Lehman testified Diemer was his live-in girlfriend. He related he was working at Webb Communications in December of 2006 when he received a call from Adrian Diemer, who told him his house had been broken into. He testified he left work and came home to find all of his weapons, including a Remington 870 Wing Master missing. He reported the incident to the police. Some time later he was contacted by the police to see if he could identify any of the missing items and was able to identify the shotgun used in this case as his Remington.

Marion Diemer testified that she lives with Lehman. Diemer related that back in December of 2006 she took Lehman's weapons, including a shotgun, in an attempt to sell them for money or drugs or both. She admitted at the time she was addicted to crack cocaine and marijuana. She testified she gave a woman on the corner of Third St. and Park Avenue the items in exchange for drugs which were later returned because she did not want them. Diemer later took guns to the residence of Gregory Ricks. She said he was able to find someone who wanted the shotgun, so they drove to the Kwik Fill where a man got in the back seat looked at the gun, handed Ricks some drugs, took the gun and got out. She described the man to police, and was able to identify Patterson by photograph for police.

Nicole Durrant testified the Defendant came to her house sometime in late March with a big jacket and her husband and Defendant immediately went upstairs. She believed the Defendant and Durrant were obviously trying to cover up something because of the way the Defendant walked in the house with something concealed under the coat. Nicole also related her son asked Durrant if he could go upstairs with them and when he said no, she believed they were doing something bad. She also testified the Defendant was going to take her to the store or something and said he had to go drop off whatever was in the jacket before he could take her because she would "trip or whatever," meaning be upset about what he was doing.

Dr. Sara Lee Funke (Funke) a forensic pathologist in Allentown testified she performed an autopsy on the body of Eric Sawyer. Funke related Sawyer sustained two shotgun wounds on the left side of his face, involving the left side of his cheek, the bottom part of his ear, and the upper part of his neck. She testified that the wound area was very large and measured five and a quarter inches by two and a half inches. Funke testified that within a reasonable degree of medical certainty the cause of death was two shotgun wounds to the head and the manner of

death was homicide. Funke testified she removed a shotgun cup which was partially protruding from the wound. She testified from an x-ray of the victim's skull to show the pattern of the shotgun pellets. Finally, Funke testified that she did check the clothing of the victim and found no unknown substances.

Elana Foster of the RJ Lee Group was presented as a gun shot residue expert. She testified there were three ways in which one could come in contact with GSR: first, the person discharged a firearm; second, they were in close proximity to somebody who discharged a firearm; or third, they came into contact with something that had GSR on it. She performed a GSR analysis on the samples provided from the person and clothing of the Defendant. Foster related several unique particles of GSR were found on the Defendant's person and clothing. Foster also testified that while the GSR particles were found on the Defendant's person and clothing, she could not say which firearm produced those particles. Defense counsel also inquired about studies that show there is the possibility of GSR contamination within a police unit.

Trooper Elwood Spencer was offered by the Commonwealth as a firearm and tool mark examiner from the Pennsylvania State Police Wyoming Regional Laboratory. Spencer examined the shotgun, two dispensed shells, and four unspent shotgun shells. He testified he discharged one of the unspent shotgun shells and analyzed it microscopically with those found on the scene to see if they were discharged from the same firearm and determined they were. Spencer also made test patterns to determine the distance and related the test pattern he made at three feet was most consistent with the wound size of Sawyer in this case.

Discussion

1. ***The Court improperly denied Defendant's Habeas Corpus Motion, improperly concluded that the stop of the vehicle was legal, and improperly denied the Motion to Suppress the seizure of the internal information from the Motorola cell phone***

The Court's rationale for the aforementioned challenged findings can be found in its March 27, 2008 Opinion and Order and the Court will therefore rely on that Opinion for purposes of this Motion.

