NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DAVON ANTHONY HAIRSTON	:	
Appellant	:	No. 1392 MDA 2025

Appeal from the Judgment of Sentence Entered September 24, 2025
In the Court of Common Pleas of Dauphin County Criminal Division at
No(s): CP-22-CR-0000231-2024

BEFORE: KUNSELMAN, J., KING, J., and STEVENS, P.J.E.*

MEMORANDUM BY STEVENS, P.J.E.: **FILED: OCTOBER 9, 2026**

Appellant Davon Anthony Hairston appeals from the judgment of sentence entered by the Court of Common Pleas of Dauphin County after a jury convicted Appellant of second-degree murder. Appellant claims the trial court erred in (1) concluding there was sufficient evidence to support his conviction, (2) refusing to grant a new trial based on after-discovered evidence and an alleged ***Brady*** violation,[1] and (3) admitting voice identification testimony. Although we affirm Appellant's conviction, we *sua sponte* determine that it was unconstitutional for the trial court to sentence Appellant to a mandatory term of life imprisonment without the possibility of parole (LWOP) for second-degree murder pursuant to our Supreme Court's

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* Former Justice specially assigned to the Superior Court.

[1] ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

recent decision in ***Commonwealth v. Lee***, 357 A.3d 356, 357 (Pa. 2026) (holding "a mandatory life without parole sentence for all felony murder convictions, absent an assessment of culpability, is inconsistent with the protections bestowed upon our citizens under the 'cruel punishments' clause of our Commonwealth's organic charter"). Accordingly, we are constrained to vacate the judgment of sentence and remand for resentencing.

In the evening hours of March 21, 2023, Harrisburg Police Officer Cynthia Kreiser was patrolling the area of North 16th and Market Streets in the Allison Hill neighborhood when she received a dispatch reporting that a male had been stabbed. Notes of Testimony (N.T.), Trial, 6/24/25 – 6/25/25, at 41-45. Officer Kreiser responded to the address of 3 North 16th Street in under a minute and was directed by a female on the street to an apartment on the second floor designated as Apartment 2A. ***Id.*** at 51-52.

Upon entering the apartment and proceeding to the back bedroom, Officer Kreiser found Damien Servidio ("the victim"), lying on his back on a bed. ***Id.*** at 52-53, 57. Officer Kreiser characterized the scene as "chaotic," noting three distraught females were present, crying and laying over the victim. ***Id.*** at 53. Though the victim was still breathing, he was unresponsive and his skin was cold and clammy. ***Id.*** at 59. Officer Kreiser applied pressure to the victim's stab wound while awaiting EMS. ***Id.*** at 58-59. She searched the exterior of the building and the stairwell and found no blood or other evidence outside of the bedroom. ***Id.*** at 62-64. No witness present that evening volunteered information identifying the perpetrator. ***Id.*** at 275.

Investigator Karen Lyda of the Harrisburg Bureau of Police processed the crime scene and collected a bloody comforter, a blood sample from the floor to the right of the bed, a piece of cardboard bearing blood, and blood samples found on either side of the doorframe leading into the back bedroom and around the door lock. ***Id.*** at 89-92.[2] All physical evidence was located within the bedroom. ***Id.*** at 96-97. The distance from the front door of the apartment building to the back bedroom was approximately thirty to forty feet. ***Id.*** at 99. Investigator Lyda noted that DNA analysis of certain blood samples had not yet been completed at the time of trial. ***Id.*** at 108-109.

Wayne Ross, M.D., performed an autopsy on the victim on March 22, 2023. ***Id.*** at 207. He testified that the fatal injury was a single stab wound to the mid-region of the left abdomen. ***Id.*** at 209. The wound track showed that the knife entered the abdomen, was driven upward, twisted, and then removed. ***Id.*** at 217. Dr. Ross observed no defensive wounds, leading him to conclude that the wound was inflicted by a quick, sudden thrust, and that it was unsurvivable. ***Id.*** at 220-21. In his opinion, the victim would have bled out within seconds to minutes. ***Id.*** at 219. Dr. Ross ruled the manner of death a homicide. ***Id.*** at 222.

