

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-877-2010  
vs. :  
: Opinion and Order re:  
ROBERT GRAHAM, : Defendant's Post Sentence Motion  
Defendant :

**OPINION AND ORDER**

Before the Court is Defendant's post sentence motion. The relevant facts follow.

On June 22, 2009 at approximately 2:20 a.m., an individual wearing sunglasses and a camouflaged sweatshirt with the hood pulled up entered the Uni-Mart on West Fourth Street and approached the clerk, Debra Almashy, who was behind the counter doing some paperwork. The clerk asked, "Can I help you?" The individual pulled out a handgun and demanded that the clerk open the register. The clerk opened the register and placed the cash drawer on the counter. The robber grabbed the back of the cash drawer with his left hand and removed \$117 in cash, but no coins. The robber then told the clerk to open the safe. When the clerk told him that she couldn't, the robber threatened to shoot her. Again, the clerk told the robber that she couldn't open the safe. The robber then demanded cigarettes. When the clerk started to grab packs of cigarettes, the robber said, "No, cartons." The clerk placed 10 cartons of cigarettes on the counter. The robber went through them and took 5 cartons of Newport cigarettes and left. The clerk immediately called the police. According to the store's surveillance videotape, the entire incident lasted approximately one minute and eleven seconds.

The police responded to the Uni-Mart. As part of their investigation, the

police dusted for fingerprints. Latent fingerprints were obtained from the cash drawer and two cartons of cigarettes. The latent prints were sent to the Pennsylvania State Police Wyoming Regional Laboratory for analysis. Sergeant Floyd Bowen, who analyzed the latent prints, determined that the latent fingerprint on the back of the cash drawer matched Defendant's left thumb print.

About ten months after the incident, the clerk saw a photograph in a newspaper article and recognized the person in the photograph as the individual who robbed her.

Defendant was arrested and charged with robbery by threatening to inflict serious bodily injury, robbery by threatening to inflict bodily injury, theft by unlawful taking, receiving stolen property, terroristic threats, and possessing an instrument of crime. A jury trial was held during the week of March 5, 2012. The jury convicted Defendant of all the charges. On May 30, 2012, the Court sentenced Defendant to an aggregate term of 11 to 22 years of incarceration in a state correctional institution. Defendant filed his post sentence motion on June 7, 2012.

Defendant first asserts that the Court erred in denying his pre-trial requests for a Frye hearing regarding the fingerprint evidence that the Commonwealth presented in this case. The Court previously addressed this issue in its Opinion and Order entered February 7, 2011, which the Court relies on and incorporates by reference.

Defendant next asserts that the Court erred in allowing the Commonwealth to strike the only African American within the jury selection panel in violation of the United

States Supreme Court case of Batson v. Kentucky, 476 U.S. 79 (1986). The Court cannot agree.

The Pennsylvania Supreme Court has set forth the following framework for analyzing a Batson claim:

First, the defendant must make a prima facie showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race; second, if the prima facie showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) at issue; and third, the trial court must then make the ultimate determination of whether the defense has carried its burden of proving purposeful discrimination.

Commonwealth v. Hutchinson, 25 A.3d 277, 286 (Pa. 2011)(citations omitted).

It is not disputed that Defendant is an African American male and the Commonwealth struck the only African American potential juror on the jury panel. Defendant, however, is not entitled to relief, because the Commonwealth offered a credible, race-neutral reason for exercising one of its peremptory challenges to strike this juror.

The prosecutor explained that he was exercising a peremptory challenge to strike the juror based on the fact that he had been charged with, although not convicted of, indecent assault and may have felt he was treated unfairly by the system. The prosecutor placed an “X” next to the juror’s name on that basis before the juror even walked into the courtroom and before the prosecutor even knew what the juror’s race was. Since the prosecutor made his determination to strike the juror even before he was aware of the juror’s race, the defense has not satisfied its burden of proving purposeful discrimination.

Defendant next avers that the Court erred in denying his motion to limit the

degree of certainty expressed by the Commonwealth's expert that the fingerprint belonged to Defendant. Specifically, Defendant requested that the Commonwealth not be permitted to state that the fingerprint, within a reasonable degree of scientific certainty, belonged to Defendant. The Court cannot agree.

