IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	No. 539 CR 2009
	:	
ERNEST T. FREEBY,	:	
Defendant	:	

Criminal Law – Murder - Post-Sentence Motion - Sufficiency of the Evidence - Weight of the Evidence - Brady Violation - Materiality - Admissibility of Evidence - Presumptive Blood Tests - *Frye* Challenge - Expert Opinion Testimony - Relevance/Prejudice of Inculpatory Statement of Intent to Harm Victim - Mistrial - Attorney/Client Privilege - Waiver - After-Discovered Evidence

1. Evidence is sufficient to sustain a conviction of murder in the first degree when the Commonwealth establishes that a human being was unlawfully killed, the defendant committed the killing, the defendant acted with a specific intent to kill, and the killing was done in a willful, deliberate and premeditated manner. The *corpus delicti* may be established through the use of wholly circumstantial evidence.

2. In considering a challenge to the sufficiency of evidence, all of the evidence admitted at trial, viewed in the light most favorable to the verdict winner, must be examined to determine whether the evidence is sufficient to enable the fact-finder to find every element of the crime charged beyond a reasonable doubt. In making this analysis, the credibility of witnesses and the weight of the evidence is determined by the trial of fact, not the reviewing court. Further, all doubts regarding the defendant's guilt are for the fact-finder to resolve, unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.

3. In a homicide case, it is not necessary that the Commonwealth produce the body of the victim to establish death. An abrupt termination by a healthy, young female of a consistent pattern of living without any prior preparation or discussion with relatives or friends, its unexplained character, and the length of the victim's absence is sufficient to support an inference that the

victim is dead.

4. Proof that the victim - Defendant's wife, from whom he was estranged, and who previously had maintained close ties with her family - was last seen alive by the Defendant in his home, together with the unexplained presence of large quantities of the victim's blood in Defendant's home under circumstances indicative of a significant injury sustained from trauma or violence, an earlier statement by Defendant expressing the possibility of killing the victim in order to marry his girlfriend with whom he had three children, Defendant's possession and use of the victim's car and credit cards immediately after her disappearance, his attempts to destroy or dispose of evidence, and his inconsistent and deceptive statements to police concerning the victim's disappearance, was sufficient to convict the Defendant of first degree murder.

5. A challenge to the weight of the evidence concedes the sufficiency of the evidence but questions the strength of the evidence in support of the verdict when weighed against all the evidence presented. For a challenge to the weight of the evidence to succeed, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court.

6. A *Brady* violation consists of three elements: (1) suppression by the prosecution (2) of evidence, whether exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. Moreover, a *Brady* violation only exists when the evidence is material to guilt or punishment, i.e., when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

7. Defendant failed to prove that the Commonwealth's purported failure to provide the defense with e-mail names and IP addresses of various witnesses, who were not eyewitnesses, violated the standards of *Brady* or was material to guilt or punishment. The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense.

8. A presumptive blood test is a field test designed to determine whether an unknown substance or stain contains blood. Presumptive blood tests do not distinguish between animal and human blood, and may give false positives.

9. Evidence need not be conclusive to be admissible. The results of presumptive blood tests are admissible provided the qualifications and limitations of a presumptive blood test are fully explained to the jury.

10. A challenge to scientific evidence on the basis of *Frye* is a challenge to the novelty of scientific principles or the methodology employed in reaching scientific conclusions. *Frye* requires that, before novel scientific evidence is admissible in criminal trials, the theories and methods of that evidence must have gained general acceptance in the relevant scientific community.

11. Defendant's challenge to the reliability or certainty of the results of presumptive blood testing went to the weight of the evidence and did not challenge the scientific principles or methodology upon which presumptive blood tests are conducted.

12. A witness who has a reasonable pretension to specialized knowledge on a subject matter under investigation may express an opinion on such subject matter if to do so would assist the jury in grasping complex issues not within the knowledge, intelligence and experience of an ordinary lay person. Under this standard, it is not error to allow an expert in blood spatter analysis to testify to the type and extent of the bleeding evidenced by pools of blood found in a defendant's coal bin.

13. Defendant's statement made to his girlfriend approximately one year prior to his wife's disappearance that he might have to kill his wife in order for them to marry was relevant both to Defendant's intent and motive, and was properly admitted in evidence. The circumstances under which and the seriousness with which the statement was made went to the weight of the statement, and not its admissibility.

14. In order for a mistrial to be declared because of a witness's remark, the remark must be of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial.

15. The testimony of the Commonwealth's forensic pathologist that the scene in defendant's basement was consistent with or indicative of either significant bodily injury or homicide, the latter being properly objected to, did not under the circumstances - including the overwhelming evidence that the victim was dead - warrant the *sua sponte*

declaration of a mistrial by the court where the defendant failed to request a mistrial and the court struck the witness's answer from the record, and later instructed the jury that evidence which had been stricken should be totally disregarded, treated as though it had never been heard, and none of their findings should be based upon it.

16. The attorney/client privilege renders an attorney incompetent from testifying about confidential communications made to him by his client unless the client waives the privilege.

17. Once the attorney/client privilege is properly invoked, the burden is upon the proponent of the evidence to show that disclosure would not violate the attorney/client privilege, e.g., because the privilege had been waived or because some exception applied.

18. Although all communications made in the course of an attorney's joint representation of two or more clients are discoverable when the clients, who were represented in a matter of common interest, sue one another, this exception to the attorney/client privilege does not apply in a criminal prosecution to communications made by the purported victim of a crime to counsel who represented both the victim and the person charged. In a criminal proceeding, the victim and defendant are not adverse parties. Instead, the charging party in a criminal prosecution is the Commonwealth.

19. After-discovered evidence is the basis for a new trial when it: (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of trial by the exercise of reasonable diligence; (2) is not merely cooperative or cumulative; (3) will not be used solely for impeaching the credibility of a witness; and (4) is of such nature and character that a new verdict would likely result if a new trial is granted. Further, the proposed new evidence must be produced and admissible.

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Gary F. Dobias, Esquire — Counsel for Commonwealth
District Attorney

Paul J. Levy, Esquire — Counsel for Defendant
Assistant Public Defender

George T. Dydynsky, Esquire — Counsel for Defendant
Assistant Public Defender

MEMORANDUM OPINION

Nanovic, P.J. – November 20, 2012

On January 30, 2012, the Defendant, Ernest T. Freeby, was convicted of murder in the first degree[1] and tampering with physical evidence.[2] As required by statute,[3] on the charge of murder Defendant was sentenced to life imprisonment without the possibility of parole.[4] In Defendant's post-sentence motion now before us, Defendant requests an arrest of judgment and judgment of acquittal or, in the alternative, a new trial. Following a thorough review of the record, we deny Defendant's requests.

[1] 18 Pa.C.S.A. § 2501(a).
[2] 18 Pa.C.S.A. § 4910(1).
[3] 18 Pa.C.S.A. § 1102(a)(1).
[4] In regards to his conviction for tampering with physical evidence, Defendant was sentenced to a consecutive term of probation for a period of two years.

FACTUAL AND PROCEDURAL BACKGROUND

Ernest Troy Freeby ("Defendant") and Edwina Onyango ("Edwina") married on March 20, 2001. Theirs was a marriage of convenience: Defendant wanted a wife to increase his chances of gaining custody of his two children from a previous relationship; Edwina, a native of Kenya whose legal status in this country was in question, hoped to obtain United States citizenship.[5] Marriage to a United States citizen would enhance her prospects of reaching this goal.

Following their marriage, the couple lived together in Allentown until 2003, when Defendant moved to Carbon County. Edwina remained in the Lehigh Valley where she eventually obtained employment as a personal caretaker for an elderly couple, Richard and Edith Schoch (the "Schochs").[6] Shortly thereafter, she began living with the Schochs in a second floor bedroom of their Bethlehem home.[7]

In the meantime, Defendant was living with Julianne Sneary ("Sneary") with whom he had begun a romantic relationship even

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[5] Edwina emigrated from Kenya to this country in 1998. Although it appears she first entered this country on a temporary visa and no longer was in possession of a valid unexpired immigrant visa, the record is not totally clear on this point. Formal deportation, also known as removal, proceedings were begun against her on February 6, 2006.

[6] Edwina did not have a valid social security number and, because of her immigration status, was not legally authorized to work. (N.T. 01/26/12, p.204.) To obtain employment, she assumed the name and social security number of a friend, Veronica Gaya, who claims to have been unaware of this subterfuge. The Schochs, who were unaware of this deception, erroneously believed Edwina was Veronica Gaya.

[7] Edwina also maintained a second residence, an apartment she shared with a roommate in Allentown.

before his separation from Edwina. From that relationship, three children were born, the oldest on June 11, 2003, and the youngest on January 9, 2008. Not until sometime in 2007 did Edwina learn that Defendant was the father of Sneary's children.[8]

One evening in the winter of late 2006 or early 2007, while driving home together, Defendant and Sneary spoke, as they often had, about getting married. When the conversation turned to making wedding plans, Sneary commented that no plans could be made so long as Defendant was married. In response, Defendant said that he could not divorce Edwina until she obtained her citizenship. Then, according to Sneary, Defendant said that the only way he could get rid of Edwina would be by killing her. Roughly a year later, Edwina went missing.

The events surrounding Edwina's disappearance are as follows. On December 8, 2007, Edwina told her sister, Phoebe Onyango ("Phoebe"), that she was going to Defendant's home in Lansford the next day to pick up some bills she was responsible for paying and to deliver a check for an insurance bill. The following morning Edwina left her Bethlehem residence at approximately 11:00 A.M.[9] A short time later, Edwina called Ester Ouma, a friend, telling her, among other things, that she

[8] Up until that time, Defendant had told Edwina that the children were his sister's. (N.T. 01/18/12, pp.161-62, 174).
[9] Edwina was seen by the Schochs leaving that morning and indicated her intentions of returning that evening.

was on her way to Defendant's home. Edwina arrived at Defendant's home at approximately noon. She again called Phoebe, this time leaving a voicemail stating that she would be returning home that same day. That was the last time Edwina was heard from or seen by her family or friends.