Tarvia Byrd, who lived in Apartment 2A with her two daughters, testified that although the victim was not her biological son, she had raised him since

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[2] Two knives were recovered from the apartment (one from the bedside nightstand and one from a person named Talia Horton), but were ruled out as the murder weapon because their hilts were smaller than the hilt impression left on the victim's wound as revealed during the autopsy. N.T. at 105-107.

he was eight months old and considered him her son. ***Id.*** at 225-28. The victim did not reside with Ms. Byrd, but spent considerable time at her apartment. ***Id.*** at 229. Ms. Byrd testified that she knew Appellant by his street name "Boogz" and that Appellant had never been invited or permitted to be in her apartment. ***Id.*** Ms. Byrd also knew a man named Antwoine Burnett, who went by the nickname "Twaney" and who "Boogz" had identified to her as his best friend. ***Id.*** at 230-31. Shortly before March 21, 2023, the victim had told Ms. Byrd that he owed "Twaney" money, but that there was a dispute over the amount. ***Id.*** at 231.

Ms. Byrd testified that on the night of March 21, 2023, she was in the kitchen of the apartment when she heard one of the victim's friends say there were several men at the front door wearing masks. ***Id.*** at 235. The victim came into the kitchen and walked out through a separate hallway entrance. ***Id.*** at 238-42. Seconds later, she heard the victim say, "I ain't trying to beat 'Twaney.'" ***Id.*** at 242. The victim then walked back past her holding the right side of his abdomen; Ms. Byrd testified that she did not like the look on his face. ***Id.*** When Ms. Byrd heard a voice say, "Yeah, Twaney's money," she rose and walked into the living room, where she saw Appellant, who Ms. Byrd knew as "Boogz." ***Id.*** at 242-43.

Ms. Byrd claimed that Appellant was the only person in the living room and Ms. Byrd did not hear the front door of the apartment open or any footsteps going down the steps. ***Id.*** at 243-44. Appellant's back was initially toward Ms. Byrd; when he turned and saw her, he said, "You better not say a

motherfucking thing, because you prolly was....” ***Id.*** at 245. He stopped speaking when someone called out “Mom, Damien’s hurt.” ***Id.*** at 246. Ms. Byrd saw Appellant make a movement with his right hand toward his pocket, though she did not see a weapon. ***Id.*** She then returned to the kitchen, and within minutes, paramedics arrived. ***Id.*** at 248.

Ms. Byrd acknowledged that she did not initially disclose this information to police on the night of March 21, 2023, because she was afraid since Appellant saw her face and threatened to hurt her. ***Id.*** at 248. She also admitted that she wanted to personally avenge her son. ***Id.*** Following conversations with her children, Ms. Byrd elected to speak with police. ***Id.*** at 249. On March 23, 2023, she contacted Detective Jon Fustine, the lead investigator, and provided him with the full account of what she had witnessed. ***Id.*** at 280. Detective Fustine testified that Ms. Byrd’s account remained consistent through the pendency of the investigation. ***Id.*** at 281.

Officers obtained several surveillance videos from the area around the apartment on the evening of March 21, 2023 which placed Appellant at the scene. Detective Brian Carriere of the Harrisburg Police Criminal Investigation Division used the videos to piece together the movements of a blue Saturn Outlook belonging to a woman named Antoinette Martin. ***Id.*** at 146-165.

At approximately 8:43-8:44 p.m., video surveillance shows the blue Saturn vehicle parked in the area and Appellant exiting the passenger side, wearing a lighter-colored jacket and a white ball cap. ***Id.*** at 169-171, 277. Surveillance footage showed Appellant walking toward 3 North 16th Street,

meeting a group of individuals (six in total), and entering through the building's side door at approximately 8:51 p.m. ***Id.*** at 170-73, 276. The same group was observed exiting the building beginning at approximately 8:52 p.m., with Appellant being the last to exit, running from the door. ***Id.*** at 173-75. Appellant ran back to the Saturn and entered the passenger side. ***Id.*** at 177. The surveillance video shows Officer Kreiser arriving on the scene at approximately 8:54 p.m. ***Id.*** at 170.

