

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANGELO ROMERO,	:	
	:	
Petitioner	:	
v.	:	No. 04-1687
	:	
..SUPERINTENDENT SCI GREEN,	:	
LOUIS FOLINO, et al.	:	
Respondent	:	

MEMORANDUM

GREEN, S.J.

August 24 , 2005

Presently pending is the Petition for Writ of Habeas Corpus relief, the Report and Recommendation ("Report") of United States Magistrate Judge Thomas J. Rueter, Petitioner's timely Objections to the Report, and the Response to Petitioner's Objections. For the following reasons Petitioner's Objections will be overruled and the Report will be approved and adopted.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this matter are set forth at length in the Report, and because there is no dispute regarding such, they will be incorporated by reference herein. The claims set forth in the petition for habeas corpus are as follows:

1. Trial counsel was ineffective because he did not object to the court's instructions which placed the burden of establishing the absence of malice on the accused insofar as voluntary manslaughter was concerned. Direct appellate counsel was ineffective for failing to raise this argument on direct appeal;

2. Appellate counsel was ineffective for failing to raise the preserved objections to the prosecutor's cross-examination of defense witness Delores Edwards as to whether she knew that the main Commonwealth witness, Mildred Jones, had been shot nine times after she had become a witness in Petitioner's case;

3. Trial counsel was ineffective because he failed to object to the court's definition of reasonable doubt which allowed the jury to exclude reasonable doubts to which petitioner was constitutionally entitled. Direct

appellate counsel was ineffective for failing to raise this argument on direct appeal.

The Report recommends that the petition be denied because the trial court's jury instructions did not improperly placed the burden of establishing the absence of malice on Petitioner. In his Objections to the Report, Petitioner states that he is not objecting to the Superior Court of Pennsylvania's determination that the jury instructions did not violate Pennsylvania state law. Rather, Petitioner argues that trial counsel's failure to object to the questioned instructions violate the due process provisions of the federal constitution. (Pet. Obj. at 5). The Magistrate Judge concluded that the trial court instructions did not violate either state or federal law and that neither trial nor appellate counsel were ineffective for failing to object to the instructions. At trial part of the court's instructions to the jury stated:

Even if you do not find defendant guilty of murder under the circumstances I have given you, you may, nevertheless, find him guilty of voluntary manslaughter if you're satisfied, beyond a reasonable doubt, that he caused the death of the victim intentionally or knowingly and that any belief he may have had in justification of the killing was an unreasonable belief.

. . . .
If you do not find the defendant had malice but did the killing, you may find him guilty of voluntary manslaughter as long as you're satisfied the following three elements have been proven beyond a reasonable doubt: First, the victim is dead; second, the defendant or an accomplice with whom he agreed to kill the person, killed him, and that he did it with the intent to kill but without malice, as I have defined it.

(N.T., 4/3/97, at 195-96.) Petitioner objects to the Magistrate's conclusion on this issue and argues that the instruction improperly shifted the burden of disproving the element of malice on him. (Petit. Object. at 10). Petitioner specifically asserts that the court placed the burden of establishing the absence of malice on him by instructing the jury that voluntary manslaughter ". . . may also constitute a defense to the charge of murder. And since the commission of a voluntary manslaughter is both a crime and in a sense a defense to murder, you should pay particular attention to these instructions." (N.T. 4/3/97 at 191). However as the Magistrate

Judge correctly noted, at the beginning of issuing his instructions to the jury, the trial judge clearly stated that “[t]he Commonwealth has the burden of proof as to each and every element of the crime charged and that the defendant is guilty of that crime beyond a reasonable doubt...” Id. at 164-65. Petitioner further objects to the trial court’s instruction that he could be found guilty of voluntary manslaughter if they found that the killing was “without malice.” Id. at 195-96. Petitioner argues that this instruction placed the burden of proving that the killing was “without malice on him.” Petitioner further argues that when the Commonwealth fails to prove malice beyond a reasonable doubt, voluntary manslaughter is a proper verdict, and that all Petitioner was required to do was to raise a reasonable doubt as to malice in order to secure a voluntary manslaughter verdict. (Petit. Obj. at 10).

On *de novo* review, the court concludes that the trial court’s charge to the jury, read in entirety rather than in isolation, would not confuse a jury as to the burden of proof. Petitioner’s objection on this ground must be overruled. Petitioner argues without authority that the instructions given by the trial court are constitutionally infirm as a matter of federal law. The court notes, however, that the Superior Court of Pennsylvania already rejected Petitioner’s claim for ineffective assistance of counsel on this issue as a matter of state law, a decision that Petitioner states he is not requesting this court to review. Although the Pennsylvania state court did not address whether the jury instructions violated federal state law, The Supreme Court has held that:

If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1).
Yarborough v. Gentry, 540 U.S. 1, 4 (2003)

As stated above, Petitioner argues that he was only required to raise a reasonable doubt as to malice in order to be found guilty of voluntary manslaughter instead of murder. This court finds that the trial court’s instructions on voluntary manslaughter did not shift the burden to Petitioner.