In Pennsylvania, for expert testimony to be admissible, the expert must express his opinion with reasonable certainty. See Pa.R.E. 702, Comment ("Pa.R.E. 702 does not change the requirement that an expert's opinion must be expressed with reasonable certainty"); Commonwealth v. Stallworth, 566 Pa. 349, 781 A.2d 110, 122 (2001)(it was appropriate to admit testimony from Commonwealth's expert that, to a reasonable degree of scientific certainty, blood on appellant's shoe was the result of contact transfer; testimony was not speculative despite the fact that there were many ways a contact transfer could have occurred); Commonwealth vv. Stoltzfus, 462 Pa. 43, 337 A.2d 873, 879 (1975)(expert testimony regarding cause of death admissible if opinion held to reasonable degree of medical certainty, not beyond a reasonable doubt). In fact, if the expert cannot express his opinion with reasonable certainty, it can be stricken from the record. See Commonwealth v. Hughes, 480 Pa. 311, 389 A.2d 1081, 1084 (1978)(trial court properly struck defense psychiatrist's testimony because the psychiatrist was unable to give a definitive opinion of appellant's insanity or sanity at the time of the offense). Therefore, it was not error for the Court to permit the Commonwealth's fingerprint expert to state his opinion to a reasonable degree of scientific certainty.

Defendant next asserts that the Court erred in denying Defendant's request to

question the Commonwealth's expert about any mistakes that may have been made in previous fingerprint analyses.

The admissibility of evidence is within the sound discretion of the trial court, which will only be reversed upon a showing of an abuse of discretion. Commonwealth v. Johnson, 42 A.3d 1017, 1027 (Pa. 2012)(citations omitted). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." Id.

The Court's recollection is that Defendant wished to cross-examine Sgt. Bowen about mistakes that were made in a Spanish train bombing incident where the fingerprint analyses, which were not conducted by Sgt. Bowen or anyone else from the Wyoming Regional State Police laboratory, erroneously implicated an attorney from the Pacific Northwest. The Court found that Defendant's proposed cross-examination was not relevant to the facts of this case.

Rule 401 of the Pennsylvania Rules of Evidence defines relevant evidence as "evidence having 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. The fact that other fingerprint examiners made a mistake in some train bombing case in Spain does not make it more or less probable that Sgt. Bowen made a mistake in his fingerprint analysis in this case. See Commonwealth v. Steele, 522 Pa. 61, 559 A.2d 904, 910 (1989)(testimony that two officers misidentified the defendant in matters

unrelated to his conviction was not relevant to show that the witnesses who identified the defendant were mistaken).

Defendant next claims that the Court erred in denying Defendant the ability to show that he was employed at the time of the alleged offense. The Court notes that this evidence was not offered to establish an alibi; Defendant withdrew his notice of alibi prior to trial and his employer was not his proposed alibi witness. Instead, Defendant wanted his employer to testify so that Defendant could argue he did not have a motive to rob the clerk, because he had a job.

The Court does not believe it abused its discretion in denying Defendant the opportunity to present the proffered evidence.

First and foremost, the Pennsylvania Supreme Court has held that testimony of income does not tend to prove or disprove any of the facts necessary to the crimes charged; therefore, such testimony is irrelevant and inadmissible. See Commonwealth v. Haight, 514 Pa. 438, 525 A.2d 1199, 1200 (1987)(testimony of a defendant's lack of income was inadmissible and its admission was not harmless error). The mere fact that one is employed does not necessarily mean that he or she does not have a motive for robbery. Law books in Pennsylvania are littered with cases where individuals who are employed commit crimes to obtain funds to address financial difficulties that arise despite their employment. In fact, it is quite common in theft and embezzlement cases for the employer to be the victim of the employee's crimes. Thus, the mere fact of employment does not show a lack of motive.

