[J-030-98]
THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	No. 0120 Capital Appeal Docket
	:	
Appellee	:	
	:	
	:	Appeal from the Judgment of Sentence
v.	:	entered September 6, 1995 in the Court of
	:	Common Pleas of Lackawanna County
	:	at No. 92 CR 397.
RICHARD YOUNG,	:	
	:	
Appellant	:	ARGUED: February 4, 1998
	:	
	:	
	:	
	:	

OPINION

MADAME JUSTICE NEWMAN DECIDED: JANUARY 22, 1999

Richard Young (Appellant) appeals from the Judgment of the Court of Common Pleas of Lackawanna County (trial court) sentencing him to death on his conviction for first degree murder. Appellant raises a plethora of issues concerning both the guilt phase and the penalty phase of the trial. For the reasons discussed herein, we affirm Appellant's conviction, but reverse the death sentence and remand for a new sentencing hearing.

FACTUAL AND PROCEDURAL HISTORY

On March 21, 1979, F.B.I. Agent Daniel Glasgow (Agent Glasgow) interviewed Russell Loomis (Loomis) concerning a fraud scheme involving Appellant, William Slick

(Slick), George Cornell (Cornell), Ronald Hull (Hull), and others. Loomis gave Agent Glasgow a statement outlining what Glasgow described as a “break out” or “bust out” scheme, whereby Appellant and his co-conspirators would fraudulently obtain merchandise on credit, avoid paying for the goods by concocting a story about it being lost or destroyed, and then sell the merchandise to a fence, or to the public from a discount store. Loomis agreed to testify before a federal Grand Jury investigating Appellant’s bust out scheme.

Loomis disappeared several days before he was scheduled to testify before the Grand Jury. Theresa Slick, Loomis’ live-in girlfriend, testified that she last spoke with Loomis at about six o’clock on the evening of April 11, 1979, at Appellant's discount store, where Loomis worked. Loomis told her and others that he had to go with Appellant to retrieve a jeep that was stuck in mud in the woods and that he would be home late. He never returned.

On the morning of April 14, 1979, two fishermen found Loomis’ body in a remote area of Lackawanna County, wedged between some debris in a creek called Painter's Creek. Near the body they found a shovel and a come-a-long (a hand operated wrench), which were later identified as having come from Appellant’s discount store. A short distance away, there was an old foundation with a recently dug rectangular hole about the size of a grave. An autopsy revealed that Loomis had three bullet wounds: one entered his back and exited his chest area; one entered his forehead near the left

scalp line and lodged at the base of his skull in the rear; and the third entered his lower left lip area in an upward direction, exiting below his right eye.

Shortly after the murder, police interviewed Hull, and he denied any knowledge of the killing. Appellant was arrested in December of 1980 on charges related to the bust out scheme, but fled while free on bail. After Appellant fled, police interviewed Hull again, and he again denied any knowledge of the murder. The police also interviewed Slick and Cornell, both of whom gave statements implicating Appellant and Hull in Loomis' murder. Cornell also told police that he helped Appellant dispose of a jeep in New York City, and that he had supplied Appellant with a .357 caliber gun, the same caliber as Loomis' bullet wounds.

In 1981, police took the statement of Andrew Halupke (Halupke), another co-conspirator in the bust out scheme. At that time, Halupke told police that on April 8, 1979, three days before Loomis disappeared, he and Hull participated in the planning of Loomis' murder by searching for a place where they would be able to dispose of Loomis' body. According to Halupke, Appellant wanted them to dig a grave where Loomis would never be found.

In 1991, police again spoke to Hull, and this time he admitted to participating in Loomis' murder. At first, Hull denied being present at the scene of the murder, but later admitted to being there with Appellant, Cornell, and Paul Nemish. Hull later retracted

that statement and told police that Nemish was not present at the murder scene, but Slick was. Hull eventually agreed to testify against Appellant and his co-conspirators.

Before a Grand Jury investigating the Loomis murder, Hull testified that on April 11, 1979, he, Appellant, Slick, and Cornell lured Loomis into the woods by telling him that they needed help retrieving a jeep that was stuck in the mud. When they arrived at Painter's Creek, Loomis began to walk across a fallen log that was acting as a bridge over the creek, and Appellant shot him in the back. Loomis turned around and attempted to walk back toward Appellant, but Cornell grabbed the gun and shot Loomis a second time. Loomis fell, and Cornell shot him again. Hull, Appellant, and Slick tried to pull Loomis' body off the log and put it in the grave, but they were unable to extricate it from the debris in the creek, so they left the body where it was. Slick drove away in the jeep, and the others drove away in Loomis' car, a green Ford LTD.

Hull testified that the undercarriage of the car was damaged as they were leaving the Painter's Creek area, so they stopped to fix it on Route 502 in Springbrook Township, Lackawanna County. Harold Litts, who owned a gas storage tank near where the co-conspirators stopped, saw the jeep and the LTD and became suspicious. He drove past the stopped vehicles, and then turned around and drove past them in the opposite direction, seeing two individuals whom he later identified as Appellant and Slick.