Antoinette Martin, who is Appellant's cousin and the girlfriend of Antwoine Burnett, testified that she drove a blue Saturn Outlook in the spring of 2023. ***Id.*** at 127-29. Ms. Martin also indicated that at the time of the stabbing, Burnett was incarcerated at the Dauphin County Prison. ***Id.*** She reluctantly admitted that on the evening of March 21, 2023, she sent Burnett a text message stating "Boogz said call now." ***Id.*** at 134-35. She further acknowledged that Burnett called her shortly after that text exchange. ***Id.*** at 136-37. Although she claimed at trial not to remember who she handed the phone to during that call, the phone call recording was played for the jury. ***Id.*** at 138-43. During the call, the recording reflects Burnett asking, "Is Boogz cool," and Martin responding, "Yeah, he cool, he wants you, hold on." ***Id.*** at 138. A second male voice then connected. ***Id.*** Martin also confirmed during the call that "Boogz" was present with her, and that she was "with" him when police arrived on scene. ***Id.*** at 141-43.

Detective Dennis Simmons of the Harrisburg Bureau of Police's organized crime and vice control unit testified that he had been familiar with

Burnett since 2002 and had known Burnett since he was a child. ***Id.*** at 184-87. Detective Simmons first encountered Appellant in 2011 when he was a uniformed officer working in the Housing Unit, and had spoken with Appellant between five and ten times over the years. ***Id.*** at 187-88. On February 23, 2023, approximately one month before the murder, Detective Simmons executed a search warrant at 2037 Kensington Street, Harrisburg, where both Burnett and Appellant were present. ***Id.*** at 188-89. He spoke with both men at length on that occasion. ***Id.*** Burnett was arrested following the execution of that warrant. ***Id.*** at 188.

The Commonwealth played the prison call recording at trial, and Detective Simmons identified the voices of both Burnett and Appellant. ***Id.*** at 189-91. During the call, Detective Simmons identified Appellant as the individual stating, "Pulled my shank out and hit him with one—one good time." ***Id.*** at 191. He also identified Appellant as the voice saying, "Mom, she's the only one that got a look at me." ***Id.*** at 193.

At the time of Appellant's arrest on April 17, 2023, he was in possession of a white ball cap—consistent with the hat worn by the individual identified on surveillance video—and a tactical folding knife. ***Id.*** at 121.

Appellant was charged in connection with the victim's death and proceeded to a jury trial before the Honorable Edward M. Marsico, Jr. At the conclusion of the trial, on June 25, 2025, the jury convicted Appellant of second-degree murder. On September 24, 2025, the trial court imposed a mandatory sentence of life imprisonment. ***See*** 18 Pa.C.S.A. § 1102(b). On

September 29, 2025, trial counsel filed a timely post-sentence motion, which the trial court denied on October 2, 2025.

Appellant filed a *pro se* notice of appeal on October 8, 2025. On October 17, 2025, Kristen Weisenberger, Esquire, was appointed as appellate counsel. On October 21, 2025, the trial court directed Appellant to file a Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Appellate counsel was granted an extension to file the concise statement after receiving the trial transcript, which was not completed until January 7, 2026. Appellant's Rule 1925(b) Statement was filed on January 27, 2026.

Appellant presents the following issues for our review:

> A. Whether the trial court erred in accepting the jury's verdict where the Commonwealth failed to present sufficient evidence to sustain a conviction for second-degree murder, specifically in failing to establish the predicate offense of burglary.
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> B. Whether the trial court erred in denying Appellant's request for a new trial where the Commonwealth revealed an exculpatory DNA report nearly three months after trial and after the Commonwealth's receipt of the report.
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> C. Whether the trial court erred in admitting voice identification testimony where the testifying witness had never spoken with Appellant on the telephone previously.

Appellant's Brief, at 4.

