

[J-9-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:No. 253 Capital Appeal Docket
	:
Appellee	:Appeal from Order of Court of Common
	:Pleas, Philadelphia County, Criminal
v.	:Division, entered December 17, 1998 at
	:0623 and 0624 September Term, 1996.
	:
	:
TIMOTHY RICE,	:
	:SUBMITTED: January 30, 2001
Appellant	:
	:
	:
	:
	:

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MADAME JUSTICE NEWMAN

DECIDED: February 20, 2002

Timothy Rice (Appellant) appeals from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County that sentenced him to death following two convictions for first-degree murder. After reviewing the claims raised by Appellant, we affirm.

I. FACTS AND PROCEDURAL HISTORY

As part of our independent review of the record, we summarize the evidence presented at trial as follows. On September 1, 1996, Labor Day, a group of family members gathered at Jay's Big Shot Bar, which is located on the corner of Narragansett Street and Stenton Avenue in the City of Philadelphia. The family included Bernard Jackson (Jackson),

his fiancée Ramona Caldwell, James Jefferson (Jefferson), his fiancée Marie Williams (Williams), Randall Rogers (Rogers), his fiancée Evette Bell, and Gilbert Green (Green).

At approximately 1:00 a.m., Appellant entered the bar with two friends. Appellant and his friends ordered two forty-ounce beers from bartender, Jerry Fluellen. Appellant talked with Sheila Holloway and then moved to an area near the middle of the establishment.

A verbal confrontation erupted between one of Appellant's friends and Green. The situation ended quickly and the two men shook hands. Then, Jefferson joined the group of men. At some point, the bartender asked Appellant and his friends to take the argument outside or drop it. Green told Jefferson that there was not a problem and then walked toward the bar and sat down, turning his back to Appellant and the door that lead to Stenton Avenue (Stenton door). Some of the family members gathered at the bar opposite the Stenton door. Several individuals sat in a row with Rogers to the right of Green and an empty barstool between Rogers and Jackson.

As Appellant backed out of the Stenton door, he pulled a gun from his pocket and fired into the establishment. He shot Jackson in the back, killing him. Appellant also shot Rogers twice in the lower back. A bullet grazed the chest of Williams, who had returned to her place at the bar just before the shooting. Both Rogers and Williams survived. Jefferson, who had been standing behind Appellant in the doorway of the Stenton door, ran outside. Appellant shot Jefferson in the back, which caused his death.

Appellant ran across the street and got into a car. Then, Appellant proceeded to his sister's apartment at 2835 Winton Street. Someone from Appellant's family called the police. At 3:30 a.m. that same night, police arrived at the apartment and arrested Appellant. Police

discovered two spent .357 caliber shells in Appellant's pocket and recovered a .357 magnum revolver, containing three live rounds, from underneath a sofa cushion in the apartment.

Appellant's non-jury trial began on October 6, 1997, and concluded on October 16, 1997, with the trial court finding him guilty of: two counts of first-degree murder,¹ two counts of aggravated assault,² one count of recklessly endangering another person,³ one count of possessing an instrument of a crime,⁴ and two counts of violation of the Uniform Firearms Act.⁵

The penalty phase was before a jury, and it began on December 1, 1998, more than one year after the bench trial. New counsel represented Appellant. On December 17, 1998, the jury returned the sentence of death on each of the two murder convictions after finding that the aggravating circumstances outweighed the mitigating circumstances. For each of the first-degree murder charges, the jury found two aggravating circumstances: (1) Appellant caused a grave risk of death to another person and (2) Appellant had been convicted of another murder at the time of the offense at issue. Additionally, for both convictions, the jury found two mitigating circumstances (1) the capacity of Appellant to appreciate the criminality of his conduct had been substantially impaired and (2) Appellant had allowed himself to be turned over to the police after the murders. The trial court imposed a sentence of death for

¹ 18 Pa.C.S. § 2502.

² 18 Pa.C.S. § 2702.

³ 18 Pa.C.S. § 2705.

⁴ 18 Pa.C.S. § 907.

⁵ 18 Pa.C.S. §§ 6106, 6108.

each first-degree murder conviction and an aggregate consecutive term of twenty to forty years imprisonment on Appellant's remaining charges.

II. DISCUSSION

A. THE GUILT PHASE

1. Sufficiency of the evidence

Appellant alleges that the evidence was insufficient to sustain his two convictions for first-degree murder. As part of our independent review of the record, we must determine whether the evidence, and all reasonable inferences deducible from that, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all the elements of the offenses beyond a reasonable doubt. Commonwealth v. Bridges, 757 A.2d 859, 864 (Pa. 2000).

To prove first-degree murder, the Commonwealth must show that the defendant acted with the specific intent to kill; that a human being was unlawfully killed; that the person accused did the killing; and that the killing was deliberate. 18 Pa.C.S. § 2502(d); Commonwealth v. Spatz, 716 A.2d 580, 583 (Pa. 1998), cert. denied, 526 U.S. 1070 (1999). The Commonwealth can prove specific intent to kill where the defendant knowingly applies deadly force to the person of another. Commonwealth v. Hall, 701 A.2d 190, 196 (Pa. 1997), cert. denied, 523 U.S. 1082 (1998). We have also held that the use of a deadly weapon on a vital part of the victim's body is sufficient to establish the specific intent to kill. Commonwealth v. Walker, 656 A.2d 90, 95 (Pa. 1995), cert. denied, 516 U.S. 854 (1995).

In challenging his convictions for first-degree murder, Appellant asserts that he shot the victims in this case in self-defense following an argument in a bar. At trial, Appellant testified

that a group of men surrounded him and his friends inside the establishment. Appellant stated that he saw Green pull a gun out of his back pocket. Then, after hearing gunshots, Appellant said that he panicked. Appellant testified that at that point he pulled out his gun and fired at his attacker. Consequently, Appellant contends that the Commonwealth failed to prove that Appellant had the specific intent to kill and that he killed with deliberation.