After the LTD was fixed, Hull drove it to the parking lot of the Wyoming Valley Mall in Wilkes-Barre, Pennsylvania. Appellant's brother-in-law picked up Hull and took him to Appellant's parents' home, where they met Appellant and Cornell. They disassembled the murder weapon and threw the parts into the Susquehanna River, and Appellant told Hull and the others not to discuss the murder with anyone.

In March of 1992, the Grand Jury indicted Appellant, Slick, and Cornell for Loomis' murder. The three co-defendants were tried together, and, on September 6, 1995, a jury found Appellant guilty of first degree and third degree murder, 18 Pa.C.S. §§ 2502(a) and (c), respectively. At the penalty hearing, the jury found one aggravating circumstance, that Appellant had killed Loomis to prevent him from testifying before the federal Grand Jury investigating Appellant's bust out scheme, and they found no mitigating circumstances. Accordingly, the trial court sentenced Appellant to death.

DISCUSSION

Appellant raises a multitude of issues in this appeal, challenging aspects of both the guilt phase and penalty phase of his trial. We address the issues seriatim.

A. GUILT PHASE

1. SUFFICIENCY OF THE EVIDENCE

Appellant first argues that there was insufficient evidence to convict him of Loomis' murder because Hull, the only witness who implicated Appellant directly, gave conflicting testimony that was unreliable as a matter of law. Appellant argues that

because Hull gave the police numerous inconsistent accounts of his participation in Loomis' murder, made statements at trial that conflicted with earlier statements, and was easily led by the prosecutor, Hull's entire testimony, and the Commonwealth's entire case, should be disregarded.

Appellant's argument is flawed for several reasons. First, he fails to acknowledge that there was substantial evidence against him independent of Hull's testimony. At trial, Harold Litts identified Appellant as one of the men he saw on Route 502 on the night of the murder, and Andrew Halupke testified that he and Hull helped Appellant plan the murder by looking for a place to dispose of Loomis' body. Second, Hull's testimony was corroborated by that of Litts and Halupke, and by the physical evidence, e.g., the location and position of Loomis' body, the location of the grave, the presence of the shovel and come-a-long from Appellant's store, and the location of Loomis' car in the parking lot of the Wyoming Valley Mall. Finally, there was additional circumstantial evidence of Appellant's guilt, including his attempt to alter his fingerprints.[1] In short, the totality of the evidence against Appellant, both direct and circumstantial, was more than sufficient to sustain Appellant's conviction for first degree murder.

2. ALLEGEDLY INCONSISTENT VERDICTS

Appellant next argues that the trial court erred in molding the jury's verdicts of guilty on the charges of first degree murder and third degree murder into a conviction for

[1] See Guilt Phase Issue 11, infra.

first degree murder. He argues that the two verdicts are legally inconsistent, because the conviction for first degree murder requires a finding that Appellant had a specific intent to kill, while the conviction for third degree murder requires the opposite finding that Appellant did not have a specific intent to kill. This, however, is an incorrect statement of the law.

Contrary to Appellant's assertion, third degree murder is not a homicide that the Commonwealth must prove was committed with malice and without a specific intent to kill. Instead, it is a homicide that the Commonwealth must prove was committed with malice, but one with respect to which the Commonwealth need not prove, nor even address, the presence or absence of a specific intent to kill. Indeed, to convict a defendant for third degree murder, the jury need not consider whether the defendant had a specific intent to kill, nor make any finding with respect thereto. Thus, there is no inconsistency in the jury's convicting Appellant of both first and third degree murder.

3. ALLEGEDLY IMPROPER EX PARTE COMMUNICATIONS WITH JURORS

Appellant argues that two instances of ex parte communications between the trial court and certain jurors entitle him to a new trial. Pursuant to Commonwealth v. Elmore, 508 Pa. 81, 494 A.2d 1050, 1051-52 (1985), where there has been ex parte contact between the court and jury in a criminal case, we are constrained to reverse the defendant's conviction unless there is no reasonable possibility that the error might have contributed to the conviction. Thus, we analyze each of the two instances according to the Elmore standard.

a. Juror's attempt to be excused from service

After the jury had been empanelled, but prior to trial, a juror (Juror One) contacted the Court Administrator and requested to be excused from service. The Court Administrator advised the trial court of Juror One's request, and the court instructed the Administrator to inform Juror One that he would not be excused.

Subsequently, Appellant's standby counsel overheard Juror One discussing with another juror (Juror Two) how to evade jury duty. Standby counsel brought the incident to the attention of the trial court, and the court held a hearing to question standby counsel and the two jurors. At the hearing, which Appellant did not attend, the court questioned the jurors in detail about their conversation, and determined that Juror Two could not evaluate the merits of the case impartially. Accordingly, the court dismissed Juror Two. The court found that Juror One's reasons for seeking to be excused had nothing to do with the merits of the case and that he could be impartial. Thus, the court declined to dismiss him.

