IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0001303-2019**
	:	
vs.	:	**CRIMINAL DIVISION**
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	:	
I-KEEM DAMONT FOGAN,	:	**Notice of Intent to Dismiss PCRA**
Defendant	:	

OPINION AND ORDER

This matter came before the court on the Amended Post Conviction Relief Act (PCRA) petition filed by PCRA counsel on behalf of I-Keem Damont Fogan (Petitioner).

By way of background, on August 4, 2019, Petitioner and his co-conspirator, 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 Petitioner went inside to rob the cashier of the money in the register.

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

and shot her in the left side of her upper chest. She fell to the floor behind the counter. Petitioner pushed Customer away from him turning her body so that she was facing him, cocked the hammer, pulled the trigger, and shot her in the chest. Customer fell to the floor in front of the counter and died quickly thereafter. Petitioner fled from the store.

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

Petitioner 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 Petitioner guilty of all the charges. With respect to Count 1, criminal homicide, the jury found Petitioner guilty of both First-Degree Murder and Second-Degree Murder. Following the verdict, the trial judge[1] sentenced Petitioner to life without parole on his first-degree murder conviction. The trial judge imposed concurrent sentences on the other charges.

On October 6, 2021, Petitioner 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 order[2] and an order permitting Petitioner to raise nunc pro tunc a request to waive costs.

On October 26, 2021, Petitioner filed a motion for reconsideration of sentence nunc

[1] The Honorable Marc F. Lovecchio was the trial judge in this case. He left the bench and returned to private practice at the close of business on November 2, 2021.
[2] 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).

pro tunc in which he sought waiver of the costs of prosecution, as Judge Lovecchio had left the bench, Senior Judge Kenneth D. Brown heard the motion and denied it on December 21, 2021.[3]

Petitioner appealed to the Pennsylvania Superior Court, which affirmed his judgment of sentence on February 7, 2023. Petitioner did not seek allowance of appeal from the Pennsylvania Supreme Court. The record was remitted on March 21, 2023.

On or about February 8, 2024, Petitioner filed a pro se PCRA petition.[4] The court appointed counsel to represent Petitioner and gave PCRA counsel an opportunity to file an Amended PCRA petition. An Amended PCRA petition was filed on March 25, 2024 and a witness certification from trial/appellate counsel was filed on April 10, 2024. A hearing was held on August 9, 2024.

In the Amended PCRA petition, Petitioner asserted the following claims of ineffective assistance of counsel: (1) trial counsel was ineffective for failing to request a new trial, which should have been granted, when the Commonwealth's attorney discussed penalties and sentence with the jurors during *voir dire*; (2) trial counsel was ineffective for failing object to the Commonwealth's narration of key events depicted on surveillance videos when the witness had no first-hand knowledge and the events did not require expert knowledge which resulted in Petitioner being denied a fair trial; (3) trial counsel was ineffective for failing to object to Agent Trent Peacock's opinion testimony regarding how

[3] Due the vacancy caused by Judge Lovecchio's departure which could not be filled until an election was held in 2023 and the winner took the bench in January 2024, Kenneth Brown was given permission to resume Senior Judge status to help fill the void until Judge Lovecchio's successor took the bench. Judge Brown also wrote the opinion for the appeal in this case.

[4] The petition is dated January 31, 2024, but it was filed in the clerk of court's office on February 8, 2024. Due to the prisoner mailbox rule, the petition would be considered filed as of the date Petitioner submitted it to prison officials for mailing. The court does not know what that date would be but it would have to be some time

long a white plastic bag and latex gloves were exposed to the elements; and (4) trial counsel was ineffective for failing to object to testimony elicited by the Commonwealth's attorney that Petitioner had prior criminal convictions.

DISCUSSION

The law presumes counsel has rendered effective assistance, and to rebut that presumption, the petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. *Commonwealth v. Kohler*, 36 A.3d 121, 132 (Pa. 2012). "[T]he burden of demonstrating ineffectiveness rests on [the petitioner]." *Commonwealth v. Rivera*, 10 A.3d 1276, 1279 (Pa. Super. 2010). To satisfy this burden, a petitioner must plead and prove by a preponderance of the evidence that: "(1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and, (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different." *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003). Failure to satisfy any prong of the test will result in rejection of the petitioner's ineffective assistance of counsel claim. *Commonwealth v. Jones*, 811 A.2d 994, 1002 (Pa. 2002).

"Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." *Commonwealth v. Miller*, 819 A.2d 504, 517 (Pa. 2000) (citation omitted). A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued. *Id.* In addition, we note that counsel cannot be deemed ineffective for failing to pursue a

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between January 31 and February 8, 2024.

meritless claim. *Commonwealth v. Nolan*, 855 A.2d 834, 841 (2004) (superseded by statute on other grounds).

