IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**CP-41-CR-0001075-2014**
v.	:	
DANTE WASHINGTON,	:	**Pa.R.A.P. 1925(a)**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)[1] OF THE RULES OF THE RULES OF APPELLATE PROCEDURE

Dante Washington (Defendant) through Counsel filed a notice of Appeal of the Judgement of Sentence rendered by this Court on February 14, 2017. The Commonwealth filed a cross appeal limited to the issue of the Court's admission of expert testimony regarding eyewitness identification.

Background

Defendant stood trial in the Lycoming County Court of Common Pleas from December 13, 2016, through December 19, 2016 with closing arguments being submitted by Counsel on December 20, 2016. On that same date, Defendant was found guilty by a jury of Criminal Attempt[2] (criminal homicide), a felony of the first degree; Aggravated Assault[3], causes serious bodily injury, a felony of the first degree; Aggravated Assault[4], deadly weapon, a felony of the second degree; Robbery[5],

[1] Except as otherwise prescribed by this rule, upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear on the record, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.
[2] 18 Pa.C.S. § 901(a).
[3] 18 Pa.C.S. § 2702(a)(1).
[4] 18 Pa.C.S. § 2702(a)(4).
[5] 18 Pa.C.S. §3701(a)(1)(i).

inflicted serious bodily injury, a felony of the first degree; Robbery[6], threaten immediate serious injury, a felony of the second degree; Possession of Instruments of a Crime[7], a misdemeanor of the first degree; and Theft by Unlawful Taking[8], a misdemeanor of the second degree. Jury Trial, 12/20/2016, at 123-124. After the jury's verdict, the Court rendered a verdict of guilty of the charges of Persons Not to Possess[9], a second degree felony, and Firearms not to Carried Without a License[10], a third degree felony. Id. at 129.

The aggregate Sentence of the Court on all convictions was for Defendant to serve a minimum of thirty-six years to a maximum of seventy-two years in a state correctional institution. Order of Sentence, 2/14/2017, at 2.

Testimony

Incident

In the early hours of May 15, 2014, Eugene Phillips (Phillips) an employee of the Billtown Cab Company was robbed at gunpoint. Mr. Phillips had just begun his shift that morning, so Defendant recovered $27 only. N.T. 12/13/2017, at 48/15.

Phillips testified on behalf of the Commonwealth. When he picked up the Defendant, he was surprised to see the Defendant come out of 679 Campbell Street as the pickup location was indicated by dispatch to be 677 Campbell Street. Defendant was wearing sunglasses and hoodie during this incident, and did not remove these items from his person during the entirety of the exchange with Mr.

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[6] 18 Pa.C.S. § 3701(a)(1)(iv).
[7] 18 Pa.C.S. § 907(b).
[8] 18 Pa.C.S. § 3925(a).
[9] 18 Pa.C.S. § 6105(c)(2).
[10] 18 Pa.C.S. § 6106.

Phillips. Id. at 70.

Defendant sat in the right rear passenger side of the taxi during the three minute ride from 679 Campbell Street to 417 Hawthorne Avenue. At the time of drop off, Defendant only offered payment in the form of a $20 bill for which Philips had no change. After receiving permission from his employer, Philips proceeded to the Uni-Mart at 6th and High Streets to make change. Defendant refused to alight from the cab to make change so Philips did so. Id. at 44. Philips then drove Defendant to the alley behind 417 Hawthorne Avenue. Id. Philips supplied Defendant with $15.40 in change as the cab ride was a $4.60 fare.

At that point in time Defendant shot Mr. Philips and told him “I want it all”. Id. Phillips testified that he saw the gun before Defendant shot him and that it was pointed at his arm/chest. Id. at 45/2. He also said that as soon as he saw the gun Defendant squeezed the trigger. Id. at 44. He also testified that after the gun went off, and he started to drive away the Defendant did not say “oops” or “sorry” or anything to express remorse or that it has been an accident, rather Defendant inquired “where are we going”. Id, at 47. The attending trauma surgeon from Geisinger who operated on Phillips after the shooting testified that in her opinion Phillips would have died had he not undergone surgery. N.T. 12/14/2016 at 55.

Phillips was bleeding profusely, the bullet having gone through his right arm through his chest. Grasping his abdomen, Philips started to drive away but was stopped by a roadblock on Elmira Street. Dennis McGill testified on behalf of the Defense that on the date in question he was working for Hamm Disposal Company. He was hanging on the back of a garbage truck on Elmira Street in Williamsport, PA

when he saw a taxicab come down the alley to Elmira Street. N.T. 12/16/2016, at 46. “When he came down the alley he bounced up behind the garbage truck, went up over the sidewalk and down. He took off, came to the stop sign and I seen [sic] a gentleman get out and he went running and the cabby took off, he sped off real fast and went up to the right.” Id. McGill testified that he believed the person came out the backseat and that he was a black male, approximately 5’10” 170 lbs. Id. 46-27.

Phillips did find a route to the Williamsport Regional Medical Center. Id. at 50. Philips did contact dispatch at his employer to let them know that he had been shot and that their cab was parked at the ER at WRMC. Id. at 50. Dispatch did have the telephone number that had called for the fare that morning and was able to relay the number to County 911. Id. at 28.