The Commonwealth called twenty witnesses, four of whom saw Appellant fire a gun into a crowded bar. When Appellant testified, he admitted that he pointed his weapon toward people and “shot until [his] gun was empty.” (N.T. 10/10/97, p. 159). Appellant shot both of the victims, who were unarmed, in their backs. Additionally, when the police arrested Appellant at his sister’s apartment several hours after the shooting, the officers discovered a .357 magnum revolver containing three live rounds and two spent .357 caliber shells in Appellant’s pocket. Appellant admitted that the .357 magnum was his gun. Police Officer Abdur-Rahin, of the Firearms Identification Unit of the Philadelphia Police Unit, testified that a bullet found on the floor of the bar was fired from Appellant’s gun. Also, Officer Abdur-Rahin stated that a bullet, which had been removed from one of the victims that had survived the shooting, had been fired from Appellant’s gun. Based upon our examination of the record, we conclude that the Commonwealth adequately established the specific intent of the Appellant to kill. We hold that the evidence sufficiently supports both of Appellant’s convictions for first-degree murder.

2. Weight of the evidence

Appellant argues that the verdicts are against the weight of the evidence presented at trial. What weight to accord to evidence is exclusively for the finder of fact, who is free to believe all, part, or none of the evidence and to determine the credibility of witnesses. Commonwealth v. Small, 741 A.2d 666, 672 (Pa. 1999), cert. denied, ___ U.S. ___, 121 S.Ct.

80 (2000). An appellate court is barred from substituting its judgment for that of the finder of fact. Commonwealth v. Johnson, 668 A.2d 97, 101 (Pa. 1995), cert. denied, 519 U.S. 827 (1996). Therefore, we may reverse the decision of the fact-finder only when the verdict is so contrary to the evidence as to shock one's sense of justice. Commonwealth v. Keaton, 729 A.2d 529, 540 (Pa. 1999), cert. denied, 528 U.S. 1163 (2000).

To demonstrate how the guilty verdicts are shocking to one's conscience, Appellant points to three different areas of inconsistent testimony. First, the testimony of persons who witnessed events outside the bar the night of the shooting conflict. One witness said he chased the shooter through the streets after the incident, while another witness testified that the suspect jumped into a car after firing several shots outside the bar. See (N.T. 10/8/97, p. 174); (N.T. 10/9/97, p. 50). Second, Appellant asserts that conflicting evidence exists concerning the appearance of the shooter. Several witnesses testified that the person who opened fire in the bar had a bald head while others testified that he had hair. See (N.T. 10/9/97, pp. 7-15, 53-54, 128, 146). Finally, Appellant asserts that ballistics evidence is inconsistent with the theory of the Commonwealth that Appellant shot both victims. Investigators testified that they found gunshot powder residue on Jackson's clothing, but not on Rogers' clothing. (N.T. 10/9/97, pp. 66, 74). Appellant asserts that if he had shot both men, who sat next to each other, then both should have had residue on their clothing.

We conclude, after a review of the entire record, that this claim of Appellant must fail. In making his argument, Appellant concedes that weighing the evidence and assessing witness credibility are tasks exclusively for the finder of fact. Yet, Appellant urges us to abandon this principle and replace the judgment of the finder of fact with our own. This we cannot do. Numerous eyewitnesses saw Appellant open fire into the bar and even Appellant testified that he had fired his weapon inside the establishment. The verdicts were consistent

with the evidence presented at trial and not so contrary to the evidence that they shock one's sense of justice.

3. Ineffectiveness of guilt-phase counsel

Appellant claims that his guilt-phase counsel acted ineffectively.⁶ In this argument, Appellant points to the three major areas of inconsistent testimony that he raises in his weight of the evidence claim, including discrepancies as to what activity had occurred outside of the bar after the shooting, whether the shooter had a bald head on the night of the murders, and the presence of gunpowder residue on the victims' clothing. Appellant asserts that his counsel ineffectively failed to argue these inconsistencies to the finder of fact.

In an ineffective assistance of counsel claim, the defendant bears the burden of proving that: "(1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable; and (3) counsel's ineffectiveness prejudiced defendant." Commonwealth v. Whitney, 708 A.2d 471, 476 (Pa. 1998), denial of post conviction relief aff'd., 708 A.2d 471 (Pa. 1998). The effectiveness of counsel is presumed, and the defendant must prove otherwise. Commonwealth v. Pierce, 645 A.2d 189, 195 (Pa. 1994).

Appellant's ineffectiveness claim lacks merit. While Appellant asserts that his attorney failed to argue the inconsistencies in the trial testimony, counsel did in fact raise

⁶ Appellant failed to raise several issues, which he now presents for our review, in his 1925(b) Statement of Matters Complained of on Appeal and these issues are waived. See Pa.R.A.P. 1925(b). Despite the waiver, we will address the issues under the relaxed waiver rule of Commonwealth v. Zettlemyer, which applies in direct capital appeals. See 454 A.2d 937, 942 n.3 (Pa. 1982), cert. denied, 461 U.S. 970 (1983); see also Commonwealth v. Gibson, 688 A.2d 1152, 1160 n.13 (Pa. 1997), cert. denied, 522 U.S. 948 (Pa. 1997).

these points in his closing argument. See (N.T. 10/14/97, pp. 39, 53-55) (addressing inconsistencies in testimony regarding what occurred outside the bar); (N.T. 10/14/97, pp. 39, 53, 55) (highlighting differences in witnesses descriptions as to whether the shooter had a bald head); (N.T. 10/14/97, pp. 35, 58) (discussing the gunpowder residue evidence). Therefore, Appellant's claim relating to the ineffectiveness of his guilt-phase counsel fails.

