IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	NO. 2025-2005
	:	
JONATHAN MITCHELL,	:	
	:	
Defendant	:	1925(a) OPINION

Date: June 2, 2008

OPINION IN SUPPORT OF THE ORDER OF MAY 1, 2007 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Jonathan Mitchell (hereafter, "Mitchell") has appealed from this court's order of May 1, 2007 in which he was sentenced to a term of confinement at a State Correctional Institution for the rest of his natural life. The court sentenced Mitchell following a jury trial in which he was found guilty on April 27, 2007. On appeal, Mitchell asserts that the court committed twelve errors before and during his trial. This court is of the opinion that none of the alleged errors were committed therefore Mitchell's appeal should be denied.

I. BACKGROUND

A. FACTS

On May 24, 2005, at approximately 12:30 a.m., several residents occupying separate apartments at 705, 706, and 659 Hepburn Street in Williamsport, heard a loud noise that resembled the sound of a crash across the street on High Street. Notes of Testimony, 4/19/07, pg. 49, 56, 68. Two of the resident/witnesses, Rodney Wyatt and Carrie Bernard, testified that they heard an additional sound immediately before they heard the crash. Bernard stated she heard gunshots, ***Id***. at 56, and Wyatt stated he heard what sounded like a car backfiring several times immediately before he heard the crash. ***Id.*** at 68, 71.

Upon hearing the crash, all three witnesses testified to observing a car smashed into a telephone pole on High Street. ***Id***. at 49, 56, 69. Shortly thereafter all three witnesses called 911 separately. ***Id***. at 50, 57, 69. One witness, Jessica Baker, who lived at 705 Hepburn Street, testified that immediately after she heard the crash from inside her apartment she ran to her window and observed a car smashed into the telephone pole. ***Id***. at 49. As she was looking out the window at the accident scene, she saw a black male, wearing a red hooded sweatshirt, exit the front passenger side of the vehicle. ***Id***. at 50, 52. Baker saw the individual run down the sidewalk, travelling south, toward Hepburn Street. ***Id***. 50-51, 53. Bernard also testified to seeing a young black male, around 5'9'' or 5'10'', 150-160 pounds, wearing a red windbreaker and dark colored baseball cap, running from the accident. ***Id***. at 57-59. Bernard stated that the person looked as though he was in a hurry to leave the accident scene. ***Id***. at 65.

Wyatt testified to approaching the crashed car before the police arrived at the scene to ensure there were no injured persons inside needing assistance. ***Id.*** at 69. Wyatt walked up to the driver's side of the vehicle and saw a man with light brown skin sitting in the front seat, blood coming from his head. ***Id***. 69-70. At this time, Wyatt stated, the police arrived and he flagged them over to the scene of the accident. ***Id***. at 70. Wyatt estimated that five to seven minutes had elapsed from the time he heard the crash until the time police arrived. ***Id***.

Officer Jason Bolt of the Williamsport Police Bureau testified that he received a dispatch to the scene of the accident at the 300 block of High Street at 12:29 a.m. ***Id***. at 79. A short distance from the scene, both Officer Bolt and his partner in the patrol car, Officer Lawrence, saw a black male in a dark colored hooded sweatshirt walking south on the west side of the Hepburn Street. ***Id***. at 80-81. Officer Bolt noticed the male talking on a cell phone while he was walking. ***Id***. at 81-82.

As the first officer on the scene at 12:31 a.m., ***Id***. at 84-85, Officer Bolt testified that he saw the maroon Pontiac crashed into the telephone pole. Defense stipulated to the fact that when police arrived at the scene the motor of the Pontiac was running and the car was in drive. ***Id***. at 105. Officer Bolt forced open the driver's side door and checked the status of the driver and turned off the car. ***Id***. at 83. He ascertained that the driver was not breathing, had a lot of blood on his face, and had sustained gun shot wounds. ***Id***. at 83, 86.

Officer Bolt secured the scene for a few minutes until the Pennsylvania State Police and forensic services arrived and notified his partner and highest ranking officer of the victim's gunshot wounds. ***Id***. at 86. The driver of the Pontiac was pronounced dead at the scene by paramedics. ***Id***. Under the waist band of the deceased driver, police found two plastic baggies; one field tested positive for cocaine and the other for marijuana. ***Id***. at 106. The contents of the baggies were taken to the Wyoming Regional Lab where they underwent chemical testing resulting in a finding of 2.8 grams of marijuana and 3.3 grams of powder cocaine. ***Id***. at 116.

Police also found bullet fragments and casings from a 9mm gun on the driver's side floor of the vehicle. ***Id***. at 108. It was later determined that a total of 5 shots were fired from a 9mm. ***Id***. at 130. Officer Arnold Duck, Jr. testified that these casings are ejected automatically from a semi-automatic handgun when fired. ***Id***. at 103. Sergeant Eric Wolfgang of the Pennsylvania State Police at the Bureau of Forensics, Ballistics Section, testified that all of the submitted discharged cartridges were from the same make of firearm, a 9mm Luger. ***Id*** at 157. Sergeant Wolfgang also testified that through his examination there was no indication that the bullets were fired by more than one gun. ***Id***. at 161. After a fingerprint swipe of the vehicle, Officer Duck stated there were no usable prints found from the passenger's side of the victim's vehicle. ***Id***. at 115.

Officer David Ritter who responded to the scene, testified that when they were trying to identify the victim at the crime scene, they were unable to find a wallet or driver's license on his body or in the vehicle. ***Id***. at 118. In an effort to identify the victim, Officer Ritter called on the apartment at 316 High Street where he had been notified a window had been broken that night. ***Id***. at 118-119. The officer speculated that the incidents could possibly be related, and therefore called on the resident to interview her. ***Id***. Inside the apartment of Judy George at 316 High Street, the officers found a bullet fragment on the bedroom floor which matched the bullets found inside the victim's vehicle. ***Id***. at 119. The officers resolved that the bullet came from the victim's vehicle and broke George's window. ***Id***. From the holes found in the vehicle, the police determined that the shots were fired from inside in the front passenger's side of the vehicle. ***Id***. at 119-120. Finally, the police found a cell phone in the vehicle which the Defense stipulated was the cell phone of the victim. ***Id***. at 133.

The victim was later identified as Idreise Jones. ***Id***. at 118. At the autopsy, Officer Ritter testified that the victim sustained three gunshot wounds to the face, one just below his eye and two in his cheek. ***Id***. at 126. Dr. Saralee Funke who performed the autopsy testified that the cause of death was multiple gun shot wounds, the result of being shot three times in the face. ***Id***. at 139-140. Dr. Funke stated that all three gunshot wounds were located on the right side of the victim's face and had been fired at close range. ***Id***. at 140-141. Dr. Funke ascertained that the victim would have been rendered incapacitated almost immediately after sustaining these wounds. ***Id***. at 148.

Sergeant Raymond Kontz, III, and Lycoming County Detective Edward McCoy, the investigating officers in this case, held a series of interviews following the shooting which led them to contact the following individuals: (1) Nolan Proctor, the last person to see the victim

alive that night; (2) Tracy Roberts, one of the last people to be with Mitchell before the time of the homicide; (3) the residents and occupants of Ronald Gibbs' home at 824 Park Ave., in Williamsport; (4) Lakeya Anderson, Mitchell's girlfriend during the time period of the shooting; and (5) Marsha Cooper who lived in an adjacent apartment from Tracy Roberts at 309 Hepburn Street and Mitchell's phone records indicate he called that night minutes after the shooting occurred. At trial, these witnesses testified to events which transpired involving Mitchell the night of the homicide on May 23rd and May 24, 2005.

The last person to see Idreise Jones alive on the night of May 23, 2005 was Nolan Proctor, a college student. N.T., 4/20/07, pg. 105. That night Proctor was drinking at a friend's house at 868 ½ Park Avenue when he called Jones in an alleged effort to obtain alcohol because Proctor and his friends were under the legal age limit to make the purchase. ***Id***. at 106, 110. That night, the cell phone records of Jones indicate that Proctor placed three cell phone calls to Jones in quick succession; calls at 12:06 a.m., 12:13 a.m., and 12:15 a.m. ***Id***. at 107. Proctor testified that Jones came to the residence at 868 ½ Park Avenue, picked Proctor up in his car, and the two drove a couple blocks to the Quik Six store. ***Id.*** 107-08. Proctor then stated that after the beer purchase, Jones left him and drove up High Street. ***Id***. 108-09. Proctor testified that Jones told him he had to make "a couple more stops-he got to run to High Street then he was going home for the night." ***Id***. at 118. Proctor did not see Jones again that night, and learned of his death the next morning. ***Id***. at 109.

Agent Kontz testified that he believed Proctor contacted Idreise Jones to purchase drugs and that the two never purchased alcohol as Proctor claimed. N.T. 4/26 & 27/07, pg. 18. Proctor owned a glass shop where smoking pipes are sold. ***Id***. These shops are known as "head shops",

establishments where pipes for marijuana are sold. ***Id***. Agent Kontz stated that the phone calls made to Jones in quick succession are indicative of a drug deal. ***Id***.

At trial, Tracy Roberts testified that she had been socializing with Mitchell regularly for a couple months before the date of the homicide and was with Mitchell the day and night of May 23, 2005. N.T., 4/20/2007, pg. 12-13. The day of May 23rd, Mitchell and Roberts were drinking, smoking marijuana in Pennsdale and visiting various locations around High Street, one of which was the home of Ron Gibbs. ***Id***. at 15. The couple stayed at Gibbs' house for some time during the day while Mitchell spoke to Gibbs outside on the porch. ***Id***. at 16. Mitchell then informed Roberts that he had to do something by 10:00 p.m. and that he needed to drop her off back at her home at 309 High Street, the Victoria Garden Apartments. ***Id***. Roberts testified that at about 10:00 p.m. she arrived home. ***Id***. Mitchell then drove to pick up his girlfriend, Lakeya Anderson, from her work in the city of McElhattan, at 11:00 p.m. N.T 4/25/07, pg. 119. Mitchell picked Anderson up at 11:00 p.m., then drove the 30 minutes back to Anderson's house, dropping her off at approximately 11:30 p.m. ***Id***. Roberts stated that after she was dropped off by Mitchell at 10:00 p.m., she waited around a while for Mitchell to return, and when he failed to appear, she went to Ron Gibbs' house to see if he was there. N.T. 4/20/07, pg. 17.