2. ***The Court improperly restricted the cross examination of Sean Durrant***

In Defendant's Post Sentence Motion he alleges the Court erred in precluding the cross examination of Durrant concerning the admitted criminal conduct alluded to during his phone conversations with Patterson. Counsel points to the language in the plea agreement where it states that "if Durrant fails to abide by the plea agreement, the Commonwealth will be free to bring any other charges it has against the defendant, including any charges originally brought against the defendant or which may have been under investigation at the time of the plea." N.T. 5/7/08 p. 52. Defendant argues this language means there were other crimes under investigation and those investigations ceased because of Durrant's cooperation. At a discussion on the record in chambers, the District Attorney represented that there were not any other charges under investigation and that there is nothing in the language of the plea agreement that indicates they agreed to cease anything under investigation in exchange for his cooperation.

In support of his argument, Defendant relies on Commonwealth v. Ocasio, 574 A.2d 1165, 1167 (Pa. Super. 1990). In that case, the Commonwealth's eyewitness was arrested for

possession of a kilogram of cocaine and was admitted into the ARD program in connection with those charges. Counsel for the Defense attempted to show that the witness had an interest in providing helpful testimony and specifically questioned him regarding his arrest and admission into the ARD program. Upon objection by the Commonwealth, the Court refused to allow Defense Counsel to pursue that line of questioning. The Court quoted the Supreme Court in Commonwealth v. Evans, 512 A.2d 626, 631-32 (1986), which stated,

> [W]henever a prosecution witness may be biased in favor of the prosecution because of outstanding criminal charges or because of any non-final disposition against him within the same jurisdiction, that possible bias, in fairness, must be made known to the jury. . . . [T]he witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to the prosecution. And if that possibility exists, the jury should know about it. . . .

Defendant's reliance on Ocasio, is misplaced. Here, Defense Counsel was able to question Durrant regarding the plea agreement he received in exchange for his cooperation. The Court accepted the representation of the District Attorney's office that there were no other offenses being investigated. In addition, the Court finds Defense Counsel was able to question the co-defendant regarding any apparent offenses with which he may have been charged based upon the facts presented during the trial, such as the possession and delivery of controlled substance. Therefore, the Court's ruling should stand.

3. The Court improperly allowed the Commonwealth to present evidence which exceeded the scope of the charged conspiracy

Defendant asserts the Court erroneously ruled the Commonwealth was permitted to present evidence of a conspiracy which preceded March 31, 2007 and erred in allowing the Commonwealth to present evidence concerning the involvement of Maurice Patterson in the

conspiracy. Specifically, the Defendant argues the conspiracy as charged in the information was on March 31, 2007 and the co-conspirator was Sean Durrant. However, at trial, the Court overruled the Defense's objection to the Commonwealth's introduction of testimony of a conspiracy which started on or about March 1, 2007 and identified Maurice Patterson as an additional co-conspirator. In opposition, the Commonwealth asserts the information indicates the conspiracy occurred on or about March 31, 2007. Further, they argue with regard to the named co-conspirators, that Defense Counsel has received complete discovery, including every document, phone call, letter, or any other evidence relating to Maurice Patterson.

While the Court can find no case law entirely on point, the Court believes the Pennsylvania Supreme Court in Commonwealth v. Jones provides some guidance. 929 A.2d 205 (2005). In that case, the defendant, despite not having been formally charged with conspiracy, was allowed to plead guilty to that crime because of prior notice of the charge by way of the plea negotiations and other discussions about the case. Id. at 212. The Court found that under the totality of the circumstances the defendant had been aware of the charge and therefore knowingly pled guilty. Id.

Applying the logic from Jones, the Court finds that Defense Counsel had full and complete notice of the Commonwealth's theory with regards to this case and the individuals alleged to have been involved. The affidavit of probable cause specifically states that a conspiracy occurred on or about March 31, 2007 and lists the one co-defendant known at the time the information was filed. Further, the Commonwealth provided full and complete discovery which also asserted Patterson's involvement and the dates of the conspiracy. Therefore, under the totality of the circumstances, evidence of the conspiracy was properly admitted.

4. The Court improperly ruled the Commonwealth could proceed on accomplice liability theory as to the Defendant

Defendant's next argument is that the Court erred in allowing the Commonwealth to proceed on accomplice liability theory when there was never a charge to which he was subject to liability. Moreover, the Defendant asserts the Court erred by instructing the jury on accomplice liability. The Commonwealth in opposition asserts his culpability as an accomplice is outlined in the affidavit of probable cause. The affidavit states that Durrant admitted to shooting Eric Sawyer and that Defendant drove him to and from the crime scene. Further, the Commonwealth states no specific accomplice liability charge is needed.