B. THE PENALTY PHASE

1. Exclusion of notes of testimony

During his sentencing hearing Appellant sought to introduce the notes of Appellant's testimony from the guilt-phase of his trial. Appellant asserts that the trial court erroneously excluded this testimony, which Appellant sought to offer in mitigation.

The admissibility of mitigation evidence is a matter vested within the sound discretion of the trial court, whose decision can only be reversed by this Court upon a showing of an abuse of discretion. See Commonwealth v. Young, 637 A.2d 1313, 1322 (Pa.1993), cert. denied, 511 U.S. 1012 (1994). A defendant may present evidence of mitigating circumstances at the sentencing hearing; however, the evidence must be relevant and admissible. 42 Pa.C.S. § 9711(a)(2); Young, 637 A.2d at 1322.

First, Appellant claims that the trial court abused its discretion in excluding the notes of testimony as evidence of Appellant's drug and alcohol impairment the night of the murder.⁷ We hold that the testimony was not admissible because it was not relevant.

⁷ The trial court did not bar Appellant from testifying during the sentencing hearing as to his impairment during the night of the murders. The court simply ruled that Appellant's notes of testimony could not be offered as proof of impairment without providing the Commonwealth with an opportunity to challenge such evidence. Moreover, the ruling of the trial court regarding the notes of testimony did not prevent Appellant from presenting evidence of his (continued...)

Appellant had testified on direct during his trial that he had gone to the bar the night of the shootings to have a couple of drinks. (N.T. 10/10/97, at p. 151). Appellant stated that he had purchased “forties”⁸ to take home and had had “a few beers” at the bar. Id. at 151, 167. Appellant never testified that he had consumed any drugs the evening of the murders. Additionally, Appellant did not state that he had been intoxicated that night. The focus of Appellant’s testimony involved his claim of self-defense, not his mental-impairment. Even if one can argue that Appellant’s testimony is relevant because it indirectly supports Appellant’s position that he had been intoxicated during the shootings, the evidence is not admissible because the Commonwealth did not have an opportunity to cross-examine Appellant on this point. “Implicit in the fact that the [death penalty] statute assigns to the defendant the burden of proving mitigating circumstances by a preponderance of the evidence is the understanding that the jury is to assess the evidence for credibility.” Commonwealth v. Abu-Jamal, 555 A.2d 846, 858 (Pa. 1989), cert. denied, 498 U.S. 881 (1990). At trial, the Commonwealth cross-examined Appellant on his self-defense claim and not on any possible impairment he may have experienced due to drinking alcohol. Because the Commonwealth was not afforded the opportunity to challenge the veracity of this evidence for the purpose for which Appellant sought to offer it, the notes of testimony were not admissible.

(...continued)

drug and alcohol use. See (N.T. 12/11/98, pp. 104, 112) (testimony of drug abuse counselor that Appellant was addicted to alcohol, marijuana, and cocaine prior to murders); (N.T. 12/14/98, pp. 15, 19) (testimony of Appellant’s mother that Appellant used drugs and had cocaine in his possession the day before the shootings); (N.T. 12/14/98, pp. 29, 37-38) (testimony of Appellant’s father that Appellant had a drug problem and was high on the afternoon of the shootings); (N.T. 12/14/98, pp. 67-68) (testimony of clinical psychologist that Appellant is drug dependent); (N.T. 12/14/98, pp. 98-101) (defense attorney’s closing argument that Appellant was under the influence of drugs during the murders).

⁸ “Forty” is a slang term for a forty-ounce bottle of beer or malt liquor.

Second, Appellant asserts that the trial court abused its discretion in limiting the admission of the notes of testimony to demonstrate Appellant's character and defense presented at trial to indisputable portions of the testimony. We recognize the privilege of the Commonwealth and Appellant to educate the jury as to the background of the case, especially in light of the fact that the jury did not sit as the fact-finder in this case. See Commonwealth v. Saranchak, 675 A.2d 268, 275 (Pa. 1996), cert. denied, 519 U.S. 1061 (1997). In Saranchak, we upheld the Commonwealth's presentation of a photograph of the crime scene to the sentencing jury following a bench trial in a capital case. We stated that "the jury must be informed of the history and natural development of the events and offenses with which appellant has been convicted, so that the jury can truly understand the nature of the offenses and appellant's character." Saranchak, 675 A.2d at 275. However, we also appreciate that the purpose of the penalty phase in a capital trial is to determine a defendant's sentence and not to once again litigate his or her guilt. 42 Pa.C.S. § 9711(a)(1). Therefore, the trial court was properly within its discretion in this case to limit Appellant's presentation of background information to strictly relevant and indisputable evidence. Pursuant to such a limitation, Appellant declined to introduce his trial testimony. Consequently, Appellant's argument fails.⁹

⁹ As noted previously, the trial court did not bar Appellant from presenting evidence regarding Appellant's character or the background of the case, but limited Appellant's presentation to live testimony or indisputable portions of the trial transcript. (N.T. 12/10/98, p. 110). It appears that Appellant wanted to inform the jury that he raised a self-defense claim at trial through the admission of his notes of testimony. While such testimony is arguably irrelevant at the sentencing phase of trial, Appellant did present this information to the jury. See (N.T. 12/14/98, pp. 20, 32, 44) (Appellant's mother, father, and sister testified that Appellant had told them that he shot his gun in the bar in self defense after being fired upon by another person); (N.T. 12/15/98, p. 98) (defense counsel stated during closing argument, "was Tim Rice under the influence of drugs that night to the point where maybe he would see somebody with a gun that maybe didn't have a gun or somebody would say (continued...)