When Roberts arrived at Gibbs' home, Gibbs was there watching a movie and eating Chinese food along with his girlfriend Dovanna Stevens, their friends Renata McKee and Gregory Logan, and Stevens' three children. ***Id.*** at 119. Stevens testified that sometime between 10:30 p.m. and 11:00 p.m., Roberts came to Gibbs' home and appeared "very, very nervous", she was "shaking profusely", looked "frantic" and Stevens stated she "knew something was wrong with her." ***Id***. at 122, 135, 140. Stevens did not believe Roberts was in need of drugs but that her appearance was due to trauma. ***Id***. at 141. Roberts was only there about five minutes. ***Id***. at

145. Roberts testified that she went to the Shamrock bar for the night when she found that Mitchell was not at Gibbs' home. ***Id***.

Stevens testified that sometime after Roberts left the house, Mitchell "burst" through the back door and had "a whole lot of blood…all over him." ***Id***. at 123, 133-34, 158. Stevens stated that when Mitchell came into the house he said, "I rocked that nigger." ***Id***. at 123, 160. Stevens testified that "to rock" someone meant to kill them. ***Id***. at 174. McKee and Gibbs also testified that Mitchell came into the house and said "I rocked that nigger" and that Mitchell had blood on his clothes and all over the left side of his body. N.T., 04/23/07, pg. 11-12, 47-48. McKee stated that because she knew to "rock" someone means to shoot or kill them in street slang, she assumed the wet substance on Mitchell was blood. ***Id***. However because he was wearing dark colored clothes, a burgundy hoodie and dark jeans, it was more difficult for McKee to determine the color of the substance. ***Id***. At that point Gibbs took Mitchell upstairs to wash the blood off of him in the shower and change clothes. ***Id***. at 12-13. Gibbs then took Mitchell's bloody clothing, placed them in a plastic garbage bag and disposed of them in the trash. ***Id***. at 13, 48. Stevens stated that when Mitchell came back downstairs he was wearing Gibbs' clothes. N.T., 4/20/07, 129-30.

Stevens then saw Mitchell make a cell phone call and say to the person on the phone "they should not have duct taped me and kidnapped me." ***Id***. at 131. McKee testified that she heard Mitchell place a call to his girlfriend, Lakeya Anderson, to inform her that he needed a ride to go get her car which he said he left "close to the scene of the crime." N.T., 4/23/07, pg. 13, 34. Anderson's phone records indicate she received the call from Mitchell at 12:43 a.m. The scene of the crime was only 0.6 to 0.7 miles from Gibbs' home. ***Id***. at 163. McKee also testified that when she went upstairs to use the bathroom she saw money on the floor. ***Id***. at 13.

Anderson testified that when Mitchell called that he said he needed to be picked up because it was "hot outside," meaning there were many police out that night. ***Id***. at 79.

After he made this phone call, Anderson arrived outside Gibbs' home with her sister, Tamika Clark, in Clark's car to pick up Mitchell. ***Id***. at 80. Mitchell had left Anderson's car at the Sunoco gas station in the area of Sixth and High Street. ***Id***. When Anderson and Clark arrived at Gibbs' house, Mitchell left with them to get the car, which Anderson then drove back to her residence, with Mitchell riding in the passenger seat. ***Id***. at 81-82.

On the way back to Anderson's, the two stopped at a gas station close to her residence where they purchased some blunts to smoke the marijuana Mitchell stated he had in his possession. ***Id***. at 82. When they arrived back at Anderson's, Mitchell told her that he needed to go to Philadelphia the next day to do "something important" and that he had to meet with his parole officer. ***Id***. at 82-83, 121. He asked Anderson to drive him there early the next morning. ***Id***. at 82-83. At trial Mitchell testified that he did not in fact have to meet with his parole officer in Philadelphia. N.T. 4/25/07, pg. 106. Anderson watched Mitchell pack a bag that night in which he placed a semi-automatic handgun and some clothes. N.T. 4/23/07, pg. 83.

The next morning, Mitchell, Anderson, and their friend Lanara Oliver started the drive to Philadelphia. ***Id***. at 84. At the half-way point between Williamsport and Philadelphia, they stopped to get some gas. ***Id***. Anderson and Mitchell got out of the car at the gas station, at which point Mitchell told Anderson that Idreise Jones was dead and that Mitchell had "put out that nigger with his maker and his life was worth $180." ***Id***. As Mitchell was paying for the gas, Anderson noticed the money he used had blood on it. ***Id***. at 85. Although not privy to the conversation between Mitchell and Anderson the day of May 24th, Lanara Oliver who was

riding with them testified that she noticed Anderson was visibly upset after they stopped for gas. ***Id***. at 136.

Anderson testified that after Mitchell told her Idreise Jones was dead she began to cry, and in response Mitchell told her not to cry for Jones because of how Jones had hurt Mitchell during an incident in Philadelphia in 2000. ***Id***. at 84-85. As Anderson understood it, Jones had been part of a group that kidnapped Mitchell, duct taped him, beat him up and left him for dead. ***Id***. at 84-85. On a later occasion, Anderson testified that Mitchell told her he killed Jones for the part he played in the kidnapping incident in Philadelphia. ***Id***. at 110.

Detective Shawn Gunshie of the Philadelphia Police Department testified that he interviewed Mitchell in the hospital on January 19th, 2000, and that Mitchell had described the kidnapping and beating incident, alleging that Idreise Jones had been among the men involved in his beating. ***Id***. at 125-126. Gunshie's report of the incident, which was signed by Mitchell, reflects that Mitchell stated Idreise Jones had kicked and punched Mitchell during the kidnapping incident. ***Id***. at 126. Idreise Jones was subsequently charged with the beating and kidnapping of Mitchell, along with the other individuals involved, and the case went to trial. ***Id***. at 127. However, the case was discharged because Mitchell refused to testify to the facts he gave in his interview with Detective Gunshie indicating Idreise Jones, among others, in his beating. ***Id***.

On July 3, 2005, after Mitchell's return from Philadelphia, Anderson found that he had gotten rid of his gun and he requested that Anderson buy him another semi-automatic 9 mm Lugar, as well as ammunition. ***Id***. at 86-87. Anderson complied with the request. ***Id***.

In August of 2005, Mitchell was incarcerated in Philadelphia County Prison on unrelated charges consisting of possession of a firearm without a license, possession of a firearm by an

unauthorized person and possession of marijuana. N.T. 4/25/07, pg. 110-111. During his incarceration, Mitchell wrote Anderson several letters, four of which were read into the record at his trial. N.T. 4/23/07, pg. 96-101. Commonwealth's Exhibit 69A-D. The letters contained statements such as the following: "…if you haven't noticed, you are in love with a man who could care less about another's life, and the fucked up thing about it is a person doesn't even have to make me that mad for me to take their life like it means nothing." Com. Ex. 69A. "I've realized that life would never be fair to me. So whenever I get out of this situation, I'm going to sell more drugs than I ever have, shoot more people than I ever have, rob more people than I ever have…" Com. Ex. 69C. "I can care less about the people who turn their backs on me because they'll be the same mother fuckers that I shoot and/or kill when I get out of this bitch." Com. Ex. 69A.

Testimony from Mitchell, his Mother Linda Mitchell, and a mutual friend of Mitchell's and the victim's, Hakim Handy, all indicated that there was no bad blood between Mitchell and the victim, Idreise Jones, stemming from the January 2000 Philadelphia incident. (Jonathan Mitchell, N.T., 04/25/07 pg. 76; Linda Mitchell, N.T. 4/24/07, pg. 61; Handy, N.T. 4/24/07, pg. 8-9). According to Mitchell, Jones had not played an active part in his beating or kidnapping and he did not feel anger towards Jones. N.T. 04/25/07, pg. 72. Both Mitchell and Handy testified that all three of them, Mitchell, Handy and the victim Jones, had known each other for the past fifteen years, were close friends, and socialized together regularly in Philadelphia and Williamsport. N.T. 4.24.07, pg. 6-7, N.T. 4/25/07, pg. 74. Mitchell testified that he never had a reason to kill Idreise Jones. N.T. 4/25/07, pg. 118.

Mitchell and Jeffery McBride also testified that from 11:30 p.m. to 12: 30 a.m. on the night of the homicide, Mitchell was with McBride in the parking lot of the Williamsport

Hospital. Both Mitchell and McBride testified to the alibi that the men were engaged in sexual relations at this location during the time period the homicide would have occurred. N.T., 04/24/07, pg. 86-115; N.T. 4/25/07, pg. 85-87. Mitchell testified that he was reluctant to bring forth this alibi because he did not want the homosexual affair to be public when his family and friends were unaware of the affair. N.T. 4/24/07, pg. 90-91; N.T. 4/25/07, pg. 173. Both Mitchell and McBride stated that the two men remained together on the night of May 23rd until they got in a disagreement over Mitchell wanting to make a cell phone call while the two were together. N.T. 4/24/07, pg. 108. Mitchell's cell phone records show that he made a call at 12:20 a.m. ***Id***. McBride was unable to remember whether Mitchell made the call in his presence or whether he had already left. ***Id***. at 108-109.

Mitchell's cell phone records show that he made several calls to residents living in close proximity to where the shooting occurred. The first was at 12:20 a.m. to David Kemper Carter who lived at the Victoria Garden Apartments across the street from where the shooting occurred. N.T. 4/25/07, pg. 123. The second call was at 12:25 a.m., to Marsha Cooper's residence to get a hold of Tracy Roberts. ***Id.*** at 95-96. Marsha Cooper lives at 653 Hepburn Street in the Victoria Garden Apartments along with Tracy Roberts who also resides in the same apartment complex. N.T. 4/25/07, pg. 93. Cooper testified that because Roberts does not have a phone and she is able to view whether the lights are on in Roberts' apartment, Roberts often times accepts phone calls on Cooper's phone line from Mitchell among others. ***Id***.

Cooper testified that on the night of May 23rd, she heard a car crash outside her back window on High Street, of which she had a view from her apartment. ***Id***. at 95. Shortly after the crash she received the phone call from Mitchell at 12:25 a.m. asking if Tracy Roberts was there.

Id. at 104. Cooper told Mitchell on the phone that Roberts was not home as she did not see her lights on. ***Id*** at 95. Thereafter Cooper hung up the phone. ***Id***.

The phone records also show that Mitchell called Cooper's residence again at 1:33 a.m. and the call lasted four minutes. ***Id***. at 99-102. Cooper testified that because she did not remember talking to Mitchell for that long a period, the person who talked to him must have been Roberts. ***Id***. Cooper testified that because her phone is cordless and she and Roberts are friends, Roberts often takes Cooper's phone to her own apartment to use it. ***Id***. at 100-101.

