NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
WILLIAM ROBERT HAVLIK,	:	
	:	
Appellant	:	No. 1712 EDA 2012

Appeal from the PCRA Order Entered June 14, 2012,
In the Court of Common Pleas of Northampton County,
Criminal Division, at No. CP-48-CR-0003660-2006.

BEFORE: SHOGAN, ALLEN and FITZGERALD*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 17, 2013**

Appellant, William Robert Havlik, appeals from the order denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541–9546. We affirm.

The panel of this Court that reviewed Appellant's direct appeal set forth the history of this case in its memorandum. ***Commonwealth v. Havlik***, 963 A.2d 566, 2596 EDA 2007, unpublished memorandum at 1-6 (Pa. Super. filed September 22, 2008). We affirmed Appellant's judgment of sentence, ***id.***, and the Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Havlik***, 999 A.2d 1246, 734 MAL 2008 (Pa. filed July 28, 2010).

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*Former Justice specially assigned to the Superior Court.

Appellant filed a timely PCRA petition on July 25, 2011. The PCRA court appointed counsel and eventually conducted an evidentiary hearing on May 29, 2012.[1] Following the hearing, the PCRA court denied Appellant's petition. This timely appeal followed, in which Appellant presents the following twenty-two allegations of ineffective assistance of counsel:

1. WHETHER TRIAL COUNSEL, MATTHEW POTTS, WAS INEFFECTIVE IN REPRESENTING YOUR DEFENDANT AT THE PRELIMINARY HEARING?

2. WHETHER TRIAL COUNSEL, CHRISTOPHER SHIPMAN, FAILED TO ADEQUATELY CONSULT WITH YOUR DEFENDANT PRIOR TO AND DURING THE TRIAL PROCESS?

3. WHETHER TRIAL COUNSEL, CHRISTOPHER SHIPMAN, FAILED TO INVESTIGATE DEFENDANT'S CLAIMS OF MENTAL DEFICIENCIES INCLUDING POST-TRAUMATIC STRESS DISORDER, BIPOLAR DISORDER, SEVERE DEPRESSION, ANXIETY, AND PANIC ATTACKS?

4. WHETHER TRIAL COUNSEL, CHRISTOPHER SHIPMAN, FAILED TO ADEQUATELY CONDUCT AN INVESTIGATION, INTERVIEW WITNESSES, AND RETURN PHONE CALLS TO DEFENSE WITNESSES, DENNIS HAVLIK, PATRICIA HAVLIK, AND PHYLLIS VASATURO?

5. WHETHER TRIAL COUNSEL, CHRISTOPHER SHIPMAN, WAS INEFFECTIVE IN FAILING TO GATHER AND COLLECT PSYCHIATRIC RECORDS, MEDICAL RECORDS, AND MEDICATION TO SHOW DEFENDANT'S STATE OF MIND DUE TO SIDE EFFECTS OF MEDICATION?

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[1] The PCRA court permitted Appellant's first and second appointed counsel to withdraw on October 24, 2011 and February 10, 2012, respectively, and appointed current counsel, Attorney Brian M. Monahan, to represent Appellant.

6. WHETHER TRIAL COUNSEL, CHRISTOPHER SHIPMAN, FAILED TO PRESENT AN ADEQUATE DEFENSE TO THE JURY AT TRIAL?

7. WHETHER TRIAL COUNSEL, CHRISTOPHER SHIPMAN, WAS INEFFECTIVE IN FAILING TO ADVISE YOUR DEFENDANT THAT A PLEA TO POSSESSION OF A LOADED FIREARM WOULD ENHANCE DEFENDANT'S CONVICTION OF BURGLARY?

8. WHETHER TRIAL COUNSEL, CHRISTOPHER SHIPMAN, WAS INEFFECTIVE IN FAILING TO INTERVIEW AND INVESTIGATE COMMONWEALTH WITNESSES, MICHAEL NEWMAN, HEATHER HAVLIK, THOMAS CLARK, JEREMY MCCLYMONT, MS. SANDT, JOSEPH DRESSLER, AND JOSEPH EFFTING?

9. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO DISCLOSE THE CONFLICT OF INTEREST BETWEEN ASSISTANT DISTRICT ATTORNEY JACQUELINE TASCHNER AND YOUR DEFENDANT?

10. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE ERRONEOUS DESCRIPTION BY THE ASSISTANT DISTRICT ATTORNEY OF PAINTER GLOVES AS SURGICAL GLOVES?

11. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST THE APPOINTMENT OF A FIREARMS EXPERT TO DETERMINE WHETHER THE 357 MAGNUM HANDGUN WAS OPERATIONAL?

12. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A PSYCHOLOGICAL AND PSYCHIATRIC EXAMINATION OF YOUR DEFENDANT IN ORDER TO PRESENT MITIGATING MENTAL HEALTH EVIDENCE, AND SIDE EFFECTS OF MEDICATION, AT TRIAL AND SENTENCING.?

13. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REVIEW THE "INFORMATION" FILED WHICH INCORRECTLY GRADED RECEIVING STOLEN PROPERTY AS A FELONY?

14. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBTAIN AND REVIEW 911 TAPES OF THE SUBJECT INCIDENT FOR PURPOSES OF PRESENTATION AT TRIAL?

15. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT EVIDENCE THAT YOUR DEFENDANT HABITUALLY CARRIED A CARPENTER'S KNIFE FOR USE AS A TOOL AND NOT AS A WEAPON?

16. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INTRODUCE EVIDENCE OF THE WEATHER ON THE DATE OF THE INCIDENT TO SHOW THAT IT WAS NOT UNLAWFUL TO WEAR A RAINCOAT WHEN IT WAS RAINING?

17. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO GATHER AND PRESENT AT TRIAL AND SENTENCING DEFENDANT'S PSYCHIATRIC MEDICAL RECORDS FROM ST. LUKE'S HOSPITAL OF QUAKERTOWN AND FROM MUHLENBERG PSYCHIATRIC HOSPITAL?

18. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE JUDGE'S STATEMENT AND/OR REQUEST A MISTRIAL WHEN THE COURT LOUDLY INSTRUCTED THE DEFENDANT TO "STOP STARING AT THE WITNESS"?

19 WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO FILE SUPPRESSION MOTIONS TO EXCLUDE THE RAINCOAT, CARPENTER'S KNIFE, 357 MAGNUM REVOLVER, BASEBALL BAT, SURGICAL GLOVES, AND ROUNDS OF AMMUNITION?

20. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO BE PRESENT DURING THE PRESENTENCE INVESTIGATION INTERVIEW BY THE NORTHAMPTON COUNTY DEPARTMENT OF ADULT PROBATION SINCE THAT INTERVIEW WAS A CRITICAL PHASE OF THE SENTENCING PROCEEDING?

21. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT EVIDENCE TO THE JURY CONNECTING A MISSING BICYCLE CHAIN GUARD TO HIS TIGHTLY TAPED PANT LEGS?

22. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY PREPARE YOUR DEFENDANT PRIOR TO DEFENDANT'S TESTIFYING AT TRIAL?

Appellant's Brief at 3-7 (*verbatim*).

Our standard of review of a PCRA court's order is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error. ***Commonwealth v. Hanible***, 30 A.3d 426, 438 (Pa. 2011). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa. Super. 2001). "The scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level." ***Hanible***, 30 A.3d at 438. To be eligible for PCRA relief, the petitioner bears the burden of proving, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated circumstances found in 42 Pa.C.S.A. § 9543(a)(2). ***Commonwealth v. Johnson***, 27 A.3d 244, 247 (Pa. Super. 2011).

Here, Appellant alleges ineffective assistance of counsel pursuant to 42 Pa.C.S.A. § 9543(a)(2)(ii). There exists a presumption that counsel is effective, and the petitioner bears the burden of proving ineffectiveness. ***Johnson***, 27 A.3d at 247. To prevail on an ineffective assistance of counsel ("IAC") claim, a petitioner must establish "(1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did

not have some reasonable basis designed to effectuate his client's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different." ***Id***. (citation omitted). Counsel cannot be deemed ineffective for failing to raise a meritless claim. ***Commonwealth v. Harris***, 852 A.2d 1168, 1173 (Pa. 2004). A petitioner's failure to satisfy any prong of the test for ineffectiveness requires rejection of the claim. ***Johnson***, 27 A.3d at 247.

Upon review, we decline to address issues 1, 13, 14, 15, 16, 18, 19, 20, 21, and 22. Appellant has waived these issues by withdrawing them or not developing them in the argument section of his brief. ***See Commonwealth v. B.D.G.***, 959 A.2d 362, 371 (Pa. Super. 2008) ("In an appellate brief, parties must provide an argument as to each question, which should include a discussion and citation of pertinent authorities."); Pa.R.A.P. 2119. As for the remaining issues, we conclude that the PCRA court comprehensively and correctly addressed them in its thorough, sixty-eight-page opinion.[2] Accordingly, after reviewing Appellant's brief, the

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[2] We commend the Honorable Edward G. Smith for his patient and exhaustive disposition of Appellant's numerous issues. Furthermore, we remind counsel that:

> [w]hile there is a middle ground that counsel must travel to avoid having a Rule 1925(b) statement so vague that the trial judge cannot ascertain what issues should be discussed in the Rule 1925(a) opinion or so verbose and lengthy that it frustrates the ability of the trial judge to hone in on the issues actually being presented to the appellate court, ***see Kanter v. Epstein***,

certified record, and the applicable authority, we affirm the order denying Appellant's PCRA petition, and we do so based on the PCRA court's October 18, 2012 opinion. We direct the parties to attach a copy of that opinion in the event of further proceedings in this matter.

Order affirmed.

Judgment Entered.

Prothonotary

Date: 7/17/2013

> 866 A.2d 394 (Pa.Super.2004), that is not an onerous burden to place on counsel. It only requires using a little common sense.
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> The Rule 1925(b) statement must be detailed enough so that the judge can write a Rule 1925(a) opinion, but not so lengthy that it does not meet the goal of narrowing down the issues previously raised to the few that are likely to be presented to the appellate court without giving the trial judge volumes to plow through.

Commonwealth v. Reeves, 907 A.2d 1, 3 (Pa. Super. 2006).

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J-S38013-13

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

COMMONWEALTH OF PENNSYLVANIA)
v.)
WILLIAM ROBERT HAVLIK,)
Appellant.)

No. CP-48-CR-3660-2006

Superior Court No. 1712 EDA 2012

MEMORANDUM OPINION

The appellant, William Robert Havlik, appeals from our order dated May 29, 2012, denying his first petition for post-conviction collateral relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541, *et seq.* This memorandum opinion is filed pursuant to Pennsylvania Rule of Appellate Procedure ("Pa.R.A.P.") 1925(a).

I. Factual And Procedural History

We previously set forth most of the factual and procedural history in this matter in a prior opinion, which was as follows:

> On August 28, 2006, the Forks Township Police Department charged the appellant with Burglary,[1] Criminal Trespass,[2] Criminal Attempt to Commit Robbery – Threat of Immediate Serious Bodily Injury,[3] Aggravated Assault (2 counts),[4] Simple Assault (3 counts),[5] Receiving Stolen Property,[6] Firearms Not to be Carried Without a License,[7] Terroristic Threats (3 counts),[8] Recklessly Endangering Another Person (3 counts),[9] and Persons Not to Possess Firearms,[10] for acts that allegedly occurred on August 27, 2006. The relevant facts underlying the charges are as follows:

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[1] 18 Pa.C.S.A. § 3502.
[2] 18 Pa.C.S.A. § 3503(a)(1)(i).
[3] 18 Pa.C.S.A. §§ 901, 3701(a)(1)(ii).
[4] 18 Pa.C.S.A. §§ 2702(a)(1), (4).
[5] 18 Pa.C.S.A. § 2701(a)(3).
[6] 18 Pa.C.S.A. § 3925(a).
[7] 18 Pa.C.S.A. § 6106(a)(1).
[8] 18 Pa.C.S.A. § 2706(a)(3).
[9] 18 Pa.C.S.A. § 2705.
[10] 18 Pa.C.S.A. § 6105(a)(2)(i).

As of August 2006, Heather Havlik ("Heather") and her 2 ½ year old son, Dominick, lived at 521 Frutchey Hill Road in Forks Township. At this time, Heather was still married to the appellant, whom she had married on September 29, 2001. However, Heather and the appellant separated in July 2005, and she and Dominick moved to New Jersey to live with her parents.

On August 11, 2005, while Heather was living in New Jersey, she obtained a final restraining order against the appellant based on various incidents. Two of the incidents involved (1) Heather finding the appellant hiding in the bushes at her parents' house, and (2) the appellant breaking into Heather's office and taking various items. Heather also claimed that the appellant would call her approximately 20 times a day crying and begging to reconcile. The appellant received a copy of the final restraining order on the same date that it was entered.

The August 2005 restraining order prohibited the appellant from having any contact with Heather, her parents, her residence, or her parents' residence. Despite receiving a copy of this order, the appellant continued to contact Heather through phone calls and letters. On October 13, 2005, Heather faxed the appellant a letter informing him that he should contact her attorneys about any money or divorce matters. The letter also advised the appellant that if he continued to contact her, she would be forced to exercise her rights under the restraining order.

In November 2005, Heather heard that the appellant was not living at 521 Frutchey Hill Road anymore, but since she was paying the mortgage on the property, she moved back into the residence. On November 3, 2005, since Heather had now moved back into Pennsylvania, she obtained a Protection From Abuse ("PFA") order based on the August 2005 final restraining order. After obtaining the PFA order, she posted it on the front of the door of the residence at 521 Frutchey Hill Road. This PFA order evicted the appellant from 521 Frutchey Hill Road.

In January 2006, the Forks Township Police Department contacted Heather because the appellant wanted to collect items that he left at the residence. The appellant arrived with the police and retrieved various items from the residence. The appellant also removed the copy of the PFA order that Heather had placed on the front door.

On or around August 24, 2006, the appellant contacted Heather in an attempt to resolve some money issues with the divorce. Heather informed him that he could have all of his stuff, his tools, and $30,000. The appellant laughed and then hung up the phone.

On August 26, 2006, the appellant was staying with his friend, Evan Schatzman ("Schatzman"), and helping him with various projects around Schatzman's property. Schatzman owned a .357 Magnum. On this date, Schatzman had taken the Magnum out of its case to clean it. Schatzman took the

weapon to the garage and, after cleaning it, placed it in a metal foam-lined case inside the front door area of his garage. The next day, Schatzman noticed that the Magnum was missing. Schatzman did not give anyone, including the appellant, permission to use this gun.

On August 27, 2006, Heather, Dominick, and Heather's boyfriend, Thomas Clark ("Clark"), were at Heather's parents' house for an anniversary gathering. At this time, Heather and Clark had been dating for approximately three months. At approximately 8:30 p.m., they left the party and drove back to 521 Frutchey Hill Road. They arrived home at approximately 9:00 p.m., and started bringing items from the car into the house. After Heather and Clark had gotten Dominick and the items in the house, the screen door for the front door was closed, but the main door was still open. As Dominick was running around the foyer area towards the front door, Heather saw someone approaching the door. When this individual reached the screen door, Heather realized that this individual was the appellant.[11]

Heather told the appellant that he could not be at the house and, at that point, the appellant proceeded to open the screen door and enter the residence. The appellant knew that the PFA was in effect as of August 27, 2006, and he was prohibited from being at 521 Frutchey Hill Road on August 27, 2006. The appellant had a gun in his right hand and a baseball bat and a bag in his left hand. The appellant was also wearing a yellow raincoat and black gloves, and he had black electrical tape wrapped around his ankles. Heather immediately grabbed Dominick and ran back into the dining room area of the house where Clark was located. Heather told Clark that the appellant was in the house with a gun, and she ran into the office with Dominick.

The appellant shut the front door and walked down the hallway. The appellant also placed the bag on the dining room table. At this point, Clark approached the appellant and told him that he should not be at the house and tried to get the appellant to go outside and talk. The appellant then began yelling about money and the divorce and started to approach Heather and Dominick in the office area. The appellant also complained that Heather was not returning his phone calls.