Investigation post incident

679 Campbell Street

Police began their investigation at 679 Campbell Street, the residence where the shooter alighted from on the morning in question. Taken into custody were Shannon Aikey (Aikey) and Eric Williams (Williams) who were both called as witnesses at trial. Williams testified that on the evening in question, he had slept on the loveseat on the first floor of Aikey’s home. N.T. 12/16/2016, at 164. A gunshot residue test (GSR) of his hands revealed only two-component particles of gunshot residue, which though indicative of GSR is not characteristic of GSR. Id. at 29.

Aikey was the leaseholder at 679 Campbell Street and both she and Williams were brought in for questioning on the morning of the shooting. Aikey was then incarcerated for 15 days related to a probation violation and gave an interview to the

affiant in this case upon her release. Aikey testified at trial contrary to the videotaped statement she made to police. N.T. 12/14/2016, at 76-175. She was confronted at trial with answers she had given at her police interview. On the date of her trial testimony she recanted the statements she made to police. She was then confronted with those statements in the form of a transcript and a video during trial.

Video from Market Street

When canvassing the neighborhood for evidence, police noticed a camera on a residence facing the direction in which the suspect would have fled. N.T. 12/13/2016, at 104. On the video, shown to the jury multiple times throughout the trial, and marked as Commonwealth's Exhibit #18, the suspect can be seen going behind two of the residences. A police car responding to the call of the shots fired can be seen in the video. The suspect comes out again and walks south toward Confusion Corner (a five point intersection in Williamsport, PA, by Brandon Park). Id. at 104-105. Several family members testified that it was not Defendant in the video. Aikey, who told police that it was Defendant in the video, recanted her statement at trial, insisting that she had never been shown the surveillance video. N.T. 12/14/2016, at 82-83. When viewing the video at trial, she said that it was not Defendant in the video. Id. at 142.

955 Market Street

The video showed an individual retreating behind 955 Market Street. Detectives did search that property later that day and questioned its occupants. Though the occupants did not recall anyone coming to their home in the early morning hours, Detectives were able to recover a blue blanket that contained the Coach bag that belonged to Philips and a white piece of paper that was the voucher for the cab

company. N.T. 12/13/2016, at 124.

1220 Franklin Street

A consent search of the bedroom where Defendant was currently residing was executed by Agent Trent Peacock and Detective Stephen Sorage of the Williamsport Bureau of Police on May 21, 2014. Recovered and tested for GSR were the following items of Defendant's clothing: a black hooded zip up Nike Sweatshirt, Nike (size 12) sneakers and two pairs of black jeans. Id. at 128. One three component particle of GSR (i.e. a particle characteristic of GSR) was found on the left sleeve of the sweatshirt recovered from the bedroom where Defendant was living at the time of the robbery. N.T. 12/13/2016, at 171.

Photo Array

Phillips testified that he was shown the photo array of suspects while still inpatient at Geisinger on the first Wednesday after he had been shot. N.T. 12/13/2016, at 67. He was given a sheet of paper with eight (8) pictures on it. Id. The pictures were too small for him to "make an ID". Id. at 68. Phillip was not wearing corrective lenses when he viewed the she sheet with all of the eight pictures together or when shown the photographs individually. Id. at 68-69.

The affiant in the above captioned matter, Agent Raymond Kontz III (Kontz), testified that he was contacted by the wife of Phillips advising him that he had had the breathing tube removed from his throat and wished to speak to police. N.T. 12/15/2016, at 194. The original photo array including the suspect, [Defendant], was in a single 8 x 11 photo. Id. at 195. The police also printed individual pictures of all eight and numbered them #1 through #8. Id. Kontz showed Phillips the pictures

individually and in order beginning at #1. Kontz testified that he when he got to #4, the photo of Defendant, Phillips stopped Kontz and said not to go to #5 because #4 was him.

Gun

Phillips testified that though he was no gun expert, he estimated that it was .357 or a .45 and that he was sure it had an eight inch barrel. He testified that he knew the difference between a semiautomatic and a revolver and that it was definitely a revolver that was pointed at him. Id at 45. Philips testified that Defendant held the gun to his head more than once after shooting him. Id. at 46.

The gun expert that testified on behalf of the Commonwealth, Corporal Elwood Spencer of the Bureau of Forensic Examiners, PSP, testified that that the lands and grooves of the exterior surfaces of the discharged and mutilated bullet submitted as Commonwealth's Exhibit 51 was a .44 caliber bullet. Id at 77. Such a bullet could be discharged from a list of 6 potential revolvers or 3 rifles. Id. at 177. A .357 or .45 as described by Phillips was excluded from that list. Id. at 180.

The Commonwealth questioned Aikey regarding whether Defendant has access to a firearm. N.T. 12/14/2016, at 91-92. The transcript of her police interview showed that she had seen Defendant with a gun for his protection. She said at the police interview that it was silver, that she had seen it for one second, and that she did not know whether it "an automatic like the little slide or was it a revolver". She did not know when he got the handgun but she saw it a week before the incident. Id. at 92.

DNA

The Forensic Analyst from PSP in Greensburg, PA, was unable to identify

Defendant's DNA in the materials forwarded to them for DNA Analysis. N.T. 12/13/2016, at 211/23-25. They remitted their data to CyberGenetics for further analysis. Dr. Mark Perlin, testified from CyberGenetics. His firm did an analysis of the raw data provided to it by the Commonwealth and determined that on item Q12 (the right rear seat) the match between the complex DNA found on that seat with Defendant was 60.7 thousand times more probable than coincidental match to an unrelated African person. N.T. 12/15/2016, at 66. Perlin also testified that the chance of a false positive was in 1 in 918,000, meaning that "if you were to sample 918,000 people, you'd see one event where a person's match statistic was bigger than that. If you were to sample a state like Pennsylvania with a population around 16 million, you'd see an average maybe 16 or 17 people whose match statistics were that large or greater if they actually weren't there." Id. at 68-69.