1. ***Was trial counsel ineffective for failing to request a new trial when the Commonwealth's attorney discussed penalties and sentence with the jurors during voir dire?***

Nicole Spring, Esquire represented Petitioner from the time the charges were filed through direct appeal. Ms. Spring testified that she has been the Chief Public Defender in Lycoming County for the last five years. Ms. Spring testified that during jury selection, the prosecutor, Martin Wade, said to the jury, "This is not a death penalty case so if anyone has that type of ethical concern, please understand that it is not in play. This is not part of this case. Sometimes we get responses on the sheets and the questionnaires having to do with that." N.T., 08/09/24, at 5.[5] Ms. Spring indicated that Petitioner was charged with first-degree murder. *Id*. The Commonwealth had originally requested the death penalty but later revoked its Notice of Intent to Seek Aggravating Circumstances. *Id*. When this case proceeded to trial, there were charges of first-degree and second-degree murder for which the penalty would be life imprisonment if Petitioner were convicted. *Id*. There was no chance of Petitioner receiving the death penalty at the time of trial. *Id.* at 6. Ms. Spring testified that she did not object to Mr. Wade's statements, which were made in the presence of the entire jury panel as there was group *voir dire* nor did she request a limiting or cautionary instruction. *Id*. She stated that she did not have a strategic basis for failing to object; she simply was not aware of the issue at the time. *Id*. at 6-7. She stated that the statements implied that death could have been on the table and that when it is not, the jury is not

involved in the penalty. *Id*. at 7.

Petitioner asserts that the Commonwealth's statement during jury selection that the death penalty was not on the table entitles him to a new jury trial. He relies on *Shannon v. United States,*[6] *Commonwealth v. Sattazahn*,[7] and *Commonwealth v. Yarris*.[8] While Petitioner's counsel acknowledged that if it were a death penalty case, mentioning the penalty might not be prejudicial because the jury would be deciding whether the defendant receives the death penalty. The same cannot be said, however, when the Commonwealth is not seeking the death penalty at trial, as mentioning possible penalties is prejudicial because the jury has no role in determining the penalty and the statement mitigates the seriousness of the case. According to Petitioner, a jury may be more likely to find a defendant guilty if they know that the defendant cannot possibly be put to death.

The Commonwealth's attorney argued that the statement was not improper and even if it were, Petitioner was not prejudiced. He noted that there is a question on the juror questionnaire asking if the juror has any philosophical, moral or religious convictions that would preclude the juror from serving on the jury. He argued that jurors typically check that box due to concerns with the death penalty. If he didn't tell the potential jurors that the death penalty was not a possibility in this case, the Commonwealth could be prejudiced by the selection of a juror who may fail or be hesitant to return a verdict of first-degree murder for fear that Petitioner could be executed. He noted that he asks such a question or makes such a statement in every murder case and he would do so again.

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[5] *See also* N.T., 09/20/21, at 71.
[6] 512 U.S. 573 (1994).
[7] 952 A.2d 640 (Pa. 2008).
[8] 549 A.2d 513 (Pa. 1988).

He also argued that the cases cited by Petitioner were distinguishable. He noted that *Yarris* was a capital case where the judge instructed the jury on the penalties for first-, second-, and third-degree murder but the judge also instructed the jury not to consider the penalties in its deliberations. The defendant in *Yarris* was not awarded a new trial due to the jury instruction. Here, at trial, in the final instructions to the jury, the court instructed the jury not to consider any possible penalties when making its decision on Petitioner's guilt. As the trial court's instruction was consistent with the instruction that the judge gave in *Yarris*, the result should be the same and Petitioner should not be awarded a new trial.

The Commonwealth's attorney argued that *Sattazahn*, another capital case, was not controlling because the judge advised the jury of the possible punishments but did not give a cautionary instruction. Even so, the Pennsylvania Supreme Court did not award Sattazahn a new trial. Instead, the Court found that Sattazahn did not suffer prejudice because the judge instructed the jury not to find him guilty unless the Commonwealth proved his guilt beyond a reasonable doubt.

According to the Commonwealth's attorney, *Shannon* is not applicable because it was a firearm case where the defendant wanted an instruction that a verdict of not guilty by reason of insanity would result in a civil commitment to a mental institution. *Shannon* also was a direct appeal, not a post-conviction collateral attack. The United States Supreme Court held that it must be assumed that the jury followed the court's instructions to follow the law regardless of the consequences.

Finally, the Commonwealth's attorney argued that if there were any error it was harmless because talk of penalties was introduced during trial through Petitioner's statement or inquiry about the means of death.

The court finds that this claim has arguable merit. In *Shannon*, the United States Supreme Court stated:

> It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.' The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. **Information regarding the consequences of a verdict is therefore irrelevant to the jury's task.** Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.

Shannon, 512 U.S. at 579 (citations and footnotes omitted; emphasis added). The jury had no sentencing function in this case, because the Commonwealth withdrew its notice of aggravating factors on August 10, 2021, approximately two months prior to trial.

Near the end of *voir dire*, the prosecutor made the following comment: "This is not a death penalty case, so if anyone has that type of ethical concern, please understand that is not in play, that is not part of this case. Sometimes we get responses on the sheets, the questionnaires having to do with that." N.T., 09/20/21 at 71.