On December 17, 2007, Edwina's family reported her missing to the Borough of Lansford Police Department. The following day, at approximately 11:30 in the evening, Officer Joshua Tom of the Lansford Police Department met briefly with Defendant at his home, inquired whether Defendant knew of Edwina's whereabouts, and conducted a quick walk-through of the home. Lansford Police Chief John Turcmanovich, accompanied by Edwina's brother, Lamech Onyango, inquired further on December 21, 2007. Although acknowledging that Edwina had been at his home on December 9, 2007, Defendant stated he had not seen her since and did not know where she was. A few weeks later, the Schochs also reported Edwina missing to the Bethlehem Police Department, the Allentown Police Department, and the Pennsylvania State Police (the "State Police").

On December 26, 2007, the State Police took over as the primary investigating agency. The following day, Defendant was questioned about the last time he had seen or heard from Edwina. Defendant advised the State Police he last saw Edwina on either December 9, or December 16, 2007, when she had come to his home

with a black female friend to pick up a cell phone bill and left her 2000 Dodge Neon with him to keep. According to Defendant, Edwina stayed for approximately two to two and a half hours and then left in her friend's vehicle. When the State Police noticed the cell phone bill Defendant referred to was still present in his home, Defendant was unable to account for this. When questioned about Edwina's finances, Defendant informed the State Police that Edwina had a Capital One credit card in her name, which he denied possessing or using.

Several days later, on December 31, 2007, the State Police obtained information from the Capital One credit card fraud investigation unit that Edwina's card had been utilized eight times after December 9, 2007, each time by Defendant.[10] In addition, a video obtained from Home Depot showed Defendant attempting to utilize the card. Because of this, Defendant was questioned further by the State Police on January 14, 2008. This time, Defendant admitted to lying about his possession and use of Edwina's Capital One card. According to Defendant, Edwina gave him the card the last time he saw her.

The State Police next obtained a search warrant for Defendant's home, which was executed on January 17, 2008. Upon searching the premises, they found that the steps leading from the first floor to the basement, as well as the door which

[10] The charges occurred between December 11 and December 19, 2007.

opened from the basement into a coal bin at the front of the home, had been recently painted. They also observed multiple bloodstains on the concrete floor of the basement between the stairs and the coal bin door. Once inside the coal bin, they discovered two pools of blood on the dirt floor, bloodstains on a wooden two by four, and bloodstains on the concrete wall.

The basement steps and coal bin door were removed for further analysis. Upon stripping the paint, the State Police found additional bloodstains. Forensic testing of three samples taken from the blood in Defendant's basement were determined to be a match for Edwina's DNA profile.[11]

On August 21, 2008, the State Police conducted a second search of Defendant's residence. By that time, Defendant had removed the top eight to ten inches of soil from the floor of the coal bin and the wooden two by four. The bloodstains previously observed on the concrete wall were now faint. However, this time the State Police noticed hair embedded within these stains. An analysis of the mitochondria DNA from this hair was found to be a match to Edwina's maternal bloodline.[12]

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[11] The three items tested were a bloodstain found on the concrete floor near the entrance to the coal bin, a soil sample collected from one of the blood pools found inside the coal bin, and a bloodstain found on a portion of the fourth step. (N.T. 01/19/12, pp.19-21; Commonwealth Exhibit Nos. 52, 53, and 54).

[12] Mitochondria, organelles in the cytoplasm of cells, are maternally inherited. (N.T. 01/20/12, pp.102-03). Consequently, unlike nuclear DNA which is specific to an individual, mitochondria DNA is specific to a maternal bloodline.

On August 3, 2009, a criminal complaint was filed against Defendant charging him with one count of criminal homicide and one count of tampering with physical evidence. Trial before a jury began on January 9, 2012. Since Edwina's body was never found, the Commonwealth relied heavily on circumstantial evidence to prove its case. The jury returned a verdict on January 30, 2012, finding Defendant guilty of both counts.

On May 14, 2012, following the preparation of a pre-sentence investigation report, Defendant was sentenced to life imprisonment without the possibility of parole to be served in a state correctional facility. On May 24, 2012, Defendant filed the instant post-sentence motion which is the subject of this opinion.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

Edwina's full brothers - Reuben Onyango, Lamech Onyango and James Onyango - provided DNA samples, via buccal swabs. Using this information, Dr. John Planz, associate director of the University of North Texas Center for Human Identification, determined that the DNA profile obtained from the hair inside the coal bin was a sibling match. Specifically, a comparison between the DNA taken from Rueben Onyango and that present in the hair revealed that Reuben and the person to whom the hair belonged had the same maternal relative. (N.T. 01/23/12, pp.25-29, 35-36).

Defendant first argues that he is entitled to an arrest of judgment or judgment of acquittal for insufficiency of the evidence to support his convictions.

When considering a challenge to the sufficiency of the evidence

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

Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa.Super. 2001), *appeal denied*, 806 A.2d 858 (Pa. 2002) (citations and quotation marks omitted).

A. FIRST DEGREE MURDER

Since the Commonwealth was unable to produce a body, a weapon, or exact measurements of the volume and age of the blood found in Defendant's residence, Defendant argues the Commonwealth has failed to introduce evidence sufficient to support his conviction of murder in the first degree. We disagree.

Evidence is sufficient to sustain a conviction of murder in the first degree when the Commonwealth establishes that a human being was unlawfully killed, the defendant committed the killing, the defendant acted with a specific intent to kill, and the killing was done in a willful, deliberate, and premeditated manner. Commonwealth v. Williams, 896 A.2d 523, 535 (Pa. 2006), *cert. denied*, 127 U.S. 1253 (2007). In a homicide case, the Commonwealth is not required to produce the body of the victim. Commonwealth v. Rivera, 828 A.2d 1094, 1104 (Pa.Super. 2003), *appeal denied*, 842, A.2d 406 (Pa. 2004). Moreover, the absence of a weapon, blood or DNA is not fatal to the Commonwealth's case; the *corpus delicti* may be established through the use of wholly circumstantial evidence. Id.

To establish Edwina's death, the Commonwealth showed that a seemingly healthy, thirty-four-year-old woman, who regularly kept in contact with her family and friends, and barely missed a day of work, suddenly disappeared following a visit to Defendant's home on December 9, 2007. (N.T. 01/10/12, pp.53,

133, 148, 159, 174, 188, 195); *see* Commonwealth v. Burns, 187 A.2d 552 (Pa. 1963) (an abrupt termination in a consistent pattern of living without any prior preparation or discussion with relatives or friends is relevant to establishing that death of the victim occurred); Commonwealth v. Smith, 568 A.2d 600 (Pa. 1989) (the length of the victim's absence, its unexplained character, and the failure of the victim to communicate with all known relatives and associates can lead to the inevitable conclusion that the individual is dead).

In addition, an extensive search was undertaken – locally, nationwide, and worldwide - to determine Edwina's whereabouts, to no avail. (N.T. 01/11/12, pp.133-39). A search of her mailbox in Whitehall on January 7, 2008, revealed that no mail had been collected after December 7, 2007. (N.T. 01/11/12, pp.121-23, 140-41). An examination into her financial records showed that after December of 2007 there was no activity by her on her JC Penny, Victoria's Secret or Capital One credit card accounts, notwithstanding a prior history of regular use and prompt payment. (N.T. 01/11/12, pp.139-40; N.T. 01/12/12, pp.127-28; N.T. 01/19/12, p.119; N.T. 01/20/12, p.7). Further, no deposits were made into her Merchants Bank account, which she previously made on a regular basis, and the account had a

balance of over one thousand dollars. (N.T. 01/11/12, pp.142-43).[13]

Edith Schoch testified that all of Edwina's personal belongings – her clothes, jewelry and money - were still intact in her second floor bedroom. (N.T. 01/10/12, p.148). And Jolene Kibler, the mother of the two children Defendant fathered prior to marrying Edwina and to whom Defendant had previously agreed to sell Edwina's car, testified that Edwina's mail, personal property, and papers were still in the car on December 10, 2007, when she came to pick it up, notwithstanding Defendant's statement to the police that Edwina had removed her property before leaving the car with him. (N.T. 01/17/12, pp.176-78; N.T. 01/20/12, p.137).[14]

That the death resulted from criminal activity was amply supported by the testimony of the police and the Commonwealth's experts. According to the police, a search of Defendant's home on January 17, 2008, revealed a number of bloodstains throughout the basement, three of which were a match to Edwina's DNA profile. (N.T. 01/13/11, pp.49, 54, 56-57, 60-62, 110-19, 127-

[13] During closing argument, the Commonwealth noted that if Edwina were alive and in hiding, as the defense suggested, it made no sense for her to walk away from this money.

[14] When Kibler brought this to Defendant's attention, Defendant insisted on cleaning out the car himself. (N.T. 01/17/12, p.178). When questioned by the police on January 17, 2008, Defendant further admitted that among the items he had removed from the car and thrown out were a garage opener and phone charger. (N.T. 01/20/12, pp.139-40). Again, the Commonwealth questioned in closing argument why Defendant would discard such items if he expected to see Edwina again.

29; N.T. 01/19/12, pp.21-32). The blood on the floor of the coal bin had pooled and was coagulated, indicating not only a large amount of blood, but also fresh bleeding. (N.T. 01/23/12, p.131). During a second search of Defendant's home on August 21, 2008, the police recovered hair, from what was believed to be the head of the victim and which matched Edwina's maternal bloodline, embedded in dried blood found on the wall of the coal bin, inches above the pools of blood. (N.T. 01/13/12, pp.142-43; N.T. 01/23/12, pp.30-42). All of this suggested Edwina's body had been lying in the coal bin, resting against the wall.