Mitchell's phone records also show there was an incoming call at 12:34 a.m. from his aunts' residence in Philadelphia. ***Id***. at 96. Mitchell testified that calls at this late hour were normal for him because he worked as a drug dealer and as such did most of his dealings at night. ***Id***. at 98.

The Defense stipulated that Idreise Jones received his last call from Nolan Proctor at 12:15 a.m. and that the call to 911 first came in at 12:29 a.m. ***Id***. at 165. Therefore the Commonwealth stated the murder of Idreise Jones occurred sometime between 12:15 a.m. and 12:29 a.m. ***Id***. at 165-66. Mitchell testified that he left McBride at his house at 718 Campbell Street prior to making the 12:20 a.m. cell phone call. ***Id***. at 166, (McBride's address: N.T. 4/24/07, pg. 85). Mitchell also agreed with the Commonwealth's contention that shortly before 12:20 a.m. and up until 12:29 a.m., Mitchell was alone. ***Id***. Mitchell indicated that it was only a few blocks between McBride's house and the 300 block of High Street and that the distance could be driven in less than 9 minutes. ***Id***. at 171.

At trial, Detective Edward McCoy from the District Attorney's Office, testified that he measured the distance and driving time between McBride's home at 718 Campbell Street and the Uni-Mart located on Sixth and High Street where Mitchell stated he stopped to buy a splif; the

distance was 0.4 miles with a driving time of one minute, five seconds, traveling the speed limit. N.T., 4/26 & 4/27, pg. 23. From the Uni-Mart on High Street, Detective McCoy drove to the scene of the homicide at 309 High Street, the total driving time being four minutes and thirty-eight seconds with a distance of 1.4 miles. ***Id***. at 24. Detective McCoy also figured in a 30 second stop at the Uni-Mart. ***Id***. at 26. Detective McCoy also measured the trip taken by Idreise Jones from Nolan Proctor's at 868 1/2 Park Avenue to the location of the homicide at 309 High Street as being four minutes, ten seconds and a distance of 1.3 miles. ***Id***.

Shortly after the homicide on June 3, 2005, Kathy Wolfe and her husband who were sent to clean up a property at 814 Park Avenue that had gone into foreclosure, came upon the wallet of Idreise Jones. N.T., 4/19.07, 163-64. The wallet was found laying in a bush on the ground. ***Id***. at 165. Wolfe found the driver's license of Idreise Jones within the wallet. ***Id***. Wolfe stated that after seeing the license in the wallet she handed it over to her husband and neither one took anything out of the wallet, nor did they look further through its contents. ***Id***. at 166. Wolfe's husband then gave the wallet to a policeman he saw stopped at a red light. ***Id***. at 168. The officer was Fred Miller of the Williamsport Police who then took the wallet and entered it into evidence. ***Id***. At trial it was confirmed by Mitchell that the wallet was found three doors down from Gibbs' residence, the residence Mitchell visited around the time of the murder on May 23rd/24th, 2005. N.T., 4/25/07 pg. 129.

Tracy Roberts testified that sometime after the events of May, 2005, Mitchell made references to the homicide on High Street when they were involved in argument. N.T. 4/20/07, pg. 19. Roberts stated that while in an argument over money with Mitchell, Mitchell said to her something to the effect of, " 'B' I'll kill you like I did that mother fucker on High Street." ***Id***.

Roberts also stated that he made the same type of threat with similar wording on another occasion. ***Id***. at 20.

B. PROCEDURAL HISTORY

On December 15, 2005, a Criminal Complaint was filed and a warrant of arrest was issued against Mitchell for the following offenses: Count 1 Criminal Homicide, 18 Pa. C.S.A. § 2501(a); Count 2 Robbery, 18 Pa. C.S.A. § 3701(a)(1)(i); Count 3 Persons Not to Possess, Use Manufacture, Control, Sell or Transfer Firearms, 18 Pa.C.S.A. § 6105(c)(8)(a); and Count 4 Possessing Instruments of Crime, 18 Pa. C.S.A. § 907(b). Mitchell was arrested on December 19, 2005. Formal charges by the District Attorney's Office were issued May 24th, 2006. During the time of his arrest, Mitchell was serving time in a county prison in Philadelphia. On April 21, 2006, a pretrial conference was held before this court outlining the procedures for the trial. On January 27, 2006, the Honorable Nancy Butts ordered Mitchell to be transported to the Lycoming County Sheriff's Department for his preliminary hearing before the Honorable Magistrate Allen Page. On October 30, 2006, a hearing on the omnibus pretrial motion and discovery motions filed by Mitchell's counsel were held.

On February 21, 2006, the Public Defender's Office of Lycoming County was appointed legal counsel for Mitchell. After the preliminary hearing Mitchell wrote a letter to this court requesting the appointment of new counsel upon the belief that the representation offered through the Public Defender's Office was not adequate. On July 28, 2006, Defense counsel filed an Omnibus Pre-Trial Motion with this court making the following motions: a motion for a change of venue or venire, motion for individual voir dire and sequestration of jurors during voir dire and during trial and penalty phase if necessary, motion to exclude photographs, motion for grand jury transcripts, and a motion to preserve the right to amend the omnibus motion. The

court ordered a hearing to be held on January 26, 2007 to make a determination in the matter. At a hearing on January 26, 2007 Mitchell withdrew his request for new counsel and the matter was closed. On February 16, 2007, the District Attorneys Office filed a notice pursuant to Pa.R.Crim.P. informing the court that the death penalty would be sought in this case.

On March 20, 2007, Mitchell's counsel filed a Supplemental Motion for Change of Venue or Venire. In that motion, Mitchell argued such a change was necessary to ensure his rights under the 6th and 14th Amendments of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. Counsel for Mitchell argues that it would be impossible to select a fair and impartial jury in Lycoming County given the alleged community prejudice incited by media coverage of the ***Commonwealth v. Kyion Ball*** trial and articles in the *Williamsport Sun Gazette* lambasting "imported violence" from Philadelphia.

On March 23, 2007, counsel for Mitchell filed a Motion to Sever the Persons Not to Possess a Firearm from the Homicide charges on the grounds that evidence necessary to prove the firearms offense would not be admissible in a murder trial.

On March 23, 2007, Counsel for Mitchell filed Proposed Voir Dire Questions to address the concerns Defendant expressed in his Supplemental Motion for Change of Venue or Venire. On that same date the Commonwealth filed a notice to Defense counsel that it intended to offer at trial evidence of Mitchell's prior bad acts invoking the provisions under Pa.R.E. 404(b). Thereafter the Commonwealth filed an Amended Notice on March 27, 2007. The evidence included testimony from Lakeya Anderson, Mitchell's girlfriend during the time period of the homicide, and letters from Mitchell sent to Lakeya Anderson while he was incarcerated in Philadelphia on separate charges. On March 26, 2007 Mitchell's counsel filed a Motion in Limine averring that the above mentioned prior bad acts evidence is not admissible under

Pa.R.E. 404(b)(3) because its prejudicial effect far outweighs its probative value. Also on that date, counsel for Mitchell filed a Motion to Use Juror Questionnaire to ascertain the venire's feelings toward the death penalty which the Commonwealth gave notice of seeking in this case.

On March 27, 2007, following a pretrial conference, this court issued an order directing that jury selection for this case was to proceed on April 10th through April 13th and outlined generally the trial dates and voir dire procedures to be taken. Also in that order the court denied without prejudice Mitchell's Supplemental Motion for Change of Venue or Venire filed March 20, 2007 and provided that the issue could again be raised during jury selection if it became apparent that the issues raised therein would prevent the obtaining of an appropriate jury from the available jury pool. The order then granted Mitchell's Motion to Sever filed March 23, 2007 without objection by the District Attorney. In regards to the Motion in Limine filed by Defendant on March 26, 2007, the court directed a hearing on the motion be held on April 3, 2007 and for the Commonwealth to furnish the Defendant with further evidence on the matter. Finally, the court denied Mitchell's Motion to Use a Juror Questionnaire filed on March 26, 2007 with its reasoning its decision summarized on the March 27, 2007 record.

On March 30, 2007, Mitchell's counsel filed a Motion for Change to the Venire on the grounds that the jury panel composition did not represent a fair cross-section of the citizens of Lycoming County. Mitchell maintained that after a review of the 700 names of potential venire persons, he believed only one to be non-Caucasian when Lycoming County has an African American population of 4.3%. Mitchell argued that this potential jury composition violated his rights to due process and an impartial jury of the vicinage as guaranteed by Article I, Section 9 of the Pennsylvania Constitution and the 6th and 14th Amendments to the United States

Constitution. Therefore Mitchell requested his trial should be stayed pending a summons of a venire pool reflective of the community.

On March 30, 2007, counsel for Mitchell filed a Petition for Life Without Parole Jury Instruction on the grounds that he is entitled to such because the prior bad acts evidence the Commonwealth will introduce implies future dangerousness. Mitchell argues that to deprive the jury of such an instruction will result in a material misrepresentation and misperception of sentencing alternatives in violation of his due process clause under the 14th Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. Also on that date, Mitchell's counsel filed a Motion in Limine II to exclude evidence that one of the major Commonwealth witnesses purchased a new gun for Mitchell after the homicide. Mitchell argues that this evidence is not relevant and its probative value is far outweighed by its prejudicial effect.

On April 2, 2007, the Commonwealth filed its Proposed Voir Dire Questions—Death Penalty. On April 3, 2007, after a pre-trial conference on the record, the court denied Mitchell's Motion to use Jury Questionnaires on the grounds that the subject had been addressed at the time of the last pre-trial conference. Also on April 3rd, the court entered an order in relation to a photograph objected to by Defense particularly referenced on the record at a pre-trail conference as Defendant's Exhibit #1. In the order the court deferred its ruling as to the photographs admissibility until such times as evidence is appropriately developed for trial to determine the evidence's probative value.

On April 3, 2007, the court entered an order denying Mitchell's request to instruct the jury that the punishment of a life sentence under Pennsylvania law means a life sentence without being eligible for parole. The court found that such an instruction is not permissible under

Pennsylvania law, but that the court would revisit the ruling in the future depending upon evidence that would be introduced during the course of the trial.

