NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KRISTOPHER BENJAMIN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1182 WDA 2014

Appeal from the PCRA Order June 25, 2014
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0013466-2009

BEFORE: SHOGAN, OLSON, and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 31, 2015**

Appellant, Kristopher Benjamin, appeals *pro se* from the June 25, 2014 order denying his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541–9546. After careful review, we affirm.

We previously summarized the facts of the crime and the initial procedural history, as follows:

> In the early summer of 2009 Amy Kucsmas (victim) was actively involved in daily drug seeking behavior in the Mt. Oliver and Carrick sections of Allegheny County. In late June or early July[,] Kucsmas spent several days in the apartment of Timothy Brunner. Brunner's residence was apartment number two (2) of a four (4) unit building located in Mt. Oliver, and at that time he was residing there with his girlfriend, Ceira Brown. [Appellant] was a friend and former co-worker of Brunner and lived in that same apartment building—apartment number four (4), which was located above Brunner's apartment. Shortly after Kucsmas began staying at Brunner's apartment she "disappeared," taking approximately $200 of Brunner's money as well as his photo identification card (ID).

In the evening of July 11, 2009, Brunner, [Appellant] and Brown went to the Hazelwood section of the City of Pittsburgh. In the early morning hours of July 12th they were returning to their Mt. Oliver apartment building when [Appellant] saw Kucsmas walking along Brownsville Road in the Carrick section of the city. They were traveling in a pick-up truck driven by [Appellant] that belonged to a neighbor James House. Upon observing Kucsmas, [Appellant] stated, "Fucking Amy", and pulled the truck over. Brunner and [Appellant] got out of the truck and both men angrily confronted Kucsmas about the stolen money and ID. Kucsmas denied taking the money and eventually became so frightened during the confrontation that she urinated on herself. Brunner took Kucsmas' purse and searched through it until he found the ID that had been stolen.

Once Brunner discovered his ID, he and [Appellant] told Kucsmas that she was going with them, and they began pulling her toward the truck. Kucsmas initially resisted, but Brunner assured her that everything would be okay and that she should come home with them; Kucsmas ceased her resistance and got into the truck, followed by Brunner and [Appellant].

[Appellant] drove to an isolated and hilly area of a nearby park where Kucsmas was ordered out of the truck. Brunner and [Appellant] again angrily confronted Kucsmas about the money and repayment, threatening to throw her over the hill. Kucsmas was scared and crying, assuring the men that she would pay the money back. Kucsmas was ordered back into the truck whereupon they drove back to their apartment building.

Once there Brown was ordered by Brunner to take Kucsmas by the hand to prevent her from fleeing, and Kucsmas was escorted to Brunner's apartment by Brunner, [Appellant], and Brown. Once in the living room, [Appellant] began yelling at Kucsmas about the money and made her take off her clothes whereupon he retrieved $60 from her "private area", which in turn was given to Brunner. Brunner, now armed with a handgun, and [Appellant] begin to beat and yell at Kucsmas. During this time Brunner cocked the weapon and fired a shot into the floor of the apartment. Brown retreated to her bedroom, but heard Brunner and [Appellant] continue the beating, as well as Kucsmas pleading with the two men to stop.

Eventually the beating stopped and Kucsmas was ordered to go to the bathroom and shower. While Kucsmas was in the

bathroom Brunner and [Appellant] had a discussion regarding the serious nature of the injuries they had inflicted on her, and they came to an agreement that she could not leave the apartment because of that.

When Kucsmas finished showering Brown witnessed Brunner go into the bathroom and help Kucsmas out of the shower. As Kucsmas began to walk out of the bathroom Brown saw Brunner put his arm around her neck from behind, and [Appellant] approach her from the front. Brown then put her head under the covers of her bed, but she heard Kucsmas struggling and gasping for air. [Appellant] punched Kucsmas in the head, which knocked her to the bathroom floor. As she lay there [Appellant] stomped on her chest, and bloody foam oozed out of her mouth and nose. Brown took her head out from under the covers and saw Kucsmas laying motionless on the bathroom floor with Brunner and [Appellant] standing around her. Brunner and [Appellant] picked Kucsmas up and laid her on the floor in front of Brown's bed. Brown was ordered to go outside and make certain that no one was around.

Brunner went to the basement of the building and returned with a roll of carpet. Brunner and [Appellant] rolled Kucsmas[']s body in the carpet and placed her in the back of the pick-up truck. At [Appellant]'s suggestion they then drove to Hunter Park in Wilkinsburg Borough where the body was left in a weeded/wooded area. [Appellant] was familiar with this area because he grew up nearby.