In Commonwealth v. Smith, 482 A.2d 1124, 1127 (Pa. Super. Ct. 1984), the District Attorney's information did not allege the Defendant was criminally liable as an accomplice because he had acted in concert with a co-defendant. The Court found the Defendant's criminal liability as an accomplice was advanced repeatedly during the trial, and therefore, the trial court properly instructed the jury that appellant could be convicted if he had cooperated with and assisted the co-defendant in the crime. The Pennsylvania Supreme Court went on to say "the defense had not been misled because the information clearly alleged that the defendant had acted with another, the defendant could be convicted as an accomplice even though the information charged him with 'committing' the crime." Id. (citing Commonwealth v. McDuffie, 466 A.2d 660 (1983)).

In the present case, the information filed against the Defendant alleged that he acted in concert with Sean Durrant in the killing of Eric Sawyer. Further, Defendant's criminal liability as an accomplice was advanced repeatedly during the trial and clearly set forth in the

affidavit of probable cause. Therefore, the Court's instruction on accomplice liability was not erroneous.

5. The Court improperly refused to grant a mistrial based on Durrant's outburst while on in the witness stand

Defendant alleges the Court erred in not granting a mistrial based upon Durrant's outburst on the stand. The Defendant relies on the following cases to support his position, Commonwealth v. Duffy, 548 A.2d 1178 91985), Commonwealth v. Marshall, 568 A.2d 590 (1989), Commonwealth v. Glover, 286 A.2d 349 (1972), and Commonwealth v. Hawkins, 292 A.2d 302 (1972). In opposition, the Commonwealth argues the Defendant's reliance on those cases is misplaced as each of those cases involved spectators at trial not witnesses. Further, the Commonwealth argued Durrant's statements were neither objectionable nor inadmissible, but were stated with a great deal of emotion and gave veracity to his words.

The following is the portion on Durrant's direct examination in which the outburst occurred:

> Q: Mr. Durrant, what was the real reason why Eric Sawyer was killed?
>
> A: The real reason why Eric Sawyer was killed was because Javier Cruz and Maurice Patterson had some problems with Eric. Maurice Patterson came on, was trying to f*** Eric's girlfriend, and she told Eric about it, and he went back – Sawyer went and approached Patterson about it and told him that he was going to hurt him, f*** him up, if he come around his wife, his girl again. And – you motherf***er! Man is dead for you lying!
>
> MR. TRAVIS: Your Honor, I would request –
>
> THE WITNESS: The boy's mother got to sit here and go through this again!
>
> THE COURT: Sir, sir, you can't give an answer unless people are asking you a question.

MR TRAVIS: I would request two things. I would request a recess and I'd also like to make a motion.

THE COURT: Sure. Okay, ladies and gentlemen, what we'll do is take our mid-afternoon recess at this time, so if you'd please put your note pads –

THE WITNESS: I asked you twice –

THE COURT: Mr. Durrant, Mr. Durrant, please do not say another word. . . .

After a review of the cases relied on by the Defendant, the Court finds each of those cases distinguishable from the case at hand. In each of the cited cases, a spectator, who was often a member of the victim's family, had an emotional outburst. Following those outbursts the Judge gave the jury a cautionary instruction to not allow the emotion to sway them one way or the other. In the instant case, the outburst was not from a spectator and/or member of the victim's family, the outburst was from the witness, who also happened to be the co-defendant in this case. Further, the Court immediately controlled the outburst. The Defense said it would not ask for a cautionary instruction and at the time the Court believed "a cautionary instruction . . . just reinforces the whole issue . . . and unless you ask for it I'm not going to do anything." N.T. 5/ 14/08, p. 111. Further, the Court stated "I think also in light of the fact that some witnesses cry, some witnesses have other responses to the nature of the testimony that they give. That's kind of how I characterize his response. . . . I don't believe that it's a ground for a mistrial in this case." Id.