At some point during this altercation, Michael Neuman ("Neuman"), a friend of Heather's, called Clark's cell phone. Someone picked up the phone but did not say anything. Instead, Neuman heard arguing in the background. Although Neuman found it strange that Clark would let him overhear him and Heather arguing, Neuman continued to listen to the conversation. At this time, Neuman heard another individual yelling. Neuman heard the individual say that "the $30,000 you offered me was a fucking joke, and then I put 75 percent of the money into this house." Neuman was aware of the appellant and Heather's

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[11] The appellant had been hiding behind a van in front of the house, and after seeing Heather, Clark, and Dominick enter the house, he followed them in to the residence.

relationship, and after believing this individual's voice to be that of the appellant's, he hung up the phone and called the police. After calling the police, Neuman left to go over to Heather's residence and, while he was traveling, he received text messages from Clark to call 911.

Back at the residence and after hearing Clark's cell phone ring, the appellant asked Clark to give him the cell phone. Clark refused to give the appellant his phone. The appellant yelled at Clark for living in his house and for dating his wife. When Clark responded that he was not living in the house, the appellant said that he saw Clark's car in the driveway every night. Heather also informed the appellant that he was scaring Dominick and the appellant replied, "He don't fucking know me. I don't care anymore. I don't care what happens anymore."

The appellant then demanded again that Clark give him his cell phone. Clark refused, and the appellant then grabbed Clark with his left hand by the throat, backed him into the dining room table, put the gun in his face, and said "[g]ive me that phone motherfucker. You don't know who you're dealing with." Despite the appellant's actions, Clark still refused to give the appellant his phone. After seeing this, Heather yelled at the appellant to stop, asking him not to hurt them, and told him that he could have whatever he wants if he just stopped. The appellant then backed off, and Heather asked him if she could go and get a cigarette. She then proceeded to go into the kitchen and used her cell phone to call 911.

After dialing 911, Heather placed the cell phone in her pocket and left the phone open so the operator could hear. The appellant sat down at the dining room table, from which he could view the kitchen area. The appellant still had the gun. Heather attempted to keep the appellant calm by talking to him and reiterating that he could have whatever he wants. The appellant responded that he did not want Heather to agree to anything now because she was scared. Heather responded by saying, "What do you expect when you come in here with a bat and gun?" The appellant then told Heather that the gun was merely a BB gun. At some point during this conversation, Heather was able to go back into the kitchen and state the address into the phone. The police arrived shortly thereafter and arrested the appellant.

The police searched the appellant and found, among other things, a box cutter, flashlight, lighter, and green surgical gloves on his person. Although they did not recover a gun from the appellant's person, the police located a .357 Magnum revolver in the office area of the residence.[12] The Magnum had six live rounds in it. The police also found a box of 50 rounds of ammunition in the appellant's raincoat pocket. In the plastic bag on the dining room table, the police recovered plastic zip ties, heavy duty garbage bags, another 50 rounds of ammunition, a cell phone, multiple pairs of green surgical gloves, yellow nylon

[12] Clark observed the appellant toss the gun into the office after seeing the police arrive.

rope with pre-tied knots at the end of the rope, and electrical black tape that was similar to the tape that was wrapped around the appellant's ankles.

The appellant was tried before a jury beginning on May 16, 2007. During the first day of trial, the appellant moved for a mistrial after the Commonwealth elicited testimony from Heather that she moved back into the home at 521 Frutchey Hill Road after the appellant had been incarcerated on other offenses. After consulting with the assistant district attorney and the appellant's counsel, the Honorable Emil Giordano granted the motion and declared a mistrial. The matter was then reassigned to the undersigned. Before trial was set to begin, the appellant's counsel moved to dismiss on double jeopardy grounds. The Court denied the motion. The appellant was then tried before a jury from May 16, 2007 until May 22, 2007.[13] The jury found the appellant guilty of Burglary, Criminal Trespass, Simple Assault (2 counts), Receiving Stolen Property, Recklessly Endangering Another Person (3 counts), and Terroristic Threats (2 counts).[14] On July 9, 2007, the Court held a sentencing hearing, during which the Court imposed (1) a sentence of state confinement for a minimum of 10 years to a maximum of 20 years for the offense of Burglary, (2) a consecutive sentence of incarceration for a minimum of 5 years to a maximum of 10 years for the offense of Receiving Stolen Property, and (3) a consecutive sentence of incarceration for a minimum of 5 years to a maximum of 10 years for the offense of Persons Not to Possess Firearms.[15] Thus, the appellant's aggregate sentence was a period of incarceration for a minimum of 20 years to a maximum of 40 years.

On July 16, 2007, the appellant filed a timely post-sentence motion. The Court held a hearing on the motion on August 31, 2007, after which the Court granted the part of the motion seeking re-sentencing on the conviction for Receiving Stolen Property because the grading of the offense was incorrectly noted on the sentencing guidelines as a Felony of the Second Degree. After the hearing, the Court reduced the appellant's sentence for the offense of Receiving Stolen Property to a period of incarceration for a minimum of 15 months to a maximum of 5 years. The Court denied the remaining issues in the motion. The appellant filed a timely notice of appeal on October 1, 2007, and the Court ordered him to file a concise statement of the matters complained of on appeal in accordance with Pa.R.A.P. 1925(a) on October 2, 2007.

The appellant timely filed a statement of matters complained of on October 16, 2007, in which he claims as follows:

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[13] On the first day of trial, counsel agreed that the charge of Persons Not to Possess Firearms would be tried separately. [Notes of Trial, 5-16-07, at p. 5-6.] On the final day of trial, the appellant pled guilty to this offense. [N.T., 5-22-07., at p. 11-36.]

[14] The Commonwealth withdrew the Firearms Not to be Possessed Without a License charge.

[15] The offenses of Criminal Trespass, Simple Assault (2 counts), Recklessly Endangering Another Person (3 counts), and Terroristic Threats (2 counts) merged with the Burglary conviction for purposes of sentencing. *See* 18 Pa.C.S.A. § 3502(d) ("A person may not be convicted both for burglary and for the offense which it was his intent to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.").

> 1. Petitioner's conviction violates Double Jeopardy. More specifically, the Trial Judge abused his discretion, thereby committing reversible error when he denied the Defendant's Motion to Dismiss on grounds of Double Jeopardy, as the first Trial of the Defendant ended in a mistrial due to no fault of the Petitioner, but due to misconduct of a Commonwealth witness.
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> 2. The Trial Judge abused his discretion, thereby committing reversible error, when he sentenced the Petitioner to the maximum term of incarceration for the offense of Burglary, a Felony of the First Degree, the maximum statutory term of incarceration for the charge of Firearms Not to Be Possessed by a Former Convict, and the statutory maximum term of incarceration for the charge of Theft of a Firearm. It is believed and therefore averred that this Honorable Court failed to state sufficient reasons upon the record for imposing such sentences.
>
> 3. It is believed and therefore averred that the sentence as aforementioned is otherwise manifestly harsh and excessive in light of the fact that no person was physically harmed and the rehabilitative needs of the Defendant.
>
> 4. The Trial Judge abused his discretion thereby committing reversible error by failing to merge the crimes of Firearms Not to Be Possessed by a Convict and Theft of a Firearm.

[Appellant's Statement Of Matters Complained Of.]

[*Commonwealth v. Havlik*, No. CP-48-CR-3660-2006, at 1-8 (C.P. Northampton Jan. 9, 2008) (Memorandum Opinion) (footnotes in original).]

On September 22, 2008, the Superior Court of Pennsylvania affirmed the appellant's judgment of sentence. *Commonwealth v. Havlik*, No. 2596 EDA 2007 (Pa. Super. Sept. 22, 2008). The appellant then filed a petition for allowance of appeal with the Supreme Court of Pennsylvania on October 22, 2008.[16] On March 9, 2009, the Supreme Court ordered that the petition was held until disposition of another matter, *Commonwealth v. Baldwin*, No. 44 EAP 2008. On July 28, 2010, the Supreme Court denied the petition for allowance of appeal.

[16] The petition was initially docketed at Supreme Court No. 565 MT 2008 and eventually transferred to 734 MAL 2008.

On July 25, 2011, the appellant filed the instant PCRA petition. On September 20, 2011, we appointed Attorney Matthew Potts, Esquire, as the appellant's PCRA counsel and scheduled an evidentiary hearing for October 28, 2011. Thereafter, we received correspondence from the appellant and Attorney Potts indicating that Attorney Potts had a conflict of interest that would preclude his representation of the appellant in this matter. As such, we entered an order on October 24, 2011, in which we (1) granted leave to Attorney Potts to file a praecipe to withdraw as the appellant's counsel, (2) appointed Attorney Alexander J. Karam, Jr., Esquire, as the appellant's PCRA counsel, and (3) scheduled an issue-framing conference.

We then held an issue-framing conference on November 9, 2011, during which Attorney Karam indicated to the court that he did not find any issues of arguable merit in the appellant's PCRA petition.[17] Based on Attorney Karam's representations, we entered an order on November 21, 2011, requiring Attorney Karam to proceed in accordance with the direction of *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), so we could conduct an independent review of the record to determine whether we agreed with his representation that the petition was meritless.

On or about December 6, 2011, we received a no-merit letter from Attorney Karam and a request to withdraw as the appellant's counsel. On January 26, 2012, after reviewing the no-merit letter and the records in this matter, we denied Attorney Karam's petition to withdraw as counsel and scheduled an evidentiary hearing for February 17, 2012.

Prior to the evidentiary hearing, Attorney Karam moved to withdraw as the appellant's counsel on February 10, 2012, and we granted his motion on that same date. We appointed Attorney Brian M. Monahan, Esquire, as the appellant's PCRA counsel.

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[17] We recognize that both the docket and our November 21, 2011 order indicate that the conference was held on November 11, 2011. Nonetheless, the conference occurred on November 9, 2011.

We held the evidentiary hearing in this matter on May 29, 2012, after which we denied the appellant's first PCRA petition on the record. On June 18, 2012, the appellant filed a timely notice of appeal from the denial of his PCRA petition. On June 20, 2012, we ordered the appellant to file a concise statement of the matters complained of on appeal in accordance with Pa.R.A.P. 1925(b). On July 9, 2012, the appellant filed his concise statement in which he complains as follows:

1. Trial Counsel, Matthew Potts, was ineffective in representing your Defendant at the Preliminary Hearing.

2. Trial Counsel, Christopher Shipman, failed to adequately consult with your Defendant prior to and during the Trial process.

3. Trial Counsel, Christopher Shipman, failed to investigate Defendant's claims of mental deficiencies including post-traumatic stress disorder, bipolar disorder, severe depression, anxiety, and panic attacks.

4. Trial Counsel, Christopher Shipman, failed to adequately conduct an investigation, interview witnesses, and return phone calls to defense witnesses, Dennis Havlik, Patricia Havlik, and Phyllis Vasaturo.

5. Trial Counsel, Christopher Shipman, was ineffective in failing to gather and collect psychiatric records, medical records, and medication to show Defendant's state of mind due to side effects of medication.

6. Trial Counsel, Christopher Shipman, failed to present an adequate defense to the Jury at Trial.

7. Trial Counsel, Christopher Shipman, was ineffective in failing to advise your Defendant that a plea to possession of a loaded firearm would enhance Defendant's conviction of burglary.

8. Trial Counsel, Christopher Shipman, was ineffective in failing to interview and investigate Commonwealth witnesses, Michael Newman, Heather Havlik, Thomas Clark, Jeremy McClymont, Ms. Sandt, Joseph Dressler, and Joseph Effting.

9. Trial Counsel was ineffective in failing to disclose the conflict of interest between Assistant District Attorney Jacqueline Taschner and your Defendant.

10. Trial Counsel was ineffective in failing to challenge the erroneous description by the Assistant District Attorney of painter gloves as surgical gloves.

11. Trial Counsel was ineffective in failing to request the appointment of a firearms expert to determine whether the 357 magnum handgun was operational.

12. Trial Counsel was ineffective in failing to request a psychological and psychiatric examination of your Defendant in order to present mitigating mental health evidence, and side effects of medication, at Trial and Sentencing.

13. Trial Counsel was ineffective in failing to review the "information" filed which incorrectly graded receiving stolen property as a felony.

14. Trial Counsel was ineffective in failing to obtain and review 911 tapes of the subject incident for purposes of presentation at Trial.

15. Trial Counsel was ineffective in failing to present evidence that your Defendant habitually carried a carpenter's knife for use as a tool and not as a weapon.

16. Trial Counsel was ineffective in failing to introduce evidence of the weather on the date of the incident to show that it was not unlawful to wear a raincoat when it was raining.

17. Trial Counsel was ineffective in failing to gather and present at Trial and Sentencing Defendant's psychiatric medical records from St. Luke's Hospital of Quakertown and from Muhlehnberg Psychiatric Hospital.

18. Trial Counsel was ineffective in failing to object to the Judge's statement and/or request a Mistrial when the Court loudly instructed the Defendant to "stop staring at the witness."

19. Trial Counsel was ineffective in failing to file Suppression Motions to exclude the raincoat, carpenter's knife, 357 magnum revolver, baseball bat, surgical gloves, and rounds of ammunition.

20. Trial Counsel was ineffective in failing to be present during the Presentence Investigation Interview by the Northampton County Department of Adult Probation since that interview was a critical phase of the sentencing proceeding.

21. Trial Counsel was ineffective in failing to present evidence to the Jury connecting a missing bicycle chain guard to his tightly taped pant legs.

22. Trial Counsel was ineffective in failing to adequately prepare your Defendant prior to Defendant's testifying at Trial.

[Appellant's Pennsylvania Rule of Appellate Procedure 1925(b) Concise Statement of Matters Complained of on Appeal.]

II. Discussion

As indicated above, the appellant has raised a plethora of issues in this appeal, all of which relate to our alleged failure to find that the appellant was entitled to PCRA relief because of the ineffective assistance of his prior counsel. We will first detail our findings from the evidentiary hearing and then present our analysis of each of the appellant's twenty-two issues on appeal.

A. Evidence Presented During the Evidentiary Hearing

Only two witnesses testified during the evidentiary hearing: the appellant and his prior counsel, Attorney Christopher Shipman, Esquire.

1. The Appellant's Testimony

Shortly before the appellant's offenses on August 27, 2006, the appellant claims that he had issues with depression, post-traumatic stress disorder, anxiety, and panic attacks. [Notes of PCRA Hearing ("N."), 5-29-12, at 12.] The appellant was also taking multiple medications for those mental health issues. [*Id.* at 13.] The appellant indicated that he was currently on the medications, Risperdal and Doxepin, but he believed that those medications would not affect his ability to remember or understand anything. [*Id.* at 11-12.][18]

[18] We note that much of the appellant's testimony was not necessarily factual testimony; instead, the testimony was devoted to the appellant's explanation and description of the claims that he was raising as part of his PCRA. Although we recognize that we reference some of the appellant's legal arguments in our recitation of the evidence presented during the hearing, we have attempted to extrapolate only the facts testified to by the appellant in this part of the opinion.

After the appellant's arrest in this case, the appellant was incarcerated in Northampton County Prison. [*Id.* at 14.] The appellant believes that he was taking Remeron, Lithium, and Klonopin for his mental health issues at that time. [*Id.* at 14, 116.][19] He does not recall the type of doses of this medication he was taking at the time, or the doses of medication that he actually took on the date of the incident. [*Id.* at 118, 119, 120, 121.] The appellant believes that those medications greatly impaired his ability and judgment to process what was happening. [*Id.* at 14.] He also believes that the medications impaired his social skills because he was unable to speak or be himself. [*Id.* at 15.]

In regard to his representation in this case, the appellant was represented by Attorney Shipman. [*Id.* at 11.] The appellant indicated that although he believed that he met with Attorney Shipman prior to the preliminary hearing, Attorney Shipman was unavailable to represent him at the preliminary hearing. [*Id.* at 17, 25.] As such, Attorney Matthew Potts, Esquire, represented the appellant during the preliminary hearing. [*Id.*] The appellant testified that he did not have any prior meeting with Attorney Potts in advance of the hearing at Magisterial District Justice Ralph M. Litzenberger's office in Palmer Township. [*Id.*]

Prior to the preliminary hearing, Attorney Potts notified the appellant of a plea offer by the Commonwealth by which the appellant would plead guilty to various offenses in exchange for a sentence of a minimum of seven years to a maximum of twenty-one years. [*Id.* at 18.] The appellant decided not to accept the plea offer at that time. [*Id.*] The appellant asserts that upon Attorney Potts communicating to the prosecutor, former Assistant District Attorney Jacqueline Taschner ("ADA Taschner"), that the appellant would not accept the offer, ADA Taschner asked District Justice Litzenberger to amend the Robbery charge to Attempted Robbery. [*Id.* at 19-20.]