Question 2 of the juror information questionnaire asks: "Do you have any religious, moral, or ethical beliefs that would prevent you from sitting in judgment in a criminal case and rendering a fair verdict?" *See* Pa. R. Crim. P. 632(H). This question is not directed at finding out whether a potential juror has a problem with the death penalty. If it were, the question would be specifically tailored to the death penalty and only be asked of jurors in capital cases. Instead, this question is designed to determine if a juror has a problem sitting in judgment of another human being in any case. For example, there may be jurors who view

or interpret Matthew 7:1, which states: "Judge not, lest ye be judged," as a prohibition on the person serving as a juror in any capacity. Although sometimes a response of "yes" to this question revolves around a potential juror's difficulty with the death penalty, the prosecutor's comment did not arise in this context. In fact, there is nothing in the record of the jury selection to indicate that any juror had responded "yes" to that question. Instead, the prosecutor was questioning the jury panel about whether anyone had a friend or family member who had a criminal case pending in Lycoming County right now that his office was prosecuting. *See* N.T., 09/20/2021 at 70-71. A couple of jurors raised their hands. Juror No. 24 wasn't sure if his sister had a pending case because she was always in trouble. Juror No. 5 responded that her brother had a criminal case in Clinton County but his lawyer was from Lycoming County. It was after Juror No. 5's answers that the prosecutor made his comment. The prosecutor's comment was not responsive to either juror's answers nor was is made in response to any inquiry to an affirmative response to Question 2 on the juror information questionnaire.

The court is concerned with the prosecutor's argument that he makes such a statement in every homicide case and he would do so again. The prosecutor should not have made a comment about any possible future consequences of a guilty verdict. If the prosecutor wanted to inquire if any juror's affirmative response to Question No. 2 was a concern with sitting as a juror in any capacity, he could do so. However, if the juror responded that it was a concern about the death penalty, the court (and not the prosecutor), should be the one telling the potential juror that he or she would not have such a concern in this particular case. When an appellate court finds that an error is harmless, it is not approving or sanctioning the conduct. It is finding that the conduct is improper but, under the facts and circumstances of a

particular case, a new trial is not required.

The court also finds that trial counsel did not have a strategic reason for failing to object to the prosecutor's comment. Trial counsel testified that she did not object to the prosecutor's statements, which were made in the presence of the entire jury panel as there was group *voir dire* nor did she request a limiting or cautionary instruction. N.T., 08/09/24, at 5. She stated that she did not have a strategic basis for failing to object; she simply was not aware of the issue at the time. *Id*. at 6-7.

Although the claim has arguable merit and counsel did not have a strategic basis for failing to object to the prosecutor's statement, the court finds that Petitioner was not prejudiced for several reasons. First and foremost, the jury needed to be informed that this was not a death penalty case due to Petitioner's statements that were admitted at trial. Although the death penalty was not an option at the time of trial, it was a possibility until the Commonwealth withdrew its notice of aggravating circumstances on August 10, 2021, less than two months prior to trial. While Petitioner was being transported from a Magisterial District Judge's (MDJ's) office back to the prison, he spontaneously asked Agent Jeremy Brown what the means of death was in Pennsylvania. The Commonwealth introduced this statement during trial to show Petitioner's consciousness of guilt. Petitioner challenged the trial court's ruling permitting the Commonwealth to introduce this statement, and the trial court's ruling was upheld on appeal. *See Commonwealth v. Fogan*, 67 MDA 2022, 293 A.3d 598 (table), 2023 WL 1794257 at *3-*4 (Pa. Super. 02/07/2023) (nonprecedential). In light of Petitioner's inquiry regarding the means of death, to avoid confusing or misleading the jury, the jury would have to be told that this case was not or was no longer a death penalty case and to not concern themselves with penalty. Furthermore, during the trial and in

response to Agent Brown's testimony about Petitioner's statement about the means of death, trial counsel asked Agent Brown what an open count of homicide meant and whether it was correct that the maximum penalty for first-degree murder would be life or death. N.T., 09/23/2021, at 5. Agent Brown responded, "Correct, life in prison or the death penalty. *Id*. During the defense presentation, the parties stipulated that if called to testify MDJ Frey would testify that it was his practice for an open count of homicide to advise a defendant that the maximum penalty is life or death. *See* N.T., 09/27/2021, at 59. As the penalties for first-degree murder were discussed during trial by both parties in connection with Petitioner's statement regarding the means of death in Pennsylvania, the prosecutor's statement during *voir dire* is harmless error.

Secondly, in its closing instructions, the court said the following: "In arriving at your verdict you should not concern yourselves with any possible future consequences of your verdict, including what the penalty might be if you should find the defendant guilty." N.T., 09/27/2021, at 128. The law presumes that the jury follows the court's instructions. *Commonwealth v. Coleman*, 230 A.3d 1042, 1050 (Pa. 2020); *Commonwealth v. Chmiel*, 30 A.3d 1111, 1184 (Pa. 2011).

Thirdly, if trial counsel had objected, it is likely that the trial court would not have ordered a new trial but instead would have informed the potential jurors to ignore the prosecutor's comment and instructed the potential jurors that they should not concern themselves with any possible future consequence of their verdict, including what the penalty might be if they should find the defendant guilty.

Finally, the evidence presented at trial was such that this error on the part of the prosecutor does not undermine the court's confidence in the outcome in this case. As noted

by the prosecutor, this is not a direct appeal; it is a PCRA proceeding. To establish prejudice in this context, Petitioner must plead and prove that but for counsel's action or inaction, there is a reasonable probability that the outcome of the proceedings would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the verdict returned by the jury. *See Commonwealth v. Bardo*, 105 A.3d 678, 684 (Pa. 2014).

