

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1303-2019
vs. : CRIMINAL DIVISION
I-KEEM FOGAN, :
Defendant : 1925(a) Opinion

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

This opinion is written in support of the judgment of sentence dated September 27, 2021 and amended on or about October 19, 2021. The relevant facts follow.

On August 4, 2019, I-Keem Fogan (“Appellant”) and his co-defendant, Noah Stroup, agreed to rob the Uni-Mart on West Fourth Street in the Newberry section of Williamsport. Stroup agreed to be the lookout while Appellant went inside to rob the cashier of the money in the register.

Before Appellant and Stroup arrived at the Uni-Mart, a customer (Victim 1) entered the store to purchase some items. Victim 1 was on a break from her employment and walked across West Fourth Street to the Uni-Mart to purchase some snacks. As she went to leave the Uni-Mart, Appellant entered carrying a firearm. Appellant grabbed Victim 1 around the neck and pulled her to the area in front of the cash register. With Victim 1 still in his grasp, Appellant pointed the firearm at the store cashier (Victim 2) and demanded money from her. Victim 2 opened the cash register but then pushed Appellant’s hand holding the firearm away to try to get him out of the store. Again, Appellant pointed the firearm at

Victim 2 and demanded money, and she pushed away his hand that was holding the firearm. Appellant then pointed the firearm at Victim 2, pulled the trigger and shot her in the left side of her upper chest. She fell to the floor behind the counter. Appellant pushed Victim 1 away from him turning her body so that she was facing him, and shot her in the chest. Victim 1 fell to the floor in front of the counter and died quickly thereafter. Appellant fled from the store.

A customer in the back of the store called 911. Police and emergency medical personnel responded. Victim 2 was taken to the hospital. She survived the shooting but suffered serious bodily injuries; the bullet remains lodged in her body.

Appellant was arrested and charged with homicide, attempted homicide, robbery, aggravated assault, firearms not to be carried without a license, possessing an instrument of crime, unlawful restraint, and conspiracy to commit robbery.

A jury trial was held September 20-24, 2021 and September 27, 2021. The jury found Appellant guilty of all the charges. With respect to Count 1, criminal homicide, the jury found Appellant guilty of both First-Degree Murder and Second-Degree Murder. Following the verdict, the court sentenced Appellant to life without parole on his first-degree murder conviction. The court imposed concurrent sentences on the other charges.

On October 6, 2021, Appellant filed a post sentence motion for a new trial, which the court denied on October 19, 2021. On that date, the court also issued an amended sentencing order¹ and an order permitting Appellant to raise nunc pro tunc a request to waive

¹ The amended sentencing order corrected Appellant's sentence for robbery, directed Appellant to provide a DNA sample, and awarded Appellant credit for time-served from the date of his arrest (August 6, 2019).

costs.

On October 26, 2021, Appellant filed a motion for reconsideration of sentence nunc pro tunc in which he sought waiver of the costs of prosecution, which was scheduled to be heard on December 3, 2021.

On November 18, 2021, Appellant filed his first notice of appeal. On November 22, 2021, the court directed Appellant to file a concise statement of errors complained of on appeal. On December 2, 2021, Appellant filed his first concise statement.

On December 21, 2021, the court denied Appellant's request to waive the costs of prosecution and granted Appellant leave to file an amended concise statement to include this issue on appeal.

On January 6, 2022, Appellant filed a second notice of appeal, and he filed an amended concise statement on January 7, 2022.

On February 28, 2022, the Pennsylvania Superior Court dismissed the first appeal as premature.

Appellant first asserts that the trial court erred by permitting the Commonwealth to show the jury multiple camera angles of the robbery/homicide. The court cannot agree.

The admissibility of evidence is a matter within the sound discretion of the trial court and will be reversed only where there is a clear abuse of discretion. *Commonwealth v. Clemons*, 650 Pa. 467, 200 A.3d 441, 474 (2019). An abuse of discretion is not a mere error of judgment but rather occurs when the court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly

unreasonable, or the result of partiality, prejudice, bias or ill-will. *Commonwealth v. Gill*, 651 Pa. 520, 206 A.3d 459, 466-467 (2019). An appellate court may not disturb a trial court's ruling by substituting its own judgment for that of the trial court. *Id.*

“Evidence is admissible if it is relevant—that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact—and its probative value outweighs the likelihood of unfair prejudice.” *Clemons, supra*; see also *Commonwealth v. Cash*, 635 Pa. 451, 137 A.3d 1262, 1276-77 (Pa. 2016)(standard of admissibility for a slow-motion video is the same as it is for the admission of other evidence; i.e., the evidence must be relevant and material and its probative value must outweigh its prejudicial effect).

