NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. PETER ROJAS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2684 EDA 2011

Appeal from the Judgment of Sentence May 13, 2011
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0002191-2009

BEFORE: STEVENS, P.J., BOWES, and PLATT,[*] [**] JJ.

MEMORANDUM BY BOWES, J.: Filed: February 13, 2013

Peter Rojas appeals from the judgment of sentence of life imprisonment imposed after he was convicted of second degree murder and robbery.[1] We affirm.

The trial court detailed the facts as follows.

> On May 28, 2009, the body of Mark A. Holdren was discovered against a rear door of a home located in the 300 block of North Jute Street, Allentown, Lehigh County, Pennsylvania by an off-duty nurse's aid, Maritza Mercado. Ms. Mercado attempted to render aid but was unsuccessful. At

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[*] Retired Senior Judge assigned to the Superior Court.

[**] Judge Platt did not participate in the consideration or decision of this case.

[1] This case began as a death penalty case, but the jury did not find Appellant guilty of first-degree murder.

that time, Ms. Mercado could not find Mr. Holdren's pulse and observed a large pool of blood surrounding him. 9-1-1 was called and Officer Karl Koslowski of the Allentown Police Department responded to the scene.

Officer Koslowski examined the victim as well but could not find a pulse. He observed that Mr. Holdren was pale and stiff. The officer noted a trail of blood from the victim to the street and immediately called for a supervisor, detectives, and additional marked units to preserve the crime scene. One of the responding officers was Detective Richard Heffelfinger, a supervisor in the Crime Scene Unit. Utilizing his training and knowledge of evidence collection at the scene, Detective Hefflefinger and his team collected various items of evidence, including blood samples, and made observations regarding a blood trail on Jute and Gordon Streets. The crime scene was videotaped.

An autopsy was performed on the victim and it was determined that the victim died from multiple sharp-force stab and slash wounds, two of which were fatal. The wounds inflicted were consistent with those made by a knife or sharp blade. One stab wound punctured the artery in the right medial thigh and was associated with a profuse loss of blood and tissue destruction. Another wound was observed in the victim's chest, which struck the left lower lobe of his lung, and had been inflicted with such force that one of the victim's rib bones was partially cut through. Defensive wounds were observed as well.

A folding pocket knife was found in the victim's shorts pocket.

In addition to the evidence collection units, detective from the Allentown Police Department responded to the scene and attempted to recover additional evidence.

In the morning hours of May 28, 2009, the Defendant contacted a friend of the family, Michael Martin, and asked to speak with him. Mr. Martin met with the Defendant and the Defendant told him that on the previous night, someone had followed him and had "jumped" him. The Defendant claimed that he pulled out a box-cutter and swung at his assailant, but was unsure if he actually connected with him. Mr. Martin lent the Defendant a small amount of money for cigarettes and the

> two returned to Mr. Martin's home in Easton, Pennsylvania. There, the Defendant contacted another family friend and that family friend instructed the Defendant to contact the police and report the attempted robbery.
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> The Defendant went to Allentown police headquarters to report the attempted robbery. After police realized that the incident may be connected to Mr. Holdren's homicide, the Defendant was interviewed by Detectives Louis Tallarico and Louis Collins. The interview was tape recorded. In the interview, the Defendant reported that he was hit on the head from behind and pulled out a razor knife in defense. He told the police he swung a couple of times, but was not sure if his attacker was injured. Once the attacker fell to the ground, the Defendant left the area. The Defendant showed the detectives some minor injuries on his head that he claimed occurred during the attack. Throughout the interview, the Defendant changed his version of the events.
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> Eventually, near the conclusion of the interview, the Defendant told the detectives that he, in fact, did know the victim from the streets. He further explained that he was taking the victim to a location to buy narcotics, with the expectation that the victim would either give the Defendant money or a portion of the drugs in return. He told the detectives that he never saw the victim with a weapon. He further revealed that he went through the victim's pockets when he was on the ground and took an ACCESS card and a pill bottle. After leaving the area, the Defendant discarded the ACCESS card and the pill bottle. The ACCESS card was eventually discovered in a public trash can nearby, in front of Dominguez Grocery.
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> The Defendant went home and put his bloody clothing in the washing machine, where it was eventually recovered by the police. The Defendant discarded the slashing instrument, a knife with a razor on one end and a longer blade on the other, wrapped in the t-shirt he was wearing, in a public trash can. This too was eventually found by the police.

