273 A.3d 514
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Rahmael Sal HOLT, Appellant

No. 789 CAP
|
Submitted: October 13, 2021
|
Decided: April 28, 2022

Synopsis

Background: Defendant was convicted in the Court of Common Pleas, Westmoreland County, Criminal Division, No. CP-65-CR-0005539-2017, Rita D. Hathaway, President Judge, of murder of a law enforcement officer of the first degree, murder of the first degree, and violations of the Uniform Firearms Act for being person not to possess a firearm and for carrying a firearm without a license, and defendant was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, No. 789 CAP, Donohue, J., held that:

evidence was sufficient to show that defendant specifically intended to kill officer, as required to support conviction for murder of a law enforcement officer;

trial court did not abuse its discretion in determining that conviction for murder of a law enforcement officer was not against the weight of the evidence;

trial court did not abuse its discretion in admitting evidence of defendant's prior possession of firearm that was allegedly of the same type used in shooting;

error in admitting testimony that witness observed defendant with a second firearm in the waistband of his pants was harmless;

trial court did not abuse its discretion by denying pretrial motion for severance of counts related to illegal possession of a firearm;

evidence indicated existence of conspiracy supporting admission of testimony under coconspirator exception to the hearsay rule;

declarant's statement regarding murder weapon was a statement in furtherance of conspiracy, as required to be admissible under coconspirator exception to hearsay rule; and

death sentence was not the product of passion, prejudice, or any other arbitrary factor.

Affirmed.

Dougherty, J., filed concurring opinion in which Mundy, and P. Kevin Brobson, JJ., joined.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection; Post-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

***522** Appeal from the Judgment of Sentence entered on February 12, 2020 in the Court of Common Pleas, Westmoreland County, Criminal Division at No. CP-65-CR-0005539-2017. Post-Sentence Motions denied August 21, 2020, Hathaway, Rita D., President Judge

Attorneys and Law Firms

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BAER, C.J., TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.
Justice Donohue delivers the Opinion of the Court as to Parts I, III, IV, V(A), V(C), V(E), VI, VII, VIII, IX and X and announces the Judgment of the Court with respect to Parts II, V(B) and V(D). The Opinion is joined in full by Chief Justice Baer and Justice Todd. Justice Dougherty files a concurring opinion, joined by Justices Mundy and Brobson.

OPINION

JUSTICE DONOHUE

This is a direct appeal from appellant Rahmael Holt's sentence of death. We affirm.

I. Factual History

On November 17, 2017, Patrolman Brian Shaw of the City of New Kensington Police Department was shot and killed in the line of duty. At 8:06 p.m. Officer Shaw informed dispatch that a vehicle had failed to stop for his lights and sirens. Shortly afterwards, Officer Shaw announced that he was pursuing on foot. Moments later he radioed that he had been shot. Because no one witnessed the shooting, the Commonwealth established Holt's guilt through circumstantial evidence, including the testimony of Tavon Harper, the driver of the vehicle Officer Shaw attempted to stop. We summarize the facts adduced by the Commonwealth.

Harper testified that he moved to New Kensington sometime around August 24, 2017, the day he was released from prison after serving a sentence for robbery. He lived at 1105 Kenneth Avenue with his then-wife, Morgan Harvin. On the day of Officer Shaw's murder, Harper initiated a video call with Vanessa Portis, "a girl that [he] talked to socially." However, Rahmael Holt answered, who Harper recognized as they had attended elementary and middle school together. The two talked, and Holt asked if Harper had any drugs. Harper said he could sell him some cocaine after he showered. N.T., 11/5/2019, at 243. Holt texted that Harper should meet him at 1206 Victoria Avenue. When Harper arrived, ***523** Holt walked next to the vehicle and showed a gun, which Harper said looked like a .40 caliber pistol. *Id*. at 247. After buying the cocaine, Holt asked if Harper could sell him some marijuana. Harper told him he would try to get some.

Later that afternoon, Harper met a friend in McKeesport who sold marijuana. Harper bought the drugs and made his way back to New Kensington. Holt bought the marijuana and then asked Harper to drive him to a nearby convenience store. Shortly after leaving the store, Harper heard and saw police sirens. Harper did not pull over, explaining in his testimony that his home on Kenneth Avenue was nearby and he intended to park there. Officer Shaw pursued the vehicle and radioed its license plate.

During the pursuit, Holt pulled a gun from underneath his jacket and asked Harper to hide it. Harper declined because he was on parole and feared going back to prison. He told Holt to get out and run. After a brief vehicular pursuit, Harper turned onto Leishman Avenue. Holt, still holding the pistol, jumped out of the vehicle and ran. Harper saw a police officer chase Holt. He then closed the passenger door and drove back to his house on Kenneth Avenue.

Nicole Drum, who resided at 1237 Leishman Avenue, testified that she heard gunshots and went to her window. Directly across from her home is a parking lot and the City Reach Church. She observed someone running down the alley behind the church parking lot. Video footage from Drum's home and the church were obtained, which together showed the following. Officer Shaw's patrol vehicle is seen pursuing a Jeep, which disappears from the camera's view. Moments later, a male who cannot be clearly identified runs on the sidewalk with Officer Shaw pursuing at a close distance. Both individuals can be seen turning into the church parking lot. A muzzle flash is seen, but the footage does not otherwise indicate anything about the shooting.

Officer James Noble testified that he heard Officer Shaw report on the radio that a vehicle was failing to yield. Officer Noble responded to the given location, which was one block over and parallel to Officer Noble's police car. Officer Shaw reported that the vehicle turned onto Leishman Avenue and "[a]t some point he had indicated that he had one running, which I believe was a foot pursuit in progress." N.T., 11/4/2019, at 71. Officer Noble then proceeded to the 1200 block of Leishman, which was the last location given by Officer Shaw. As he arrived at the intersection of Catalpa and Leishman, he heard several gunshots. Officer Noble then exited his vehicle and quickly located Officer Shaw, who was on the ground. He went to render aid and observed that Officer Shaw's firearm holster still had its flap closed, meaning that it had not been drawn. [1] Despite emergency measures, Officer Shaw died. Jennifer Hammers, M.D., performed the autopsy and testified to a reasonable degree of medical certainty that Officer Shaw primarily died from blood loss, with the accumulation of blood outside of his lungs and within the chest cavity as a secondary cause. N.T., 11/7/2019, at 781.

Multiple police forces and agencies investigated. Thomas Klawinski, an agent employed by the Office of Attorney General, told the jury that at approximately 9:30 p.m. he received word that a cell phone had been found on Victoria Avenue, which runs parallel to Leishman Avenue and is separated from Leishman Avenue by ***524** Equator Alley. Agent Klawinski retrieved the cell phone, which was powered on and appeared operational, from the backyard of 1204 Victoria Avenue. The straight-line distance between Officer

Shaw's body and the yard was measured as approximately 165 yards. N.T., 11/5/2019, at 184. Meanwhile, authorities quickly closed in on Harper based on the license plate relayed by Officer Shaw. Detective Ray Dupilka of the Westmoreland County District Attorney's office received a call at approximately 10:30 p.m. informing him that the Jeep had been located at 1105 Kenneth Avenue. Detective Dupilka then proceeded to that address, where officers had already contacted Harper and Harvin.

Harper and Harvin both testified at trial that they jointly decided to lie and tell the police that Harvin had been driving the Jeep. The next day, she told police that she had lied, and that Harper was the driver. Harper eventually admitted to driving the Jeep and claimed that the passenger was known on the street as "Reese." Harper denied that he was in regular communication with Reese. The next morning, authorities searched the phone recovered from the backyard of 1204 Victoria Avenue and learned that the device had been in contact with Harper's phone on multiple occasions on November 17. Harper was then arrested.

At that point, Harper provided more details, including identifying the passenger as Holt. He indicated that after closing the passenger door, he parked the Jeep at home because he knew the police had the license plate and would find the vehicle. *Id.* at 276. He then took Harvin's Nissan to 1206 Victoria Avenue where he saw Holt standing in the doorway. Holt said, "I'm fucked ... I dropped my phone." *Id*. at 295. Harper took Holt to another location then returned to Kenneth Avenue.

Multiple people testified to Holt visiting 1206 Victoria Avenue shortly after Officer Shaw was shot. Michael Luffey and his fiancée, Holly Clemons, lived there along with Lakita Cain, Cain's daughter Taylor Mitchell, and Cain's niece Antoinette Strong. Luffey testified that Mitchell and Holt were in a relationship and that Holt stayed over most evenings. The night of the shooting, Luffey and Clemons came home and saw Holt on the second floor. Luffey observed Mitchell trying to bandage Holt's right hand, which was bleeding. Holt left within thirty minutes of Luffey's arrival. Clemons testified that Holt appeared nervous and was pacing. He left and "got into some type of dark-colored vehicle" and did not return. N.T., 11/6/2019, at 493. Antoinette Strong testified that she was inside the home and heard gunshots outside. N.T., 11/7/2019, at 661. Approximately three minutes later, she heard knocking. *Id*. She opened the backdoor and Holt asked if Lakita Cain was home. *Id*. at 664. Holt came in and went to the basement, which did not function as a living space. A few minutes later, Holt went upstairs to Cain's room. Strong returned to her room and did not see Holt again. *Id*. at 665-66.

The Commonwealth also presented evidence suggesting that Holt made efforts to have others remove evidence from 1206 Victoria Avenue.[2] Luffey testified that on November 18, 2017, he came home in the afternoon and saw Lisa Harrington, a relative of Holt's, speaking to Cain. After smoking a cigarette on the porch, Luffey saw "Lisa ... taking a paper bag out of ***525** the house[.]" N.T., 11/6/2019, at 426. Harrington then left. Clemons also testified to this interaction, saying that she was in the residence when Harrington arrived. Cain "ma[de] a comment that she had to get her story together." *Id*. at 499. According to Clemons, Harrington arrived with several other people. Clemons saw Harrington leave with a purse and told the others "to wait here, she would be right back." *Id*. at 501. Harrington was gone approximately fifteen minutes before returning. Clemons asked Cain what was happening, and Cain replied, "she had ... to get stuff out of the house." *Id*. at 502. Cain "did say that there was, like, a gun in the basement." *Id*. at 503. Clemons did not see either woman go to the basement. Antoinette Strong saw both women go to the basement and observed Harrington leave the house carrying a purse. N.T., 11/7/2019, at 671-72.

Holt was apprehended on November 21, 2017. N.T., 11/8/2019, at 928. The Commonwealth presented extensive evidence of Holt's movements after the shooting. Vanessa Portis, the owner of the phone recovered from 1206 Victoria Avenue, testified that she bought the phone for Holt and put its service on her T-Mobile plan. At 8:38 p.m. on the night Officer Shaw was murdered, Portis received a phone call from Lisa Harrington. At 8:48 p.m., she received another phone call from Harrington's phone, but Holt was on the line. Holt informed her that he had lost his phone. She called T-Mobile at 8:49 p.m. and cancelled his line.[3] Shortly after 9 p.m., Portis went to her home. As she arrived, "they [Holt and Harrington] pulled up directly behind me two seconds later." N.T., 11/6/2019, at 544. At Holt's request, Portis took Holt to Holt's mother's home, where they stayed for approximately two and one-half hours. Afterwards, Portis dropped Holt off "somewhere in Penn Hills." *Id*. at 554.

Aysa Benson testified that Holt arrived at her home in Duquesne on November 18, 2017 between 10 a.m. and noon. Benson lived there with Holt's cousin, Marcel Mason. Holt stayed there throughout the day. Around 11:30 p.m., Benson

saw on the news that Holt was wanted in connection with Officer Shaw's murder. She and Mason told Holt that he had to leave. Benson took Holt to Mason's brother's house on 5005 Ladora Way in Hazelwood, where Holt was ultimately apprehended. After dropping Holt off, Benson returned home. The next day, she provided Mason with a prepaid cell phone at Mason's request. That phone was seized when Benson was arrested for hindering apprehension. The phone sent multiple text messages to a phone recovered at 5005 Ladora Way, including a message saying, "[E]rase everything in your old phone and tell Aysa ... To go upstairs, get them pants I had and throw them away. My ID in there. Get rid of." *Id*. at 919-20.

Finally, the Commonwealth presented ballistics evidence. Detective Todd Roach recovered five bullet casings from the parking area next to the City Reach Church crime scene. N.T., 11/7/2019, at 692, 700. Agent Klawinski discovered a sixth casing the next day. *Id*. at 812. Agent Klawinski discovered parts of two bullets lodged in the exterior of 1237 Leishman Avenue. *Id*. at 815, 819. A third bullet fragment was recovered from 1243 Leishman Avenue. *Id*. at 752-53. Dr. Hammers testified that she found two bullets in Officer Shaw's body during her examination. The first entered the left shoulder and perforated the lung on the left side. *Id.* at 778-79. The second bullet entered the back of the officer's left shoulder and lodged ***526** near his right armpit. *Id*. at 779. These items were turned over to Detective Roach, along with a third bullet that was lodged in Officer Shaw's bullet resistant vest. *Id*. at 732-33.

Corporal Robert Hagins testified as an expert in firearm and toolmark examination. He concluded that four bullets—the two recovered from Officer Shaw's body, one from his vest, and one bullet from 1237 Leishman—were all discharged from the same firearm and were .40 caliber class bullets. N.T., 11/8/2019, at 866-67. He could not determine if the other bullet pieces recovered from the homes were fired from the same firearm. He did, however, opine that all six casings discovered in the church parking lot were fired from the same firearm. *Id*. at 859. The corporal also explained that the firearm operator can suffer injuries due to "slide bite." "[A]n improper grip on the firearm will allow ... the bottom of the slide, which has sharp edges and is not to go against skin. That will ride on the web of the shooter's hand between the index finger and thumb and can cause a bite in this manner." *Id*. at 871.

Holt was charged by criminal information with murder of a law enforcement officer of the first degree, murder of the first degree and two violations of the Pennsylvania Uniform Firearms Act, [4] the first as a person not to possess a firearm and the second for carrying a firearm without a license. [5] On January 19, 2018, the Commonwealth filed notice of its intent to seek the death penalty. Trial Court Opinion, 8/12/2020, at 1. The defense and Commonwealth filed pretrial motions, regarding various issues including the introduction of evidence of Holt's prior possession of firearms and the disclosure of the defense's expert mitigation report. The trial court held hearings addressing the pretrial motions on various dates between May 21, 2018 and October 28, 2019.

Thereafter, a jury trial was held. Following the six-day jury trial, at which the Commonwealth presented the above-described evidence, Holt was convicted of all charges. Verdict Slip, 11/12/2019, at 1. At the penalty phase, the Commonwealth presented testimony from the victim's mother and brother; the defense presented evidence from a neighbor of Holt and a pastor who ran a youth program that Holt attended from the ages of six to fourteen. N.T. 11/13/2019–11/14/2019, at 19-80. The jury found the existence of a single aggravating circumstance, namely that Officer Shaw was a peace officer murdered while in the line of duty, 42 Pa.C.S. § 9711(d)(1). Sentencing Verdict Slip, 11/14/2019, at 3. The jury also determined that Holt established the existence of the catch-all mitigating circumstance, and in the sentencing verdict slip, referred specifically to Holt's "lack of parental guidance growing up, [being] raised in a high crime environment and [the] violent death of his brother." *Id*.; 42 Pa.C.S. § 9711(e)(8). The jury determined that the aggravating circumstance outweighed any mitigating circumstances and recommended a sentence of death. Sentencing Verdict Slip, 11/14/2019, at 3. Thereafter, the trial court formally imposed a sentence of death, followed by an aggregate sentence of ten and a half to twenty-seven years of imprisonment for the violations of the Pennsylvania Uniform Firearms Act. Sentencing Court Order, 2/12/2020.

Holt filed post-sentence motions, raising, inter alia, a claim that his conviction for first-degree murder was against the ***527** weight of the evidence. Post-Sentence Motions, 2/25/2020, at 2. The trial court denied the post-sentence motions on August 21, 2020. Trial Court Opinion and Order, 8/21/2020. Holt filed a notice of appeal, and, upon order of the trial court, a timely statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) raising eight issues for appeal. He raised claims regarding the sufficiency of the evidence; claiming

that the verdict of death was the product of passion, prejudice and arbitrariness; arguing the admission of evidence of his prior possession of firearms violated Pennsylvania Rule of Evidence 404(b); asserting the trial court erred in denying his motion for severance of counts; asserting the trial court erred in allowing Cain's testimony to hearsay; asserting that the trial court erred in requiring the defense to disclose the mitigation report prior to the conclusion of the guilt phase; and raising a claim that the death penalty in Pennsylvania is unconstitutional. Rule 1925(b) Statement, 11/20/2020, at 1-6.

Holt raises nine claims on appeal.

II. Sufficiency of the evidence

Holt's first two claims involve the sufficiency of the evidence to convict and the weight of the evidence.

Holt's first issue addresses the sufficiency of the evidence to support his conviction for homicide of a law enforcement officer. 18 Pa.C.S. § 2507(a). The elements of this crime are identical to murder of the first degree with the added elements that the victim (1) is killed while in the performance of duty and (2) that the actor knew the victim is a law enforcement officer. The only element challenged by Holt is the applicable mens rea of intentionality. [6] "To convict a defendant of first degree murder, the Commonwealth must establish a human being was unlawfully killed, the defendant was responsible for the killing, and the defendant acted with malice and a specific intent to kill." *Commonwealth v. Perez*, 625 Pa. 601, 93 A.3d 829, 841 (2014).

Holt argues that the evidence presented established "only that the shooter shot recklessly at Officer Brian Shaw as he was running away during a police pursuit following an attempted traffic stop." Holt's Brief at 20. According to Holt, the reckless acts of the shooter [7] cannot support the requisite specific intent. Holt maintains that he was only "shooting on the run, not squaring up to fire back at the pursuing victim." *Id*. at 19 (citation omitted). Holt supports this argument with citation to the Commonwealth's forensic pathologist, alleging that she "confirmed that the pathological evidence was consistent with the shooter not facing the victim and shooting ***528** as he was running away." *Id*. Additionally, the location of the bullet casings from the first to the fifth "were [twenty-two] feet apart" and therefore "consistent with the shooter running away and not stopping and deliberately and intentionally taking aim at the pursuing officer." *Id*. Additionally, Holt argues that Officer Shaw "was not shot in the head or heart or a vital part" of his body. *Id*. The pathologist identified the cause of death as blood loss and opined that the bullets did not puncture Officer Shaw's lungs. *Id*. In sum, Holt argues that the Commonwealth's evidence established only that Holt wildly fired his gun in the general direction of Officer Shaw. In legal terms, he contends that he acted so recklessly that his actions demonstrated a callous indifference regarding the possibility that Officer Shaw would die, making him guilty of murder in the third degree. *Id*. at 21 ("There was simply no evidence of specific intent to kill as is required to sustain the first-degree murder conviction in this capital murder case. Third degree, yes. First degree, no.").

The Commonwealth responds with the legal proposition that "specific intent to kill may be inferred from the defendant's use of a deadly weapon upon a vital part of the victim's body." Commonwealth's Brief at 9 (citing cases). The Commonwealth submits that Officer Shaw was struck in a vital part of his body, as three bullets hit his torso, one of which was stopped by the officer's vest while another perforated a lung. The Commonwealth also disputes Holt's averment that he was merely reckless in firing the gun. It cites as factually similar *Commonwealth v. Washington*, 549 Pa. 12, 700 A.2d 400 (1997), wherein Washington turned and fired a gun at an unarmed security guard who was chasing Washington and his co-defendant following a botched robbery. This Court affirmed the conviction for first-degree homicide. The Commonwealth argues that the present facts more strongly indicate an intent to kill, as Holt fired multiple shots at Officer Shaw.