The evidence presented at trial against Petitioner was significant, if not overwhelming. The video surveillance from the Uni-Mart showed that the suspect intentionally shot the Clerk and the Customer. The Clerk was shot in the left chest area, which caused her lung to collapse.[9] The Customer was shot in the chest, such that the bullet struck and injured her fourth and fifth ribs, the pericardium (sac around the heart), the left ventricle of the heart, and the diaphragm, causing a liter of blood to accumulate in her chest cavity and rapidly fatal injuries.[10] The heart and lungs are vital organs. The specific intent to kill and malice can be inferred from shooting someone in their vital organs. *See Commonwealth v. Hitcho*, 633 Pa. 51, 123 A.3d 731, 746 (Pa. 2015)("the finder of fact may infer malice and specific intent to kill based on the defendant's use of a deadly weapon on a vital part of the victim's body").

A wealth of evidence was presented to show that Petitioner was the shooter. The video surveillance from the store also showed the suspect wearing latex gloves, distinctive clothing (a brown, hooded sweatshirt with a pattern and logo or insignia; and gray Nike sweatpants with a black diagonal pattern on the thighs), white Adidas sneakers, and carrying a white plastic bag. The police used the video surveillance from the store, a nearby business

[9] *See* N.T., 09/22/21, at 8-14 (testimony of Dr. John Becker, radiologist).
[10] N.T., 09/22/21, at 122-124 (testimony of forensic pathologist Dr. Rameen Starling-Roney).

-Martino's Auto, and personal video from residence(s) and observations by residents in the neighborhood to determine the direction that the suspect fled and the general area where they could search for him.

For example, John Bower testified that he lived at 1949 Newberry Street. He was on his front porch and saw a gentleman run through a parking lot and jump over his neighbor's fence. The person was wearing a dark hoodie and a mask on his face. The person was leaning down behind a truck, looking at the ground and then he got up, darted toward the fence and jumped over the neighbor's fence. Mr. Bower lived by the Hip Hop Hippy Shop.

Surveillance video from Martino's Auto[11] showed an individual in a dark top and light pants like the suspect's run across the intersection and heading between the Newberry Sub Shop and the residence at 1005 Dewey Avenue.[12]

The police found latex gloves and clothing consistent with that worn by the suspect discarded behind 1005 Dewey Avenue and on the hillside in the area behind that residence.[13] On the side of the building at 1005 Dewey Avenue, Agent Peacock discovered gray sweatpants tucked between a plastic tote and the building. On the hillside behind the building, he saw scuff marks on the shale hillside and he found latex gloves. About fifty feet up the hillside tucked behind a tree, he found a brown sweatshirt consistent with what the shooter was wearing. These items were submitted to the Pennsylvania State Police (PSP) labs for recovery of DNA evidence and analysis.[14]

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[11] Martino's Auto was located at the intersection of Newberry Street and Dewey Avenue.
[12] *See* N.T., 09/22/21, at 23-24 (testimony of Agent Trent Peacock)
[13] *See* N.T., 09/22/2021, at 23-37 (testimony of Agent Peacock describing the search of the area and the discovery of the gloves, bag and clothing consistent with the items worn and possessed by the shooter); *Id*. at 94-99 (testimony of Officer Joseph Ananea regarding collection of evidence from the surrounding area).
[14] *See* N.T., 09/23/2021, at 13-33 (testimony of Gordon Calvert regarding the taking of samples from the recovered items); N.T., 9/27/2021, at 10-29 (testimony of Joseph Kukosky regarding DNA analysis of the

Officer Joseph Ananea collected the latex gloves. He did not pick them up; he just scooped them into an evidence envelope. When the envelope was opened by the serologist, the envelope contained not only latex gloves but also a blue bracelet. The gloves were turned inside out. The latex gloves and blue bracelet were swabbed for DNA. The combined samples from the latex gloves and the blue bracelet recovered with the gloves contained a mixture of DNA from at least three people.[15] Petitioner's DNA was the major component and DNA from at least two other individuals were in the minor components.[16]

A cutting from the back of the waist band/tag area of the gray sweatpants was submitted for DNA analysis. The gray sweatpants also contained a mixture of DNA from at least three individuals. There were two major components and one minor component. One of the major components was consistent with Petitioner's DNA.[17]

About fifty feet up the hillside above where the gloves were found, the police found a brown sweatshirt behind a tree. Down the left side and front of the sweatshirt, there was a unique pattern and logo consistent with the one worn by the shooter as depicted in the video surveillance from the store. Stroup testified that Petitioner told him he ran up into the woods and his after the shooting.

In April of 2020, about eight months after the incident, police found white Adidas sneakers in a different location on the same hillside as the other items. A few days prior to the incident, Petitioner was seen at the Genetti Hotel wearing white Adidas sneakers that were consistent with those the suspect was wearing during the incident. The Adidas sneakers

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samples submitted).

[15] The PSP scientist took a wet swab and applied it to the all three items and a dry swab and applied it to all three items and submitted the two swabs for DNA analysis.