[19] The appellant initially stated that he was on Thorazine at the time of the offenses, but he later admitted that he was taking that medication only at the time of trial. [N. at 14, 118, 119.]

Additionally, the appellant claims that because Attorney Potts was not his counsel at trial, all of the information that he possessed from the preliminary hearing "disappeared." [*Id.* at 20.] The appellant asserts that the notes from the preliminary hearing were not transcribed. [*Id.* at 20-21.] He believes that four witnesses testified at the preliminary hearing: two police officers, Heather Havlik, and Thomas Clark. [*Id.* at 21.]

The appellant claims that he asked Attorney Potts to seek a different prosecutor because he did not feel that he was going to get a fair proceeding with ADA Taschner handling the case for the Commonwealth. [*Id.*] The appellant also testified that he told Attorney Shipman about this alleged conflict of interest with ADA Taschner. [*Id.* at 22.] Attorney Shipman told the appellant that the alleged conflict should not be a problem. [*Id.* at 22-23.]

The appellant believes that he met with Attorney Shipman on two occasions prior to trial, although he admits that he might have met with him on other occasions. [*Id.* at 24, 26.][20] The appellant stated that he (1) attempted to talk to Attorney Shipman about how he was seeing psychiatrists and taking medication, and (2) asked Attorney Shipman to obtain medical records and testimony from the doctor. [*Id.* at 26-27, 30.] The appellant intimated that his medication caused certain side effects, and he believes he told Attorney Shipman that those side effects caused him to act out like he did. [*Id.* at 27-28.] The appellant was "pretty sure" that he told Attorney Shipman that he was on Klonopin, Thorazine, Remeron, and Lithium. [*Id.* at 28.] The appellant also stated that he discussed his post-traumatic stress disorder, bipolar disorder and panic attacks with Attorney Shipman. [*Id.*] He believes that he also told Attorney Shipman the names of his treating doctors. [*Id.* at 9.]

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[20] The appellant admits he might have met with Attorney Shipman on other occasions, but he only recalls two meetings. [N. at 25, 26.] The appellant asserts that he attempted to obtain copies of Attorney Shipman's notes as part of this PCRA proceeding, but he never received that information. [*Id.* at 25-26.]

The appellant claims that Attorney Shipman did not contact any mental health professionals to determine the nature of his mental health issues. [*Id.* at 29.] The appellant asked him to obtain medical records from physicians or mental health professionals relating to his mental condition. [*Id.* at 30.]

The appellant also asserts that Attorney Shipman's representation was deficient because he did not interview other witnesses or attempt to get them to testify on the appellant's behalf. [*Id.* at 31.] More specifically, the appellant asked Attorney Shipman to call his father, Dennis Havlik, as a witness. [*Id.* at 31, 32.] The appellant believes he provided Attorney Shipman with his father's phone number and address, but Attorney Shipman did not subpoena him. [*Id.* at 32, 34.][21] The appellant does not know what his father would have testified to, but he would have generally testified about "what was happening to [the appellant] physically and mentally." [*Id.*] The appellant believes that this testimony would have advanced his defense because it would have shown his "culpable mental state . . .[;] why [he] was acting in the way [he] was acting . . . . [I was acting] psychotic, outside of the normal realm. I was acting crazy." [*Id.* at 32-33.]

The appellant claims that prior to the crimes at issue in this case, he was suffering from anxiety, depression, and blackouts. [*Id.* at 33.] In addition, he believes his mental health issues manifested themselves in his involvement in four vehicular accidents within four to six weeks, with the last accident occurring approximately six weeks prior to the crimes. [*Id.* at 33-34.][22] The appellant asserts that the accidents were caused by him "black[ing] out" while operating the vehicles. [*Id.* at 34.]

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[21] Although clearly hearsay, we note that the appellant testified that his father had attempted to contact Attorney Shipman to find out the trial date so he could appear and testify, but Attorney Shipman allegedly never returned his calls. [N. at 34.]

[22] The appellant did not testify that his father was a witness to those blackouts; rather, the appellant referred to the police reports. [N. at 34.]

Along with his father, the appellant sought to call his stepmother, Patricia Havlik as a witness. [*Id.*] The appellant believes that she would have testified to the same issues regarding the appellant's mental health. [*Id.* at 35.] In particular, his stepmother could have testified that

> what was causing me to do this originated from me catching my wife cheating on me. Physically I caught her naked in the bed. So that was causing a lot of the emotional distress, and she would have been able to testify to that. She was very aware of that.
>
> And she -- after that, we had [a] conflict with my [step-]mother over this, because she didn't -- after this, I took her back and then we had a baby together. And my [step-]mother was really, really mad at me because I accepted her back and we did have a baby. And she stopped talking to me at that time. Like she wouldn't even come and visit me and see my son because she was so angered and mad at what my ex-wife did to me.
>
> So that put a lot of strain on our relationship between me and my [step-]mother. So that's what she would have testified to, I'm sure.

[*Id.* at 35-36.]

The appellant also would have called his ex-wife, Phyllis Vasaturo, as a witness. [*Id.* at 36.] The appellant could not specifically state what this witness would have testified to in his case, but he asserts that she knew what was happening between the appellant and Heather Havlik. [*Id.* at 37.] Thus, the appellant believes that Phyllis Vasaturo "could have told [the jury] what [the appellant] was going through." [*Id.*]

Essentially, the appellant wanted to assert that his psychological conditions and the side effects of the medication caused him to commit the criminal acts at issue in this case. [*Id.* at 38.] These medical issues, combined with "what [Heather Havlik] was trying to do to [him], intentionally trying to provoke th[e] situation," caused the appellant to act out in the way he did. [*Id.*] The appellant believes that he raised this issue at trial with Attorney Shipman, and he asked Attorney Shipman for information about the side effects of his medication but did not receive any information from him. [*Id.*] The appellant wanted Attorney Shipman to raise an issue

relating to his mental health combined with Heather Havlik's acts to "intentionally . . . provoke this situation." [*Id.*]

The appellant also raised an issue related to his guilty plea to Persons Not to Possess Firearms. [*Id.* at 40.] The appellant pleaded guilty to this offense while the jury was deliberating on the other offenses. [*Id.*] The appellant claims that his plea was not knowing and voluntary because he believes that the plea caused a deadly weapons enhancement to apply to the sentencing guidelines for some of his other offenses. [*Id.* at 41.] The appellant believes he would not have pleaded guilty if he knew that his sentencing guidelines would be enhanced because of his plea. [*Id.*] According to the appellant, the guilty plea colloquy does not contain any reference to the sentence enhancement. [*Id.* at 41-42.]

The appellant asserts that Attorney Shipman failed to interview and investigate the Commonwealth's witnesses prior to trial. [*Id.* at 42.] In this regard, the appellant noted that Attorney Shipman was not present at the preliminary hearing to hear the testimony himself. [*Id.* at 44.] Although Attorney Shipman did receive discovery in the case from the Commonwealth and provide this information to the appellant, the appellant feels that Attorney Shipman should have gone beyond those pieces of information. [*Id.* at 44-45.] The appellant did not identify what type of information beneficial to his case that Attorney Shipman's investigation would have revealed. [*Id.* at 42.]

Concerning the previously mentioned alleged conflict of interest with ADA Taschner, the appellant intimates that Attorney Shipman was ineffective for failing to address this conflict. [*Id.* at 45.] The appellant believes he was prosecuted vindictively by ADA Taschner and her actions constituted prosecutorial misconduct. [*Id.* at 46.] In this regard, the appellant testified that at some point in the 1990s, another attorney contacted him to repair the ceiling in ADA Taschner's

private practice office. [*Id.* at 47, 126.] While the appellant was there, ADA Taschner confronted the appellant and claimed that he took money (less than $100) from her desk. [*Id.* at 47, 48, 126.][23] ADA Taschner then told the appellant that if he did not return the money, she would contact the police. [*Id.* at 47.] The appellant paid the money to her and she did not call the police. [*Id.* at 48.]

The appellant believes that this conflict affected his case because the plea bargain that the Commonwealth offered him at the preliminary hearing – an agreement that would call for a sentence of a minimum of seven years to a maximum of twenty-one years – was "outside of the normal realm of what should have been offered." [*Id.* at 48-49.] In addition, when ADA Taschner described the gloves that the appellant wore at the time of the offenses, she would describe them as "surgical gloves" when in fact they were regular Latex gloves also known as "painter's gloves." [*Id.* at 49.] Further, when the appellant proceeded with the probation violation hearing before the Honorable Emil Giordano, ADA Taschner sought that he would receive additional time in prison for the probation violation on top of the sentence in this case. [*Id.* at 50-51.][24]

The appellant also asserts that the alleged conflict of interest manifested itself when ADA Taschner sought to amend the charges in the case because of her dislike for the appellant. [*Id.* at 52.] In this regard, she amended the Robbery charge to Attempted Robbery and the firearms charge from Firearms Not to Be Carried Without a License to Persons Not to Possess Firearms. [*Id.*] Also, the Receiving Stolen Property charge was graded as a felony rather than as a misdemeanor. [*Id.*]

[23] The appellant claims that he did not take the money. [N. at 126.]
[24] The appellant also testified that Judge Giordano "scolded" ADA Taschner when she recommended that he receive an additional period of incarceration for the probation violation. [N. at 51.]

Regarding ADA Taschner's classification of the appellant's gloves as "surgical gloves," the appellant also contends that Attorney Shipman was ineffective for failing to correct ADA Taschner when she repeatedly mischaracterized the gloves. [*Id.* at 54.] The appellant claims that the gloves were painter's gloves and not surgical gloves. [*Id.* at 55.] Although the appellant asked Attorney Shipman to object to these references, he refused to do so. [*Id.*] In addition, the appellant believes that Attorney Shipman should have produced similar painter's gloves – the appellant indicated that he bought his from Home Depot – to show the jury. [*Id.*]

The appellant claims that Attorney Shipman should have hired a ballistics expert for the defense. [*Id.* at 56.] The appellant did recall that a police officer testified at trial that he tested the operability of the firearm that the appellant used in the perpetration of his offenses. [*Id.*] The appellant does not believe that Attorney Shipman knew that this officer had tested the firearm and, thus, he should have hired an expert to provide testimony about this firearm. [*Id.* at 57.][25]

The appellant claims that Attorney Shipman should have hired a mental health professional to conduct an independent mental health examination of him "immediately" upon the commencement of Attorney Shipman's involvement in the case. [*Id.* at 58, 59.] Although the court received psychological and psychiatric reports regarding the appellant prior to sentencing, the appellant believes that an independent review would have discovered more information. [*Id.*] In this regard, the appellant asserts that the reports produced as part of the pre-sentence report, were created without regard to his medical records or psychiatric history. [*Id.* at 59.]

In addition, the appellant intended to use a mental health expert at trial. [*Id.* at 60.] This mental health expert would have testified about the appellant's mental health history, "which

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[25] The appellant did not identify the evidence that an expert would have uncovered had said expert performed an examination of the firearm.

would have been outside the realm of the state's ordinary evaluation." [*Id.*] More specifically, the appellant stated as follows:

> I believe that expert -- this is just my opinion -- would have looked at my prior criminal history, seeing that I was not violent in the past. He would have looked at my past marriages and saw that there was never a police report done for anything, not even an argument more or less violence.
>
> I think he would have testified to the fact that this was a very isolated incident and provoked incident. And medications and the emotional distress and depression and anxiety and the whole combination was a major contributing factor to this very isolated incident.
>
> I think defendant's evaluation, psychological evaluation, would have been much more detailed and in-depth. I think that would have been a critical thing to have in any case -- this specific case because it has to do -- to deal with so much of a mental and psychiatric dealings.

[*Id.* at 60-61.]

The expert would have also been able to identify the side effects of the medication that the appellant was taking. [*Id.* at 61-62.] The appellant also introduced a document showing side effects of Klonopin. [*Id.* at 63-64 & Defendant's Exhibit 2.] The appellant claims that he felt all of the side effects, including feeling suicidal. [*Id.* at 64.] The appellant "knows" those side effects caused him to do what he did on August 27, 2007. [*Id.* at 64-65.]

As for the appellant taking Thorazine, the appellant introduced a document showing those side effects. [*Id.* at 65 & Defendant's Exhibit 3.] The appellant believes that he may have exhibited the side effects of, *inter alia*, blank facial expressions, in the courtroom. [*Id.*] He also believes that the jury may have determined that those side effects were actually character flaws when he testified. [*Id.* at 65-66.] Further, he believes that the court misinterpreted the manifestation of his side effects when we allegedly admonished him for staring at Heather Havlik. [*Id.* at 66.]

Concerning the medications of Remeron and Lithium, the appellant also introduced documents showing the side effects from those medications. [*Id.* at 67 & Defendant's Exhibit 4.] The appellant stated that he was suffering from drowsiness, dry mouth, and a faster heartbeat while on Remeron, and he suffered from, *inter alia*, restlessness and depression while on Lithium. [*Id.* at 67-68.]

The appellant also asserts a claim that Attorney Shipman was ineffective for failing to examine the "charging documents." [*Id.* at 68-69.] In this regard, the appellant points out that he was sentenced for Receiving Stolen Property graded as a felony when it should have been graded as a misdemeanor. [*Id.* at 69.] Nonetheless, the appellant acknowledges that the court discovered the error. [*Id.*]

Attorney Shipman also allegedly failed to obtain 911 recordings relating to this incident. [*Id.* at 70.] Although the appellant asked Attorney Shipman to get them, Attorney Shipman said he never received them. [*Id.*] The appellant wanted to view the transcripts of the tapes. [*Id.*] The appellant believes that the tapes would have "showed that [he] was pretty much calm and not threatening anybody." [*Id.*]

The appellant includes another ineffectiveness claim relating to a carpenter knife. [*Id.* at 71.] The appellant stated that he carried the carpenter knife with him on a regular basis because he performed work as a contractor. [*Id.*] The appellant does not believe that Attorney Shipman challenged the use of the carpenter knife, and he indicates that Attorney Shipman should have filed a motion to exclude the knife as evidence because it was not part of the crime. [*Id.* at 72, 81.] The appellant heard that there was such a motion filed and it was denied, but there was no appeal filed from the denial. [*Id.*]

The appellant believes that Attorney Shipman should have produced a weather report for August 27, 2007 because it was raining outside that evening. [*Id.* at 73.] The appellant contends that Attorney Shipman could have used this evidence to show that he was wearing a raincoat that night simply because it was raining outside and not for any other reason proposed by the Commonwealth. [*Id.*]

In addition to the appellant's aforementioned claims relating to mental health evidence, he asserts that Attorney Shipman failed to gather medical records from his visits at Quakertown and Muhlenberg Hospitals. [*Id.* at 74.] The appellant asserts that prior to the offenses on August 27, 2006, he was under psychiatric care of Dr. Schilkie at Muhlenberg Hospital and Dr. Benjamin from Quakertown Hospital. [*Id.* at 75.] The appellant indicated that he saw Dr. Benjamin on five to ten occasions between 2005 and 2006, and he was also hospitalized. [*Id.* at 122-23.][26] The appellant believes that Attorney Shipman should have obtained these records prior to any proceedings because it was "an extraordinary case" that did not involve money; instead, it dealt with "mental and medical issues, psychiatric issues[,] [a]nd drug side effect issues." [*Id.* at 75-76.]

The appellant further believes that Attorney Shipman should have talked to the marriage counselor that the appellant and Heather Havlik were seeing prior to the offenses. [*Id.* at 90.] This counselor saw the appellant's progression and deterioration of his mental state. [*Id.*] The appellant was unaware of the counselor's name, but he pointed out that the counselor had an office near Easton Hospital. [*Id.* at 91.] He did not recall telling Attorney Shipman about this counselor. [*Id.* at 92.]

Concerning the previously-mentioned alleged admonishment by the court during the trial, the appellant testified that the undersigned yelled "very loud" at him to stop staring at Heather

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[26] The appellant did not know the number of times that he met with Dr. Schilkie. [N. at 124.]