In Commonwealth v. Evans, 348 A.2d 92, 95 (1975), the victim's daughter, a Commonwealth witness began to softly weep on the witness stand. The Court declared a short recess to give the witness a chance to regain her composure. The standard the Court relied on in making its decision was whether "the jury is, in the opinion of the court, swayed by such conduct." Id. The Pennsylvania Supreme Court held the trial court did not abuse its

discretion in denying the motion for a mistrial as it felt the jury had not been swayed by the conduct. In the standard criminal jury instruction on credibility, 4.17, the jury is told it can consider "how [did] the witness look, act, and speak while testifying." Since the reaction of the co-defendant is one of those factors the jury can consider in determining whether to believe all, part or none of a witnesses' testimony, the Court finds no error in the Commonwealth's argument. Here, the Court felt based upon the nature of the comments and the length of the outburst, Durrant's conduct did not sway the jury but was merely additional information for the jury to consider in determining his truthfulness generally. Therefore, the Court's refusal to grant to mistrial was proper.

6. The Court improperly denied the Motion for Mistrial based upon the District Attorney's closing argument which referenced Durrant's outburst

The Defendant alleges the District Attorney's reference to Durrant's outburst unfairly buttressed the credibility of his testimony. In opposition, the Commonwealth asserts their reference to Durrant's outburst in closing argument was not improper as it is something they are allowed to consider when determining any witnesses' credibility.

The Court agrees the Commonwealth's argument referencing Durrant's outburst was not improper since it occurred during the trial and it would be something the jury is allowed to consider in determining Durrant's credibility as discussed generally, above. Therefore, the Court finds no error in the Commonwealth's argument. As such, the Court properly denied the Motion for Mistrial.

7. The Commonwealth's closing argument violated Defendant's Fifth Amendment Right against self incrimination

Next, the Defendant alleges the Commonwealth's closing argument violated the Defendant's Fifth Amendment right against self incrimination by making a comment on how the Defendant could explain some of the evidence, when the Defendant chose not to testify on his own behalf. In opposition, the Commonwealth asserts their statements were not references to the Defendant failing to testify but to the fact that the evidence was uncontradicted.

The relevant portions of the Commonwealth's closing argument are as follows: "How does Javier Cruz explain how he is the single connection to all of this evidence? . . And how does Javier Cruz possibly explain all of the gunshot residue found on his person?" N.T. 5/14/08 pgs. 60-61. According to the Pennsylvania Superior Court, "[a] prosecuting attorney may properly respond to opposing counsel's argument which questions the credibility of a witness. The Commonwealth may properly refer to the fact that the incriminating evidence was uncontradicted. Such will not necessarily be deemed to be a reference to a defendant's failure to testify." Commonwealth v. Fulton, 465 A.2d 650, 656 (Pa. Super. Ct. 1983) (and cases cited therein).

Since the Commonwealth only referenced the fact that the evidence against the Defendant was uncontradicted, it was therefore, not a comment on the Defendant's failure to testify. The Court finds the Commonwealth's closing argument did not violate the Defendant's Fifth Amendment right against self-incrimination.

8. Durrant's plea agreement precluded the Commonwealth from submitting to the jury the offenses of first degree murder and conspiracy to commit first degree murder

Defendant next alleges that based upon the plea agreement reached with Durrant the Commonwealth should have been precluded from submitting the offenses of first degree murder and conspiracy to commit first degree murder to the jury. Defendant argues he is being selectively prosecuted. The Commonwealth's position is that it is not selective prosecution to allow one defendant to plead to lesser offenses. The Commonwealth relies on Commonwealth v. Mulholland, 702 A.2d 1027 (Pa. 1997) to support its argument.

In order to prove selective prosecution, two elements are required: "first, others similarly situated were not prosecuted for similar conduct, and, second, the Commonwealth's discriminatory selection of them for prosecution was based on impermissible grounds such as race, religion, the exercise of some constitutional right, or any other such arbitrary classification." Mulholland, 702 A.2d at 1034 (citing Wayte v. United States, 470 U.S. 598 (1985)). Neither of the two elements are met in this case. Durrant was charged with first degree murder and conspiracy to commit first degree murder, but in exchange for his cooperation accepted a plea agreement to third degree murder and conspiracy to commit third degree murder. The Court does not find, nor can the Defendant show any indication of discriminatory selection. Therefore, the fact that Durrant entered into a plea agreement for third degree murder and conspiracy to commit third degree murder did not prelude the Commonwealth from submitting first degree murder and conspiracy to commit first degree murder charges to the jury.