When Brunner returned to his apartment he awakened Brown and told her that they had left Kucsmas behind a dumpster, and he planned to go back and burn the body. Brown was instructed to clean up some blood spots on the living room carpet, as well as some pieces of cut carpet from that which Kucsmas[']s body had been wrapped in. Brunner instructed Brown that if she were ever questioned by the police, that she was to acknowledge the confrontation with Kucsmas on the street and their return with her to the apartment building, but to inform the police that upon their return they went their separate ways and Kucsmas never went into Brunner's apartment.

On July 23, 2009[,] a tree cutting crew was dumping wood chips at Hunter Park when they discovered the carpet and partially decomposed body of Amy Kucsmas dumped by Brunner and [Appellant] eleven (11) days earlier. The medical examiner

> was not able to determine the exact cause of death due to the advanced stage of decomposition, however there were multiple areas of blunt force trauma to the body including broken ribs and head trauma. Given all the circumstances presented, including the trauma to the body and where and how the body was found, the pathologist concluded that the manner of death was homicide.
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> Appellant . . . was charged by Criminal Information (200913466) with one count each of: Criminal Homicide; Kidnapping; Abuse of Corpse; and Criminal Conspiracy. Appellant filed a pre-trial motion to sever his case from that of co-defendant Timothy Brunner (CC 200913465) which was denied by the Trial Court.
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> Appellant proceeded to a jury trial on April 7, 2010, and on April 14, 2010[,] Appellant was convicted of First Degree Murder, Kidnapping, Abuse of Corpse, and Criminal Conspiracy (Kidnapping and Abuse of Corpse).
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> On April 22, 2010, Appellant was sentenced to a life sentence at the charge of First Degree Murder, and consecutive periods of incarceration of five (5) to ten (10) years (Kidnapping), one (1) to two (2) years (Abuse of Corpse), five (5) to ten (10) years (Criminal Conspiracy).
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> Appellant filed a post sentence motion which was denied . . . .[1]

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[1] After Appellant filed the notice of appeal on October 27, 2010, trial counsel submitted a motion for leave to withdraw, which we granted to the extent that it ordered the trial court to conduct a hearing pursuant to ***Commonwealth v. Grazier***, 713 A.3d 81 (Pa. 1998), before transmitting the certified record to this Court. Appellant also filed a motion to proceed *pro se* and for appointment of standby counsel on July 26, 2011. On September 29, 2011, the trial court held a hearing on the matter and ruled that the ***Grazier*** standard was met, as Appellant had made a knowing, intelligent, and voluntary decision to represent himself on appeal. Counsel was permitted to withdraw, and standby counsel was appointed.

Commonwealth v. Benjamin, 1689 WDA 2010, 68 A.3d 374 (Pa. Super. filed February 28, 2013) (unpublished memorandum at 1–5) (citations to record and footnotes omitted). Appellant filed a direct appeal, we affirmed the judgment of sentence, and our Supreme Court denied further review. ***Id***., *appeal denied*, 143 WAL 2013, 72 A.3d 599 (Pa. filed July 24, 2013).

Appellant filed the instant *pro se* PCRA petition on January 29, 2014, along with a motion to proceed *pro se* and for the appointment of standby counsel. On April 3, 2014, the PCRA court held a ***Grazier*** hearing, following which the PCRA court found "that [Appellant] is knowingly, intelligently, and voluntarily waiving his right to counsel." Order, 4/4/14, at 1. Appellant was permitted to proceed *pro se*, and the PCRA court appointed standby counsel "for the duration of [Appellant's] PCRA proceedings." ***Id***. On June 5, 2014, the PCRA court filed a notice to dismiss the PCRA petition pursuant to Pa.R.Crim.P. 907, and then denied the petition on June 25, 2014.[2] Appellant filed a timely notice of appeal.

Appellant presents the following issues for our review:

> 1. [A] Whether the trial court erred in denying [Appellant's] PCRA petition as [Appellant] was denied the Sixth Amendment right to effective assistance of counsel when trial counsel submitted/declared to the jury that they had been presented with specific nonexistent testimony of and by Commonwealth witness Drewery, thereby altering the entire evidentiary picture and ruining the credibility of [Appellant] which so undermined the truth-determining process that no reliable adjudication of

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[2] Appellant filed a Pa.R.A.P. 1925(b) statement on June 16, 2014.