The Commonwealth's experts opined that the nature, location, and extent of the blood found in Defendant's basement was consistent with an individual suffering from a significant injury resulting from trauma or violence, rather than accidental means. (N.T. 01/23/12, pp.148-50; N.T. 01/24/12, pp.140-43). It was the experts' further opinion that the individual who suffered this injury would have required medical attention and treatment due to the large amount of blood lost, particularly when examining the two blood pools in the coal bin. (N.T. 01/13/12, pp.75-77; N.T. 01/23/12, pp.148-52; N.T. 01/24/12, pp.42-43).

Defendant's involvement in Edwina's death was evidenced in part by the fact that Edwina was last seen alive by Defendant in his home and that, following her disappearance, her blood was

inexplicably found throughout his basement. (N.T. 01/20/12, p.150). As part of its case, the Commonwealth presented evidence to establish that approximately one year prior to her disappearance, Defendant contemplated the possibility of killing Edwina in order to marry Sneary.[15] (N.T. 01/19/12, pp.201-02); *see* Commonwealth v. Zimmerman, 504 A.2d 1329, 1335 n.4 (Pa.Super. 1986) (noting that although proof of motive is not required for a conviction of first degree murder, it may be probative of the killer's intent or plan.). In addition, the Commonwealth produced evidence to support a finding that Defendant was planning Edwina's murder a month prior to her disappearance, when the day after Thanksgiving he agreed to sell Edwina's car to Jolene Kibler for a thousand dollars. (N.T. 01/17/12, pp.169-71).

Perhaps the most incriminating evidence linking Defendant to Edwina's death were his actions as well as his statements to the police. In regards to his conduct, Defendant never reported her missing, or expressed concerns for her safety. (N.T. 01/10/12, pp.54-55). After Defendant was questioned by Officer Tom and Chief Turcmanovich on December 18 and December 21, 2007 respectively, and later by the State Police on December 27, 2007, about his knowledge of Edwina's whereabouts, Defendant

[15] In this same context, it is also not insignificant that Defendant's youngest child with Sneary was born on January 9, 2008, one month after Edwina disappeared.

attempted initially to paint over and later to dispose of the blood evidence in his home. (N.T. 01/11/12, pp. 55-56; N.T. 01/13/12, pp.45-47, 135-41; N.T. 01/20/12, p.177); *see* Commonwealth v. Dollman, 541 A.2d 319, 322 (Pa. 1988) (actions subsequent to a killing in attempting to destroy or dispose of evidence are relevant to prove the accused's intent or state of mind).

Moreover, Defendant repeatedly made inconsistent statements to the police. Among these statements were his accounts of how long Edwina remained at his house when she visited on December 9, 2007;[16] stating that the reason for Edwina's visit was to pick up a cell phone bill, yet having no explanation why this bill was still in his home (N.T. 01/11/12, pp. 144-45); giving contradictory statements regarding his use and possession of Edwina's Capital One credit card (N.T. 01/11/12, p.146; N.T. 01/19/12, pp.76, 80-81); and providing vague and misleading statements about greeting cards and envelopes which he claimed to have received from Edwina after her disappearance, which, he said, contained a return address, and which he promised to

[16] At first, he told the police that she had only stayed for ten minutes. (N.T. 01/11/12, p.9). Later, he stated she stayed for two to two and a half hours. (N.T. 01/11/12, pp.143-46).

provide to the police, but never did.[17] (N.T. 01/19/12, pp.84-89).

Viewing the evidence and all reasonable inferences in the light most favorable to the Commonwealth, we find that the testimony and circumstantial evidence presented was sufficient to convict Defendant of murder in the first degree.

B. TAMPERING WITH THE EVIDENCE

Defendant also contends the Commonwealth's evidence was insufficient to sustain his conviction of tampering with physical evidence because it failed to show that Defendant acted with the necessary intent to hinder the police investigation. On this charge the Commonwealth's evidence is sufficient if it establishes that: "(1) the defendant knew that an official proceeding or investigation was pending; (2) the defendant altered, destroyed, concealed, or removed an item; and (3) the defendant did so with the intent to impair the verity or availability of the item to the proceeding or investigation."

[17] Such envelopes, if they existed, would have been important not only in locating Edwina, but also in determining whether she was alive. In particular, the police wanted to examine the envelopes for postmarks, the possibility of a return address, and the chance of obtaining DNA evidence. (N.T. 01/19/12, pp.85-89). Even though the importance of the police examining the envelopes was repeatedly explained to Defendant, he used their represented existence as a bargaining tool in his discussions with the police, proclaiming their existence, yet demanding one concession after another before he would produce them (e.g., to have a computer tower returned and later requesting that his 22 rifle, a phone charger and the basement steps be returned). (N.T. 01/19/12, pp.83-89, 133-36; N.T. 01/20/12, pp.9-11, 120-22, 140-49). After six months of requesting the envelopes from Defendant, the police gave up in these efforts. (N.T. 01/20/12, pp.8-10, 207-08).

Commonwealth v. Jones, 904 A.2d 24, 26 (Pa.Super. 2006), *appeal denied*, 917 A.2d 845 (Pa. 2006).

When viewed in the light most favorable to the Commonwealth, we conclude the jury could reasonably find that all three elements were proven beyond a reasonable doubt. As already indicated, the police testimony clearly established that Defendant knew an official investigation into Edwina's whereabouts was in progress.[18]

The evidence further established that it was after Defendant was made aware of the investigation but before the police searched his home on January 17, 2008,[19] that he painted both the steps leading to the basement and the coal bin door. (N.T. 01/12/12, pp.48-49; N.T. 01/19/12, p.195). Underneath the recently painted areas, the police discovered bloodstains. During the January 17, 2008 search, the police also discovered two pools of blood on the dirt floor of the coal bin and bloodstains on a two by four inside the coal bin. Between this first search and that on August 21, 2008, the Defendant removed

[18] Defendant was questioned about Edwina's disappearance on the following days by the following officers: December 18, 2007 by Officer Tom of the Borough of Lansford Police Department; December 21, 2007 by Chief Turcmanovich of the Borough of Lansford Police Department; December 27, 2007 by Corporal Thomas McAndrew of the Pennsylvania State Police; and January 14, 2008, again by Corporal McAndrew. (N.T. 01/11/12, pp.9-10, 45-46, 143-46; N.T. 01/19/12, pp.80-81). Defendant was questioned a total of four times prior to the January 17, 2008 execution of the first search warrant on his home.

[19] It was during this same time period that Defendant's earlier statement denying possession or use of Edwina's Capital One credit card was disproved and Defendant admitted he had lied. (N.T. 01/19/12, pp.80-81).

and disposed of between eight and ten inches of soil, as well as the two by four.

This evidence, together with that previously discussed, was more than sufficient to establish that Defendant engaged in these acts with the intent of hindering the police investigation. *See e.g.* Commonwealth v. Yasipour, 957 A.2d 734, 746 (Pa.Super. 2008) (evidence was sufficient to support a conviction of tampering with physical evidence where the police found defendant attempted to clean up the crime scene), *appeal denied*, 980 A.2d 111 (Pa. 2009). Accordingly, Defendant's Motion on this basis is without merit.

II. WEIGHT OF THE EVIDENCE

In a related matter, Defendant contends he is entitled to a new trial on the grounds that the verdict was against the weight of the evidence.

> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. [A] new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. Stated another way, . . . the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court.

Commonwealth v. Sullivan, 820 A.2d 795, 806 (Pa.Super. 2003) (citations, quotation marks, and emphasis omitted), *appeal denied*, 833 A.2d 143 (Pa. 2003).

A. FIRST DEGREE MURDER

Defendant challenges the weight of the evidence on the grounds that the expert testimony falls short of establishing whether Edwina is dead and whether Defendant caused her death.

Lisa Shutkufski, a forensic scientist with the State Police, testified that the three blood samples collected from Defendant's basement and tested for DNA were a match to Edwina's DNA profile. She further testified that the probability of randomly selecting an unrelated individual with this combination of DNA type was one in four hundred and thirty quintillion from the African American population. (N.T. 01/19/12, pp.31-32). Dr. John Planz, an associate director of the University of North Texas Center for Human Identification, testified that the mitochondrial DNA obtained from the hair sample collected from Defendant's residence belonged to the same maternal bloodline as Edwina's brothers. According to Dr. Planz, the probability of someone outside this bloodline having mitochondrial DNA matching that found in the hair was one in 1.8 trillion; thus, denoting that the source of the hair was a sibling of Edwina's brothers. (N.T. 01/23/12, pp.28-29, 36).

The Commonwealth also placed in evidence the opinion testimony of Trooper Phillip Barletto, an expert in crime scene processing and blood splatter analysis, that the blood evidence was indicative of an individual who had suffered a significant injury and that the pooling in the coal bin indicated such individual was in a stationary position for a prolonged period of time; the opinion testimony of Dr. Isidore Mihalakis, a forensic pathologist, that the evidence was consistent with someone suffering a significant injury caused by trauma or violence, and that the amount of blood loss suggested the person was in need of medical attention; and the opinion testimony of Paul Kish, a forensic consultant, that the injury was a serious one caused by criminal activity. (N.T. 01/13/12, pp.75-77; N.T. 01/23/12, pp.148-50). From this evidence, together with that set forth earlier when discussing Defendant's claim as to the sufficiency of the evidence, and the fact that Edwina was not seen by her family or friends since December of 2007, the jury determined that Edwina was dead.

In arguing that this conclusion is unsustainable, Defendant argues not only that the Commonwealth's evidence was untrustworthy and unreliable, but that the jury arbitrarily ignored and capriciously disregarded his evidence to the contrary, particularly that of two eyewitnesses, Pat Gordon and Doris Meitzler, who claimed to have seen Edwina after December

9, 2007. As to both, the jury had reason to doubt their testimony.