Appellant's first issue challenges the sufficiency of the evidence supporting his conviction of murder of the second degree, specifically arguing that the Commonwealth failed to prove the predicate felony of burglary. Our standard of review for a sufficiency of the evidence challenge is well established:

> The standard we apply in reviewing the sufficiency of the evidence 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. ... Finally, the finder 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. Jones, 271 A.3d 452, 457–58 (Pa. Super. 2021) (citations omitted). The standard of review for a sufficiency claim is de novo and the scope of review is plenary. ***Commonwealth v. Neysmith***, 192 A.3d 184, 189 (Pa. Super. 2018). The Commonwealth may sustain its burden by means of wholly circumstantial evidence, and the fact-finder is free to believe all, part, or none of the evidence. ***Commonwealth v. Leaner***, 202 A.3d 749, 768 (Pa. Super. 2019).

Appellant argues that the Commonwealth failed to prove unlawful entry because, while Ms. Byrd claimed she did not grant Appellant permission to be in the apartment, other individuals were present in the residence that night and it is possible that one of them admitted Appellant through the front entrance. Appellant's Brief, at 15-16. Appellant further asserts that there was no testimony that the door to the apartment was forced open. ***Id.*** at 16. Accordingly, Appellant argues that consequently, the second-degree murder

conviction cannot stand as the predicate offense of burglary has not been proven. We disagree.

Murder of the second degree is defined as a criminal homicide "committed while [the] defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S.A. § 2502(b). The term "perpetration of a felony" includes "the act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit … burglary." 18 Pa.C.S.A. § 2502(d).

A person commits burglary if, with the intent to commit a crime therein, the person enters a building or occupied structure adapted for overnight accommodations in which at the time of the offense a person is present, and the person commits, attempts, or threatens to commit a bodily injury crime therein. 18 Pa.C.S.A. § 3502(a)(1)(i). It is a defense to burglary if the actor is licensed or privileged to enter. 18 Pa.C.S.A. § 3502(b)(3).

We begin by highlighting that Section 2502, which defines second-degree murder, "does not require, as an element of the crime, the completion of the predicate offense," but merely requires the Commonwealth to show the defendant committed a murder while "engaged in the perpetration of a felony." ***Commonwealth v. Miller***, 613 Pa. 584, 595-96, 35 A.3d 1206, 1212-13 (2012) (citing 18 Pa.C.S.A. § 2502(b)). Our Supreme Court has observed that the phrase "[p]erpetration of a felony" is "statutorily defined in a very broad manner," as it includes "[t]he act of the defendant in engaging

in …the commission of, or an attempt to commit, … [burglary] ….”***Id.*** As such, to sustain a conviction for second-degree murder, the Commonwealth “is not required to prove that the accused actually committed the predicate offense.” ***Id***. In ***Miller***, the Supreme Court determined that the defendant’s acquittal of the predicate offense of robbery did not necessitate the vacatur of his second-degree murder conviction. ***Id.***

When viewing the evidence presented in this case in the light most favorable to the Commonwealth as verdict winner, the evidence amply supports the jury’s finding that Appellant committed a murder while engaged in the perpetration of a burglary. We reject Appellant’s suggestion that there was no evidence that Appellant entered the apartment unlawfully. Ms. Byrd, the resident of the apartment, testified unequivocally that Appellant had never been invited into and was not welcome in her home. N.T. at 229. The Commonwealth is not required to disprove every conceivable hypothesis of innocence; Appellant’s speculative assertion that an unidentified household member may have let him in is precisely the type of doubt that the jury, as fact-finder, was entitled to reject. ***See Jones***, 271 A.3d at 457-58.

The circumstantial evidence further supported the inference of Appellant’s unlawful entry. Surveillance video established that Appellant arrived at the apartment in the company of multiple individuals, including some who were masked, at approximately 8:51 p.m. N.T. at 171-74, 276. The context of the visit was not a social call; the victim admitted that he owed money to Burnett, Appellant’s associate and the individual on whose behalf

Appellant was acting. ***Id.*** at 231. Video surveillance confirmed that Appellant had an extremely brief interaction with the victim inside the apartment during which the victim was asked for money and then stabbed. At 8:52 p.m., approximately one minute after he arrived, Appellant was seen running from the building; his flight was consistent with unlawful presence. ***Id.*** at 174-75.