For item Q5, the right rear door handle, the results were that match is 48.7 thousand times more probable than a coincidental match to an unrelated African American person. Id. at 69. The chance of a false positive for item Q5 was one in 24.6 million, meaning "that if you had a population of 250 million people, 24.6 million is one tenth of that, you'd expect to see on average maybe ten people of 250 million that had a match statistic this by chance if they actually weren't there". Id. at 70.

Matters Complained of on Appeal

Defendant has alleged, through Counsel, various matters complained of an appeal, which the Court will address *in seriatim*

> ***Was the evidence produced at trial insufficient to establish Attempted Murder beyond a reasonable doubt?***

The Defendant avers that the evidence produced at trial was insufficient to establish attempted murder beyond a reasonable doubt; specifically, testimony "implied that the Defendant accidentally discharged the firearm while it was pointed at Phillips, over the back of the seat; the Defendant appeared surprised when the gun fired, and the victim complied with the demand for the money and have given the money prior to discharge of the firearm". Matters Complained of on Appeal, 3/21/2017.

> When reviewing a challenge to the sufficiency, of the evidence, [the appellate court] must determine whether the evidence admitted at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict winter, supports all of the elements of the offense beyond a reasonable doubt. Commonwealth v. Cooper, 941 A.2d 655 (Pa. 2007) (citing Commonwealth v. Bomar, 826 A.2d 831, 840 (Pa. 2003)).
>
> In making this determination we consider both direct and circumstantial evidence, cognizant that circumstantial evidence alone can be sufficient to prove every element of an offense. Id. (citing Commonwealth v. Gorby, 588 A.2d, 902, 906 (Pa. 1991).
>
> [The appellate court] may not substitute its own judgment for the jury's as it is the fact-finder's province to weigh the evidence, determine the credibility of witnesses, and believe all, part or none of the evidence submitted. Id. (citing Commonwealth v. Hawkins, 701 A.2d 492, 501 (Pa. 1997).

Commonwealth v. Sanchez, 82 A.3d 943, 972 (Pa. 2013).

The evidence adduced at trial does not establish any of the facts as Defense Counsel avers them. There was no testimony that the discharge of the firearm was

accidental, rather Defendant testified that he was at a poker game on the date and time of the shooting (i.e. denied firing the gun). N.T. 12/19/2016, at 99. Phillips testified that the Defendant pointed the gun at him. Additionally, Phillips testified that Defendant shot him contemporaneously with demanding money, and continued to make demands after the firearm was discharged. Though there was some testimony from neighbors that seemed to place the sound of the gunshot to occur while the taxicab was still in motion (Testimony of Forsburgs, 12/16/2016, at 49-57), which would contradict Phillips testimony, it is not for the Court to displace the jury's judgment with its own.

The following jury instructions were presented to the jury regarding attempted murder:

> 1. The defendant has been charged with attempted murder. To find the defendant guilty of this offense, you must find that the following three elements have been proven beyond a reasonable doubt:
>
> First, that the defendant did a certain act, that is, he shot the victim EUGENE PHILLIPS in the front seat of his taxicab;
>
> Second, that at the time of this alleged act, the defendant had the specific intent to kill EUGENE PHILLIPS, that is, he had a fully formed intent to kill and was conscious of his own intention; and,
>
> Third, that the act constituted a substantial step toward the commission of the killing the defendant intended to bring about.
>
> 2. Let me explain the meaning of a "substantial step." A person cannot be guilty of an attempt to commit a crime unless he or she does an act that constitutes a "substantial step" toward the commission of that crime. An act is a "substantial step" if it is a major step toward commission of the crime and also strongly corroborates the jury's belief that the person, at the time he or she did the act, had a firm intent to commit that crime. An act can be a "substantial step" even though other steps would have to be taken before the crime could be carried out.
>
> 3. A person has the specific intent to kill if he or she has a fully formed intent to kill and is conscious of his or her own intention. Stated differently,

> a killing is with specific intent to kill if it is willful, deliberate, and premeditated. The specific intent to kill including the premeditation needed for attempted murder does not require planning or previous thought or any particular length of time. It can occur quickly. All that is necessary is that there be time enough so that the defendant can and does fully form an intent to kill and is conscious of that intention. When deciding whether the defendant had the specific intent to kill, you should consider all the evidence regarding his words and conduct and the attending circumstances that may show his state of mind, including the evidence presented. If you believe that the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may regard that as an item of circumstantial evidence from which you may, if you choose, infer that the defendant had the specific intent to kill.
>
> 4. If you are satisfied that the three elements of attempted murder have been proven beyond a reasonable doubt, you should find the defendant guilty. Otherwise, you must find the defendant not guilty of this crime.

Jury Trial, 12/20/2016, at 99-101.

> The courts have decided that the only degree of murder that may be subject to an attempt charge is murder in the first degree. A defendant must specifically intend that death result for an attempted homicide to be complete. The death in lesser grades of murder may occur as an unintended result of otherwise criminal conduct; it is, thus, logically impossible for one to be able to attempt to commit second- or third-degree murder. See Commonwealth v. Geathers, 847 A.2d 730 (Pa. Super. 2004); Commonwealth v. Williams, 730 A.2d 507 (Pa. Super. 1999); Commonwealth v. Griffin, 456 A.2d 171 (Pa. Super. 1983).