Trial Court Opinion, 9/15/11, at 3-5.

Police charged Appellant with criminal homicide and robbery the following day, May 29, 2009. Following the unsuccessful litigation of an

omnibus pre-trial motion, Appellant proceeded to a jury trial. The jury found Appellant guilty of second-degree murder and the robbery charge. The trial court sentenced Appellant to life imprisonment for felony murder and also imposed a concurrent ten-to-twenty-year period of incarceration for the robbery count. Appellant timely filed a post-sentence motion, and a supplemental motion challenging the robbery sentence. The trial court vacated the merged robbery sentence, but denied the remaining claims in the original post-sentence motion. This appeal ensued.

Appellant raises five issues for our consideration.

> A. Whether the verdict of the jury was not supported by sufficient evidence so as to prove the Petitioner guilty of Criminal Homicide - Murder in the Second Degree and Robbery, beyond a reasonable doubt.
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> B. Whether the jury verdict finding him Guilty of Criminal Homicide – Murder in the Second Degree and Robbery was against the weight of the evidence and, as such, should be overturned?
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> C. Whether The Court Erred in Failing to Grant Defendant's Motion In Limine Pertaining to Mark Holder's [sic] Welfare Account Access Card And The Rescue Mission Questionnaire?
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> D. Whether the Court erred in allowing the Commonwealth to present bloody video of Mark Holder's [sic] body where it was discovered?
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> E. Whether the Commonwealth committed various discovery violations which constituted a violation of the Defendant's constitutional rights under both the United States and Pennsylvania Constitutions?

Appellant's brief at 3.

Appellant's initial contention is that there was insufficient evidence to find him guilty of both second-degree murder and robbery. Our standard and scope of review in analyzing a sufficiency claim is as follows.

> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. ***Commonwealth v. Mobley***, 14 A.3d 887, 889–890 (Pa.Super. 2011). Additionally, "in applying the above test, the entire record must be evaluated and all evidence actually received must be considered." ***Commonwealth v. Coleman***, 19 A.3d 1111, 1117 (Pa.Super. 2011).

Commonwealth v. Brown, 52 A.3d 320, 323 (Pa.Super. 2012) (quoting ***Commonwealth v. Stokes***, 38 A.3d 846, 853-854 (Pa.Super. 2011)).

Appellant argues that "there was insufficient evidence produced at trial to establish that the Defendant was engaged in a felony when the killing took place." Appellant's brief at 10. According to Appellant, the Commonwealth did not establish that the victim was killed during a robbery. He asserts that the Commonwealth only established that a theft occurred after the victim died. In addition, without any development, Appellant baldly asserts that he acted in self-defense. Since Appellant does not develop his self-defense position in any manner, that aspect of his issue is waived. ***Commonwealth v. McClaurin***, 45 A.3d 1131, 1139 (Pa.Super. 2012).

The Commonwealth counters that Appellant ignores the applicable standard of review and that its evidence established that Appellant repeatedly stabbed the victim and took an ACCESS card and an empty methadone bottle while taking the victim to purchase drugs. In addition, it highlights that Appellant discarded the card and bottle, promptly showered, and wrapped the murder weapon in a bloody shirt and threw them in the trash. Appellant also attempted to remove the blood from his remaining clothes by washing them and admitted to taking items from the victim's pocket.

We find Appellant's sparse sufficiency argument entirely unavailing. To prove second-degree murder, the Commonwealth must show that the killing was "committed while [the] defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S. § 2502(b). Our crimes code defines "perpetration of a felony" as: "The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." 18 Pa.C.S. § 2502(d). Further, to establish the crime of robbery charged herein,[2] the Commonwealth was required to demonstrate

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[2] We note that the trial court in its opinion incorrectly discussed robbery under section 18 Pa.C.S. 3701(a)(1)(ii). The criminal information, however, referenced only 18 Pa.C.S. 3701(a)(1)(i).

that during the course of committing a theft, the defendant inflicted serious bodily injury upon the victim. ***See*** 18 Pa.C.S. § 3701(a)(1)(i).

Viewed in a light most favorable to the Commonwealth, the evidence presented meets each element of the charged crimes. Appellant admitted to taking the victim to purchase cocaine. The victim died after being stabbed multiple times. Appellant acknowledged taking several items from the victim and, in a taped interview with police, stated that he robbed the victim after the victim attempted to rob him. Further, Appellant's later actions in disposing of evidence demonstrated a guilty mind.