2. Admission of Appellant's violent felony convictions

Appellant claims that the trial court erred in admitting his prior convictions for robbery and criminal conspiracy to support the aggravating circumstance of a significant history of violent felony convictions. See 42 Pa.C.S. § 9711(d)(9). After the Commonwealth introduced the above prior convictions, the parties stipulated to their factual basis on the record. In May of 1990, Appellant and another male agreed to rob Henry Blue, a 66-year-old man. At around 9:00 p.m., Appellant and his friend approached Blue with a gun. Appellant's friend held the gun, while Appellant threatened to kill Blue if he did not hand over his money. Blue gave the two men his money and they left. While Appellant concedes that his prior convictions are felonies, he claims that they were inadmissible because the conspiracy conviction was not a violent felony and his prior convictions do not bear any factual similarity to Appellant's current convictions for murder in the first-degree.

First, Appellant argues that his conviction for criminal conspiracy is not a violent felony because he merely engaged in a peaceable agreement with a co-conspirator. He maintains that the object of the conspiracy, even if a violent felony itself, does not render the conspiracy violent. Appellant's argument is completely without merit. We have held that a conviction for conspiracy to commit murder is admissible as a violent felony conviction. Commonwealth v. Reid, 626 A.2d 118, 122 (Pa. 1993). Similarly, a conviction for conspiring to rob a victim at gunpoint is admissible and the trial court did not err.

Second, Appellant argues that his convictions for robbery and conspiracy are not admissible because they are not factually similar to his present murder convictions.

(...continued)

something that he could infer was a threat to his life or his physical well-being?”).

Appellant supports his position with our plurality decision in Commonwealth v. Holcomb, 498 A.2d 833 (Pa. 1985), cert. denied, 475 U.S. 1150 (1986).

In the Opinion Announcing the Judgment of the Court in Holcomb, Justice Hutchinson states that in finding the aggravating circumstance of a significant history of prior felony convictions, the jury should examine not only the quantity of prior convictions, but also the qualitative relationship between the prior convictions and the present homicide conviction. 498 A.2d at 852. Justice Hutchinson suggests that prior felony convictions must be factually similar to the conviction at issue in order to support the aggravating circumstance. Id. This interpretation of the aggravating circumstance by Justice Hutchinson, accepted by only one other Justice, is not binding precedent upon this court. See CRY, Inc. v. Mill Service, Inc., 640 A.2d 372, 376 n.3 (Pa. 1994). Additionally, we specifically rejected reliance upon Holcomb for the argument raised by Appellant in Commonwealth v. Young, 637 A.2d 1313, 1320-1321 (Pa. 1993), cert. denied, 511 U.S. 1012 (1994) (holding that section 9711(d)(9) does not require that prior felony convictions be factually similar to the crime at issue). The evidence of Appellant's two prior convictions was admissible and Appellant is not entitled to relief.¹⁰

3. Victim impact evidence

¹⁰ The jury did not find the aggravating circumstance of a significant history of violent felony convictions; therefore, we have addressed only the admissibility of Appellant's convictions and not whether the Commonwealth sufficiently established this aggravating circumstance.

Appellant raises two issues with respect to victim impact evidence, which he claims entitle him to a new sentencing hearing.¹¹ Appellant asserts that 42 Pa.C.S. § 9711(a)(2) and (c)(2)¹² are unconstitutional and the trial court erroneously instructed the jury on how it should consider the evidence.

¹¹ Appellant asks: “[d]id the trial court err in admitting victim impact evidence at the sentencing phase hearing?” in his statement of questions involved, (Brief of Appellant, at 5), however, he does not mention or develop this issue in his brief. Therefore, Appellant has waived this claim. See Commonwealth v. LaCava, 666 A.2d 221, 229 n.9 (Pa. 1995).

¹² 42 Pa.C.S. § 9711(a)(2) and (c)(2) state:

§9711. Sentencing procedure for murder of the first degree

(a) Procedure in jury trials.-

(2) In the sentencing hearing, evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible. Additionally, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed. Evidence shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e), and information concerning the victim and the impact that the death of the victim has had on the family of the victim. Evidence of aggravating circumstances shall be limited to those circumstance specified in subsection (d).

* * *

(c) Instructions to jury.-

(2) The court shall instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it shall consider, in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim’s family. The court shall also instruct the jury on any other matter that may be just and proper under the circumstances.

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Recently, this Court addressed the validity of Pennsylvania’s statutory provisions permitting the admission of victim impact evidence and the procedures whereby such evidence is admissible. Commonwealth v. Means, 773 A.2d 143 (Pa. 2001); Commonwealth v. Natividad, 773 A.2d 167 (Pa. 2001). While we issued plurality opinions in both Means and Natividad, we note that both cases guide our discussion infra. See generally Marks v. United States, 430 U.S. 188, 193 (1977) (stating that when “a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [the majority], ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’”); CRY, Inc. v. Mill Service, Inc., 640 A.2d 372, 376 n.3 (Pa. 1994) (noting that a plurality opinion of this Court lacks the authority of precedent); McDermott v. Biddle, 647 A.2d 514, 524 n. 8 (Pa. Super. 1994), rev’d on other grounds, 674 A.2d 665 (Pa. 1996) (stating that for any principle of law expressed in a Majority Opinion to be considered precedent it must command a majority of judges voting both as to the disposition and the principle of law expressed); Glendale Sch. Dist. v. Feigh, 513 A.2d 1093, 1094 n.5 (Pa. Cmwlth. 1986), pet. for allowance of appeal denied, 527 A.2d 547 (Pa. 1987) (noting that a decision of an equally divided Supreme Court is not controlling but may be persuasive).

a. Constitutionality of 42 Pa.C.S. § 9711(a)(2) and (c)(2)

First, Appellant challenges the constitutionality of 42 Pa.C.S. § 9711(a)(2) and (c)(2), which permit the introduction of victim impact testimony in the penalty phase of a capital case. Appellant argues that subsections (a)(2) and (c)(2) of section 9711 are

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As amended, 1995, October 11, P.L. 1064, No. 22 (Special Session No. 1), §1.

unconstitutional because they do not provide any procedure for how the jury should incorporate victim impact testimony into its deliberation. We addressed the constitutional concerns of Appellant in Means, where four members of this Court upheld 42 Pa.C.S. § 9711(a)(2) and (c)(2) under both the federal and Pennsylvania constitutions. 773 A.2d at 148-157, 159 (Opinion Announcing the Judgment of Court and Saylor, J., concurring). Because a majority of this Court has concluded that subsections (a)(2) and (c)(2) of section 9711 are constitutionally valid, Appellant is not entitled to relief.

b. Jury instructions

Additionally, Appellant claims that the trial court erred while instructing the jury on how to consider the victim impact evidence. Appellant asserts that because the trial court instructed the jury on the law of New Jersey¹³ and not Pennsylvania, he is entitled to a new sentencing hearing.