9. The Court improperly allowed the Commonwealth to present expert evidence concerning GSR particles found on the person and clothing of the Defendant

The Defendant's next argument is that the Court erred in allowing the Commonwealth to present expert evidence concerning particles of gun shot residue (GSR) found on the person and clothing of the Defendant. Specifically, Defendant argues the chain of custody was not properly established and the expert could not say how the GSR was deposited on the Defendant, therefore, allowing the jury to speculate. In opposition, the Commonwealth argues the GSR evidence could be admitted as its probative value outweighs any prejudicial effect.

In order for any evidence to be admitted the court must first determine if it is relevant. Pa. R. Evid 402. If the evidence is relevant, the court must next determine whether "its probative value is outweighed by the danger of unfair prejudice . . . or misleading the jury . . .." Pa. R. Evid 403. Under Pennsylvania Rules of Evidence 702,

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the for of an opinion or otherwise.

The Court finds the GSR evidence relevant and the probative value outweighed by the danger of unfair prejudice or misleading the jury. During trial, the Defendant attempted to show he was not outside the vehicle at the time of the shooting and was in no way involved in this murder. The GSR expert, Elana Foster of the RJ Lee Group, testified that several particles of GSR were found on the Defendant's person and clothing. Foster also testified that while the GSR particles were found on the Defendant's person and clothing, she could not say from which firearm those particles came. Although, as the Defendant argues Foster

was unable to say exactly how the GSR was deposited on Defendant, this testimony does not require the jury to speculate, rather it assists the jury in determining what if any involvement the Defendant had in this murder. The Court also notes the Defendant had ample opportunity to cross examine Foster and did in fact attempt through its cross examination to show the presence of GSR particles did not mean the Defendant was involved in this murder. Specifically, Defense Counsel questioned Foster at length regarding a symposium on GSR conducted by the FBI lab in 2005, in which various studies were presented that showed there is the possibility of GSR contamination within a police unit. Therefore, the Court did not error in allowing the Commonwealth to present expert evidence regarding the particles of GSR found on the person and clothing of the Defendant.

As to the chain of custody, the Defendant asserts the Commonwealth did not prove a valid chain of custody on the basis the items delivered to RJ Lee was handled through Federal Express and Crate & Freight as opposed to the person-to-person delivery.

In Commonwealth v. Copenhefer, the defendant argued his trial counsel was ineffective for stipulating to the chain of custody when gaps and defects existed. 719 Pa. 242, 265 (Pa. 1998). According to the Pennsylvania Supreme Court, "gaps in the chain of custody go to the weight that is to be afforded evidence, not to its admissibility." Id. The Court went onto find that the defendant did not explain "how the alleged defects in the chain of custody would have caused the jury to weigh any evidence that was presented to them by the Commonwealth in a different manner." Id. The Court can find no explanation for how shipping through Federal Express and Crate & Freight rather than person-to-person delivery would have caused the jury to weigh the evidence in a different manner. Therefore, the Court finds the chain of custody was properly established.

10. The Court improperly allowed the Commonwealth to introduce photographs of the victim and a videotape of the crime scene

Next, Defendant asserts the Court erred in allowing the Commonwealth to introduce into evidence bloody and inflammatory photographs and a videotape depicting the body of the victim. Specifically, Defendant asserts it was error to allow the Commonwealth to admit photographs, involving a close up of Sawyer's body, including the head wound and river of blood, photographs depicting the location of the expended shotgun shell, photographs depicting the location of the shotgun wad within the wound, and photographs depicting the wound size after the skin had been returned to its normal location. Defendant argues the blow up crime scene diagram which depicted the location of the body of Sawyer and oral testimony of multiple officers concerning the observations made with respect to the location of Sawyer's body adequately explained to the jurors the location of Sawyer's body. In opposition, the Commonwealth argues the photos were not inflammatory and corroborates the testimony of the police officers. The Commonwealth also asserts the photographs were necessary so that the jury could have a sense of the location for where the killing occurred, could understand where a spent shotgun shell came to be located with respect to Sawyer's body, and to document the presence of the shotgun wad in the wound, along with showing the wound size.