Our standard of review follows the United States Supreme Court's approach as articulated by *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which holds that the Due Process Clause as incorporated by the Fourteenth Amendment requires that all convictions be supported by "sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Id*. at 316, 99 S.Ct. 2781. We follow that approach, as stated in *Commonwealth v. Brown*, 617 Pa. 107, 52 A.3d 1139 (2012):

> This Court follows the *Jackson* approach in determining whether evidence is sufficient to support a conviction beyond a reasonable doubt. First, our standard of review, like the *Jackson* standard, recognizes the proper regard

> an appellate court must give to the fact-finder's evaluation of all of the evidence received at trial and, therefore, requires scrutiny of the totality of that evidence "in the light most favorable to the Commonwealth, as verdict winner," *Commonwealth v. Sanchez,* 589 Pa. 43, 58, 907 A.2d 477, 486 (2006), and to "draw all reasonable inferences in favor of the Commonwealth." *Commonwealth v. Fisher,* 491 Pa. 231, 234, 420 A.2d 427, 428 (1980). Further, our Court's determination of the ultimate question of evidentiary sufficiency parallels the central inquiry under the *Jackson* standard, namely, whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319, 99 S.Ct. 2781; *see also Commonwealth v. Reed,* 605 Pa. 431, 436, 990 A.2d 1158, 1161 (2010) (sufficiency determination depends on whether a reasonable ***529** trier of fact could have found every element of the crime was established beyond a reasonable doubt).

Id. at 1164 (footnote omitted).

We find that the Commonwealth presented sufficient evidence to enable a rational trier of fact to conclude that Holt specifically intended to kill Officer Shaw. To the extent that the Commonwealth asks the Court to affirm based solely on the fact that Officer Holt was struck in vital parts of his body, we decline to do so. There is no doubt that intentionally striking a vital part of the body with a deadly weapon is, by itself, sufficient for a fact-finder to infer the specific intent to kill. For example, in *Commonwealth v. Rodgers*, 500 Pa. 405, 456 A.2d 1352, 1353 (1983), the cause of death was "a shotgun blast from a distance of three (3) to five (5) feet to the face of the victim." As we observed, "The nature of the killing, a shotgun blast to the head at short range, establishes the specific intent to take life." *Id.* at 1354.

We agree that the bullets struck Officer Shaw in vital body parts. *See*, *e.g.*, *Commonwealth v. Talbert*, 129 A.3d 536, 543 (Pa. Super. 2015) ("The gunshot wounds suffered by both victims were inflicted on vital parts of the body including the head, chest, and lung."). However, this is not a straightforward case like *Rodgers*, where the "nature of the killing" leaves no room to question whether the actor intentionally aimed the weapon at the victim. The validity of the inference that striking a vital body part with a bullet is sufficient evidence of intent to kill rests on the intentional use of the weapon to achieve that result. For example, a person firing a gun blindly through the woods for amusement may strike an unseen hunter in the heart. A rational fact-finder could not conclude that the fact a bullet struck a vital part of the body established a specific intent to kill. In *Commonwealth v. Drum*, 58 Pa. 9 (Pa. 1868), we stated: "He who uses a deadly weapon upon another at some vital part, with manifest intention to use it upon him, must in the absence of qualifying facts be presumed to know that his blow is likely to kill, and must be presumed to intend death." *Id.* at 9.

Thus, the fact that a victim suffered injuries to a vital body part is not dispositive for a sufficiency analysis. There must also be other evidence demonstrating that the shooter manifestly intended to use the weapon upon the victim. Affirming the verdict based solely on the fact that a vital body part was struck would be in dereliction of *Jackson* and the Due Process Clause, as we are required to review all the evidence. *See* *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781 ("Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review **all of the evidence** is to be considered in the light most favorable to the prosecution."). Holt correctly observes that there is no direct testimony concerning how he deployed his weapon. We therefore decline to uphold the verdict based solely on the fact that at least one bullet struck a vital body part.

Nonetheless, examining all the evidence we find that the Commonwealth presented sufficient evidence. Drawing all inferences in favor of the Commonwealth as verdict winner, the jury could have determined that Holt fired six bullets in rapid succession. Three of these bullets struck Officer Shaw. Together, those facts are indicative of an intent to kill. In *Commonwealth v. Padgett*, 465 Pa. 1, 348 A.2d 87, 88 (1975), the defendant was charged with murder. He took the stand and testified that he shot the victim at a distance of approximately six feet "and admitted pointing the weapon at the arm of the victim in jest." *Id.* at 90. The bullet entered the victim's ***530** arm and proceeded through her heart. Padgett argued that the inference of a specific intent to kill based on striking a vital body part was negated because he shot only her arm. We disagreed. "[W]e are not persuaded that it must be shown that the bullet fired from a revolver, a deadly weapon, initially entered a vital organ before the inference of specific intent to kill can arise. The firing of a bullet in the general area in which vital organs are located can in and of itself be sufficient to prove specific intent to kill beyond

a reasonable doubt." *Id.* at 88 (citing *Commonwealth v. Gidaro*, 363 Pa. 472, 70 A.2d 359 (1950)).[8] The *Gidaro* case likewise cited the fact that a person fires a gun towards another human being as supporting a "reasonable inference" of an intention to kill. "When any person standing [sixteen] feet from another person points a loaded gun at that person's chest area and pulls the trigger, the reasonable inference is that he intended to take that person's life." *Gidaro*, 70 A.2d at 362.

While this case lacks direct evidence that Holt intentionally aimed his gun at Officer Shaw, as was the case in *Padgett* and *Gidaro*, a rational fact-finder could conclude beyond a reasonable doubt that he did so. That three of the six bullets fired struck Officer Shaw is circumstantial evidence permitting an inference that Holt in fact aimed his weapon at Officer Shaw. The Commonwealth, as verdict winner, is also entitled to the reasonable inference that Holt fired at close range. The video evidence showed Officer Shaw was roughly six to seven feet behind Holt. Multiple officers testified that Officer Shaw radioed that he had been shot shortly after stating that he had started a foot chase. It is obvious that aiming a gun at a human being and firing multiple shots at close range can result in death. "[W]e know of no proposition more consistent with human experience than the conclusion that absent circumstance to the contrary, a person intends the natural and probable consequences of his act." *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30, 37 (1976). Moreover, the fact that those bullets struck vital body parts, while not conclusive, is certainly a fact that the jury could consider in determining whether Holt deliberately aimed his firearm at Officer Shaw as opposed to wildly firing the gun in Officer Shaw's general direction. In combination, these circumstantial facts warranted the inference that Holt acted with the specific intent to kill. *See Commonwealth v. Houser*, 610 Pa. 264, 18 A.3d 1128, 1133 (2011) ("The Commonwealth may use solely circumstantial evidence to prove a killing was intentional[.]").

Holt rejects the validity of these inferences by positing that he shot recklessly, based primarily on the fact that the distance from the first to fifth ammunition casings was twenty-two feet, and the expert testimony of Dr. Hammers. Beginning with the former point, Detective Roach explained that the majority of the time cartridge cases are ejected "out the right side of the weapon," and can go different distances, from "a couple of inches" to "up to 10 to 15 feet[.]" N.T., 11/7/2019, at 701. As to Dr. Hammers' testimony, while Holt ***531** claims that she "confirmed" that the evidence was consistent with Holt not facing the victim and shooting as he was running away from Officer Shaw, the expert did not do so. Dr. Hammers merely said that she could not say one way or the other. She testified, "[T]here's nothing about the injuries that lets me know which direction the person firing the shots was looking at the time that they fired the gun." N.T., 11/7/2019, at 787-88. The jury could certainly have determined that Holt fired his gun in the manner described in his brief, but it was not required to accept Holt's favored inferences.[9]

Relatedly, Holt's argument that he is guilty only of third-degree homicide asks this Court to weigh the evidence for itself. The sufficiency inquiry "does not require a court to ask itself whether **it** believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 318-19, 99 S.Ct. 2781 (quotation marks and citation omitted). The jury is entrusted with deciding the facts, and what Holt intended when he fired the gun is quintessentially a factual determination. "As intent is a subjective frame of mind, it is of necessity difficult of direct proof." *Commonwealth v. Matthew*, 589 Pa. 487, 909 A.2d 1254, 1257 (2006) (citation omitted). We find that the Commonwealth presented sufficient evidence.[10]

III. Weight of the evidence

"A weight challenge is *sui generis*. Such a claim is not premised upon trial court error or some discrete and correctable event at trial, but instead ripens only after, and because of, the jury's ultimate verdict in the case." *Criswell v. King*, 575 Pa. 34, 834 A.2d 505, 512 (2003). As a result, a claim asserting that the verdict was against the weight of the evidence rests within the trial court's discretion. *Commonwealth v. Houser,* 610 Pa. 264, 18 A.3d 1128, 1135 (2011). We review the trial court's exercise of discretion in ruling on the claim, and not whether the verdict was against the weight of the evidence. *Id.* The trial court is required to consider whether the jury's verdict "is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative[.]" *Commonwealth v. Clemons*, 650 Pa. 467, 200 A.3d 441, 463 (2019). Holt raises ten assertions in support of his claim that the trial court erroneously denied his weight motion.

1. The prosecution's key witness, Tavon Harper, who was released from prison and state parole a few weeks after this trial, despite the Commonwealth and Harper

misrepresenting that he had no plea agreement with the prosecution to testify, lied repeatedly in statements provided prior to his trial testimony ***532** ([N.T., 11/5/2019, at] 323-24) and was not a credible witness.

2. Five casings were located [twenty-two] feet apart by investigating detectives, indicating the shooter shot back recklessly at Officer Shaw, as he ran from him. There was no gun residue on the body, indicating no close-range shots were fired.

3. The testimony of Holly Clemons and Michael Luffey was tainted by threats to take away their kids if they did not cooperate and testify.

4. The testimony of Antoinette Strong, who testified repeatedly she arrived at Cain's residence at 9:00 pm on the night of the murder, one hour after Officer Shaw was shot, and made observations that could not have been made at that time ([N.T., 11/7/2019, at] 676-77).

5. The allegation that [Holt] cut his hand while firing a semiautomatic weapon was rebutted by photos produced at trial of both hands uncut and without sign of injury at the time of his arrest.

6. There was no eyewitness to the murder of Brian Shaw.

7. The video displayed in court did not identify [Holt].

8. No murder weapon was produced.

9. [Holt] did not confess.

10. There was no DNA or other scientific evidence linking [Holt] to this murder.

Holt's Brief at 22-23 (reordered).

This list of complaints unaccompanied by any substantive argument impedes meaningful review, and two of these points are subsumed within other appellate issues. Regarding Tavon Harper's alleged plea deal, there is no factual support for this claim on the record. Concerning the bullet casings, Holt raised this point when challenging the sufficiency of the evidence to support the mens rea of intentionality.

The remaining eight assertions reduce to an allegation that someone other than Holt committed the crime, which was Holt's primary defense at trial. "Mr. Holt has maintained from day one since capture that he is innocent." N.T., 11/4/2019, at 43. The absence of DNA evidence, a confession, a direct eyewitness or video recording of the murder, and a murder weapon are not dispositive because the Commonwealth may establish guilt through entirely circumstantial evidence, "so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt." *Commonwealth v. Hardcastle,* 519 Pa. 236, 546 A.2d 1101, 1105 (1988). "A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict." *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751 (2000). When ruling on a weight claim, the trial court must determine whether "certain facts are so clearly of greater weight that to ignore them, or to give them equal weight with all the facts, is to deny justice." *Commonwealth v. Rivera*, 603 Pa. 340, 983 A.2d 1211, 1225 (2009). The points discussed above do not point to contrary facts but rather cite the Commonwealth's failure to present certain facts.

To the extent that these assertions generically challenge the weight of the evidence with respect to linking Holt to the identity of the shooter, Harper's testimony, if accepted by the jury, itself provided a sufficient basis to implicate Holt as the shooter. As the trial court observed, "Testimony from Tavon Harper established that Holt possessed a handgun with a 'long magazine' immediately before the traffic stop and testified that Holt 'jumped out' of the vehicle on Leishman Avenue with the pistol in his hand and he watched Officer Shaw pursue him on foot." ***533** Trial Court Opinion, 8/12/2020, at 19. The trial court also cited circumstantial evidence presented by the Commonwealth, including the testimony by multiple residents of 1206 Victoria Avenue that placed Holt at the residence shortly after shots were heard and the cell phone discarded at 1204 Victoria Avenue which was linked to Holt. [11] The trial court also cited the evidence of flight and that continued attempts to evade law enforcement suggested a consciousness of guilt. We agree that the weight given to Harper's testimony and the circumstantial evidence presented was for the jury. *Commonwealth v. DeJesus*, 580 Pa. 303, 860 A.2d 102, 107 (2004) ("The weight of the evidence is exclusively for the finder of fact, which is free to believe all, part, or none of the evidence, and to assess the credibility of the witnesses.").

Holt is correct that some of the testimony conflicts with other evidence. Strong testified that she arrived home after 9 p.m., and the Commonwealth presented several pieces of evidence showing that Officer Shaw was murdered

approximately twenty minutes beforehand. However, "[a] new trial should not be granted because of a mere conflict in the testimony[.]" *Widmer*, 744 A.2d at 752. What effect the minor discrepancy in recalling the timing of the events had upon other portions of Strong's testimony was for the jury to decide. *DeJesus*, 860 A.2d at 107. Likewise, the assertion that photographs of Holt's hand objectively establish that he did not suffer any injuries did not convince the trial court that a new trial was warranted. Both Strong and Luffey testified that they observed Holt with an injury to his hands consistent with the "slide bite" injuries described by Corporal Hagins. The fact that those injuries were, according to Holt, not depicted in the photographs taken after Holt's capture was a potential conflict [12] in the testimony for the jury to weigh. *Id.* In any case, Holt was not apprehended immediately, and Holt does not account for the fact that the injuries may have healed. Based on its review of Harper's testimony and the circumstantial evidence, the trial court concluded that the "verdict as rendered by the jury is not so contrary to the weight of the evidence that it shocks this court's sense of justice[.]" Trial Court Opinion, 8/12/2020, at 21. We find no abuse of discretion.

IV. Failure to disclose plea deal

Next, Holt alleges that the Commonwealth had an undisclosed agreement with Harper that he would testify at trial in exchange for the dismissal of his outstanding charges and his release from custody. Holt's Brief at 23-24. Holt draws attention to the fact that Harper was being held in the Westmoreland County Jail for the two years leading up to Holt's trial and faced ***534** felony drug charges and a parole revocation. N.T., 11/5/2019, at 232. Shortly after testifying, Harper was released from custody and the charges against him were dismissed. Holt's Brief at 24. Holt asks this Court to infer from the circumstances that there was a plea agreement, arguing that "[i]t offends one's sense of justice and defies logic to conclude that [Harper] did not have an agreement with the prosecution to set him free by testifying against [Holt]." *Id.* at 26. Holt complains that the Commonwealth's failure to disclose the alleged plea agreement violates the principle established in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and continued in *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). He contends that the jury could have been "significantly influenced" by Harper's undisclosed plea bargain and may have rejected Harper's testimony and rendered a different verdict as a result. *Id.* at 27.

In *Brady,* the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. To succeed on a *Brady* claim, a petitioner must demonstrate (1) that the prosecutor suppressed evidence; (2) that the evidence is helpful to the petitioner, either because it is exculpatory or impeaching; and (3) that prejudice ensued. *Commonwealth v. Lambert*, 584 Pa. 461, 884 A.2d 848, 854 (2005). Notably, "when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [*Brady*'s] general rule." *Giglio*, 405 U.S. at 154, 92 S.Ct. 763 (*citing* *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). *See also* *Commonwealth v. Natividad*, 650 Pa. 328, 200 A.3d 11, 25-26 (2019) (reciting *Brady* standard).

The Commonwealth "expressly denies that any agreement existed prior to Holt's trial or Harper's testimony." Commonwealth's Brief at 15. It states that Harper acknowledged in his testimony that he was not promised that his cooperation and testimony would be rewarded in his own criminal cases. *Id*. The Commonwealth also argues that Holt waived this claim because he failed to raise it before the trial court. *Id.* at 16.

Significantly, *Brady* claims are subject to waiver. *Commonwealth v. Hannibal*, 638 Pa. 336, 156 A.3d 197, 209-10 (2016) (failure to raise *Brady* claim at trial or on direct appeal resulted in waiver); *Commonwealth v. Roney*, 622 Pa. 1, 79 A.3d 595, 609 (2013) (*Brady* issues which could have been raised at trial and/or on direct appeal but were not, were waived for collateral review). Despite being aware of the facts underlying his claim, Holt did not raise a *Brady* claim before the trial court. Instead, he recited the facts underlying this claim in his Pa.R.A.P. 1925(b) statement in support of a claim he entitled "the verdict of death was a product of passion, prejudice and arbitrary factors." *See* Holt's 1925(b) statement, 11/20/2020, ¶ 8. [13] In his Rule 1925(b)

statement, Holt ***535** attacked Harper's credibility by stating that Harper "was released from prison and parole a few weeks after trial, despite the prosecution and Harper claiming he had no plea agreement with the prosecution to testify," and also asserting that Harper "lied repeatedly" in his pre-trial statements. *Id*. Holt attacked Harper's credibility to support his weight of the evidence claim. Holt did not raise the present claim – a *Brady* claim based on the Commonwealth's failure to disclose Harper's alleged plea agreement – in his Rule 1925(b) statement or at any point before the trial court. He did not claim that Harper had a secret plea agreement or assert that the prosecution suppressed evidence of such a plea agreement. Thus, the Commonwealth is correct that the claim is waived. Pa.R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal."). [14]

V. Evidence of Holt's prior possession of firearms

(A)

Prior to trial, the Commonwealth filed notice of its intention to present testimony from Michael Luffey that he had seen Holt in possession of a semi-automatic firearm prior to the shooting. [15] The Commonwealth stated that the evidence would demonstrate Holt's access to a firearm and motive to murder a pursuing police officer to avoid charges for the illegal possession of the firearm. Commonwealth's Motion in Limine, 9/30/2019, ¶¶ 7(d), 12. Holt objected, arguing that the evidence was inadmissible evidence of prior bad acts. Defendant's Response to Commonwealth's Motion in Limine, 10/22/2019, ¶¶ 7(d) (citing Pa.R.E. 404(b)). The trial court ruled that the evidence was admissible, and the Commonwealth proceeded to introduce the evidence at trial. N.T., 10/23/2019, at 15-21. Luffey testified that he saw Holt in possession of a black firearm twice in the weeks leading up to the shooting. N.T., 11/6/2019, at 399-403. According to Luffey, on the first occasion, he observed Holt in possession of a .40 caliber black firearm with a loaded clip. *Id*. at 400-01. On the other occasion, he observed what he believed to be a different weapon in the waistline of Holt's pants. *Id*. at 402-03.

Pursuant to Rule 404(b), "[e]vidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Pa.R.E. 404(b)(1). Nonetheless, this evidence may be admissible for another purpose, such as to prove motive, opportunity, or intent. Pa.R.E. 404(b)(2). When introduced for another purpose, this evidence is admissible only if its probative value outweighs its potential for unfair prejudice. Pa.R.E. 404(b)(2).