A trial court has broad discretion in phrasing its instructions to a jury, and may choose its own wording so long as it clearly, adequately, and accurately presents the law to the jury for its consideration. Commonwealth v. Ohle, 470 A.2d 61, 70 (Pa. 1983), cert. denied, 474 U.S. 1083 (1986). Appellate review of a charge must be based on an examination of the instruction as a whole to determine whether it was fair or prejudicial. Id.

The Pennsylvania death penalty statute provides that “[t]he court shall instruct the jury that if it finds at least one aggravating circumstance and at least one mitigating circumstance, it shall consider, in weighing the aggravating and mitigating circumstances,

¹³ See N.J.S.A. 2C:11-3c(6).

any evidence presented about the victim and about the impact of the murder on the victim's family." 42 Pa.C.S. § 9711(c)(2). The Opinion Announcing the Judgement of Court in Means set forth a model jury instruction that tracks the language of 42 Pa.C.S. § 9711(c)(2) and includes language designed to prevent the possibility of the evidence inflaming the passions of the jury.¹⁴ 773 A.2d at 158-159. While examining the jury instruction given in

¹⁴ The jury instruction in Means reads:

The prosecution has introduced what is known as victim impact evidence. Victim impact evidence is not evidence of a statutory aggravating circumstance and it cannot be a reason by itself to impose the death penalty. The introduction of victim impact evidence does not in any way relieve the Commonwealth of its burden to prove beyond a reasonable doubt at least one aggravating circumstance. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt independent from the victim impact evidence, and if one or more jurors has found that one or more mitigating circumstances have been established by a preponderance of the evidence. Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. The sentence you impose must be in accordance with the law as I instruct you and not based on sympathy, prejudice, emotion or public opinion and not based solely on victim impact.

773 A.2d at 158-159.

Natividad, three Justices found that the language used¹⁵ was consistent with our model instruction in Means. 773 A.2d at 180. The Opinion Announcing the Judgment of Court in Natividad upheld the instruction given in that case because it “adequately channeled the

¹⁵ The trial court in Natividad instructed the jury as follows:

Now, when voting on the general findings, you are to regard a particular aggravating circumstance as present only if you all agree that it is present. On the other hand, each of you is free to regard a particular mitigating circumstance as present despite what the other jurors believe.

This different treatment of aggravating and mitigating circumstances is one of the law’s safeguards against unjust death sentence. [sic] It gives the defendant the full benefit of any mitigating circumstances. It is closely related to the burden of proof requirements. Remember, the Commonwealth must prove any aggravating circumstances beyond a reasonable doubt while the defendant only has to prove mitigating circumstance by a preponderance of the evidence.

Now, members of the jury, you have heard testimony about the victim and about the impact of the killing on the victim’s family.

Victim impact is not an aggravating circumstance, may not be so considered and is not a reason to impose the death penalty. Should you find at least one aggravating circumstances and at least one mitigating circumstance, only then may you even consider this testimony and only for the very limited purpose of helping you to determine whether or not the aggravating circumstance outweigh the mitigating circumstance. [sic]

The sentence you impose must be in accordance with the law as I instruct you and not based on sympathy, prejudice, emotion, or public opinion and not based on victim impact.

773 A.2d at 180.

focus of the jury on concerns appropriate to its sentencing function and away from arbitrary and capricious factors.” Id.

In the present case, the Commonwealth, Appellant’s counsel, and the trial court discussed how to instruct the jury about victim impact evidence during a hearing in December of 1998. The trial court, without the benefit of the decisions of this Court in Means and Natividad, expressed concern as to how to channel the jury’s discretion in the consideration of the evidence. (N.T. 12/1/98, pp. 42-43). During the sentencing hearing, the trial court instructed the jury before the witnesses testified to the impact of the victims’ deaths. The trial court explained that such evidence is admissible under Pennsylvania law. (N.T. 12/11/98, p. 71). Additionally, the judge instructed the jury that victim impact evidence was neither an aggravating nor a mitigating circumstance and could not be used to weigh the worth of Appellant against the worth of the victims. (N.T. 12/11/98, pp. 71-72). As part of its charge to the jury prior to its deliberation, the trial court instructed as follows:

Now, you heard evidence from four persons, specifically victim impact evidence. I will now give you an instruction as to how to consider that evidence.

If you unanimously find that the Commonwealth has proven at least one aggravating factor beyond a reasonable doubt and any of you find at least one mitigating factor which is relevant to the defendant’s character or record or to the circumstances of the offense, and that’s what I alluded to earlier as the catch-all, then **you may consider any presented victim impact testimony in determining the appropriate weight to be given to the mitigating catch-all factor.** Keep in mind victim impact testimony cannot be used as a general or specific aggravating factor or as a means of weighing the worth of this defendant against the worth of either or both victims in this case. **Instead, it’s [sic] only use is to determine how much weight to attach to the catch all mitigating factor.**

(N.T. 12/16/98, pp. 12-13) (emphasis added).

While the trial court in the present case had broad discretion in wording its instructions to the jury, the trial court failed to present the law accurately to the jury. Because we conclude that Appellant did not experience prejudice due to the erroneous instruction, a new sentencing hearing is not required.