The Pennsylvania Supreme Court "has long recognized that photographic images of the injuries inflicted in a homicide case, although naturally unpleasant, are nevertheless oftentimes particularly pertinent to the inquiry into the intent element of the crime of murder." Commonwealth v. Solano, 906 A.2d 1180, 1191 (Pa. 2006) See also Commonwealth v. Marinelli, 690 A.2d 203, 216 (Pa. 1997) (the mere fact that blood is

visible in a photograph does not necessarily render the photograph inflammatory). A two-step analysis is used to determine whether the photographs are admissible. First, is "whether the photograph is inflammatory. If it is, [then the Court] must consider whether the evidentiary value of the photograph outweighs the likelihood that the photograph will inflame the minds and passions of the jury." Solano, 906 A.2d 1191-92. "Gruesome or potentially inflammatory photographs are admissible if the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors." Commonwealth v. Gorby, 588 A.2d 902, 907 (Pa. 1991).

The Court finds the photographs and videotape were properly admitted into evidence. The Court notes the three photographs used by Dr. Funke were in black in white, which the Court believes reduced any gruesomeness. The first photo depicted the two shotgun wounds, the second depicted the size of the wound, and the third was a photograph of the x-ray of Sawyer's skull showing the location of the shotgun pellets. Additionally, a photograph of the left side of Sawyer's face utilized by Jeremy Brown of the WBP in his testimony was also in black and white.

The Court also notes the photographs directly related to the Commonwealth's theory that the murder was intentional, the victim was shot at close range, and then shot again as he lay on the ground. The photographs helped demonstrate the number and location of the shotgun shells. The videotape and other crime scene photographs were also necessary for the jury to gain an understanding for the scene. Although the video and some of the photographs depict a river of blood, the Court did not find the video to be inflammatory and did not allow the video to dwell on any areas which depicted blood or bloody body parts. The video and photographs also depict the close proximity of the shell casings and were thus relevant to the

Commonwealth's case. Therefore, the Court finds the photographs and video were not inflammatory, and that the evidentiary value clearly outweighs any potential prejudice.

11. The Court improperly allowed the Commonwealth to put into evidence Patterson's conviction of third degree murder

Lastly, the Defendant argues the Court improperly allowed the Commonwealth to put into evidence Patterson's conviction for third degree murder. The Defendant asserts the information was not relevant to any issue in the case. The Commonwealth argues the information was relevant and was not prejudicial to Defendant.

The Court found that Patterson's conviction was relevant to this case as the Commonwealth's evidence showed Patterson's involvement in the case and his connections to the Defendant. The defense asserted that Defendant was merely in the wrong place at the wrong time and knew nothing of this murder; the admittance of Patterson's third degree murder conviction shows Defendant's connections to Patterson to show that his close friend was a murderer. Being that the three men, Defendant, Durrant, and Patterson considered themselves the "three kings" and with Patterson's murder conviction and Durrant's confession to murder, it supports the Commonwealth's theory that the Defendant was not just in the wrong place at the wrong time. Therefore, the evidence was properly admitted.

ORDER

AND NOW, this 1st day of October 2008, based on the foregoing Opinion, it is hereby ORDERED AND DIRECTED that Defendant's Post Sentence Motion is DENIED.

Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified that he has the right to appeal this Order within thirty days (30) of the date of this Order to the Pennsylvania Superior Court. He also has the right to the assistance of counsel in the preparation of the appeal. The Court notes Defendant is represented by court appointed counsel who will continue to represent him through any appeal which may be taken. Since the Defendant has been convicted of the offense of Murder in the First Degree with a sentence of life imprisonment, he shall not be eligible for bail under Rule 521(B).

By The Court,

Nancy L. Butts, Judge

cc: Ronald C. Travis, Esq.
DA (EL & KO)
Hon. Nancy L. Butts
Trisha D. Hoover, Esq. (Law Clerk)
Gary Weber, Esq. (LLA)