The second issue Appellant levels on appeal is a weight of the evidence claim. We examine a weight of the evidence challenge under the following precepts.

> [W]e may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003) (citations omitted). Hence, a trial court's denial of a weight claim "is the least assailable of its rulings." ***Commonwealth v. Diggs***, 949 A.2d 873, 880 (Pa. 2008). Conflicts in the evidence and contradictions in the testimony of any witnesses are for the fact finder to resolve. ***Commonwealth v. Tharp***, 830 A.2d 519, 528 (Pa. 2003). As our Supreme Court has further explained,

> A new trial should not be granted because of a mere conflict in the testimony or because the judge on the

> same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "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."
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> ***Commonwealth v. Widmer***, 744 A.2d 745, 752 (Pa.2000) (citations omitted). In addition, a weight of the evidence claim must be preserved either in a post-sentence motion, by a written motion before sentencing, or orally prior to sentencing. Pa.R.Crim.P. 607; ***Commonwealth v. Priest***, 18 A.3d 1235, 1239 (Pa.Super. 2011). Failure to properly preserve the claim will result in waiver, even if the trial court addresses the issue in its opinion. ***Commonwealth v. Sherwood***, 982 A.2d 48[3], 494 (Pa. 2009).

Commonwealth v. Lofton, 2012 PA Super 267, *2.

Appellant argues that he was the sole eyewitness and that the physical evidence is consistent with his assertion of self-defense. The Commonwealth responds that the jury plainly rejected Appellant's self-defense claims and that the verdict "hardly shocks the conscience." Commonwealth's brief at 17. We agree that the trial court did not abuse its discretion in concluding that its conscience was not shocked. Here, there simply are no facts that clearly outweigh others that would render the verdict suspect. The jury certainly was free to reconcile any conflicts between Appellant's own claims in his taped statement to police and the other evidence introduced. That the jury did not credit Appellant's account

of self-defense provided in his taped statement, in light of the additional evidence arrayed in this case, does not render the verdict unreliable.[3]

The next claim Appellant forwards is that the court erred in denying his motion *in limine* to introduce the victim's Department of Public Welfare records and a rescue mission questionnaire based on irrelevance. Our appellate review is settled.

> When ruling on a trial court's decision to grant or deny a motion *in limine,* we apply an evidentiary abuse of discretion standard of review. The admission of evidence is committed to the sound discretion of the trial court, and a trial court's ruling regarding the admission of evidence will not be disturbed on appeal unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous.

Commonwealth v. Moser, 999 A.2d 602, 605 (Pa.Super. 2010) (citation and footnote omitted). Appellant asserts that this evidence would have shown that the victim needed money and was without funds to support himself, and no one was available to help him. He acknowledges that the questionnaire also indicated that the victim admitted to being a heroin addict, but had not used for over a year. According to Appellant, these documents supported his claim that the victim attempted to rob him. In advancing his position, Appellant presents a single citation to ***Commonwealth v. Simmons***, 662 A.2d 621 (Pa. 1991), and argues that the evidence was admissible as a prior bad acts evidence.

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[3] Appellant did not testify at trial.

The Commonwealth replies that evidence that a victim is poor is irrelevant and therefore inadmissible. It incorrectly asserts that our Supreme Court ruled in ***Commonwealth v. Haight***, 525 A.2d 1199 (Pa. 1987), that a victim's financial status is irrelevant. In actuality, ***Haight*** held that the defendant's need for income was inadmissible in a burglary prosecution. Nonetheless, despite the Commonwealth's mistake, we agree that Appellant is not entitled to relief.

First, we note that Department of Public Welfare records are in no manner analogous to bad acts evidence, as they do not involve illegal or morally suspect behavior. Simply put, evidence that the victim was poor does not equate to a bad act. Moreover, evidence that the victim was struggling financially, without more, does not make it more likely that the victim would have physically attacked Appellant. Finally, the jury was apprised that the victim was not financially well off since it knew that he had an ACCESS card. For these reasons, Appellant has not proven that he is entitled to relief.

Appellant's fourth issue pertains to the trial court's admission of a video depicting the bloody crime scene. He submits that the video was unduly inflammatory and prejudicial.[4] The Commonwealth counters that the

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[4] Appellant does not object to the admission of Commonwealth photographs depicting the crime scene or photographs of the victim's body and wounds
(Footnote Continued Next Page)

issue is waived because Appellant did not object to the video before or at trial. In the alternative, it maintains that Appellant has waived the issue by failing to adequately develop his argument that the video was inflammatory. We apply the standard for examining photographs to the video in question.