Courts routinely admit evidence that on another occasion, the defendant possessed the weapon used to commit the crime. In *Commonwealth v. Towles*, 630 Pa. 183, 106 A.3d 591 (2014), this Court determined that a defendant's prior requests to see ***536** and use the handgun used to commit a killing "demonstrated appellant knew where the handgun was located, had the ability to retrieve it, and was familiar with it due to his prior use of it[.]" *Id*. at 603. This "other act evidence" – the defendant's prior possession of a weapon – may be relevant to demonstrate the defendant's access to the weapon and opportunity to commit the crime that is charged. One commentator recounted that "[o]ne of the most common fact patterns employing 'opportunity' reasoning involves the admission of uncharged misconduct evidence that helps establish that a person had the means by which to commit a crime, especially a weapon that was used in the charged offense." David P. Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct & Similar Events* § 11.7.1 (2d ed. 2019) (uncharged misconduct showing access to or possession of weapon or tools used to commit the charged act).

(B)

Pennsylvania courts, unlike those in other jurisdictions, [16] require the prosecution to make some connection between the weapon defendant previously possessed and the crime at issue to justify the "similar-weapons exception." In *Commonwealth v. Christine*, this Court stated, "the fact 'the accused had a weapon or implement suitable to the commission of the crime charged ... is always a proper ingredient of the case for the prosecution.' " *Commonwealth v. Christine*, 633 Pa. 389, 125 A.3d 394, 400 (2015) (citing *Commonwealth v. Robinson*, 554 Pa. 293, 721 A.2d 344, 351 (1998)). The Court explained that, to admit evidence that a defendant possessed a weapon suitable to the crime, the Commonwealth must "lay a foundation that would justify an inference by the finder of fact of the likelihood that the weapon was used in the commission of the crime." *Id*. (citing *Commonwealth v. Lee*, 541 Pa. 260, 662 A.2d 645, 652 (1995)). There, the Court considered

the admissibility of similar-weapons evidence (a shank) in a trial for aggravated assault arising out of a prison altercation and in which the injuries to the victim were caused by a razorblade. This Court determined that the defendant's possession of a shank did not qualify as similar-weapons evidence because it was not used in the pertinent assault. The Court explained that "[t]he theory of the exception is that the weapon possessed could have been the weapon used–that simply is not the case here[.]" *Id.* at 400-01. The Court reiterated the requirement that the Commonwealth lay a foundation to justify an inference that the weapon was the actual weapon used in the crime when it concluded: "To the extent that cases affirm use of this exception strictly on the basis of similarity, without an inference they were the weapons used, we reject them." *Id.*

In *Commonwealth v. Lee*, the similar-weapons exception was invoked to justify admission of evidence (two knives and a pair of scissors) to prove that the defendant was responsible for repeatedly stabbing and ultimately killing two victims. *Lee*, 662 A.2d at 649. The Court determined that the similar-weapon exception justified admission of evidence that two knives and a pair of scissors were seized ***537** from the defendant's mother's home, despite that it was never definitively established that these weapons were actually used in the commission of the killings. *Id.* at 649, 652. The Commonwealth introduced evidence that the defendant was seen in the rooms from which the knives and scissors were recovered, as well as testimony from the medical examiner that the scissors and knives "were consistent with the puncture and stab wounds inflicted upon the victims." *Id.* at 652-53. In consideration of the evidence of the defendant's access to the weapons and the testimony from the medical examiner, we concluded that the trial court did not abuse its discretion in allowing admission of the evidence regarding the scissors and knife because "the Commonwealth laid a foundation to justify the inference that the scissors and knife seized by police could have been the murder weapons." *Id.* at 653.

Thus, under the similar-weapon exception, the Commonwealth must lay a foundation to justify an inference that the weapon was the actual weapon used. The exception will not justify admission of a weapon that cannot have caused the injuries, as was the shank in *Christine*. And a weapon may not be introduced solely based on similarity. Nonetheless, once the Commonwealth establishes a **likelihood** that the weapon evidence it seeks to admit was used in the commission of the crime, it is admissible. *Christine*, 125 A.3d at 400 (citing *Commonwealth v. Thomas*, 522 Pa. 256, 561 A.2d 699, 707 (1989)). When the Court expressly rejected prior case law that applied this exception "strictly on the basis of similarity," it required the Commonwealth to lay a foundation to justify an inference that the weapon possessed on a prior occasion was used in the commission of the offense. *Id.* at 401. Further, the *Christine* Court clarified that the Commonwealth need only lay a foundation to justify an inference by the jury—it need not definitively establish that they are the same weapon. Instead, "uncertainty that the weapon is the actual weapon used in the crime goes to the weight of such evidence." *Id.* at 400 (citing *Commonwealth v. Williams*, 537 Pa. 1, 640 A.2d 1251, 1260 (1994) (citing *Commonwealth v. Coccioletti*, 493 Pa. 103, 425 A.2d 387, 390 (1981))).

We must apply these principles to review the admission of Luffey's testimony that Holt possessed a firearm two to three weeks prior to the murder. We will reverse only if Holt shows that the trial court abused its discretion. *Commonwealth v. Gill*, 651 Pa. 520, 206 A.3d 459, 466-67 (2019). This Court "will not find an abuse of discretion 'based on mere error of judgment, but rather ... where the [trial] 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.' " *Id.* (citing *Commonwealth v. Eichinger*, 591 Pa. 1, 915 A.2d 1122, 1140 (2007)).

Holt contends that the trial court abused its discretion in admitting this evidence, as its sole purpose was to demonstrate his criminal propensities. Holt's Brief at 27-32 (citing *Commonwealth v. Billa*, 521 Pa. 168, 555 A.2d 835, 840 (1989) and Pa.R.E. 404(b)(1)-(2)). He acknowledges the test set forth in *Christine* permitting the admission of weapons evidence, but argues that the Commonwealth did not lay a foundation to justify an inference that the weapons possessed on the prior occasion were the weapon used in the commission of the crime here. *Id.* at 29-31. Further, Holt argues that the prejudice of their admission "greatly outweighed any pretense of probative value." *Id.* at 28. Holt asserts that the evidence that he illegally possessed a firearm on a previous occasion would prejudice the jury's deliberation ***538** over whether he illegally possessed the firearm on the

date of the incident as charged in counts three and four of the criminal information. *Id.* at 29, 33; 18 Pa.C.S. § 6105 (a)(1) (prohibiting possession of a firearm by persons who have been convicted of statutory enumerated offenses); 18 Pa.C.S. § 6106 (a)(1) (prohibiting concealed carry of a firearm without a lawfully issued license).

The Commonwealth emphasizes this Court's statement in *Christine* that "the fact 'the accused had a weapon or implement suitable to the commission of the crime ... **is always a proper ingredient of the case for the prosecution**.' " Commonwealth's Brief at 20-21 (citing *Christine*, 125 A.3d at 400 (emphasis added by Commonwealth)). Relying on *Christine*, the Commonwealth asserts that Luffey's testimony demonstrated that Holt possessed a firearm [17] which bore sufficient similarities to the firearm used to kill Officer Shaw to raise an inference that it was the murder weapon. *Id*. at 22. The Commonwealth further argues that Luffey's testimony fell squarely within the permitted uses of evidence otherwise barred by Rule 404(b) because it addressed opportunity, motive and identity. *Id*. at 17-18. The Commonwealth asserts that Luffey's testimony demonstrates Holt's opportunity to commit the murder. More specifically, it demonstrates that Holt had "access to and familiarity with such a weapon in close temporal proximity to the crime." *Id.* at 20-22 (citing *Christine*, 125 A.3d at 400). As to motive, the Commonwealth argues that the testimony demonstrated that Holt was illegally in possession of a firearm which he could not conceal in the car, and once the officer began pursuing Holt, that officer presented an immediate threat to Holt's liberty should Officer Shaw discover the illegal firearm. *Id*. at 20. The Commonwealth states that it was vital to its case that the weapon was possessed illegally, because this fact establishes a motive for Officer Shaw's murder. *Id*. With regard to identity, the Commonwealth observes that, because Holt fled and was not apprehended at the scene, the identity of Holt as the shooter was at issue. *Id*. at 18.

In asserting that the probative value of the evidence outweighed its potential for unfair prejudice, the Commonwealth cites to a series of cases in which it claims the other crimes evidence was more inflammatory than the evidence introduced here. *Id*. at 25-26. For instance, in *Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291 (2011), this Court held that evidence that the defendant had previously purchased a firearm was admissible as part of the sequence of events forming the history of the case, and also, was relevant to show the defendant's ability to acquire handguns. *Briggs*, 12 A.3d at 337-38. In *Commonwealth v. Towles*, this Court approved of the admission of evidence that the defendant had stolen and hidden a handgun in the alley near the murder scene because it demonstrated the defendant's familiarity with the handgun. *Towles,* 106 A.3d at 602. The Commonwealth asserts that in *Briggs* and *Towles*, "the 'other crimes' evidence was more inflammatory than the rather pedestrian testimony" challenged here. Commonwealth's Brief at 26. Further, the Commonwealth asserts that it limited its introduction of the evidence in this case by calling only one witness, Luffey, when multiple witnesses could have been called to testify that they witnessed Holt with a firearm immediately prior to the murder. *Id*. at 27.

***539** (C)

Because Luffey's testimony addressed two occasions when he witnessed Holt in possession of what he believed to be two different firearms, we will address them separately. We find that the trial court did not abuse its discretion in admitting Luffey's testimony regarding his first viewing of Holt with a firearm. Luffey testified that he observed Holt mere weeks before the shooting in possession of a firearm. N.T., 11/6/2019, at 399-403. Specifically, Luffey testified that he was familiar with firearms, and that based on his familiarity with firearms, he believed the firearm Holt possessed to be a .40 caliber black firearm. *Id*. The Commonwealth presented evidence demonstrating that the murder weapon in this case was a .40 caliber firearm. N.T., 11/5/2019, at 245-47; 11/8/2019, at 866-67. Through this evidence, the Commonwealth laid a proper foundation to justify an inference by the jury that when Luffey observed Holt in possession of a .40 caliber weapon at their dining room table weeks before the shooting, he observed Holt with the same weapon used in the commission of the offense. This evidence was relevant to demonstrate Holt's access to and familiarity with a .40 caliber firearm, and thus, his opportunity to commit the murder. Holt's attempts to attack Luffey's testimony to suggest that he did not observe the "actual weapon used in the crime" are the type of arguments that go to the weight of the evidence, and not its admissibility. *Christine*, 125 A.3d at 400 (citing *Coccioletti*, 425 A.2d at 390).

The probative value of the evidence that Luffey witnessed Holt in possession of a .40 caliber firearm shortly before the murder outweighed its potential for unfair prejudice. The evidence demonstrated that Holt had possession of the firearm shortly before the offense and thus, had access to the firearm to commit the shooting. *See* N.T., 11/6/2019, at 399-401. Aside from arguing that evidence of his possession of an illegal weapon is prejudicial, Holt does not point to anything prejudicial about the testimony. For these reasons, we agree with the trial court's rejection of Holt's contention that this "prior bad acts" evidence was being used as propensity evidence.

(D)

Luffey's testimony that he observed Holt with a firearm in the waistline of his pants on a second occasion was not properly admitted as it did not meet the requirements of Rule 404(b) delineated in *Christine*. Luffey testified that on some unspecified day he viewed Holt carrying a firearm in his waistband. N.T., 11/6/2019, at 402-03. He said this weapon did not appear to be the same weapon he saw on the first occasion, and Holt never removed the gun from his waistband. *Id*. Because the Commonwealth introduced no other evidence supporting an inference that this was the weapon used in the commission of the crime, we find that the court erred in admitting that evidence. [18] *Christine*, 125 A.3d at 400 (citing *Lee*, 662 A.2d at 652).

***540** (E)

Its admission, however, was harmless error. In *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978), we announced that an error is harmless "only if the appellate court is convinced beyond a reasonable doubt that the error is harmless." *Id*. at 162. Further, "an error cannot be held harmless unless the appellate court determines that the error could not have contributed to the verdict. Whenever there is a reasonable possibility that an error might have contributed to the conviction, the error is not harmless." *Id*. (internal citations omitted). In *Commonwealth v. Fulton*, 645 Pa. 296, 179 A.3d 475 (2018), we summarized the three scenarios in which an error may be found to be harmless:

> (1) [T]he error did not prejudice the defendant or the prejudice was de minimis; or
>
> (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or
>
> (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Id. at 492-94. The Commonwealth bears the burden of proving that the error was harmless beyond a reasonable doubt. *Story*, 383 A.2d at 162 n.9. We may sua sponte invoke the harmless error doctrine "as it does nothing more than affirm a valid judgment of sentence on an alternative basis." *Commonwealth v. Hamlett*, —— Pa. ——, 234 A.3d 486, 492 (2020) (citing *Commonwealth v. Hicks*, 638 Pa. 444, 156 A.3d 1114, 1140 (2017) (Baer, J., concurring)).

We find that the prejudice of the admission of Luffey's brief testimony that he observed Holt with a firearm in his waistband was de minimis. Given that the Commonwealth already introduced evidence that Holt possessed a firearm consistent with the murder weapon, the reference to Holt possessing another firearm would not have significantly influenced the jury. In both instances, the Commonwealth was seeking to establish the same point: that Holt possessed a firearm that was consistent with the murder weapon mere weeks before the murder and therefore, he had the opportunity to commit the murder. Although Luffey testified that he thought these were different firearms, the Commonwealth did not emphasize that point. Instead, it focused on how Holt had access to firearms capable of committing the murder. Further, Holt does not draw our attention to any specific prejudice caused by Luffey's testimony. Thus, in light of the properly admitted evidence regarding Holt's possession of a .40 caliber firearm weeks before the shooting, we find that the reference to Holt possessing another firearm on a different occasion could not have contributed to the conviction.

VI. Severance

Next, Holt argues that the trial court abused its discretion by denying his pretrial motion for severance of the counts

related to illegal possession of a firearm [19] ***541** from the first-degree murder counts. At trial, the Commonwealth and defense stipulated that "on November 17, 2017, the Defendant was a person prohibited by Pennsylvania law from possessing, using or controlling a firearm, and that he had been so prohibited since May 8, 2012." N.T., 11/8/2019, at 906-07. The jury was not informed why Holt was disqualified from possessing a firearm.

Holt argues that he was prejudiced by the introduction of evidence that he was disqualified from possessing a firearm, contending that the stipulation invariably led the jury to assume that Holt "had committed some serious crime to disqualify him[.]" Holt's Brief at 45. While he acknowledges the court took measures to avoid prejudice by advising the jury via stipulation that Holt was disqualified from owning a firearm without describing the basis for Holt's disqualification, Holt contends that "the jury could easily read through that." *Id.*

The Commonwealth observes that Superior Court case law generally requires severance of charges where the proof of the disqualifying conviction is relevant only to the section 6105 charge and not relevant to the other offenses on trial. Commonwealth's Brief at 43-45 (citing *Commonwealth v. Jones*, 858 A.2d 1198, 1206-07 (Pa. Super. 2004)). Specifically, in *Commonwealth v. Jones*, the Superior Court stated that it is well-settled that a charge for section 6105 should be severed from other charges where the other charges do not require evidence of a prior offense. *Jones*, 858 A.2d at 1206-07. However, the Commonwealth explains, that rule does not apply here because the limited stipulation did not reveal that Holt had a prior conviction but only that he was disqualified from possession of a firearm. Commonwealth's Brief at 43-45. Further, Holt's possession of an unlawful firearm "was the motive the Commonwealth alleged for the murder of a law enforcement officer[,]" and therefore was relevant and admissible at his trial for first-degree murder. *Id.* at 44. Accordingly, the Commonwealth argues "the fact of [Holt's] prohibition, and not the details of the crime that rendered him a felon, was vital to establishing [Holt's] motive to flee from and ultimately kill a pursuing officer." *Id.* at 45.

A motion to sever charges is addressed to the discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Commonwealth v. Paolello*, 542 Pa. 47, 665 A.2d 439, 451 (1995). The trial court may order separate trials pursuant to Pennsylvania Rule of Criminal Procedure 583 "if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. 583. The critical question in this analysis is whether the accused has been prejudiced by the decision not to sever, and the accused bears the burden of demonstrating prejudice. [20] ***542** *Commonwealth v. Lopez*, 559 Pa. 131, 739 A.2d 485, 501 (1999) (determining that trial court did not abuse its discretion in declining to order separate trials of co-defendants).

The trial court did not abuse its discretion in denying Holt's motion to sever. The stipulation regarding Holt's disqualification from possessing a firearm informed the jury that Holt was not permitted to possess a firearm, but it did not specify the reason for his disqualification. N.T., 11/8/2019, at 906-07. The jury did not hear evidence of Holt's prior convictions and, contrary to Holt's speculations, had no basis to assume that prior criminal conduct was the basis for Holt's disqualification. Significantly, according to the Commonwealth, Holt's inability to lawfully possess a firearm was his motive for fleeing from and killing Officer Shaw. The Commonwealth's theory was that the initial unlawful activity was the defendant's motive for his subsequent offense. Thus, evidence of Holt's disqualification from possession of firearms was relevant and admissible to prove the first-degree murder charge. Because the evidence of Holt's unlawful possession of a firearm was admissible at the murder trial, and because no evidence was admitted regarding Holt's prior offenses that led to his disqualification from possessing a firearm, we find that the trial court did not abuse its discretion when it determined that Holt would not be prejudiced by the offenses being tried together.

VII. Introduction of co-conspirator statements

Holt next argues that the trial court erred in admitting hearsay in the form of statements made by Lakita Cain through the testimony of Holly Clemons. The trial court agreed with the Commonwealth that the statements were admissible pursuant to the "coconspirator exception" to the hearsay rule, which permits the introduction of a statement against the opposing party where the statement "was made by the party's coconspirator during and in furtherance of the conspiracy." Pa.R.E. 803(25)(E).

The specific statements at issue were related by Clemons, a resident of 1206 Victoria Avenue at the time of Officer Shaw's murder. She testified that on November 18, 2017, one day after the shooting, Holt's relative Lisa Harrington arrived to meet with Cain, left via vehicle, and then returned shortly thereafter. N.T., 11/6/2019, at 497-502. Clemons testified to the following exchange:

> Q. When [Harrington] leaves, do you have any conversations with [Cain] about why [Harrington] came to the house?
>
> A. I did ask her what was going own [sic]. [Cain] was like – she had, like, to get stuff out of the house. She –
>
> Q. Who had to get stuff out of the house?
>
> A. [Cain]. She told [Harrington] to get things out of the house.
>
> ***543** Q. Did she say what she needed to get things out of the house?
>
> A. [Cain] did say that there was, like, a gun in the basement. I never seen [Harrington] go to the basement or –
>
> Q. I understand.
>
> A. – [Cain] go to the basement.
>
> Q. What did [Cain] say about that gun?
>
> A. She said it was [Holt's] gun and she had to get it out of the house so she called [Harrington].
>
> Q. Was she explaining to you why [Harrington] had come to the house that afternoon?
>
> A. That's what she said she was there for.

Id. at 502-03. On re-direct examination, Clemons further clarified that she asked Cain "if it was [Holt's] gun," to which Cain replied that it was. *Id.* at 523.

Holt objected to the introduction of these statements during pre-trial motions and prior to Clemons's testimony. The Commonwealth replied that Clemons's statements fell within the co-conspirator exception. *Id.* at 449, 455, 461-62, 464, 473-74. While Holt argued that this was an uncharged conspiracy, suggesting that the coconspirator exception did not apply in such an instance, *see id.* at 449, 456, 475, he also objected in the alternative that if Clemons's statements did fall within the exception, the prejudice established by her statements outweighed their probative value. *Id.* at 466-67, 475. The trial court overruled these objections after holding an in camera hearing with Detective Dupilka to establish that there was an ongoing conspiracy among the residents of 1206 Victoria Avenue to hinder Holt's apprehension by law enforcement. *Id.* at 464-78.