On April 4, 2007, this court entered an order denying Mitchell's Motion for Change of Venire filed March 30, 2007. The court noted that counsel for Mitchell stipulated on the record at argument held on April 3, 2007 that the jury selection process and facts as referenced by this court in its order sustaining preliminary objections to the Defendant's civil complaints in case number 06-02,171, the order being filed March 1, 2007, is an appropriate statement as to the jury selection process. A copy of that order was attached as Appendix A to the April 3, 2007 Order. The court noted in its April 3rd order that in the absence of evidence that a constitutionally impermissible jury selection was utilized, under the law a challenge to the selection process must fail. Defense counsel acknowledged that no such evidence exists and that the procedures utilized by Lycoming County's jury selection process have been upheld as constitutional under ***Commonwealth v. Bridges***, 757 A.2d 859 (Pa. 2000), among other cases.

On April 4, 2007, this court entered an order denying Mitchell's Supplemental Motion for Change of Venue filed March 20, 2007. The order was entered without prejudice and called for the issues to be re-raised, if appropriate, during the course of jury selection.

Also on April 4, 2007, this court entered an order following a pre-trial conference and argument on the record held April 3rd, regarding Mitchell's Motion in Limine filed March 26, 2007, objecting to the introduction into evidence of prior bad acts proposed by the Commonwealth in their Amended Notice filed March 27, 2007. In that order, the court noted that the Commonwealth had since withdrawn its notice as to paragraph 4, testimony of Kariemma Morrison, and 5(b), portions of Mitchell's letter to Lakeya Anderson stating he would "physically hurt you." The court ordered that except as to paragraph 5(a), portion of Mitchell's

letter stating he was "robbing and stealing", Mitchell's Motion in Limine to exclude the evidence of prior bad acts pursuant to Pa.R.E. was denied. The court found that a denial was proper because the evidence's probative value outweighs its prejudicial effect and establishes motive, intent, plan, identity as well as absence of mistake or accident for the Commonwealth's contention that Mitchell committed murder in the 1st degree and/or murder in the 2nd degree.

The court also remarked in its order that Mitchell's counsel acknowledged at argument that many of the proposed statements it sought to exclude in its Motion in Limine are admissible as admissions made by the Defendant. As to the statement contained in the Commonwealth's Amended Notice under paragraph 5(a) that Mitchell was "robbing and stealing", the court sustained Mitchell's Motion in Limine on the ground that the court was unsure that the evidence had a probative value and that the context of the statements amount to the admission and statement of intent argued by the Commonwealth. The evidence in paragraph 5(a) in the Commonwealth's Notice was excluded therefore on the basis that its prejudicial effect outweighed its probative value.

On April 5, 2007, this court issued a *sue sponte* order modifying its order entered on April 4th in regards to Mitchell's Motion in Limine to exclude the letters sent to Lakeya Anderson. In the April 5th order the court referenced the ruling in ***Commonwealth v. Fortune***, 366 A.2d 783 (Pa. 1975) as well as the comments under Rule 400 of the Pennsylvania Rules of Evidence as the legal basis to modify the previous order. According to the holding in ***Fortune***, the court directed that Mitchell's Motion in Limine would be granted in regards to evidence listed under paragraph 2 and 5(e) and (g) of the Amended Notice. Paragraph 2 dealt with testimony from Tracy Roberts that Mitchell was known to commit robberies and other drug dealings and both 5(e) and (g) consisted of excerpts from letters written by Mitchell and sent to

Lakeya Anderson. The Order of April 5th sets out in detail the court's reasoning and legal grounds for modifying its previous order of April 4th.

On April 5, 2007, Mitchell's counsel filed a Motion for Continuance on the basis that recently discovered evidence in the form of 11 ½ hours of taped telephone calls and visits from the Lycoming County Prison may aid in the development of his defense. Defense counsel further called for a continuance because supplemental voir dire questions were necessary in light of the court's ruling on its Motion in Limine on April 5, 2007. On April 9, 2007 Mitchell filed his Supplemental Proposed Voir Dire Questions. On the morning of April 18, 2007, Defense for Mitchell filed a Notice of Alibi Defense alleging that during the commission of the homicide he was in the Williamsport Hospital Parking Lot and that witness Jeffrey McBride can testify to the veracity of this alibi. Later in the day on April 18th, this court entered an order after a hearing in relation to Defense counsel's request for continuance as well as to consider the appropriateness of the late filing of a Notice of Alibi Defense. The Motion for Continuance was denied as the reasons given by the Defense were deemed inappropriate by the court since Defense sought the continuance in order to reduce prejudice to the Commonwealth. The Commonwealth did not request the continuance nor were they adverse to beginning trial the following day as scheduled. Furthermore, the court noted the Commonwealth did not raise an objection to the late Notice of Alibi Defense.

On April 19, 2007, the court entered an order at the commencement of jury trial indicating the Commonwealth's withdrawal of Exhibit #1, which pictured the victim's face with rods showing the bullet trajectory.

On April 27, 2007, the jury found Mitchell guilty on Count 1, Criminal Homicide, Murder of the First Degree, Murder of the Second Degree and Murder of the Third Degree,

Count 2, Robbery and Count 4, Possessing Instruments of Crime. Accordingly the court ordered and directed the verdict be filed of record the same date.

On May 1, 2007, Mitchell was sentenced on Count 1, Criminal Homicide Murder in the First Degree to a term of confinement at a State Correctional Institution for the rest of his natural life. Under Count 2, Robbery, Mitchell was sentenced to a minimum of 5 years and maximum of twenty years incarceration at a State Correctional Institution and under Count 4 to a minimum of 12 months and a maximum of 5 years. Mitchell was given credit for time served from December 19, 2005. The sentences given are to be served consecutive to each other and consecutive to any other sentence Mitchell is serving. Additionally, the court ordered under Count 1 that Mitchell pay a fine of $10,000 as well as restitution to the Victim Compensation Assistance Program in the amount of $2,100, and an additional $200 to Geila Tucker Jones. The court acknowledged in its sentencing order that for sentencing purposes, Murder in the Second Degree under Count 1 merges with Murder in the First Degree.

On July 18, 2007 Mitchell filed a Post-Sentence Motion laying out three counts for the court to address. Count I consisted of a Motion for a New Trial, Count II was a Motion in Arrest of Judgment, and Count III was a Motion to Reconsider Sentence. On September 7, 2007 counsel for Mitchell filed a Memorandum in Support of Post-Sentence Motions. On September 19, 2007, the Commonwealth filed a Memorandum in Opposition to Defendant's Post-Sentence Motion. A hearing was held on the matter of the Post-Sentence Motions on October 1, 2007. On October 4, 2007 this court entered a motion denying Mitchell's Post-Sentence Motion.

On October 22, 2007 Mitchell filed his Notice of Appeal from the May 1, 2007 order. On October 24, 2007, this court filed an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Mitchell to file a concise statement of matters

complained of an appeal within fourteen days of the order. On November 6, 2007, Mitchell filed his Concise Statement of Matters Complained of on Appeal.

II. STATEMENT OF MATTERS OF ERROR CLAIMED UPON APPEAL

In his statement of matters, Mitchell raises twelve issues listed (a) through (l). This opinion shall address each issue from the most to the least significant in regards to the appeal while maintaining Mitchell's alphabetical listing for that issue.

a. The Defendant avers the Trial Court erred by Denying his Motion in Limine for admitting into evidence portions of his letters Lakeya Anderson;

b. The Defendant believes that portions of the letters may have been sent out with the jury deliberations and avers that, if so, the court erred by permitting the jury to have that information pursuant to Rule 646(B) of the Pennsylvania Rules of Criminal Procedure;

c. The Defendant avers the Trial Court erred by denying his motion to use a jury questionnaire;

d. The Defendant avers that the Trial court erred by denying his request for change of venire or venue;

e. The Defendant avers that the Trial Court erred by denying his supplemental voir dire questions, except for question #1;

f. The Defendant submits that the Trial Court erred by denying his challenge to the entire jury array;

g. The Defendant submits that the Commonwealth's preemptory challenge to Juror #50 violated ***Batson v. Kentucky***, 476 U.S. 79 (1986);

h. The Defendant avers that the Court erred by failing to grant challenges for cause to Juror #9 and Juror #87;

i. The Defendant avers that the Court erred by failing to give a cautionary instruction during trial concerning the purpose of admission of the letters containing bad acts evidence;

j. The Defendant avers that he Court erred by giving a consciousness of guilt instruction;

k. The Defendant avers that the evidence presented was insufficient to prove beyond a reasonable doubt that he was the person who killed the victim; and

l. The Defendant avers the court abused its discretion when imposing a fine as part of his sentence.

Mitchell's Concise Statement of Matters Complained of on Appeal Pursuant to Rule 1925(B) Order.

III. DISCUSSION

(k) Sufficiency of Evidence to Prove Mitchell was the Person who Shot Victim

Mitchell claims the evidence presented to the jury was insufficient to prove beyond a reasonable doubt that he was the person who killed the victim. The court disagrees and finds the evidence presented by the Commonwealth was sufficient for a reasonable finder of fact to determine beyond a reasonable doubt that Mitchell was the individual who killed Idreise Jones.

In reviewing such a claim, we must view the evidence admitted at trial, and all reasonable inferences drawn there from, in the light most favorable to the Commonwealth as the verdict winner, to determine whether the jury could have found the element at issue beyond a reasonable doubt. ***Commonwealth v. Spotz***, 552 Pa. 499, 716 A.2d 580, 583 (Pa. 1998). Under this standard, it was reasonable for the jury to conclude that Mitchell was the person who shot Idreise Jones from the testimony of witnesses who were with Mitchell on the night of the shooting and shortly thereafter, evidence that Mitchell had a motive, propensity and opportunity to kill Idreise Jones, as well as a wealth of circumstantial evidence linking Mitchell to the crime.

Testimony from several witnesses concerning statements made to them by Mitchell on the date of the shooting and shortly thereafter provide sufficient evidence that Mitchell was the person who shot Idreise Jones. On the night Idreise Jones was killed, May 23, 2005, Ronald Gibbs, Dovanna Stevens and Renata McKee testified that Mitchell entered Gibbs' home

sometime after 11:30 p.m. with blood all over his clothes, specifically on the left side of his body. N.T. 4/20.07, pg. 123, 133-134, N.T. 4/23/07, pg. 11-12, 47-48. Blood on the left side of Mitchell's clothing is consistent with the method in which police forensics personnel testified Jones was shot; that is Jones was shot while seated in the driver's seat of his car, with the bullet trajectory coming from the front passenger seat of the car. Dr. Funke and Officer Ritter testified that all three gunshot wounds were on the right side of Jones' face, fired at close range from the inside of Jones' car. N.T. 4/19/07, pg. 140-141, 119-120. The shooter would have therefore been in the passenger's side of the vehicle and been covered with blood on the left side of his body from shooting the victim in this manner.