Subcommittee Note, Pa. SSJI (Crim) 12.901A.1 (ATTEMPTED MURDER).

In Geathers, the Appellant chased the victim and fired a gun at him multiple times. One of the bullets grazed the victim's scalp, leaving a permanent scar. The gun used in the incident was never recovered, and the only physical evidence presented at trial were two shell casings from a 9mm weapon. Geathers at 732. The court found that because the appellant used a deadly weapon to inflict injury to a vital part of the victim's body, the jury could have easily concluded that appellant had the specific intent to kill. In Pennsylvania, evidence that a gun was pointed at a vital organ can be

used to infer a specific intent to kill. The evidence as presented at trial established that Defendant pointed a gun at Phillips within close range inside a taxicab. That evidence was sufficient for the jury to find that the Defendant had the specific intent to kill Phillips. Moreover the victim testified that were no actions made by Defendant that would indicate that the gun was discharged accidentally. Rather after shooting Phillips, the Defendant demanded more money. N.T. 12/13/2016, at 46.

Did the Court err by denying Motion to Suppress Identification?

Commonwealth v. Sanders 42 A3d 225 (Pa. Super. 2012), relying on the rationale expressed in Commonwealth v. Bryant, 467 A.2d 14 (Pa. Super 2013), held that where a defendant does not show that improper police conduct resulted in suggestive identification, suppression is not warranted. Sanders at 330. Defense Counsel conceded that there was no improper police conduct in the photo array shown to Phillips but asserted that his physical condition was one such that he could not give reliable information on identification. The Defense argues that identification evidence should be suppressed on grounds other than police misconduct and cites Commonwealth v. Walker, 92 A.3d 766 (Pa. 2014), however, Defense Counsel conceded at argument that Sanders was controlling and merely wished to preserve the issue if there is a chance in the law in the interim. Argument, 11/28/2016, at 8. The Court relies on the transcript from the argument in support of its decision. Id. at 5.

Did the Court err by excluding testimony of Dr. Lawrence Guzzardi?

Evidence is admissible if it is relevant. The Court found that the testimony of Dr. Lawrence Guzzardi (Guzzardi) would be irrelevant to determining whether Phillips identification of Defendant in the photo array was reliable. Order, 12/9/2016,

Argument on decision whether to submit testimony of Dr. Guzzardi, 11/28/2016, at 5-19, 12/1/2016, at 37-54. The Court issued an Order on December 2, 2016, denying Defense Counsel's request, finding Guzzardi's proposed testimony to be irrelevant, i.e. not tending to make a fact of consequence in determining the action any more or less probable. Morever, the information Defense Counsel wanted Guzzardi to testify regarding, the notations from trauma doctors that Phillips was incapable of making decisions, was best testified to by the treating physician, not a third party. Defense Counsel was able to establish the information through cross-examination of the treating physician, *infra*. Argument, 12/1/2016, at 47-48.

Did the Court err by denying the request for reconsideration of its decision to preclude Dr. Guzzardi when Dr. Leonard, the victim's physician, testified about the medications, but would not opine on the effect on the victim or the effects of the medications in general?

The testimony of Dr. Dianna Jo Leonard (Leonard), treating physician, 12/14/2016, established what medications Phillips was taking and the Court allowed Leonard to testify regarding what the medications were being used for. N.T. 12/14/2016, at 64, 66, 67. The testimony of Leonard is found in the record at N.T., 12/14/2016 at 49-73. The Court was unable to find an additional place in the record where Defense Counsel renewed asked for reconsideration of its Motion to have Dr. Guzzardi testify and such reconsideration being denied.

The Commonwealth did object to Leonard testifying past the date of May 21, 2016, as that was the date Phillips was shown the photo array by police whereby he identified Defendant as his attacker. Jury Trial, 12/14/2016, at 70. Such objection was sustained because any information about the medications Phillips was taking after the time of the identification would be irrelevant to making the determination of whether

his identification was reliable given his medicated state at the time of the identification.

On closing, the Defense, when arguing regarding the victim's various inaccuracies in recalling events, made reference to "all the "drugs" he [the victim] was on". The Commonwealth objected that Defense Counsel was asking the jury to speculate. The Court found that though the jury might not speculate, the argument was reasonable based upon the testimony presented. Defense Closing, 12/20/2016, at 40-41. In short, the treating physician did testify to the medications that the victim was taking, The Court did not disallow questioning as the medications effects, only disallowed questioning past the date victim identified the suspect in a photo array. The Court also allowed Defense Counsel to argue the effect of the medication in closing, over the Commonwealths objection.

Did the Court err by excluding Defendant's proposed Exhibits #6 through 10, showing each of the individuals in the photo array photo shopped wearing a hoody and sunglasses; the victim testified that the glasses used in the photos were similar to those worn by the robber and described where the hood ended on the robber's face?

Defense Counsel had a multimedia company superimpose sunglasses and hoodies on the images of the photo array that was shown to Defendant. Jury Trial, 12/13/2016, at 82. The enhanced versions of the photographs would include the images wearing a hoody and sunglasses. The Commonwealth argued that such evidence was not relevant. Relevant evidence means 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, such evidence could potentially be relevant as it goes to the identification of the perpetrator. However, the Court found that it could not be the sure that the superimposed images

accurately reflected what those in the photo array would look like if wearing those garments, and therefore disallowed the proffered evidence. Jury Trial, 12/13/2017, at 83.