Although Appellant argues that, as a result of the trial court's ex parte contact with Juror One, "the conclusion that Appellant suffered prejudice is inescapable," there is absolutely no evidence to support that conclusion. Absent any indication that Juror One was biased against Appellant or his counsel, or that Juror One's communications with the trial court had some effect on his or other jurors' decision to convict Appellant, we have no basis on which to find a reasonable possibility of prejudice. Cf.

Commonwealth v. Winstead, 377 Pa. Super. 483, 547 A.2d 788 (1988), alloc. denied, 524 Pa. 620, 571 A.2d 382 (1989) (conviction affirmed where appellate court could not discern any prejudice from juror's ex parte contact with prosecutor). Accordingly, we will not reverse Appellant's conviction because of the ex parte contact of the trial court with Juror One.

b. Juror's dismissal during trial

On August 28, 1995, approximately two weeks after the start of trial, the court dismissed a juror (Juror Three) pursuant to an agreement with the parties to excuse Juror Three if the trial extended beyond August 25, 1995. Although Appellant denies the existence of such an agreement, the record reflects otherwise:

TRIAL COURT:	At the individual voir dire, at which time the attorneys and the litigants were present, we had indicated to [Juror Three] that we would excuse him as of August 25th in the event that the trial did not conclude at that time. He had stated that he had made arrangements to have a vacation with his family first beginning on August 21 and he postponed it a week but he could not postpone it any longer. And we did represent to him that he would be excused at that time. I'm sure counsel would recall that.
APPELLANT'S COUNSEL:	I recall it, but I object to excusing a juror at this stage of the trial. . . .

(N.T., 8/28.95, pp. 3-4). Appellant's trial counsel plainly acknowledged the existence of the agreement to dismiss Juror Three. Furthermore, there is no evidence that the court had any ex parte contact with Juror Three. Accordingly, no relief is due.

4. ADMISSION OF HEARSAY EVIDENCE

Appellant argues that the trial court erred in admitting various testimony and documents that constituted hearsay. We discuss each item as follows:

a. Loomis' statement to Agent Glasgow

At trial, Agent Glasgow read into the record his written report of Loomis' statement regarding the bust out scheme, in which Loomis implicated Appellant and others. Agent Glasgow's report, however, was not offered to prove that Appellant was involved in the bust out scheme, but to establish Appellant's motive for killing Loomis, i.e., to prevent him from cooperating with the FBI and testifying against Appellant before the federal Grand Jury. Accordingly, it was not excludable hearsay. See, e.g., Commonwealth v. Griffin, 511 Pa. 533, 515 A.2d 865 (1986).

b. Agent Glasgow's testimony regarding Lou Masgay

Agent Glasgow also testified that he received information from Lou Masgay, a fence, from which he could estimate that the value of the goods acquired in the bust out scheme was approximately one million dollars. Like Loomis' statement, this testimony was not offered to prove the truth of the matter asserted, but to establish motive.Accordingly, it was properly admitted.

c. Complaints made to law enforcement authorities

Agent Glasgow testified that he began investigating the bust out scheme, and ultimately came into contact with Loomis, after receiving complaints that Appellant and

others were involved in fraudulent activity. While this testimony may have gone beyond the limits of permissible explanation of police conduct, see, e.g., Commonwealth v. Palsa, 521 Pa. 113, 555 A.2d 808 (1989), it was merely cumulative of other evidence concerning the bust out scheme, and had no effect on the jury's verdict. Accordingly, any error in admitting the testimony was harmless. See Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978).

d. Slick's and Cornell's statements

Slick and Cornell, Appellant's co-defendants, both exercised their Fifth Amendment privilege not to testify at the joint trial. The trial court, however, admitted into evidence statements Slick and Cornell made to Agent Glasgow and State Police Trooper Nicholas Genova (Trooper Genova) in January, February, and March 1981. In these statements, Slick and Cornell recounted their involvement with Appellant and others in the bust out scheme and in the planning and cover-up of Loomis' murder. Appellant argues that the co-defendants' statements should have been excluded as hearsay, and as a violation of Appellant's right to confrontation as expressed in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968). These arguments fail.

Pennsylvania recognizes an exception to the hearsay rule for an unavailable declarant's statements against interest. See, e.g., Commonwealth v. Colon, 461 Pa. 577, 337 A.2d 554 (1975). Because they exercised their Fifth Amendment privilege against self-incrimination, Slick and Cornell were unavailable to testify. Their statements implicated themselves, as well as Appellant and each other, in the bust out

scheme and in Loomis' murder, and, therefore, were plainly against their respective penal interests. Therefore, the statements were admissible.