"Application of the coconspirator exception to the hearsay rule is predicated on agency principles—when the elements of the exception are established, each conspirator is considered an agent of the other, and therefore, a statement by one represents an admission by all." *Commonwealth v. Johnson*, 576 Pa. 23, 838 A.2d 663, 675 (2003). The exception contains three elements: "[(1)] the existence of a conspiracy between the declarant and the defendant must be demonstrated by a preponderance of the evidence; [(2)] the statements must be shown to have been made during the course of the conspiracy; and [(3)] they must have been made in furtherance of the common design." *Id*. at 674.

Holt challenges both the existence of a conspiracy between him and the declarant (Cain) as well as the existence of a conspiracy between Holt, Cain, and Clemons. Holt also argues that the exception "has its limits, especially with an uncharged conspiracy with no defined objective." Holt's Brief at 36. Holt concedes that the Commonwealth established a conspiracy between Cain and Taylor, albeit one limited to assisting Holt's attempts to evade capture. "While the prosecution successfully argued that an uncharged conspiracy existed due to the failure of Cain and Taylor's failure to disclose the whereabouts of [Holt] following the Shaw murder, there was no evidence of record of any conspiracy to hide the murder weapon." *Id*. at 37. In effect, Holt argues that Cain, Clemons and all the other residents of 1206 Victoria Avenue, as well as Harrington, could have conspired to remove incriminating evidence on their own accord, and not necessarily at Holt's behest. As well, Holt states that presenting Cain's statements through Clemons violated his rights to confront the witness. *Id*. at 42.

The Commonwealth responds that the testimony was properly admitted because all residents of 1206 Victoria Avenue, including Clemons, were involved in the conspiracy. Commonwealth's Brief at ***544** 29-33. Further, the Commonwealth asserts that Holt's counsel never objected to the testimony as violating Holt's right to confrontation, and therefore, he waived the confrontation argument. *Id.* at 31. [21]

As with the other evidentiary rulings addressed above, we will reverse only if Holt shows that the trial court abused its discretion in deeming this evidence admissible. *Gill*, 206 A.3d at 466-67. The trial court's opinion explained its basis for admitting the statements as follows.

> The evidence showed repeated contact between the Defendant and the other residents of 1206 Victoria Avenue, which include Lakita Cain, Taylor Mitchell, Holly Clemons, Michael Luffey, and Antoinette Strong. The evidence further showed that while the Defendant remained underground, those residents repeatedly rebuffed police attempts to learn of his whereabouts in order to effectuate his arrest and to secure the weapon. Over a period of four days, during each of which the police appeared at that address, the residents concealed knowledge of the Defendant's whereabouts, his status as a resident at that address, and the fact that he had been there shortly after the shooting in a frantic state of mind, with a bleeding hand. Only when Michael Luffey began to fear that he might lose his children if he continued in this concerted course of conduct with the other residents and went to the police, did the fabrication and concealment begin to unravel.
>
> Holly Clemons testified that from Lakita Cain, she learned that Lisa Harrington was present to get the Defendant's gun out of the house. Hiding the gun from the police was of the utmost importance to the Defendant, who had contact with the others in the house and who ultimately said he was "sorry for the things he put us through."
>
> From all of this, the court felt that, by reasonable inference from all of the circumstances present, a conspiracy existed inclusive of the Defendant and involving the other members of the household and that the statements made were in furtherance of and during the conspiracy involving the Defendant and the various persons at 1206 Victoria Avenue, including Holly Clemens, Lisa Harrington and Lakita Cain, inter alia.

Trial Court Opinion, 8/21/2020, at 34-35 (citations omitted).

The trial court did not err. The first question is whether there was a conspiracy between the declarant, Holt, and Clemons as the challenged statements were relayed by Cain to Clemons in response to Clemons's question. The Commonwealth is not required to establish the existence of conspiracy through direct evidence, and the conspiracy "may be inferentially established by showing the relation, conduct or circumstances of the parties." *Commonwealth v. Mayhue*, 536 Pa. 271, 639 A.2d 421, 432 (1994). The trial court determined by a preponderance of the evidence that, following Officer Shaw's murder, ***545** the police questioned all the residents of 1206 Victoria Avenue daily until Holt's arrest, and on each occasion the residents concealed knowledge of Holt's whereabouts, his status as a resident at that address, and that he had been there shortly after the shooting. It was reasonable for the trial court to infer that this ongoing conduct demonstrated an agreement between the residents of 1206 Victoria Avenue to impede the Commonwealth's investigation.

Addressing Holt's argument that a conspiracy must be limited in its scope, we conclude that, under the circumstances, there is no difference between a conspiracy to frustrate law enforcement's attempts to locate Holt and a conspiracy to conceal evidence on Holt's behalf. In both scenarios, the conspirators share the overriding goal of shielding Holt from arrest. The preponderance of the evidence as accepted by the trial court established that the residents of 1206 Victoria Avenue engaged in conduct designed to assist Holt in avoiding prosecution. Nor do we need to rely on the inferential strength of these circumstances, as there was evidence that Holt was a part of this conspiracy. Clemons testified that Cain and Mitchell had communications with Holt in the days following Officer Shaw's death. The trial court also cited the testimony of Michael Luffey, who was present for a phone call between Holt, Cain, and Mitchell, which took place on Cain's speakerphone. Holt acknowledged Luffey's presence and told them he was "sorry for the things he put us through." N.T., 11/6/2019, at 421-22. We agree that this evidence, while not overwhelming evidence of a conspiracy, satisfies the applicable preponderance standard as it establishes that Holt was in contact with the residents. [22]

Finally, addressing whether the statements were in furtherance of the conspiracy, we note that statements of prior activity can fail this aspect of the exception. *Commonwealth v. Johnson*, 576 Pa. 23, 838 A.2d 663, 675 (2003) ("In a number of circumstances, however, where ... the inculpatory statements are narrative declarations of past activity made to a non-participant in the asserted conspiracy, courts have found the essential in-furtherance-of attribute absent."). Thus, there is some merit to the argument that the statements here, which involve the completed activity of removing a firearm, failed to satisfy the in-furtherance-of requirement.

However, we find that the statements promoted the broader conspiratorial goal of impeding the Commonwealth's

investigation. The exception "contains no requirement that the conspiracy identified as the basis for admissibility be related to the crime charged." *Id.* at 676. Accordingly, "in order to satisfy the in-furtherance-of requirement of the coconspirator hearsay exception, it is sufficient for the government to establish an intent to promote the conspiratorial objective." *Id.* at 675. In *Johnson*, the appellant Raymond Johnson was convicted of murdering Louis Combs. The evidence established that Johnson and Combs were rival drug dealers. Nicole Ramsey testified that she sold drugs for Johnson and was present for conversations between Johnson and a man known as "Izod," whom she identified as Johnson's "right-hand man," regarding a plan to eliminate Combs. *Id.* at 679. On the day of Combs's murder, Johnson testified that Izod told her, "we did them ***546** n_____s. You didn't think we would, but we did. There is not going to be a problem." *Id.* at 670. We determined that the evidence was admissible under the co-conspirator exception to hearsay.

> Here, as Johnson essentially concedes, the Commonwealth's evidence demonstrated, by a clear preponderance, a larger conspiracy between Appellant and Izod to distribute illegal drugs. Significantly, this is a conspiracy as to which the evidence demonstrated that Ramsey was not a third party, but a participant. In the course of Izod's remarks to Ramsey, he advised her of an act that eliminated a rival seller, thus promoting the objectives of the drug conspiracy, and instructed her to maintain a low profile for the time being to avoid detection in light of the expected, increased law enforcement activity. *Accord* [*United States v.*] *Johnson,* 200 F.3d [529] at 533 [(7th Cir. 2000)] (noting that statements made in furtherance of a conspiracy can take a variety of forms, including comments made "to inform other members about the progress of the conspiracy, to control damage to or detection of the conspiracy, to hide the criminal objectives of the conspiracy, or to instill confidence and prevent the desertion of other members").

Id. at 677 (footnote omitted).

Likewise, we find that the Commonwealth established a conspiratorial objective broader in scope than the limited nature posited by Holt. *See* Holt's Brief at 37-28 ("While the prosecution successfully argued that an uncharged conspiracy existed due to the failure of Cain and Taylor's failure to disclose the whereabouts of [Holt] following the Shaw murder, there was no evidence of record of any conspiracy to hide the murder weapon."). Clemons and Cain were both participants in a conspiracy to impede the Commonwealth's investigation. Cain's statements informing Clemons that another person removed a gun from the residence served to apprise Cain of the ongoing conspiracy. Additionally, Clemons's testimony reflected that Cain's statements were not spur of the moment. Instead, they were in direct response to Clemons's questioning. Cain telling Clemons that Harrington came over because she "had to get the gun out of the house" kept Clemons abreast of the conspiracy and thus satisfies the co-conspirator exception's in-furtherance-of requirement. Accordingly, we find that the trial court did not abuse its discretion in admitting Clemons's testimony.

VIII. Proposed voir dire questions

The purpose of voir dire is to facilitate the empaneling of a "competent, fair, impartial, and unprejudiced jury" and thus a trial court's discretion concerning the scope of voir dire must "be considered in light of the factual circumstances of a particular criminal episode." *Commonwealth v. Proctor*, 526 Pa. 246, 585 A.2d 454, 460 (1991); *Commonwealth v. England*, 474 Pa. 1, 375 A.2d 1292, 1295 (1977). Notably, "flight alone" is not sufficient to convict, but the "evidence is relevant and admissible to establish an inference of guilt." *Commonwealth v. Gorby*, 527 Pa. 98, 588 A.2d 902, 909 (1999).

Holt's counsel proposed the following question for voir dire, which the trial court refused:

> You may hear that the Defendant did not turn himself in and was only arrested after a four day police search or manhunt for his whereabouts. Would that fact alone cause you problems?

N.T., 10/28/2019, at 16-18.

Holt argues that he was denied his constitutional right to due process by the trial court's refusal to approve a suggested voir dire question, "wherein the jury panel ***547** would be asked if the flight alone by [Holt] would prevent them from being a fair and impartial juror." Holt's Brief at 42. Holt argues that his alleged flight following the murder of Officer Shaw was portrayed by the Commonwealth as evidence of his guilt

"and proved to be a significant factor in the jury's one-hour verdict after [seven] days of trial testimony." *Id.* at 43. It is his contention that given the significance of Holt's flight in the minds of the jurors, it should have been addressed during voir dire. *Id.* at 43-44.

The Commonwealth argues that Holt's question was "not relevant in seeking to determine whether jurors would be competent, fair, impartial, and unprejudiced ... [but] [r]ather, the question at issue sought to gauge the efficacy of potential evidence." Commonwealth's Brief at 47. The Commonwealth asserts that the trial court's instruction that the jury "may not find the defendant guilty solely on the basis of flight or concealment" by itself was enough to address the concern raised by Holt. *Id.*

The scope of voir dire rests in the sound discretion of the trial court, whose decision will not be reversed on appeal absent palpable error. *Commonwealth v. Bomar*, 573 Pa. 426, 826 A.2d 831, 849 (2003). The record before us fails to demonstrate any abuse of that discretion. As both parties note, the singular purpose of voir dire is to provide the defendant with a "competent, fair, impartial, and unprejudiced jury." *England*, 375 A.2d at 1295. It "is not intended to provide a defendant with a better basis upon which to utilize his peremptory challenges[.]" *Id.*

Here, the proposed question appears to have been designed to inform Holt's counsel in advance what opinion a prospective juror might form when presented with evidence of Holt's flight. In speculating that his flight evidence was so significant to the jury's finding of guilt, Holt proves the Commonwealth's argument that he was not seeking to determine whether jurors would be fair, but rather, was seeking to gauge the efficacy of the evidence of flight. Holt's Brief at 43-44. A prospective juror's personal views are of no moment unless these opinions "are so deeply embedded as to render that person incapable of accepting and applying the law as given by the court." *England*, 375 A.2d at 1296.

The trial court instructed the jury regarding the significance and proper use of evidence of flight:

> [W]hen a crime has been committed and a person thinks they may be accused of committing it and he flees or conceals himself, such flight or concealment is a circumstance tending to prove that the person is conscious of guilt. Such flight or concealment does not necessarily show consciousness of guilt in every case. A person may flee or hide for some other motive and may do so even though innocent. Whether the evidence of flight or concealment in this case should be looked upon as tending to prove guilt depends on the facts and circumstances of this case and especially upon motives that may have prompted the flight or concealment.
>
> You may not find the Defendant guilty solely on the basis of flight or concealment.

N.T., 11/12/2019, at 1067. "So long as the juror is able to, intends to, and eventually does, adhere to the instructions on the law as propounded by the trial court, he or she is capable of performing the juror's function." *England*, 375 A.2d at 1296. We are bound to presume that the jury followed the trial court's instructions. ***548** *Commonwealth v. Robinson*, 581 Pa. 154, 864 A.2d 460, 513 (2004); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 37 (2008).

Accordingly, we find that the trial court did not abuse its discretion in denying Holt's proposed voir dire question.

IX. Disclosing mitigation report prior to penalty phase

Holt challenges the propriety of an order that required him to turn over a report created by his mitigation specialist prior to the penalty phase of the proceedings. *See* Holt's Brief at 46. By way of background, in August 2019, the trial court entered an order requiring Holt to turn over his mitigation specialist's report to the Commonwealth by the tenth of September. On September 10, Holt's counsel represented to the Commonwealth that he did not have the report but that it was forthcoming. *See* N.T., 10/4/2019, at 3. Shortly thereafter, Holt filed a motion seeking to have the mitigation report placed under seal until the penalty phase of the proceedings. In response, the Commonwealth filed a motion to compel the production of the mitigation report. Following a hearing, the trial court granted the motion to compel and ordered Holt to provide the mitigation report to the Commonwealth. *Id.* at 13.

In his post-trial motions, Holt challenged this ruling as improper. The trial court addressed this allegation with citation to Rule 573(C) of Criminal Procedure, which governs disclosure by defendants. This rule provides for, of relevance here, the discovery of reports prepared by witnesses that the defendant intends to call as a witness when the report relates to that witness's potential testimony. *See* Trial

Court Opinion, 8/21/2020, at 38 (discussing Pa.R.Crim.P. 573(C)(1)(a)). The trial court explained that Holt did not call his mitigation specialist as a witness at any point in the proceedings, nor was the report used in connection with the questioning of any witness. As Holt failed to establish that the report was used or relied upon in any way, the trial court concluded that Holt's objection to this evidentiary ruling was without merit and moot. *Id.* at 39.

Before this Court, Holt does not challenge the discoverability of mitigation specialists' reports in general. Rather, the heart of his argument is that it was error for the trial court to require him to provide the Commonwealth with the report prior to the commencement of the penalty phase of the trial. *See* N.T., 10/4/2019, at 4-5; Holt's Brief at 46-48. To that end, he assails the trial court's citation to Rule 573, arguing that its reach does not encompass the mitigation report, as the mitigation specialist is not an expert witness nor an eyewitness. Holt's Brief at 47.

The resolution of issues regarding pre-trial discovery in criminal cases is entrusted to the trial court's discretion and will be upheld absent an abuse of that discretion. *Commonwealth v. Rucci*, 543 Pa. 261, 670 A.2d 1129, 1140 (1996). Discretion is abused when the trial court misapplies the law, or where its judgment is manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. *Commonwealth v. DiStefano,* —— Pa. ——, 265 A.3d 290, 296 (2021). Rule 573 governs pre-trial discovery and inspection. Subsection (C) provides as follows:

> (C) Disclosure by the Defendant.
>
> (1) In all court cases, if the Commonwealth files a motion for pretrial discovery, upon a showing of materiality to the preparation of the Commonwealth's case and that the request is reasonable, the court may order the defendant, subject to the defendant's rights against compulsory self-incrimination, to allow the attorney for the Commonwealth to inspect and copy or photograph any of the following requested items:
>
> ***549** (a) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, that the defendant intends to introduce as evidence in chief, or were prepared by a witness whom the defendant intends to call at the trial, when results or reports relate to the testimony of that witness, provided the defendant has requested and received discovery under paragraph (B)(1)(e); and
>
> (b) the names and addresses of eyewitnesses whom the defendant intends to call in its case-in-chief, provided that the defendant has previously requested and received discovery under paragraph (B)(2)(a)(i).
>
> (2) If an expert whom the defendant intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare and the defendant disclose a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.

Pa.R.Crim.P. 573(C). As explained above, the trial court found that the mitigation report was discoverable under subsection (C)(1)(a) as the report of a witness Holt intended to call on his behalf. Although the trial court referenced this rule in its opinion, it ultimately disposed of Holt's challenge upon a finding that because the mitigation report was never utilized, the issue was not only meritless but moot. Holt does not respond to this conclusion, yet our review of the record supports the trial court's conclusion in this regard, as it reveals that Holt did not call his mitigation specialist as a witness and neither party used the mitigation report in any manner during any phase of trial. Importantly, Holt does not contend that the ruling forced him to alter his defensive strategy. Indeed, Holt admits that he cannot establish that he was harmed in any way because this ruling. Holt's Brief at 46. Aside from posing a hypothetical harm that could ensue, Holt does not establish fault with the trial court's ruling. Accordingly, we agree with the trial court's determination that this issue has been rendered moot. *See Printed Image of York, Inc. v. Mifflin Press, Ltd.*, 133 A.3d 55, 59 (Pa. Super. 2016) ("An issue before a court is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy."). As such, any decision rendered on this issue would be merely advisory, and therefore, inappropriate. *Stuckley v. Zoning Hearing Bd. of Newtown Twp.*, 621 Pa. 509, 79 A.3d 510, 516 (2013).

X. Verdict of death

This Court is required to review every death sentence and "shall affirm the sentence of death unless it determines that: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; or (ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d)." 42 Pa.C.S. § 9711(h)(1), (3); *Commonwealth v. Harris*, 572 Pa. 489, 817 A.2d 1033, 1058 (2002). The death penalty was imposed for the murder of Officer Shaw and the Commonwealth presented one aggravating circumstance, that Officer Shaw was a peace officer murdered while in the line of duty. 42 Pa.C.S. § 9711(d)(1). Holt conceded that the Commonwealth established the aggravating circumstance. N.T., 11/14/2019, at 94 ("[W]e concede that the government has established their aggravator."). The evidence supports this concession, and the "sound factual predicate for ***550** the aggravating factors bolsters a conclusion that the sentence was not the result of passion, prejudice or any other arbitrary factor." *Commonwealth v. Johnson*, 639 Pa. 196, 160 A.3d 127, 153 (2017).

Holt submitted the catch-all mitigating circumstance. 42 Pa.C.S. § 9711(e)(8) ("Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense."). One or more of the jurors found its presence, specifically the "lack of parental guidance growing up, [being] raised in a high crime environment and [the] violent death of his brother." Sentencing Verdict Slip, 11/14/2019, at 3. Ultimately, the jury determined that the mitigating circumstances was outweighed by the aggravator.

Holt argues this was a highly publicized and emotionally charged case involving a victim that "was a young popular local white police officer[,]" while Holt "was a young African American male with a Muslim sounding name ... from Allegheny County." Holt's Brief at 48. Holt notes that Westmoreland County has a limited number of African Americans in its jury pools.[23] *Id.* As a result, the jury was composed of all white jurors and alternates. *Id.* Holt also highlights the "passionate display of police presence" at "every minute of every trial proceeding ... in full view of the jury." *Id.* It is his contention that this "unquestionably had a significant impact on the jury." *Id.* Holt contends that these factors resulted in an expedited guilty verdict and subsequent death sentence.[24] *Id.* at 48-49.