Pat Gordon is Defendant's mother. She testified that on three separate occasions after December 9, 2007, she saw Edwina. (N.T. 01/18/12, pp.194-95). On one of these occasions, she stated Edwina was a front seat passenger in a vehicle driven by one of Edwina's brothers which quickly passed where she was standing outside a McDonald's in Easton waiting for her daughter. (N.T. 01/18/12, pp.199-204, 206-07). No further details were provided as to the dates, times, or circumstances of the other two incidents. (N.T. 01/18/12, pp.195-96).

On each occasion when these observations were made, Ms. Gordon was by herself, with no one else present to confirm what she claimed to have observed. Ms. Gordon was unable to give any specific dates or times when these sightings occurred, other than to state that they occurred after Edwina disappeared. In fact, Ms. Gordon testified that she had suffered a stroke, had difficulty with her memory, and could not recall dates and times. (N.T. 01/18/12, pp.176-77, 188-89, 206). In addition to having an obvious interest in helping her son, Ms. Gordon's testimony was in complete contradiction to that of Edwina's brothers, each of whom denied having had any contact with Edwina since December 9, 2007.

The other eyewitness Defendant presented, Doris Meitzler ("Meitzler"), worked for Express Cash, a check cashing business in the Lehigh Valley. Meitzler testified she was familiar with Defendant, who cashed his payroll checks at Express Cash every two weeks, and Edwina, who frequently accompanied him. (N.T. 01/26/12, pp.31-33). She also testified that after learning through media reports that Edwina was missing and that Defendant was charged with her killing, she saw Edwina once or twice outside her office with another woman. (N.T. 01/26/12, pp.35-37). According to Meitzler, she intended to report what she had witnessed to the police but failed to do so because it slipped her mind. (N.T. 01/26/12, p.39).

On December 18, 2011, Meitzler gave a statement about observing Edwina to Defendant's private investigator. (Defense Exhibit No. 37). This statement was handwritten by the investigator and signed by Meitzler. However, in early January 2012, Meitzler signed a typewritten letter which was sent to defense counsel and Trooper William Maynard of the State Police Criminal Investigation Unit in which she repudiated her earlier statement and stated she could recall nothing about the case other than what she had seen in the news media. (Commonwealth Exhibit No. 60). This letter further stated that Defendant's private investigator had "put words in [her] mouth in order to obtain false and misleading statements." At trial, Meitzler

claimed that she had never read the typewritten letter, that it was prepared for her by her manager, and that it was wrong. (N.T. 01/26/12, pp.63, 66-69).

During her testimony, Meitzler wasn't certain about when she had seen Edwina last or how many times, claiming at one point that she had seen Edwina in 2010 and at another point that it was sometime between 2007 and 2009. (N.T. 01/26/12, pp.54-56). She also testified that it had to be between these two years because she first learned of Edwina's reported death from news media accounts in December 2007 which reported that Defendant was suspected in the disappearance and death of Edwina, and that 2009 was when Defendant was arrested. (N.T. 01/26/12, pp.56, 61). When told that the police only began their investigation of Edwina as a missing person in December 2007 and that Defendant was not arrested and charged until 2009, Meitzler backed off of her previous testimony and stated she did not know when she had last seen Edwina. (N.T. 01/26/12, pp.76-77). Meitzler further vacillated as to the number of times - between one and two - she saw Edwina after December 9, 2007. (N.T. 01/26/12, pp.38,54).

Meitzler was interviewed by Trooper Maynard on December 28, 2011, about the handwritten statement she first gave. On cross-examination, Meitzler agreed she told Maynard she had not read the statement the private investigator prepared before signing

it and she did not know what was in it; that she did not know the last date she had seen Edwina; that she had not given any specific date to the private investigator after which she saw Edwina; and that, at some point, Edwina suddenly stopped coming to Meitzler's place of employment. (N.T. 01/26/12, pp.73, 75-76). This interview with Trooper Maynard occurred ten days after the statement given to the private investigator and within a week or two prior to the typewritten letter.

Defendant also presented evidence that once before, in 2003, Edwina disappeared without notice for several weeks or months and went to Canada. (N.T. 01/11/12, p.33; N.T. 01/19/12, pp.150-51, 153, 204-05; N.T. 01/27/12, pp.53-55). That time, however, when Edwina left, she took all of her belongings with her. (N.T. 01/27/12, p.75). This was in obvious contrast to her present disappearance which, as of trial, was in excess of four years and after an intense search had been untaken, to no avail, to locate her. Also, unlike Edwina's previous disappearance, this time there was substantial reason to believe that Edwina was the victim of a crime and that Defendant was the perpetrator.

The Commonwealth's evidence that Defendant was the last person to see Edwina alive, that the circumstances of her disappearance and the results of its investigation to find her suggest death, that Defendant had a motive and expressed a

reason for killing Edwina, and that, subsequent to her disappearance, Edwina's blood was found in sufficient quantity throughout Defendant's basement to indicate a serious bodily injury, all support the conclusion that Edwina is dead and that Defendant is responsible. This evidence, which was not limited to expert testimony alone, also established that Edwina's death resulted from criminal agency.

Given the evidence, the verdict does not shock our conscience, nor will Defendant's conviction for murder in the first degree be set aside on this basis.

B. TAMPERING WITH THE EVIDENCE

Defendant further challenges the weight of the evidence to show Defendant acted with the requisite intent of concealing or removing physical evidence when he painted the basement steps and coal bin door, and later removed the dirt and two by four from the coal bin.

At trial, the Commonwealth proved that Defendant painted over blood on the basement steps and coal bin door, after knowing that Edwina was missing and that an investigation to find her - which was focusing on him - was underway, and before

the police conducted a full search of his home.[20] Furthermore, the Commonwealth established that Defendant removed dirt from the coal bin floor, as well as the two by four, after the initial search revealed evidence of Edwina's blood on these items.

Defendant's explanation of the foregoing, that he painted the steps to cover splinters (N.T. 01/18/12, p.193), the coal bin door to prevent a draft (N.T. 01/20/12, p.149), and removed between eight and ten inches of soil from the coal bin floor to make repairs and improvements (N.T. 01/18/12, pp.181-82, 190-92; N.T. 01/19/12, p.197; N.T. 01/20/12, p.150) was not so convincing or overwhelming as to require its acceptance by the jury. This is especially true given that the painting occurred within days after Defendant was questioned by the police about Edwina's whereabouts and he had been caught in a lie about her Capital One account. Further, the removal of the dirt from the coal bin occurred soon after Defendant was told that the blood in the basement was Edwina's.

From all of the evidence, the jury could fairly determine that Defendant committed these acts with the intent to hinder the police investigation. "[I]t is absurd to suggest that [Defendant] attempted to destroy the evidence for any reason

[20] Officer Tom's walk-through of Defendant's home on December 18, 2007 was just that, a brief view looking for a missing person and not a search looking for any signs or evidence of a crime. (N.T. 01/11/12, pp.46-48, 82-84).

other than to keep it out of the hands of police. . . . Certainly, by destroying evidence to avoid arrest, [Defendant] necessarily demonstrated his intent to impair a police investigation." Commonwealth v. Govens, 632 A.2d 1316, 1329 (Pa.Super. 1993) (emphasis in original), *appeal denied*, 652 A.2d 1321 (Pa. 1994). Accordingly, Defendant's conviction of tampering with the evidence was not so contrary to the evidence as to shock one's sense of justice.

III. DISCOVERY AND TRIAL ISSUES

Defendant raises one issue which occurred during discovery and five which occurred during trial which he contends entitle him to a new trial. We address each in the order presented.

A. DISCOVERY - BRADY VIOLATION

In answer to Defendant's pre-trial discovery requests, the Commonwealth produced in excess of 1,000 pages of documents with certain information blacked out. Defendant moved for the Commonwealth to produce clean and unredacted copies of these documents. The Commonwealth responded that the information redacted "concerns primarily the addresses and phone numbers of witnesses, but may also include social security numbers, dates of birth and drivers' license numbers." (*See* Order of Court dated November 12, 2010 ruling on Defendant's motion). This was

never disputed by Defendant. In its response, the Commonwealth further noted that none of the witnesses involved were eyewitnesses and that by redacting personal information of the type indicated, it sought, in part, to protect these individuals from certain persons who had been harassing potential witnesses and misrepresenting themselves as being from the District Attorney's office.

By order dated November 12, 2010, we denied Defendant's motion reasoning that none of the individuals whose personal information had been deleted were known to be eyewitnesses, that in denying Defendant's request the information which Defendant sought to have disclosed was not the subject of mandatory disclosure under Pa.R.Crim.P. 573(B)(1), and that Defendant had not shown that any of the information requested was material to the preparation of the defense, keeping in mind that the names of the witnesses and their statements had been disclosed. Defendant argues we erred in denying his motion.

Specifically, Defendant claims that some of the information redacted included e-mail names and internet protocol ("IP") addresses that may have been helpful to impeach Phoebe's trial testimony. This was never disclosed to us prior to trial nor do we know whether such information was in fact redacted by the Commonwealth. At the time we ruled on Defendant's pre-trial motion, no specific mention was made of e-mail names or IP

addresses. Nor did Defendant advise the court that e-mail names or IP addresses were of any significance to his questioning of Phoebe.