With respect to the confrontation issue, the United States Supreme Court in Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210 (1970), held that a statement that came within an exception to the hearsay rule would not violate the Confrontation Clause if it had sufficient "indicia of reliability." See also Commonwealth v. Coccioletti, 493 Pa. 103, 425 A.2d 387 (1981). Here, Slick's and Cornell's statements had ample indicia of reliability because they were corroborated by Hull, Halupke, and each other. Accordingly, Appellant's right to confrontation was not violated.

e. Loomis' statement to State Police Trooper Golden

At trial, Trooper Golden testified to various statements that Loomis had made to him about Appellant. Loomis told Trooper Golden that he was afraid of Appellant; that Appellant had told him that he was in the "Richard Young Mafia" for life, and so was his family; and that he was afraid that Appellant would harm his family if he cooperated with the police and testified against Appellant. Like Loomis' statements to Agent Glasgow, these statements were not offered for the truth of the matter asserted, but to establish Appellant's motive for killing Loomis. Accordingly, they were admissible.

f. Loomis' statements to Theresa Slick and others

Theresa Slick, Loomis' girlfriend, testified that Loomis told her that he was talking to the police about Appellant and he was "afraid something would happen" if Appellant

discovered what he was doing. Again, these statements went to motive, and, therefore, were admissible. Theresa Slick and others testified that, on the day before the murder, Loomis told them that he was going with Appellant to retrieve a jeep that was stuck in the mud. These statements were admissible as evidence of Loomis' intent.

g. Andrew Halupke's statement

At trial, the prosecutor called Halupke to question him about his involvement in the bust out scheme and in the planning of Loomis' murder. Halupke testified that he had no present recollection of those matters. The prosecutor attempted to refresh Halupke's recollection by showing him a written statement he made to the police on January 22, 1981, but Halupke testified that he still could not remember. The prosecutor then introduced into evidence, and the trial court admitted, the written statement as a past recollection recorded.

Four elements are required for a hearsay statement to be admitted as a past recollection recorded: (1) the witness must have had firsthand knowledge of the event; (2) the written statement must be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it; (3) the witness must lack a present recollection of the event; and (4) the witness must vouch for the accuracy of the written memorandum. See, e.g., Commonwealth v. Cargo, 498 Pa. 5, 444 A.2d 639 (1982). All four elements were met in this case: (1) Halupke took part in the events he described; (2) the statement, though made approximately two years after the events, describes events that are likely to be remembered (such as looking for a

place to bury Loomis' body), and indicates that Halupke had a clear memory of the events at the time; (3) Halupke had no present recollection of the events, even after seeing the statement; and (4) Halupke identified his signature on the statement, recalled making and signing it, and testified that he told the police the truth. Thus, the statement was admissible as a past recollection recorded.

5. HYPNOTICALLY REFRESHED TESTIMONY

Appellant argues that the trial court erred in admitting the testimony of Theresa Slick, who had undergone hypnosis on November 29, 1979. Pursuant to Commonwealth v. Smoyer, 505 Pa. 83, 476 A.2d 1304, 1308 (1984), where a party seeks to introduce the testimony of a witness who has previously been hypnotized, the following guidelines must be followed: (1) the party must advise the court of the existence of the hypnosis; (2) the party must show that the testimony to be presented was established and existed prior to the hypnosis; (3) the party must show that the hypnotist was trained in the process and was neutral; and (4) the court must instruct the jury that the witness had been hypnotized and that they should receive the testimony with caution.

Here, instead of following the Smoyer guidelines, the trial court admitted Theresa Slick's testimony without requiring the Commonwealth to prove that it was independent of hypnosis or that the hypnotist was neutral, and the court did not issue a cautionary instruction. This was clearly erroneous. However, because Theresa Slick's testimony was cumulative of the testimony of Hull, Agent Glasgow, Trooper Golden, and others,

we are convinced beyond a reasonable doubt that the error was harmless. See Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978). Accordingly, we decline to reverse Appellant's conviction on this basis.

6. HAROLD LITTS' IDENTIFICATION TESTIMONY

At trial, Harold Litts identified Appellant as one of the men he saw on Route 502 on the night of the murder. Appellant argues that this testimony should have been excluded because it was the product of an unduly suggestive photo array. This argument is without merit. Litts was shown an array of five photographs, two of which were of Appellant. One of the photographs of Appellant was a mug shot with a piece of tape over the police identification numbers. These circumstances in no way indicate that the photo identification procedure was unduly suggestive. See, e.g., Commonwealth v. Moore, 534 Pa. 527, 633 A.2d 1119 (1993) (photo array containing mug shot and one other photograph of defendant was not unduly suggestive); Commonwealth v. Patterson, 392 Pa. Super. 331, 572 A.2d 1258 (1990), alloc. denied, 527 Pa. 631, 592 A.2d 1299 (1991) (identification made after witness viewed seven or eight photographs in mug book was not unduly suggestive). Accordingly, no relief is due.

7. CROSS-EXAMINATION OF TROOPER GENOVA

Appellant argues that the trial court erroneously precluded him from cross-examining Trooper Genova regarding Genova's alleged bias against him and Genova's alleged demotion for tampering with evidence in another capital case. Appellant's

allegations are entirely lacking in factual support, and therefore warrant no further discussion.