The evidence likewise supported an inference that Appellant entered the apartment with the intent to commit a crime therein. With respect to burglary prosecution, "[t]he intent to commit a crime after [unlawful] entry may be inferred from the circumstances surrounding the incident." ***Commonwealth v. Lambert***, 795 A.2d 1010, 1022 (Pa. Super. 2002) (citing ***Commonwealth v. Alston***, 539 Pa. 202, 651 A.2d 1092, 1094 (1994)).

As such, it was reasonable for the jury to find that Appellant entered Ms. Byrd's apartment intending to commit a bodily injury crime against the victim given that Appellant arrived with a group of masked individuals to confront the victim and collect a debt, quickly committed the stabbing, and fled the scene one minute after the crime. The jury accepted Ms. Byrd's identification of Appellant as the perpetrator which was corroborated by surveillance footage and Appellant's recorded admissions on the prison call. The prison call recording was consistent with the events of the attack; Appellant admitted that he "pulled [his] shank out" and struck the victim "one good time" and acknowledged to Burnett that "Mom," presumably Ms. Byrd, "is the only one that got a look at me." ***Id.*** at 191-93.

As such, we conclude that the Commonwealth proved beyond a reasonable doubt that Appellant committed the fatal stabbing of the victim while he was engaged in the perpetration of a burglary. We may not disturb the jury's credibility determinations. Accordingly, as the evidence was sufficient to support Appellant's second-degree murder conviction, his first issue merits no relief.

Appellant next contends that the trial court erred in denying his post-sentence motion seeking a new trial based on a DNA laboratory report that was disclosed to defense counsel nearly three months after trial on September 12, 2025. Appellant claims that the lab report constitutes both after-discovered evidence and exculpatory material that the Commonwealth was obligated to disclose under ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

With respect to Appellant's after-discovered evidence claim, in order to prove he was entitled to a new trial, he was required to prove that "the evidence (1) could not have been obtained prior to trial by exercising reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach a witness's credibility; and (4) would likely result in a different verdict." ***Commonwealth v. Castro***, 625 Pa. 582, 93 A.3d 818, 821 n.7 (2014) (citing ***Commonwealth v. Pagan***, 597 Pa. 69, 950 A.2d 270, 292 (2008)).

The DNA report at issue, dated July 29, 2025, was completed after Appellant was convicted on June 25, 2025. The report analyzed swabs taken

from the doorframe of the bedroom where the victim was found and buccal swabs from Appellant and one Kevin Blanding. The report concluded that the blood on the bedroom doorframe was a mixture of at least two contributors, one of whom was the victim; Appellant and Blanding were excluded as contributors. Appellant's Brief, at 17-18.

We find that Appellant cannot show that the DNA report could not have been obtained prior to trial through the exercise of reasonable diligence. At trial, Investigator Lyda specifically testified that DNA results for certain samples had not yet been returned from the Pennsylvania State Police laboratory. N.T. at 108-109. Defense counsel was therefore aware prior to and during trial that the DNA report was pending. Indeed, defense counsel's brief cross-examination of Investigator Lyda focused precisely on the absence of DNA evidence linking Appellant to the bedroom. ***Id.*** at 108-110. Despite this knowledge, Appellant did not request a continuance of the trial to await the report's completion. A defendant who fails to investigate or pursue an obvious and available source of information cannot later claim that the resulting evidence constitutes after-discovered evidence. ***See Commonwealth v. Padillas***, 997 A.2d 356, 363-64 (Pa. Super. 2010).

Even if we were to assume, *arguendo*, that Appellant had acted with due diligence, his claim nonetheless fails as he has not shown the likelihood of a different verdict. The report establishes that Appellant's DNA was not found on the bedroom doorframe. However, the evidence presented at trial never placed Appellant in the back bedroom at any point during the incident. Ms.