[16] *See* Commonwealth Exhibit 99; N.T., 09/27/21, at 16-18.

found on the hillside were submitted for DNA testing, and Petitioner's DNA was found in the toe box of the right sneaker.

On the night of the incident, Petitioner was caught on camera on the porch of a residence in his underwear.[18] When he realized the was being captured by a video camera, he immediately left the porch. He was in a state of undress and carrying a garbage can. The footage was from sometime between 10:00 p.m. and midnight.

Another witness, who lived in the eleven hundred block of Race Street saw Petitioner running down the street clothed only in underwear and carrying a garbage can.[19] His uncle and his neighbor spoke to him while he was standing three to four feet from him. The individual asked if he could throw some stuff away. They told him no and asked him to leave. The individual left and went north on Race Street. The witness called the police at approximately 10:50 p.m.

The neighbor testified that he heard what happened at the Uni-Mart.[20] He was standing on the neighbor's porch when an individual walked up and asked for a ride. He thought the individual looked weird because he was dressed in socks and underwear and carrying a trashcan. He asked the individual why he looked that way, and the individual said he and friends were playing around. He may have told the individual that the police were being called. The individual left and went up Race Street toward Memorial Avenue.

In a prison phone call, Petitioner admitted he was walking in the area without any clothes shortly after incident.

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[17] *See* Commonwealth Exhibit 100; N.T., 09/27/21, at 19-22.
[18] *See,* N.T., 09/21/21, at 126-128 (testimony of Anthony Snyder).
[19] *See,* N.T., 09/21/21, at 130-136 (testimony of Sean Forker).
[20] *See,* N.T., 09/21/21, at 140-142 (testimony of George Whaley).

A plastic grocery bag similar to the one the shooter was holding during the robbery was found in the area of 947 Race Street.[21]

The owner of the Hip Hop Hippy Shop was staying in the apartment behind the Hip Hop Hippy Shop, because he was in town to do inventory. The Shop was located at 1953 Newberry Street. Someone texted his daughter and she told him that there were a whole bunch of police at their shop. About twenty minutes later, the police knocked on the door of the apartment. A sergeant came up and explained what was going on and asked several questions. The next morning, the owner heard a thump outside. He looked outside and saw a bike lying on the ground and a person came over the fence. The person said, "It's not what you think." The owner replied, "I don't know that I thought so how could you know." He told the person that he did not know anything and he was going back inside. The person rode away on the bike and the owner called the police. The person was a young black male and

[21] *See,* N.T., 09/22/21, at 39.

was wearing a hooded sweatshirt made out of a Mexican blanket. Inside the pocket of the sweatshirt was what appeared to be a box-type object shaped like a brick but smaller. The person said he came to pick up a friend's bike but the bike was not there a few minutes earlier.[22]

Still photographs from the surveillance video from 1018 Dewey Avenue after the incident showed an individual with tattoos on his triceps that were the same as tattoos on Petitioner's triceps.[23]

Petitioner was arrested approximately one and one-half days after the incident. His cell phone was on his person and seized incident to his arrest. The police obtained a search warrant to search the cell phone and discovered text messages between Petitioner and his co-conspirator, Noah Stroup, discussing their plans to rob that particular Uni-Mart.

Stoup testified at trial that Stroup was the look-out and Fogan was the person who attempted to rob the Uni-Mart. Stroup was captured on the video surveillance outside the store. He was wearing a distinctive black jacket that had fleur-de-lis (like the New Orleans Saints symbol) on the sleeve of the jacket. Stroup was living with his girlfriend. When the police went to that residence to arrest Stroup he was hiding in the basement. In the living room, the police observed a black jacket with fleur-de-lis on it. The police called the phone number that Petitioner was communicating with in the text messages planning the Uni-Mart robbery and Stroup's phone, which was hidden on the furnace in the basement, rang. The text messages from both phones were introduced into evidence.[24]

The black jacket with fleur-de-lis was recovered from Stroup's residence and

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[22] *See*, N.T., 09/22/21, at 42-51 (testimony of Michael Belemonti).
[23] *See*, Commonwealth Exhibits 76 & 77; N.T., 09/22/21, at 144 (Agent Jeremy Brown).

submitted for DNA testing. The DNA consisted of a mixture of at least three individuals and Stroup's DNA was the major component.[25]

Both the text messages and the DNA evidence corroborate Stroup's testimony about their roles in the attempted robbery of the Uni-Mart.

At the time of his arrest, Agent Jeremy Brown swabbed Petitioner's hands for gunshot residue (GSR).[26] The swabs or STUBS were sent to the PSP Harrisburg Regional Laboratory for analysis. Characteristic particles of GSR were found on both the STUBS from Petitioner's left and right palms. Indicative particles were found on all four STUBS – left palm, left back, right palm and right back. The results indicated that Petitioner may have recently handled or discharged a firearm, been in close proximity to a firearm when it was discharged or came into contact with GSR that was on another item.[27]

In light of all the facts and circumstances of this case, including but not limited to the evidence set forth above, the court finds that there is not a reasonable probability that the outcome of the proceedings would be different if trial counsel had objected to the prosecutor's statement during jury *voir dire*.

Since Petitioner has not proven all three prongs necessary for a claim of ineffective assistance of counsel, he is not entitled to relief on this claim.