Moreover, when Mitchell entered Gibbs' house on the night of May 23, 2005, Stevens, Gibbs and McKee testified that Mitchell "burst" in yelling repeatedly "I rocked that nigger." N.T. 4/20/07, pg. 123, 160, N.T. 4/23/07, pg. 11-12, 47-48. It was generally understood by all those in the house that to "rock" means to kill or shoot someone. N.T. 4/20/07, pg. 174, N.T. 4/23/07, 11-12, 47-48. Gibbs also overheard Mitchell make a cell phone call to Lakeya Anderson asking her to come pick him up because it was "hot outside", meaning there were many police outside, and he had left his car at "the scene of the crime." N.T. 4/20/07, pg. 79; N.T. 4/23/07, pg. 13, 34. The following morning when Lakeya Anderson was driving Mitchell to Philadelphia he told her at the gas station that he killed Idreise Jones and that his life was only worth $180. N.T. 4/23/07, pg. 184. Sometime after the shooting of Idreise Jones, when Mitchell was in a fight with Tracy Roberts, he yelled something to the effect of "I'll kill you like I did that mother fucker on High Street." N.T. 4/20/07, pg. 19-20. High Street is the location where the homicide occurred.

There was also evidence supporting a finding that Mitchell had a motive and propensity to kills Idreise Jones. Lakeya Anderson testified that Mitchell told her he killed Jones for the part he played in Mitchell's kidnapping in Philadelphia in 2000. N.T. 4/23/07, pg. 110. Gibbs also testified that when Mitchell entered his home with blood on him, he heard Mitchell say to someone on his cell phone, "They should not have duct taped me and kidnapped me." N.T. 4/23.07, pg. 131. The interview conducted by Officer Gunshie of the Philadelphia Police in January of 2000, shows that Mitchell told the officer that Idreise Jones was among the men who duct taped, kidnapped and beat him. N.T. 4/25/07, pg. 125-127. Furthermore, Officer Gunshie testified that the charges against Idreise Jones were dropped in Mitchell's 2000 case because Mitchell refused to testify to the facts in the interview, leaving the subject unresolved. ***Id***.

Letters written by Mitchell to Anderson demonstrate that Mitchell had the propensity and intent to kill Idreise Jones. N.T. 4/23/07, pg. 96-101. In Commonwealth's Exhibits 69A-D, Mitchell states in his letters that he could "care less about another's life", that "a person doesn't even have to make me that mad for me to take their life like it means nothing" and when he is released from prison he will "sell more drugs than I ever have, shoot more people than I ever have…". This evidence, when viewed in a light most favorable to the Commonwealth, shows Mitchell had the propensity to kill in his ambivalence for the value of human life, and the motive of revenge to kill Jones for the part he played in Mitchell's 2000 Philadelphia beating and kidnapping.

Mitchell also had the opportunity the night of May 23, 3005 to carry out the shooting of Idreise Jones. Police pinpointed the time of the shooting as between 12:15 a.m. when Idreise Jones received his last phone call from Nolan Proctor, and 12:29 a.m. when the 911 call was received by police. N.T. 4/25/07, pg. 165-66. Mitchell's cell phone records and testimony

reflect he left the company of Jeffery McBride and then sometime thereafter made a telephone call at 12:20 a.m. ***Id***. From the time Mitchell left McBride until his arrival at Gibbs' house, Mitchell agreed with the Commonwealth's finding that he was alone in his car. ***Id***. Detective McCoy measured the distance and driving time from McBride's house, to the Uni-Mart, to the scene of the crime as 1.4 miles with a driving time of four minutes, thirty-eight seconds, taking into account a 30 stop at the Uni-Mart and travelling the speed limit. ***Id.*** Assuming Mitchell drove the speed limit, although he testified to generally exceeding the speed limit, this would have left him in close enough proximity to have carried out the shooting.

Circumstantial evidence also links Mitchell to the crime.

First, a black man wearing the same colored clothing Mitchell was seen wearing on the night of May 23, 2005 was seen running from the passenger side of Idreise Jones' car after it crashed. Witnesses of the crash stated the man running away was wearing a red windbreaker or a red hoodie, and Renata McKee who saw Mitchell burst into Gibbs' home testified Mitchell was wearing a burgundy hoodie as well. N.T. 4/19/07, 50, 52, 57, 59; N.T. 4/23/07, pg. 11-12, 47-48.

Secondly, Mitchell's cell phone records reflect that he made telephone calls to David Kemper Carter at 12:20 a.m. and Marsha Cooper's residence at 12:25 a.m. in an effort to reach Tracy Roberts. N.T. 4/25/07, pg. 123, 95-96. Both of these residences were in the Victoria Garden Apartments overlooking the crime scene. This evidence tends to prove Mitchell's knowledge of the shooting and attempt to get off the street and hide quickly in an apartment of a friend upon commission of the crime.

Third, there was testimony from Anderson that Mitchell had stolen $180 from Jones, and Jones' wallet was found three doors away from Gibbs' home in the bushes. N.T. 4/19/07, pg. 163-64.

Finally, Mitchell's actions directly after the night of May 23rd are indicative of guilt. In the early morning of May 24th, Mitchell requested Anderson to drive him to Philadelphia to meet with his parole officer, when in fact, as Mitchell testified later, he had no meeting with his parole officer. N.T. 4/25/07, pg. 106. Anderson watched Mitchell pack a bag full of clothes and place his 9mm semi-automatic in the bag. ***Id***. When Mitchell returned from his trip to Philadelphia on July 3, 2005, he no longer had the gun and requested for Anderson to purchase a new 9mm gun for him as well as ammunition. ***Id***. at 86-87. This action of unexplained flight to Philadelphia directly after the shooting and discarding of his gun are indicative of guilt and Mitchell's attempt to distance himself from the crime.

In a light most favorable to the Commonwealth the testimony established, the existence of a revenge motive, propensity and opportunity to kill, circumstantial evidence linking Mitchell to the crime including eye-witness reports, Jones' wallet and statements regarding Mitchell robbing Jones, plus Mitchell's flight and purging of his firearm early the next morning, provide an overwhelming amount of evidence sufficient for the jury to find beyond a reasonable doubt that Mitchell was the individual responsible for the killing of Idreise Jones. The evidence establishes that Mitchell entered Jones' car with the plan to kill him, shot three bullets into Jones' face at close range, and fled the scene and the city immediately following the crime. This is evidence of a pre-planned scheme to carry out a revenge killing for serious harm done by the victim, Idreise Jones, upon Mitchell, thereby establishing the elements of first degree murder and upholding the jury's verdict.

(a) Motion in Limine, Lakeya Anderson Letters

Mitchell's claim that the court erred in denying his request to exclude letters written by Mitchell to his girlfriend of the time, Lakeya Anderson, while he was incarcerated in the

Philadelphia County Prison on unrelated charges must also fail, particularly in light of their significance in establishing propensity and intent to kill Idreise Jones. Mitchell argues that the prejudicial effect of the letters far outweigh any probative value and as such should have been excluded under Pa.R.E. 404(b) concerning evidence of prior bad acts.

After a hearing on the matter held April 3, 2007, the court held that some of the letters could be admitted under Pa.R.E.404(b) as their probative value outweighed any prejudicial effect to Mitchell. The court discussed its reasoning for this decision on the record April 3rd and in two orders, one on April 4th and a subsequent opinion on April 5th, modifying the first opinion. Ultimately the court held that the Motion in Limine to exclude the letters was granted only as to contents listed under paragraphs 2, and 5(a), (e) and (g) of Commonwealth's Amended Notice filed March 27, 2007. The court contends it did not err in its ruling concerning the Motion in Limine denying the suppression of the remaining listed letters.

When reviewing the denial of a motion in limine, the reviewing court applies an evidentiary abuse of discretion standard of review. *See* ***Commonwealth v. Zugay***, 2000 PA Super 15, 745 A.2d 639 (Pa. Super.), appeal denied, 568 Pa. 662, 795 A.2d 976 (Pa. 2000) (explaining that because a motion in limine is a procedure for obtaining a ruling on the admissibility of evidence prior to trial, which is similar to a ruling on a motion to suppress evidence, our standard of review of a motion in limine is the same as that of a motion to suppress). A trial court's ruling regarding the admissibility of evidence will not be disturbed "unless that ruling reflects 'manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.'" ***Commonwealth v. Einhorn***, 2006 PA Super 322, 911 A.2d 960, 972 (Pa. Super. 2006).

It is established law that evidence which is not relevant is not admissible. Pa.R.E. 402;

Commonwealth v. Robinson, 554 Pa. 293, 304-305, 721 A.2d 344, 350 (1998) Pennsylvania Rule of Evidence 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401**.**

Relevance does not mean evidence is automatically admissible, however. Such evidence is only admissible where the probative value of the evidence outweighs its prejudicial impact. ***Robinson***, 721 A.2d at 350. As a panel of this Court explained in ***Commonwealth v. Broaster***, 2004 PA Super 458, 863 A.2d 588 (Pa. Super. 2004), "[r]elevant evidence may nevertheless be excluded 'if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" ***Broaster***, 863 A.2d at 592 (*citing* Pa.R.E. 403).

Because all relevant Commonwealth evidence is meant to prejudice a defendant, however, exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case. ***Broaster***, 863 A.2d at 592 (citations omitted). A trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts form part of the history and natural development of the events and offenses with which [a] defendant is charged. ***Id***.

Generally, evidence of prior bad acts unrelated to the offenses for which a defendant is being tried, is inadmissible unless it comes under a recognized exception and the need for the evidence outweighs the potential prejudice. ***Commonwealth v. Baez***, 759 A.2d 936 (Pa. Super. Ct. 2000). Moreover, as recognized by its comment, Rule 404 allows the introduction of other crimes or wrongs to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident only if their probative value outweighs the potential prejudice.

Pa.R.E. 404, cmt; ***Commonwealth v. Morris***, 493 Pa. 164, 425 A.2d 715 (1981); see also ***Commonwealth v. Aguado***, 760 A.2d 1181 (Pa. Super. Ct. 2000). Such evidence falling within an exception may only be admitted "upon a showing that the probative value of the evidence outweighs its potential for prejudice." See Pa.R.E. 404(b)(3).