8. PRECLUSION OF DEFENSE WITNESSES

Appellant argues that the trial court erred in precluding a number of defense witnesses from testifying. We discuss each witness as follows:

a. Luke Asande

Luke Asande, a New York City Sanitation Supervisor, would have testified that a jeep similar to the one driven by Slick was found abandoned in Harlem shortly after the murder. This evidence would have had no probative value, and therefore was properly excluded.

b. Paul Walker, Esquire

Paul Walker, Esquire, who represented Appellant at his preliminary hearing, would have testified that Hull made a drawing of the murder scene that conflicted with his trial testimony. However, Appellant did not seek to introduce the drawing. Accordingly, the trial court properly excluded Walker's testimony pursuant to the best evidence rule. See MCCORMICK ON EVIDENCE, §§ 229-33 (4th ed. 1992).

c. Frank Muraca, Esquire

Frank Muraca, Esquire, who had represented Appellant in previous criminal cases, would have testified that Hull had a reputation for untruthfulness. This testimony

was properly excluded because there was no offer of proof that Muraca knew Hull's reputation in the community.

d. Patrick Tigue

The Commonwealth called Patrick Tigue, who claimed to be an alibi witness for Appellant, during its case in chief, and Appellant questioned him extensively at that time.Hence, there was no need to allow Appellant to call him during Appellant's case.

e. Thomas Padden

Thomas Padden allegedly would have testified that it was "common knowledge" in the Lackawanna County Jail that the way to get a "deal" was to implicate Appellant. This testimony was properly excluded as lacking probative value.

f. Trooper Golden

Appellant alleges that Trooper Golden would have corroborated the defense theory that Loomis was killed as a result of his involvement in drug activity. In the Commonwealth's case in chief, however, Trooper Golden testified that Loomis was not involved in any drug activity, and Appellant had an opportunity to cross-examine him on this point. Accordingly, there was no error in precluding Appellant from calling Trooper Golden.

g. Warden Thomas Gilhooley

Thomas Gilhooley, Warden of the Lackawanna County Jail, would have testified to Appellant's reputation for nonviolence in the jail. This testimony was not relevant to Appellant's reputation in the community at the time of the murder, and was therefore properly excluded.

h. Appellant's Mother Marion Young

Appellant's mother allegedly would have testified to police harassment of Appellant. This testimony was properly excluded as irrelevant.

i. Sergeant Lisa Christie

Sgt. Christie, a police handwriting expert, would have testified regarding a letter written by a man named Garcia that exculpated Appellant. The letter was hearsay, and, therefore, Sgt. Christie's testimony was properly excluded.

j. Charles Curtin, M.D.

Dr. Curtin, who performed the original autopsy on Loomis, would have testified about Loomis' stomach contents. This testimony would have been cumulative, because Dr. Curtin testified about the stomach contents on direct examination during the Commonwealth's case in chief.

k. JoAnne Litts

JoAnne Litts, Harold Litts' wife, allegedly would have given testimony refuting her husband's identification of Appellant and Slick. Mrs. Litts, however, was not present on

the night Harold Litts saw the two men on Route 502, nor at his subsequent photo identification. Accordingly, her testimony was irrelevant.

l. State Police Trooper James

Trooper James would have testified that people living in the area of the murder did not hear anything unusual on the night of the murder. This testimony would have been irrelevant hearsay, and was therefore properly excluded.

m. Wilkes-Barre Police Officer Andrew Jurriziani

Officer Jurriziani would have testified that another officer did not follow proper police procedure in handling Loomis' car when it was discovered in the parking lot of the Wyoming Valley Mall. This testimony was properly excluded as irrelevant.

n. Wilkes-Barre Police Chief Donald Armstrong

Chief Armstrong would have testified that he informed the State Police that Theresa Slick's ex-husband had been making threats against Loomis. This testimony was properly excluded as inadmissible hearsay.

9. DEFENSE WITNESSES TESTIFYING IN SHACKLES

Appellant argues that the trial court erred in allowing defense witnesses to testify in handcuffs and leg irons without any showing that such restraints were necessary. These witnesses, however, had a history of assaultive behavior, and the trial court properly determined that shackling was appropriate. Accordingly, no relief is due. See,

e.g., Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949, 955 (1992) ("Proper security measures are within the discretion of the trial court.")

10. COMMONWEALTH'S CALLING POTENTIAL DEFENSE WITNESSES

Appellant argues that the trial court erred in allowing the Commonwealth to call potential defense witnesses John Hope and Patrick Tigue during the Commonwealth's case in chief and to question them as on cross-examination, e.g., by asking leading questions. Appellant contends that Hope and Tigue had no relevance to the Commonwealth's case in chief, and that the Commonwealth called them solely to undermine Appellant's alibi defense before he had an opportunity to present it. This is inaccurate.

The Commonwealth called Hope and Tigue to prove that Appellant had spent time in jail with them and had persuaded them to fabricate an alibi for him. Evidence that a defendant has suborned false alibi testimony is admissible as substantive evidence of consciousness of guilt. See, e.g., Commonwealth v. Carbone, 524 Pa. 551, 574 A.2d 584, 589 (1990) ("The fabrication of false and contradictory statements by an accused are evidence from which a jury may infer that they were made with an intent to mislead the police or other authorities, or to establish an alibi or innocence, and hence are indicatory of guilt.") Thus, there was no error in allowing the Commonwealth to call Hope and Tigue and question them as on cross-examination.