Havlik during her testimony. [*Id.* at 76, 77.] The appellant claims that, at the time, Heather Havlik was testifying and he was not doing anything wrong. [*Id.*] Instead, he was taking very high doses of Thorazine, and he may have been suffering from the side effects. [*Id.* at 76-77.] The appellant claims that the side effects caused "a mask-like face" and may have caused him to have a robotic mannerism. [*Id.* at 78.]

The appellant believes that

> the reaction [to the undersigned's statement to him] was devastating to my case. I believe the jury may have been -- since the witness was testifying, I believe the jury was looking at the witness and not me. So from Judge Smith in front of the jury yelling at me saying stop staring at the witness, the jury had no -- they believed that the judge was correct and I was staring at the witness.
>
> But I think that influenced the jury against me and prejudiced the jury against me. I believe that was a major issue here.

[*Id.* at 77.]

In addition, the appellant indicated that he had looked at Attorney Shipman to try to tell him that he was not doing anything wrong and that Attorney Shipman should object to the court's statement. [*Id.* at 78.] The appellant also stated that the sheriff's deputies came over "real quick" and moved his chair so he could not see the witness. [*Id.* at 78, 79.] The appellant stated that the deputies stayed in close proximity to him, so "the jury was made aware of and obviously they were influenced in and thought that I was doing something wrong for this to occur." [*Id.* at 79.] The appellant believes that the "correct way to handle that would have been to recess and dismiss the jury and then handle it outside of the jury's presence." [*Id.* at 78.]

The appellant also contends that Attorney Shipman was ineffective for failing to properly prepare him to testify at trial. [*Id.* at 86.] The appellant believes that he "pretty much just wanted to get [the trial] over with." [*Id.* at 87.] Due to his medication, the side effects, the duress, and the stress of the trial, he was not of "sound mind" to make the judgment to testify on

his own behalf. [*Id.*] The appellant does not believe that he should have been put on the stand. [*Id.* at 89.]

The appellant stated that he and Attorney Shipman did not prepare for the appellant to testify at trial. [*Id.* at 88.] In this regard, Attorney Shipman did not provide the appellant with a list of questions that he was going to ask him. [*Id.*] Additionally, the appellant believes that Attorney Shipman asked questions to the appellant to which Attorney Shipman did not know the answers. [*Id.*]

2. Attorney Shipman's Testimony

Attorney Shipman testified that upon graduating from law school, he served as a law clerk for the Honorable Robert E. Simpson.[27] [*Id.* at 98.] Attorney Shipman has been licensed to practice law since 1997. [*Id.* at 111.] After concluding his clerkship, Attorney Shipman began practicing law and eventually became a part-time member of the public defender staff in approximately 2000. [*Id.* at 98, 111.] In addition, Attorney Shipman was employed by another attorney, Attorney Gary Asteak, and Attorney Asteak's law firm was primarily devoted to the practice of criminal law. [*Id.* at 98.] Currently, approximately sixty to seventy percent of Attorney Shipman's practice is devoted to criminal matters. [*Id.* at 112.]

Attorney Shipman has participated in approximately fifty criminal trials since 1997. [*Id.* at 112.] Those cases have included felonies, misdemeanors, and homicide cases. [*Id.*]

As part of Attorney Shipman's duties as a public defender, the court appointed him to represent the appellant in this case. [*Id.* at 98-99.] Once this assignment occurred, Attorney Shipman commenced his representation by meeting with the appellant on one occasion prior to the preliminary hearing. [*Id.* at 99.] During this meeting, they discussed the charges and the

[27] Judge Simpson was formerly a member of this court and is now a judge with the Commonwealth Court of Pennsylvania.

appellant's version of the alleged events. [*Id.*] Additionally, Attorney Shipman indicated that he usually collects information about the appellant's prior record and his bail during this initial meeting. [*Id.*] Regarding the appellant's mental health issues, Attorney Shipman was unsure whether these issues were discussed during his initial meeting with the appellant. [*Id.* at 99, 100.]

As for the appellant's preliminary hearing, Attorney Shipman explained that Attorney Potts was also on the Public Defender's staff and "it [was not] unusual" for them to cover each other's cases if either of them were unavailable because of vacation or if they would have to be in two places at once due to scheduling issues. [*Id.* at 100.] Prior to the appellant's preliminary hearing, one of the two aforementioned situations occurred and Attorney Potts assisted Attorney Shipman by entering an appearance and representing the appellant at the hearing. [*Id.*] Although Attorney Potts represented the appellant, Attorney Shipman discussed the appellant's case with Attorney Potts prior to the preliminary hearing. [*Id.*] Attorney Shipman recalled that Attorney Potts represented the appellant at the hearing, and he believes that a transcript was prepared from that hearing. [*Id.*][28]

Regarding the appellant's mental health issues, Attorney Shipman recalled the appellant mentioning that he previously suffered from depression and bipolar disorder. [*Id.* at 101-02.] The appellant also indicated that he had been hospitalized once or twice for those mental conditions. [*Id.* at 102, 103.] Despite this information, at no time did the appellant ever request that Attorney Shipman prepare a defense that would focus on his mental health. [*Id.* at 103, 104.] The appellant was aware that they were not going to assert any sort of mental health defense at trial. [*Id.* at 105.]

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[28] Attorney Shipman also noted that he always has a stenographer present when he represents a client at a preliminary hearing. [N. at 101.]

Instead, Attorney Shipman and the appellant agreed that the defense would be that the appellant went to Heather Havlik's house that evening to confront her regarding property settlement issues in the midst of their divorce. [*Id.* at 102, 105.] There was also an issue as to whether a PFA was in effect at the time that the appellant was inside of the house. [*Id.*] The appellant had told Attorney Shipman that he called Heather Havlik on numerous occasions to resolve the property issues, which included resolving issues with their jointly-held residence and other monetary issues. [*Id.*]

Attorney Shipman noted that the defense could not contend that the appellant was not at the house that evening. [*Id.* at 104.] Thus, they attempted to argue that the appellant went to the house not to accost Heather and the other individuals inside, but to discuss the property settlement issues. [*Id.*] The confrontation only ensued after the appellant saw Heather Havlik, Dominick Havlik and Thomas Clark go into the house. [*Id.*] Attorney Shipman explained that he hoped to convince the jury that the appellant did not intend to harm anyone inside the residence, but he was there only to scare them because he was not getting any answers about the property settlement issues. [*Id.*]

Although the defense was not going to include a mental health-related defense, Attorney Shipman pointed out that he did bring up the appellant's mental health issues to the jury. [*Id.* at 105.] He noted that he brought up to the jury that the appellant was on certain medications that gave him a "flat affect" so that they would not interpret that manifestation of the medications as showing the appellant's indifference to the matter. [*Id.*]

Attorney Shipman indicated that he and the appellant never discussed the types of medications the appellant was taking at the time of trial. [*Id.* at 106.] In addition, the appellant did not speak to Attorney Shipman about the medication he was taking at the time of the offense

or the possible side effects of said medication. [*Id.*] In fact, the appellant never informed Attorney Shipman that he did not know exactly what he was doing at the time he committed the offenses in this case. [*Id.*] If the appellant had asserted that he either did not know what he was doing or he lacked the capacity to understand the nature of his conduct, Attorney Shipman may have explored or pursued a mental health defense. [*Id.*]

Regarding the appellant's guilty plea to Persons Not to Possess Firearms, Attorney Shipman recalled requesting to sever this offense from the other charges so that the jury would not improperly hear about the appellant's prior criminal history. [*Id.* at 107.] Attorney Shipman believes that the appellant pleaded guilty to this offense after the jury reached a decision on the more serious charges. [*Id.*] The appellant and Attorney Shipman discussed the appellant choosing to plead guilty to the Persons Not to Possess Firearms offense. [*Id.*] Attorney Shipman had no concerns about the appellant's ability to knowingly and voluntarily enter into the plea. [*Id.* at 108.] Attorney Shipman did not compel the appellant to plead guilty. [*Id.*]

Additionally, Attorney Shipman rebuked the appellant's assertion that his guilty plea to the firearms charge had any bearing on the sentencing guidelines for his other offenses. [*Id.* at 113.] In this regard, Attorney Shipman noted that the appellant did not have to plead guilty for the deadly weapon enhancement to apply to the Burglary charge. [*Id.*]

As for Attorney Shipman's trial preparations, he remembered having all of the discovery in the case, which included all of the police reports. [*Id.* at 108.] The police reports contained notes from any interviews that the police had with witnesses. [*Id.* at 108-09.] Thus, Attorney Shipman knew what the witnesses were going to say when they testified at trial. [*Id.* at 109.]

According to Attorney Shipman, the basic facts were not contested; instead, he was concerned with how those facts were characterized. [*Id.*] Attorney Shipman had discussed with

the appellant that they were not contesting the facts, but they were attempting to explain to the jury why the appellant did what he did. [*Id.*]

Attorney Shipman also discussed with the appellant about his decision to testify on his own behalf. [*Id.* at 109.] Attorney Shipman prepared the appellant for his testimony, although he did not go through a specific set of questions with him because he never does that with his criminal clients. [*Id.* at 109, 110.] In particular, if Attorney Shipman would go through a set of questions with the appellant and the questions at trial were presented differently, then the appellant would have memorized an outline and may have had difficulty with the new questions. [*Id.* at 110.] Attorney Shipman did not want the appellant to work off of a script when he testified. [*Id.*]

In terms of their preparation for the appellant's testimony, the appellant and Attorney Shipman discussed the general areas of questions that he was going to ask the appellant during direct questioning. [*Id.*] They also discussed the areas that were going to be breached on cross-examination. [*Id.*]

Attorney Shipman also contradicted the appellant's testimony regarding the appellant's acknowledgment of the PFA. [*Id.* at 114.] Attorney Shipman pointed out that there was an issue whether there was a PFA in effect that excluded the appellant from the residence. [*Id.*] In this regard, Heather had obtained a prior PFA at a time when she was not living at the marital residence and, thus, the PFA order did not exclude the appellant from the residence. [*Id.*] At some point, Heather and the appellant switched, and she was living at the marital residence. [*Id.*] The appellant argued that he did not violate the PFA because he was returning to a location that he was not previously excluded from entering. [*Id.*]

Attorney Shipman had attempted to explain the specifics of the PFA issue with the appellant. [*Id.*] Attorney Shipman did not recall the appellant's testimony relating to the PFA. [*Id.*]

Concerning the alleged conflict of interest and prosecutorial misconduct, Attorney Shipman recalled the appellant indicating to him that he had been involved with ADA Taschner in an adversarial way, but he did not recall the appellant asking Attorney Shipman to attempt to remove her from the case. [*Id.* at 115.] Even if the appellant had sought such an action by Attorney Shipman, he would not have petitioned to remove ADA Taschner because he did not see any conduct from her that he would say was out of character or overzealous. [*Id.*]

B. Analysis

As pointed out above, the appellant has included a plethora of alleged issues in his concise statement. We respectfully submit that none of the appellant's issues have merit.

1. Appellate Standard of Review

The appellate standard of review from a trial court's denial of a PCRA petition requires the appellate court to determine whether the ruling of the PCRA court is supported by the record and is free of legal error. *Commonwealth v. Marshall*, 947 A.2d 714, 719 (Pa. 2008). The PCRA court's credibility determinations are binding on this Court when they are supported by the record. *Commonwealth v. Johnson*, 966 A.2d 523, 532, 539 (Pa. 2009). However, the appellate court applies a *de novo* standard of review to the PCRA court's legal conclusions. *Commonwealth v. Rios*, 920 A.2d 790, 810 (Pa. 2007).

2. Eligibility for PCRA Relief

To be eligible for PCRA relief, a petitioner must prove by a preponderance of the evidence that the conviction or sentence resulted from, inter alia, one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S. § 9543(a)(2).

In addition, the PCRA petitioner must prove that the issues raised have not been previously litigated or waived. *Id.* § 9543(a)(3). An issue has been previously litigated if the highest appellate court in which the petitioner was entitled to review as a matter of right has ruled on the merits of the issue. *Id.* § 9544(a)(2); *see Commonwealth v. Crawley*, 663 A.2d 676, 678 (Pa. 1995) (stating that to be eligible for PCRA relief, petitioner must establish that issues have not been previously litigated). A petitioner waives a PCRA claim if he or she "failed to raise it and if it could have been raised . . . at the trial, [or] on appeal . . . ." 42 Pa.C.S. § 9544(b).

Here, the appellant seeks relief under section 9543(a)(2)(ii) for the alleged ineffective assistance of his trial counsel, Christopher Shipman, and the alleged ineffectiveness of Attorney

Matthew Potts, who represented him at his preliminary hearing. There is no indication that the appellant previously litigated or waived these issues; therefore, these issues were cognizable as part of this PCRA petition.[29]

3. Appellant's Ineffective Assistance of Counsel Claims

All of the appellant's issues on appeal relate to the alleged ineffectiveness of his counsel. We address each of these issues in turn.

a. Standard – Ineffective assistance of counsel

Generally, to succeed on a claim of ineffectiveness of counsel brought under the PCRA, the alleged ineffectiveness must have "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543; *Commonwealth v. Rathfon*, 899 A.2d 365, 369 (Pa. Super. 2006). Because counsel is presumed to be effective, the petitioner bears the burden of establishing ineffective assistance of counsel. *Commonwealth v. Mallory*, 888 A.2d 854, 859 (Pa. Super. 2005).

To establish ineffective assistance of counsel, the appellant must "first demonstrate that the underlying claim is of arguable merit; then, that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate defendant's interest; and, finally, that but for the act or omission in question, the outcome of the proceedings would have been

[29] We note that we had jurisdiction to consider the appellant's first PCRA petition. In this regard, a PCRA petition, including a second or subsequent petition, must be filed within one year of the date that the judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). A judgment becomes final for purposes of the PCRA "at the conclusion of direct review, including direct review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S. § 9545(b)(3). If a PCRA petition is untimely, neither the trial court nor the appellate courts have jurisdiction over the petition. *Commonwealth v. Murray*, 753 A.2d 201, 203 (Pa. 2000); *see Commonwealth v. Fisher*, 870 A.2d 864, 869 (Pa. 2005) ("Without jurisdiction, we simply do not have the legal authority to address substantive claims.").

Here, the judgment of sentence became final on October 26, 2010, ninety days after the Supreme Court of Pennsylvania's denied the appellant's petition for allowance of appeal on July 28, 2010. *See, e.g.*, *Commonwealth v. Williamson*, 21 A.3d 236, 241 (Pa. Super. 2011) (citing 42 Pa.C.S. § 9545(b)(3) and United States Supreme Court Rule 13 and explaining that judgment of sentence became final ninety days after Supreme Court denied petition for allowance of appeal). Accordingly, the defendant had to file the instant PCRA petition on or before October 26, 2011. Because the instant petition was filed on July 25, 2011, the petition was timely filed.

different." *Commonwealth v. Travaglia*, 661 A.2d 352, 356-57 (Pa. 1995); *see Commonwealth v. Weinder*, 577 A.2d 1364, 1374 (Pa. Super. 1990) (explaining that petitioner seeking to demonstrate prejudice must show that counsel's actions or inactions made result of trial inherently unreliable). Absent a demonstration of prejudice, the appellant cannot prevail on his claim of ineffective assistance of counsel. *See Commonwealth v. Albrecht*, 720 A.2d 693, 701 (Pa. 1998) ("If it is clear that Appellant has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met.").

b. Attorney Potts was not ineffective in his representation of the appellant at the preliminary hearing

The appellant's first alleged error concerns our conclusion that the appellant did not prove that Attorney Potts was ineffective in his representation of the appellant at the preliminary hearing. It appears that the appellant claims that Attorney Potts was ineffective not because of the quality of his representation of the appellant at the preliminary hearing; rather, he asserts that he was ineffective because he did not raise the issue of a conflict of interest between the appellant and ADA Taschner. [N. at 19.] In addition, the appellant believes that Attorney Potts was ineffective because he was not the appellant's trial counsel and the information that Attorney Potts gained from the preliminary hearing was lost because the hearing was not transcribed. [*Id.*] As discussed below, these claims of ineffectiveness lacks merit.