> The law regarding the admission of post-mortem photographs of a murder victim is well-settled:
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> > Photographs of a murder victim are not *per se* inadmissible.... The admission of such photographs is a matter within the discretion of the trial judge. The test for determining the admissibility of such evidence requires that the court employ a two-step analysis. First[,] a court must determine whether the photograph is inflammatory. If not, it may be admitted if it has relevance and can assist the jury's understanding of the facts. If the photograph is inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.
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> > In addition, this Court has observed that:
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> > A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in

(Footnote Continued) ––––––––––––––––––––

that were taken after he was removed from the scene and taken for an autopsy.

> support of the onerous burden of proof beyond a reasonable doubt.

Commonwealth v. Mollett, 5 A.3d 291, 301-302 (Pa.Super. 2010) (quoting ***Commonwealth v. Tharp***, 830 A.2d 519, 531 (Pa. 2003)).

Initially, we agree that because Appellant did not lodge a contemporaneous objection to the showing of the video, the issue is waived. Pa.R.A.P. 302(a); ***see also Commonwealth v. Bedford***, 50 A.3d 707, 714 (Pa.Super. 2012). Nevertheless, even if Appellant adequately preserved his claim, we find it does not entitle him to relief. The video is part of the certified record and is approximately eleven and one-half minutes long.[5] The body first appears briefly for approximately three seconds at the forty-seven-second mark. The victim's face is turned to the right and his head and part of his upper body are against the side of a wall to the right of a doorway. The remainder of his body is lying on the ground. Cans of soda and several other items of trash are around the body. At this point, it is difficult to discern the blood. Two cars are in the driveway before one arrives at the body. At approximately the minute-and-one-half-to-two-minute-and-fifteen-second-mark, bloody items are depicted further up on the side of the street as well as blood on the sidewalk. ***See also***

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[5] The record contains both a DVD and a sealed video tape of the crime scene. We have viewed the DVD, which is labeled Commonwealth's Exhibit 8.

Commonwealth's Exhibit 1 and Exhibit 6.[6] The video returns to the driveway at the two-minute-and-fifty-five-second mark and shows blood spots in the driveway, mostly to the left of the first vehicle as one approaches the house. ***See also*** Commonwealth's Exhibit 3.

The video then turns into more difficult viewing. From approximately the three-minute-and-forty-five-second point until about the five-minute mark, the video demonstrates the body. Most of the easily discernible blood is located on the victim's lower body and his legs are covered in blood. The back of his shirt and upper part of his shorts are blood stained. At four minutes and thirty-seven seconds, a close-up of the victim's face is shown. Thereafter, the video depicts blood on the doorway, house, small amounts of blood on the other vehicle, and eventually a pool of blood at the beginning of the driveway on the right side if facing the house.

The video is consonant with the severity of a homicide crime scene. However, it does not rise to the level of inflammatory and overwhelmingly prejudicial evidence that would inflame the minds of the jury. The video plainly would aid the jury in its ability to understand the Commonwealth's evidence and is not overly gruesome. Indeed, we agree with the trial court's assessment that the video was "essentially a video recording of the evidence collection[.]" Trial Court Opinion, 12/15/11, at 14. Since the video was not

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[6] Commonwealth's Exhibits 1 and 6 are color photographs of the bloody items.

inflammatory and was probative in demonstrating the unlikelihood of Appellant's self-defense claim, Appellant's issue fails. ***See***, ***e.g.***, ***Commonwealth v. Marinelli***, 690 A.2d 203, 217 (Pa. 1997) ("While the presence of blood on the victim depicted in the photographs is unpleasant, it is not in and of itself inflammatory."); ***Commonwealth v. Wright***, 961 A.2d 119, 138-139 (Pa. 2008) ("Neither graphic testimony nor the pictures' gruesome nature precludes admissibility of photographs of a homicide scene.").

The final claim Appellant presents is that the Commonwealth violated our criminal discovery rules and ***Brady v. Maryland***, 373 U.S. 83 (1963).