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[24] *See*, N.T., 09/21/21, at 62-81 (testimony of Noah Stroup).
[25] *See* Commonwealth Exhibit 100; N.T., 09/27/21, at 19-20.
[26] *See* Commonwealth Exhibits 80 and 81 (the evidence envelope containing the GSR kit and the video of the GSR collection process); N.T., 09/22/21, at 148-150 (testimony of Agent Jeremy Brown regarding swabbing Petitioner's hands for GSR).
[27] *See* N.T., 09/23/21, at 36-40 (testimony of Nicholas Plumley); Commonwealth Exhibit 98 (a copy of Mr. Plumley's report).

2. Was trial counsel ineffective for failing object to the Commonwealth's narration of key events depicted on surveillance videos when the witness had no first-hand knowledge and the events did not require expert knowledge which resulted in Petitioner being denied a fair trial?

This issue involves two separate surveillance videos: (1) the videos from the Uni-Mart; and (2) the surveillance video from Martino's Auto.

a. Narration of the Uni-Mart Video

Petitioner contends that trial counsel was ineffective for failing to object to Agent Trent Peacock narrating portions of the Uni-Mart video. Specifically, Petitioner contends that trial counsel should have objected to Agent Peacock narrating the video when the shooter pulled the hammer back on the revolver prior to shooting the clerk and again prior to shooting the customer.

During trial, the Commonwealth called Agent Peacock as a witness. Agent Peacock stated his experience in law enforcement and with firearms. Agent Peacock testified that he reviewed the video surveillance of the incident at the Uni-Mart. He noted that there were two video systems – a newer, 8-camera system which the time stamp was off by one hour as it had not been adjusted for Daylight Savings Time; and an older, six-camera system with a time stamp that was five minutes and fifty seconds slow. He testified that the weapon used in the shooting was a revolver. He explained that a revolver has a cylinder that rotates. Revolvers can be single action or double action. On a single action revolver, the hammer must be cocked before the trigger can be pulled to fire it. On some double action revolvers, the hammer must be cocked before the trigger can be pulled to fire it and on others, the trigger can just be pulled and the weapon will fire. He testified that the digit or finger used to

cock the hammer is the thumb.

The Commonwealth played the surveillance video for Agent Peacock and while the video was playing, Agent Peacock testified that while the suspect was holding Customer over the counter and pointing the gun at Clerk you could clearly see him pull the hammer back with his thumb and after he fired and shot Clerk, you could clearly see that he did it again. Video from another camera angle was played and Agent Peacock stated, "If you watch right there he just raised his thumb and cocked the hammer back." The video clip was played again and Peacock said, "Watch his hand right there, you'll see his thumb come up, right there and pull the hammer back and cock it. And right there she was just shot." N.T., 09/22/2021, at 15-21.

Petitioner contends that because Agent Peacock was not present at the shooting and the shooter cocking the hammer was obvious in the video, Peacock's testimony was not necessary or proper under Pa.R.E. 701. Although Peacock testified about his extensive experience and qualifications, he was not qualified as an expert witness and his testimony was not on a subject beyond the knowledge of a lay juror. The jury could see for itself whether the suspect cocked the hammer of the gun. Trial counsel should have objected to Peacock's testimony and the trial court should have sustained the objection.

The Commonwealth contended that Agent Peacock's testimony was not improper and, even if it were, Petitioner was not prejudiced. The Commonwealth noted that an element of first-degree murder is the specific intent to kill. Directing the jury to look at the shooter's hand to see that he intentionally cocked the hammer of the firearm and shot the Clerk and the Customer was proper. It showed that the gun did not accidentally discharge while the shooter was holding the Customer around her neck with his right arm and keeping her close

to or up against his body. Furthermore, since one could clearly see the suspect cock the hammer, Petitioner was not prejudiced by Agent Peacock's testimony on this issue.

The court finds that this claim lacks arguable merit. The court finds that Agent Peacock's testimony was not improper. This testimony was helpful for the jury to clearly understand that the handgun possessed by the shooter was a revolver and what it takes for a revolver to fire. While some jurors may be familiar with firearms and know which ones require the cocking of a hammer and which ones merely require the pulling of the trigger, not all jurors may have such familiarity or knowledge. It was also helpful to direct the jury's attention to the location on the video where the jury could see what the shooter was doing with the firearm so that the jury could determine for itself whether Petitioner had the specific intent to shoot the Clerk and the Customer in vital areas of their bodies. He did not, however, offer opinion testimony that the shooter acted with the specific intent to kill or malice.

Agent Peacock's testimony was also helpful to explain the differences in the time-stamps from the two different systems and how much those times were off from the actual time that the incident occurred. This testimony was based on his own observations of the actual time and comparing it to the time displayed on the video surveillance systems.[28]

Even assuming for the sake of argument that this testimony was improper, Petitioner has failed to establish prejudice. As noted by the prosecutor, even without Agent Peacock's testimony, the jury could see that the individual shot the Clerk and the Customer. The fact that they were shot in vital organs is enough to establish that the perpetrator had the specific intent to kill and malice to support a conviction for first-degree murder. Given the wealth of evidence set forth earlier in this opinion that established Petitioner was the perpetrator inside

the Uni-Mart, the court finds that Petitioner has failed to establish prejudice.

