NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. PAUL PARKS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 705 EDA 2013

Appeal from the PCRA Order February 25, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0703321-2004

BEFORE: FORD ELLIOTT, P.J.E., BOWES, J., and OTT, J.

MEMORANDUM BY OTT, J.: **FILED APRIL 22, 2014**

Paul Parks appeals, *pro se*, from the order entered February 25, 2013, in the Philadelphia County Court of Common Pleas, denying him relief on his first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq*. On December 19, 2005, Parks was sentenced to an aggregate term of life imprisonment, following his jury conviction of first degree murder and criminal conspiracy.[1] On appeal, Parks raises six claims asserting the ineffective assistance of trial counsel. For the reasons set forth below, we affirm.

The facts underlying Parks's arrest and conviction are aptly summarized by the trial court as follows:

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[1] 18 Pa.C.S. §§ 2502(a) and 903.

On the evening of March 15, 2003, Kenneth Stokes (Stokes) planned to go to the movies with his daughter and his girlfriend. Before his girlfriend arrived at his home, Stokes went to the New Deli Market located at the corner of 16th and Ruscomb Streets. Prior to arriving at the market, Stokes ran into Michelle Gatlin (Gatlin), who asked Stokes if she could purchase crack cocaine from him. [Gatlin admitted at trial that she used cocaine regularly around the time of the murder, and that she had last used crack cocaine approximately three hours before the shooting.] Stokes told Gatlin that he did not have any drugs to sell. On the way back to her house, Gatlin noticed a dark blue, four-door car parked across the street from her house. After seeing the car flash its headlights, Gatlin approached the car and recognized [Parks] as the driver and Khalib Hurst (Hurst) in the passenger's seat. [During the trial, Parks was referred to by his nickname "P.J." and Hurst was referred to as "Brick" or "Brickhead."] Gatlin saw Hurst reach under the passenger's seat of the car, grab something, put it under his coat, get out of the car and walk towards the New Deli Market. [Parks] then directed Gatlin to go into her house.

When she arrived at the steps to her house, located across the street from where [Parks's] car was parked, Gatlin watched [Parks] get out of the car and walk towards Stokes. Gatlin observed [Parks] step off the sidewalk and fire a shot from a gun. At that point, she turned toward her house and began to run away. On the way to the house, Gatlin heard five or six more shots; she heard one final loud bang as she opened her door.

Around the same time, Damon Toney (Toney) was using a pay phone outside the New Deli Market; he noticed Stokes exit the New Deli Market and cross the street to converse with [Parks]. Shortly thereafter, Toney heard gunshots and observed [Parks] shooting. Subsequently, Toney went over to Stokes and noticed a "blue car take off."

About fifteen minutes after Gatlin had entered her house, Malik Mustafa (Mustafa) knocked on her front door; once she opened the door, Mustafa told her that there was a cellphone call for her. Initially, Gatlin refused to take the phone. When Mustafa insisted, Gatlin took the phone and recognized [Parks's] voice on the other end of the line. [Parks] told her, "Don't put my name in that." [Parks] added, "You didn't see nothing."

> Roughly two months after the shooting, Mustafa attended a party with [Parks], Hurst and Julani Christmas (Christmas). The group discussed Stokes' death. Christmas confronted [Parks] about having shot Stokes; [Parks] responded, "I had to do what I had to do. It looked like he was reaching."

PCRA Court Opinion, 8/22/2013, 3-4 (footnotes and record citations omitted).

Parks was subsequently arrested and charged with first degree murder, criminal conspiracy and possessing an instrument of crime (PIC).[2] On December 19, 2005, a jury found Parks guilty of first degree murder and criminal conspiracy, and not guilty of PIC.[3] Parks was sentenced on March 2, 2006, to a term of life imprisonment for first-degree murder, and a consecutive term of 20 to 40 years' imprisonment for criminal conspiracy. Parks filed post-sentence motions, which were denied by operation of law on July 12, 2006. This Court affirmed Parks's judgment of sentence on September 10, 2007, and the Pennsylvania Supreme Court subsequently denied Parks's petition for allowance of appeal. ***Commonwealth v. Parks***, 938 A.2d 1119 (unpublished memorandum) (Pa. Super. 2007), *appeal denied*, 951 A.2d 1162 (Pa. 2008).

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[2] 18 Pa.C.S. § 907.

[3] Parks was originally tried in June of 2005. However, that proceeding ended in a mistrial when the jury declared that it could not agree on the verdict.