We see no error in our November 12, 2010 order given the information which was then made available to us and the arguments made by counsel. *See* Commonwealth v. Colson, 490 A.2d 811, 822-23 (Pa. 1985) (holding that the Commonwealth is not required to disclose names and addresses of all witnesses, only those of eyewitnesses and only on a discretionary basis), *abrogated on other grounds by* Commonwealth v. Burke, 781 A.2d 1136 (Pa. 2001); *see also* Pa.R.Crim.P. 573(B)(2).[21]

[21] Pa.R.Crim.P. 573(B)(2), which allows for the discovery of non-mandatory matters in the discretion of the court, provides, in relevant part, as follows:

> (a) In all court cases, except as otherwise provided in Rule 230 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, *upon a showing that they are material to the preparation of the defense*, and that the request is reasonable:
>
> (i) *the names and addresses of eyewitnesses*;
>
> (ii) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;
>
> (iii) all written and recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not; and
>
> (iv) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.

(emphasis added).

With respect to Defendant's reliance on the seminal case of Brady v. Maryland, 373 U.S. 83 (1963):

> A Brady violation consists of three elements: (1) suppression by the prosecution (2) of evidence, whether exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. No violation occurs if the evidence at issue is available to the defense from non-governmental sources. More importantly, a Brady violation only exists when the evidence is material to guilt or punishment, i.e., when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Commonwealth v. Burkett, 5 A.3d 1260, 1267 (Pa.Super. 2010) (citation and quotation marks omitted).

Defendant's claim of *Brady* error is misplaced for at least four reasons. First, Defendant has failed to demonstrate that the Commonwealth in fact withheld e-mail names and IP addresses relevant to the impeachment of Phoebe. Burkett, 5 A.3d at 1268 ("The burden of proof is on the defendant to establish that the Commonwealth withheld evidence."). Second, the type of information Defendant claims was withheld – e-mail names and IP addresses - is not in itself exculpatory or impeaching and it is not known whether access to this information would have led to information favorable to Defendant. Third, Defendant has not shown that the information sought was not available to him from non-governmental sources. At trial, it was evident that the e-mails with which he sought to impeach Phoebe and the e-mail

addresses from which they were sent were already in Defendant's possession.[22] Fourth, and most importantly, there is no basis to conclude that even if Defendant had been provided the information he claims to have been deprived of and that with this information he would have been able to prove, as Defendant intimated at trial, that Phoebe was plotting with Edwina to fabricate a resume for Edwina to seek political asylum in this country as a refugee from torture, that the result of the trial would have been different. Burkett, 5 A.3d at 1268 ("[T]he mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense.").

B. ADMISSIBILITY OF PRESUMPTIVE BLOOD TEST RESULTS

Defendant's first claim of trial error is that we erred in allowing in evidence the results of presumptive blood tests to establish that blood was found in Defendant's home.

On January 6, 2012, Defendant filed a motion *in limine* seeking to preclude, among other things, the introduction of presumptive tests to establish the presence of blood in

[22] When Phoebe was questioned at trial about several e-mails which Defendant believed had been sent by her, she denied having sent them. (N.T. 01/10/12, pp.63-64, 103-05). When Defendant then sought to track down the IP addresses for the computer from which the messages were sent in hope of impeaching Phoebe, we did not prevent Defendant from inquiring further on this subject, from subpoenaing records to obtain such information, or from employing an IP expert, if deemed necessary. (N.T. 01/10/12, pp.79-80, 89, 105, 128-29).

Defendant's home, arguing such tests are unreliable because they are not definitive. (Motion in *Limine* Pertaining to Testimony of John V. Planz, Ph.D., Trooper Phillip Barletto and Paul Erwin Kish, Paragraph 18). By order dated January 10, 2012, we denied Defendant's motion.[23] At trial, Defendant renewed his objection to the Commonwealth's introduction of presumptive test results arguing primarily, and more specifically, that these tests are inherently unreliable given their inability to distinguish between human or animal blood, and their susceptibility to false positives, not that presumptive tests are not generally accepted in the scientific community or that they are based on unreliable scientific methods. (N.T. 01/12/12, pp.177-78).

To better understand this issue, it is important to explain briefly the various tests administered in this case to detect and identify blood in suspected blood stains and smears found in Defendant's basement. First are presumptive tests, field tests designed to react with hemoglobin to indicate that blood may be present. (N.T. 01/13/12, p.51). Three types of presumptive testing were utilized by the police: phenolphthalein testing,[24]

[23] Within this order, we explained that with respect to "the evidence regarding the testing of blood and hair fibers found in Defendant's home, as well as genetic testing, the arguments made in Defendant's Motion go to the weight, not the admissibility, of the evidence." (Order of Court dated January 10, 2012).

[24] For this test, if blood is present, the phenolphthalein reacts with blood in the sample being tested to produce a hot pink color. (N.T. 01/13/12, p.51).

luminol testing,[25] and testing with leuco crystal violet.[26] Also utilized was a confirmation test, known as the Takayama test, used to determine with certainty whether blood is present in the sample.[27] While the three presumptive tests may react with other substances to give a false positive, a reaction similar to that which occurs when blood is present, a positive confirmation test is definitive for blood.[28] (N.T. 01/18/12, pp.70, 101). All four tests, however, do not distinguish between human and animal blood. (N.T. 01/18/12, p.70).

The third level of testing is the ring precipitant test. This test, by testing for human or higher primate proteins, is species specific: it is used to distinguish whether the substance being tested is from an animal, or from a human or higher primate.[29] (N.T. 01/18/12, p.66). It does not, however, determine whether the substance is blood. (N.T. 01/18/12,

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[25] For this test, luminol is sprayed on the unknown sample. When the room is darkened, a glowing effect indicates the presence of blood. (N.T. 01/13/12, p.51).

[26] For this test, leuco crystal violet is sprayed on an unknown sample, and then removed with either water or a methanol rinse. The sample will produce a purple color to indicate the presence of blood. (N.T. 01/13/12, pp.207-08).

[27] For this test, the unknown sample is mixed with a chemical (paradione) and heated. Red crystals form if there is a positive reaction to blood. (N.T. 01/18/12, pp.70, 100).

[28] As further confirmation of the presence of blood, in several instances more than one presumptive test was performed on the same stain. (*See, e.g.,* N.T. 01/13/12, pp.132-33).

[29] For this test, the unknown stain or sample is mixed with water and placed on top of a solution containing antibodies. If human or higher primate proteins are present in the sample being tested, the antibodies react with these proteins to form a white band precipitate at the interface between the two solutions. (N.T. 01/18/12, pp.64-65). Higher primates refers to any type of greater ape: gorillas, orangutans, and chimps. (N.T. 01/18/12, p.101). It does not include all monkeys. *Id.*

pp.119, 145-46). Finally, there is DNA testing, which while specific to an individual, also does not identify the tissue or fluid (e.g., bone, blood, saliva) from which the sample is taken. (N.T. 01/19/12, pp.16-17, 42).

At trial, Trooper Barletto testified that several samples of suspected blood found in Defendant's basement gave a positive presumptive test. On cross-examination, Trooper Barletto acknowledged that presumptive testing by itself does not distinguish between human and animal blood.[30]

Trooper Barletto was followed by Gordon Calvert, a forensic scientist with the State Police, who conducted presumptive (here, phenolphthalein), confirmatory, and ring precipitant testing on several of the samples collected. Mr. Calvert testified that although the presumptive test is subject to false positives,[31] this rarely happens. (N.T. 01/18/12, p.68).

In two instances where the presumptive test results conducted by Mr. Calvert differed from the confirmatory test results, the presumptive test being positive and the confirmatory test negative, one explanation given by Mr. Calvert

[30] This was particularly important in this case since Defendant was an active trapper, and skinned and dressed what he caught in the basement. (N.T. 01/19/12, pp.139, 220, 229).

[31] According to Mr. Calvert's testimony, "other peroxidases . . . like horseradish and I think potatoes, they have been known to give positive reactions to this test, however, this usually only happens after an extended period of time . . . ." (N.T. 01/18/12, p.68). In addition to horseradish and potatoes, Trooper Barletto also identified citrus juice and rust as substances that can give a false positive. (N.T. 01/16/12, pp.38-39). Trooper Barletto further testified that liminol can give a false positive for cooper, fecal matter and for some bleaches. (N.T. 01/16/12, pp.94-95).

for this difference was that the sample tested contained an insufficient quantity of blood to be detected by the confirmatory test, which is less sensitive to blood than the presumptive test.[32] Two additional reasons given for the negative confirmatory test were that the substance tested was not blood or there was an interference from a second substance in the sample. (N.T. 01/18/12, pp.82-83, 148).

In three instances, the ring precipitant test performed by Mr. Calvert was negative when the presumptive test was positive. (N.T. 01/18/12, pp.84-90). Given the extra sensitivity of the presumptive test to small quantities of blood, Mr. Calvert explained that this could occur if the sample tested was too small, if there were no human or higher primate proteins present, or if there was an interference. (N.T. 01/18/12, p.85).

In addition, the Commonwealth presented the testimony of Ms. Shutkufski, who testified to conducting DNA testing on three of the samples by Mr. Calvert. In each, Ms. Shutkufski determined Edwina's DNA profile was consistent with that found in the sample. One of these was one of the two samples which

[32] In both instances, the ring precipitant test, which is more sensitive to blood than the confirmatory test but less sensitive than presumptive testing, was also positive. (N.T. 01/18/12, pp.84, 90-91, 119). Further, in one of these samples, that taken from the fourth step in Defendant's basement, DNA testing was found to be a DNA match for Edwina. (N.T. 01/18/12, p.91; N.T. 01/19/12, pp.19-21).