11. TESTIMONY OF STATE POLICE TROOPER FRANCIS ZANIN

Trooper Zanin testified that Appellant had attempted to alter his fingerprints by scarring his fingers, and that the only other case in which he had seen something similar was a murder case. Appellant argues that Trooper Zanin's testimony amounted to an expert opinion that only murderers attempt to alter their fingerprints. This argument is ridiculous and warrants no further comment.

12. ALLEGED PROSECUTORIAL MISCONDUCT

Appellant alleges that the prosecutor committed numerous acts of misconduct throughout the trial, as follows:

a. Cross-examination of Appellant

Appellant argues that the prosecutor improperly cross-examined him regarding statements made by former Police Chief John Barry that implicated Appellant in a conspiracy to obstruct investigations into his bust out scheme. This line of questioning went to Appellant's motive for killing Loomis, and was a fair response to Appellant's statements on direct examination challenging the Commonwealth to prove that he was involved in illegal activity. Accordingly, the prosecutor committed no misconduct in cross-examining Appellant.

b. Cross-examination of Father William Piccard

Father Piccard, a Catholic priest who worked with inmates at the Lackawanna County jail, testified on direct examination that Appellant had a reputation for nonviolence. On cross-examination, the prosecutor asked Father Piccard about his

bias against the death penalty, and, in particular, his testimony in support of a defendant in another capital murder case. Because a witness' bias or prejudice is relevant and admissible, there was no impropriety in the prosecutor's cross-examination of Father Piccard. See, e.g., Commonwealth v. Birch, 532 Pa. 563, 616 A.2d 977 (1992).

c. Reference to "The Richard Young Mafia"

The reference to the "Richard Young Mafia" was made by Trooper Golden, not by the prosecutor. See Guilt Phase Issue 4(e), supra. Accordingly, it could not possibly constitute an act of prosecutorial misconduct.

d. Prosecutor's closing argument

Although Appellant argues that the prosecutor improperly offered his personal opinion as to the credibility of the Commonwealth's witnesses, he does not present any examples of such conduct. Accordingly, no relief is due.

e. Representation of Hull's plea bargain

Hull testified that, in exchange for his testimony against Appellant, the Commonwealth agreed to allow him to plead guilty to conspiracy to commit murder and face no other charges. Because Hull has not yet entered his guilty plea, Appellant accuses the prosecutor of perpetrating a "sham." This argument is completely unfounded and warrants no further discussion.

13. TRIAL COURT'S JURY INSTRUCTIONS

Appellant argues that the trial court's jury instructions during the guilt phase of the trial were erroneous in a number of respects, as follows:

a. Failure to give cautionary instruction on other crimes evidence

Relying on Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989), Appellant contends that the trial court erred in failing to give a limiting instruction regarding the evidence of Appellant's other crimes admitted at trial. This argument is unpersuasive.

In Billa, this Court held that a cautionary instruction was necessary because "the evidence of prior criminal activity was so similar to that for which [the defendant] was being tried that we could not conclude 'with any reasonable certainty that the jury would have returned the same verdict of murder of the first degree had it been properly instructed.'" Commonwealth v. Sam, 535 Pa. 350, 635 A.2d 603, 608 (1993) (quoting Billa, 555 A.2d at 842-43). Here, however, the prior crimes evidence concerning Appellant's bust out scheme was not so similar to the evidence pertaining to Loomis' murder that the jury's verdict could be considered unreliable. Thus, as in Sam, "we are certain that the jury would have returned the same verdict," regardless of the presence or absence of a limiting instruction as to prior crimes evidence. Sam, 635 A.2d at 608.

b. Failure to give Kloiber instruction

Appellant argues that the trial court should have given a Kloiber instruction with respect to Harold Litts' identification testimony. Pursuant to Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820 (1954), where a witness was not in a position to observe the

assailant clearly, or has previously failed to identify the defendant, the court must instruct the jury to receive the witness' identification testimony with caution. Harold Litts, however, had an unobstructed view of Appellant, and was able to identify him from a photo array and again at trial. Accordingly, there was no need for a Kloiber instruction.

c. Instructing the jury that the date of the murder was not relevant

In general, the Commonwealth need not prove that the crime occurred on the date alleged in the indictment, except where the date is an essential issue in the case, e.g., where the defendant presents an alibi defense. See, e.g., Commonwealth v. Boyer, 216 Pa. Super. 286, 264 A.2d 173 (Pa. Super. 1970). Here, Appellant did assert an alibi defense, but the Commonwealth completely eviscerated the testimony of Appellant's two alibi witnesses, John Hope and Patrick Tigue. Hope recanted his alibi testimony, and the Commonwealth proved that Tigue was in jail at the time he claimed to be with Appellant. Accordingly, the trial court did not err in instructing the jury that they could find Appellant guilty even if they found that the murder took place on a date other than that alleged in the indictment.