Parks filed a timely *pro se* PCRA petition on June 19, 2009. Although counsel was promptly appointed, on December 9, 2009, Parks filed a petition requesting to proceed *pro se*. Following a ***Grazier***[4] hearing conducted on February 8, 2010, the PCRA court determined that Parks had knowingly and voluntarily waived his right to counsel, and granted his petition to proceed without counsel. Thereafter, Parks and the Commonwealth both filed a series of amended petitions, motions to dismiss, and responses thereto. Ultimately, on October 12, 2012, the PCRA court conducted an evidentiary hearing limited to Parks's claim that that trial counsel was ineffective for failing to present character testimony regarding his reputation for being non-violent.[5] At the conclusion of the hearing, the PCRA court determined that Parks's claim was without merit. Thereafter, on January 11, 2013, the PCRA court notified Parks, pursuant to Pa.R.Crim.P. 907, of its intention to dismiss his PCRA petition. Parks filed two responses to the court's Rule 907 notice; however, on February 25, 2013, the PCRA court entered an order denying Parks's PCRA petition. This timely appeal followed.[6]

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[4] ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998).

[5] Counsel was appointed for the limited purpose of conducting the examination during the evidentiary hearing. Thereafter, counsel was relieved of representation.

[6] On March 8, 2014, Parks filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), prior to receiving the PCRA court's directive, which had been docketed and mailed the previous day.

When reviewing an order dismissing a PCRA petition, we must determine whether the ruling of the PCRA court is supported by record evidence and is free of legal error. ***Commonwealth v. Robinson***, ___ A.3d ___, 2013 WL 6822831, *4 (Pa. December 27, 2013) (citation omitted). "Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record." ***Commonwealth v. Carter***, 21 A.3d 680, 682 (Pa. Super. 2011) (citation omitted).

In the present case, Parks raises six challenges to the effective assistance of trial counsel. Specifically, Parks argues counsel was ineffective for: (1) failing to object when the trial court permitted the jury to review the statement of witness, Malik Mustafa, which contained a confession by Parks, during its deliberations; (2) failing to object to third party statements contained in Mustafa's statement, which violated both the Confrontation Clause and the hearsay rules; (3) failing to request a mistrial when the Commonwealth disclosed, near the end of trial, that a potential defense witness had made an inculpatory statement; (4) failing to present an expert witness to testify to the effect of crack cocaine on a witness's ability to perceive an event; (5) failing to challenge the weight of the evidence on direct appeal; and (6) failing to present character testimony regarding Parks's reputation for non-violence. ***See*** Parks's Brief at 4-5.

Our review of an allegation of counsel's ineffectiveness is well-settled:

> In Pennsylvania, counsel is presumed effective, and a defendant bears the burden of proving otherwise. In order to be entitled to relief on a claim of ineffective assistance of counsel, the PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel whose effectiveness is at issue did not have a reasonable basis for his action or inaction; and (3) the PCRA petitioner suffered prejudice as a result of counsel's action or inaction. When determining whether counsel's actions or omissions were reasonable, we do not question whether there were other more logical courses of actions which counsel could have pursued: rather, we must examine whether counsel's decisions had *any* reasonable basis. Further, to establish prejudice, a petitioner must demonstrate that but for the act or omission in question, the outcome of the proceedings would have been different. Where it is clear that a petitioner has failed to meet any of the three, distinct prongs of the [ineffectiveness] test, the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met.

Commonwealth v. Steele, 961 A.2d 786, 796-797 (Pa. 2008) (internal citations and punctuation omitted).

The PCRA court provided a thorough and well-reasoned discussion of its decision denying Parks's petition for PCRA relief. ***See*** PCRA Court Opinion, 8/22/2013, at 5-22 (finding no ineffective assistance of trial counsel when (1) Parks's statement, contained within Mustafa's written statement, was not a confession pursuant to Pa.R.Crim.P. 646(c)(2); (2) the statements of two non-testifying declarants contained in Mustafa's written statement were non-testimonial for purposes of the Confrontation Clause,[7] and

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[7] ***See Crawford v. Washington***, 541 U.S. 36 (2004).

qualified as tacit admissions of Parks pursuant to Pa.R.E. 803(25)(B);[8] (3) no mistrial was warranted based upon the Commonwealth's failure to inform

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[8] A tacit admission of a defendant has been deemed admissible at trial, so long as it was not made in police custody, or during police questioning.