On September 8, 2021, the trial court held a hearing and argument on the admissibility of the surveillance videos from the Uni-Mart. The Uni-Mart had two video surveillance systems. There was an older system with camera angles outside of the store. The Commonwealth sought to admit video clips from two different outside camera angles and the defense counsel did not object to those videos. The Commonwealth admitted the video from the older system as Commonwealth's Exhibit 1 at the hearing held on September 8, 2021.

The new surveillance system had a separate channel for each of the different cameras inside the store. The video clips from the new system were on Commonwealth's Exhibit 2. The Commonwealth sought to introduce video clips from Channels 2, 3, 4, 5, 6, and 8.

Channel 2 was from a camera mounted behind the counter, which also

captured the entrance to the store. The Commonwealth requested to play a one minute and forty-one second clip (1:41). Defense counsel objected to the Commonwealth playing anything beyond the first 28 to 30 seconds. The Commonwealth argued that Channel 2 showed the suspect approach from the East, which was consistent with the accomplice's testimony; it showed the armed robbery from start to finish; and it was the best camera angle to show the physical distress of the cashier, who was having difficulty breathing and was unable to get up after being shot. The trial court permitted the Commonwealth to show the entire one minute and forty-one second clip.

There was one minute and twenty-five seconds of video of the incident from Channel 3. The Commonwealth only sought to introduce the first 34 seconds. Defense counsel objected to any footage beyond the first 26 seconds. The trial court permitted the Commonwealth to play the first 34 seconds from Channel 3. This view showed a fuller body view of the shooter's shoes and clothing, including a white insignia on the right side of his top; the shooter pulling the hammer back on the revolver, a cloud of gunshot residue when shooter discharged the firearm, and the direction that the shooter fled after the shooting.

There was a total of 2:09 of video footage from Channel 4. The Commonwealth sought to play the first 1:09. The defense object to any footage after 1:00. The trial court permitted the Commonwealth to play the first 1:04. While this video also showed the shooter's clothing and shoes, it showed more of the shooting of the customer, Victim 1, than Channel 3. This video provided the best view of the shooter pushing Victim 1 away from him and opening the front of her body to him as he did so, shooting her in a vital area of her body, and a puff or cloud of gunpowder.

Channel 5 was from a camera above the customer side of the counter looking down on the register. There was 1:15 of footage from this channel. The Commonwealth sought to introduce all of the footage; defense counsel objected to anything beyond the first 51 seconds. The trial court permitted the Commonwealth to play the first 54 seconds from this channel. This channel provided the best view of the shooting of the cashier. In this video, the skin color of the shooter was visible² as he pointed the firearm at the cashier, cocked the hammer on the revolver and shot the cashier. It also showed the look of shock on the cashier's face.

Channel 6 was a view from the camera above the counter. The total amount of footage was 2:48. The Commonwealth requested to play the first 58 seconds. Defense counsel objected to anything after the first 57 seconds. This view showed more of the markings on the suspect's sweatshirt, and his dark face covering. The trial court permitted the Commonwealth to play the first 58 seconds from Channel 6.

The trial court precluded any video from Channel 8. Channel 8 was from a camera from the back of the store looking toward the front of the store from a distance. It did not add anything that could not be seen from the other channels.

The trial court did not find any of the videos inflammatory, either individually or cumulatively. Although the perpetrator shot two individuals, there was a minimal amount of blood visible on their clothing. The videos were relevant in different ways to show the identity of the perpetrator and the elements of the charges, which the Commonwealth was required to prove beyond a reasonable doubt. Appellant was charged with a variety of

²Most of the shooter's body was covered with clothing. He wore a hooded sweatshirt with the hood up, a facemask, gloves, long pants, and shoes. The only portion of his face that was visible was the area around his

offenses, include murder, attempted murder, robbery, and aggravated assault. The different camera angles showed a variety of relevant information. Some videos, such as the videos of Appellant cocking the hammer on the revolver, were extremely relevant to show that Appellant intended to fire the gun at the victims. Other videos were important to show the impact on the victims, such as whether they were shot in vital organs and whether they suffered serious bodily injury. Other videos were relevant and material to proving the identity of the shooter from his clothing and shoes. Although at first blush videos from five separate channels and camera angles may seem excessive, it was not when one considered that the jury needed to see what was occurring with three different people—Appellant and the two individuals who were shot.