d. Failure to give cautionary instruction regarding accomplice testimony

Where an accomplice implicates a defendant, the court should instruct the jury that the accomplice is a "corrupt and polluted source" whose testimony must be received with caution. See, e.g., Commonwealth v. Chmiel, 536 Pa. 244, 639 A.2d 9 (1994). Here, the trial court gave a "corrupt and polluted source" instruction with

respect to Hull's testimony, but neglected to do so with respect to Slick's and Cornell's statements to police, which were admitted into evidence. See Guilt Phase Issue 4(d), supra. Although this was an error, in light of the corroboration of the statements by numerous other witnesses, we cannot conclude that Appellant was harmed by the oversight of the trial court. Accordingly, because the error is harmless, no relief is due.

e. Allegedly erroneous instruction regarding the elements of first degree murder

Appellant alleges that the trial court failed to instruct the jury that, to convict Appellant of first degree murder, they must find beyond a reasonable doubt that Appellant had a specific intent to kill. This allegation is unsupported by the record, and therefore requires no further discussion.

f. Instructing the jury that the credibility of the police was not at issue

The trial court instructed the jury that the police officers who testified against Appellant, whose credibility Appellant attacked, were "not on trial" and "have not been charged with any criminal offense." Although Appellant characterizes these instructions as the equivalent of telling the jury that "the credibility of the police officers was not an issue in this case," we find no merit in this argument, and, therefore, grant no relief.

14. TRIAL JUDGE'S FAILURE TO RECUSE HIMSELF

Appellant alleges that the trial judge exhibited bias and hostility against Appellant in his remarks and evidentiary rulings, and therefore should have recused himself. This argument is patently meritless and requires no further comment.

15. PUBLICITY BEFORE AND DURING TRIAL

Appellant argues that extensive publicity about his case both before and during trial prejudiced his rights to a fair trial and an impartial jury. In Commonwealth v. Casper, 481 Pa. 143, 392 A.2d 287 (1978), we held that:

> Normally, one who claims that he has been denied a fair trial because of prejudicial pre-trial publicity must show actual prejudice in the empanelling of the jury. But this rule is subject to an important exception. In certain cases there "can be pretrial publicity so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity and actual jury prejudice."

Casper, 392 A.2d at 291 (citations omitted). Pursuant to Casper, "a presumption of prejudice . . . requires the presence of exceptional circumstances," e.g., whether the publicity consisted of sensational, inflammatory, and slanted articles demanding conviction; whether it revealed the existence of the defendant's prior criminal record; whether it referred to the defendant's confessions or admissions of the crime; and whether it is the product of police or prosecutorial reports. Id., at 292 (citations omitted). "Should any of the above elements be found, the next step of the inquiry is to determine whether such publicity has been so extensive, so sustained and so pervasive that the community must be deemed to have been saturated with it." Id. "The critical factor in the finding of presumptive prejudice . . . is the recent and pervasive presence of 'inherently prejudicial' publicity, the likely effect of which is to render a fair trial impossible." Id., at 293 (citations omitted).

Here, Appellant does not attempt to prove actual prejudice, but argues that prejudice should be presumed pursuant to Casper. We disagree. Although there were numerous newspaper and television reports about the case before and during trial, the publicity cannot be considered "inherently prejudicial." The majority of the news reports were not sensational or inflammatory, none referred to any confessions or admissions, and, despite Appellant's bald assertions, there is no evidence regarding whether the media coverage was based on police or prosecutorial sources. Although a large number of venirepersons indicated that they had heard or read about the case, the trial court took appropriate measures to limit the possibility of juror prejudice, e.g., questioning potential jurors to determine whether they were exposed to media coverage of the case and whether such exposure would influence their ability to remain impartial; and repeatedly instructing jurors to avoid media coverage of the case and to refrain from talking about the case with others. Considering the totality of the circumstances, we cannot conclude that the publicity surrounding this case was so inherently prejudicial as to render a fair trial impossible. Accordingly, we grant no relief.

Having found no reversible errors in the guilt phase of the trial, we turn to Appellant's arguments regarding the penalty phase.

B. PENALTY PHASE

1. TRIAL COURT'S JURY INSTRUCTIONS

As with the guilt phase, see Guilt Phase Issue 13, supra, Appellant argues that the trial court's jury instructions during the penalty phase of the trial were erroneous in a number of respects, as follows:

a. Failure to instruct the jury regarding ineligibility for parole

Relying on Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187 (1994), and other federal cases, Appellant argues that the trial court erred in refusing to instruct the jury that Appellant would be statutorily ineligible for parole if sentenced to life in prison. This argument has no merit. Simmons applies only where the defendant's future dangerousness is at issue. See Commonwealth v. Smith, 544 Pa. 219, 675 A.2d 1221 (1997). Because Appellant's future dangerousness was not at issue here, a life without parole instruction was unnecessary. Therefore, in denying the instruction, the trial court properly followed Pennsylvania precedent, which holds that capital juries should be precluded from considering the defendant's eligibility for parole. See, e.g., Smith, Commonwealth v. Christy, 540 Pa. 192, 656 A.2d 877 (1995); Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990).