> The rule of evidence is well established that, when a statement made in the presence and hearing of a person is incriminating in character and naturally calls for a denial but is not challenged or contradicted by the accused although he has opportunity and liberty to speak, **the statement and the fact of his failure to deny it** are admissible in evidence as an implied admission of the truth of the charges thus made. The justification of this rule is to be sought in the age-long experience of mankind that ordinarily an innocent person will spontaneously repel false accusations against him, and that a failure to do so is therefore some indication of guilt.

Commonwealth v. Hubble, 460 A.2d 784, 788 (Pa. Super. 1983) (internal citation and quotation marks omitted; emphasis supplied). ***See also Commonwealth v. Coccioletti***, 425 A.2d 387, 392 (Pa. 1981); ***Commonwealth v. Faraci***, 466 A.2d 228, 232 (Pa. Super. 1983). Here, in Mustafa's written statement, he recalled "sitting around talking" with Parks, Hurst, and Juliani Christmas, a few months after the shooting. N.T., 12/14/2005, at 151. His recollection of their conversation included the following third party declarations:

> **And then [Christmas] said it was stupid for [Parks] to shoot [Stokes] over some stupid stuff.** I was just sitting back, being quiet. [Parks] was saying, "I had to do what I had to do. It looked like he was reaching." We were all like, "Yeah, I know. **[Hurst] said, "Man, he," meaning [Parks,] "had to do it. He, [Stokes], shouldn't have stepped to him like that. It looks like he was reaching."**

N.T., 12/14/2005, at 151 (emphasis supplied). The statements of Christmas and Hurst were of an incriminating nature and would have naturally called for a denial by Parks. His failure to do so renders their statements admissible as a tacit admission. ***See Hubble***, ***supra***. Moreover, even if we were to find that those statements should have been precluded or readacted

(Footnote Continued Next Page)

Parks, until near the end of trial, that potential defense witness, Sonia Washington (Stokes's girlfiriend), had told Stokes's mother that Parks shot Stokes as the Commonwealth did not call Washington to testify or offer her statement into evidence, and a mistrial would have been "out of proportion to the discovery violation alleged;"[9] (4) expert testimony regarding Gatlin's skeptical ability to perceive events while high on crack cocaine would not have been admissible because expert testimony is not permitted "to intrude upon a jury's basic function of determining credibility;" (5) Parks's challenge to the weight of the evidence based solely upon the jury's acquittal of the charge of PIC was meritless because inconsistent verdicts are permissible; and (6) trial counsel had a reasonable basis for failing to present character testimony, by Parks's mother, sister and aunt, regarding his reputation for

(Footnote Continued) ———————————

from Mustafa's statement as hearsay, Parks has failed to demonstrate how he was prejudiced because he, himself, admitted to Mustafa that he shot Stokes. ***See Steele***, ***supra***.

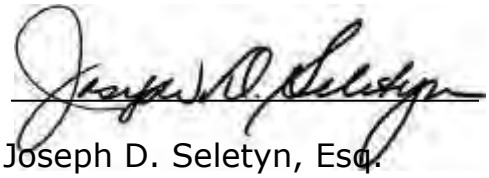
[9] Further, we note that Parks has not demonstrated he was prejudiced as a result of counsel's failure to request a mistrial. Indeed, the significance of Washington's proposed testimony was uncertain at best. Apparently, Washington arrived on the scene after the shooting, described an individual leaving the scene who did not resemble Parks, and described a cream-colored car leaving the scene. ***See*** N.T., 12/14/2005, at 325-326, 340. Later, she failed to identify Parks in a photo array. Moreover, Parks's counsel informed the court that Washington's mother told their defense investigator that Washington "flat out refused" to come to trial because she was so traumatized by the shooting. N.T., 12/14/2005, at 323. The defense investigator had attempted to serve Washington with a subpoena, but her mother refused to accept it. In fact, defense counsel stated that Washington would be "hostile" and that he had "no idea what she would do." ***Id.*** at 324.

non-violence since Parks's prior convictions on drug and gun charges would have been admitted).