The trial court did not correctly instruct the jury regarding our victim impact provisions. Pennsylvania law permits the jury to consider victim impact testimony after it finds any aggravating circumstance and any mitigating circumstance. 42 Pa.C.S. § 9711(c)(2). In contrast, the trial court limited the jury's examination of victim impact evidence until after it found any aggravating circumstance and the catch-all mitigating circumstance. The trial court further instructed the jury to consider the victim impact testimony only in determining how much weight to attach to the catch-all mitigating circumstance.¹⁶

Although the jury instruction in this case was inaccurate, it was not prejudicial. The jury in the present case found two aggravating circumstances and two mitigating circumstances for each first-degree murder conviction. It would have considered the victim

¹⁶ The instruction given by the trial court resembles the language of the New Jersey Victim Impact Statute, which has been upheld against constitutional attack in State v. Muhammad, 678 A.2d 164 (N.J. 1996). In Muhammad, the New Jersey Supreme Court establishes numerous procedural safeguards for the admission of victim impact testimony. Id. at 180. While these guidelines are appropriate under New Jersey's statutory provisions, they are not constitutionally required nor dictated by Pennsylvania law. We do not adopt New Jersey's law as our own and conclude that the manner whereby victim impact testimony is presented is best left to the sound discretion of the trial court. See Means, 773 A.2d at 154, 158, 160 (Opinion Announcing the Judgement of Court and Saylor, J., concurring); but see 773 A.2d at 164-167 (Nigro, J., dissenting) (suggesting rules for the use of victim impact testimony that are based upon the New Jersey scheme).

impact evidence even if it had received an instruction similar to that set forth in Means. See 773 A.2d at 158-159. Additionally, the trial court instructed the jury that victim impact testimony was neither an aggravating nor a mitigating circumstance and could not be used to weigh the worth of Appellant against the worth of the victims, which is consistent with Pennsylvania law. The instruction in this case sought to channel the focus of the jury on concerns appropriate to its sentencing function and away from arbitrary and capricious considerations. While the present instruction was contrary to Pennsylvania law, we fail to see how an instruction that was more restrictive on the consideration of victim impact evidence than Pennsylvania law permits was unfair to Appellant. In the present case, the error of the trial court in instructing the jury regarding victim impact evidence was harmless beyond a reasonable doubt and Appellant is not entitled a new sentencing hearing.

4. Jury instructions on mitigating factor

Appellant argues that the trial court erred when it refused to instruct on the mitigating factor of extreme mental or emotional disturbance at the time of the crime. See 42 Pa.C.S. § 9711(e)(2). We conclude that the trial court did not err.

A defendant is entitled to an instruction on a mitigating circumstance only when the defendant has presented some evidence to support such circumstance. 42 Pa.C.S. § 9711(c)(1)(ii). Appellant argues that the testimony of three witnesses, Grace Flannery, Leondra Rice, and Dr. Allen Tepper, warranted an instruction on the extreme mental or emotional disturbance mitigating circumstance.

We have reviewed the record and conclude that Appellant failed to present evidence that he had been under the influence of extreme mental or emotional disturbance at the time of the crime. Grace Flannery, a drug and alcohol abuse counselor, testified that she

treated Appellant for drug and alcohol addiction from January through March of 1995. (N.T. 12/11/98, pp. 97-103). The treatment sessions occurred over one year before Appellant committed the crimes at issue and Flannery did not offer any opinion as to Appellant's mental or emotional state on the night of the shootings. Next, Leondra Rice, Appellant's father, testified that Appellant was under the influence of drugs around four or five o'clock in the afternoon the day of the crime. (N.T. 12/14/98, pp. 37-38). Eight hours elapsed between when Mr. Rice saw Appellant and when Appellant fired shots in the bar. Mr. Rice did not testify that Appellant was high at the time of the crime. Finally, Dr. Tepper, the defense's clinical psychologist, testified that Appellant had a lower-than average IQ and was drug dependant, but that he did not exhibit signs of severe mental illness or psychotic disturbance. (N.T. 12/14/98, pp. 56-68). Additionally, Dr. Tepper also indicated that his opinion of the psychological state of Appellant had nothing to do with Appellant's mental state the night of the murders. (N.T. 12/14/98, pp. 129-130, 135). We hold that the trial court did not err by declining to instruct on this mitigating circumstance because Appellant failed to present any evidence that he had been suffering from an extreme mental or emotional disturbance at the time of the crime.

5. Admissibility of mitigating evidence

Appellant argues that the trial court erroneously prohibited him from introducing mitigating evidence. Because the trial court did not limit Appellant's ability to present mitigating evidence, this claim must fail.

The admissibility of evidence is solely within the discretion of the trial court and we will reverse on appeal only upon abuse of that discretion. Commonwealth v. Thomas, 717 A.2d 468, 477 (Pa. 1998), cert. denied, 528 U.S. 827 (1999). During the penalty phase, the Commonwealth may offer evidence to rebut a defendant's mitigating evidence of good

character. Commonwealth v. Harris, 703 A.2d 441, 451 (Pa. 1997), cert. denied, 525 U.S. 1015 (1998) (upholding Commonwealth's introduction of several statements made by an appellant to rebut appellant's character evidence that he was a nice person and amenable to rehabilitation); Commonwealth v. Abu-Jamal, 555 A.2d 846, 858 (Pa. 1989), cert. denied, 498 U.S. 881 (1990) (holding that Commonwealth's introduction of statements made by appellant and his Black Panther membership to rebut appellant's character evidence that he was a peaceful and genial man).