The appellant failed to demonstrate that Attorney Potts was ineffective in his representation of the appellant at the preliminary hearing because he did not show that his claim had arguable merit. In the first instance, the appellant's assertion Attorney Potts was somehow ineffective because the information that Attorney Potts obtained during the preliminary hearing

was somehow lost and, thus, unavailable to his trial counsel, Attorney Shipman, is not credible and unsubstantiated by the record.

While we were not presented with a copy of a preliminary hearing transcript during the PCRA evidentiary hearing, the record at trial reflects that a transcript of the hearing was prepared and referenced by counsel during the trial.[30] In this regard, we note that during Attorney Shipman's cross-examination of Heather Havlik, he specifically referenced her testimony during the preliminary hearing and questioned her about the accuracy of her trial testimony compared to her preliminary hearing testimony. [Notes of Trial – Day Two ("Day Two Tr."), 5-17-07, at 67-68.] In fact, Heather Havlik admitted on cross-examination that part of her testimony during the trial differed from her preliminary hearing testimony. [*Id.* at 68.] Moreover, ADA Taschner specifically referenced a preliminary hearing transcript during a conference with the court relating to her request to have exhibits admitted into evidence that apparently were introduced during a pretrial motions hearing before Judge Giordano. [*Id.* at 132.][31]

In addition to the specific references to a preliminary hearing transcript on the record, Attorney Shipman indicated that he and Attorney Potts discussed the events that transpired at the preliminary hearing. Therefore, there is no support in the record for the appellant's assertion that Attorney Potts' information obtained during the preliminary hearing was lost and not otherwise made available to Attorney Shipman.

The appellant also failed to show that Attorney Potts was ineffective for failing to raise an issue with an alleged conflict of interest affecting ADA Taschner. The appellant claims that ADA Taschner had an impermissible conflict of interest because at some point in the 1990s,

[30] The appellant did not call Attorney Potts to testify as a witness.
[31] Subsequent to the PCRA evidentiary hearing in this case, a transcript was prepared of a hearing before Judge Giordano on May 15, 2007. During this hearing, the transcript of the preliminary hearing was admitted as Commonwealth Exhibit C-3. [Transcript of Pretrial Motions, 5-15-07, at 33.]

ADA Taschner accused the appellant of stealing less than $100 from her. Apparently, ADA Taschner demanded that he return the money in exchange for not contacting the police. We did not find that this conduct constituted an impermissible conflict of interest and, thus, Attorney Potts was not ineffective for failing to raise the claim.[32]

We note that generally, "prosecution is barred when an actual conflict of interest affecting the prosecutor exists in the case; under such circumstances a defendant need not prove actual prejudice in order to require that the conflict be removed." *Commonwealth v. Eskridge*, 604 A.2d 700, 702 (Pa. 1992). The Superior Court has described a "true" conflict of interest as follows:

> A true "conflict" of interest occurs when a party has competing professional and personal interests, each of which will be served by opposing results. If a prosecutor is asked to prosecute someone he would not wish to see convicted, a relative or friend, perhaps, or if the prosecution of someone will somehow have an adverse [e]ffect on the prosecutor's personal interests, he will be experiencing a "conflict" of interests. His professional obligation will be in conflict with his personal desire or feelings and thereby threaten, or at least call into question, the performance of his professional duties.

Commonwealth v. Balenger, 772 A.2d 86, 91 n.4 (Pa. Super. 2001).

Our appellate courts have determined that an impermissible conflict of interest exists in situations where the district attorney has a direct financial interest in obtaining a defendant's conviction. *See Eskridge*, *supra* (concluding that district attorney whose private law partners represented victims of actions in civil suits against defendant had obvious conflict of interest that prohibited district attorney from prosecuting defendant for offense of homicide by vehicle). *But see Commonwealth v. Jermyn*, 709 A.2d 840, 859-60 (Pa. 1998) (finding that district attorney did not have impermissible conflict of interest that would prohibit district attorney from prosecuting capital murder case, even though district attorney was initially appointed executor of homicide

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[32] We are presuming for purposes of this opinion that the appellant raised the conflict of interest claim with Attorney Potts.

victim's estate and passed executor's obligations to law partner after district attorney assumed prosecutor's role in case). In addition, the appellate courts have concluded that a prosecutor can be disqualified from prosecuting a case if the prosecutor has a non-economic, personal interest in the outcome of the prosecution. *See Commonwealth v. Balenger*, 704 A.2d 1385, 1389-90 (Pa. Super. 1997) (concluding that defendant was entitled to new trial because prosecutor's amorous relationship with defendant's former girlfriend created an impermissible conflict of interest as prosecutor attempted to remove defendant as competitor for girlfriend's affections), *appeal denied*, 727 A.2d 126 (Pa. 1998). "This non-economic, personal interest is likewise a conflict of interest." *Commonwealth v. Lutes*, 793 A.2d 949, 956 (Pa. Super. 2002).

If the court determines that a conflict of interest exists, "a defendant need not prove actual prejudice in order to require that the conflict be removed." *Eskridge*, 604 A.2d at 702. Nonetheless, "a mere allegation or appearance of impropriety is insufficient to establish an actual conflict of interest." *Commonwealth v. Sims*, 799 A.2d 853, 857 (Pa. Super. 2002). Moreover, "[m]ere animosity, even it if it exist[s], is not sufficient by itself to require replacement of a prosecutor." *Commonwealth v. Stafford*, 749 A.2d 489, 495 (Pa. Super. 2000).[33]

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[33] In the context of a double jeopardy challenge after the Superior Court vacated a previous conviction because of an impermissible conflict of interest, the Superior Court stated as follows:

> [D]elving into the "personal motivation" of the prosecutor in a case is a tricky proposition and puts courts squarely in the middle of the proverbial "slippery slope." Prosecutors are human and possess human traits like all other people. Many individuals are competitive by nature and highly motivated to "win," or to do their job well. Thus, some prosecutors might be "highly motivated" in their prosecutions for these reasons. Some might be readily "judgmental" about the objects of their prosecutions and develop a strong "ill will" toward them. Or some might be very empathetic toward a complainant and be strongly motivated to put a defendant away due to such empathy. . . . [T]he fact that [a prosecutor's] personal interests would be served by [a defendant's] conviction alone does not indicate that he tried any harder to convict [the defendant] than would another prosecutor who was motivated simply by a desire to win or do his job well or one who developed a strong contempt for [a defendant's] felonious behavior.
>
> Although ideally we would like all prosecutors to be operating on only the most "ethical" and neutral motivational bases, are we to vacate any conviction where a prosecutor's personal interests might be advanced as a result of the prosecution or who has a "personal desire" to see the accused convicted? Many prosecutors have gone on to a "higher office" or advanced their careers

In the first instance, we have located no appellate court case concluding that an occurrence such as one presented here constitutes a conflict of interest for a prosecutor. The appellant has not identified how his prior interaction with ADA Taschner, which occurred at some random time in the 1990s (thus, at least six years prior to the charges in this case), created such a conflict. There is no indication in the record, other than the appellant's bare assertion, that ADA Taschner had a non-economic personal interest in the outcome of the prosecution. Even if ADA Taschner recalled her previous, brief interaction with the appellant and retained some animosity toward him, this animosity would not have created a sufficient conflict to call for the replacement of ADA Taschner as the prosecutor in the case.

Additionally, the alleged manifestations of this purported conflict (*i.e.* the alleged prejudice that the appellant suffered because of the supposed conflict), do not, as the appellant contends, demonstrate the existence of a conflict or show that he suffered any actual prejudice for the following reasons: First, other than yet another of the appellant's unsupported assertions, he has provided no persuasive evidence or argument in support for his contention that the alleged conflict resulted in him receiving a less favorable plea offer than he would have received if he did not have the prior alleged interaction with ADA Taschner. There is no indication that, in light of the charges and the appellant's prior, substantial criminal record, ADA Taschner's plea offer on behalf of the Commonwealth was "outside the normal realm" of what would have otherwise been offered.

> after prosecuting a "high profile" case that gets their name in the news media. Some, like those involved in the prosecution of high profile celebrity cases, might later write a book or screenplay about the experience thereby experiencing pecuniary gain. Undoubtedly some prosecutors are aware that a conviction in a certain case might advance their careers. Can the fact that a prosecutor is motivated by the potential benefits of prosecuting a particular case be used as a basis to nullify an ensuing conviction? In our opinion, as long as the motivational factor does not lead the prosecutor to "step over the line" and engage in improper conduct, we think the answer to the above rhetorical questions must be "no."

Balenger, 772 A.2d at 92-93.

Additionally, the appellant cannot show and we cannot discern how ADA Taschner's alleged amendment of the charges in this case is demonstrative of a conflict of interest and he clearly was not prejudiced by the amendment of the charges. The appellant is factually incorrect regarding the firearms charges insofar as the police initially charged the appellant with both Persons Not to Possess Firearms and Firearms Not to Be Carried Without a License. The Commonwealth eventually withdrew the Firearms Not to Be Carried Without a License charge.

Moreover, the appellant cannot show how the amendment of the Robbery charge to Attempted Robbery was a result of any conflict. While we were not provided with a copy of the preliminary hearing transcript, it appears that although the Criminal Complaint includes Robbery as a listed offense, the police attempted to change the charge to Attempted Robbery by writing in the word "Attempted" above the word "Robbery." [*See* 8-28-06 Criminal Complaint at p. 2.] Thus, to the extent that the Magisterial District Judge was presented with a Robbery charge, it would appear that ADA Taschner was amending the charge to correspond with the intent of the Criminal Complaint. We further note that the appellant cannot show how he was ultimately prejudiced by the amendment because the jury found him not guilty of Attempted Robbery.

Finally, although the police and the Commonwealth incorrectly initially graded the charge of Receiving Stolen Property as a felony rather than as a misdemeanor, there is no support in the record that this error was nothing other than a mistake. The appellant has not demonstrated that any alleged conflict of interest caused the incorrect grading of the offense. Moreover, the appellant failed to show that he suffered prejudice because of the incorrect grading insofar as we corrected the mistake in our resolution of the appellant's post-sentence motions and modified the appellant's sentence accordingly.

Second, the appellant's assertion that the conflict manifested itself in ADA Taschner's request for him to receive additional prison time as part of his probation violation hearing is also unavailing. As we were not presented with a transcript of this hearing, any statements from the hearing that the appellant referenced during his testimony are hearsay statements and we could not consider the statements as true. Even if we did find that the appellant was correct that ADA Taschner sought additional prison time for the probation violation and that Judge Giordano disagreed with her argument, the appellant still has failed to show that this action is not the result of ADA Taschner's role as a prosecutor and her disdain for the appellant's conduct in this case rather than because of an alleged conflict of interest. Moreover, the appellant was not allegedly prejudiced by this action as the appellant admits that Judge Giordano did not impose an additional period of incarceration or other sanction for the violation.

Finally, the appellant's final alleged manifestation of ADA Taschner's conflict of interest is her repeated reference to the gloves that he wore at the time of the offenses as "surgical gloves" rather than as painter's gloves. We note that the record of trial demonstrates that ADA Taschner and the police officer witnesses did in fact refer to the gloves as surgical gloves on multiple occasions. [*See, e.g.*, Notes of Trial – Day One ("Day One Tr."), 5-16-07, at 34.] In addition, Attorney Shipman attempted to re-characterize the gloves as painter's gloves and not surgical gloves during his cross-examination of witnesses. [*See, e.g.* Day Two Tr. at 212.] The appellant cannot show that ADA Taschner was exhibiting any particular, personal animus towards him by referring to the gloves as surgical gloves. Also, the jury had an ample opportunity to view the gloves and determine what type of gloves they were after viewing them and listening to the parties' arguments. Therefore, the appellant failed to show that ADA Taschner had a conflict of interest merely by describing his gloves as surgical gloves. Moreover,

even after considering the totality of his issues with ADA Taschner's conduct, the appellant has failed to support his claims with any viable or persuasive evidence and he failed to demonstrate that a conflict of interest existed or that he was somehow prejudiced by such a conflict. Accordingly, the appellant has not shown that Attorney Potts was ineffective for failing to raise an alleged conflict of interest by ADA Taschner because the underlying claim lacked merit.

c. Attorney Shipman did not fail to adequately consult with the appellant prior to trial

The appellant's second claim on appeal is that we erred in failing to find that Attorney Shipman was ineffective because he failed to adequately consult with him prior to trial. This claim lacks merit.

We note that the appellant comingles various aspects of his ineffectiveness claims into this general assertion that Attorney Shipman failed to adequately consult with him prior to trial. Some of those claims include Attorney Shipman's alleged failure to present a mental health defense in the case. [N. at 24-30.] For purposes of this part of the memorandum opinion, we will only address the appellant's apparent claim that he had insufficient opportunities to consult with Attorney Shipman. We respectfully submit that this claim lacks merit.

Preliminarily, we note that when analyzing a claim of a failure to adequately consult, "the amount of time an attorney spends consulting with his client before trial is not, by itself, a legitimate basis for inferring the total extent of counsel's pretrial preparation, much less the adequacy of counsel's preparation." *Commonwealth v. Harvey*, 812 A.2d 1190, 1196-97 (Pa. 2002) (citing *Commonwealth v. Bundy*, 421 A.2d 1050, 1051 (Pa. 1980)). The appellant testified that he believed that he met with Attorney Shipman on at least two occasions prior to trial. [N. at 24, 26.] The appellant sought, but did not receive, any information from Attorney Shipman about how many times they met and what conversations took place between them. [*Id.* at 25.]

We found that Attorney Shipman credibly testified that he discussed the charges and the appellant's version of the events with the appellant. In addition, Attorney Shipman received and reviewed the discovery in the case with the appellant, and they discussed and prepared the defense that they were going to present at trial. The appellant has not identified what evidence or information further consultations between Attorney Shipman and the appellant would have disclosed. Moreover, other than a few conclusory allegations, the appellant has not shown or demonstrated that Attorney Shipman was not fully prepared to represent him at trial. We also submit that a review of the record at trial shows that Attorney Shipman was fully prepared and more than adequately represented the appellant's interests at trial. Accordingly we respectfully submit that the appellant's claim lacked arguable merit, and the appellant failed to demonstrate that Attorney Shipman's conduct was not grounded on a reasonable basis designed to effectuate his best interest or how the outcome of the proceedings would have been different.[34]

d. Attorney Shipman was not ineffective for failing to present a mental health-based defense

The appellant has included multiple claims of error in his concise statement relating to Attorney Shipman's general alleged failure to investigate or present a mental health defense on his behalf. In this regard, the appellant contends that we erred in concluding that Attorney Shipman was not ineffective for allegedly failing to (1) investigate his claims of mental deficiencies including post-traumatic stress disorder, bipolar disorder, severe depression, anxiety, and panic attacks, (2) gather and collect psychiatric records, medical records, and medication to show his state of mind due to the side effects of medication, (3) request a psychological and psychiatric examination of him to present mitigating mental health evidence, and side effects of

[34] While we acknowledge that the appellant included in this part of his concise statement that Attorney Shipman failed to adequately consult with the appellant <u>during</u> the trial process, he did not support this claim with any credible evidence during the evidentiary hearing. We are unaware of what the appellant is referring to by including this issue in his concise statement.

medication, at trial and sentencing, (4) gather and present at trial and sentencing his psychiatric medical records from St. Luke's Hospital of Quakertown and from Muhlenberg Psychiatric Hospital. [Pennsylvania Rule of Appellate Procedure 1925(B) Concise Statement of Matters Complained of on Appeal at ¶¶ 3, 5, 12, 17.] None of these claims have merit.

We concluded that the appellant's claims relating to the assertion of a mental health defense lacked arguable merit in large part because of the testimony of Attorney Shipman, which we found credible when compared to the conflicting testimony of the appellant, which we did not find credible. In this regard, we found Attorney Shipman's testimony entirely credible especially concerning the following: (1) the appellant never requested that Attorney Shipman prepare or present a defense that would focus on the appellant's mental health; (2) the appellant was aware that they were not going to assert any mental health defense at trial; (3) Attorney Shipman did raise at trial some aspects of the appellant's mental health issues only insofar as they affected his presentation to the jury in terms of his affect and mannerisms; (4) the appellant never discussed the types of medication that the appellant was taking at the time of the offenses or the possible side effects of this medication with Attorney Shipman; (5) the appellant never informed Attorney Shipman that he did not know exactly what he was doing at the time he committed the offenses; and (6) if the appellant had indicated that he did not know what he was doing or lacked the capacity to understand the nature of his conduct, Attorney Shipman might have explored a mental health-based defense. Based on, *inter alia*, the above-stated findings, we did not find that the appellant's claims relating to the lack of investigation into (and the failure to present) a mental-health-based defense at trial, lacked arguable merit.