Mr. Calvert had tested and found a positive presumptive test but a negative confirmatory test.[33]

Evidence need not be conclusive to be admissible. Commonwealth v. Crews, 640 A.2d 395, 402 (Pa. 1994). In Commonwealth v. Romano, 141 A.2d 597, 600-601 (Pa. 1958), the Pennsylvania Supreme Court upheld the admissibility of chemical testing to prove that certain stains found on clothing and money were blood, even though the expert was unable to distinguish whether the blood was human or animal blood, or whether it was from the decedent or of the defendant, because of the small quality available for testing. Specifically, the Court held that evidence of blood was a circumstance to be considered by the jury and, even further, that expert testimony is not required to identify a substance as being blood. Id. (citing Gains v. Commonwealth, 50 Pa. 319 (1865)). Additionally, in Commonwealth v. Hetzel, 822 A.2d 747, 762 (Pa.Super. 2003), *appeal denied*, 839 A.2d 351 (Pa. 2003), the Pennsylvania Superior Court held that as long as the qualifications and limitations of presumptive testing are fully described to the jury, it is not error to admit the results of presumptive tests.

[33] *See*, *supra* note 32. These findings are consistent with the presumptive test correctly signaling blood, an insufficient sample amount to yield a positive confirmatory test, and a DNA profile confirming the substance is human. It is also possible in this scenario that the presumptive test could be giving a false positive, and that the substance being tested is a human specimen other than blood, such as saliva or urine, which would also give a DNA match for a human. (N.T. 01/13/12, p.193).

Under such circumstances, the inability of the test to distinguish between human and animal blood, and the possibility that some substance other than blood may trigger a positive test, goes to the weight, not the admissibility of the evidence. *Id*. at 762.

The bloodstains were one piece of evidence linking Defendant to Edwina's death. In evaluating whether the stains found in Defendant's basement were blood, and if so, were human blood, and if so, were Edwina's blood, the jury was permitted to consider not only the results of the presumptive tests, but also the results of the multiple other tests performed. This is allowed under the case law provided the qualifications and limitations of the tests are fully explained to the jury, including that presumptive tests are not conclusive for blood. Since this was done, we find no error was committed.

Before leaving this issue, we also note that at trial, almost as an afterthought, Defendant for the first time nominally raised a *Frye* challenge to the use of presumptive blood tests on the apparent basis that these tests are subject to false positives. (N.T. 01/12/12, p.224). As was explained to counsel "[a] *Frye* challenge is where the defense is challenging the novelty of scientific principles or the methodology by which scientific conclusions are made." (N.T. 01/12/12, p.178); *see also* Commonwealth v. Hall, 867 A.2d 619,

633 (Pa.Super. 2005) ("*Frye* requires that, before novel scientific evidence is admissible in criminal trials, the theories and methods of that evidence 'must have gained general acceptance in the relevant scientific community.'").

As is evident from the reasons set forth by Defendant for this challenge, Defendant's challenge is based upon the certainty of the test results, not upon any novel or untested scientific principle or methodology. Moreover, Defendant presented no expert evidence questioning the validity of the scientific principles or methodology underlying the test results.[34] For these reasons, we believe it unnecessary to address this claim further and find it to be without merit. *Cf.* Hetzel, 822 A.2d at 761 (finding that since a *Frey* challenge to the validity and admissibility of presumptive blood testing had not been made, no further discussion was necessary on this point).

[34] In discussing the *Frye* test, the Pennsylvania Superior Court recently stated:

> The *Frye* test is a two-step process. First, the party opposing the evidence must show that the scientific evidence is novel by demonstrating that there is a legitimate dispute regarding the reliability of the expert's conclusions. If the moving party has identified novel scientific evidence, then the proponent of the scientific evidence must show that the expert's methodology has general acceptance in the relevant scientific community despite the legitimate dispute.

Commonwealth v. Foley, 38 A.3d 882, 888 (Pa.Super. 2012) (citations and quotation marks omitted).

C. TESTIMONY OF TROOPER PHILLIP BARLETTO

Defendant argues that we erred in permitting Trooper Barletto to testify to the type and extent of the bleeding evidenced by the pools of blood found in Defendant's coal bin because he was an expert in blood spatter analysis, and not a medical expert.

The purpose of expert testimony is to assist the jury in grasping complex issues not within the knowledge, intelligence, and experience of the ordinary layperson. Pa.R.E. 702. Where a witness has a reasonable pretension to specialized knowledge on a subject matter under investigation, the witness may testify as an expert and the weight to be given such testimony is for the jury to decide. Commonwealth v. Gonzalez, 546 A.2d 26, 31 (Pa. 1988). "It is also well established that an expert may render an opinion based on training and experience; formal education on the subject matter is not necessarily required." Commonwealth. V. Copenhefer, 719 A.2d 242, 254-55 (Pa. 1998).

In his brief, Defendant fails to establish how Trooper Barletto's testimony, which was essentially cumulative to that of Dr. Mihalakis' and Mr. Kish's, prejudiced him. Notwithstanding this fact, a review of Trooper Barletto's training and experience clearly establishes that he was qualified to render opinions about the blood found in the coal bin. Trooper Barletto stated during *voir dire* that he has been

a member of the forensic services unit with the State Police for the past fourteen years, that he has processed over 1,820 crime scenes, and that he has participated in 310 death investigations. (N.T. 01/13/12, pp.18-19). He further testified that his training in blood splatter analysis began in February of 1998. (N.T. 01/13/12, pp.20-22). Since then, the trooper testified to receiving advanced training in blood spatter analysis as well as training in forensic photography, fingerprint analysis, evidence collection, and crime scene analysis. (N.T. 01/13/12, p.20). In addition, he testified to attending a weeklong class conducted by Paul Kish, a recognized expert on blood spatter analysis. (N.T. 01/13/12, p.21).

Instantly, Defendant challenges Trooper Barletto's opinion that the pooling in the coal bin came from an individual who had lost a "significant" amount of blood, sustained a "significant wound," and was in a stationary position "for a prolonged period of time." (N.T. 01/13/12, pp.75-77). Given Trooper Barletto's practical experience and training, we found that these opinions were within Trooper Barletto's expertise and would assist the jury in understanding the evidence. Essentially, Trooper Barletto's opinion amounted to an interpretation of the physical evidence based upon the shape, location, amount, and distribution of blood found in Defendant's coal bin and basement. We find no error in having admitted this testimony.

Next, Defendant asserts that we erred in allowing the trooper to give his opinion that the painting of various areas in the basement, the removal of soil, and the removing of the two by four were indicative of a "cover-up."[35] It is "well-settled that a defendant's failure to object to allegedly improper testimony at the appropriate stage in the questioning of the witness constitutes a waiver." Commonwealth v. Molina, 33 A.3d 51, 55 (Pa.Super. 2011) (citation omitted). Since Defendant failed to object to this testimony at the time of trial, we deem this claim waived.

D. JULIANNE SNEARY'S TESTIMONY

The third trial issue Defendant raises is Sneary's testimony about a statement Defendant made that for them to

[35] The trooper's testimony was as follows:

> Mr. Dobias: Trooper Barletto, maybe I'm not doing a good job in asking the question, but looking at the blood stains and the blood transfers in the basement as well as the painting of the various areas, the removing of the soil and the removing of that piece of wood that's in the coal bin door, what does that tell you?
>
> Trooper Barletto: That, in fact, the scene had been tampered with, that evidence had been removed or, therefore, covered up. The painting of the steps, the painting of the coal bin door, taking the entirety of the residence, looking at the coal bin door, looking at the steps, to have them recently painted like that and then to find blood where the steps weren't painted indicates a cover-up to me. The mere fact that the two by four which had originally been at the residence had been removed, it had blood on it, the soil had been taken out of the basement, out of the coal bin, that and the totality of all those circumstances would indicate to me that the scene had been tampered with and a crime had been covered up.

(N.T. 01/13/12, pp.152-53).

marry he might have to kill Edwina. This statement occurred within a year of Edwina's disappearance during a conversation in which Sneary and Defendant were discussing their marriage plans, something they had been discussing for several years, in part because Sneary's parents, especially her mother, were upset with her for having a relationship with a married man and fathering children with him. Defendant's statement was made in response to Sneary's comment that it made no sense to make wedding plans as long as he was married.

On January 9, 2012, Defendant filed a motion *in limine* seeking, among other things, to preclude Sneary from testifying about this conversation. By order dated January 10, 2012, we directed "counsel to provide the court with legal authority in support of their respective positions on the admission of this statement . . . ." (Order of Court dated January 10, 2012).

Before Sneary testified, counsel was given an opportunity to argue their positions further. Moreover, we first heard Sneary's testimony *in camera*. (N.T. 01/19/12, p.172). When asked about their conversation, Sneary indicated Defendant told her in "a frustrated quipper remark . . . that the only way he'd be able to get rid of [Edwina] is to kill her." (N.T. 01/19/12, p.176). She further defined a quip as "a remark made not necessarily to be funny, but at the moment it did not appear to be a remark to be taken seriously." (N.T. 01/19/12, p.178).

In ruling Sneary's testimony admissible, we relied upon the decision of the Superior Court in Commonwealth v. Showers, 681 A.2d 746 (Pa.Super. 1996), *appeal denied*, 685 A.2d 544 (Pa. 1996), which held that

> evidence concerning the nature of the marital relationship [between a defendant and a homicide victim] is admissible for the purpose of proving ill will, motive or malice. This includes, in particular, evidence that the accused physically abused his or her spouse. . . . [I]t is generally true that remoteness of the prior instances of hostility and strained relations affects the weight of that evidence and not its admissibility. . . . [N]o rigid rule can be formulated for determining when such evidence is no longer relevant.

Id. at 754 (quoting Commonwealth v. Ulatoski, 371 A.2d 186, 190-91 (Pa. 1977)). We also found Sneary's characterization of the statement as a quip went to its weight, and not its admissibility. Accordingly, the jury heard Sneary's account of what Defendant said.[36] (N.T. 01/19/12, p.202).

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[36] The testimony heard by the jury included the following exchange:

> Mr. Dobias: And when you say – I think you said the status of things between Troy and Edwina, what do you mean by that?
>
> Ms. Sneary: When a divorce would be forthcoming and that.
>
> Mr. Dobias: And can you tell the jury what did the Defendant say at that time?
>
> Ms. Sneary: He said that, um, that it wouldn't be possible until she got her citizenship.
>
> Mr. Dobias: What else did he say?
>
> Ms. Sneary: He – he had mentioned that the only way he could get rid of her would be to kill her.