Petitioner has not established the first and third prongs for a successful ineffective assistance of counsel claim. Therefore, he is not entitled to relief on this claim.

b. Narration of the Martino's Auto video

Petitioner also contends that trial counsel was ineffective for failing to object to Agent Peacock's testimony regarding the video surveillance from Martino's Auto for the same reasons that he should not have been permitted to narrate the video from the Uni-Mart. Again, the court cannot agree.

Agent Peacock testified that he reviewed the surveillance footage from Martino's Auto. He testified that he observed "an individual in a dark top and light color pants run across the intersection of Dewey and Race Street, he would have been running in a westerly direction, and coming from the area on the west side of the Hip Hop Hippy Shop." The surveillance video from Martino's Auto was not playing at the time Agent Peacock offered this testimony. Instead, immediately after that testimony a portion of the aerial drone footage taken by Assistant Chief Jason Bolt and admitted as Commonwealth's Exhibit 4, was played.[29] Furthermore, Agent Peacock did not offer any opinion testimony. Instead, he noted

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[28] *See*, N.T., 9/22/21, at 17.

[29] *See*, N.T., 09/22/21, at 24 (Agent Peacock's testimony about what he saw on the surveillance footage and that drone footage was played after that statement); N.T., 09/21/21, at 56-60 (testimony of Assistant Chief Bolt regarding the drone footage that he took).

what he observed in the video footage to explain the locations of the Uni-Mart in relation to other places and events such as seeing an individual running near Martino's Auto. He also explained why the police took the subsequent actions that they did, including searching the area around and behind 1005 Dewey Avenue and discovering the items that near that building and on the hillside behind that building.

Petitioner's contention that Agent Peacock narrated the video from Martino's Auto is simply inaccurate. The incident occurred at approximately 9:10 p.m. on August 4, 2019. Agent Peacock's testimony described what the police did that night and during the daylight hours the next day to discover any evidence related to the incident. It was based on his own perceptions.[30] Therefore, the court finds that this claim lacks arguable merit.

Even assuming for the sake of argument that this claim was of arguable merit, for the reasons stated previously in this opinion, the court finds that Petitioner has not established prejudice.

As Petitioner has not established all three prongs of an ineffective assistance of counsel claim, he is not entitled to relief.

3. Was trial counsel ineffective for failing to object to Agent Trent Peacock's opinion testimony regarding how long a white plastic bag and latex gloves were exposed to the elements?

Petitioner next asserts that trial counsel was ineffective for failing to object to Agent Peacock's testimony regarding how long a white plastic bag and latex gloves were exposed to the elements.

With respect to the white bag, Agent Peacock testified

[30] *See*, N.T., 09/22/21, at 24-29.

> I did not discover it, but while we were searching the area a white plastic bag was found in the back yard of 947 Race Street, that's consistent with what the suspect was holding in his left hand at the time of the robbery, and that bag was clean, had obviously not been out in the weather any amount of time.

N.T., 09/22/21, at 23. With regard to the latex gloves, the following exchange took place between the prosecutor and Agent Peacock:

> Q. This one here is Exhibit 29, talk about this one.
> A. This is the shale hillside, these are scuff marks where obviously somebody slid down over the hillside, and right here are the latex gloves I seen, they were about 10 feet up the hillside.
> Q. Did you manipulate those or touch those with your ungloved hands at all?
> A. I did not.
> Q. When you're searching for items as a detective do you make note of the condition of the items that you see relative to other items? For example, do you take note of whether an item's weathered or not?
> A. Yes.
> Q. Can you explain the significance of those types of observations for an investigator?
> A. It -- obviously if something's laid out in the weather for a period of time it collects dust, dirt, dew from overnight. All these items were -- were relatively clean, had not been weathered and laying out in the weather for any period of time.

N.T., 09/22/21, at 30.

Petitioner contends that this was improper opinion testimony under Rule 701 and instead it was expert testimony when Agent Peacock had not been offered as an expert witness in violation of Pa. R.E. 702. The court cannot agree.

Rule 701 states:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to

determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Pa. R. E. 701.

Detective Peacock testified that he was part of the investigation to look for evidence in the area. With respect to the gloves, he found them ten feet up the hillside behind 1005 Dewey Avenue. He noticed that the gloves were relatively clean. He also testified that although he was not the person who located the white plastic bag, it also was clean.[31]

The testimony regarding the lack of dew or the cleanliness of the gloves and bag was based on the personal perceptions or observations of the law enforcement officers that discovered them. It was helpful to the jury's understanding of the officer's testimony and helpful to the jury determining whether a fact in issue, more specifically whether the items were left by the perpetrator in the Uni-Mart incident. It was not based on scientific, technical or specialized knowledge. Agent Peacock did not testify about the chemical composition of the items or how long it would take plastic or latex to break down. He testified about common sense information possessed by the general public and reasonable inferences to be drawn from that information. A person need not be a weatherperson to testify that that the street wasn't went before s/he went inside and it was wet after s/he came back outside; therefore, it rained. The information provided by Agent Peacock was similar. It is common knowledge that items that have been left

[31] The white plastic bag was discovered by Agent Jeremy Brown, who testified that the bag was discovered in a yard at the rear of 947 Race Street. Although the grass had some light dew, the bag did not. The bag was not weathered and it was not placed there by the owner of the property. *See*, N.T., 09/22/21 at 135-136.

outside gather dust, dirt and dew. The longer that they are left outside, the more weathered they appear. Therefore, this testimony was not improper.