b. Allegedly erroneous instructions regarding aggravating circumstance (d)(5)

In the penalty phase, the Commonwealth sought to prove one aggravating circumstance: that Loomis was "a prosecution witness to a . . . felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in [a] grand jury or criminal proceeding involving such offense[]." 42 Pa.C.S. § 9711(d)(5). Appellant argues that the trial court erred in failing to instruct the jury with

respect to the name or definition of the predicate felony in this case. This argument is meritless. During the penalty phase, the trial court, on request of the prosecutor, took judicial notice of the fact that violations of the Racketeering Influenced Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 – the crimes that the federal Grand Jury was investigating and about which Loomis was planning to testify – were classified as felonies. There was no need to instruct the jury with respect to this element of aggravating circumstance (d)(5). Cf. Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1992), cert. denied, 461 U.S. 970, 103 S.Ct. 2444 (1983) (predicate felony for purposes of aggravating circumstance (d)(5) was never specifically named or defined).

c. Allegedly erroneous instructions regarding aggravating and mitigating circumstances

In describing aggravating and mitigating circumstances, the trial court instructed the jury that:

> Aggravating circumstances are things about the killing and the killer, Richard Young, which makes a first degree murder case more terrible and deserving of the death penalty, while mitigating circumstances are those things which make the case less terrible and less deserving of death.

Although Appellant claims that this instruction was erroneous, we approved a substantially identical instruction in Commonwealth v. Saranchak, 544 Pa. 158, 675 A.2d 268 (1996) ("The Sentencing Code of Pennsylvania defines aggravating and mitigating circumstances. They are things that make a first degree murder case more or less terrible."). Accordingly, Appellant's claim is meritless.

2. ADMISSION OF VICTIM IMPACT TESTIMONY

During Appellant's sentencing hearing, which was held on September 6, 1995, the Commonwealth introduced the testimony of Loomis' mother Betty Jane Loomis, who testified regarding, inter alia, the impact of Loomis' death on various members of her family:

> Prosecutor: Would you tell us what the impact was of the death of your son on your family?
>
> Mrs. Loomis: Well at the time that my son was murdered I had just been diagnosed with cancer and given a chance of one in thirty-five thousand of living. So my family not only had to contend with my son's death, they had to contend with taking me for treatments and everything in between. I had the twelve- year-old. It affected him because his brother and him were close.
>
> . . .
>
> Prosecutor: How did it affect (the victim's brother) Mark?
>
> Mrs. Loomis: Mark didn't care about the law because he said the law let them get away with murdering my brother, so he didn't care about the law anymore. He just didn't care about anything. He needed psychiatric help, I think, but he wouldn't go for it. But he rejected everybody because he said they got away with murder and nobody is going to do anything about it.
>
> . . .
>
> Prosecutor: How has the death of Russell affected (the victim's father) Mr. Loomis?
>
> Mrs. Loomis: My husband had open heart surgery. He had four bypasses and a third of his heart cut away. And you don't live, you wait from day to day to see when they are going to get them, when they are going to be punished for what they did. So that's the way we have lived. At one time we thought the state troopers had given up, that they weren't doing anything, that we were never going to get anything accomplished, but all the time apparently they were working. Thank heavens.

N.T., 9/6/95, at 30-34.

At the time of Appellant's sentencing hearing, 42 Pa.C.S. § 9711(a)(2) provided that:

> In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

The legislature amended 42 Pa.C.S. § 9711(a)(2) on October 11, 1995, effective sixty days after that, to provide that, "evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible." In Commonwealth v. Fisher, 545 Pa. 233, 681 A.2d 130 (1996) and Commonwealth v. McNeil, 545 Pa. 42, 679 A.2d 1253 (1996), however, this Court held that, in sentencing hearings held prior to the effective date of the 1995 amendment, victim impact testimony was per se inadmissible. Thus, pursuant to Fisher and McNeil, we are compelled to hold that the trial court here erred in admitting Betty Jane Loomis' victim impact testimony at Appellant's sentencing hearing. Moreover, as in Fisher and McNeil, "we are unable to determine how the sentencing jury considered the testimony in weighing the aggravating and mitigating circumstances." McNeil, 679 A.2d at 1259. Accordingly, we have no choice but to reverse Appellant's death sentence and remand to the trial court for a new sentencing hearing.

CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction for first degree murder, but reverse his death sentence and remand the case to the trial court with instructions to conduct a new sentencing hearing in which victim impact testimony will not be admitted.

Mr. Chief Justice Flaherty files a concurring opinion in which Mr. Justice Zappala joins.

Mr. Justice Cappy files a concurring opinion.

Mr. Justice Castille files a dissenting opinion.

Mr. Justice Nigro concurs in the result.