Appellant next asserts that the trial court erred by denying a challenge for cause to prospective juror #16, a retired Federal Bureau of Prisons guard, who had been the victim of an assault during his employment. The court cannot agree.

Juror No. 16 noted that he had recently retired from his employment as a federal prison guard at Allenwood Penitentiary. Approximately ten years earlier, inmates grabbed him from behind and beat him. He suffered cracked ribs as a result of the incident. Juror No. 16 indicated that he could follow the court's instructions and be fair. He was not trying to get out of being a juror.

In *Commonwealth v. Wilson*, 543 Pa. 429, 672 A.2d 293 (1996), the Pennsylvania Supreme Court set forth the test for evaluating claims involving the refusal to strike a prospective juror for cause as follows:

The test for determining whether a prospective juror should be

eyes. In the video from Channel 5, however, one could see the shooter's skin in the area of his wrist.

disqualified is whether he is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence, and this is to be determined on the basis of answers to questions and demeanor.... It must be determined whether any biases or prejudices can be put aside on proper instruction of the court.... A challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct or answers to questions.... The decision on whether to disqualify is within the discretion of the trial court and will not be reversed in the absence of a palpable abuse of discretion....

Commonwealth v. Wilson, 543 Pa. 429, 672 A.2d 293, 299 (1996) (quoting *Commonwealth v. Colson*, 507 Pa. 440, 490 A.2d 811, 818 (1985), *cert. denied*, 476 U.S. 1140, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986)). A remote relationship to an involved party is not a basis for juror disqualification where a prospective juror indicated during *voir dire* that he or she will not be prejudiced. *Commonwealth v. Colson*, 507 Pa. 442, 490 A.2d 811, 818 (1985). The burden of proving that a prospective juror should be excused for cause is on the challenger who must demonstrate that the prospective juror 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. Robinson*, 581 Pa. 154, 864 A.2d 460, 490 (Pa. 2004)

The court found that Juror No. 16 did not have a close situational relationship sufficient to presume prejudice. Rather, the relationship was remote. His assault occurred in a prison setting ten years prior to jury selection and did not involve the use of a firearm or a public setting. He indicated that he could follow instructions and be fair. Therefore, the court denied the defense request to strike Juror No. 16 for cause.

Appellant also asserts that the trial court erred by admitting trial testimony from Agent Jeremy Brown that Appellant asked during transportation to the Lycoming

County Prison what the means of death was in Pennsylvania.

During the trial, the Commonwealth requested to approach sidebar to discuss a statement that Appellant spontaneously made while Agent Brown was transporting him to the prison. The Commonwealth sought to introduce Appellant's statement where he asked Agent Brown, "What's the means of the death penalty in Pennsylvania?" Trial counsel objected. She indicated that she thought that all of Appellant's statements were covered by the suppression motion and stipulation. The court ruled that the statement was not overly prejudicial and it went to Appellant's consciousness of guilt. N.T., 09/22/2021, at 159-161. Agent Brown testified that while Appellant was in the back of the transport en route to the prison he, on his own, asked what's the means of the death penalty in Pennsylvania. Id. at 164-165.