(N.T. 01/19/12, p.202). During cross-examination, defense counsel asked Sneary to characterize the statement, to which she replied that it was a quip - "a remark made out of frustration, not a joke but not necessarily intended

The challenged testimony consists of evidence probative of Defendant's state of mind and reveals a clear motive why he would kill Edwina.[37] Defendant's statement was clearly relevant to at least two main issues in the case: whether Defendant killed his wife and whether he intended to do so. *See* Commonwealth v. Bederka, 331 A.2d 181, 184 (Pa. 1975) (testimony by daughter-in-law that appellant had stated he was going to kill his wife and then himself was admissible to show appellant's "state of mind toward certain persons with respect to a particular subject"). Whether this statement was said in jest or in a moment of candor goes to its weight, not its admissibility. As such, the statement was properly admitted.

As part of this issue, it appears that Defendant is now claiming that we also erred in allowing the introduction of this statement prior to the Commonwealth's proof of the *corpus delicti*. Beyond the failure of Defendant to object on this basis, "[t]he order of proof is a matter within the realm of (the trial court's) judicial discretion." Burns, 187 A.2d at 562. The law does not require that the *corpus delicti* be

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to be taken seriously." (N.T. 01/19/12, p.226). Sneary also testified the statement was one she never forgot. (N.T. 01/19/12, pp.202-03).

[37] When interviewed by the police on January 14, 2008, Defendant denied that he had planned to marry Sneary and, inferentially, that he had a motive to kill Edwina. (N.T. 01/19/12, p.151). This was the same date that Defendant admitted lying to the police about his possession and use of Edwina's Capital One credit card (N.T. 01/19/12, pp.80-81), and also the same or one day previous to when he painted the basement steps. (N.T. 01/19/12, pp.195, 217-18).

established prior to the admission of the inculpatory statement as it can be established following its admission. *See e.g.* Commonwealth v. Smallwood, 442 A.2d 222, 225 (Pa. 1982) (in a prosecution for murder and arson, the court did not err in admitting testimony concerning defendant's statement, which was proffered before the *corpus delicti* of arson was established, where Commonwealth subsequently did establish the *corpus delicti* and could have obtained the admission of the testimony thereafter). Nevertheless, we find the *corpus delicti* was, in fact, established prior to the introduction of the statement. Therefore, no violation of the principle of *corpus delicti* has been made out.

E. TESTIMONY OF DR. ISIDORE MIHALAKIS

Next, Defendant contends we erred in failing to declare a mistrial *sua sponte* in response to an allegedly prejudicial remark made by Dr. Isidore Mihalakis, an expert in the field of forensic pathology.

The decision of whether to declare a mistrial *sua sponte* upon a showing of manifest necessity rests within the discretion of the trial court. Commonwealth v. Hoovler, 880 A.2d 1258 (Pa.Super. 2005), *appeal denied*, 890 A.2d 1057 (Pa. 2005).

> The determination by a trial court to declare a mistrial after jeopardy has attached is not one to be lightly undertaken, since the defendant has a substantial interest in having his fate determined by

> the jury first impaneled. Additionally, failure to consider if there are less drastic alternatives to a mistrial creates doubt about the propriety of the exercise of the trial judge's discretion and is grounds for barring retrial because it indicates that the court failed to properly consider the defendant's significant interest in whether or not to take the case from the jury.

Commonwealth v. Kelly, 797 A.2d 925, 936 (Pa.Super. 2002).

At trial, the Commonwealth asked Dr. Mihalakis if he had formed an opinion as to whether the scene in Defendant's basement was "consistent with or indicative of serious bodily injury or even homicide." (N.T. 01/23/12, p.150). Defense counsel objected, and we sustained the objection.[38] (N.T. 01/23/12, pp.151-52). The Commonwealth was allowed to rephrase the question, this time simply asking the doctor if the scene was indicative of serious bodily injury to which he replied: "Yes, I believe it is indicative of significant bodily injury or homicide." (N.T. 01/23/12, pp.152-53). Defense counsel again objected and we sustained, directing that the remark be

[38] In his report of February 18, 2008, Dr. Mihalakis expressed the opinion that the amount and location of blood found in Defendant's basement was indicative of an individual who had suffered trauma. Furthermore, he opined, relying on what he called "interpersonal factors," that it was apparent this individual is now dead. Because the "interpersonal factors" to which Dr. Mihalakis referred in opining Edwina was dead – factors such as her unexplained disappearance, failure to contact friends and family, and failure to return to work – were all factors which the jury could interpret on its own, without the need for expert testimony, we declined to allow Dr. Mihalakis to make this conclusion for the jury. Moreover, Dr. Mihalakis did not opine in his report that the nature of the wounds sustained were indicative of a homicide. Hence, if allowed to testify to the question posed, Dr. Mihalakis would have been giving an opinion that went beyond the scope of his report.

stricken.[39] Later, during closing instructions, we reminded the jury to disregard any testimony that had been previously stricken and "not [to] base any of [their] findings upon it."[40] (N.T. 01/30/12, p.163). A similar preliminary instruction was given prior to any testimony being taken. (N.T. 01/09/12, p.6).

Though Defendant failed to request a mistrial,[41] he now asserts that Dr. Mihalakis' remark was so prejudicial as to give rise to manifest necessity such that this court was required, as a matter of law, to declare a mistrial *sua sponte*. Not every unwise or irrelevant remark made in the course of a trial by a witness, however, compels the granting of a new trial. In order

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[39] The exact words exchanged were as follows:

> Mr. Dobias: Doctor, let me go back. Do you have an opinion as to whether or not the scene in Mr. Freeby's basement, again, the totality of the situation, is consistent with or indicative of serious bodily injury?
>
> Mr. Dydynsky: Objection as to what does he mean by totality of the situation.
>
> Court: I'm going to overrule that objection.
>
> Dr. Mihalakis: Yes, I believe it is indicative of significant bodily injury or homicide.
>
> Mr. Dydynsky: Objection.
>
> Court: I'm going to sustain that objection. That answer will be stricken.

(N.T. 01/23/12, pp.152-53).

[40] The actual instruction was the following:

> If there was any testimony which was stricken from the record, and I know that happened on a number of occasions, then you are to disregard that testimony and treat it as though you had never heard it and not base any of your findings upon it.

(N.T. 01/30/12, p.163)

[41] *See* Commonwealth v. Ables, 590 A.2d 334, 340 (Pa.Super. 1991) (holding that a request for mistrial must be made at time of prejudicial event in order to preserve perceivied trial error), *appeal denied*, 597 A.2d 1150 (Pa. 1991).

for a mistrial to be declared, the remark must be of such "a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial." Commonwealth v. Sullivan, 820 A.2d 795, 800 (Pa.Super. 2003), *appeal denied*, 833 A.2d 143 (Pa. 2003).

Dr. Mihalakis' remark does not rise to this level. This is especially so given the court's immediate instruction that the testimony be stricken together with our opening and closing instructions that the jury not base its finding upon stricken testimony. *See* Commonwealth v. Lee, 662 A.2d 645, 653 (Pa. 1995) (no mistrial warranted where court sustained the objection, cautioned the jury that the testimony should be disregarded, and later instructed the jury not to consider in its deliberations any evidence that the court had previously told it to disregard); Commonwealth v. Brown, 786 A.2d 961, 971 (Pa. 2001) (the law presumes that the jury will follow the instructions of the court). We believe these instructions to have been enough to cure whatever prejudice, if any, resulted from the remark.

Moreover, the record demonstrates overwhelming evidence of a homicide, even without Dr. Mihalakis' comment. In such circumstances, it cannot reasonably be said that Dr. Mihalakis' remark deprived Defendant of a fair and impartial trial. Thus,

we find that Defendant is not entitled to a new trial on this issue.

F. ATTORNEY-CLIENT PRIVILEGE

As his final trial issue, Defendant argues it was error to permit Attorney Dennis Mulligan to assert attorney-client privilege on behalf of his client, Edwina.

Attorney Mulligan was called by the defense to identify several documents, as well as to testify about his representation of Defendant and Edwina with respect to proceedings pending against her for deportation.[42] Prior to Attorney Mulligan's trial testimony, on September 27, 2011, Defendant filed a Petition/Motion for Waiver of Attorney/Client Privilege and for the Production of Documents and Testimony of Dennis Mulligan, Esquire. A hearing was held on October 25, 2011. At that time Attorney Mulligan asserted attorney-client privilege on behalf of Edwina with respect to three areas of inquiry: how Edwina entered this country; whether Edwina claimed to be a victim of torture; and what Edwina told him regarding her sisters. (N.T. 11/25/11, pp.36-39, 72, 76-77).

[42] To explain Edwina's sudden disappearance, part of Defendant's defense was that Edwina had gone into hiding to avoid deportation. In line with this argument, Defendant hoped to show through Attorney Mulligan that Edwina was running out of time in the deportation proceedings and that if it were determined she had entered this country illegally, her chances of establishing permanent residency status were virtually non-existent.

At the conclusion of this hearing, we granted defense counsel ten days to provide us with legal authority in the event that counsel sought to challenge the exercise of the privilege. (N.T. 11/25/11, p.80). After no legal memorandum was submitted, we issued an order dated January 9, 2012, denying and dismissing Defendant's request.[43] Notwithstanding this procedural history, at trial defense counsel again asked Attorney Mulligan whether he knew "how [Edwina] was admitted to the United States in terms of actual admission as to what she told you." (N.T. 01/26/12, pp.195-96). To this question Attorney Mulligan invoked the attorney-client privilege. (N.T. 01/26/12, p.196).