> In ***Brady,*** the United States Supreme Court held that "suppression by the prosecution of favorable evidence to an accused upon request violates due process where the evidence is material either to guilt or to punishment...." ***Brady***, 373 U.S. at 87. ***Brady's*** mandate is not limited to pure exculpatory evidence; impeachment evidence also falls within ***Brady's*** parameters and therefore must be disclosed by prosecutors. ***U.S. v. Bagley***, 473 U.S. 667, 677, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). However, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." ***Id***. at 675.
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> As referenced *supra,* to establish a ***Brady*** violation, a defendant must demonstrate that: (1) the evidence was suppressed by the Commonwealth, either willfully or inadvertently; (2) the evidence was favorable to the defendant; and (3) the evidence was material, in that its omission resulted in prejudice to the defendant. [***Commonwealth v.***]***Dennis***, 609 Pa. 442, 17 A.3d at 308. The burden rests with the defendant to "prove, by reference to the record, that evidence was withheld or suppressed by the prosecution." ***Commonwealth v. Paddy***, 609 Pa. 272, 15 A.3d 431, 451 (Pa.2011). The withheld evidence must have been in the

> exclusive control of the prosecution at the time of trial. No ***Brady*** violation occurs when the defendant knew, or with reasonable diligence, could have discovered the evidence in question. Similarly, no violation occurs when the evidence was available to the defense from a non-governmental source. ***Id.***

Commonwealth v. Haskins, 2012 PA Super 223, *6-7.

Appellant asserts that exculpatory evidence existed on city cameras and a camera outside a grocery store. According to Appellant, the videos would corroborate his claims that the victim approached him. He adds that the tapes should have been preserved and disclosed.

We note that there is no dispute that the videos in question were never turned over to Appellant; however, police testified as to viewing two of the three surveillance cameras at issue.[7] In that testimony, police acknowledged that one tape, from Second and Gordon Streets, depicted a person matching Appellant's description crossing the street. However, they stated that the camera located on Sixth and Turner Streets did not show anyone matching Appellant's description. The camera owned by the grocery store was not viewed by either the police or Appellant. Police attempts to view the grocery store video were thwarted when store employees could not download the footage. Subsequently, the store's security company deleted the applicable footage.

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[7] A city camera video was shown to the jury. Appellant is challenging separate video surveillance.

The Commonwealth responds that Appellant's issue is both waived and meritless. With respect to waiver, it maintains that Appellant did not object at the time the Commonwealth witnesses testified about the video surveillance. Secondarily, it posits that it never possessed the grocery store video and could not have been responsible for its destruction. Indeed, the store destroyed the video and police did not obtain the surveillance footage at any time or view it because the store employees could not download the video. As to the city cameras, there are two relevant surveillance videos. The Commonwealth contends that the missing evidence "was only 'potentially useful.'" Commonwealth's brief at 29. Accordingly, it submits that Appellant must establish that it destroyed the tapes in bad faith. ***See Commonwealth v. Chamberlain***, 30 A.3d 381 (Pa. 2011). Since Appellant does not argue bad faith, the Commonwealth asserts that Appellant is not entitled to relief.

We disagree that Appellant's claim is waived. Counsel for the defendant requested a jury instruction for failure to produce tangible evidence and objected to the Commonwealth's failure to provide those tapes. Although this objection came after testimony regarding the tapes and did not expressly cite ***Brady***, it was extensive and focused on the Commonwealth having control of the video and not providing it. N.T., 3/23/11, 136-151. Nonetheless, we find that, relative to the grocery store surveillance video, Appellant's issue is meritless because he cannot establish

that the Commonwealth ever possessed the footage. ***See Haskins***, ***supra*** at *7 ("The withheld evidence must have been in the exclusive control of the prosecution at the time of trial."). Regarding the Commonwealth's failure to disclose the disputed city camera surveillance videos, although we disapprove, we fail to discern how the video evidence was exculpatory.[8] The video was not of the crime scene and, according to Appellant, showed the victim approaching him. However, Appellant himself acknowledged to police that he walked with the victim to attempt to purchase drugs. The fact that the victim may have first approached Appellant on the video in no way advances the position that the victim attacked Appellant. Appellant's own averments in his brief of what the tapes would show doom his claim.

Judgment of sentence affirmed.

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[8] The trial judge agreed to give the jury instruction relative to failure to produce tangible evidence and disagreed with the Commonwealth that it should not have had to disclose the tape. N.T., 3/23/11, at 148-150. The court did so instruct the jury. N.T., 3/24/11, at 48-49.