The identity of the shooter was an issue at trial. The defense presented at trial was Appellant was not the shooter. Pursuant to Pa. R. E. 803(24), statements of an opposing party are not excluded by the rule against hearsay. The Commonwealth asserted that Appellant's statement was consciousness of guilt. The court agreed. The death penalty is available as sentence only for murder of the first degree, i.e., an intentional killing. 18 Pa. C.S.A. §§1102(a); 2502(a). By asking about the means of the death penalty, Appellant was indirectly admitting that he was the shooter by inquiring how Pennsylvania would put him to death for his crime. At the time Agent Brown was transporting Appellant, the Commonwealth had not filed any type of notice that it intended to seek the death penalty. The Commonwealth filed a notice of aggravating circumstances on September 19, 2019. It withdrew its notice on or about August 10, 2021. See Order, 8/10/2021, para. 9. Trial

counsel cross-examined Agent Brown regarding whether the Magisterial District Judge (MDJ) advised Appellant at his preliminary arraignment that the open count of homicide carried a possible death sentence. Agent Brown indicated that he did not think so. He also said, “I don’t recall exactly what he said. I’m sure he said it could carry a life sentence. I’ve never heard him say death before, but I don’t recall.” N.T., 9/23/2021, at 4-5. The parties also entered a stipulation that if called as a witness MDJ Christian Frey would testify that that he has arraigned 5 or 6 individuals on open counts of homicide, and he does not recall specifically if he told Appellant, but his practice is to advise that the maximum penalty for an open count of homicide, which includes a first-degree murder, is life or death. N.T., 9/27/2021, at 59.

Trial counsel argued that Appellant’s statement was covered by the suppression motion contained in Appellant’s omnibus pretrial motion and the Commonwealth’s concession that it did not intend to utilize Appellant’s statements at trial. N.T., 9/22/2021, at 160. The court cannot agree.

Appellant’s motion sought suppression of Appellant’s statements made during the video-recorded police interrogation of Appellant and the statements made in Appellant’s prison phone calls. See Omnibus Pretrial Motion filed on 04/27/2020, Counts 2 & 3 (pp. 6-9, 10-14). In a response to Appellant’s omnibus pretrial motion filed on January 21, 2021, the Commonwealth indicated that it would not be attempting to introduce any portion of Appellant’s video-recorded interview at trial. The court order entered on or about April 21, 2021, also reflects that the suppression and the agreement contemplated the video-recorded interview. Since Appellant’s statement or inquiry regarding the manner in which

Pennsylvania imposes the death penalty was not part of his video-recorded interrogation, it was not precluded by the agreement reached regarding Appellant's omnibus pretrial motion.

Appellant next asserts the trial court erred by refusing to instruct the jury on third degree murder. The court cannot agree.

First-degree murder involves an intentional killing. 18 Pa. C.S.A. §2501(a). Second-degree murder occurs when a killing is committed while the "defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S.A. §2501(b). The phrase "perpetration of a felony" is specifically defined as "the act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." 18 Pa. C.S.A. §2501(d). All other kinds of murder are murder in the third degree. 18 Pa. C.S.A. §2501(c).

Trial counsel tried to argue that the killing of the customer was separate from the robbery of the cashier. This argument ignored the definition of "perpetration of a felony". Both shootings occurred either in the attempt to commit a robbery or as part of the shooter's flight after attempting to commit a robbery. Not only does the definition of second-degree murder include flight after committing or attempting to commit a robbery, but the definition of the phrase "in the course of committing a theft" in the robbery statute includes not only the commission or attempt to commit theft but also flight after the attempt or commission. 18 Pa. C.S.A. §3701(a)(2). Whether Appellant shot and killed the customer during the attempted robbery or in his efforts to flee from the Uni-Mart is of no moment as both would satisfy the definitions of "in the course of committing a theft" for a robbery and the "perpetration of a

felony” for second-degree murder. Since the acts clearly constituted second-degree murder, by definition the crime could not be third-degree murder. Instructions that are not supported by the evidence are not required and serve no purpose other than to confuse the jury.

Commonwealth v. Browdie, 543 Pa. 337, 671 A.2d 668, 674 (1996); *Commonwealth v. Patton*, 936 A.2d 1170, 1176 (Pa. Super. 2007).

Furthermore, the standard jury instruction for second-degree murder states that a defendant kills while fleeing if he does the act that kills during his flight from the scene and there is no break in the chain of the events between the felony and the killing. Pa. SSSJI §15.2502B. The court gave this instruction to the jury. N.T., 09/27/2021, at 117.