> guilt or innocence could have taken place and there is a reasonable probability that absent a deliberate attempt to mislead the jury the factfinder would have had a reasonable doubt respecting guilt thereby requiring reversal of the unreliable and fundamentally unfair verdict rendered in this case?
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> [B] Whether the PCRA court abused its discretion via summarily dismissing [Appellant's] PCRA petition without an evidentiary hearing in a case with no overwhelming evidence of guilt thereby requiring remand for a full and fair evidentiary hearing?

Appellant's Brief at 4.

When reviewing the propriety of an order granting or denying PCRA relief, we consider the record "in the light most favorable to the prevailing party at the PCRA level." ***Commonwealth v. Stultz***, 114 A.3d 865, 872 (Pa. Super. 2015) (quoting ***Commonwealth v. Henkel***, 90 A.3d 16, 20 (Pa. Super. 2014) (*en banc*)). This Court is limited to determining whether the evidence of record supports the conclusions of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Rykard***, 55 A.3d 1177, 1183 (Pa. Super. 2012). We grant great deference to the PCRA court's findings that are supported in the record and will not disturb them unless they have no support in the certified record. ***Commonwealth v. Rigg***, 84 A.3d 1080, 1084 (Pa. Super. 2014). "There is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." ***Commonwealth v. Jones***, 942 A.2d 903, 906 (Pa.

Super. 2008) (quoting ***Commonwealth v. Barbosa***, 819 A.2d 81 (Pa. Super. 2003)).

In order to obtain collateral relief, a PCRA petitioner must establish by a preponderance of the evidence that his conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S. § 9543(a)(2). Instantly, Appellant asserted in his PCRA petition the existence of ineffective assistance of counsel pursuant to 42 Pa.C.S. § 9543(a)(2)(ii). To plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act. ***Commonwealth v. Stewart***, 84 A.3d 701, 706 (Pa. Super. 2013) (*en banc*). A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any one of these prongs. ***Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010). Counsel is presumed to have rendered effective assistance of counsel. ***Commonwealth v. Montalvo***, 114 A.3d 401, 410 (Pa. 2015). We have explained that trial counsel cannot be deemed ineffective for failing to pursue a meritless claim. ***Commonwealth v. Loner***, 836 A.2d 125, 132 (Pa. Super. 2003) (*en banc*).

Appellant's ineffective-assistance-of-counsel claim avers "that during the critical stage of closing argument," defense counsel "attempted to mislead the fact-finder thereby destroying the credibility of Appellant

Benjamin, by submitting to the jury that Commonwealth witness Andre Drewery ("Drewery"), testified to factual matters not supported by the evidence of record . . . ." Appellant's Brief at 13. Defense counsel's language to which Appellant objects was as follows:

> He[3] said that. And I specifically asked him, well, what was Mr. Benjamin's role in this argument about the money? And he said, No, he didn't have anything to do with the actual argument, that was completely between Amy and Tim Brunner.
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> Okay. So then we hear from Ceira Brown, and actually Timothy Brunner, and the two of them also reiterate those essential facts: Mr. Benjamin had absolutely nothing to do with any kind of accusations at that parking lot about missing money and ID, anything along those lines. As a matter of fact, he had nothing to do with Amy Kucsmas at that point in time. He was off in a dark area of the parking lot conducting a drug deal. All three of them agree on that.

N.T. (Trial Vol. II), 4/7–14/10, at 994–995. In asserting his ineffectiveness claim, Appellant avers that the closing argument was factually inaccurate and prejudiced him. Appellant's Brief at 13.

In lieu of a Pa.R.A.P. 1925(a) opinion, the PCRA court referred us to the reasons expressed in its Notice of Intention to Dismiss Pursuant to Pa.R.Crim.P. 907 filed June 5, 2014. Order, 9/8/14, at 1. In that Rule 907 notice, the PCRA court stated as follows:

> Appellant's first claim fails as trial counsel did not mischaracterize testimony, but rather summarized the testimony of Drewery and drew reasonable inferences therefrom to support

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[3] Defense counsel was referring to Drewery's testimony when she stated, "He said that." N.T. (Trial Vol. II), 4/7–14/10, at 994.

> the defense theory and lend credibility to [Appellant's] testimony. [Appellant] has further failed to demonstrate prejudice, as the statements made by trial counsel furthered the defense theory and bolstered the credibility of [Appellant's] testimony. Thus, [Appellant's] first claim lacks merit based on the record.