In order for evidence of prior bad acts to be admissible as evidence of motive, the prior bad acts must give sufficient ground to believe that the crime currently being considered grew out of, or was in any way caused by the prior set of facts and circumstances; however, in weighing whether evidence of prior bad acts will be admissible, the trial court must still weigh the relevance and probative value of the evidence against the prejudicial impact of that evidence. ***Commonwealth v. Dowling***, 883 A.2d 570, 2005 Pa. LEXIS 2164 (Pa. 2005).

The letters were correctly admitted by the court as their probative value concerning Mitchell's intent and propensity to kill Idreise Jones far outweighs any prejudicial effect the letters have to show appellant's general propensity for criminal conduct. The significance of the letters in their regard was summarized by the court in the first part of the discussion relating to sufficiency of the evidence. (See also, argument of 1st Assistant District Attorney Kenneth A. Osokow, Esquire, as to relevance in relation to motives, which this Court also adapts as its reasoning, N.T. April 3, 2007, page 46, l. 3-22)

<u>(b) Portions of Letters Possibly Sent Out to Jury</u>

In his Concise Statement, Defendant states that he "believes" portions of the Lakeya Anderson letters "may" have been sent out to the jury during deliberations and if so the court erred under Pa.C.R.P. 646(B). After review of the record, and in the absence of any further evidence of such an error offered by the Defendant, the court disagrees with Mitchell's claim of

error. There is no indication in the record that portions of letters deemed prohibited from going out to the jury, did in fact get sent out to the jury during deliberations.

Furthermore, the Defendant's claim that portions of the letter's "may" have gone out to the jury, without an evidentiary offering as to what portions of letters or whether letters were in fact sent out, is a vague and over broad claim in the concise statement precluding review. "When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review." ***Commonwealth v. Dowling**,* 2001 PA Super 166, 778 A.2d 683, 686. "A Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." ***Id.**,* 778 A.2d at 686-687. In the absence of a more precise statement of matters or any affirmative evidence that portions of letters did go out to the jury, the Defendant's argument as to this issue is denied.

(c) Jury Questionnaire

Mitchell claims the court erred by denying his motion to use a jury questionnaire. This issue was addressed during an on the record pre-trial hearing on March 27, 2007 with reasons set forth on the record for the motion's denial. The actual order was dictated on the record at a subsequent proceeding held April 3, 2007. See, N.T. April 3, 2007, p.4. The court disagrees with Mitchell's assignment of error as to this issue.

The Pennsylvania Rules of Criminal Procedure permit trial courts to use juror information questionnaires in conjunction with the examination of prospective jurors. Pa. R. Crim. P. 631(D). In the context of voir dire, while the parties are permitted to supplement the court's examination, this grant is not unrestricted but rather is subject to limitations as the judge deems proper. ***Commonwealth v. Ellison***, 588 Pa. 1, 902 A.2d 419 (Pa. 2006). It is well settled Pennsylvania law that the scope of voir dire is within the sound discretion of the trial.

Commonwealth v. McGrew, 375 Pa. 518, 100 A.2d 467, 471 (1953). The decision of whether counsel may propose their own questions of potential jurors during voir dire is a matter left solely within the trial judge's discretion. ***Salameh v. Spossey***, 731 A.2d 649 (Pa. Cmwlth. 1999).

In this case, the court did not abuse its discretion in denying the request for a jury questionnaire because the use of such a questionnaire is not appropriate.

We stated our reasons for the denial of the use of the questionnaire on the record at the March 27, 2007 pre-trial hearing after hearing arguments of counsel (See, N.T. 3/27/07) p. 12; l. 18- p. 19 l.13. Defense counsel acknowledged that the jury questionnaire to be presented to the prospective jurors was different than that specifically referenced by the state rules. N.T., 3/27/07, pg. 12. Defense counsel also admitted that to allow such a questionnaire was entirely within the discretion of the court and that there was no legal authority existing to support its use or exclusion. ***Id***. at 13. Defense counsel stated at the hearing on March 27 that the purpose of the questionnaire was to gain as much information about the prospective jurors as possible, due to the gravity of the crime charged and the possibility of a death sentence, as well as to shorten the voir dire process. ***Id.*** at 13-14. The court found persuasive the Commonwealth's arguments as set forth at pp. 15-17 of the March 23 transcript which we adopt as part of our reasoning for denying the use of a voir dire questionnaire, most significantly the point that the use of such a questionnaire is a matter for the Supreme Court of Pennsylvania to implement an appropriate rule.

If this court had allowed use of the jury questionnaire its use could have been the basis for an ineffectiveness of counsel claim as this proposed detailed questionnaire and its areas of inquiry and subsequent procedures to utilize the responses are not authorized specifically by law.

See, ***Id***. at 17. Its use may have resulted in the elimination of jurors who under personal questioning may have indicated traits favorable to the Defendant or perhaps an alienation to the Defendant not apparent in written responses to the proposed interrogatories. The court felt that the many open ended questions as proposed by the questionnaire could

> spark different thoughts and completely different reactions of individuals who have not had the benefit of being present in a courtroom and receiving court instructions and other wise know some parameters in which they should appropriately be answering them may make it difficult, if not impossible, to ascertain what's really important in the juror's mind.

Id. at 18. The genuineness and the veracity of the jurors' responses can not be verified in the use of the questionnaire. As the court stated on the record neither the court nor counsel could be sure the juror was responding to the questions on his or her own and not being subjected to undue influence by a friend or family member in their completion of the form. See, ***Id***. Many of the proposed individual questions were inappropriate for voir dire, specifically questions 16 through 20. See, ***Id***.

The Defendant's request for a jury questionnaire was properly and fully considered by the court. As we noted on the record, after reviewing this specific questionnaire, the arguments of counsel, as well as recent writings, literature and lectures on the use of such a questionnaire, although the questionnaire may be helpful in some areas of voir dire, the court believes without legal authority supporting its use the questionnaire should not be allowed because it is cumbersome, it is potentially misleading, intimidating and misunderstood by jurors and it is subject to being prejudicial to both the Commonwealth and Defendant in a trial having the legal complexities of a death penalty case. See, ***Id.*** at 19. Therefore denial of the questionnaire was not in error.

(d) Change of Venire or Venue

Mitchell's next claim is that the court erred by denying his Motion for a Change of Venire or Venue. After an on the record argument held April 3, 2007, the court entered two orders, one addressing the Change of Venire on April 3rd and Change of Venue on April 4th. As to the denial of the Motion for Change of Venire entered April 3rd, the court would rely on its opinion entered that date as sufficient in laying out its reasoning and legal grounds for its ruling. The denial of the Motion for Change of Venue entered April 4th was without prejudice and allowed for the Defense to re-raise the issue, if appropriate, during jury selection beginning April 10th. Mitchell's counsel did not re-raise the issue. The court finds no error in its decision to deny the Motion for Change of Venue.

(e) Supplemental Voir Dire Questions

Mitchell argues the court erred in denying his Supplemental Voir Dire Questions, except for question #1.

As discussed above in (c) regarding jury questionnaires, the process of voir dire is within the sound discretion of the trial judge; discretionary rulings will be reversed only where the record indicates an abuse of the discretion given. ***Commonwealth v. Abu-Jamal***, 521 Pa. 188, 201 (Pa. 1989). The court would rely on its discussion in section (c) for its reasoning as denial of error as to this issue.

(f) Challenge to Entire Jury Array

Mitchell claims the court erred in denying his challenge to the entire jury array. This issue was addressed in the court's Order of April 3, 2007 denying Mitchell's Motion for Change of Venire on the grounds that the jury array was not a fair and representational cross-section of

the community. The court relies on the subsequent April 4, 2007 Order and Opinion as sufficient to explain its reasoning and the legal basis as to the recognized validity and constitutionality of the Lycoming County venire process.

(g) ***Batson*** Challenge to Juror #50

Mitchell next claims that the Commonwealth's peremptory challenge to Juror #50 violated the ruling under ***Batson v. Kentucky***. 476 U.S. 79 (1986). After review of the case law and the record, the court finds no grounds for Mitchell's Batson challenge. A trial court's determination with respect to an allegation of purposeful discrimination in the jury selection process will be accorded due deference by the appellate courts and will not be disturbed in the absence of clear error. ***Commonwealth v. Young***, 536 Pa. 57, 637 A.2d 1313 (1993). ***Commonwealth v. Jackson***, 386 Pa. Super. 29, 562 Pa. Super. 338 (1989) (allocatur refused).

In ***Batson v. Kentucky***, the Supreme Court of the United States held that the Equal Protection Clause prohibits exclusion of jurors through peremptory challenges based solely on race. 476 U.S. 79 (1986). In subsequent decisions, the Court not only expanded the holding to prohibit the purposeful exclusion of prospective jurors based on their ethnicity or gender, but also determined that the defendant need not be a member of the group which allegedly was excluded through discriminatory use of peremptory challenges. ***Hernandez v. New York***, 500 U.S. 352 (1991) (plurality) (equal protection clause would be violated by use of peremptory challenges to exclude Latinos based solely on ethnic background). ***J.E.B. v. Alabama***, 511 U.S. 127 (1994) (equal protection clause prohibits exercise of a peremptory challenge based solely on gender); ***Powers v. Ohio***, 499 U.S. 400 (1991) (white defendant may object to purposeful exclusion of black veniremen). The court has also held that the prohibitions of ***Batson*** apply to the defendant as well as to the prosecutor. ***Commonwealth v. Garrett***, 456 Pa. Super. 60, 689

A.2d 912 (1997); (white defendant may not use peremptory strikes to exclude black members from jury based on race).

The party alleging improper use of peremptory challenges bears the burden of establishing a prima facie case of purposeful discrimination by showing that the stricken venire person is a member of a cognizable group; that the prosecutor used peremptory challenges to exclude members of that group; and that the circumstances surrounding jury selection support an inference that the prosecutor used the peremptory challenges in order to discriminate. ***Batson v. Kentucky***, 476 U.S. 79 (1986). A trial court should consider the totality of circumstances in evaluating a claim of discrimination, including factors such as the race of the victim, the witnesses, and the seated jurors; the number of strikes used against minorities; the percentage of minorities on the venire panel who were eliminated by peremptory strikes; past prosecutorial conduct in challenging members of minority groups at other trials; the type and manner of the prosecutor's statements and questions during voir dire; and other similarities and differences between challenged and unchallenged venire panel members. ***Commonwealth v. Jackson***, 386 Pa. Super. 29, 562 Pa. Super. 338 (1989).