In this case, there was no break in the chain of events between the felony and the killing. Appellant grabbed the customer as he entered the store. With the customer still in his grasp, he attempted to rob the cashier of the money in the register. The cashier initially opened the register but, instead of providing the money to Appellant, she pushed Appellant’s hand away twice. Appellant shot the cashier in the chest, pushed the customer away from him, shot the customer in the chest, and then left the Uni-Mart. Appellant’s defense was that he was not the shooter. In such circumstances, a third-degree murder charge is not required. *Commonwealth v. Solano*, 588 Pa. 716, 906 A.2d 1180, 1190 (2006)(court properly refused to charge on third-degree murder where the evidence established that the victim was shot at close range, appellant made no claim that the killing was other than intentional, and appellant asserted that he was not the shooter, claiming he was in Connecticut at the time); *Commonwealth v. Taylor*, 583 Pa. 170, 876 A.2d 399, 402 (2005)(evidence did not support diminished capacity or third-degree murder instruction where appellant’s expert testified that

some of the appellant's actions were deliberate in that he deliberately shot white people but not women or black people, so he was obviously aware of what was happening).

Finally, Appellant avers the lower court erred by denying his request to waive costs of prosecution.

The court recognizes that the Pennsylvania Supreme Court is currently considering the following issue: "Whether Pennsylvania Rule of Criminal Procedure 706(C) requires a trial court to consider a defendant's ability to pay prior to imposing mandatory court costs at sentencing." *Commonwealth v. Lopez*, 261 A.3d 1031 (Pa. 2021)(order granting allowance of appeal). The Court has not ruled on this issue yet. Rather, the case is still in the briefing stage.

Pennsylvania law that is binding (currently) on this court has held that the imposition of court costs is mandatory and the court is not required to hold a hearing on a defendant's ability to pay until it is attempting to incarcerate a defendant for failing to pay. *Commonwealth v. Snyder*, 251 A.3d 782, 797-798 (Pa. Super. 2021); see also 42 Pa. C.S.A. §9728(b.2)(regarding mandatory payment of costs).

Appellant is 22 years old. To the court's knowledge, he has no dependents. If his conviction is affirmed he will spend the remainder of his life in prison. While an inmate's wages are low, so are their expenses. An inmate's basic needs for food, shelter, and clothing are generally provided by the Department of Corrections. The court is not sympathetic to the fact that Appellant may not have money left in his inmate account for "extras" such as snacks. The victim of the homicide was on a break from working when she went across the street to the Uni-Mart to purchase some snacks. Appellant did not have any

consideration for her whatsoever.

Appellant contends that costs should be waived to ensure that restitution is paid. The court is sympathetic to the victim's family. However, the court questions whether Appellant is truly concerned with the victim's family receiving restitution as compared with making any argument that will lessen the deductions from his inmate account.

Appellant argued that pursuant to statutory and regulatory authority, only 50% of any payments will go toward restitution. This is not entirely accurate. Section 9728(g.1) of the Judicial Code states that “[n]o less than 50% of all moneys collected...shall, until the satisfaction of the defendant's restitution obligation, be used to pay restitution to victims.” 42 Pa. C.S.A. §9728(g.1)(emphasis added). Similarly, the regulation states: “At least 50% of any additional payment shall go to restitution until it is paid in full.” 204 Pa. Code 29.405(1)(i)(C)(emphasis added). If it had the authority to do so, the court would be inclined to order the payment of restitution before any payments were applied to court-related fees such as expert witness expenses from the trial. However, neither party requested such relief and, at least at this time, the court may not have the authority to do so in light of other provisions in the regulations regarding the distribution of payments.

The court also notes that there is proposed legislation which would require that restitution be paid before any costs, fines, penalties or other court-related obligations and would permit the court to conduct an ability to pay hearing at any stage of the proceedings. See 2021 Pa. H.B. 248.

The court does not know what the future holds. Perhaps Appellant will live a long life and work his way into one of the better paying inmate jobs. Perhaps inmate wages

will increase. Perhaps the Pennsylvania Supreme Court will rule favorably to Appellant's position in the *Lopez* case. Perhaps the Pennsylvania Legislature will change the statutes related to the payment of restitution and the waiver of costs. Rather than try to anticipate the future, the court endeavored to apply the current statutory, regulatory and case law to the best of its ability.

DATE: _____

By The Court,

Kenneth D. Brown, Senior Judge

cc: Martin Wade, Esquire (ADA)
Nicole Spring, Esquire (PD)
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)