The Commonwealth asserts that Holt makes only "general claims" that his death sentence was the product of passion, prejudice, or other arbitrary factors. Commonwealth's Brief at 53. With respect to Holt's argument that he did not receive a proper verdict and sentence because of his race and the race of the jurors, the Commonwealth contends that this "is a spurious allegation unsupported by evidence." *Id.* at 53-54. Moreover, the record reflects that Holt "fully participated in jury selection[,]" making no claim of partiality or prejudice by any juror. *Id.* at 54. As for Holt's claim concerning the overwhelming police presence during the trial, the Commonwealth argues that this is not a matter of record and was not objected to, and is thereby waived. *Id.* (citing Pa.R.E. 103; Pa.R.A.P. 302). It also notes that the trial court previously explained that any police officers in attendance were not in uniform, and that any uniformed officers present "during trial were deputy sheriffs assigned for courtroom security." *Id.*; Trial Court Opinion, 8/21/2020, at 23. Lastly, the Commonwealth argues that the length of jury deliberations, by itself, does not support a finding of passion or prejudice, but rather "reflects the strength of the Commonwealth's case." Commonwealth's Brief at 55.

The Commonwealth correctly notes that Holt participated fully in jury selection without asserting partiality or prejudice on the part of any juror. Commonwealth's Brief at 53-54; Trial Court Opinion, 8/21/2020, at 23. We add that Holt did not challenge the composition of the panel. At its core, Holt's primary contention is that the jury deliberated too quickly, and thus it defies logic to conclude that the decision was not a result of passion, prejudice or arbitrary factors. *See* Holt's Brief at 14-15, ***551** 23, 43, 49. However, this Court has found that the length of jury deliberations by itself is not enough to demonstrate passion or prejudice. *Commonwealth v. Reyes*, 600 Pa. 45, 963 A.2d 436, 442 (2009). Our review of the record reveals that this decision was solemnly rendered and in accordance with the jury's duty to follow the law. We do not find that the sentence was the product of passion, prejudice, or any other arbitrary factor.

Accordingly, we affirm all convictions and the sentence of death. The Prothonotary of the Supreme Court is directed to transmit the complete record of this case to the Governor. 42 Pa.C.S. § 9711(i).

Chief Justice Baer and Justice Todd join the opinion.

Justice Dougherty files a concurring opinion in which Justices Mundy and Brobson join.

Justice Wecht did not participate in the consideration or decision of this matter.

JUSTICE DOUGHERTY, concurring

I concur in the decision to affirm appellant's sentence of death but write separately to express my different rationale with respect to three issues.

First, I agree the evidence was sufficient to convict. The lead opinion correctly notes three of the six bullets appellant fired from close range while fleeing the pursuing officer struck the officer; two hit the officer in a part of his body unprotected by his bullet-proof vest, one of those lodged in his lung, the remaining bullet lodged in his vest. Appellant did not testify at trial. On appeal, appellant recognized "[t]he jury determined the shooter to be [appellant]" but asserted the shots were merely fired "reckless[ly]" and that the "shooter" did not "intentionally tak[e] aim at the pursuing officer." Appellant's Brief at 19-21. In my view, because the jury properly determined appellant was the shooter, his specific intent to kill was plainly evidenced by his firing six bullets at the pursuing officer from close range, at least one of which lodged in a vital part of the officer's body. The lead opinion inaptly states, "this is not a straightforward case" in which " 'the nature of the killing' " establishes the specific intent to kill by "inference [of] striking a vital body part with a bullet[.]" Lead Opinion at ——, *quoting* *Commonwealth v. Rodgers*, 500 Pa. 405, 456 A.2d 1352, 1354 (1983). I am particularly unpersuaded by the suggestion a more nuanced review of the evidence of a bullet striking a vital body part is necessary in this case by positing "a person firing a gun blindly through the woods for amusement may strike an unseen hunter in the heart," as an example of a shooting from which one could not reasonably infer the specific intent to kill. *Id.* The facts here could not be further from that example. The lead opinion insists, however, there was "no direct testimony concerning how [appellant] deployed his weapon," and on that basis, "decline[s] to uphold the verdict based solely on the fact that at least one bullet struck a vital body part." *Id.* at ——. In my view, the circumstantial and direct evidence at trial clearly showed appellant fired six bullets at the pursuing officer from close range and the officer died when one of those bullets lodged in his lung. The specific intent to kill can be inferred simply but absolutely from that fact, namely a ***552** deadly weapon was used on a vital part of the decedent's body, and any further analysis regarding the element of intent is unnecessary.

Second, I differ with the analysis regarding evidence presented at trial of appellant's prior possession of firearms. At trial, Commonwealth witness Michael Luffey testified he saw appellant in possession of a black firearm twice in the weeks before the shooting. Luffey testified he initially saw appellant in possession of a semi-automatic .40 caliber black firearm with a loaded clip, and some time later observed what he believed to be a different black handgun in the waistline of appellant's pants. The trial court ruled Luffey's testimony regarding both sightings was admissible. The lead opinion concludes, and I agree, Luffey's first sighting was properly admitted under the similar-weapon exception set forth in *Commonwealth v. Christine*, 633 Pa. 389, 125 A.3d 394, 400 (2015) ("[t]he theory of the exception is that the weapon possessed **could have been** the weapon used[.]") (emphasis added). However, I depart from the lead opinion's analysis on this point to the extent it concludes "the Commonwealth must lay a foundation to justify an inference that the weapon was the actual weapon used." Lead Opinion at ——. That overstates the requirement of the similar-weapon exception, in my view. I believe the inference is applicable in situations where the weapon possessed could have been the weapon used; the exception does not, I would hold, require a stricter inference the weapon introduced was the **actual** weapon used. Additionally, the lead opinion determines the trial court erred in admitting Luffey's testimony regarding his sighting of a black handgun in appellant's waistband that did not appear to be the .40 caliber firearm he saw appellant with on the earlier occasion, ostensibly because the evidence did not satisfy the similar-weapon exception. Although I question whether that evidence might have been admissible for some other purpose under Rule 404(b) such as to show motive, opportunity, or intent if its probative value outweighed its potential for unfair prejudice, I agree that the error, if any, was harmless beyond a reasonable doubt, given its *de minimis* nature.

Lastly, with respect to appellant's claim the Commonwealth failed to disclose an alleged plea agreement with witness Tavon Harper in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the lead opinion notes "*Brady* claims are subject to waiver." Lead Opinion at ——, *citing* *Commonwealth v. Hannibal*, 638 Pa. 336, 156 A.3d 197, 209-10 (Pa. 2016) (failure to raise *Brady* claim at trial or on direct appeal resulted in waiver);

Commonwealth v. Roney, 622 Pa. 1, 79 A.3d 595, 609 (2013) (*Brady* issues which could have been raised at trial and/or direct appeal but were not, were waived on collateral review). I note both cases cited by the lead opinion involved this Court's disposition of a capital appeal at the collateral review stage, where the person sentenced to death had not raised a *Brady* claim in the trial court or on direct appeal. *See also Commonwealth v. Cousar*, 638 Pa. 171, 154 A.3d 287, 301-02 (2017) (*Brady* claim cognizable but not raised on post-verdict motions or direct capital appeal waived on collateral appeal); *Commonwealth v. Treiber*, 632 Pa. 449, 121 A.3d 435, 460-61 (2015) (*Brady* claim waived on collateral appeal because it could have been raised in earlier proceeding); *Commonwealth v. Bomar*, 629 Pa. 136, 104 A.3d 1179, 1190-91 (2014) (*Brady* claims apparently cognizable but not raised on post-verdict motions and direct capital appeal waivable on collateral appeal; however because Commonwealth did not assert waiver, this Court addressed substance of ***553** claims at collateral stage and dismissed them on the merits).

I concur in the present determination in this direct capital appeal that appellant's specific claim of a *Brady* violation was not properly presented to the trial court. Nevertheless, I note that appellant will likely have another opportunity to raise the claim if he properly challenges counsel's effectiveness on collateral review for failing to raise a cognizable *Brady* claim post-sentence which resulted in waiver of the claim on direct appeal.

In sum, I join the Court's opinion with respect to Parts I, III, IV, V(A), V(C), V(E), and VI-X, but concur only in the result as to Parts II, V(B), and V(D).

Justices Mundy and Brobson join this concurring opinion.

All Citations

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Footnotes

1 Officer Shaw's firearm's magazine was fully loaded and one round was in the chamber.

2 Holt raises an issue concerning the introduction of statements by Lakita Cain, who did not testify, via the co-conspirator exception to the rule prohibiting the introduction of hearsay. We discuss the particular statements in greater detail within that section of the opinion.

3 Glenn Bard, an expert in digital forensics, analyzed phone records and supplied the precise times. *See generally* N.T., 11/8/2019, at 933-72.

4 18 Pa.C.S. §§ 6101–6128.

5 18 Pa.C.S. §§ 2507 (a); 2502 (a); 6105 (a)(1); 6106 (a)(1).

6 "A person commits murder of a law enforcement officer of the first degree who intentionally kills a law enforcement officer while in the performance of duty knowing the victim is a law enforcement officer." 18 Pa.C.S. § 2507(a). While Holt does not challenge the other elements of the crime, "[i]n capital direct appeals, this Court conducts an independent review of the sufficiency of the evidence supporting the first-degree murder conviction, even if the defendant does not challenge evidentiary sufficiency[.]" *Commonwealth v. Knight*, 638 Pa. 407, 156 A.3d 239, 244 (2016). The evidence presented establishes that Officer Shaw died, that he was in the performance of his duties, and that Holt knew Officer Shaw was a law enforcement officer.

7 Holt's defense at trial was that he was not the shooter, and his current brief consistently refers to the assailant as "the shooter." Simultaneously, the jury obviously determined that Holt was the shooter, and Holt does not challenge that conclusion for purposes of challenging the sufficiency of the evidence.

8 *Padgett* predates *Jackson* and our decision did not explicitly state whether we assessed the sufficiency of the evidence in light of Padgett's testimony. In separately addressing Padgett's argument that the Commonwealth failed to establish the requisite mens rea due to his testimony that he was intoxicated, we observed that "the Commonwealth's expert testified that there were powder burns on the decedent's clothing, indicating that the weapon had been fired at point-blank range, thus establishing another conflict in appellant's testimony and allowing the jury to properly infer that the shooting had been intentional." *Padgett*, 348 A.2d at 89.

9 As the trial court recognized, there are no facts of record to establish that Holt was firing the weapon recklessly. Its opinion explained:

> The Defendant asserts that he was running, and not aiming, but that assertion is nowhere in the record in this case. The Defendant did not testify. Although video surveillance captured the incident on camera, because the shots were fired in a darkened parking lot, the manner and position of shooter and victim were not discernible.

Trial Court Opinion, 8/21/2020, at 16.

10 The Commonwealth claims that in *Commonwealth v. Washington* we upheld the conviction "despite Washington's claim of mere recklessness[.]" Commonwealth's Brief at 10. However, the opinion does not contain any reference to recklessness, and the second paragraph of the opinion states that "Appellant does not challenge the sufficiency of the evidence[.]" *Washington*, 700 A.2d at 404. Our review of the sufficiency was based on our duty "to review the record to determine whether the Commonwealth has established the elements necessary to sustain a conviction for first-degree murder." *Id.* (citation omitted).

11 Holt's argument that Luffey and Clemons were untrustworthy witnesses because the authorities threatened to take away their children if they did not cooperate bore on their credibility. "We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316–17, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). On direct examination, the Commonwealth asked Luffey to explain how he came to contact the FBI with information. He replied, "Well, after [authorities] had been there a couple of times they had told us that if we withhold anything from them, any information from them, you know, we could lose our kids. We could end up in jail ourselves." N.T., 11/6/2019, at 418. Counsel was entitled to cross-examine on this matter, and any issue within the scope of that examination would implicate collateral review.

12 The certified record does not include any of the exhibits presented at trial, and thus we have no basis to say what the photographs do or do not show.

13 As with the list included in his appellate brief, paragraph eight of Holt's Rule 1925(b) statement commences with "[t]here was no eyewitness to the murder..." and concludes by asserting that the allegation that he cut his hand while firing the weapon was rebutted by photographic evidence at trial. Compare Holt's Brief at 22-23 with Holt's 1925(b) statement, 11/20/2020, ¶ 8. Thus, these factual assertions (including the assertions regarding Harper's lack of credibility) are raised in his Rule 1925(b) statement in support of his claim that the verdict was against the weight of the evidence.

14 *Brady* claims may also be waived for lack of development. *Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291, 326 n.34 (2011) (deeming a *Brady* claim waived for lack of development); *Commonwealth v. Yandamuri*, 639 Pa. 100, 159 A.3d 503, 527-28 (2017) (defendant waived *Brady* claim by failing to identify the particular evidence withheld). Holt's claim is subject to waiver for that reason as well, in that he does not identify any particular evidence withheld from him, but merely relies on supposition.

15 Pursuant to Rule 404(b)(3), the prosecutor must provide reasonable notice of its intent to introduce any such evidence at trial. Pa.R.E. 404(b)(3).

16 *State v. Pena*, 301 Conn. 669, 22 A.3d 611, 617 (2011) ("The state does not have to connect a weapon directly to the defendant and the crime. It is only necessary that the weapon be suitable for the commission of the offense.") (internal citations omitted); *People v. Fierer*, 124 Ill.2d 176, 124 Ill.Dec. 855, 529 N.E.2d 972, 979 (1988) (holding that the State need not prove that the given weapon was the one actually used in order to make it admissible).

17 The Commonwealth refers to a single firearm and does not address that Luffey, in his testimony, referred to two separate occasions when he viewed Holt with what he believed to be two different firearms.

18 The Concurrence suggests that we interpret *Christine* to mandate a "strict[ ] inference the weapon introduced was the **actual** weapon used." Concurring Op. at ——. Respectfully, we do not affirm the admission of the evidence based on an assessment of how strong the inference was; instead, we merely hold that under the facts of the case, where Luffey testified that he was familiar with a .40 caliber firearm, the Commonwealth satisfied its burden regarding that first occasion. We do not suggest that the Commonwealth's initial burden requires a witness to supply some basis to determine that the weapon observed was of the same caliber. *See* *Oliver v. City of Pittsburgh*, 608 Pa. 386, 11 A.3d 960, 966 (2011) ("[V]arious principles governing judicial review protect against such slippage, including the axiom that the holding of a judicial decision is to be read against its facts."). Indeed, we note that on cross-examination the Commonwealth's own firearms expert agreed that it would be difficult to identify from a glance the caliber of a weapon. N.T., 11/8/2019, at 876. With respect to the second firearm, the Concurrence does not claim that Luffey's testimony satisfies the Commonwealth's burden under the similar-weapon exception.

19 Holt was charged and convicted of violating section 6105(a)(1) of the Uniform Firearm Act, which provides that a person who has been convicted of one of the statutory enumerated offenses shall not, inter alia, possess or use a firearm in the Commonwealth. 18 Pa.C.S. § 6105(a)(1). He was also charged and convicted of violating section 6106(a)(1) of the Uniform Firearm Act, which makes it a felony of the third degree for a person to "carr[y] a firearm in any vehicle or ... concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter[.]" 18 Pa.C.S. § 6106(a)(1).

20 Notably, Holt asserts that he is entitled to relief based on the test set forth in *Commonwealth v. Collins*, which requires trial courts to consider "[1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion, and if the answers to these inquiries are in the affirmative; [3] whether the defendant will be unduly prejudiced by the consolidation of offenses." *Commonwealth v. Collins*, 550 Pa. 46, 703 A.2d 418, 422 (1997) (referring to the former versions of Rules 582 and 583 found at Rules 1127 and 1128) (internal citations omitted).

However, Holt overlooks that *Collins*, which followed the approach set forth in *Commonwealth v. Lark*, 518 Pa. 290, 543 A.2d 491, 496-97 (1988), applies "[w]here the defendant moves to sever offenses not based on the same act or transaction that have been consolidated in a single indictment or information, or opposes joinder of separate indictments or informations[.]" *Collins* and *Lark* each involved temporally distinct criminal episodes. Presently, the charged offenses were based "on the same act or transaction," and were charged in a single criminal information. Therefore, the trial court's decision not to sever is subject only to the prejudice component.

21 We agree with the Commonwealth that Holt's counsel's failure to raise the confrontation clause argument before the trial court resulted in waiver of that aspect of his argument. This Court has long held that "[i]t is a fundamental principle of appellate review that we will not reverse a judgment or decree on a theory that was not presented to the trial court." *Commonwealth v. Bishop*, 655 Pa. 270, 217 A.3d 833, 842 (2019) (quoting *Kimmel v. Somerset Cty. Comm'rs*, 460 Pa. 381, 333 A.2d 777, 779 (1975)). At trial, Holt's counsel explicitly objected to this evidence on the grounds that the statement was inadmissible hearsay and, alternatively, that the evidence was overly prejudicial, pursuant to Pa.R.E. 403. N.T., 11/6/2019, at 448-49, 466-67, 475. Counsel never mentioned Holt's rights under the confrontation clause.

22 The Commonwealth draws our attention to additional facts not cited by the trial court, namely that Luffey testified that Cain asked Luffey for $100 to help Holt. N.T., 11/6/2019, at 430.

23 "According to U.S. Census Bureau records, 2.6% of Westmoreland County is African American." Holt's Brief at 48 n.22.

24 The jury entered the guilty verdict one hour after it began deliberations, and a verdict of death two days later after less than two hours of deliberation. Holt's Brief at 14.

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA - CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	
	)	No. 5539 C 2017
RAHMAEL SAL HOLT,	)	
	)	
Defendant.	)	
	)	

OPINION OF THE COURT ISSUED PURSUANT TO PA.R.A.P. RULE 1925

AND NOW, this 3 day of December, 2020, it appearing to this Court that Defendant filed a Notice of Appeal from the judgment of sentence entered February 12, 2020, and that Defendant filed a timely Concise Statement of the Errors Complained of on Appeal on November 23, 2020, as Ordered by the Court on September 15, 2020 and October 2, 2020,[1] pursuant to Rule 1925(a) of the Rules of Appellate Procedure, the reasons for said decision appear in the Opinion and Order of Court, filed on August 21, 2020, specifically denying Defendant's post –sentence motions. A copy of that Opinion is attached hereto for reference.

[1] The Court notes that the Defendant filed a Motion for Extension of Time to File a Concise Statement of Errors, consented to by the District Attorney's Office, on or about October 2, 2020, requesting an additional sixty (60) days to file a 1925b statement, which was granted by Order of Court, dated October 2, 2020. Pursuant to that Order, Defendant was to file his 1925b statement by December 1, 2020.

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BY THE COURT:

December 18, 2020 — Rita Donovan Hathaway, J.