The Court believes that it is part of common sense that an individual is harder to identify when wearing sunglasses and a hoody, a fact that was not hidden from the jury. Moreover, Defense Counsel was able to establish through cross-examination of Phillips who required corrective lenses at all times was not wearing his glasses when making the identification in the photo array. N.T. 12/13/2016, at 64-65. Defense Counsel also was permitted to wear sunglasses during his cross-examination of Phillips and Phillips agreed that the only part he could really see was from the nose to the chin. Id. at 72.

Did the Court err by precluding Defense Counsel from using demonstrative evidence in closing argument to show either himself or a photo of the Defendant in a black hoody and sunglasses as described by the victim?

Defense Counsel believed that it should be able to wear a black hoody and sunglasses during its closing as demonstrative evidence of testimony adduced at trial as it would illustrate for the jury how much of the perpetrators face was open or available for observation in terms of eyewitness identification. Argument, 12/19/2017, at 150.

The Court disallowed this demonstrative evidence for many reasons not least of which was that the sunglasses worn by Defendant during the robbery were never recovered, though the black hoody was. The Court denied the request because Defense Counsel was not the person who was suspected of committing the crime and his appearance while wearing those garments or similar garments would not

accurately reflect what Phillips saw and could mislead the jury Id. at 151.

Court's Rulings on Dr. Jonathan Vallano's Testimony

Did the Court err by admitting the expert testimony of Dr. Jonathan Vallano?

The admission of expert testimony is a matter of discretion for the trial court, and will not be disturbed absent an abuse of discretion. Commonwealth v. Walker, 92 A.3d 766, 772 (Pa. 2014). An abuse of discretion "is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused." Id. at 772-73 (citation omitted). In Walker, the Pennsylvania Supreme Court removed the absolute ban on expert testimony on eyewitness identification and "join[ed] the vast majority of jurisdictions which leave the admissibility of such expert testimony to the discretion of the trial court." Id. at 769. The Court took argument on whether to admit the testimony of Dr. Jonathan Vallano (Vallano) prior to trial. Motions, 12/1/2016, at 16-37. Having made the decision to allow the testimony of Vallano, the Court took further argument on what the substance of his testimony could be just prior to his testimony. Argument, 12/19/2016, at 13-54. The Commonwealth raises on cross-appeal, that it was error for the Court to admit the expert testimony of Vallano. The Commonwealth argued that eyewitness identification testimony is only admissible when it is the Commonwealth's sole or primary evidence the Commonwealth has presented:

> Initially, we envision that allowing such expert testimony would be limited to certain cases. As discussed below, such testimony would only be permitted where relevant. Pa.R.E. 401. While we need not precisely define such situations, generally speaking, it would be where the Commonwealth's case is solely or primarily dependent upon eyewitness testimony. Thus, contrary to the Commonwealth's suggestion that

> permitting expert testimony would impact thousands of cases, we believe the scope of removing the per se ban on such testimony would be limited, and, again, at the discretion of the trial judge.

Commonwealth v. Walker, 92 A.3d 766, 787-88 (2014).

The Commonwealth brought to the Court's attention various other pieces of evidence that established Defendant's guilt: the DNA evidence, the GSR evidence; the phone call coming from Aikey's cell phone number; Aikey's statement in her police interview that the Defendant was the individual on the surveillance video; the connection between 417 Hawthorne Avenue and Defendant. Argument, 12/16/2016, at 149. Therefore the Commonwealth's evidence that Phillips identified Defendant in the photo array and that he was 100% sure that the person he identified in court was the person that shot him (N.T. 12/13/2016, at 56) was not the Commonwealth's sole or primary evidence. The Commonwealth argued that to allow Vallano to testify in the limited capacity in which he did was not what the Supreme Court envisioned when it removed the per se ban on eyewitness identification testimony. The Commonwealth was concerned that if the Court allowed it in when identification was not primary (of utmost importance) to the case, then it would open the floodgates. Argument, 12/19/2016, at 15.

As an initial ruling, the Court found based on Walker that testimony on eyewitness identification meets the Frye standard so it would be admissible generally. The Court deferred its decision whether to allow Vallano to testify until after Phillips testimony. The Court found that the Phillips testifying at trial that he was 100% sure that Defendant was the man who shot and robbed him, was an important part of the Commonwealth's case and that the trier of fact would be assisted by more information

regarding eyewitness identification evidence. Argument, 12/16/2016, at 162, 167. Finding that Vallano could help the trier of fact determine a fact in issue, the Court allowed the testimony but limited it to those factors that are evident in the testimony/record i.e. Cross racial; Stress; and Robbed at gun point (weapon focus).

Did the Court err by limiting Vallano's expert identification testimony?

a. Not permitting him to testify about "reaffirming statements" when the victim and officer acknowledged that the victim's wife said something to the effect of "good job, Honey" after the victim made an identification from the photo array showing to him while a patient in Geisinger Medical Center's ICU?

The Court found that the positive affirmation the victim's wife allegedly gave Phillips after identifying someone in the photo array provided by police was not the type of affirmation identified in eyewitness research that could call into question the reliability of the identification. Moreover, it was never established that Phillips wife made that statement. N.T. 12/13/2016, at 80. Defense objected to a digital audio recording of the photo array exchange being played for the jury. N.T. 12/15/2016, at 197. Someone who was in the position of knowing whether the victim had identified the suspect, and then told the victim, we are pursuing this suspect based on your identification is the type of affirmation that the research calls into question, not the type of affirmation Phillips received from his wife. Id. at 36. There was no testimony that Kontz stated that the police were moving forward with the suspect (Kontz did agree, however, to stop showing the pictures at #4, and a criminal complaint was filed by Kontz against Defendant the next day).

b. Not permitting Vallano to testify about the impact of a disguise on an individual making identification because it was not beyond the knowledge of the average juror; the

information was part and parcel of Vallano's factors in this case?