Notice of Intention to Dismiss Pursuant to Pa.R.Crim.P. 907, 6/5/14, at 1.[4]

We note that Appellant's brief, while listing a myriad of generalized legal precepts and references to case law, fails to provide a specific and particular argument regarding exactly what facts counsel misrepresented and why and how her reference to Drewery's testimony prejudiced him. For example, Appellant underscores the portion of Drewery's testimony reproduced above and complains that it was "factually inaccurate and objectively unreasonable," yet he fails to identify what facts are inaccurate and lack "one iota of record support." Appellant's Brief at 13. We conclude that Appellant's issue lacks merit.

Dating back to the post-trial ***Grazier*** hearing in this case in September 2011, Appellant argued that the testimony of Commonwealth witness Drewery had been "altered or omitted" by the court reporter. N.T. (***Grazier*** Hearing), 9/29/11, at 6. The trial court ordered Appellant to file a motion pursuant to Pa.R.A.P. 1926 and Pa.R.Crim.P. 115(C) in support of his

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[4] Appellant complains of the brevity of the PCRA court's reasons. Appellant's Brief at 14. We concur that a more detailed explanation by the PCRA court is preferable and advantageous; however, we do not find the lack of same to be a substantial impediment to effective appellate review in the present case.

challenge to the alleged deficiencies in the transcript. Order, 9/29/11, at 1. Appellant subsequently filed a petition to correct the record in which he alleged, *inter alia*, that Drewery's testimony had been altered in the trial transcript such that the specific testimony supporting trial counsel's claim in her summation, reproduced above, lacked any support in the notes of testimony. Petition to Correct the Record Pursuant to Pa.R.A.P. 1926, 10/14/11, at ¶16.

The trial court denied Appellant's petition in an order filed on November 16, 2011, stating, "This [c]ourt reviewed its own notes from the trial and has found that the transcript accurately reflects the testimony. Additionally, this [c]ourt contacted the Court Reporter who checked her stenographic notes and found that the transcript accurately reflects the testimony." Order, 11/16/11, at 1. On direct appeal, in answer to a claim by Appellant regarding the completeness of the record, this Court stated, "[N]o deficiency in the transcript is apparent. There is no indication that certain trial testimony has been omitted." ***Benjamin***, 1689 WDA 2010 (unpublished memorandum at 6 n.1).

Andre Drewery testified that sometime after midnight on July 12, 2009, he was walking home along Brownsville Road in the Carrick section of Pittsburgh when he saw the victim, who was a woman with whom he would "do drugs together on occasion." N.T. (Trial Vol. I), 4/7–14/10, at 206–207. Drewery and the victim decided to walk toward Mt. Oliver on Brownsville

Road in an attempt to find drugs. ***Id***. at 208. After reaching Nobles Lane, a truck pulled up, and two men—Appellant, whom Drewery knew as "Casper," and co-defendant Timothy Brunner—got out of the vehicle.[5] ***Id***. at 209–210. Drewery testified that both men immediately approached the victim and started yelling at her about money that she had owed them. ***Id***. at 211. The victim, who was "pretty frightened," denied owing them money. ***Id***. at 212. Drewery testified that Appellant and the co-defendant both kept "pulling on" the victim in an attempt to get her into their truck. ***Id***. at 214. He testified that after attempting to resist, the victim—who was so frightened that she urinated on herself—eventually gave up and got into the truck, which then drove off in the direction of Mt. Oliver. ***Id***. at 212, 214–216).

During cross-examination by Appellant's counsel, Drewery admitted that in the midst of the incident, when things had calmed down somewhat, he and Appellant walked over to a nearby parking lot, where Drewery bought crack cocaine from Appellant. N.T. (Trial Vol. I), 4/7–14/10, at 235–238. Brown testified that when Appellant saw the victim on the street as they drove down Brownsville Road, he pulled the truck over and both he and the co-defendant got out. ***Id***. at 287. Brown testified similarly to Drewery,

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[5] Drewery stated that a black female also was in the truck at the time. N.T. (Trial Vol. I), 4/7–14/10, at 215. Witness Ceira Brown, the co-defendant's girlfriend, admitted being in the truck at the time. ***Id***. at 286–288.

that Appellant and his co-defendant angrily confronted the victim about money that she allegedly stole from the co-defendant. ***Id***. at 287–289. Brown also testified that at one point during this incident, the interaction was only between the co-defendant and the victim because Appellant was off with Drewery, allegedly conducting a drug deal. ***Id***. at 292, 345–346. Appellant's co-defendant also testified that during the incident, Appellant and Drewery "removed themselves even further and conducted a drug deal." N.T. (Trial Vol. II), 4/7–14/10, at 930.