Date — Rita Donovan Hathaway, President Judge

ATTEST:

Bryan S. Keen

Clerk of Courts

Cc: File
John W. Peck , Esq. – District Attorney
James Lazar , Esq. – Assistant District Attorney
Timothy Dawson, Esq. – Counsel for Defendant
James Robinson, Esq. – Counsel for Defendant
Pamela Neiderhiser, Esq. – Office of the Court Administrator
Rahmael Sal Holt (# QB-7565) – SCI – Phoenix, 1200 Mokychic Drive, Collegeville, PA 19426

-IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA – CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
VS.	)	No. 5539 C 2017
	)	
RAHMAEL SAL HOLT,	)	
	)	
DEFENDANT	)	

OPINION AND ORDER OF COURT

The Defendant, Rahmael S. Holt, ("Holt" or "Defendant") was charged by criminal information at 5539 C 2017 in the Court of Common Pleas of Westmoreland County, Pennsylvania with Murder of a Law Enforcement Officer of the First Degree, Murder of the First Degree, Person Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearm, and Firearms Not to Be Carried without a License.[1] The Commonwealth filed a notice to seek the death penalty against the Defendant on January 19, 2018. Defendant filed pre-trial motions, which were heard by this court on May 21, 2018, June 10, 2019, October 4, 2019, October 23, 2019 and October 28, 2019. A jury trial was held on November 4, 5, 6 7, 8 and 12, 2019. The Defendant was convicted of all charges and the jury returned a verdict of death on November 14, 2019. This Court formally imposed a death sentence, plus a sentence of 7 to 20 years' imprisonment for Person Not to Possess a Firearm and 3 ½ to7 years' imprisonment for Firearms Not to be

[1] 18 Pa. C.S.A. §2507(a), 18 Pa. C.S.A. §2502(a), 18 Pa. C.S.A. §6105(a)(1) and 18 Pa. C.S.A. §6106(a)(1), respectively.

Carried without a License on February 12, 2020.[2] Defendant filed a post-sentence motion on or about February 25, 2020. By Order of Court, dated March 3, 2020, counsel were ordered to submit briefs in support of their respective positions. A Judicial Emergency was declared by the undersigned in Westmoreland County from March 17, 2020 until May 8, 2020.[3] The Defendant filed a brief in support of Defendant's Post-Sentence Motion on May 1, 2020. The Commonwealth filed a Response to Defendant's brief on or about May 29, 2020. This matter comes before the court on Defendant's Post-Sentence Motion.

FACTUAL HISTORY

The charges in this case arose from events that occurred on or about November 17, 2017, in New Kensington, Westmoreland County. The testimony at trial established that in the morning of November 17, 2017, Tavon Harper was scrolling through his phone, looking for "girls' numbers" that he could "chill," when he came across the name Vanessa Portis. (TT 238).[4] Harper face-timed the number listed for Vanessa Portis and the Defendant answered the call. (TT 239). Although he was surprised "when his face popped up," Harper knew the Defendant from his childhood neighborhood and had gone to elementary and middle school with him. (TT 239). During the conversation, Holt

[2] *See* Sentencing Order of Court, dated 2/12/20. At Count 2, the Defendant was sentenced to death, Count 1 merged with Count 2, at Count 3, the Defendant was sentenced to 7 to 20 years' incarceration and at Count 4, 3 and ½ to 7 years, consecutive to Count 3.

[3] In Re: Tenth Judicial District, Declaration of Judicial Emergency, 3 M 2020 (Westmoreland County Court of Common Pleas)

[4] Numerals in parenthesis preceded by the letters "TT" refer to specific pages of the transcript of the trial in this matter, held on November 4-8 and 12, 2019 before this court and made a part of the record in this case.

asked Harper if he could get him some cocaine. (TT 243). Harper agreed to obtain the drugs on his behalf and met the Defendant at 1206 Victoria Avenue in New Kensington, Westmoreland County. (TT 245). When he arrived at the location to pick him up, Defendant opened his jacket and showed Harper a pistol, tucked into his waistband. (TT 246). Harper testified that he exclaimed to Defendant, "[Y]o, why the hell are you doing that. You're in New Ken. You're not in Homewood." (TT 248). Harper gave the cocaine to the Defendant, who gave Harper $300.00 and requested that he procure "Sour Diesel" marijuana for him. (TT 249). Harper agreed to do so. (TT 249).

Harper face-timed the Defendant when he procured the marijuana and "showed him the weed." (TT 258). After the Defendant approved it, Harper purchased the marijuana for $125.00 and headed back to New Kensington where he picked up the Defendant on Woodmont Street. (TT 262). After briefly speaking with the Defendant's little sister at the residence on Woodmont Street, Harper and Holt travelled to the Stop-N-Go on Constitution Avenue in New Kensington. (TT 265). Harper pulled alongside a van, where the Defendant rolled down his window and conversed with the driver of the van. (TT 266).

Harper pulled out of the Stop-N-Go and made a left turn onto Constitution Boulevard, and then another left turn onto Locust Street in New Kensington, where he came to a stop sign. (TT 268). Officer Brian Shaw of the New Kensington Police Department was on routine patrol, at approximately 8:00 p.m., when he attempted to stop the Jeep Cherokee driven by Tavon Harper, with the Defendant riding in the passenger seat, for failing to stop at the stop sign. (TT 269). When the police lights came on, Holt

displayed a gun with a "long magazine" and asked to hide it in Harper's vehicle. (TT 271). Harper testified that he told the Defendant, "I'm on parole, you can't hide it here. You have to get out and run." (TT 271). At the Defendant's direction, Harper did not stop and drove off. (TT 271, 272). As Harper turned onto Leishman Avenue in New Kensington, the Defendant "jumped out" of Harper's vehicle, ran in front of his jeep with the pistol in his hand, and fled. (TT 275). Harper saw Officer Shaw exit his vehicle and begin chasing the Defendant, shouting "Police! Stop!" (TT 275). Harper reached over, shut his passenger door and continued to drive to his home at 1105 Kenneth Avenue in New Kensington. (TT 276).

Nicole Drum, who lives at 1237 Leishman Avenue in New Kensington across the street from the City Reach Church, testified that she was watching television in her living room at approximately 8:00 p.m. when she heard five to six gunshots and heard something hit the house. (TT 139). She looked out her living room window and saw someone running at the very end of the alley behind the City Reach Church parking lot and Officer Shaw lying on the ground. (TT 140-143). Video surveillance cameras, present at her home on November 17, 2017, captured the incident on camera. (TT 144). Ms. Drum exited her house, went over to Officer Shaw and observed that he was bleeding from the chest and coughing up blood. (TT 143). She ran back into her home to gather towels and gave them to the officers who had responded to the scene and were rendering aid to Officer Shaw. (TT 143-144).

Officer James Noble was working as a patrol officer of the New Kensington Police Department on the evening of November 17, 2017. (TT 69). He heard Officer

Shaw's radio transmission indicating that a vehicle had failed to yield and that he was engaged in a foot pursuit. (TT 69). Officer Noble was proceeding to the 1200 block of Leishman Avenue when he heard four to five gunshots. (TT 71). He exited his vehicle and walked down the sidewalk, looking for Officer Shaw and calling out to him, when he heard Officer Shaw say, "Over here" and saw him "fall to his knees." (TT 74). Officer Noble ran to Officer Shaw to render aid and turned him onto his back, where he noticed a gunshot wound to his shoulder, and, after removing his external vest, a large amount of blood on his left side. (TT 75). Officer Noble was joined by other officers and they administered CPR until the ambulance arrived. (TT 79).

Officer Shaw had sustained two gunshot wounds: one to his left front shoulder and one to the back of the left shoulder. (TT 775). A third bullet was found lodged in his protective vest. (TT 780). Dr. Jennifer Hammers testified that the gunshot wound to the front of the left shoulder perforated a lung and broke some ribs and the gunshot wound to the back of the shoulder also caused bleeding and injury to the lungs and additional fractures to the ribs. (TT 778-780). In her opinion, the cause of death to Officer Shaw was "blood loss primarily, and then secondarily the accumulation of blood around the outside of his lungs, but inside his chest cavity. That bleeding occurred because of the injuries to his lungs primarily, but also to the fractures and injuries to his ribs." (TT 781).

Six (6) discharged .40 caliber cartridge casings were found in the parking area next to the City Reach Church where Officer Shaw had been found by Officer Noble. (TT 698-700, 807, 812, 859). A phone call from Detective Marcocci at approximately 9:30 p.m. alerted Agent Thomas Klawinski that a cell phone was found in the back yard of a

residence at 1204 Victoria Avenue in New Kensington, one block over from Leishman Avenue. (TT 152).

Antoinette Strong testified that, on November 17, 2017, she resided at 1206 Victoria Avenue in New Kensington along with her aunt, Lakita Cain, her cousin, Taylor Mitchell, and two of her aunt's friends, Michael Luffey and his fiancé, Holly Clemons and their children. (TT 655). The Defendant was in a romantic relationship with Taylor Mitchell and he resided at the house "every day," sleeping there at night. (TT 659). In the evening hours of November 17, 2017, Strong came home from working at the Family Dollar store in New Kensington, at approximately 9:00 p.m., and was in her aunt's room, talking with her, when there was "a noise outside" and then a series of knocks at the door. (TT 661-662). The "noise outside" was identified by Strong as gunshots. (TT 661). Cain instructed Strong to answer the door. (TT 663). Strong went to the front door, but there was no one there. (TT 663). She went to the back door and answered the door. (TT 663). The Defendant, known as "Flip" to Strong, entered the residence. (TT 664). Strong testified that she asked him, "Why are you talking so low?" and he asked if her aunt was there. (TT 664). Strong observed the Defendant go into the basement. (TT 664). While he was in the basement, she went upstairs to talk to Cain. (TT 664). He then joined Strong in Cain's bedroom. (TT 665). Strong testified that the Defendant "had a cut on his hand and he was shaking." (TT 665). She went back to her bedroom and did not see the Defendant again until the day of her testimony. (TT 666). Strong testified that law enforcement officers visited the house every day for four days. (TT 668). She testified that, on Saturday, November 18, 2017, "Lisa," (later identified as Lisa Harrington) who

on previous occasions had dropped the Defendant off at the Cain residence, arrived at 1206 Victoria Avenue with some children. (TT 670). Harrington went upstairs to speak with Cain and, after about five or six minutes, Harrington and Cain descended and went into the basement together. (TT 671). Harrington was carrying a purse. (TT 672). She and Cain came upstairs, went outside and Harrington left in a van. (TT 672). The children remained at the house. (TT 672). Strong thereafter left the residence and went to work. (TT 684).

Michael Luffey testified that, in November of 2017, he also resided at 1206 Victoria Avenue in New Kensington. He resided on the first floor with Holly Clemons and his children, Vincent and Rocco, while Lakita Cain, Taylor Mitchell and Antoinette Strong lived on the second floor. (TT 394). The Defendant also lived there with Taylor Mitchell, whose relationship he described as "boyfriend/girlfriend." (TT 397). In the evening hours of November 17, 2017, Luffey met Clemons at the store to do some shopping after completing work at Custom Auto Body. (TT 403). After completing their shopping, Luffey and Clemons were walking back to 1206 Victoria Avenue when they received a call from Taylor Mitchell, alerting them that "a cop had been shot." (TT 408). When he entered the house, he testified that he observed that "[e]verybody was pretty frantic. Running around."(TT 409). The Defendant was present when Luffey arrived. (TT 409). The Defendant was standing upstairs and Mitchell was attempting to bandage his bleeding hand. (TT 410). Cain informed Luffey again that a police officer had been shot. (TT 411). Luffey testified that the Defendant was acting "not normal. Frantic."(TT 413). He described the Defendant as "nervous, worried about something" and "pacing a

little bit." (TT 413) Within half an hour, the Defendant left. (TT 414). Law enforcement officers came to the house that evening and again the next day. (TT 416). All of the residents were given cards by the officers and told to contact them if they knew anything. (TT 416). Luffey testified that he contacted Michael Nealon of the FBI a few days later because people inside the house told the officers that "they didn't know [the Defendant]. He was just some guy that helped them carry in groceries." (TT 417-418). Luffey told Nealon that he knew Holt and that he did "very well live there." (TT 419). He decided to correct the misinformation because he "didn't want to get in trouble. I didn't want to lose my children." (TT 419). Luffey was also present when Lisa Harrington came to the house in the afternoon of November 18, 2017. (TT 425). He arrived at his residence, after working a half day, to a house full of people. (TT 424). Holly Clemons, Lakita Cain, Taylor Mitchell, Lisa Harrington, two young black males and "some kids," ranging in age from three to ten were present. (TT 424). He went outside to smoke a cigarette and when he returned, he observed Harrington "taking a paper bag out of the house with her." (TT 426). She got into her van and left, leaving the children at the residence. (TT 428). She returned about 30 minutes later and left the residence with the children. (TT 429).

Holly Clemons testified that she lived with her fiancé, Michael Luffey, and their two children, Vincent and Rocco, at 1206 Victoria Avenue, New Kensington on November 17, 2017, after moving there in August or September of 2017. (TT 481). The Defendant also lived there and was there on a daily basis, as he and Taylor Mitchell were "seeing each other." (TT 484). She testified that, on November 17, 2017, she and

Michael Luffey had gone to a few stores to do some shopping and were on their way home when she received a phone call, asking if they were all right because a "cop had got shot." (TT 488). After the phone call, sirens started going off. (TT 490). When they arrived home, Cain, Mitchell, her two sons, the Defendant and "I think Antoinette" were there. (TT 490). She testified that, when they arrived at the house, "[e]verybody . . . is pacing." (TT 491). She testified that the Defendant seemed "like, a little bit maybe frantic. Like, shook up." (TT 492). She noticed a cut on his hand that was "wet . . . and bloody, like a fresh laceration." (TT 495). She observed him make some phone calls and then he left in a "dark-colored vehicle" and did not return. (TT 493). The police were at the house that night and the next day. (TT 497-498). On Saturday, November 18, 2017, "Lisa" (later identified as Lisa Harrington) came to the house with a "bunch of kids." (TT 499). Harrington went upstairs. (TT 500). The kids stayed at the residence and Harrington left in a van. (TT 500-501). She had a purse and she was gone for about 10 to 15 minutes. (TT 502). When she returned, Harrington went upstairs to talk to Cain and then left with the children. (TT 502). Clemons testified that she asked Cain what was going on and Cain told her that she "told Lisa to get things out of the house" and that there was a "gun in the basement," that "it was the Defendant's gun" and that she "had to get it out of the house so she called Lisa." (TT 503). She testified that Mitchell and Cain had communications with Holt after he left the residence in the evening of November 17, 2017. She asked Mitchell if she talked to the Defendant, asking, "Is he okay?" and Mitchell answered, "Yeah." (TT 503).

Tavon Harper testified that, after he returned to his residence at 1105 Kenneth Avenue on the evening of November 17, 2017, he told his wife, Morgan Harvin, that he had been in a "little high speed chase" and the "cops were looking for the truck." (TT 276). When he got into the house, he "called Rahmael's phone to see if he would need picked up."(TT 277). When he didn't answer, he asked Harvin for her car keys and drove in her car, a black Nissan Maxima, to 1206 Victoria Avenue. (TT 277-278). He testified that he saw the Defendant "just standing in the doorway." (TT 278). The Defendant came down the stairs and said, "These cops are butt ass fucked." (TT 279). He got into the car and Harper took him to the house on Woodmont Street, where he met him earlier, and then Harper returned to 1105 Kenneth Avenue. (TT 280).

Vanessa Portis testified that, in November of 2017, she was in a romantic relationship with the Defendant, who stayed at her house at 17 Vine Street, Natrona Heights in Allegheny County two or three days a week. (TT 527). She testified that she bought things for him, including a cell phone that she added to her plan. (TT 529). The number associated with the phone she gave him was (412)482-4158. (TT 535). On November 17, 2017, she spoke with the Defendant on that phone around 5:30 and 5:40 p.m. (TT 535). She spoke to him again that evening at 8:48 p.m. when he called her from Lisa Harrington's phone. (TT 541). He told her he lost his phone. (TT 542). She called T-Mobile and cancelled his phone. (TT 542). She testified that she received another call from the Defendant at 9:02 p.m., asking her where she was, and she agreed she would meet him at her house. (TT 544). When she arrived at her house, the Defendant and Harrington pulled directly behind her in a gold minivan a few minutes later. (TT 545).

The Defendant asked her to take him to his mother's house in Homewood and she agreed. (TT 545). They traveled in her car, along with her niece, to the Defendant's mother's house on Formosa Way in Homewood, PA. (TT 548). After spending about 2 ½ hours there, the Defendant and Ms. Portis had an argument, left the residence and the Defendant asked her to drop him off in Penn Hills. (TT 554). She dropped him off at an apartment building in Penn Hills. (TT 554). She testified that she never saw him again after dropping him off in Penn Hills and that she still loves him. (TT 556, 565).

Asya Benson testified that, in November, 2017, she was residing with Marcel Mason and her daughter at 833 Hinerman Street in Duquesne, Allegheny County. (TT 574). Marcel Mason and the Defendant are cousins. (TT 574). On November 18, 2017, the Defendant knocked at the back door of their residence sometime between 10:00 a.m. and noon. (TT 577). Mason and Benson slept on the first floor of the residence, in the living room, as Mason had become paralyzed six months earlier. (TT 575). When the Defendant arrived, he followed Benson to the living room, where she got back into bed, and handed a television remote to the Defendant. (TT 580). After they woke up, she ran errands and the Defendant remained at the residence with Mason. (TT 581). He spent the night at the residence, sleeping in the living room. (TT 583). Later that evening, at about midnight, Mason showed Benson a photograph on his phone of the Defendant as a "wanted suspect in the New Kensington cop killing." (TT 584). Mason woke the Defendant up and showed him what was on the phone. (TT 584). She testified that "we told Rahmael that he couldn't stay at our residence from that point on, that he had to leave." (TT 585). She and Mason drove him to Lateef Mason's residence in Hazelwood

and dropped him off in the early morning hours of November 19, 2017. (TT 590). Found in a hamper on the second floor of her residence were blue jeans, a Louis Vuitton belt, an identification card and a casino card all identified as belonging to the Defendant. (TT 602-604).

The Defendant was arrested by police on November 21, 2017, when, after a four day search, he surrendered to authorities who had surrounded the residence of Lateef Mason in Hazelwood, Allegheny County, where he was believed to be residing. (TT 928-931).

It is noted that the events of November 17, 2017 were caught on various surveillance cameras that had been installed by residents and businesses in the area.

Detective Raymond Dupilka testified that he received a copy (and ultimately the original) of a letter from the counsel of Tavon Harper. (TT 341). The letter purported to be from the Defendant to Harper when both were incarcerated at the Westmoreland County Prison. (TT 341). Detective Dupilka read the contents of the letter into the record. (TT 342 -346). That letter had been examined by Sgt. Robert Negherbon, who was qualified as an expert in document examination, and who opined that the Defendant was the author of that letter. (TT 645). In the letter, the Defendant outlines a false story for Harper to tell, which would exculpate the Defendant of the murder, in return for which the Defendant would assume responsibility for Harper's drugs. (TT 342-346).

ISSUES PRESENTED:

I. WHETHER THE VERDICT WAS SUPPORTED BY SUFFICIENT EVIDENCE?

The Defendant suggests that the evidence presented at trial was insufficient to support the jury's verdict of guilty at all four counts of the criminal information.[5] Specifically, he contends the evidence was insufficient to sustain his convictions for murder of a law enforcement officer and murder of Officer Brian Shaw. Defendant claims that the evidence was insufficient to prove that the Defendant "shot New Kensington police officer Brian Shaw with the specific intent to kill."[6] Rather, he alleges the evidence was sufficient to prove "only that the shooter shot recklessly at Officer Brian Shaw as he was running away during a police pursuit following an attempted traffic stop."[7]

The standard of review for a sufficiency of the evidence challenge is well-settled:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

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[5] Defendant's Post-Sentence Motion, ¶ 2, filed on or about February 25, 2020.

[6] Defendant's Brief in Support of Post-Sentence Motion, p. 2-3.

[7] Defendant's Brief in Support of Post-Sentence Motion, p. 3.

Commonwealth v. Mucci, 143 A.3d 399, 408–09 (Pa. Super. 2016)(*citing* ***Commonwealth v. Brooks,*** 7 A.3d 852, 856–57 (Pa.Super.2010)).