The attorney-client privilege, as it pertains to criminal matters in Pennsylvania, is set forth as follows:

> In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S. § 5916;[44] *see also* Gillard v. AIG Insurance Company, 15 A.3d 44 (Pa. 2011) (holding the attorney-client privilege is a two-way street, applying to both client communications and

[43] In this order we also noted our belief that Defendant had abandoned his earlier reservation of perhaps seeking to set aside the privilege as claimed by Attorney Mulligan, defense counsel having advised the court at the conclusion of the hearing that he was unsure whether he would be pursuing the issue further and would be filing the requested legal authority if he intended to do so.

[44] 42 Pa.C.S. § 5928 contains the same language with respect to civil matters.

attorney advice, so long as the purpose of the communication is to secure or provide professional legal services).

It is undisputed that Attorney Mulligan was representing Edwina in her efforts to avoid deportation. It is also clear that information regarding how she entered this country was a communication relating to those proceedings and was at issue.[45] Consequently, there is no question that the attorney-client privilege was properly invoked. Carbis Walker, LLP v. Hill, Barth & King, LLC, 930 A.2d 573, 579 (Pa.Super. 2007) (listing the four elements necessary to secure successful enforcement of the privilege). Therefore, the burden was upon Defendant to show that "disclosure [would] not violate the attorney-client privilege, e.g., because the privilege [had] been waived or because some exception [applied]." *Id.* at 581 (citation and quotation marks omitted).

[45] Attorney Mulligan explained that Edwina was involved in two separate and independent proceedings: a deportation or removal proceeding pending before the immigration court and a request for permanent resident status filed with the United States Department of Justice, Office of Immigration and Naturalization Service. The latter consists of a two-step process: a relative petition by a United States citizen, followed by an application for adjustment of status to that of a lawful permanent resident. The relative petition was filed in August 2006 by Defendant and approved in May 2007. Edwina's application for adjustment of status was filed in June 2007 but, due to various clerical errors, not acted upon prior to her disappearance in December 2007. For the application for adjustment of status to be approved, it is necessary that the applicant have entered this country legally and been inspected. (N.T. 01/26/12, pp.194-95). Whether this had occurred, was one of the issues Attorney Mulligan was reviewing with Edwina at the time of her disappearance. (N.T. 01/26/12, p.195). It was his belief that if Edwina had been successful in obtaining legal status in this country through the process of applying for permanent resident status based upon her marriage to a United States citizen, she would have been able to avoid deportation.

Defendant argues that since Attorney Mulligan was representing both himself and Edwina in her efforts to obtain permanent residence status, and thus to avoid deportation, the privilege does not prevent disclosure to him. Essentially, Defendant claims that because of this dual representation, a communication between Edwina and Attorney Mulligan should be viewed the same as a communication by him to Attorney Mulligan.[46] Defendant cites no authority to support this position and, at least in the context of this case, we believe the law to be to the contrary.

The holder of the attorney-client privilege is the client and the attorney, without the consent of the client, cannot be compelled to reveal or disclose the communication. Commonwealth v. Maguigan, 511 A.2d 1327, 1333-34 (Pa. 1996). While it is true that when former co-clients of the same counsel representing them in a matter of common interest sue one another, all communications made in the course of the joint representation are discoverable, Loutzenhiser v. Doddo, 260 A.2d 745, 748 (Pa. 1970), such is not the case here. As is apparent from the nature of these proceedings, Defendant and Edwina are not adverse parties. Instead, Defendant is a defendant in a criminal proceeding charged with killing his wife. *See also* In

[46] In this regard, there is no evidence that Defendant was actually present and able to hear whatever Edwina may have told Attorney Mulligan regarding the circumstances of her admission to this country.

re Teleglobe Communications, Corp., 493 F.3d 345, 363 (3rd Cir. 2007) (recognizing a joint client may unilaterally waive privilege concerning his own communications with attorney, but may not waive privilege as to communications by any other joint client). Thus, Attorney Mulligan was entitled to assert the privilege on behalf of Edwina.

IV. AFTER-DISCOVERED EVIDENCE

As his final claim, Defendant argues he is entitled to relief on the basis of after-discovered evidence.

> After-discovered evidence is the basis for a new trial when it: 1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of trial by the exercise of reasonable diligence; 2) is not merely corroborative or cumulative; 3) will not be used solely for impeaching the credibility of a witness; and 4) is of such nature and character that a new verdict will likely result if a new trial is granted. Further, the proposed new evidence must be "produced and admissible."

Commonwealth v. Chamberlain, 30 A.3d 381, 414 (Pa. 2011) (citations omitted). Additionally, "[i]n order for after-discovered evidence to be exculpatory, it must be material to a determination of guilt or innocence." Id. at 416. A new trial is warranted only where the defendant has demonstrated each factor by a preponderance of the evidence. Commonwealth v. Padillas, 997 A.2d 356, 363 (Pa.Super. 2010), *appeal denied*, 14 A.3d 826 (Pa. 2010).

A. EVIDENCE OF REAL ESTATE HOLDINGS

In his brief in support of his post-sentence motion, Defendant contends that during trial and for more than a year preceding trial, the defense hired a private investigator to determine, among other things, whether Edwina had financial holdings or interests in Kenya. Prior to the conclusion of trial, Defendant admits to receiving verbal information from the investigator, which defense used when cross-examining Edwina's family members. According to Defendant, a final written report detailing the extent of Edwina's holdings was not received, however, until after the conclusion of trial. This report, titled "Report of Investigations," forms the basis of this claim of after-discovered evidence.[47]

Presently, Defendant has failed to explain why he could not have produced the evidence at or before trial by the exercise of due diligence. The Report of Investigations shows that the letter from the investigator containing his findings is dated January 19, 2012. Therefore, the evidence which forms the basis for this claim was, in fact, discovered prior to the conclusion of trial, which ended on January 30, 2012. (Report of Investigations, 01/19/12, p.1); *see* Commonwealth v. Chambers, 599 A.2d 630, 641 (Pa. 1991) (a defendant who fails to question

[47] We note that Defendant did not file a copy of this report until September 20, 2012, one month after the filing of his brief in support of his post-sentence motion. Though untimely, we have reviewed the report.

or investigate an obvious, available source of information, cannot later claim evidence from that source constitutes newly discovered evidence).

Further, Defendant has failed to demonstrate that the sole purpose of the evidence was not for impeachment purposes or merely to corroborate Defendant's belief that Edwina was in hiding. In his brief, Defendant states that he intends on using the evidence to "impeach the untruthfulness of the Onyango witnesses" and "to show a determined pattern of deception and determination by the Onyangos to establish control over [Ediwna's] real estate in Kenya." (Defendant's Brief in Support of His Post-Trial Motion, p.21). Lastly, a reading of the report indicates that the nature and character of the evidence is not such as would likely result in a different verdict because it is at best tangential to the core evidence linking Defendant to Edwina's disappearance and death.

As such, the evidence upon which Defendant bases this claim is insufficient to entitle him to a new trial.

B. EVIDENCE FROM AN INTERNET PROTOCOL (IP) EXPERT

In his last issue, Defendant asserts he is entitled to a new trial based upon the possibility that after-discovered expert evidence could establish that Phoebe authored the e-mails the defense attempted to introduce when cross-examining her at

trial. This issue overlaps and is a variation of that previously discussed with respect to discovery, but now recast as after-discovered evidence.

Defendant acknowledges that he was given multiple e-mails from the Commonwealth during discovery, which he assumed were authored by Phoebe. However, when questioned at trial, Phoebe denied writing several of these e-mails. Defendant contends he was unable to refute her testimony because he had not employed an IP computer expert. Defendant now asks this court to grant him the remedy of a new trial in order to present testimony from an expert who could testify that the e-mails were sent from Phoebe's computer IP address.

Accepting for the moment that such evidence even exists, Defendant has failed to meet the standards required to support this claim of after-discovered evidence by a preponderance of the evidence. First, such evidence could have been obtained at or prior to the conclusion of trial by the exercise of reasonable diligence. Second, it seems that Defendant's only use for the evidence would be to impeach the credibility of Phoebe as Defendant states in his brief that he would use the evidence to show that "Phoebe Onyango was a liar, and is covering up the disappearance of her sister" and to "expose the interest of the Onyango family in having the Defendant found guilty of murder because in this way they would be the heirs to

the holdings of Onyango." (Defendant's Brief in Support of His Post-Trial Motion, p.22). Finally, critically absent from Defendant's claim is proof that such evidence even exists. Without Defendant producing the proposed new evidence, the claim is wholly speculative and unsubstantiated. *See* Commonwealth v. Dickerson, 900 A.2d 407 (Pa.Super. 2006) (holding that the appellant's mere assertions were insufficient to support after-discovered evidence exception), *appeal denied*, 911 A.2d 933 (Pa. 2006). Accordingly, we deny Defendant's request for a new trial on this issue.[48]

CONCLUSION

In accordance with the forgoing, we conclude Defendant's contentions are without merit. We, therefore, find that Defendant is not entitled to any of the remedies he seeks.

BY THE COURT:

_____

P.J.

[48] We also note, in accordance with defense counsel's representations to the court at the time of trial, that an IP address can only show from which computer an e-mail was sent, not who sent it. (N.T. 01/10/12, p.80). Consequently, even if Defendant were to establish that the e-mails in question were sent from Phoebe's computer, their authenticity and that they were sent by Phoebe would still be in issue. *See* Commonwealth v. Koch, 39 A.3d. 996 (Pa.Super. 2011) (noting that the mere fact that an e-mail bears a particular e-mail address or comes from a particular computer is inadequate to authenticate the identity of the author; courts oftentimes demand that the messages themselves contain factual information or references unique to the parties involved), *appeal granted*, 44 A.3d 1147 (Pa. 2012).