Expert testimony is admissible in all cases, civil and criminal alike, "when it involves explanations and inferences not within the range of ordinary training knowledge, intelligence and experience." Walker at 788. The Court also believed, based on Walker, that testimony of an expert in eyewitness identification would not be relevant if someone, a lay person, who is using their common sense could use that same judgment to determine whether or not that person has the ability to identify them. Id. at 151. Because it is part an parcel of common sense that it is more difficult to recognize someone when they are wearing a disguise i.e. sunglasses and a hoody, expert testimony regarding was not required.

c. Not permitting Dr. Vallano to talk about retention interval?

d. Not permitting him to testify about subtle clues when an identification procedure is not "blind line-up administration"?

e. Not permitting Dr. Vallano to discuss confidence malleability?

Prior to Vallano's testimony, argument was taken on what Vallano would be permitted to testify about. Argument, 12/16/2016, at 148-167 and 12/19/2016, at 13-54. Vallano was not allowed to testify as to whether a specific witness was accurate in his identification. Walker at 784, Argument, 12/19/2016, at 25. The Court limited testimony on disguise because any layman would know it is more difficult to identify someone when there are areas of the face obscured. Id. at 38.

The expert would be allowed to testify to weapon focus as that knowledge is beyond a laypersons. Id. at 39. The Defense expert would also be able to testify that in court identification can be highly persuasive but not necessarily indicative of

eyewitness identification accuracy. Id. at 52. The expert witness would not be allowed to testify to any studies or peer reviewed articles he has participated in nor read in forming his opinion. He was also not allowed to testify to reviewing specific evidence in this case. He was unable to testify to retention interval because the Court agreed with the Commonwealth that "memory fades over time" is within the realm of layman's knowledge. Id. at 43. The Court disallowed the testimony regarding blind line up administration because it believed that it was necessary that there be testimony regarding subtle clue given by Kontz during the administration of the photo array and finding there to be none, additional information regarding this phenomenon would not aid the trier of fact. Id. at 47-48. The Court did not allow testimony on the confidence malleability for the same reason that it did not permit testimony on the reaffirming statements: the statements would have need to come from law enforcement and been presented in testimony in order for the expert to testify regarding their potential effect on a victim's ability to make an accurate identification. Id. 49-51. An expert cannot base his opinion upon facts which are not warranted by the record.

Did the Court err by limiting the testimony of Nathanial Adams, the Defense expert on DNA statistical information?

a. By not permitting Adams from statistically attacking Dr. Perlin's conclusions?

b. By sustaining the Commonwealth's objection to Adams explaining/challenging Perlin's numerator/denominator assignments?

c. By not permitting Adams from testifying to statistics as it related to DNA because he was not an expert in DNA extraction/testing/biology?

The Defense objected to the Court's precluding Nathanial Adams, B.S. (Adams) as an expert in DNA Data Analysis. 12/15/2016 at 153. Adams is an

employee at Forensic Bioinformatics in Dayton, Ohio, a company that does “forensic DNA Consulting”. After hearing his qualifications, the Court qualified him as an expert in computer science and statistics. Because of his lack of formal training, education or credentials in the science of DNA collection and analysis, the Court could not extend his expertise to that of DNA analysis. Adams did testify to his belief that the calculations Perlin testified to were not calculated appropriately, and the Court found that he was qualified to opine in this area because it involved the computer analysis of data. TrueAllele software calculated complex DNA evidence from three items: Q5 – taxi interior right rear door handle; Q9-black bag; and Q12-rear seat.

Adams said “as we heard earlier with Dr. Perlin’s testimony there were unreliable results that were generated by TrueAllele when it was examining Q9 under certain parameters. So a description of that prompts a question of were all relevant answered asked of TrueAllele and were all relevant questions answered”. N.T. 12/15/2016 at 156. Defense Exhibit 20 showed a table of genotype probabilities associated with the genotypes in common with [Defendant] and item Q5 that were selected for reporting in Perlin’s report. Commonwealth’s Exhibit 94 was a slide showing genotype possibilities where Perlin described we might see 20 or so of the possibilities but not all 100 possibilities that there might be. The eight locations where data was calculated for Q5, eight locations there are multiple possible genotypes Id. at 166. Defendant’s Exhibit 12 was an excel spreadsheet where Adams did the multiplication that he believed would accurately depict the probability that the DNA was Defendant’s. Perlin, in rebuttal, explained that what Adams was calculating was a meaningless number. A

Adams was not allowed testify to his ultimate conclusion based on his math that there was a one in three and a half billion chance that Defendant's DNA matched the evidence. N.T. 12/15/16 at 172. The testimony was limited because his probability calculation presented as Defendant's Exhibit 12 was not in his expert report. Id. at 173. The Court submits it was correct in limiting Adams testimony to matters contained in his export report. "Although there are no rules of procedure in criminal cases precisely governing expert reports, it cannot be asserted that either the Commonwealth or a defendant has carte blanche to allow an expert to testify beyond the information contained in his or her report. To hold otherwise would eviscerate the requirement that reports be disclosed. Commonwealth v. Roles, 116 A.3d 122, 131-32 (appeal denied by Commonwealth v. Roles, 128 A.3d 220 (Dec. 1, 2015)).