18 Pa. C.S.A. §2507(a), Murder of a Law Enforcement Officer of the first degree, provides:

> **(a) Murder of a law enforcement officer of the first degree.**--A person commits murder of a law enforcement officer of the first degree who intentionally kills a law enforcement officer while in the performance of duty knowing the victim is a law enforcement officer.

18 Pa. C.S.A §2507(e) defines law enforcement officer as:

> "**Law enforcement officer**." This term shall have the same meaning as the term "peace officer" is given under section 501 (relating to definitions).

"Peace officer" is defined as:

> **"Peace officer."** Any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses, or any person on active State duty pursuant to 51 Pa.C.S. § 508 (relating to active duty for emergency). The term "peace officer" shall also include any member of any park police department of any county of the third class.

18 Pa. C.S.A. § 501.

18 Pa. C.S.A. 2502(a), Murder of the first degree, provides:

> **(a) Murder of the first degree.**--A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

In order for a first-degree murder conviction to be sustained, the Commonwealth is required to introduce evidence at trial which establishes beyond a reasonable doubt the following factors: (1) a human being was unlawfully killed; (2) the accused bears responsibility for the killing; and (3) the accused acted with malice and a specific intent to kill. ***Commonwealth v. Reed,*** 990 A.2d 1158, 1161 (Pa. 2010); *18 Pa.C.S.A. §§*

2501, 2502(a). The Crimes Code defines an intentional killing as a "[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing." *18 Pa.C.S.A.§ 2502(d).*

> To convict a defendant of first degree murder, the Commonwealth must prove: a human being was unlawfully killed; the defendant was responsible for the killing; and the defendant acted with malice and a specific intent to kill. *See* 18 Pa.C.S. § 2502(a)... The Commonwealth may use solely circumstantial evidence to prove a killing was intentional, and the fact-finder may infer that the defendant had the specific intent to kill the victim based on the defendant's use of a deadly weapon upon a vital part of the victim's body. Malice, as well, may be inferred from the use of a deadly weapon upon a vital part of the victim's body.

Commonwealth v. Houser, 18 A.3d 1128, 1133–34 (Pa. 2011)(Internal citations omitted).

Viewing the evidence in a light most favorable to the Commonwealth as verdict winner, it is clear that there was sufficient evidence presented at trial to sustain the jury's verdict of guilty as to First Degree Murder and Murder of a Law Enforcement Officer. There can be no serious issue that Officer Shaw was in the performance of his duties and similarly, there can be no doubt that the Defendant was aware of Officer's Shaw's status as a law enforcement officer and that he was in the performance of his duties, since the whole incident began when the police lights were activated, the Defendant was forced to exit the vehicle at the direction of the driver and was attempting to flee and elude the pursuing police officer when the deadly shooting occurred. Defendant shot six times, hitting Officer Shaw three times - once in the left front shoulder, once in the left back shoulder and once in the back, which did not penetrate his protective vest. As noted in the Commonwealth's brief, two (2) shots entered his lungs, a vital part of his body,

causing his death.[8] The Defendant's deliberate and repeated use of a firearm to shoot the officer in those areas clearly established his specific intent to kill him. Video tape surveillance obtained from the residence of Nicole Drum, who lived across the street from the City Reach Church, showed Harper's vehicle traveling on Leishman Avenue, the subsequent chase and the jury heard Shaw's radio call of the chase and his statement that he had been shot. (TT 137-144). The Defendant asserts that he was running, and not aiming , but that assertion is nowhere in the record in this case. The Defendant did not testify. Although video surveillance captured the incident on camera, because the shots were fired in a darkened parking lot, the manner and position of shooter and victim were not discernible. Additionally, there was no testimony as to the manner in which Holt shot Officer Shaw.

The Defendant was legally prohibited from possessing a firearm, did not and could not possess a license to carry a firearm, and had asked permission to hide the weapon in the vehicle at the time of the traffic stop, which permission was denied. He then left the vehicle in possession of that illegal firearm and being pursued by Officer Shaw. After the shooting, he fled the scene and successfully evaded arrest for several days, moving several times to avoid detection. In the case *sub judice*, the evidence presented by the Commonwealth, and the reasonable inferences deduced therefrom, clearly demonstrated that Defendant, acting with malice and the specific intent to kill, caused the death of Officer Brian Shaw, thus supporting the jury's verdict of first-degree murder.

[8] Commonwealth's Response to Defendant's Brief at p 4.

In conjunction with the undisputed evidence that Officer Brian Shaw was a New Kensington Police Officer, this same evidence also supports the jury's verdict of first-degree criminal homicide of a law enforcement officer.

Of the remaining offenses, the offense of Person not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms (18 Pa. C.S.A. § 6105) was clearly shown.

To sustain a conviction for the crime of persons not to possess a firearm, the Commonwealth must prove that "[Defendant] possessed a firearm and that he was convicted of an enumerated offense that prohibits him from possessing, using, controlling, or transferring a firearm." ***Commonwealth v. Miklos***, 2017 PA Super 107, 159 A.3d 962, 967 (2017)(*citing* ***Commonwealth v. Thomas***, 988 A.2d 669, 670 (Pa. Super. 2009).

A violation of this offense requires two elements. First, that the Defendant is a person prohibited by law from owning a weapon. The Defendant and the Commonwealth stipulated at trial that the Defendant was "a person prohibited by Pennsylvania law from possessing, using or controlling a firearm" and the jury was so instructed. (TT 906-907). Accordingly, the Commonwealth was required to prove beyond a reasonable doubt only that the Defendant "possessed, used, controlled, sold, transferred or manufactured" a firearm in Pennsylvania. Possession can be found by proving actual possession, constructive possession or joint constructive possession. ***Commonwealth v. Heidler***, 741 A.2d 213, 215 (Pa. Super. 1999). *A fortiori,* the Defendant was not licensed to carry a firearm and could not be and, accordingly, was in violation of 18 Pa. C.S.A. §6106.

The record was replete with witnesses and evidence confirming the Defendant's possession of a firearm in a vehicle and concealed on his person, both in the immediate past and on the day of the killing. Since he could not possess a firearm, he could not be licensed to carry one.

For these reasons, the jury's verdict was supported by sufficient evidence and this contention is without merit.

II. WHETHER THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE?

In his post-sentence motion, Defendant also alleges that the verdicts were against the weight of the evidence. He avers that the jury verdict in the guilt phase was against "the great weight of evidence" in this case.[9]

When a defendant raises a weight of the evidence claim, it is a trial court's role to determine whether "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *In re J.B.*, 106 A.3d 76, 95 (Pa. 2014). A trial court should award a new trial if the verdict of the fact-finder "is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Id.* Moreover, "[a] weight of the evidence claim concedes that the evidence is sufficient to sustain the verdict, but seeks a new trial on the ground that the evidence was so one-sided or so weighted in favor of acquittal that a guilty verdict

[9]Defendant's Brief in Support of Defendant's Post-Sentence Motion, p. 3.

shocks one's sense of justice." *Id.* (*citing* ***Commonwealth v. Lyons***, 79 A.3d 1053, 1067 (Pa. 2013).

"A true weight of the evidence challenge 'concedes that sufficient evidence exists to sustain the verdict' but questions which evidence is to be believed." ***Commonwealth v. Galindes***, 786 A.2d 1004, 1013 (Pa. Super 2001).

In the case *sub judice,* the Defendant contends:

> There was no eyewitness to the murder; the video displayed in court did not identify the defendant; no murder weapon was produced; the defendant did not confess; the prosecution's key witness, who was released from prison and state parole a few weeks after this trial, despite the prosecution and Harper claiming he had no plea agreement with the prosecution to testify, lied repeatedly in statements provided prior to this trial testimony and was not a credible witness; the testimony of Holly Clemons and Michael Luffey was tainted by threats to take away their kids if they did not cooperate and testify; The testimony of Antoinette Strong, who testified repeatedly she arrived at Cain's residence at 9:00 p.m. on the night of the murder, one hour after Officer Shaw was shot, and made observations that could have not been made at that time; There was no DNA or other scientific evidence linking the defendant to this murder; The allegation that he cut his hand while firing a semiautomatic weapon was rebutted by photos produced a trial of both hands uncut and without sign of injury at the time of his arrest.[10]

This claim lacks merit. Testimony from Tavon Harper established that Holt possessed a handgun with a "long magazine" immediately before the traffic stop and testified that Holt "jumped out" of the vehicle on Leishman Avenue with the pistol in his hand and he watched Officer Shaw pursue him on foot. (TT 275). Multiple witnesses, who were present at 1206 Victoria Avenue in the evening of November 17, 2017,

[10] Brief in Support of Defendant's Post-Sentence Motion, p. 3-4

testified that Holt appeared at the residence shortly after shots were heard, knocked in a persistent manner at the back door and that he seemed "not normal," "frantic," "shaking" and that he was "pacing". (TT 413, 491,661-662,665). A cell phone, belonging to Vanessa Portis, was found that same evening in the back yard of 1204 Victoria Avenue, "half a city block" from the where the shooting occurred next to the City Reach Church. (TT 153). Vanessa Portis testified that she purchased the phone for the Defendant, added the phone to her plan, that phone was in the exclusive possession of the Defendant and he asked her to cancel it from the plan on November 17, 2017 at approximately 8:48 p.m.. (TT 528,529,531,541). Video tape surveillance obtained from the residence of Nicole Drum, who lived across the street from the City Reach Church, showed Harper's vehicle traveling on Leishman Avenue, the subsequent chase and the jury heard Shaw's radio call of the chase and his statement that he had been shot. (TT 137-144). The jury heard testimony about a letter that was sent to Tavon Harper while Harper and the Defendant were incarcerated at the Westmoreland County Prison, which letter was determined by a document examination expert to have been authored by the Defendant, and which implored Harper to join in a made-up story exculpating Holt in return for Holt's agreement to take the blame for Harper's drugs. (TT 342-346). Additionally, Holt's immediate flight and his continued elusion of authorities for four days suggested a consciousness of guilt.

The jury is free to believe all, part or none of the evidence presented at trial. ***Commonwealth v. Forbes***, 867 A.2d 1268, 1274 (Pa. Super 2005). Inconsistencies in the testimony were, therefore, for the jury to resolve. The jury clearly weighed the evidence

presented, evaluated the testimony of the witnesses and made a determination thereupon. The evidence was of adequate weight to support the verdict of the jury, and a reviewing court should not disturb the verdict of the jury when the evidence was both of sufficient weight and nature to sustain the verdict of guilty. The verdict as rendered by the jury is not so contrary to the weight of the evidence that it shocks this court's sense of justice and therefore, this court will not disturb the jury's verdict.

III. WHETHER THE VERDICT OF DEATH WAS A PRODUCT OF PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTOR?

Holt's next allegation of error avers that the "cumulative effect" of "significant, prejudicial and arbitrary factors" produced a verdict of death based upon passion, prejudice and arbitrary factors.[11] Specifically, he alleges that the victim was a young, white, popular police officer while the Defendant was an African-American with a Muslim sounding name, the jury was comprised of white jurors, white police officers attended the trial proceedings and the jury's deliberations, lasting approximately one hour in the guilt phase, support his position that the verdict was the product of passion and prejudice.[12]

42 Pa. C.S. 9711(h) provides:

> **(h) Review of death sentence.--**
> (1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

[11]Defendant's Brief in Support of Defendant's Post-Sentence Motion, p. 4

[12] Defendant's Brief in Support of Defendant's Post-Sentence Motion, p. 4

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).
(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; or
(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d).

(4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

As the Commonwealth notes in its Response to the Defendant's Brief in support of the Post-Sentence Motion, this statute grants authority to the Supreme Court, not to the trial court, to determine whether the sentence of death was the product of passion, prejudice or any other arbitrary factor. The Defendant does not cite to any authority to the contrary. Moreover, he does not cite to any evidence of record in support of his claim of passion, prejudice or other arbitrary factor.

Even if it were the function of the trial court to make this determination, which this Court believes it is not, a review of the entire record shows that it was not the product of passion, prejudice or any other arbitrary factor, but rather based on properly admitted evidence that, *inter alia,* the Defendant shot Officer Shaw in a vital part of his body, using a weapon that he was prohibited from possessing and which he had not been allowed to conceal in the vehicle in which he had been a passenger. The sentence here was based upon the willful and intentional killing of a police officer in the performance of his duties.

As the Commonwealth notes, Defendant and his counsel participated fully in jury selection and pointed to no specific claim of partiality or prejudice relating to any of the jurors selected.

It is noted that the record is void of any defense objection to the makeup of the persons attending the trial. Those that may have been police officers were not in uniform or otherwise identifiable as law enforcement officials. The Court notes that the no one in the courtroom was in uniform, other than the security personnel supplied by the Sheriff's Office for the trial.

Defendant appears to complain that the jury deliberated for too short a period of time before reaching its verdict and, thus, passion, prejudice or other arbitrary factors are implicated. This Court disagrees. The Supreme Court, in ***Commonwealth v. Reyes***, 963 A.2d 436, 442 (Pa. 2009), noted that "we are not persuaded the length of time, by itself, demonstrates passion or prejudice."

Accordingly, this claim lacks merit and is denied.

IV. WHETHER THE COURT ERRED IN DENYING DEFENDANT'S PRETRIAL MOTIONS?

1. Prior Bad Acts Evidence

Defendant's next allegation of error suggests that the Defendant was denied his constitutional right to due process and fair trial by allowing evidence of the Defendant being in possession of a firearm "thought to be similar (40-caliber semiautomatic handgun) to the weapon used to shoot and kill Officer Shaw, on occasions several weeks prior to the incident at issue" through witness testimony over the objection of the

Defendant.[13] He alleges that the prejudice of the jury hearing testimony that the accused was in possession of a firearm similar to the one believed to have been used in shooting and killing Officer Shaw significantly outweighs its probative value and that "the dangerous effect of allowing such speculative and prejudicial evidence to be admitted. . . was to deny the accused his presumption of innocence."[14]

It is well–settled that the admissibility of evidence is within the sound discretion of the trial court:

> Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." ***Commonwealth v. Drumheller,*** 808 A.2d 893, 904 (Pa. 2002), *cert. denied,* 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003) (quoting ***Commonwealth v. Stallworth,*** 566 Pa. 349, 363, 781 A.2d 110, 117 (2001)); ***Commonwealth v. Collins,*** 70 A.3d 1245, 1251 (Pa.Super.2013). An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record. ***Commonwealth v. Harris,*** 884 A.2d 920, 924 (Pa.Super.2005), *appeal denied,* 593 Pa. 726, 928 A.2d 1289 (2007).

Commonwealth v. Tyson, 119 A.3d 353, 357–58 (Pa. Super. 2015).

In this case, as in all cases, relevance is the threshold for admissibility of evidence. In that regard, Pennsylvania Rule of Evidence 401 provides:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

Pa.R.E. 401.

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[13]Defendant's Brief in Support of Defendant's Post-Sentence Motion, p. 4, citing the testimony of Michael Luffey (TT 399-403).

[14] Brief in Support of Defendant's Post-Sentence Motion, p. 4

Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. ***Drumheller,*** *supra,* at 904. "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible."*Pa.R.E. 402*. "Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact." ***Commonwealth v. Reese***, 31 A.3d 708, 716 (Pa. Super. 2011)(*citing* ***Drumheller,*** *supra*). "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."*Pa.R.E. 403*.

Rule of Evidence 404 bears directly on the issue:

Rule 404. Character Evidence; Crimes or Other Acts

(b) Crimes, Wrongs or Other Acts.

> (1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

Pa.R.E. 404(b)(1)-(2).

Evidence of [other acts] is not admissible for the sole purpose of demonstrating a criminal defendant's propensity to commit crimes. ***Commonwealth v. Melendez–Rodriguez,*** 856 A.2d 1278, 1283 (Pa.Super.2004). Nevertheless, "[e]vidence may be admissible in certain circumstances where it is relevant for some other legitimate purpose and not utilized solely to blacken the defendant's character." ***Melendez–Rodriguez, supra.*** Specifically, other [acts] evidence is admissible if offered for a non-propensity purpose, such as proof of an actor's knowledge, plan, motive, identity, or absence of mistake or accident. ***Commonwealth v. Chmiel,*** 889 A.2d 501, 534 (Pa. 2005). "Evidence is not unfairly prejudicial simply because it is harmful to the defendant's case. Rather, exclusion of evidence on this ground is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." ***Commonwealth v. Foley***, 38 A.3d 882, 891 (Pa. Super. 2012) (internal quotation marks and citations omitted), ***appeal denied***, 60 A.3d 535 (Pa. 2013).

In ***Commonwealth v. Yount,*** 314 A.2d 242 (Pa. 1974), the Supreme Court observed that a defendant's possession of a weapon that could have been used to commit the crime is relevant. The Court explained that such evidence is relevant to show that the defendant owned or had access to an implement with which the crime could have been committed.

More recently, in ***Commonwealth v. Christine***, 125 A.3d 394, 400 (Pa. 2015), the Supreme Court stated, "A weapon not 'specifically linked' to the crime is generally inadmissible; however, the fact 'the accused had a weapon or implement suitable to the

commission of the crime charged ... is always a proper ingredient of the case for the prosecution.'" *Id.* "Any uncertainty that the weapon is the actual weapon used in the crime goes to the weight of such evidence." *Id.* ((*citing* ***Commonwealth v. Williams,*** 537 Pa. 1, 640 A.2d 1251, 1260 (1994) (citing ***Commonwealth v. Coccioletti,*** 493 Pa. 103, 425 A.2d 387, 390 (1981)). "The only burden on the prosecution is to lay a foundation that would justify an inference by the finder of fact of the likelihood that the weapon was used in the commission of the crime." *Id.* ((citing ***Commonwealth v. Thomas,*** 522 Pa. 256, 561 A.2d 699, 707 (1989) ("If a proper foundation is laid, the weapon is admissible where the circumstances raise an inference of the likelihood that it was used.")). The Court, in evaluating the admission of a homemade shank in contrast to a firearm, explained "[p]ossession of a handgun may be relevant even if the particular gun possessed cannot be proven to be the one used in the crime. That it was possessed may allow the inference it could have been used." *Id.*

Regarding the interval of time,

> With regard to the argument of the interval of time that dissipated any relationship that may have normally flowed from the possession and the connection with the event, it must be remembered that such a consideration is one for a jury to resolve in evaluating the weight of the probative value of the offered evidence and not its competency.*Id.* at 565, 366 A.2d at 1226. See: ***United States v. Covelli,*** 738 F.2d 847, 855–856 & n. 14 (7th Cir.1984), *cert. denied,* 469 U.S. 867, 105 S.Ct. 211, 83 L.Ed.2d 141 (1984) (testimony concerning defendant's possession of handgun on two occasions, once three years prior to and once seven months prior to shooting, was admissible); ***United States v. Zappola,*** 677 F.2d 264, 270 (2d Cir.1982), *cert. denied,* 459 U.S. 866, 103 S.Ct. 145, 74 L.Ed.2d 122 (1982) (testimony that defendant possessed handgun six months prior to crime was properly admitted as evidence of access to weapon); ***Commonwealth v. Clark,*** 280 Pa.Super. 1, 5–7, 421 A.2d 374, 376–377 (1980), *aff'd,* 501 Pa. 393, 461 A.2d 794 (1983) (testimony regarding defendant's possession of knife five weeks after commission of crime admissible even though victim was unable to identify knife).

See also: ***Commonwealth v. Coccioletti,*** 493 Pa. 103, 110, 425 A.2d 387, 390 (1981); ***Commonwealth v. Lark,*** 316 Pa.Super. 240, 254, 462 A.2d 1329, 1336 (1983), *aff'd,* 505 Pa. 126, 477 A.2d 857 (1984).