Byrd's testimony established that Appellant confronted the victim near the front of the apartment; she saw the victim walk toward the back of the apartment clutching his abdomen, but she never saw Appellant follow the victim toward the bedroom. N.T. at 241-44. Moreover, when Officer Kreiser arrived on scene moments later, multiple people were already present in the bedroom with the victim. ***Id.*** at 52-53, 57.

Under these circumstances, the presence of an unidentified contributor's DNA on the bedroom doorframe, a location where Appellant was never alleged to have been, would not have altered the jury's verdict. ***See Commonwealth v. Murchison***, 328 A.3d 5, 18-19 (Pa. 2024) (new DNA evidence that was not exculpatory and would not likely result in a different verdict, particularly where cumulative of evidence showing defendant's DNA was not at the specific locus in question, did not warrant new trial). The jury's verdict was grounded in the overwhelming weight of direct and circumstantial evidence: Ms. Byrd's eyewitness account of Appellant's presence in the apartment and threatening conduct immediately after the stabbing; the surveillance footage placing Appellant at the scene; and, most compellingly, Appellant's own recorded admission that he "pulled [his] shank out and hit him with one—one good time." N.T. at 191.

To the extent Appellant frames this issue as a ***Brady*** violation by asserting that the Commonwealth suppressed material exculpatory evidence, we similarly find no relief is warranted. For a ***Brady*** violation, a defendant must show that: "(1) the evidence at issue was favorable to the accused,

either because it is exculpatory or because it impeaches; (2) the prosecution has suppressed the evidence, either willfully or inadvertently; and (3) the evidence was material, meaning that prejudice must have ensued." ***Commonwealth v. Bagnall***, 661 Pa. 123, 141, 235 A.3d 1075, 1086 (2020) (citations omitted).

Here, the Commonwealth disclosed the DNA report on September 12, 2025—approximately six weeks after it was completed on July 29, 2025, and approximately two and a half months after the verdict. The report was not in the Commonwealth's possession prior to or during trial. The duty to disclose under ***Brady*** applies to evidence in the prosecution's possession or of which it has knowledge; the Commonwealth cannot be found to have suppressed evidence that did not yet exist at the time of trial. ***See Commonwealth v. Miller*****,** 212 A.3d 1114, 1126 (Pa. Super. 2019) (finding that the prosecution could not have been found to have suppressed evidence that it did not have in its possession at the time of trial). Furthermore, as discussed above, for the same reasons the report would not likely have produced a different verdict, it was not material. Appellant's second issue merits no relief.

Appellant's final issue contends that the trial court abused its discretion in permitting Detective Simmons to identify Appellant's voice on the prison call recording, arguing that because Detective Simmons had never spoken with Appellant over the telephone, he lacked a sufficient basis to identify Appellant's voice.

When considering the admission of evidence, our standard of review is very narrow.

> Our review of a trial court's evidentiary ruling is limited to determining whether the trial court abused its discretion. ***See Commonwealth v. Dengler***, 586 Pa. 54, 890 A.2d 372, 379 (2005). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Id***. (citation omitted). "To constitute reversible error, an evidentiary ruling must not only be erroneous but also harmful or prejudicial to the complaining party." ***Commonwealth v. Lopez***, 57 A.3d 74, 81 (Pa. Super. 2012) (citation omitted).

Commonwealth v. Pratt, 357 A.3d 497, 502 (Pa. Super. 2026).

Pennsylvania Rule of Evidence 901(b)(5) explicitly authorizes the admission of "an opinion identifying a person's voice … based on hearing the voice at any time under circumstances that connect it with the alleged speaker." Pa.R.E. 901(b)(5). This Court has recognized that