In addition, we recognize that

> [i]t is undoubtedly true that a defense attorney's failure to investigate potentially meritorious defenses or failure to interview witnesses whose testimony could

> prove beneficial and exculpatory can constitute ineffective assistance of counsel if no reasonable basis exists for counsel's failure. However, the value of a particular defense or witness' testimony is not judged abstractly in the vacuum of what might have been but in the reality of what is; accordingly, the defendant must sustain his burden of proving how the "road not taken" or the testimony of the uninterviewed witness would have been beneficial under the facts and circumstances of his case.

Commonwealth v. McNeil, 487 A.2d 802, 806 (Pa. 1985).

In this case, the appellant failed to support his claims that Attorney Shipman was ineffective for not familiarizing himself with the appellant's mental health history of have the appellant psychologically examined. As stated in *McNeil*, counsel is not ineffective for failing to assert a defense that would not have been helpful or for failing to interview witnesses whose testimony would not have been helpful. We respectfully submit that the appellant did not prove that there was any evidence available to Attorney Shipman that would have allowed him to assert a mental-health-based defense.

In this regard, we note that the defense of diminished capacity would not have been a possible defense for the appellant in this case. *See Commonwealth v. Russell*, 938 A.2d 1082, 1092 (Pa. Super. 2007) (citing *Commonwealth v. Swartz*, 484 A.2d 793 (Pa. Super. 1984) and explaining that diminished capacity is "available only as a defense to first-degree murder and not to second-degree murder[; l]ikewise, it is not available as a defense for other 'specific intent' non-homicide offenses"). Additionally, the appellant did not establish that Attorney Shipman had evidence that would have allowed him to offer a defense of mental infirmity, insanity or incompetence. As explained *infra*, the appellant's defense was that while he was at Heather Havlik's home that evening, he was there to discuss property settlement issues and did not intend to harm or alarm anyone inside the home. In light of the alternatives available to Attorney

Shipman, his pre-trial and trial strategy was not so unreasonable that no competent attorney would have chosen a similar course of conduct.

In addition to the appellant's mental health claims lacking arguable merit and his inability to show that Attorney Shipman's course of action was not grounded on a reasonable basis designed to effectuate the appellant's best interest, he has not shown prejudice, *i.e.* but for Attorney Shipman's conduct, the outcome of the trial would have been different. In particular, the appellant's arguments concerning the impact of the omitted investigation and testimony are speculative at best. The appellant did not offer any credible scientific or expert testimony in support of his claims that he was suffering from any mental health issues that would have served as a defense to the charges in this case.[35] Further, other than his conclusory assertions, he did not prove that his actions on the night of the offenses were affected by the side effects of any medication he was allegedly taking at the time or, even if they were, that the outcome of the proceedings would have been different if Attorney Shipman discussed the side effects of the medication. As such, the appellant failed to prove that the outcome of the proceedings would have been different had Attorney Shipman introduced the mental health information.

Additionally, the appellant failed to show that he was prejudiced at sentencing by any lack of a defense-requested mental health examination or investigation into the appellant's previous mental health history or hospitalizations. In this regard, although the appellant asserts that the July 2, 2007 psychological evaluation and July 6, 2007 psychiatric evaluation were somehow deficient, he has failed to substantiate this allegation with any credible supporting evidence. He also failed to demonstrate what such examinations or investigations would have

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[35] The appellant did testify that he was previously under the care of Dr. Schilkie and Dr. Benjamin, the appellant did not show that (1) these doctors were available to testify for the defense, (2) Attorney Shipman knew or should have known about these doctors, (3) the doctors were willing to testify for the defense, or (4) the absence of the testimony of the two doctors was so prejudicial as to have denied the appellant a fair trial. We also note that the appellant did not delineate the substance of what these witnesses would have testified to a trial or at sentencing.

revealed. The appellant has further failed to show how a defense-requested mental health examination would have caused this court to impose a more favorable sentence in this case. Accordingly, the appellant's claims of ineffectiveness related to the investigation and presentation of any mental-health-related claims lack merit.

e. Attorney Shipman was not ineffective for failing to interview or contact alleged defense witnesses

The appellant's fourth matter complained of relates to his contention that we erred in failing to find Attorney Shipman ineffective for not contacting and interviewing various witnesses, including Dennis Havlik, Patricia Havlik, and Phyllis Vasaturo. This contention lacks merit.

We note that

> [c]ounsel has a general duty to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary. *Commonwealth v. Basemore,* 560 Pa. 258, 744 A.2d 717, 735 (2000) (citing *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052). Counsel's unreasonable failure to prepare for trial is "an abdication of the minimum performance required of defense counsel." *Commonwealth v. Brooks,* 576 Pa. 332, 839 A.2d 245, 248 (2003) (quoting *Commonwealth v. Perry,* 537 Pa. 385, 644 A.2d 705, 709 (1994)). The duty to investigate, of course, may include a duty to interview certain potential witnesses; and a prejudicial failure to fulfill this duty, unless pursuant to a reasonable strategic decision, may lead to a finding of ineffective assistance. Recently summarizing cases in *Commonwealth v. Dennis,* 597 Pa. 159, 950 A.2d 945 (2008), this Court stated that:
>
> > These cases ... arguably stand for the proposition that, at least where there is a limited amount of evidence of guilt, it is *per se* unreasonable not to attempt to investigate and interview known eyewitnesses in connection with defenses that hinge on the credibility of other witnesses. They do not stand, however, for the proposition that such an omission is *per se* prejudicial.
>
> *Id.* at 960 (citing *Perry, supra; Commonwealth v. Weiss,* 530 Pa. 1, 606 A.2d 439, 442–43 (1992); *Commonwealth v. (Harold) Jones,* 496 Pa. 448, 437 A.2d 958 (1981); *Commonwealth v. Mabie,* 467 Pa. 464, 359 A.2d 369 (1976)) (emphasis omitted). Indeed, such a *per se* failing as to performance, of course, does not make out a case of prejudice, or overall entitlement to *Strickland* relief.

When raising a failure to call a potential witness claim, the PCRA petitioner satisfies the performance and prejudice requirements of the *Strickland* test by establishing that:

> (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Washington, 592 Pa. 698, 927 A.2d 586, 599 (2007). To demonstrate *Strickland* prejudice, the PCRA petitioner "must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case." *Commonwealth v. Gibson,* 597 Pa. 402, 951 A.2d 1110, 1134 (2008); *see also Commonwealth v. Chmiel,* 585 Pa. 547, 889 A.2d 501, 546 (2005) ("Trial counsel's failure to call a particular witness does not constitute ineffective assistance without some showing that the absent witness' testimony would have been beneficial or helpful in establishing the asserted defense.").

Commonwealth v. Johnson, 966 A.2d 523, 535-36 (Pa. 2009).

As indicated above, the appellant was able to identify the three witnesses that he believed Attorney Shipman should have interviewed and called as witnesses at trial. Nonetheless, it is unclear from the appellant's own testimony that the three witnesses were available and willing to testify for the defense. Even if the witnesses were available and willing to testify, the evidence did not demonstrate that Attorney Shipman should have known about the three witnesses. In this regard, the appellant did not show that Attorney Shipman would have known about the appellant's stepmother, Patricia Havlik, or his ex-wife, Phyllis Vasaturo. Also, the only evidence introduced about the appellant's father, Dennis Havlik, was the appellant's hearsay statements that Dennis Havlik attempted to contact Attorney Shipman on various occasions only to have Attorney Shipman not return his calls.

Even if the appellant had shown that Attorney Shipman should have been aware of these three witnesses, the appellant failed to prove that he was prejudiced by Attorney Shipman's

failure to interview or call these individuals as witnesses because there is no indication that their testimony would have been beneficial under the circumstances of the case. More specifically, none of these witnesses observed the events that occurred between the appellant and the victims on August 27, 2006. At best, these witnesses could have testified about the appellant's background (although we note that the appellant did not claim that they were character witnesses) and the history between the appellant and Heather Havlik. As such, their testimony was irrelevant to the substance of the appellant's case and Attorney Shipman was not ineffective for not interviewing them or calling them as witnesses on the appellant's behalf.

f. Attorney Shipman did not fail to present an adequate defense

For his sixth matter complained of, the appellant contends that Attorney Shipman failed to present an adequate defense at trial. This argument also lacks merit.

The essence of the appellant's argument on this issue also relates to his after-the-fact contention that Attorney Shipman should have presented some sort of mental-health-based defense at trial. Other than mere speculation on the appellant's part, the appellant did not demonstrate that this claim had arguable merit, that Attorney Shipman's actions were not grounded on a reasonable basis designed to effectuate the appellant's best interests, or that the outcome of the proceedings would have been different.

During his testimony at the PCRA evidentiary hearing, Attorney Shipman credibly testified that he and the appellant agreed that the defense would be that the appellant went to Heather Havlik's house that evening to confront her regarding property settlement issues in the midst of their divorce. [N. at 102, 105.] There was also an issue as to whether the PFA was in effect at the time that the appellant was inside of the house. [*Id.*] The appellant had told Attorney Shipman that he called Heather Havlik on numerous occasions to resolve the property

issues, which included resolving issues with their joint residence and other monetary issues. [*Id.*]

Attorney Shipman noted that the defense could not contend that the appellant was not at the house that evening. [*Id.* at 104.] Thus, they attempted to argue that the appellant went to the house not to accost Heather Havlik and the other individuals therein, but to discuss the property settlement issues. [*Id.*] The confrontation only ensued after the appellant saw Heather Havlik, Dominick Havlik and Thomas Clark go into the house. [*Id.*] Attorney Shipman explained that he hoped to convince the jury that the appellant did not intend to harm anyone inside the residence, but he was there only to scare them because he was not getting any answers about the property issues. [*Id.*]

We previously explained that the appellant has not adduced sufficient evidence or argument concerning the merit of a proposed mental-health-based defense in this case. Other than this unsuccessful argument, the appellant has not shown how Attorney Shipman's conduct at trial was constitutionally insufficient. The Commonwealth presented significant evidence at trial to establish the appellant's guilt to the crimes the jury ultimately found the appellant committed, and Attorney Shipman's strategy and defense resulted in the appellant being acquitted of some of the other serious charges such as Aggravated Assault and Attempted Robbery. The appellant failed to produce any credible evidence that would show that the results of the trial could have been more favorable to him if they asserted a mental-health-based defense other than the defense both he and Attorney Shipman agreed they would present at trial. Accordingly, we respectfully submit that this claim of error also fails.

g. Attorney Shipman was not ineffective in failing to advise the appellant that a plea to possession of a loaded firearm would enhance his conviction of burglary

The appellant's seventh allegation of error concerns his contention that we erred in failing to find that Attorney Shipman was ineffective for failing to advise the appellant that his plea to Persons Not to Possess Firearms would enhance the sentencing guidelines applicable to his Burglary conviction. As indicated below, this claim lacks merit.

The appellant failed to show that this claim had arguable merit because the appellant is mistaken about the applicability of the Persons Not to Possess Firearms conviction to the sentencing guidelines for his Burglary offense. More specifically, the appellant's guilty plea to the Persons Not to Possess Firearms offense did not affect the sentencing guidelines for the Burglary charge. Although the appellant is correct that his sentencing guidelines for the Burglary charge were enhanced because of the deadly weapon used enhancement, 204 Pa.Code § 303.10(a)(2), the guidelines were enhanced because the court determined that the appellant used a deadly weapon (in this case, a firearm) during the commission of the offense.[36] We based this determination not on the appellant's guilty plea to the Persons Not to Possess Firearms charge, but on the significant credible testimony presented during the trial that the appellant used a firearm during the commission of the offenses. Accordingly, the appellant could not show that Attorney Shipman was ineffective for failing to advise the appellant of something that had no effect on the sentencing guidelines for his Burglary conviction.

[36] In *Commonwealth v. Lowery*, 784 A.2d 795 (Pa. Super. 2001), the court concluded that the jury did not have to make a specific factual finding regarding the weapons enhancement as required under the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) because it did not increase the penalty for the crime beyond the prescribed statutory maximum. 784 A.2d at 799-800.

h. Attorney Shipman was not ineffective for failing to interview and investigate Commonwealth witnesses, Michael Newman, Heather Havlik, Thomas Clark, Jeremy McClymont, Ms. Sandt, Joseph Dressler, and Joseph Effting

The appellant's eighth matter complained of involves a contention that we erred in failing to find Attorney Shipman ineffective for his alleged failure to interview Commonwealth witnesses, Michael Newman, Heather Havlik, Thomas Clark, Jeremy McClymont, Filomena Sandt, Joseph Dressler, and Joseph Effting. This claim lacks merit.

The appellant failed to establish that this claim had arguable merit. The appellant claimed that although he never asked Attorney Shipman to interview the aforementioned witnesses, he believed that it would have assisted with the preparation for trial. [N. at 42.] In particular, the appellant believes that Attorney Shipman

> would have had time to prepare for their testimony and know what their testimony would have been in advance. And it would have helped to corroborate their statements that they made. Go over the statements and corroborate that information, and it would have kind of like a deposition of them.

[*Id.* at 43.] The appellant also once again asserts that since Attorney Shipman did not attend the preliminary hearing, he needed to interview these witnesses because of his mistaken belief that Attorney Shipman did not have a transcript of the preliminary hearing and Attorney Potts did not discuss the preliminary hearing with Attorney Shipman. [*Id.* at 44-45.]

Regarding the appellant's claim, we have previously discussed the appellant's mistaken belief regarding the effect of Attorney Shipman not attending his preliminary hearing. In the first instance, the appellant is mistaken that Attorney Shipman's inability to attend the preliminary hearing had any effect on the appellant's case because he (1) conferred with Attorney Potts about what happened at the preliminary hearing, and (2) possessed and reviewed the transcript from the preliminary hearing. We also note that the appellant acknowledges that

Attorney Shipman had obtained the discovery in the case, including the police reports, and that he provided those reports to the appellant. [N. at 45.]

Secondly, the appellant utterly failed to identify the evidence that Attorney Shipman would have uncovered had he interviewed the Commonwealth's witnesses and how this evidence could have been used to impeach their trial testimony. The Superior Court rejected a similar unsubstantiated claim of ineffective assistance in *Commonwealth v. Brown*, 18 A.3d 1147 (2011). In *Brown*, the court described the deficiencies of the defendant's ineffectiveness claim in that case as follows:

> Appellant next avers that counsel was ineffective for neglecting to "take statements from any and all potential Commonwealth witnesses for use at trial for purposes of cross-examination." Appellant's brief at 11–12. Significantly, Appellant wholly neglects to specify how any Commonwealth witness could have been impeached. In *Commonwealth v. Carson*, 590 Pa. 501, 913 A.2d 220 (2006), the defendant argued that his trial counsel was ineffective for not impeaching witnesses. As in the present case, the defendant failed to delineate how the witnesses could have been effectively cross-examined. Our Supreme Court refused to consider the merits of this claim on the basis, *inter alia*, that it was boilerplate and that it therefore could not "evaluate [the defendant's] insubstantial claim, as we are left to guess what relevant and material evidence trial counsel should have uncovered and how this evidence was so easily within his grasp." *Id.* at 247.