As outlined *supra* in the discussion regarding the admission of Vallano's expert testimony, it is well within the discretion of the trial court to determine what evidence is admissible at trial. The test to be applied when a qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject matter under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. Because, Adams had no formal training in in DNA extraction testing and biology he was not able to present to the jury in those areas but he was as outlined above able to call into the question that specific data that the Commonwealth presented to the jury as he did present expertise in the area of computer analysis of data. Id. at 150-151.

Did the Court err by admitting testimony that Shannon Aikey saw the Defendant in possession of a silver handgun a week before the incident; Defendant submits that the information was remote and the prejudice outweighed any probative value.

The Court admitted Aikey's prior testimony regarding having seen the Defendant with a gun a week before the armed robbery based on the guidance of Commonwealth v. Clark, 421 A.2d 374 (1980). In Clark, the Superior Court stated that "it is well established in Pennsylvania tall that is demanded before a weapon may introduced into evidence is a sufficient foundation revealing circumstances justifying an inference of the likelihood that the was weapon was used in the course of the crimes charged". Clark at 376, in this particular instance, the foundation was laid to admit Aikey's interview transcript where she stated that he had a silver gun for his own protection (N.T. 12/14/2016, at 91, because Philips the victim in this case had already testified that the Defendant pointed a large revolver at him. N.T. 12/13/2016, at 45.

"The accused's possession of an implement of weapon giving him the means to carry out the crime constitutes some evidence of the probability that he committed the crime and is a relevant part of the Commonwealth's case' Id. (internal citations omitted). The Court found that the viewing of the item by Aikey a week before the commission of a crime was not so remote as to make a possible connection untenable. Moreover, the probative value of such evidence to the Court outweighed the likely prejudice that would be caused when the jury heard that the Defendant was in possession of one. Possession of a firearm in Lycoming County, Pennsylvania, is not a particularly unusual circumstance or one that is likely to be condemned.

Did the Court err by admitting testimony, some through transcripts and videotaped interview, about the Defendant's alleged drug usage?

Defense Counsel requested that the Commonwealth redact portions of Aikey's statements regarding Defendant's alleged drug usage at it was prior bad acts

evidence. Argument, 12/14/2016, at 116. The Commonwealth wanted to present the statement to the jury because the statements corroborated Dawn Phillips (the dispatcher from the taxicab company and Phillip's sister) testimony regarding her description of the caller for the taxi:

> Usually when you're dispatching you can tell which ones – who is on drugs, who is on alcohol, and all that and he just seemed out of it. His voice was real low. They [sic] talked really - - I don't know how you want to say it, but you could tell that they were – that phone call I was hesitant about taking or giving it out because of the way they [sic] sounded.

N.T. 12/13/2016, at 26.

The Court overruled the Defense's objection because the Defendant was not charged with any drug offense and the Court found the probative value of the statements about drug use to outweigh the prejudice it would cause in the jury's decision making. Id. at 119.

Did the Court err by admitting the videotaped interview of Shannon Aikey to be shown to the jury after the Commonwealth granted her use immunity and she acknowledge that she admitted making statements in the video?

Defense Counsel argued that there was no relevance to playing the video if Aikey acknowledged that she made the statements in the video. Argument, 12/14/2016, at 101. The Court however allowed the video to be played because it was not unnecessary even though Aikey would admit having made those statements. In light of the testimony that Aikey had made at trial, i.e. outbursting several times that the Commonwealth was prosecuting an innocent man and all the reasons she lied in her videoed statement to police, it was important for the jury to see the circumstances under which she made the statement. Id. at 133. There could be no better evidence for that than the video. Moreover, Pa.R.E. 613 allows for the use of a Witness's Prior

Inconsistent Statement to Impeach: A witness may be examined concerning a prior inconsistent statement made by the witness to impeach the witness's credibility.

Did the Court err by excluding evidence that Darnell Eaddy, a friend of Ms. Aikey who was an early potential suspect, had a prior theft and by excluding testimony from Captain Donald Mayes of the Williamsport Bureau of Police that he had considered Mr. Eaddy a suspect early in the investigation?

Trial testimony of Aikey established that a former boyfriend of hers, Darnell Eaddy (Eaddy), is a person that had lived with her in 2013, that she had pressed a theft charges against him and he possibly fit the description of the suspect. N.T. 12/14, 2016, at 156-161.

On day five of testimony, Defense Counsel attempted to present the testimony of the police captain who he was investigating the instant matter in 2014 and at one point had Eaddy has a suspect based upon his relationship with Aikey, his prior convictions for gun crimes, and his fitting the physical description of suspect. Argument, 12/19/2016, at 5. The Defense wanted to present this as evidence that someone else may have committed the crime. The Court did not allow the testimony because it was speculative and found that Defense Counsel would need to proffer facts that showed this other person committed the crime rather than merely present evidence that he was an early suspect.

Did the Court error by granting the Commonwealth's Motion in Limine to present evidence that the Defendant had resided at 417 Hawthorne Avenue because it was remote in time to the robbery?

Defendant's sister, Karina Washington, and Keith Freeman, were leaseholders at 417 Hawthorne Avenue from September 10, 2012 until they vacated the address on January 24, 2013. N.T. 12/15/2016, at 193. Paulette Clementoni, Director of

Domestic Relations in Lycoming County, would have testified but the parties stipulated to it that 417 Hawthorne Avenue was a good postal address for Defendant in January and February of 2012. N.T. 12/15/2016, at 192.