Our review of the record leaves no doubt that the trial testimony established there was some portion of time that Appellant was not interacting with the victim because he and Drewery were off in the adjoining parking lot engaging in a drug transaction. We have no hesitation in rejecting Appellant's implication that his counsel's closing argument was equal to a deceptive fabrication or omission. Clearly, counsel's closing argument was supported by reasonable inferences from the testimony. As our Supreme Court has stated, "[T]he prosecution and the defense alike are afforded wide latitude and may employ oratorical flair in arguing to the jury." ***Commonwealth v. Keaton***, 45 A.3d 1050, 1074 (Pa. 2012).

Thus, contrary to Appellant's argument, there is no basis for Appellant's claim that counsel was ineffective, nor is there any basis to his contention that Drewery's actual testimony is absent from the trial transcript. Appellant's Brief at 16. The trial court instructed the jury that

counsels' arguments were not evidence, N.T. (Trial Vol. II), 4/7–14/10, at 1095, counsel's personal beliefs were irrelevant and immaterial, ***id***. at 1096, and the jury is presumed to follow the trial court's instructions. ***Id***. at 1093. ***See Commonwealth v. Simmons***, 662 A.2d 621, 639–640 (Pa. 1995) (counsel's inadvertent misstatement of fact during closing argument would not constitute basis for new trial where any prejudicial effect was cured by instruction telling jury that attorneys' arguments are not evidence and jury is sole fact-finder).

The trial court admonished the jurors that arguments of counsel could not be considered evidence, that they were the sole judges of the credibility of witnesses and the ultimate finders of the facts. Our Supreme Court has noted the significance of such instruction. "Counsel could properly and reasonably deem the comment unworthy of objection and its concomitant emphasis, **particularly given the court's standard instruction that the lawyers' arguments are not evidence**." ***Commonwealth v. Tedford***, 960 A.2d 1, 49 (Pa. 2008) (emphasis added); ***Commonwealth v. Judy***, 978 A.2d 1015, 1028 (Pa. Super. 2009) (although some arguments in closing were not favored, where jury was instructed that arguments of counsel were not evidence, jury is presumed to have followed such instruction). Because Appellant has failed to prove that his underlying claim has arguable merit, he is not entitled to relief on this basis.

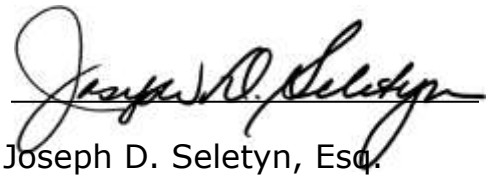
Not only do we find arguable merit lacking, we also conclude that Appellant cannot establish prejudice. Even if defense counsel's argument was improper, our appellate courts have recognized that improper closing arguments rarely merit a new trial. ***See***, ***e.g.***, ***Commonwealth v. Thompson***, 660 A.2d 68, 75 (Pa. Super. 1995) ("Improper closing arguments will not often merit a new trial. It is even rarer that a defendant can meet the heavier burden of showing that trial counsel was ineffective for failing to object."). Appellant has not established that but-for the alleged error of counsel, there is a reasonable probability that the outcome of the proceeding would have been different. This is especially true when considered in the context of the ample and credible Commonwealth evidence in support of Appellant's conviction.

Finally, as to Appellant's contention that the PCRA court erred in dismissing his petition without a hearing because he is entitled to demonstrate the inaccuracy and deficiency of the certified record, we decline to address it. Pursuant to 42 Pa.C.S. § 9543(a)(3), "[t]o be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence," *inter alia*, "[t]hat the allegation of error has not been previously litigated or waived." A claim is previously litigated under the PCRA if, *inter alia*, "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." ***Commonwealth v. Chambers***, 807 A.2d 872, 881 (Pa.

2002). As noted *supra*, on direct appeal we rejected the issue that the instant record contained omissions, and our Supreme Court denied further review. ***Benjamin***, 1689 WDA 2010 (unpublished memorandum), *appeal denied*, 143 WAL 2013, 72 A.3d 599 (Pa. filed July 24, 2013). Accordingly, this claim merits no relief.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015