Furthermore, the Commonwealth did not present any motive evidence against Defendant.<sup>1</sup>

Defendant also contends that the Court erred in allowing the Commonwealth's affiant to provide his opinion that the Defendant's height and size matched the height and size of the person seen on the Uni-Mart's security cameras. The Court's recollection is that Defendant objected to this testimony on the basis that it would not assist the jury, and the jury could decide for themselves whether Defendant matched the height and size of the person seen on the Uni-Mart's security cameras. Again, the Court cannot agree.

The videotape of the incident from the security cameras depicted the perpetrator of the robbery, but neither the door frame nor any other fixed object in the store contained height markings or any other measurements to give the jury a frame of reference for the height or size of the perpetrator depicted on the videotape. During trial, the affiant went to the Uni-Mart and took measurements of various objects in the store, such as the height of the counter and the door frame or crossbar on the door. The affiant testified about these measurements, his own height, how high the objects were in relation to his height and his height in comparison to Defendant to give the jury a frame of reference. Based on these measurements and comparisons, the affiant testified that Defendant was the same height/size as the person seen on the Uni-Mart's security cameras.

The Court found this evidence was relevant, admissible and not unduly prejudicial. The evidence assisted the jury because the videotape did not show any height markings or other measurements to give the jury a frame of reference. Even if this evidence

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<sup>1</sup> The Court also notes that the proposed witness was not available to appear in court to testify. The witness went out of town on business, and the defense wanted to present the witness's testimony by telephone.

were construed as an opinion or inference that embraces an ultimate issue to be decided by the jury, such would not render it inadmissible. Pa.R.E. 704.

Defendant avers that the Court erred in denying Defendant's request to use the "In-Court Identification" jury instruction from New Jersey. The Court cannot agree.

"The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration." Commonwealth v. Koehler, 36 A.3d 121, 157 (Pa. 2012)(citations omitted).

The Court denied Defendant's request to utilize either a 2011 revision or 2007 revision of New Jersey's "In-Court Identification" jury instruction, because it did not accurately present Pennsylvania law to the jury. Both of Defendant's proposed identification instructions contained components that were contrary to Pennsylvania law. The 2011 revision enumerated and discussed factors such as stress, weapons focus and cross-racial effects. Although not labeled as cross-racial effects, the 2007 revision also contained language to the effect that people have greater difficulty in accurately identifying members of a different race. The Pennsylvania appellate courts have precluded expert testimony regarding such topics, finding such testimony would intrude upon the jury's basic function of deciding credibility. See Commonwealth v. Abdul-Salaam, 544 Pa. 514, 678 A.2d 342 (1996); Commonwealth v. Simmons, 541 Pa. 211, 662 A.2d 621 (1995); Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993); and Commonwealth v. Bormack, 827 A.2d 503 (Pa. Super. 2003).



In Commonwealth v. Robinson, 5 A.3d 339 (Pa. Super. 2010), appeal denied 19 A.3d 1051 (Pa. 2011), an appellant desiring to introduce expert testimony on the topics of “weapon focus,” reduced reliability of cross-racial identifications, and the decreased accuracy of an eyewitness in a high-stress, traumatic, criminal event, attempted to distinguish the earlier cases cited above by arguing that he wanted his expert to testify how the human mind operates, and not to express an opinion as to the credibility of a specific witness or the truthfulness of that witness’s testimony. He also sought a jury instruction as to the “inherent difficulties in making an accurate cross-racial identification.” Both requests were denied by the trial court. On appeal, the Superior Court found that, based on the cases cited above, the Pennsylvania Supreme Court would find appellant’s proposed expert testimony equally objectionable. Furthermore, the Superior Court found that the trial court “properly refused to instruct the jury as to inherent difficulties in making an accurate cross-racial identification.” 5 A.3d at 344. It noted that a jury instruction shall be given only when either the evidence of record supports the instruction or the instruction is as to a well established principle of law.” Id.

Here, as in Robinson, there is no evidence to support a jury instruction focusing on the difficulties in identifications that allegedly occur due to stress, weapons focus or cross-racial identification, and such a premise is not settled law in Pennsylvania. Therefore, it would be inappropriate to give a jury instruction from New Jersey, which contains language regarding cross-racial identification.