Rather, the court concludes that the instructions merely provided the jurors with the possibility of finding Petitioner guilty of the lesser offense of voluntary manslaughter if they concluded that the Commonwealth had not proven malice beyond a reasonable doubt. Nowhere in the trial court's instructions can this court find any basis for Petitioner's assertions that he was required to prove that he acted without malice. Although Petitioner cites several decisions which hold that jury instructions that have both constitutional and unconstitutional language cannot be upheld, there is no basis upon which this court can determine that the trial court's instructions regarding the burden of proof were in any way constitutionally infirm. Therefore, the instructions did not violate any clearly established federal law. Again, read in their entirety rather than in isolation the trial court's instruction did not shift the burden of disproving malice onto Petitioner. Trial counsel cannot be found ineffective for failing to object to the jury instructions. Petitioner's Objection on this ground will be overruled.

The Magistrate Judge also concluded that appellate counsel was not ineffective for failing to pursue trial counsel's preserved objections regarding the questioning of defense witness Delores Edwards. At trial Ms. Edwards was a witness for the defense who testified for the purpose of rebutting the Commonwealth's evidence that Petitioner shot the decedent. Ms. Edwards testified that at the time of the shooting she was in the home where the shooting took place, and that Petitioner exited the home before any shots were fired. At trial the Commonwealth questioned Ms. Edwards regarding the extent of her knowledge about the shooting of the lead Commonwealth witness, Mildred Jones. During cross examination of Ms. Edwards the Commonwealth asked her if she knew Ms. Jones had been shot 9 times prior to testifying, and also if anyone had threatened her [Ms. Edwards]. (N.T. 4/2/97, 203). Petitioner's trial counsel objected to the questioning and the admissibility of the evidence, but was overruled. The court noted that the evidence was admitted for the limited purpose of permitting the jury to measure Ms. Edwards ability to tell the truth. Id. Petitioner now objects

and argues that the testimony was unfairly prejudicial and could not be overcome by any limiting instructions. The court will also overrule Petitioner's objection on this ground. Commonwealth v. White, 290 A.2d 246 (Pa. 1972), which Petitioner cites to support his argument that the admission of the testimony was prejudicial, states the general rule that threats by third persons against witnesses are not relevant unless it is shown that the defendant is linked in some way to the making of the threats. The court went on, however, to explain that the rule refers to the relevance of a threat as it bears upon the issue of the defendant's guilt. Similar to the testimony given in Com. v. White, the purpose for the admission at Petitioner's trial was to permit the jurors to determine the credibility of the testimony Ms. Edwards. The court gave limiting instructions on the purpose of the testimony. In a decision addressing this issue which was raised in Petitioner's PCRA petition, the Superior Court of Pennsylvania reasoned that because the question was posed to explore whether Ms. Edwards testimony was influenced by fear due to the shooting of Ms. Jones - instead of for the purpose of establishing Petitioner's guilt - the testimony was admissible for the limited purpose of revealing Ms. Edwards' motivation for testifying. Petitioner strenuously objects and asserts that the evidence was not admissible and that appellate counsel was ineffective for failing to raise this issue on direct appeal. Petitioner argues that the line of inquiry violated both state and federal law. Again the Superior Court of Pennsylvania held that the line of questioning did not violate state law, a determination which is binding on this court. Petitioner argues that it also violated federal law in that the testimony - once admitted - was relevant to the jury not only to determine Ms. Edwards' state of mind, but also implied that she was fearful of retribution for testifying truthfully. Petitioner has not previously claimed that the admission of the testimony violated federal law, and cannot argue such for the first time in this petition. Nevertheless, assuming *arguendo* that Petitioner had previously raised this claim, the court finds that the testimony as restricted was admissible. In balancing the relevance of the line of questioning of Ms. Edwards

regarding her knowledge of Ms. Jones' shooting, was limited by the trial court's instruction. No clearly established federal law was violated by the admission of the testimony. Therefore, Petitioner's objection on this ground will be overruled.

Finally, Petitioner also argues that his claims for ineffectiveness of both trial and appellate counsel were exhausted and had not been defaulted. While there is a question as to whether Petitioner's claims were exhausted at the state court level, the Magistrate Judge nevertheless reviewed the claims on the merits and recommended that they be denied. Because the claims were fully considered by the Magistrate Judge and by this court on their merits, any objections based on failure of claim exhaustion are also overruled.

For the foregoing reasons the petition for habeas corpus will be denied.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANGELO ROMERO,	:	
	:	
	:	
Petitioner	:	No. 04-1687
v.	:	
	:	
LOUIS FOLINO, et al.	:	
	:	
Respondents.	:	

ORDER

AND NOW, this 24th day of August 2005, upon careful and independent consideration of the Petition for Writ of Habeas Corpus and Response thereto, and after review of the Report and Recommendation of United States Magistrate Judge Thomas J. Reuter and Petitioner's Objections thereto, **IT IS HEREBY ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. Petitioner's Objections are **OVERRULED**.
3. The Petition for Writ fo Habeas Corpus is **DENIED**; and
4. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

S/_____

Clifford Scott Green, S.J.