> It is settled law that "[a] witness may testify to a person's identity from his voice alone." ***Commonwealth v. Fromal****,* 392 Pa.Super. 100, 572 A.2d 711, 716 (1990) (citing ***Commonwealth v. Woodbury****,* 329 Pa.Super. 34, 477 A.2d 890, 893 (1984) (citation omitted)). Moreover, evidence of identification need not be positive and certain to sustain a conviction. ***Woodbury****,* 329 Pa.Super. at 40, 477 A.2d at 893 (quoting ***Commonwealth v. Hickman****,* 453 Pa. 427, 309 A.2d 564 (1973)). Additionally, the weight to be accorded voice identification testimony is a question for the trier of fact. ***Fromal***, ***supra****.* In ***Woodbury****,* this Court, presented with a sufficiency of the evidence challenge to a murder conviction, found that a voice identification alone by a witness, who was familiar with the appellant's voice and had a "long existing acquaintanceship" with him, was sufficient to identify the appellant as the person who committed the murder. ***Woodbury****,* 477 A.2d at 893.

Commonwealth v. Jones, 954 A.2d 1194, 1197 (Pa. Super. 2008).

Here, Detective Simmons laid an ample foundation for his identification of Appellant and Burnett's voices. He testified that he had known Burnett since 2002 and had spoken to him on numerous occasions since Burnett was a child. N.T. at 187. He had known Appellant since 2011, had spoken to him between five and ten times, and had spoken with Appellant in person most recently on February 23, 2023, which was less than a month before the murder. On that occasion, Detective Simmons spoke with both men at length while he was executing a search warrant at a residence where both Burnett and Appellant were present. ***Id.*** at 187-89. This foundation was sufficient to establish Detective Simmons's familiarity with both voices.

The fact that Detective Simmons's prior interactions with Appellant occurred in person rather than over the telephone does not disqualify his identification; Rule 901(b)(5) requires only that the witness have heard the voice "at any time under circumstances connecting it with the alleged speaker." Pa.R.E. 901(b)(5).

Appellant further argues that the identification was flawed because the prosecutor purportedly asked Detective Simmons whether the voice on the recording was Appellant's rather than asking him to independently identify the speaker. However, as the trial court correctly observed, this argument does not accurately reflect the trial record. After the recording was played, the following exchange occurred:

> Q: So we hear a dialogue begin, do you recognize the voice on the other end of the dialogue?

> A: Yes, the second voice would be Davon Hairston.
>
> Q: And is that the—the—who you know to have the street name of Boog?
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> A: Yes.
>
> Q: Okay. And you recognize his voice; would that be from your interaction with him and speaking with him?
>
> A: Yes.

N.T. at 190. Detective Simmons was asked an open-ended identification question of whether he recognized the voice in the recording, and he independently identified the speaker as Appellant before being asked any confirming question. This sequence reflects a proper identification, not a leading or suggestive one.

It was within the province of the jury to assess the weight of Detective Simmons's voice identification in light of his prior interactions with Appellant. ***See Jones***, 954 A.2d at 1198. As the trial court did not abuse its discretion in admitting the testimony, Appellant's third issue is without merit.

Although we affirm Appellant's second-degree murder conviction, we evaluate *sua sponte* the constitutionality of Appellant's mandatory sentence of life imprisonment without the possibility of parole. At the time of the imposition of Appellant's sentence on September 24, 2025, Section 1102 of the Crimes Code required that "a person who has been convicted of murder of the second degree … shall be sentenced to a term of life imprisonment." 18 Pa.C.S.A. § 1102(b). ***See also*** 61 Pa.C.S.A. § 6137(a)(1) (excluding individuals sentenced to life imprisonment from parole eligibility).

While the instant case was pending on appeal, on March 26, 2026, the Supreme Court issued its decision in ***Lee***, in which it declared that a *mandatory* sentence of life imprisonment without parole for all felony murder convictions, absent an assessment of culpability, violates the "cruel punishments" clause of Article I, Section 13 of the Pennsylvania Constitution. ***Lee***, 357 A.3d at 357. The Supreme Court explained as follows:

> We find that the sentencing framework imposing a *mandatory* sentence of [LWOP] for second[-]degree murder convictions in *all* cases, regardless of the culpability and characteristics of the defendant — including [] the extent of an offender's participation in the conduct, and the details of his offense — without individualized assessment either at sentencing or through parole, prevents the sentencer from considering whether this harshest of sentences proportionately punishes the offender. Furthermore, this mandatory sentencing scheme runs afoul of notions of individualized sentencing for defendants facing the second most severe punishment after death, and the harshest type of incarceration. Finally, the mandatory nature of the sentencing scheme without individualized sentencing lacks adequate penological justification. Ultimately, we find the mandatory sentencing scheme for second[-]degree murder poses too great a risk of disproportionate punishment, and, thus, find it to be cruel.