Even assuming for the sake of argument that this testimony was improper, Petitioner was not prejudiced. Even without Agent Peacock's "opinion" testimony, the jury could reasonably conclude that the items were discarded by the perpetrator during the night after the incident before they were found the next day. The items were similar to the ones possessed by the perpetrator and the gloves were found in the same area as other items of clothing similar to the clothing worn by the perpetrator. The combined sample from the gloves and bracelet as well as the sample from the gray sweatpants had Petitioner's DNA. Shortly after the commission of the shooting, an individual was captured on surveillance video running past Martino's Auto. Martino's Auto was located on Dewey Avenue. The gloves and items of clothing were discovered near 1005 Dewey Avenue and on the hillside behind that building. The jury could reasonably infer that the perpetrator removed his clothing and discarded it in the area of 1005 Dewey Avenue and the hillside behind it.

Petitioner was in a state of undress during the night after the incident occurred in the neighborhood where incident occurred and the items were found. He admitted in a prison phone call that it was he who was walking down the street in his underwear carrying a trashcan. The inference that the perpetrator discarded his clothing in the location where the items were found by the police is strengthened by the fact that Petitioner was in a state of undress after the incident and that Petitioner's DNA was found on the combined sample from the gloves and blue bracelet and on the gray sweatpants. The text messages between Petitioner and Stroup show that they planned to commit a robbery of this specific Uni-Mart. Based on all the evidence, even without Agent Peacock's statement that the items had not

been laying out in the weather for any significant period of time, the jury would have concluded that the items were discarded by the perpetrator and the perpetrator was Petitioner.

Based on this evidence and the inferences from this evidence, as well as the evidence the court outlined earlier in this opinion, the court concludes that Petitioner has not established a reasonable probability that the outcome of the proceedings would have been different.

As Petitioner has not established by a preponderance of the evidence all three prongs of an ineffective assistance of counsel claim, he is not entitled to relief on this issue.

4. Was trial counsel ineffective for failing to object to testimony elicited by the Commonwealth's attorney that Petitioner had prior criminal convictions?

Petitioner's final claim is that trial counsel was ineffective for failing to object to testimony elicited by the Commonwealth's attorney that Petitioner had prior criminal convictions.

There was no direct testimony that Petitioner had prior criminal convictions. Rather, Agent Jeremy Brown testified that the mostly unclothed individual carrying a trashcan in surveillance video from 1018 Dewey Avenue was positively identified as I-Keem Fogan by a probation officer and the Chief of Police; that's where he obtained the name I-Keem Fogan.[32]

The court agrees that this issue has arguable merit. An inference from this testimony is that Petitioner had prior convictions. The Commonwealth did not need to indicate the persons who identified Petitioner in the video by their titles. The Commonwealth could have instructed Agent Brown to testify simply that individuals familiar with Petitioner identified him and provided the police with his name or he could have identified the probation officer

and Chief of Police by their name rather than their title so that the jurors, even if some of them were familiar with those people and their occupations, would not know if their knowledge came from contacts Petitioner had with the criminal justice system or some innocuous situation such as, for example, being from the same school or neighborhood as Petitioner or as a coach of Petitioner when he was in school or Petitioner dated or knew a relative.

Trial counsel testified that she did not have any strategic reason for not objecting to this testimony.

Although Petitioner has established the first two prongs for an ineffective assistance of counsel claim, he has not established prejudice. As discussed with respect to the first claim, the evidence against Petitioner was substantial, if not overwhelming. This isolated reference to Petitioner being identified by a probation officer and the Chief of Police was not enough to alter the outcome in this case. There was a wealth of evidence, as set forth earlier in this opinion, to establish that Petitioner was the individual who entered the Uni-Mart, attempted to rob it, and shot the Clerk and the Customer.

As Petitioner has not established the prejudice prong for ineffective assistance of counsel, he is not entitled to relief.

Conclusion

Petitioner has not established by a preponderance of the evidence all of the prongs for ineffective assistance of counsel on any of his claims; therefore, he is not entitled to a new trial.

O R D E R

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[32] *See*, N.T., 09/22/21, at 138.

AND NOW, this 18th day of July 2025, the parties are hereby notified of this Court's intention to deny the Petition. Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter a final order denying the petition. The court notes that an order such as this is normally entered when the court dismisses a petition without an evidentiary hearing. However, due to an issue that arose at the time of the hearing, the court assured the parties at the hearing that it would utilize this procedure.

The Clerk of Courts shall mail a copy of this order to the Petitioner by certified mail, return receipt requested.

By The Court,

_____
Nancy L Butts, President Judge

cc: Martin L. Wade, Esquire (ADA)
Donald F. Martino, Esquire (PCRA Counsel)
I-Keem Fogan, #QN-3483 (certified mail)
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Jerri Rook