In the present case, Appellant intended to present evidence to the jury of his kindness in sharing a civil settlement award with his family.¹⁷ Appellant also wanted to prevent the Commonwealth from introducing evidence of Appellant's involvement in several stabbings while in prison. During the Commonwealth's case-in-chief at the penalty phase, Appellant moved in limine to prevent the Commonwealth from presenting evidence of Appellant's misconduct. The Commonwealth did not attempt to introduce this evidence during its case-in-chief and planned to present these facts only in rebuttal if Appellant presented testimony of his kind and generous character. (N.T. 12/11/98, pp. 8-10). The trial court ruled that if Appellant offered evidence of his good character during his case-in-chief, then the Commonwealth would be allowed to offer evidence of Appellant's bad character during its rebuttal. (N.T. 12/11/98, pp. 11-13). We conclude that the trial court did not abuse its discretion with this ruling. Because Appellant elected not to introduce evidence of his good character, the Commonwealth did not present evidence of his prison misconduct. Consequently, because the trial court did not abuse its discretion and

¹⁷ Appellant's counsel noted during his opening statement to the penalty phase jury, "You'll hear that he was generous with his family. He gave his mom and dad \$15,000 and he gave his brothers and sisters each \$500 a piece." (N.T. 12/10/98, pp. 128-29).

Appellant deliberately chose not to present evidence of his good character, we hold that Appellant is not entitled to relief.

6. Prosecutorial misconduct

Appellant alleges several instances of prosecutorial misconduct and claims that they warrant a new sentencing hearing. Appellant argues that the prosecutor's improper cross-examination of a defense witness engendered hostility among the jury against Appellant.¹⁸ Furthermore, Appellant contends that the prosecutor made several errors during his summation.

a. Cross-examination

Appellant claims that the prosecutor should not have asked a defense witness during cross-examination about Appellant's receipt of welfare benefits or prior criminal activity. Appellant asserts that income status and how he supported his drug habit were not relevant to any mitigating or aggravating circumstances. He argues such evidence stimulated jury bias toward the Appellant.

Admissible evidence during the penalty phase is not limited to that which supports mitigating or aggravating circumstances, but may encompass any relevant topic to the sentencing of the defendant. 42 Pa.C.S. § 9711(a)(2); Commonwealth v. Koehler, 737 A.2d 225, 243 (Pa. 1999), cert. denied, ___ U.S. ___, 121 S.Ct. 79 (2000). The penalty phase is part of the "truth-determining process" that enables the sentencer to discern and

¹⁸ Appellant failed to object to the alleged improper cross-examination by the prosecutor and technically waived this issue. Nonetheless, we may still reach the merits of the claim pursuant to the relaxed waiver rule in direct appeals of capital cases. Commonwealth v. Fletcher, 750 A.2d 261, 270 (Pa. 2000), cert. denied, ___ U.S. ___, 121 S.Ct. 623 (2000).

apply facts bearing upon the appropriate sentence. Abu-Jamal, 555 A.2d at 858. Implicit in the fact that our death penalty statute places a burden upon the defendant to prove mitigating circumstances by a preponderance of the evidence is the understanding that the Commonwealth may challenge the veracity of the defendant's proof, and the jury is to weigh the evidence. 42 Pa.C.S. § 9711(c)(1)(iii); id.

In the present case, Appellant initially put his receipt of public assistance before the jury during the direct examination of a defense witness, Grace Flannery (Flannery), a drug and alcohol abuse counselor. Flannery has a bachelor's degree in special education with a minor in psychology. She also has a master's degree in criminal justice. She testified that Appellant had been on public assistance when she counseled him for his drug addiction. (N.T. 12/11/98, p. 102). On cross-examination, the prosecutor asked Flannery if she knew how Appellant had supported his drug addiction while he had been on public assistance. (N.T. 12/11/98, p. 119). Flannery responded that she did not know. Id. The prosecutor then called to Flannery's attention the place in her report, which was a defense exhibit, where she had recorded that Appellant had supported his habit by selling drugs, robbing people, and working. (N.T. 12/11/98, pp. 120-22).

Appellant sought to introduce mitigating evidence regarding his drug addiction through the testimony and report of Flannery. The prosecutor had the right to challenge the veracity of such evidence and the credibility of the witness asserting such facts. Therefore, the areas that the prosecutor explored were relevant and not explored to create hostility toward the defendant. We conclude that the prosecutor did not act improperly during the cross-examination.

b. Closing argument

Appellant challenges two portions of the prosecutor's closing argument. First, Appellant claims that the prosecutor improperly compared his law-abiding life to Appellant's life. Appellant asserts that the prosecutor intended to engender hatred and bias against Appellant through this comparison. Second, Appellant claims that the prosecutor unlawfully commented on Appellant's failure to testify and effectively rendered the jury incapable of delivering a fair verdict.

In our review of whether the prosecutor's comments were improper, we must look at the context in which the prosecutor made the statements. Commonwealth v. Dennis, 715 A.2d 404, 413 (Pa. 1998). The remarks of a prosecutor do not constitute reversible error unless their unavoidable effect would be to prejudice the jury, forming in their minds a fixed bias and hostility toward Appellant such that they could not weigh the evidence objectively and render a true penalty determination. Commonwealth v. Hackett, 735 A.2d 688, 696 (Pa. 1999), cert. denied, 528 U.S. 1163 (2000). Also, "[a]t the penalty phase, where the presumption of innocence is no longer applicable, the prosecutor is permitted even greater latitude in presenting argument. The prosecutor may 'present argument for or against the sentence of death' and may employ oratorical license and impassioned argument." Commonwealth v. Washington, 700 A.2d 400, 414 (Pa. 1997), cert. denied, 524 U.S. 955 (1998) (quoting Commonwealth v. Travaglia, 661 A.2d 352, 365 (Pa. 1995), cert. denied, 516 U.S. 1121 (1996)).

We conclude that the prosecutor's comments regarding his job and the life of Appellant were proper:

The judge will tell you if you find one aggravating circumstance beyond a reasonable doubt and no mitigating circumstance,

then your duty is clear. If you find that there are aggravating circumstances and mitigating circumstance or circumstances, but the aggravating circumstances outweigh the mitigating circumstance, then your duty is clear.