Id. at 395-96 (emphasis in original).[3] As a result, the Supreme Court vacated Lee's sentence and remanded for resentencing. Although the Supreme Court

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[3] In ***Lee***, our Supreme Court was tasked with determining whether a mandatory sentence of life imprisonment without parole violated both the federal and Pennsylvania Constitutions. The ***Lee*** Court found that the precedential law of the United States Supreme Court did not compel it to conclude that the imposition of a mandatory term of life imprisonment without parole constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution. ***Lee***, 357 A.3d at 372. However, the ***Lee*** Court also held that Pennsylvania's constitutional proscription against cruel punishments in Article I, Section 13 provides broader protections than the
(Footnote Continued Next Page)

stayed its decision in ***Lee*** for 120 days to give the Legislature a reasonable amount of time to consider appropriate remedial measures, the stay has expired without the Legislature enacting a response.

Our courts have held that "[w]here a new principle of law is adopted while a case is pending on direct appeal, an appellant may be entitled to the retroactive application of the new rule so long as the issue was properly preserved for the reviewing court." ***Commonwealth v. Moore***, 263 A.3d 1193, 1199 (Pa. Super. 2021) (quoting ***Commonwealth v. Newman***, 99 A.3d 86, 90 (Pa. Super. 2014) (*en banc*)).

> [W]here an appellate decision overrules prior law and announces a new principle, unless the decision specifically declares the ruling to be prospective only, the new rule is to be applied retroactively to cases where the issue in question is properly preserved at all stages of adjudication up to and including any direct appeal.

Newman, 99 A.3d at 90 (quoting ***Commonwealth v. Cabeza***, 503 Pa. 228, 469 A.2d 146, 148 (1983)) (emphasis omitted).

As noted above, we acknowledge that Appellant did not challenge the constitutionality of his mandatory life sentence before the trial court. However, this Court has held that, "a claim that a sentence violates an individual's right to be free from cruel and unusual punishment is a challenge to the legality of the sentence, rendering the claim unwaivable." ***Commonwealth v. Brown***, 71 A.3d 1009, 1015–16 (Pa. Super. 2013). Further, while Appellant also did

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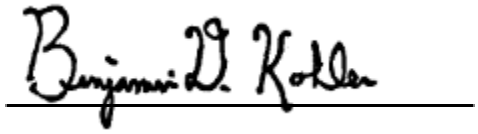
Eighth Amendment, in part because "the cruel punishments provision in the Pennsylvania Constitution, which does not use the term 'unusual,' has a distinct meaning and application." ***Id.*** at 380.

not assert on appeal that the ***Lee*** decision rendered his sentence unconstitutional, this Court has the discretion to *sua sponte* raise and address issues concerning illegal sentences. ***Commonwealth v. Armolt***, 294 A.3d 364, 376 (Pa. 2023) ("providing that "[a]n appellate court may address, and even raise *sua sponte*, challenges to the legality of an appellant's sentence even if the issue was not preserved in the trial court").

Accordingly, in this instant case, the trial court imposed a mandatory sentence of life imprisonment for Appellant's second-degree murder conviction, a punishment which was ruled unconstitutional under ***Lee***. As such, we vacate the judgment of sentence and remand to the trial court for a resentencing hearing pursuant to ***Lee***. Upon remand, the trial court consider Appellant's "individual culpability [and] determine whether he should be resentenced to life imprisonment without the possibility of parole; or to a maximum sentence of life imprisonment … accompanied by a minimum sentence determined by the Court." ***Id.*** at 396.

Judgment of sentence vacated. Case remanded for resentencing. Jurisdiction relinquished.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

Date: 10/9/2026