18 A.3d at 1161.

Here, the appellant has only indicated his "belief" that Attorney Shipman would have uncovered useful information for impeachment if he had conducted interviews of the Commonwealth's witnesses.[37] Similar to the circumstances of *Carson* and *Brown*, we were left to guess what relevant and material evidence Attorney Shipman would have uncovered. We also note that, where possible, Attorney Shipman effectively cross-examined the Commonwealth's witnesses concerning their trial testimony. As such, not only did the appellant fail to show that

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[37] We also note that the appellant is mistaken insofar as he asserts that Attorney Shipman had the right to depose those witnesses or otherwise compel them to speak to him.

his claim had arguable merit, but he also failed to demonstrate any possible prejudice. Accordingly, the appellant was not entitled to PCRA relief on the basis of this claim.

i. Attorney Shipman was not ineffective for failing to disclose the alleged conflict of interest between the appellant and ADA Taschner

In his ninth matter complained of, the appellant contends that Attorney Shipman was ineffective for failing to disclose an alleged conflict of interest between the appellant and ADA Taschner. We have previously addressed the appellant's conflict of interest claim above, and we respectfully submit that this claim of error lacks merit.

j. Attorney Shipman was not ineffective for failing to allegedly challenge the erroneous description of the gloves he was wearing on the night of the crimes as surgical gloves rather than painter's gloves

For his tenth matter complained of, the appellant asserts that Attorney Shipman failed to challenge the allegedly erroneous description of the gloves he was wearing at the time of his offenses as surgical gloves rather than as painter's gloves. The appellant believes that Attorney Shipman was ineffective because he did not object to the characterization of the gloves as surgical gloves despite the appellant pleading with him to do so. [N. at 55.] He also argues that Attorney Shipman should have produced painter's gloves that the appellant had previously purchased so the jury could examine the gloves. [*Id.*] The appellant's arguments lack merit.

As indicated earlier, the appellant correctly asserts that ADA Taschner and some of the Commonwealth's witnesses referred to two gloves that were located in the appellant's pocket and the extra gloves that were located in the bag the appellant carried with him that evening as surgical gloves. After reviewing the trial transcripts in this matter, we observed that the references to "surgical gloves" appear in the following limited locations: First, during ADA Taschner's opening statement to the jury, she indicated that the testimony will show that the appellant was carrying "several sets of green surgical gloves" in a bag. [Day One Tr. at 34.] On

the second day of the trial, Officer McClymont testified that the appellant was carrying disposable "surgical gloves" in the bag and indicated that the police also recovered a pair of said gloves from the appellant's pocket. [Day Two Tr. at 199-200, 207.] Officer McClymont also identified those green gloves as exhibits for the jury. [*Id.* at 199-200; Commonwealth's Exhibit 11.]

Although Attorney Shipman did not object to the Commonwealth's reference to the gloves as surgical gloves, he did cross examine Officer McClymont about his characterization of the gloves as surgical gloves rather than as painter's gloves. Attorney Shipman's cross-examination went as follows:

> Q. . . . And just so we're clear, you mentioned these green gloves, the surgical gloves. Aren't these more like Home Depot gloves for painting and things?
>
> A. It's the common name surgical.
>
> Q. You don't mean actually medical/surgical gloves that would be sized to fit?
>
> A. Correct.

[*Id.* at 212.] We also note that during the appellant's testimony, he referred to the gloves as Home Depot gloves. [Notes of Trial – Day Three ("Day Three Tr."), 5-21-07, at 120.]

The appellant failed to show that his claim had arguable merit because there is no indication that Attorney Shipman had sustainable grounds to object to the characterization of the gloves as surgical gloves. When ADA Taschner referred to the gloves as surgical gloves in her opening statement, she was commenting on the evidence that she anticipated being introduced at trial. During the trial, Officer McClymont called the gloves "surgical gloves." Attorney Shipman attempted to discredit the characterization in the only proper fashion, by cross-examining the officer about his characterization. Additionally, the members of the jury had the

opportunity to view the gloves and make their own determination about the characterization of the gloves. Therefore, this claim lacked arguable merit.

We further point out that the appellant failed to demonstrate that the outcome of the proceedings would have been different if Attorney Shipman somehow had a valid basis to object to the references as surgical gloves. More specifically, the surgical gloves were a very minor piece of the overall evidence introduced in the case. The gloves were just one of many items that the appellant was carrying in his bag (and apparently on his person), and it does not appear that any of the victims even saw the gloves. [*See, e.g.*, Day Two Tr. at 119-20 (testimony of Heather Havlik that appellant never pulled out any items from bag he was carrying that evening).] As such, the appellant has not demonstrated that he was prejudiced in this case by the use of the term "surgical gloves" to describe the gloves.

k. Attorney Shipman was not ineffective for failing to hire a ballistics expert

In his eleventh matter complained of, the appellant contends that Attorney Shipman was ineffective for failing to hire a ballistics expert to examine the firearm that the appellant used in committing the offenses in this case. [N. at 57.] The appellant appears to assert that because Attorney Shipman failed to interview any of the Commonwealth's witnesses, he needed a ballistics expert. [*Id.*] This claim lacks merit.

During the trial, Officer Joseph Effting of the Forks Township Police Department testified for the Commonwealth. [Day Three Tr. at 39.] Officer Effting performed a "function test" on the recovered firearm (a .357 black revolver) to ensure that it was operable and fireable at the time. [*Id.* at 43, 44.][38] Officer Effting testified that he recovered six bullets from the handgun, and he used one of the bullets for the function test. [*Id.* at 44.] Officer Effting performed the test and testified that the firearm was functional and operational. [*Id.* at 44-45.]

[38] Officer Effting testified as a lay witness. He was not admitted as an expert.

We note that, in general,

> [t]he law merely requires defense counsel to conduct reasonable investigations or reach rational decisions that make particular investigations unnecessary. *Commonwealth v. Hughes,* 581 Pa. 274, 865 A.2d 761, 813 (2004). In *Commonwealth v. Copenhefer,* 553 Pa. 285, 719 A.2d 242 (1998), this Court stated that "[t]rial counsel will not be deemed ineffective for failing to call a medical, forensic, or scientific expert merely to critically evaluate expert testimony which was presented by the prosecution." *Id.* at 255, *citing Commonwealth v. Smith,* 544 Pa. 219, 675 A.2d 1221, 1230 (1996).

Commonwealth v. Cox, 983 A.2d 666, 692 (Pa. 2009).

Here, other than his bald assertion of ineffectiveness, the appellant did not introduce any facts to support his claim that Attorney Shipman was ineffective for failing to obtain a ballistics expert to examine the firearm. [*See* N. at 57-58.] In particular, the appellant did not show how that this claim has arguable merit. In this regard, the appellant has failed to demonstrate how testimony from a ballistics expert, even if elicited, would have assisted the defense. The appellant has not claimed that Officer Effting's testimony was somehow inaccurate or incorrect. *See Commonwealth v. Johnson*, 815 A.2d 563, 580-81 (Pa. 2002) (finding that appellant failed to satisfy burden to show ineffective assistance of counsel claim had arguable merit because he failed to assert that conclusions of Commonwealth's expert were incorrect or show that ballistics expert hired by defense would have uncovered evidence to aid defense). Moreover, the appellant did not identify any particular ballistics expert, delineate the substance of the expert's proposed testimony, or show that this ballistics expert was available and would have offered testimony favorable to his case. *See Commonwealth v. Wayne*, 720 A.2d 456, 470-71 (Pa. 1998) (concluding that appellant could not show counsel was ineffective for failing to request continuance to obtain ballistics expert because appellant did not prove that said expert "was available [and] would have offered testimony designed to advance appellant's interest"). Thus, at a minimum, the appellant did not show that his claim had arguable merit or that the outcome

of the proceedings would have been different had Attorney Shipman secured such an expert to testify for the defense.

1. Attorney Shipman was not ineffective for allegedly failing to review the Criminal Information, which incorrectly graded Receiving Stolen Property as a felony

The appellant's thirteenth matter complained of relates to his argument that we erred by failing to determine that Attorney Shipman was ineffective for failing to notice that the offense of Receiving Stolen Property improperly graded as a felony rather than as a misdemeanor. We respectfully submit that we properly determined that the appellant was not entitled to post-conviction collateral relief on this claim because the appellant could not show that he was prejudiced by the improper grading.

In this regard, the appellant appears to be technically correct insofar as Attorney Shipman was not the individual that raised the issue concerning the grading of the Receiving Stolen Property charge. Although Attorney Shipman did file a Motion for Reconsideration on the appellant's behalf, this issue was not included in the motion. Regardless, the appellant did not show that he was prejudiced by Attorney Shipman not raising the issue. In particular, we entered an order on August 2, 2007, scheduling this matter for a hearing to discuss the grading of the aforementioned charge. After a hearing on August 31, 2007, we changed the grading of the offense to a misdemeanor of the first degree and resentenced the appellant to a consecutive sentence of incarceration for a minimum of fifteen months to a maximum of sixty months.[39] Therefore, the appellant's sentence was modified to what it would have been if the offense was graded properly in the first instance and, as such, he failed to demonstrate that he was prejudiced by Attorney Shipman not raising this issue prior to sentencing or in the Motion for Reconsideration.

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[39] It does not appear that a transcript of the hearing on the post-sentence motions was prepared and docketed in this matter.

m. Attorney Shipman was not ineffective for failing to obtain and review 911 tapes of the subject incident for purposes of presentation at trial

In his fourteenth matter complained of, the appellant contends that we erred in declining to find Attorney Shipman ineffective for failing to obtain and review 911 tapes of the subject incident for purposes of presenting them at trial. The appellant believes that the tapes would have "showed that [he] was pretty much calm and not threatening anybody." [N. at 70.] This claim lacks merit.

As with the other ineffective assistance of counsel claims, we found that the appellant's claim lacked arguable merit because it is belied by the record in this matter. More specifically, the record of trial is clear that Attorney Shipman not only obtained, but he also thoroughly reviewed the 911 tapes of the subject incident. [*See* Day Three Tr. at 79.][40] Attorney Shipman indicated on the record that he had reviewed the 911 tape a week prior to trial, and he sought to sanitize the tape by redacting part of the tape that had possible references to inadmissible prior bad acts evidence by the appellant. [*Id.* at 79-80.] Attorney Shipman also stated that he wanted to introduce the redacted tape because it was probative on the issue of the appellant's intent on the night of the incident. [*Id.* at 80.]

Due to issues with redacting the tape and the Commonwealth's desire to introduce the entire tape, the parties attempted to resolve any admissibility issues during a recess. [*Id.* at 82-84.] During this recess, the parties agreed to a written stipulation of fact, which was signed by both counsel and the appellant. [*Id.* at 85.] Upon hearing about the stipulation, we asked Attorney Shipman whether he had a sufficient opportunity to discuss the stipulation with the appellant. [*Id.*] We also conducted the following colloquy with the appellant to ensure that he agreed with and understood the proposed stipulation of fact:

[40] Attorney Shipman discussed the 911 tape on the record and in the presence of the appellant.

THE COURT: Mr. Havlik, do you understand this stipulation?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand what it says?

THE DEFENDANT: Yes.

THE COURT: You read this over with Mr. Shipman?

THE DEFENDANT: Yes.

THE COURT: Now, as I indicated to you before, a stipulation of fact will not be entered into evidence unless you agree to it being entered into evidence. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Do you agree to this stipulation of fact being entered into evidence?

THE DEFENDANT: Yes, I do.

THE COURT: You understand that this will be uncontested facts. In other words, these are the agreed facts that the jury must accept as being true. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You want these facts to be part of your case?

THE DEFENDANT: Yes, sir. I do.

THE COURT: And, Mr. Shipman, are you requesting, and of course Mr. Havlik, this is your signature which appears on this document?

THE DEFENDANT: Yes.

[*Id.* at 85-87.]

Prior to the appellant's testimony, we read the parties' stipulation of fact relating to Heather Havlik's 911 call to the jury. [*Id.* at 102-03.] As demonstrated by the trial record, Attorney Shipman had reviewed the 911 call and he and the appellant agreed to a stipulation of

fact relating to the substance of the call. Since Attorney Shipman did precisely what the appellant is claiming he did not do, the appellant's claim did not have arguable merit.

n. Attorney Shipman was not ineffective in failing to present evidence that the appellant habitually carried a carpenter's knife for use as a tool and not as a weapon

In his fifteenth matter complained of, the appellant asserts that we erred by not finding Attorney Shipman ineffective for failing to present evidence that the appellant habitually carried a carpenter's knife for use as a tool and not as a weapon. The appellant claims that as a contractor, he would carry his usual equipment such as a tape measure, pencil, pen, and the carpenter's knife. [N. at 71.] This claim also lacks merit.

The appellant failed to demonstrate that this claim had arguable merit. In particular, there was testimony presented at trial showing that the appellant habitually carried a carpenter's knife. We note that when Attorney Shipman asked the appellant about the tools that he normally used in his business as a contractor, the appellant did not respond that he always carries the carpenter's knife with him. [Day Three Tr. at 112.] Nonetheless, during cross-examination, the appellant testified that he had kept the knife in his pocket throughout the entire encounter that evening, and he stated that he always brought the knife with him. [*Id.* at 152.]

Moreover, as none of the charges were specifically based on the appellant's possession of the carpenter's knife, the appellant could not show that the outcome of the trial would have been different if Attorney Shipman had introduced additional evidence that he habitually carried the knife with him. Therefore, the appellant did not prove that he was entitled to post-conviction relief on the basis of this claim.

o. Attorney Shipman was not ineffective for failing to introduce evidence of the weather on the date of the incident to show that it was not unlawful to wear a raincoat when it was raining

In his sixteenth matter complained of, the appellant argues that we erred in declining to conclude that Attorney Shipman was ineffective for allegedly failing to include evidence of the weather on the date of the offenses to show that it was not unlawful for him to wear a raincoat while raining. The appellant appears to contend that Attorney Shipman did not contest the Commonwealth's theory that the appellant was wearing the raincoat in combination with the gloves and other items (such as the electrical tape around the ankles) in an attempt to intimidate the victims (and possibly cover his clothing from blood). [N. at 73-74.] The appellant believes that this evidence would have rebutted the Commonwealth's claim that he was wearing the raincoat as part of the aforementioned plot. [*Id.* at 74.] This argument also lacks merit.

In the first instance, we did not find that the appellant's claim had arguable merit. In this regard, even though the appellant is correct that Attorney Shipman did not introduce a weather report as evidence in the case, there is no evidence that Attorney Shipman did not attempt to effectively contest and rebut any unfavorable inferences about the appellant's use of the raincoat. Instead, Attorney Shipman's questioning brought about ample testimony that it was raining on the evening of the appellant's offenses. In particular, Heather Havlik testified that it had been raining earlier in the day, but she was not sure if it was raining when she returned to her house at 9:00 p.m. on the night in question. [*See* Day Two Tr. at 56-57.] In addition, Officer Jeremy McClymont of the Forks Township Police Department testified that it was wet outside that day and it was raining when he arrived at Heather Havlik's home to investigate the disturbance there. [*See id.* at 211-12.] Finally, the appellant testified that it was raining that evening when he drove the bicycle to confront Heather Havlik. [Day Three Tr. at 119.]

Even if the appellant's claim had arguable merit and Attorney Shipman's conduct was not grounded on a reasonable basis designed to effectuate his best interest, the appellant has not shown that he was prejudiced by Attorney Shipman's conduct insofar as the outcome of the proceedings would have been different. The appellant's reasoning for wearing a raincoat that evening was an extremely minor issue in the trial, and does not take away from the conduct of the appellant as he burglarized the house and then committed various crimes therein.[41] Accordingly, the appellant was not entitled to post-conviction relief on this theory.

p. Attorney Shipman was not ineffective for failing to request a mistrial after alleged comments towards the appellant by the court

In his eighteenth matter complained of, the appellant argues that Attorney Shipman was ineffective because he failed to request a mistrial when we allegedly instructed the appellant to stop staring at Heather Havlik during her testimony. The appellant claims that our remarks to the appellant were devastating to his case as these remarks were made in open court and in the presence of the jury. As discussed below, this claim lacks merit.

As with many of the appellant's other issues, the appellant could not satisfy any of the three elements of an ineffective assistance of counsel claim to show that Attorney Shipman was ineffective in failing to request a mistrial in light of the court's comments. Nonetheless, we need not address the final two elements because the appellant's claim lacks arguable merit. In this regard, the appellant's recollection (or interpretation of the transcript) and characterization of the events on the second day of trial are completely inaccurate.

More specifically, although we could not independently recollect the events happening as the appellant described above, our review of the transcript from the trial confirms that the appellant is mistaken. During Attorney Shipman's cross-examination of Heather Havlik, an

[41] In fact, the Commonwealth did not reference the raincoat in its closing argument. [Day Three Tr. at 176-97.]

evidentiary issue arose over a PFA. [*Id.* at 69-72.] We then held a lengthy side-bar conference with counsel until eventually taking a recess and ***excusing the jury***. [*Id.* at 72-76.] Thereafter, we continued to confer with counsel (both in the courtroom and in chambers) ***outside the presence of the jury*** in an attempt to resolve the issue. [*Id.* at 76-109.] At the conclusion of these discussions in chambers, Heather Havlik resumed her position on the witness stand and the court had another conference with counsel in the courtroom to discuss a proposed stipulation of fact between the parties. [*Id.* at 109-113.]