Evidence of purposeful discrimination include evidence that use of peremptory challenges had a disparate impact on minority venire panel members; evidence that challenged venire panel members had no characteristic in common except for race; evidence that minority panel members were questioned in a manner that was especially likely to elicit disqualifying responses; and evidence that minority venire panel members were struck while white panel members who had similar characteristics were retained. ***Id***. If the moving party establishes a prima facie case, the burden shifts to the opponent to provide a neutral explanation concerning the manner in which the peremptory challenges were used. ***Commonwealth v. Dinwiddie***, 529

Pa. 66, 601 A.2d 1216 (1992). (The prosecutor must articulate a neutral explanation particular to the case in order to meet this burden). However, the proffered explanation need not rise to the level required to justify exercise of a challenge for cause. ***Commonwealth v. Hardcastle***, 519 Pa. 236, 546 A.2d 1101 (1988), cert. denied, 493 U.S. 1093 (1989).

In this instance, a prima facie case was made by the Defendant that the venire person, Juror #50, was the subject of discriminatory practices. Although Juror #50 indicated that she was of the Caucasian race by checking the box marked "Caucasian" on her jury questionnaire, she told the court during questioning that she was a mix of several different races including White, Black and Cherokee Indian among others. Notes of Testimony, 04/12/07, pg. 13, 16. The court recognized that Juror #50 was not Caucasian but a member of a minority race. ***Id***. at 12, 25. The Defendant therefore carried its burden as to the prima facie showing that the juror the Commonwealth sought to strike was of a minority race.

The court properly found, however, that the presumption of discrimination was rebutted by the Commonwealth's sufficient and credible showing of race-neutral reasons for the strike of Juror #50. Firstly, while the Commonwealth acknowledged that the juror was of a race other than Caucasian, because the juror marked "Caucasian" on her jury questionnaire and did not appear from sight to clearly be a member of a minority race, the Commonwealth adamantly contended that their motives for striking the juror were not race related. ***Id***. at 13. The Commonwealth argued, and the court agreed, that the Commonwealth had intentions to strike the juror before ever knowing her racial background. ***Id***. at 20, 22, 25.

Secondly, the Commonwealth was able to give two race-neutral reasons for striking the juror which the court found sufficient and not mere pre-text to conceal a discriminatory reason. The Commonwealth stated that it had intended to strike the juror based on (1) her answer to

question #5 in the jury questionnaire, that she or someone close to her had been arrested for a crime other than a traffic infraction; and (2) the fact that she was the wife of a Baptist pastor. ***Id***. at 14. Upon questioning, Juror #50 admitted that her daughter had been arrested for drug possession in Philadelphia nine months prior to appearing before the court and that her husband was a Baptist preacher of the Hepburn Baptist Church in Cogan Station. ***Id***. at 17. Although Juror #50 stated upon questioning by the court that she would not harbor bias for or against the Defendant because of the these facts, the Commonwealth maintained that they still wished to strike her on the grounds given. ***Id***. at 18.

The court properly concluded, under the totality of the circumstances, that the Defendant was unable to rebut the race-neutral reasons given by the Commonwealth for the strike of juror #50. Because there was evidence the Commonwealth never knew the juror's racial minority background and therefore did not assess her as such before her appearance for questioning before the court, the court deemed that race was not a consideration the Commonwealth used in its decision to use that strike. ***Id***. at 25, 26. Furthermore, the reasons given by the Commonwealth were sufficiently race-neutral to rebut the presumption of race-based prejudice in striking Juror #50. The Commonwealth expressed a concern that the juror's religious affiliation and marriage to a pastor would affect her ability to weigh the evidence and that the juror's close connection to someone arrested for a crime would make her bias in favor of the Defendant. Such concerns need not rise to the level of a challenge for cause when given to support a race-neutral reasons for a preemptory challenge, and as such are sufficient to uphold the strike. *See* ***Hardcastle***, 519 Pa. 236.

(h) Challenges for Cause to Jurors #9 and #87

Mitchell avers the court erred in denying Defendant's challenge for cause to Proposed Jurors #9 and #87. The court disagrees with this claim of error and finds the jurors were correctly selected as competent and neutral jurors.

Whether a juror should be excused for cause is a matter within the discretion of the trial judge. ***Commonwealth v. Stoltzfus***, 462 Pa. 43, 337 A.2d 873 (1975). The judge sees the prospective jurors, hears their responses on voir dire and is therefore in a better position to evaluate challenges for cause than the appellate court. ***Commonwealth v. Bighum***, 452 Pa. 554, 307 A.2d 255 (1973). A combination of circumstances which individually would not constitute cause may together provide a basis for discharging a juror. ***Commonwealth v. Fletcher***, 245 Pa. Super. 88, 369 A.2d 307 (1976).

"The burden of proving that a venireman should be excused for cause is on the challenger who must demonstrate that he or she possesses a fixed, unalterable opinion that would prevent him or her from rendering a verdict based solely on the evidence and the law." ***Commonwealth v. (James) Smith***, 518 Pa. 15, 540 A.2d 246, 256 (Pa. 1988). Moreover, from the voir dire examination, a prospective juror's ability and willingness to eliminate the influence of his scruples and render a verdict according to the evidence must be determined. ***Commonwealth v. Lane***, 521 Pa. 390, 555 A.2d 1246 (1989). The judgment in this regard must be based upon the juror's answers and demeanor. ***Commonwealth v. Bighum***, 452 Pa. 544,560, 307 A.2d 255 (1973). The underlying question is whether the prospective juror has formed a fixed opinion or is willing to be guided by the evidence. ***Commonwealth v. Sparrow***, 471 Pa. 490,500-01, 370 A.2d 712 (1977). If a juror has formed a fixed opinion, the court is not required to permit further questioning by the parties in an attempt to rehabilitate that juror. ***Commonwealth v. Jasper***, 531

Pa. 1, 610 A.2d 949 (1992) (prospective jurors who expressed unqualified opposition to death penalty in a capital punishment case could be excused without permitting defendant to ask any additional questions).

(1) Proposed Juror # 9

The court did not abuse its discretion in denying the Defendant's challenge for cause to Juror #9. The Defendant argued that Proposed Juror #9 should be stricken for cause because he could not envision a factual scenario in which he would vote for a life sentence rather than a death sentence if the defendant were found guilty of an intentional, premeditated, deliberate killing. Notes of Testimony 4/10/07, pg. 182, 186. After extensive questioning by Defense counsel, the court was satisfied that Juror #9 could and would be an impartial and fair, and would properly weigh the aggravating and mitigating circumstances and vote for life if that was the appropriate determination. The court therefore denied Defense's motion to strike Juror #9 for cause, however, the juror was stricken from the jury panel regardless of this ruling by Defense's use of a peremptory strike.

Generally, jurors who are predisposed to vote for the death penalty upon proof of first degree murder must be excused. ***Commonwealth v. Jermyn***, 516 Pa. 460, 533 A.2d 74,87 (1987); ***Commonwealth v. Holland***, 518 Pa. 405, 543 A.2d 1068 (1988). Such is not the circumstance in our case. Upon first questioning, Juror #9 stated that he was in favor of the death penalty, but did not know if he would always vote for it in a premeditated, deliberate intentional killing. N.T. pg. 179. After the same question was asked again, he stated that he would vote for it in such a situation, excluding a self-defense scenario. ***Id*** at 182.

Defense counsel found problematic Juror #9's response to the following questions:

> Defense Counsel: Can you envision any circumstance other than self defense that you would not vote for the death penalty?

Juror #: Yes.

Defense Counsel: And what do you believe that would be?

Juror #9: Maybe I should say no then.

Id. After this answer Defense counsel asked whether his support for the death penalty substantially effected his ability to decide life over death, assuming that an intentional, premeditate first degree killing had already been found. ***Id***. The juror replied that his beliefs would not effect his ability to decide life over death. ***Id***.

The court found under the totality of the circumstances and in light of the other questions and answers given, that the juror would and could fairly weigh the aggravating and mitigating circumstances in deciding a sentence and would follow the court's instructions as he responded such to all the Defense's questions. ***Id***. at 180-183. Furthermore, Juror #9 stated that he would not automatically vote for the death penalty if the Defendant were found guilty of premeditated murder, but would weigh the aggravating and mitigating factors on his own and could announce a sentence of life. ***Id***. at 181, 185.

The court reasoned that the Juror's problematic response in not being able to envision a factual scenario where a sentence of life would apply in an intentional, deliberate killing not involving self defense was a result of an ambiguous and overly difficult question on the part of Defense counsel rather than a flaw in the juror's ability to fairly weigh the evidence. ***Id***. at 187-188. The court stated that:

> I do note that he couldn't envision a situation, but at the same time given the somewhat ambiguous nature of the mitigating factors, I think it's very difficult maybe for someone to envision a situation where they are going to be voting for the penalty of life versus the aggravating factor without something more concrete. And in any fact may even be going into the area of getting the jurors to make up a pre-commitment as to the particular type of fact and finding that would be made.

Id. at 187-188. The court reasoned that asking a juror to conjure up factual scenario's in which he would vote for death was too difficult a request by Defense counsel, and perhaps an improper request fixing the juror to a particular factual situation where he would vote life or death.

The court further noted that in light of Juror #9's responses to all Defense counsel's other questions, the court believed the juror was convinced he could and would follow the legal principles that the court and counsel enunciated. ***Id.*** at 188. Given this determination the court properly refused the challenge for cause to Juror #9 as it believed the proposed venireman was capable and prepared to fairly weigh the mitigating factors.

(2) Proposed Juror #87

The court did not abuse its discretion in refusing to grant Defendant's challenge for cause to Juror #87. The Defendant argued Proposed Juror #87 should be stricken for cause because the she manifested a fixed opinion as to the death penalty, appeared unable to be guided by evidence and applicable law, and appeared confused by the instructions as to the law. After questioning and informative explanations given to the juror by the court, the court properly found otherwise.

Upon initial questioning by Defense, Juror #87 expressed the view that should the defendant be found guilty of premeditated murder, she believed the death penalty should be imposed automatically as a punishment befitting the crime. Notes of Testimony, 4/13/07, pg. 6-8. When instructed by the court and Defense council that this is not how the process of imposing a penalty operates and that she must appropriately weigh aggravating and mitigating circumstances to impose the death penalty, Juror #87 expressed an understanding of the process and willingness to be guided by the evidence and law, even if it meant imposing a verdict or punishment contrary to her personal beliefs. N.T. pg., 10, 24. The court was satisfied that the

juror's opinion as to the death penalty did not appear "fixed" after explanation by the court regarding how such penalties are imposed. ***Id.*** at 30-31.