Given the limits in Pennsylvania case law, which preclude evidence and jury

instructions regarding stress, weapons focus and cross-racial identification and which this Court was bound to follow, the Court did not give the requested instructions. Instead, the Court was constrained to charge the jury in accordance with Pennsylvania Suggested Standard Jury Instruction (Criminal), 4.07B.

Defendant next asserts that the Foreperson was asleep during many parts of the trial. As Defendant did not create a record in support of this contention, it is waived.

Defendant also alleges that the Commonwealth's witness, Debra Almashy, provided testimony at trial which differed from what she testified to at the preliminary hearing. The Court does not believe Ms. Almashy's testimony at trial was materially different or inconsistent from the testimony she provided at the preliminary hearing, and Defendant has not identified specific instances of any such differences. During cross-examination of Ms. Almashy, defense counsel may have asked the witness if she indicated in her preliminary hearing testimony that the perpetrator was 5' 9" and 180 pounds, and the witness may have responded that she didn't know or didn't recall. However, the preliminary hearing transcript indicates that Ms. Almashy identified Defendant as the perpetrator and described him as being an inch or two taller than she was, with her height being 5' 4". Preliminary Hearing Transcript, pp. 7, 13.

Even if Ms. Almashy's trial testimony differed from her preliminary hearing testimony, such would not entitle Defendant to a new trial. The credibility of witnesses rests within the sole discretion of the jury, which is free to believe all, part or none of any witness's testimony. Commonwealth v. Gibson, 553 Pa. 648, 720 A.2d 473, 480 (Pa. 1998);

Commonwealth v. Spatz, 552 Pa. 499, 510, 716 A.2d 580, 585 (Pa. 1998).

Defendant next claims the cash drawer from Uni-Mart was not sent to be fingerprinted to determine if there was a match between the prints that may have been found on this item and the Defendant's fingerprints. This claim does not entitle Defendant to any relief. Although the cash drawer itself was not sent to the Wyoming Regional laboratory, the latent fingerprint that the police lifted from the cash drawer was sent to the laboratory, it was compared to Defendant's fingerprints, and Sgt. Bowen testified that the latent print from the cash drawer matched Defendant's left thumb print. In addition, the videotape from Uni-Mart's security cameras showed the perpetrator touching the back of the cash drawer with his left thumb.

Defendant also contends the Commonwealth's witness, Laura Robson's boyfriend Shawn Neupauer, was not called to be a witness at Defendant's trial, though Neupauer was with Robson that evening. This contention also does not entitle Defendant to a new trial. The Court believes Mr. Neupauer was subpoenaed as a witness but failed to appear. There is nothing in the record to indicate that Mr. Neupauer would have offered any material testimony different from Ms. Robson. In fact, the Court believes the Commonwealth indicated on the record that Mr. Neupauer probably wouldn't have added anything. If Defendant thought Mr. Neupauer could have offered testimony helpful to his defense, he could have subpoenaed him and called him as a witness.

Defendant's final allegation is that the Court should grant his motion for a new trial on the basis that he was not afforded his constitutional right to a fair trial.

Defendant, however, has not indicated how his constitutional rights were violated or how his trial was unfair. The Court has addressed each of Defendant's specific claims in the earlier paragraphs of his motion and found them to lack merit. Any other basis is waived.

**ORDER**

**AND NOW**, this \_\_\_ day of September 2012, the Court DENIES Defendant's "post verdict motion for a new trial."

Defendant is notified that he has a right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, the defendant may lose forever his right to raise these issues.

Defendant is notified that he has the right to assistance of counsel in the preparation of the appeal.

If Defendant is indigent, he has the right to appeal in forma pauperis and to elect to proceed with court-appointed counsel. The Court notes that, pursuant to Rule 122 (B)(2) of the Rules of Criminal Procedure, Mr. Miele's and Ms. Ippolito's appointment as his court-appointed counsel would continue throughout any direct appeal.

Defendant also has a right to qualified bail under Rule 521(B).

Defendant should discuss these rights with his court-appointed counsel.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
William Miele, Esquire (PD)/Nicole Ippolito, Esquire (APD)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)