We then conducted a colloquy with the appellant to ensure that he was knowingly and voluntarily entering into the proposed stipulation of fact with respect to the PFA. [*Id.* at 112-13.] While Heather Havlik was sitting on the witness stand (and while the jury was outside of the courtroom), we observed that the appellant was excessively staring at her in a manner that we interpreted as an attempt to intimidate her. [*Id.* at 114.] Our observation was reflected in the following exchange:

> THE COURT: Generally, I don't send any exhibits out, certainly not a court exhibit. I don't send any exhibits until they request the exhibit, and then I would consult with counsel to determine whether we want the jury to have the exhibit or not.
>
> ***Mr. Havlik, I would prefer if you not stare at your wife right now.***
>
> MR. SHIPMAN: I'll have him away from the general direction.
>
> THE COURT: It was not my intent to put the witness in a position where she was subject to that pending the stipulation being entered.
>
> THE COURT: ***Of course, Mr. Havlik, if you are continuing to stare at her, stare somewhere else.*** Could I have both counsel and Mr. Havlik sign it just as additional evidence that everybody has reviewed it and signed it and finds it acceptable as the stipulation being entered into evidence and read to the jury.

[*Id.* (emphasis added).]

Although we recognize that it is somewhat difficult to interpret our tone used in the above-referenced exchange by simply reviewing the transcript, the appellant is patently incorrect that we "yelled" at him in any way. In fact, we did not yell at him. Also, although we do not have an audio recording of the proceeding, we submit that the structure of our sentences (in itself) demonstrates that we did not yell at him. While we do not recall the Sheriff's deputies moving the appellant's chair at that time, even if they did move the chair, the appellant's chair was not facing away from the witness when the jury returned. Nonetheless, and most importantly, the jury was not present for our exchange with the appellant and, as such, could not have been influenced by our statements to the appellant. Therefore, the appellant's statements and conjecture to the contrary are false, and Attorney Shipman had no basis to object or to otherwise move for a mistrial. Accordingly, the appellant's claim lacked arguable merit and he could not show that Attorney Shipman was ineffective for failing to object.[42]

q. Attorney Shipman was not ineffective for failing to file suppression motions to exclude the raincoat, carpenter knife, 357 magnum revolver, baseball bat, surgical gloves, and rounds of ammunition

For the appellant's nineteenth matter complained of on appeal, he contends that we erred in failing to find Attorney Shipman ineffective for allegedly failing to file any suppression motions to exclude the raincoat, carpenter knife, 357 magnum revolver, baseball bat, surgical gloves, and rounds of ammunition. The appellant believes that Attorney Shipman should have filed a suppression motion. [N. at 80.] The appellant also does not believe Attorney Shipman's representation that he filed such a motion and that the motion was denied. [*Id.* at 71, 80.] As explained below, this claim lacks merit.

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[42] We also note that the jury's failure to be present in the courtroom also shows that the appellant could not show that he was prejudiced by Attorney Shipman's conduct.

The appellant's ineffectiveness claim lacks arguable merit because the appellant is incorrect that Attorney Shipman failed to file a motion to exclude all of the aforementioned evidence. In this regard, we note that the docket entries in this matter reflect that Attorney Shipman filed a motion to dismiss (or *habeas* motion) on January 31, 2007, claiming that the Commonwealth failed to present sufficient evidence to establish a *prima facie* case of the charges at the preliminary hearing. Although it does not appear that Attorney Shipman included a suppression motion with his omnibus pretrial motions, he did file a motion *in limine* to preclude the Commonwealth from introducing some of the aforementioned items. [*See* Transcript of Pretrial Motions ("Pretrial T."), 5-15-07, at 17.][43] Attorney Shipman also argued the motion before Judge Giordano, and the appellant was present for the hearing.

In this regard, it appears that Attorney Shipman moved to have the court exclude all items that were found in the bag that the appellant carried with him into the house during the incident. [*Id.* at 17-18.] Some of these items included "the paint, seal, electrical tape, a roll of electrical tape, a knot rope, rubber gloves, winter type gloves, garbage, ammunition and a box cutter. [*Id.* at 17.] Attorney Shipman argued that the court should exclude this evidence because the evidence was irrelevant and the probative value was outweighed by the danger of unfair prejudice insofar as the appellant did not use the items in the commission of the crimes. [*Id.* at 17, 18.] Judge Giordano eventually denied the motion.

We further note that the appellant has articulated any additional grounds by which Attorney Shipman could have properly moved for suppression of the aforementioned evidence. He has not identified any constitutional violations surrounding his arrest or the seizure of this evidence that would have warranted suppression of this evidence. Accordingly, we respectfully

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[43] It appears from the transcript that Attorney Shipman presented two motions *in limine* to Judge Giordano. [Pretrial T. at 17.] Unfortunately, the motions are not included in the Clerk of Court's file.

submit that we did not err in concluding that the appellant did not prove that this claim had arguable merit, and he has not shown that the outcome of the proceedings if any additional grounds were presented to the court.

r. Attorney Shipman was not ineffective for failing to be present during the pre-sentence investigation interview by the Northampton County Department of Adult Probation and that interview is not a critical phase of the sentencing proceeding

The appellant's twentieth claim on appeal is that we erred in failing to find that Attorney Shipman was ineffective for failing to be present at his pre-sentence interview with the Northampton County Probation Department. The appellant also claims that this interview is a critical stage of the proceedings. Neither of these claims have merit.[44]

In the first instance, the appellant is incorrect when he contends that the pre-sentence interview is a critical stage of the proceedings entitling him to counsel under the Sixth Amendment to the United States Constitution.[45] The Supreme Court of Pennsylvania has specifically rejected this argument when the Court concluded that the pre-sentence investigation/interview process is not a "critical stage of the criminal process" entitling an individual defendant to counsel. *Commonwealth v. Burton*, 301 A.2d 675, 676 (Pa. 1973). In reaching this conclusion, the Court stated as follows:

> While the report may have some bearing on the sentence that it ultimately imposed, the investigator is not the decision-maker. The power to impose sentences is strictly within the province of the court. Thus, this case is distinguishable from such cases as *Commonwealth v. Johnson*, 428 Pa. 210, 236 A.2d 805 (1968), and *Com. ex rel. Remeriez v. Maroney*, 415 Pa. 534, 204 A.2d 450 (1964). In those cases, we recognized that, since sentencing is the last opportunity for the defendant to present matters and circumstances which may

[44] We note that the appellant had also raised a claim that Attorney Shipman was ineffective for failing to be present for the appellant's psychological and psychiatric examination ordered as part of the pre-sentence investigation. [N. at 82-83.] This claim was not specifically included in the appellant's Rule 1925(b) concise statement.

[45] The right to counsel under Article I, § 9 of the Pennsylvania Constitution is "coterminous" with the Sixth Amendment of the United States Constitution for purposes of determining when the right to counsel attaches. *Commonwealth v. Arroyo*, 723 A.2d 162, 170 (Pa. 1999).

> lead to his freedom, he should have an attorney to aid him in mustering the facts and arguments on his behalf.
>
> On the other hand, the presentence investigation is not a situation where legal rights must be preserved or lost. Instead, it is the first opportunity for the rehabilitative administration of the Commonwealth to interview the defendant, with a view to determining what particular types of treatment or guidance the defendant needs for rehabilitation. In order to be effective, an investigator must build a certain rapport with the defendant, so that the true nature of the defendant's personality may be discovered. The presence of counsel at such an interview could only frustrate this purpose.
>
> The defendant is adequately protected from any possible prejudicial inferences in the report. First, counsel has a right to examine the report before sentencing. *Commonwealth v. Phelps*, Pa., 301 A.2d 678 (1973). Then, if his client contests any portion of the report, counsel can offer evidence in rebuttal and disclose the inaccuracies in the report to the judge. We believe that this is sufficient.

Id. at 676-67.

The appellant also failed to show that his claim of ineffectiveness against Attorney Shipman had arguable merit or that he was somehow prejudiced by Attorney Shipman's conduct. The essence of the appellant's claim is as follows:

> By [Attorney Shipman] failing to be present at that interview, if testimony was being extracted from me and I was voluntarily expressing unfavorable information during this examination or evaluation, Attorney Shipman would have been present to stop me from voluntarily giving this unfavorable information to this psychiatrist or psychologist, or who would have been able to stop me and direct me and more favorable ways to express myself or give that information that was requested in more favorable way that wouldn't be used against me because this is, I believe, to be a critical phase in the process.

[N. at 83-84.] The appellant also asserted that "if I . . . provide voluntarily unfavorable information that will increase my sentence and without my knowledge being that I was on these psychotropic medications, I could have unknowingly volunteered information that would have been used against me for my sentencing." [*Id.* at 84.]

As indicated by reviewing the appellant's argument, he incorrectly presumes that he had the right to the presence of counsel during the pre-sentence investigation. The appellant also

asserts without any support that he has the right to be coached by Attorney Shipman so that he only provided favorable information to the pre-sentence investigators. Moreover, the appellant once again assumes, without any reliable corroborating medical support, that the medications he was taking would have caused him to provide involuntary statements to the investigators. Thus, this claim lacks arguable merit.

The appellant also failed to demonstrate how he was prejudiced by any failure because he did not identify any information in the pre-sentence report that was inaccurate or otherwise disputed. [N. at 85.] Additionally, we note that the appellant admitted during the sentencing hearing that he had the opportunity to review the pre-sentence investigation report, the psychiatric evaluation, and psychological evaluation with Attorney Shipman. [*See* Sentencing Transcript, 7-9-07, at 2-3, 4-5.] Neither the appellant nor Attorney Shipman identified any corrections or modifications to those reports. [*Id.* at 3.] Accordingly, we respectfully submit that we did not err in rejecting this claim.

s. Attorney Shipman was not ineffective for allegedly failing to present evidence to the jury about a missing bicycle chain guard

The appellant's twenty-first matter complained of relates to our error in failing to find Attorney Shipman ineffective because he allegedly failed to present evidence to the jury about a missing bicycle chain guard. The appellant alleged that Attorney Shipman should have introduced pictures of either the missing guard or the bicycle itself so the appellant could support his assertion that he used electrical tape around his pant legs because of the missing guard. [N. at 85-86.] This claim also lacks merit.

In the first instance, the appellant's claim of ineffectiveness lacks arguable merit. The appellant did not introduce any evidence that the bicycle that he drove to the house that evening had a missing chain guard. In addition, the appellant has not introduced any evidence that the

bicycle was even available to Attorney Shipman to photograph or otherwise attempt to use as evidence. In particular, Officer Joseph Dressler of the Forks Township Police Department had testified that the police had attempted to locate the bicycle based on the appellant's description of where he left it and they could not locate it. [Day Three Tr. at 19-20.][46]

Nonetheless, even if somehow this claim had arguable merit and Attorney Shipman's failure to introduce the bicycle or a picture of the bicycle into evidence lacked any reasonable basis designed to effectuate the appellant's interest, he has not shown that he was prejudiced by any such failure. In this regard, during the trial the appellant was able to present to the jury his assertion that he taped the hems of his pants with electrical tape to prevent his pant legs from getting caught in the bicycle chain. [Day Three Tr. at 117, 118.] The appellant cannot show that the introduction of the bicycle would have caused the jury to find him not guilty of any of the offenses because the taping of his pant legs was just one minor part of his overall conduct that evening. Thus, he cannot show that the outcome of the trial would have been different had Attorney Shipman introduced the bicycle or a picture of the bicycle.

t. Attorney Shipman did not fail to adequately prepare the appellant prior to his testimony at trial

The appellant's twenty-second and final contention on appeal is that we erred in failing to find Attorney Shipman ineffective for allegedly failing to adequately prepare him for his testimony at trial. The appellant asserts that he testified at trial without Attorney Shipman preparing him for his testimony, and he again asserts that his medication affected his trial testimony. [N. at 86-87.] The appellant appears to further assert that he "was not in sound mind" to decide whether to testify. [*Id.* at 87-88.]

[46] We note that Even Schatzman testified that approximately a week after the incident, he went to Heather Havlik's house and recovered the bicycle from an area by the front yard. [Day Two Tr. at 129.]

As with many of the appellant's other claims, this claim lacked arguable merit. In the first instance, the appellant's claim regarding the effects of his medication is rebutted by his trial testimony. In particular, to the extent that the appellant was exhibiting any detached effects from the medication, Attorney Shipman initially asked the appellant if he was taking any medications. [Day Three Tr. at 104-05.] Attorney Shipman then asked the appellant if the medications interfered with his ability to understand what Attorney Shipman was saying. [*Id.* at 105.] The appellant responded that the medications did not interfere with his ability to understand what was being said. [*Id.*]

Despite this testimony, the appellant, without presenting any supporting credible medical evidence during the evidentiary hearing, claims that he was not of sound mind to testify. We did not find his testimony credible or supported by the evidence. The appellant even admitted that he "pretty much just wanted to get it over with," which is indicative of a level of understanding as to what he was doing at the time. Moreover, we conducted a thorough colloquy with the appellant prior to his decision to testify, and there was no indication that it was not a knowing, intelligent, and voluntary decision. This colloquy was as follows:

> MS. TASCHNER: Is Mr. Havlik testifying?
>
> THE COURT: That's a question I should be asking.
>
> MR. SHIPMAN: Well, it's an issue we've been discussing. And I don't know that I yet have a decision from Mr. Havlik.
>
> THE COURT: Well, the only concern I have is we will have a short charge conference, but then I'll be bringing the jury down. So I don't know how much other evidence you have to present, but if you don't think Mr. Havlik's going to be put in a position to make a decision in a relatively short period of time, that's fine.
>
> That said, I'll give you all the time you need given the importance of that decision.

But certainly I want to make sure you have that time and, Mr. Havlik, you understand you have no obligation to testify, and --

THE DEFENDANT: Yes.

THE COURT: I'll instruct the jury that they cannot hold your decision not to testify against you as any evidence of guilt or otherwise but at the same time this is the only opportunity you will have during this trial to testify before this jury.

So the decision of whether to testify or not to testify must be yours in the last instance. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: But you should certainly consider the advice that Mr. Shipman would provide you but ultimately the decision whether to testify or not to testify is your decision. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: That being the case, Mr. Shipman, and of course I said we would have a charge conference at this time. Are you going to need additional time to discuss this with Mr. Havlik?

MR. SHIPMAN: One second. He's going to testify, Judge.

THE COURT: All right. And you don't need any more time to discuss it?

MR. SHIPMAN: No. We weighed the costs and benefits. It's just a matter of him making his decision. He made it so he will testify.

[Day Three Tr. at 88-89.]

We also did not find credible the appellant's testimony that Attorney Shipman did not prepare him prior to his testimony. Attorney Shipman credibly testified that he consulted with the appellant prior to his testimony and prepared him for his testimony. [N. at 109.] There is also no support in the record for the appellant's assertion that Attorney Shipman asked him a series of questions to which Attorney Shipman did not know the answers.

We further point out that, even if this claim had arguable merit, the appellant failed to show that Attorney Shipman's conduct was not grounded on any reasonable basis designed to effectuate the appellant's interests. In particular, Attorney Shipman's rationale for not preparing the appellant with a script prior to his testimony was reasonable and designed to effectuate the appellant's best interests as that very well could have harmed his case in front of the jury. Moreover, Attorney Shipman would not have been able to prepare the appellant with a memorized answer or response for every single question that ADA Taschner would have asked him on cross-examination.[47] Accordingly, this allegation of error also fails.

III. Conclusion

For the reasons stated herein, we respectfully submit that the appellant's allegations of error are without merit and the order entered on May 29, 2012, should properly be affirmed.

BY THE COURT:

EDWARD G. SMITH, J.

Date: October 18, 2012

[47] The appellant baldly claimed that Attorney Shipman elicited unfavorable information on direct examination, but he has failed to identify any such unfavorable information that prejudiced him with the jury. Moreover, he did not even attempt to show that the outcome of the proceedings would have been different had Attorney Shipman not solicited that information.