Juror #87 further stated that she believed she could be fair in making such evaluations of guilt, innocence and penalty, could follow the applicable law, and could set aside any personal feelings in making these determinations. ***Id***. at 10, 18-19, 24, Taking into consideration the juror's demeanor, hesitancy in areas and answers, the court was satisfied that she both understood and was candid as to her responses regarding her desire to the follow the law. ***Id***. at 30.

The court noted that any confusion manifested by the juror during the Defense's instruction of law stemmed from Defense counsel's confusing questions and hypothetical fact scenario regarding presumption of innocence and the Defendant's refusal to take the stand not being held against him. ***Id***. at 31. The court determined that Juror #87's confusion was due to a layman's general unfamiliarity with legal terms of art and concepts and was satisfactorily ameliorated by explanations given by the court. ***Id***. at 30-3. The court found that most people in the juror's place would have had such misunderstandings given the type of instruction given by Defense counsel and foreign subject matter. ***Id***. As Juror #87 did not harbor a fixed opinion as to the death penalty, manifested a demeanor demonstrative of one willing to be guided by evidence and the law, and expressed a desire to fairly evaluate the case, she was properly retained by the court and empanelled as Juror #12.

(i) Cautionary Instruction for Admission of Letters

Mitchell argues the court erred in abstaining from giving a cautionary instruction during trial concerning the purpose of the admission of letters containing evidence of prior bad acts written by Mitchell to Lakeya Anderson. In this case the trial court did in fact offer a cautionary

instruction to the jury regarding the letters, therefore the Defendant's argument that the court erred by omitting such instruction is erroneous.

When examining jury instructions, we must determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. ***Blicha v. Jacks***, 2004 PA Super 448, P14 (Pa. Super. Ct. 2004) quoting ***Ferrer v. Trustees of University of Pennsylvania***, 573 Pa. 310, 345, 825 A.2d 591, 612 (2002) (citations omitted). Evidence of a defendant's prior criminal activity may not be admitted solely to establish his bad character or criminal propensity. *See* **Commonwealth v. Paddy**, 569 Pa. 47, 800 A.2d 294, 307 (2002). It may be admitted for various legitimate purposes, however, including to demonstrate motive or malice, so long as its probative value outweighs its prejudicial effect, and an appropriate cautionary instruction is given. *See* **Commonwealth v. Claypool**, 508 Pa. 198, 206, 495 A.2d 176, 179 (1985). In ***Claypool***, the court stated in regards to the admittance of prior bad acts evidence: "we are mindful of the potential for misunderstanding on the part of the jury when this type of evidence is admitted. Therefore, such evidence must be accompanied by a cautionary instruction which fully and carefully explains to the jury the limited purpose for which that evidence has been admitted." ***Id***. at 179.

In its charge, the court instructed the jury to consider the meaning of the letters and stated that the letters were before the jury for a very limited purpose of "tending to show motive and also for intent." N.T. 4/26 & 27/07, pg. 106, 108-109. The court further instructed the jury that such evidence must not be considered,

> to show Mitchell is a person of bad character or a person of criminal tendencies from which you might be inclined to infer guilt…nor may you in any way infer guilt to him based upon these prior actions in this case from the fact of him being involved in them. As I say, they are not that type of evidence of guilt…and you may be very careful to limit your consideration of them to that purpose.

N.T. 4/26 & 27/07, pg. 106, 108-109.

These cautionary instructions regarding the letters are consistent with the instructions that were agreed upon previously by Defense counsel during a conversation at side bar. N.T. 4/26 & 27/07, pg. 48-49, 52.

As Defense counsel previously agreed with the cautionary instruction proposed by the court, ***Id***., and such instructions were given to the jury during its charge, N.T. 4/26 & 27/07, pg. 106, 108-109, the issue as to wrongfully omitted cautionary instructions for evidence of the letters as prior bad acts tending to prove bad character is denied.

(j) Consciousness of Guilt Instruction

Mitchell avers that the court erred by giving a consciousness of guilt instruction to the jury. The court disagrees with Mitchell's contention.

When evaluating the propriety of a trial court's jury charge, it is axiomatic that the charge should be read as a whole. ***Commonwealth v. Overby***, 575 Pa. 227, 836 A.2d 20, 24 (Pa. 2003). Further, the trial court has broad discretion in phrasing its instructions as long as it presents the law to the jury clearly, adequately, and accurately. ***Id***. It is only when "the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue" that error in the charge will be found to be a sufficient bases for the award of a new trial. ***Blicha v. Jacks***, 2004 PA Super 448, 864 A.2d 1214, 1220 (Pa. Super. 2004), quoting, ***Ferrer v. Trustees of University of Pennsylvania***, 573 Pa. 310, 345, 825 A.2d 591, 612 (2002). We explained that [a] charge will be found adequate unless "the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error." ***Id.***

Generally, the trial court can use a flight/concealment jury charge when a person commits a crime, knows that he is a suspect, and conceals himself, because such conduct is evidence of consciousness of guilt, which may form the basis, along with other proof, from which guilt may be inferred. ***Commonwealth v. Hartey***, 424 Pa. Super. 29, 40, 621 A.2d 1023, 1029 (1993), appeal denied, ***Commonwealth v. Hartey***, 540 Pa. 611, 656 A.2d 117 (1994)(citation omitted). The court's instruction on this issue was as follows:

> There has been evidence introduced in this case that would tend to show that Mr. Mitchell left the Williamsport area on the morning of the offense at some hours after it occurred and went to the City of Philadelphia. The Commonwealth contends that this was a flight to avoid apprehension, or arrest, or other detention. Now, the Defense has, of course, maintained that he did so for other reasons. Now the credibility, weight, and effect of t his evidence is for you to decide.
>
> Generally speaking, when a crime has been committed and a person thinks that he is or may be accused of committing it, and he flees or conceals himself, such flight or concealment is a circumstance tending to prove the person is conscious of guilt. **Such flight or concealment does not necessarily show consciousness of guilt in every case. A person may flee or hide for some other motive and may do so even though innocent. Or a person may choose to travel of leave the area for some other appropriate reason without any impact at all upon his idea of a consciousness of guilt.**
>
> Whether the evidence of this traveling to Philadelphia is evidence of flight or concealment in this case, **whether or n**ot it should be looked at as tending to prove guilt, depends upon the facts and circumstances of this case and **especially upon the motives** that may have prompted the leaving of this area and going to Philadelphia. You may not find Mr. Mitchell guilty solely on the basis of this evidence of flight or concealment or his travel to Philadelphia.
>
> There was also evidence that tended to show Mr. Mitchell disposed of his clothing, the victim's wallet, and the gun that he allegedly used to commit the murder based upon the Commonwealth's contentions. If you believe any of this evidence you may consider it as tending to prove Mr. Mitchell's consciousness of guilt. **You are not required to do so.** You should consider and weigh this evidence along with all the other evidence is the case. And, again, you may pay not to find Mr. Mitchell guilty solely on the basis of this evidence as showing a consciousness of guilt.

N.T., 4/26 & 27/07, pg. 109-111. (Emphasis added). Upon reading the charge as a whole, there is no abuse of discretion. The trial court explained that a motive other than consciousness of

guilt may prompt flight. The charge was also not misleading, the court told the jury to consider this evidence in light of all the other evidence presented at trial and to make a determination for themselves as the weight of the evidence presented.

(l) Fine as Part of Sentence

Mitchell argues the $10,000 fine imposed as part of his sentence is an abuse of discretion by the court. The court disagrees with Mitchell's contention and finds the fine imposed reasonable in light of the sentence as a whole and the nature of the crime committed.

"Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." ***Commonwealth v. Roden***, 1999 Pa. Super. 105, 730 A.2d 995, 997 (Pa. Super. 1999) (quoting ***Commonwealth v. Harris***, 719 A.2d 1049, 1052 (Pa. Super. 1998). An abuse of discretion is not merely an error in judgment, but occurs when the record discloses that the sentencing court misapplies or overrides the law, exhibits partiality, bias or ill will, or reaches a conclusion that is manifestly unreasonable. ***Commonwealth v. Smith,*** 543 Pa. 566, 673 A.2d 893 (1996).

A court shall not impose a fine as part of a sentence unless it appears of record that a defendant is or will be able to pay the fine and the fine will not prevent the defendant from making restitution or reparation to the victim of the crime. 42 Pa. C.S. § 9726(b)(1)-(2). Furthermore, in determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose. 42 Pa. C.S. § 9726(d).

In this case the court properly considered the financial resources of the Defendant and did not impose a sentence that the Defendant was unable to pay. Mitchell was sentenced by the jury to a term of imprisonment for the duration of his natural life. Upon entering prison, Mitchell was

22 years old. If he remained at the lowest pay rate, 19 cents an hour, doing the least skilled work for prison inmates for a term of 40 years, his inmate account would accrue more than $10,000. A prison inmate has a work day of 6 hours and a 5 day work week. The highest hourly rate for a prison inmate is 51 cents an hour, and it is unlikely that an inmate would stay at the lowest rate of pay for their entire prison term as familiarity with a task leads to jobs entailing greater skill level and thus higher pay. (Therefore, 19¢/hour x 6 hours= $1.14 per day; $1.14/day x 5 days= $5.70 per week; $5.70/week x 52 weeks in a year = $296.40; $296.40 x 40 years = $11,856.00.) See Policy and Procedures, Commonwealth of Pennsylvania, Department of Corrections, Inmate Compensation, DC-ADM 816. March 20, 2008.

Additionally, the fine imposed upon Mitchell is not outside the amount allowed by statute. Under 18 Pa. C.S. §1101(1), for a conviction of murder, a fine up to $50,000 may be imposed upon a defendant. The $10,000 fine imposed upon Mitchell remains far below the maximum fine allowed by statute, and given the length of Mitchell's sentence, he is able to pay the fine by amounts accrued through inmate compensation from prison labor.

VI. CONCLUSION

The foregoing record and discussion demonstrate that no procedural or evidentiary error occurred during the trial, and even if an error of such nature were found, it is clearly harmless, given the overwhelming volume and weight of the evidence presented to the jury throughout the trial which established beyond a reasonable doubt that Jonathan Mitchell committed a pre-meditated, intentional murder of the first degree. Accordingly, Mitchell's appeal should be denied and the conviction and order of May 1, 2007 affirmed.

BY THE COURT,

William S. Kieser, Judge

cc: William Miele, Esquire
Nicole Spring, Esquire
Ken Osokow, District Attorney