The Commonwealth argued that even though the Defendant's sister had not lived there since 2013, it was still an address in his mind. If one planned to commit an armed robbery of taxicab, one would not want the drop-off location to be an unknown one that one could not find his way back from if he had to flee. Even if Defendant spent three years there in his childhood, the Commonwealth argued, that is a significant connection that most other people in the world and in Williamsport would not have to that property. Moreover, the remoteness in time, the Commonwealth argued, goes to the weight the jury would give the evidence rather than its admissibility.

The Court did consider the remoteness as it had with Darnell Eaddy and his theft charge (November of 2013 to May of 2014) and that was six months. And in the instant matter there was an even longer period of time between Defendant's connection with the address and the date of the crime (February of 2013 to May of 2014) however the Court found persuasive the Commonwealth's logic to allow it in. in "terms of [suspect's] familiarity with the neighborhood, how [the suspect] goes between houses and wanders around that out to Market street and being generally familiar with that location." Argument, 12/15/2016, at 3-9.

Did the Court err by precluding Defense Counsel arguing about GSR indicative particles on Eric Williams and from arging that some other person committed the offenses?

On the morning of closing arguments, Defense Counsel requested that it be allowed to argue regarding the GSR recovered from Eric Williams. The

Commonwealth argued that Defense Counsel should not be allowed to argue that Williams was the assailant because no three component particles were found on Williams. Defense Counsel argued that unlike the situation *supra* with Eaddy, there were actual facts tying Williams to this particular crime i.e. his presence at the pick up location, his presumed access to Aikey's phone, the GSR, his height and weight being more in line with what was described by the various witnesses who saw the likely perpetrator, and his admission that he was very drunk on the night in question which would be consistent with Dawn Phillips testimony *supra*. Because of the actual facts proffered, the Court allowed Defense Counsel to argue regarding the GSR but not that he committed the crime as it was not developed in the testimony. Argument, 12/20/2016, at 5. Susan Atwood, a GSR expert did testify regarding the indicative particles on Williams so such argument upon closing appropriate. N.T. 12/16/2016, at 25-31.

Did the Court err by denying a request for a Mistrial during jury selection when prospective juror #29 indicated, in open court in front of all other prospective jurors, that he recognized Defendant's name; then later he, again in open court, said he was a physician at a nearby federal prison?

During Jury Selection, Juror #29 asked "if I might have seen [Defendant's] name in a professional capacity. I don't know if you want me to list that out loud because it might bias other people." Excerpt of Jury Selection, 12/13/2016, at 2. The Court polled the prospective juror and said "Do you think that the exposure would affect your ability to be a fair and impartial juror? In other words, would you be able to keep that information out of your mind?" The prospective juror replied that he could. Id. Later in jury selection, Juror #29 stated

I'm a staff physician at the Federal Penitentiary in Allenwood. In my

> professional capacity we're currently short staffed and if you wish I will be here. I can make it this week, ma'am, but inmate medical care down there is a little bit lacking until I return. I'm the one designated to work this month while all my colleagues have vacation.

Excerpt of Jury Selection, 12/13/2016, at 3.

Defense Counsel was concerned that the other jurors would now believe that the prospective juror knew Defendant from prison and that therefore the entire jury pool would no longer give Defendant the benefit of the presumption of innocence to which he is entitled.

> The trial court concluded that any prejudice resulting from such a limited, unintentional alleged exposure was not sufficient to mandate a mistrial. We agree. "Clearly, the mere possibility that some of the jurors might have seen appellant briefly in the hallway in handcuffs is not grounds for a mistrial, as a brief viewing of a defendant in handcuffs is not so inherently prejudicial as to strip defendant of the presumption of innocence." Commonwealth v. Lark, 543 A.2d 491, 501 (Pa. 1988), see also Commonwealth v. Evans, 348 A.2d 92 (Pa. 1975).

Commonwealth v. Carson, 741 A.2d 686, 702 (1999).

The Court did not declare a mistrial related to Juror #29's statements as they did not so prejudice the jury against Defendant that they would not be able to give a fair and impartial decision based on the evidence offered at trial. Juror #29 confirmed this with the Court when polled. Even after later disclosing that he was in fact a physician at a federal penitentiary it was not clear that the jury pool would infer that because Juror #29 might have known Defendant in a professional capacity that it would necessarily have to be as inmate physician to inmate. The Court further instructed the jury on the presumption of innocence at the beginning of trial. Jury Trial, 12/13/2016, at 4. Applying the same reasoning from Carson to the instant matter, the prospective juror's statement was not so prejudicial to strip the Defendant of the presumption of innocence.

Did the cumulative errors of the Court deny Defendant a fair and appropriate determination of guilt?

[The Supreme Court of Pennsylvania] repeatedly has held that "no number of failed claims may collectively warrant relief if they fail to do so individually." Commonwealth v. Johnson, 139 A.3d 1257, 1287 (Pa. 2016) (citing Commonwealth v. Washington, 592 Pa. 698, 927 A.2d 586, 617 (Pa. 2007). As the Court finds no error with its rulings, it respectfully requests that its Judgement of Sentence in the above captioned matter be affirmed.

DATE: _____ _____

Nancy L. Butts, P.J.

cc: DA (MW)
PD (NS, WM)
Gary Weber, Esq.