I'm not saying it's an easy duty. People say to prosecutors all the time, parents, my parents, everybody probably, how can you do that for 20 years? It's easy, take an oath to a duty and you do your duty. That's what drives it. That's what drives it. [sic] It doesn't work no other way. It can't work any other way. They swear you in, you take the pledge, because if it worked any other way, we'd have what? We'd have Timmy Rice's law. I feel this way, boom, I shoot you. I feel that way, I'll do whatever I want, that's what you have. You have anarchy, you have no law.

(N.T. 12/15/98, p. 69). Concerning the explanation regarding the duty of the jury, while it is properly the role of the court to instruct the jury, the prosecutor did not misstate the law. We hold that the explanation was proper. The comment regarding Appellant's behavior was fair since the record showed that Appellant had shot two unarmed individuals in the back. We fail to see how the above comments could have so inflamed the passions of the jury that they could not have rendered a fair sentence.

Additionally, Appellant asserts that the prosecutor's comments constituted improper comment on his failure to testify at the penalty phase:

About six people testified for the Defense. Several of them, I'm not going to talk too much about the mother, father, sister, but the only person I heard up here that said anything about remorse was the sister. She looked at you and said, and I don't want to talk too much about this, I want you to spare Timmy's life and I'm sorry for the family. Remorse. He has not raised his head in the last, I don't know, five or six days. This does not equate with remorse.

(N.T. 12/15/98, pp. 80-81). After the prosecutor made the above statement, defense counsel objected, the trial court struck the above remarks, and the court ordered the jury not to consider them. Appellant could not have been prejudiced when the jury did not consider the statements. See Commonwealth v. Bridges, 757 A.2d 859, 883 (Pa. 2000) (stating that a jury is presumed to have followed the instructions of the trial court). Additionally, even if the jury had considered the prosecutor's comments, we would have rejected Appellant's claim. See Commonwealth v. Lester, 722 A.2d 997, 1009 (Pa. 1998); Commonwealth v. Holland, 543 A.2d 1068, 1076-77 (Pa. 1988), denial of post-conviction relief aff'd., 727 A.2d 563 (Pa. 1999). This Court has stated:

It is established, however, that the demeanor of a defendant, including his apparent remorse, is a proper factor to be considered by a jury in the sentencing phase of a capital case. Recognizing that the sentencing phase of trial has a different purpose than the guilt determination phase, and that the privilege against self-incrimination and the presumption of innocence has no direct application to the latter phase, this Court has held that comment upon a defendant's failure to show remorse is permitted at least where the comment does not amount to an extended tirade focusing undue attention on the factor of remorse.

Lester, 722 A.2d at 1009 (citations omitted).

In the present case, Appellant's demeanor, and his apparent lack of remorse, was a factor that the jury was permitted to consider during the penalty phase. The statements by the prosecutor to the jury regarding Appellant's lack of remorse, which were limited to that quoted above, were proper. The prosecutor's comments do not amount to an impermissible tirade. Therefore, we do not grant Appellant relief on this issue.

7. Ineffectiveness of penalty-phase counsel

Finally, Appellant argues that his penalty-phase counsel acted ineffectively. Appellant asserts that penalty-phase counsel should have objected to alleged misconduct by the prosecutor and requested an instruction that a sentence of life in prison means life without the possibility of parole.

As set forth previously, the effectiveness of counsel is presumed, and the defendant must prove otherwise. Commonwealth v. Balodis, 747 A.2d 341, 343 (Pa. 2000), cert. denied, ___ U.S. ___, 121 S.Ct. 55 (2000). The defendant bears the burden of showing that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) counsel's ineffectiveness prejudiced defendant. Commonwealth v. Scott, 752 A.2d 871, 877 (Pa. 2000), cert. denied, ___ U.S. ___, 121 S.Ct. 1419 (2001).

Neither of Appellant's underlying claims have merit, therefore counsel did not act ineffectively by failing to raise these issues. First, as discussed in the immediately preceding section, the prosecutor did not improperly cross-examine the defense witness regarding Appellant's drug addiction. Thus, defense counsel did not act ineffectively by failing to object during this portion of the prosecutor's cross-examination. Second, a "life means life" or Simmons instruction was not warranted in this case. See Simmons v. South Carolina, 512 U.S. 154 (1994). A Simmons instruction is required only where the prosecution injects the issue of the defendant's future dangerousness into the case. Commonwealth v. Williams, 732 A.2d 1167, 1186 (Pa. 1999).¹⁹ Such an instruction is not

¹⁹ A minority of this Court is of the view that a Simmons instruction should be given, prospectively, in all capital cases. See Commonwealth v. Clark, 710 A.2d 31 (Pa. 1998), cert. denied, 526 U.S. 1070 (1999).

necessary where the prosecution merely refers to the defendant's past violent acts. Id. After reviewing the prosecutor's closing argument in its entirety, we conclude that a Simmons instruction was not needed because the prosecutor never touched upon the future dangerousness of Appellant. Defense counsel was not ineffective for failing to request an instruction to which Appellant was not entitled. Appellant's ineffectiveness claims fail.

III. CONCLUSION

We conclude that none of the claims of error raised by Appellant warrant relief. There was sufficient evidence to support the determination of guilt for both murders and sufficient evidence to support the aggravating circumstances found by the jury in imposing the death penalty. After a thorough review of the record, we have determined that the sentences of death were not the product of passion, prejudice, or any other factor. We affirm the verdict and sentences of death imposed upon Appellant, Timothy Rice. Pursuant to 42 Pa.C.S. § 9711(i), we direct the Prothonotary of the Supreme Court of Pennsylvania to transmit, within ninety days, the complete record of this case to the Governor of Pennsylvania.

Mr. Chief Justice Zappala files a concurring and dissenting opinion.

Mr. Justice Cappy files a concurring and dissenting opinion.

Mr. Justice Nigro files a concurring opinion.

Mr. Justice Saylor concurs in result.