

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :  
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 v. : CR 89-2017  
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 JORDAN RAWLS, : CRIMINAL DIVISION  
 Appellant : APPEAL

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

Appellant appeals his judgment and sentence, which was rendered on April 5, 2019. This Court requested a Concise Statement of Matters Complained of on Appeal on May 8, 2019. Appellant filed for an extension of time to file, which this Court granted. Appellant filed his Statement of Matters Complained of on Appeal on June 28, 2019. In his Statement of Matters Complained of on Appeal Appellant claims that this Court erred: (1) in not suppressing Appellant’s statements to police;<sup>1</sup> (2) in granting Commonwealth’s Motion to Preclude the testimony of Dr. Richard Ofshe; (3) in denying Appellant’s Motion in Limine to preclude the testimony of Elwood Spencer an expert in firearms and toolmark examination; (4) in not conducting a *Frye* hearing for the admissibility of Elwood Spencer’s expert testimony; (5) failing to give a consciousness of innocence jury instruction; and (6) by failing to give a jury instruction on various omissions in the police investigation.

***Improper Preclusion of Dr. Richard Ofshe***

Appellant claims this Court erred in precluding the testimony of Dr. Richard Ofshe “whose testimony would have educated the jury on influences during police interrogation, coercive techniques utilized by the police to elicit a confession and overbear an individual’s will,

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<sup>1</sup> This issue was addressed in this Court’s Opinion and Order dated August 13, 2018, on which this Court will rely for the purposes of this Opinion.

and generally how interrogations work.” Appellant’s Statement of Matters Complained of on Appeal 6/28/19, at 1. This mirrors Appellant’s representation to the Court regarding the matter at the March 5, 2019 hearing. Appellant claims that *Commonwealth v. Alicia* barred expert testimony on false confessions and not on police techniques and theories of coerced confessions. N.T. 3/5/19, at 6-8. This Court disagrees with Appellant and finds that the proffered testimony would have been no different than that which was prohibited in *Alicia*.

The Pennsylvania Supreme Court in *Alicia* determined that, even after barring an expert from giving an final opinion on the issue of whether a confession was false or not, “[g]eneral expert testimony that certain interrogation techniques have the potential to induce false confessions improperly invites the jury to determine that those particular interrogation techniques were used to elicit the confession in question, and hence to conclude that it should not be considered reliable.” *Commonwealth v. Alicia*, 92 A.3d 753, 764 (Pa. 2014). The Pennsylvania Supreme Court found the testimony was therefore not permissible because it would be “an impermissible invasion of the jury’s role as the exclusive arbiter of credibility.” *Id.* As in *Alicia*, whether an individual’s confession is coerced “is best left to the jury’s common sense and life experience, after proper development of relevant issues related to . . . the particular circumstances surrounding the elicitation of his confession, using the traditional and time-honored techniques of cross-examination and argument.” *Id.*

#### ***Failure to Preclude the Testimony of Elwood Spencer***

Appellant contends that this Court erred in two ways, by not precluding the testimony of Elwood Spencer and by not holding a *Frye* hearing on the issue. “*Frye* is not implicated every time science comes into the courtroom; rather, it applies only to proffered expert testimony involving novel science.” *Commonwealth v. Dengler*, 890 A.2d 372, 382 (Pa. 2005). At trial, Elwood Spencer testified as an expert in the field of firearms and toolmark examination.

Firearms and toolmark examination is a field which Pennsylvania Courts have time and time again found to not be novel. *See Commonwealth v. Whitacre*, 878 A.2d 96, 101 (Pa. Super. 2005) (“As the technique [used in firearms and toolmark examination] has been in use since the 1930's, it is neither new nor original, but rather is of the sort that is offered all the time.”); *see also Commonwealth v. Ovalles*, 144 A.3d 957, 963 (Pa. Super. 2016) (expert testimony of firearms and toolmark examiner provided at trial); *Commonwealth v. Frein*, 206 A.3d 1049, 1061 (Pa. 2019) (expert toolmark evidence used as evidence at trial). Since the methods used by Elwood Spencer are not novel and are commonly accepted by Pennsylvania Courts this Court did not preclude his testimony or hold a *Frye* hearing to determine if the methods of examination were novel.

#### ***Court’s Failure to Give Pertinent Jury Instructions***

Appellant argues this Court should have given the jury a consciousness of innocence instruction because he self-reported to the police station for questioning. One of the few Pennsylvania cases dealing with a consciousness of innocence jury instruction is *Commonwealth v. Thomas*. The Pennsylvania Supreme Court recognized that other jurisdictions which have addressed consciousness of innocence jury instruction “uniformly have concluded that a defendant is not entitled to such an instruction.” *Commonwealth v. Thomas*, 54 A.3d 332, 342 (Pa. 2012). Although it did not all together bar a trial court from giving a consciousness of innocence jury instruction, the Pennsylvania Supreme Court stated “[t]he matter is properly one of argument to the jury.” *Id.* This Court found, as in *Thomas*, Appellant had ample opportunity to address the issue on cross examination and in argument while closing. Appellant took full advantage of his opportunity to do so. N.T. 4/4/19, at 23, 29, 33-34. Appellant would have this Court instruct a jury on consciousness of innocence every time a defendant came in for

questioning of their own accord, which as a singular action is not enough to trigger the necessity for such an instruction.

Lastly Appellant argues this Court erred when it failed to instruct the jury based on “various omissions in the police investigation where the lack of scientific testing and/or otherwise following police procedures during the investigation of the murders was a relevant factor in evaluating the Commonwealth’s evidence.” Appellant’s Statement of Matters Complained of on Appeal 6/28/19, at 2. Appellant presented this Court with the Criminal Model Jury Instructions for Massachusetts 3.740, Omissions in Police Investigations, asking it be read to the jury. *See* N.T. 4/4/19, at 15-16. As Pennsylvania Courts have not recognized such an instruction, this Court did not allow the instruction to read to the jury. The Court noted that the jury is already instructed to find based on the evidence “*or the lack thereof*” and permitted counsel for both sides to argue the issue in closing. *Id.* at 16-17, 78-79. Defense counsel did argue the issue adamantly in his closing. *Id.* at 35-40. To have allowed the instruction would have taken focus away from the jury’s primary task to determine whether the Commonwealth had proved the entirety of its case beyond a reasonable doubt. The jury would have instead been directed to focus on what efforts created the evidence as opposed to the evidence itself, which would be in err.

DATE: July 5, 2019

By the Court,

Nancy L. Butts, President Judge

xc: DA (MW)  
Edward J. Rymysza, Esq.

NLB/kp