Commonwealth v. Akers, 572 A.2d 746, 754–55 (Pa. Super. 1990).

The Commonwealth asserts that "identity, opportunity and motive" were vital to the proof of the Commonwealth's case, as the shooter fled from the scene, there was no apparent history between the Defendant and Officer Shaw and, because the murder weapon was never recovered, proof establishing that the Defendant, who was not permitted to possess a firearm , had recently possessed the means to commit a murder was important.[15]

In the case *sub judice*, six .40 caliber discharged cartridges were found near the crime scene. (TT 698-700, 807, 812, 859). Three .40 caliber bullets were recovered during the autopsy of Officer Shaw. (TT 860-861). Michael Luffey testified that he saw the Defendant in possession of a firearm multiple times, including a few weeks before the killing. (TT 399-403). On one occasion, he observed the Defendant remove a .40 caliber handgun from his waistband and place it on the dining room table. (TT 399-400). On another occasion, the Defendant had a handgun in his waistband, but Luffey could not specifically describe it because it was not removed from the waistband. (TT 402-403). The evidence presented supports the inference that the Defendant fled to the same residence moments after Officer Shaw's murder and hid that firearm in the basement. Tavon Harper described the Defendant carrying the firearm in his waistband on the day of the murder. (TT 245-247).

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[15] Commonwealth's Response to Defendant's Brief, p. 10.

The Defendant posits that "simple possession of a firearm by an individual not permitted to possess one does not equate to motive to kill a police officer," but the jury heard that when the traffic stop was occurring, the Defendant, in possession of a firearm with a "long magazine" that he was not permitted to have in his possession, fled from the car when he was refused the opportunity to hide the plainly illegal firearm in the vehicle. The jury also heard that, as Officer Shaw narrowed the gap during the chase, the Defendant fired that weapon with sufficient deliberation that three of the six bullets struck their intended target. This bears heavily on the issue of the Defendant's perceived need to use any means to effectuate his escape and avoid police detection.

The Commonwealth correctly asserts that, because the firearm was never recovered, proof establishing that the Defendant, who was not permitted to possess a firearm, had recently possessed the means to commit a murder was clearly relevant.

This allegation is without merit and is denied.

2. Denial of Motion to Sever Uniform Firearm Act Charge

The Defendant also argues that the court's denial of his pretrial request to sever the Uniform Firearms Act violations (Counts 3 and 4) from the murder charges (Counts 1 and 2) denied his constitutional right to due process and a fair trial.

The pertinent Rule of Criminal Procedure provides:

Rule 583. Severance of Offenses or Defendants

> The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

Pa. R Crim.P. 583.

[A] motion for severance is addressed to the sound discretion of the trial court, and ... its decision will not be disturbed absent a manifest abuse of discretion."

Commonwealth v. Melendez-Rodriguez, 856 A.2d 1278, 1282 (Pa. Super. 2004).

> Clearly, with respect to the charge of violating § 6105 of the Crimes Code the Commonwealth must introduce evidence of a prior conviction as an element of its proof of the crime. It is axiomatic that evidence of prior crimes is not admissible for the sole purpose of demonstrating a criminal defendant's propensity to commit crimes. ***Commonwealth v. Boyle***, 733 A.2d 633, 636 (Pa.Super.1999). This rule is not without exception, however. Evidence may be admissible in certain circumstances where it is relevant for some other legitimate purpose and not utilized solely to blacken the defendant's character. *Id.* It is well-established that reference to prior criminal activity of the accused may be introduced where relevant to some purpose other than demonstrating defendant's general criminal propensity.

Id. at 1283.

Here, the defense complains that the Court erred in its refusal to sever the UFA violation from the murder charges. The Defendant postulates that with respect to the charge of violation of Section 6105 of the Crimes Code, the Commonwealth must introduce evidence of a prior conviction as an element of its proof of the crime, and that evidence of prior crimes is not admissible for the sole purpose of showing a criminal defendant's propensity to commit crimes.

This allegation belies the record. By stipulation, the jury was informed *only* that the Defendant was ineligible to own a firearm. The Commonwealth was not permitted, and in fact, did not attempt to adduce evidence of a prior crime committed by Holt.

Woven into the Commonwealth's case, as an important element, was the fact that Holt's ineligibility to possess a firearm provided the motive for his flight from the automobile when the police lights came on, and his subsequent shooting of Officer Shaw. It is not an instance where the gun charge was used by the Commonwealth merely to blacken the character of the Defendant, but rather, as noted, was an important and integral part of the evidence needed to establish the motivation for the killing, i.e., the preservation of Holt's liberty by killing the pursuing officer.

The Defendant would urge this Court to speculate that some or all of the jurors would somehow know the specific reason for Holt's ineligibility to possess a firearm, out of the multitude of reasons available. The record is void of any such evidence and the court will not engage in such speculation.

For the reasons set forth above, the Court finds no merit in this allegation and it is denied.

3. Whether the trial court erred in permitting testimony from Holly Clemons as to statements made by Lakita Cain?

In his next allegation of error, Defendant avers that this Court erred in permitting testimony from Holly Clemons as to statements made by Lakita Cain, as violative of the hearsay rule. The heart of Defendant's argument is that the statements made by Cain to Clemons were not within the co-conspirator exception to the hearsay rule because the Defendant was not a co-conspirator with the other two. The Defendant recognizes that the hearsay rule permits an exception for out-of-court statements of a co-conspirator to be admitted against another co-conspirator, but rests his position on the proposition that no

conspiracy was shown between the accused and Lakita Cain or Taylor Mitchell or Lisa Harrington, or even charged.[16]

The rule regarding the co-conspirator to the hearsay rule has been repeatedly examined:

> Hearsay statements made by a co-conspirator are allowed to be admitted against an accused if the statements are made during the conspiracy, in furtherance thereof, and where there is other evidence of the existence of a conspiracy. ***Commonwealth v. Dreibelbis,*** 493 Pa. 466, 426 A.2d 1111 (1981); ***Commonwealth v. Coccioletti,*** 493 Pa. 103, 425 A.2d 387 (1981); ***Commonwealth v. Plusquellic,*** 303 Pa.Super.1, 449 A.2d 47 (1982); ***Commonwealth v. Tumminello,*** 292 Pa.Super.381, 437 A.2d 435 (1981). This exception applies even where no party has been formally charged with conspiracy. ***Dreibelbis, supra; Commonwealth v. Weitkamp,*** 255 Pa.Super.305, 386 A.2d 1014 (1978). Nor need the co-conspirator, whose declaration is testified to, be on trial. ***Weitkamp, supra.***
>
> To lay a foundation for the co-conspirator exception to the hearsay rule, the Commonwealth must prove that: (1) a conspiracy existed between declarant and the person against whom the evidence is offered, and (2) that the statement sought to be admitted was made during the course of the conspiracy. ***Weitkamp, supra.*** However, there must be evidence other than the statement of the co-conspirator to prove that a conspiracy existed. ***Plusquellic, supra.***
>
> A conspiracy, for purposes of this exception, may be inferentially established by showing the relation, conduct or circumstances of the parties. ***Dreibelbis, supra; Plusquellic, supra.*** Such a conspiracy need only be proved by a fair preponderance of the evidence. ***Commonwealth v. Hirsch,*** 225 Pa.Super. 494, 311 A.2d 679 (1973). Also, when a conspiracy to commit a particular crime or crimes has been shown, each conspirator is responsible for the acts of his co-conspirators committed in furtherance of the conspiracy; the agreement is the nexus which renders a conspirator vicariously liable for the acts of his associates. ***Plusquellic, supra.***
>
> As stated in ***Commonwealth v. Tumminello,*** 292 Pa.Super. at 389, 437 A.2d at 439:"In ***Commonwealth v. Evans,*** 489 Pa. 85, 413 A.2d 1025 (1980) our Supreme

[16] Defendant's Brief in Support of Post-Sentence Motion, p. 9

Court reaffirmed its approval of the use of evidence of a co-conspirator's attempt to conceal evidence *after the commission of a crime,* finding that such acts "c[a]me within the scope of the conspiracy to commit the crime." ***Id.*** at 92, 413 A.2d at 1028. In so doing, the *Evans* court directed that the following test be followed:

> The duration of a conspiracy depends upon the facts of the particular case, that is, it depends upon the scope of the agreement entered into by its members. Generally, the conspiracy ends when its principal objective is accomplished because no agreement to retain secrecy after the achievement of the unlawful end can be shown or implied by mere "acts of covering up." Thus in ***Grunewald v. United States,*** supra, 353 U.S. [391] at 402, 77 S.Ct. [963] at 972, [1 L.Ed.2d 931 (1957),] the Supreme Court stated, "Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators." But the fact that the "central objective" of the conspiracy has been nominally attained does not preclude the continuance of the conspiracy. Where there is evidence that the conspirators originally agreed to take certain steps after the principal objective of the conspiracy was reached, or evidence from which such agreement may reasonably be inferred, the conspiracy may be found to continue. ***Atkins v. United States,*** 307 F.2d 937, 940 (9th Cir.1962); cf., ***United States v. Allegretti,*** 340 F.2d 254, 256 (7th Cir.1964), *cert. denied,* 381 U.S. 911, 85 S.Ct. 1531, 14 L.Ed.2d 433 (1965).... The crucial factor is the necessity for some showing that the later activities were part of the original plan.' " (Footnote omitted) (Citations omitted) *Id.* at 92–93, 413 A.2d at 1028–29.

Commonwealth v. Basile, 458 A.2d 587, 590–91 (Pa. Super. 1983).

In the instant matter, the Court heard testimony from Detective Dupilka in an *in camera* hearing as to the conspiracy. (TT 464-478).

As set forth in ***Basile,*** a conspiracy need not be charged in order for the hearsay declarations of one co-conspirator to be admitted; rather, the conspiracy must be shown, the statements must be made during the conspiracy and in furtherance thereof.

A conspiracy need not be, and often cannot be, established by direct testimony of the unlawful agreement. Circumstantial evidence has been held to be sufficient to carry the burden by a preponderance of the evidence of showing the conspiracy.

Here, one of the pieces of evidence that turned up missing was the weapon that brought about the death of Officer Shaw. The evidence showed repeated contact between the Defendant and the other residents of 1206 Victoria Avenue, which include Lakita Cain, Taylor Mitchell, Holly Clemons, Michael Luffey, and Antoinette Strong. The evidence further showed that while the Defendant remained underground, those residents repeatedly rebuffed police attempts to learn of his whereabouts in order to effectuate his arrest and to secure the weapon. Over a period of four days, during each of which the police appeared at that address, the residents concealed knowledge of the Defendant's whereabouts, his status as a resident at that address, and the fact that he had been there shortly after the shooting in a frantic state of mind, with a bleeding hand. Only when Michael Luffey began to fear that he might lose his children if he continued in this concerted course of conduct with the other residents and went to the police, did the fabrication and concealment begin to unravel.

Holly Clemons testified that from Lakita Cain, she learned that Lisa Harrington was present to get the Defendant's gun out of the house. (TT 503). Hiding the gun from the police was of the utmost importance to the Defendant, who had contact with the others in the house and who ultimately said he was "sorry for the things he put us through." (TT 422).

From all of this, the court felt that, by reasonable inference from all of the circumstances present, a conspiracy existed inclusive of the Defendant and involving the other members of the household and that the statements made were in furtherance of and during the conspiracy involving the Defendant and the various persons at 1206 Victoria Avenue, including Holly Clemens, Lisa Harrington and Lakita Cain, *inter alia*.

For these reasons, this allegation is without merit.

V. WHETHER THE COURT ERRED IN DENYING DEFENDANT'S PROPOSED VOIR DIRE QUESTION CONCERNING DEFENDANT'S FLIGHT?

The Defendant next asserts that the Court erred in denying the Defendant's proposed voir dire question:

> "You may hear that the Defendant did not turn himself in and was only arrested after a four day police search or manhunt for his whereabouts. Would that fact alone cause you problems . . . in being a fair and impartial juror in this case.

(TT at 17-18, Motions and Jury Selection, 10/28/19).

The single goal in permitting the questioning of prospective jurors is to provide the accused with a "competent, fair, impartial and unprejudiced jury." ***Commonwealth v. England***, 375 A.2d 1292, 1295 (Pa. 1977)(internal citations omitted). Voir dire examination is not intended to provide a defendant with a better basis upon which to utilize his peremptory challenges. ***Id.*** The scope of voir dire examination is a matter within the discretion of the trial court, and that court's rulings will not be reversed absent an abuse of discretion. ***Commonwealth v. Richardson***, 473 A.2d 1361, 1363 (Pa. 1984).

Further, jurors are presumed to follow the court's instructions. *Commonwealth v. La Cava*, 666 A.2d 221, 228 (Pa. 1995).

Although the Defendant's brief posits that the Defendant's alleged flight as evidence of Defendant's guilt "proved to be a significant factor . . . in the jury's . . . verdict. . . . ," such is unknowable. The instant case was rife with evidence upon which a jury could rest its verdict and what factors were more significant or less significant are always, and should be, unknowable. The evidence of flight was properly admitted and the jury was properly instructed as to its purpose. The scope of voir dire should be limited to questions designed to disclose a potential juror's lack of qualification or fixed opinion regarding guilt or innocence. This proposed voir dire question did not do so and this allegation of error is denied.

VI. WHETHER THE COURT ERRED IN GIVING PA. SUGGESTED JURY INSTRUCTION 15.2502F.1(7) REGARDING VICTIM IMPACT STATEMENTS?

The Defendant alleges that Pennsylvania suggested jury instruction 15.2502F.1(7) is unconstitutional as violative of due process and deprived the Defendant of a fair trial, by impacting the jury's weighing process of aggravating and mitigating factors.[17]

During the penalty phase, pursuant to a notice of intent to present victim impact testimony, the Commonwealth presented the testimony of the victim's mother and brother. (TT at 19-38, penalty phase, 11/13/19). The defense did not object to the testimony. At the conclusion of the sentencing hearing, the Court instructed the jury,

[17] Defendant's Brief in Support of Post-Sentence Motions, p. 14.

pursuant to 15.2502F.1(7) of Pa. SSJI (Crim) as to the use of victim impact testimony. The defense did not object to the instruction (TT at 100-101,105, penalty phase, 11/14/19).

Having not objected to the testimony or the instruction, the Defendant cannot be heard to complain for the first time in the post sentence motion. This issue, therefore, is waived.

Assuming arguendo that it had not been waived, the well-settled law in Pennsylvania confirms the constitutionality of such testimony and instruction. The United States Supreme Court and the Pennsylvania Supreme Court have held that victim impact testimony and the standard instruction thereon are constitutional. ***Payne v. Tennessee,*** 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991); ***Commonwealth v. Ballard,*** 80 A.3d 380, 404 (2013); ***Commonwealth v. Means,*** 773 A.2d 143 (Pa. 2001).

Accordingly, this allegation lacks merit.

VII. WHETHER THE COURT ERRED IN DIRECTING THE DEFENDANT'S MITIGATION REPORT BE FURNISHED TO THE COMMONWEALTH?

In Defendant's next allegation of error, he complains that a mitigation report compiled by a mitigation expert should not have been supplied to the Commonwealth at the direction of the court. In his post-sentence motion, he alleges that the mitigation report was not discoverable and should not have been released before the penalty phase.

Rule 573 of the Pennsylvania Rules of Criminal Procedure, governing disclosure by the Defendant, provides as follows:

> **(C) Disclosure by the Defendant.**
>
> (1) In all court cases, if the Commonwealth files a motion for pretrial discovery, upon a showing of materiality to the preparation of the Commonwealth's case and that the request is reasonable, the court may order the defendant, subject to the defendant's rights against compulsory self-incrimination, to allow the attorney for the Commonwealth to inspect and copy or photograph any of the following requested items:
>
> (a) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, that the defendant intends to introduce as evidence in chief, or were prepared by a witness whom the defendant intends to call at the trial, when results or reports relate to the testimony of that witness, provided the defendant has requested and received discovery under paragraph (B)(1)(e); and (b) the names and addresses of eyewitnesses whom the defendant intends to call in its case-in-chief, provided that the defendant has previously requested and received discovery under paragraph (B)(2)(a)(i).

Pa. R. Crim. P. 573.

[D]ecisions involving discovery in criminal cases lie within the discretion of the trial court. ***Commonwealth v. Smith***, 955 A.2d 391, 394 (Pa. Super. 2008)."We will not reverse a trial court's order absent an abuse of that discretion." *Id.*

As noted in the Commonwealth's brief, Rule 573 allows for the discovery of reports prepared by a witness whom the Defendant intends to call at trial when such reports relate to that witness's potential testimony.[18]

[18] Commonwealth's Response to Defendant's Brief at p. 34.

The Court notes that the Defendant in this matter never called the author of the mitigation report as a witness in either guilt phase or the penalty phase, and points to no instance in the record where the mitigation report was used for examination or cross-examination of any witness or in any other manner whatsoever, nor cite to any objection in any way attributable to the mitigation report. Absent such objection or reference, the matter is clearly moot and meritless and is denied.

VIII. WHETHER THE DEATH PENALTY IN PENNSYLVANIA IS UNCONSTITUTIONAL?

In his final allegation, the Defendant asserts the death penalty statute is unconstitutional, citing not to any particular error that made the death penalty in the instant matter unconstitutional but rather but to its constitutionality generally.

The Defendant filed a King's Bench Petition (application for extraordinary relief), raising the issue of constitutionality of the death penalty and it was denied by the Supreme Court on December 5, 2019 at 87 WM 2019, as was the Cox case (102 EM 2018) and the Marinelli case (103 EM 2018).

The United States Supreme Court has rejected challenges to the constitutionality of the death penalty. *See, e.g.,* ***Baze v. Rees,*** 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d. 420 (2008). Likewise, the Pennsylvania Supreme Court in ***Commonwealth v. Zettlemoyer,*** held, "it is undisputed that the framers of the United States Constitution did not consider the death penalty to be a per se violation of the prohibition against 'cruel punishments'." ***Id.*** 454 A.2d 937, 967 (Pa. 1982).[19]

[19] Abrogated on other grounds by ***Commonwealth v. Freeman***, 827 A.2d 385 (Pa. 2003).

As the Pennsylvania Supreme Court has rejected the Defendant's King's Bench Petition raising substantially the same issues and the Defendant raises no specific instances that the administration of the death penalty in his particular case is unconstitutional, this Court finds no merit to Defendant's constitutional challenge to the Pennsylvania death penalty statute and the same is denied.

The following Order shall enter:

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA – CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
VS.	)	No. 5539 C 2017
	)	
RAHMAEL SAL HOLT,	)	
	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 21 day of August, 2020, for the reasons set forth in the preceding Opinion, the Defendant's Post Sentence Motion is hereby **DENIED**.

The Defendant is notified that any appeal to the Supreme Court of Pennsylvania from this court's denial of his Post-Sentence Motion must be filed within thirty (30) days from the date of this Order of Court. If Defendant chooses to appeal the denial of the Post-Sentence Motion, he will continue to be represented by Timothy Dawson and James Robinson.

BY THE COURT:

Rita Donovan Hathaway

Rita Donovan Hathaway, President Judge

ATTEST:

Bryan L. Klein

Clerk of Courts

Cc: File
John W. Peck, Esq. – District Attorney
James Lazar, Esq. – Assistant District Attorney
Timothy Dawson, Esq. – Counsel for Defendant
James Robinson, Esq. – Counsel for Defendant
Rahmael Sal Holt, Defendant (QB-7565) – SCI Phoenix – 1200 Mokychic Drive, Collegeville, PA 19426
Pamela Neiderhiser, Esq.- Office of the Court Administrator