Our independent review of the record reveals ample support for the PCRA court's conclusions. Therefore, we adopt the sound reasoning of the Honorable M. Teresa Sarmina as dispositive of Parks's ineffectiveness claims raised on appeal, and affirm the order denying PCRA relief.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014

PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	
		CP-51-CR-0703321-2004
	:	
v.		Superior Court Docket
	:	No. 705 EDA 2013
PAUL PARKS	:	
	:	

Sarmina, J.
August 22, 2013

OPINION

PROCEDURAL HISTORY

On December 19, 2005, following a jury trial,[1] Paul Parks (petitioner) was found guilty of murder of the first degree (H-1) and criminal conspiracy (F-1).[2] Sentencing was deferred until March 2, 2006, on which date this Court sentenced petitioner to the mandatory term[3] of life imprisonment.[4] Post-sentence motions were filed on March 13, 2006, and denied by operation of law on July 12, 2006. The Superior Court affirmed petitioner's judgments of sentence on September 10, 2007.[5] On October 10, 2007, petitioner filed a petition for allowance of appeal; *allocatur* was denied on July 10, 2008.[6]

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[1] Petitioner was originally tried in June 2005, but this Court declared a mistrial by agreement of both parties when the jury was unable to reach a verdict as to the two charges for which petitioner was ultimately convicted. Notes of Testimony (N.T.) 6/5/2005 at 2. All ineffective assistance of counsel claims raised here concern only trial counsel for his re-trial.

[2] 18 Pa.C.S. §§ 2502(a) and 903, respectively.

[3] 18 Pa.C.S. § 1102(a).

[4] As to the conviction for criminal conspiracy, this Court sentenced petitioner to a consecutive term of not less than 20 years nor more than 40 years confinement. N.T. 3/2/2006 at 20.

[5] Commonwealth v. Parks, No. 2202 EDA 2006, slip op. (Pa.Super., Sept. 10, 2007) (memorandum opinion).

[6] Commonwealth v. Parks, No. 549 EAL 2007, slip op. (Pa., July 10, 2008) (memorandum opinion).

On June 19, 2009, petitioner filed a timely *pro se* petition pursuant to the Post-Conviction Relief Act (PCRA).[7] Counsel was appointed,[8] but prior to his filing an amended petition or a "no-merit" letter, petitioner requested to proceed *pro se*. On February 8, 2010, this Court held a Grazier[9] hearing and determined that petitioner knowingly, intelligently, and voluntarily waived his right to counsel. On April 8, 2010, petitioner filed an amended *pro se* PCRA petition. The Commonwealth responded by filing a motion to dismiss on November 24, 2010. On December 27, 2010, petitioner filed a response to the Commonwealth's motion to dismiss. On February 7, 2011, petitioner followed his response with a supplemental filing and, on May, 9, 2011, the Commonwealth filed a Supplemental Motion to Dismiss. On July 13, 2011, petitioner requested leave to amend his PCRA petition and raise an additional claim to which the Commonwealth replied on August 4, 2011.

On September 7, 2011, after reviewing the extensive pleadings, this Court notified the parties that an evidentiary hearing would be granted as to a single claim: that trial counsel was ineffective for failing to call witnesses to testify concerning petitioner's character for non-violence. Counsel was appointed solely for the purpose of the evidentiary hearing.[10] On October 12, 2012, this Court conducted an evidentiary hearing concerning petitioner's claim that counsel was ineffective for failing to call character witnesses to testify about his character for non-violence. This Court found that that claim was without merit, and informed petitioner of such in open court. On January 11, 2013, this Court sent petitioner notice pursuant to Pa.R.Crim.P. 907 (907 Notice) of its intent to deny petitioner's other claims and to dismiss his petition. Petitioner filed two separate

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[7] 42 Pa.C.S. §§ 9541-9546.

[8] David S. Rudenstein, Esquire, had been appointed to represent petitioner.

[9] Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998).

[10] On September 13, 2011, this Court entered an order appointing P. [illegible] Wittels, Esquire to represent petitioner at the evidentiary hearing. On December 16, 2011, Mr. Wittels filed an amended petition, though he had been appointed for the evidentiary hearing only. On December 28, 2011, petitioner wrote this Court to clarify that he did not want to give up his right to self-representation, and only asked for representation as to the issue to be litigated at the evidentiary hearing. On April 13, 2012, Mr. Wittles was relieved, and on April 18, 2012, Emily B. Cherniak, Esquire was appointed to appear on petitioner's behalf solely for the evidentiary hearing.

responses to this Court's 907 Notice – on January 29, 2013 and again on February 14, 2013. On February 25, 2010, this Court issued an order denying the petition. This timely appeal followed.

FACTS

On the evening of March 15, 2003, Kenneth Stokes (Stokes) planned to go to the movies with his daughter and his girlfriend. N.T. 12/14/2005 at 60. Before his girlfriend arrived at his home, Stokes went to the New Deli Market located at the corner of 16th and Ruscomb Streets. Id. at 61. Prior to arriving at the market, Stokes ran into Michelle Gatlin (Gatlin), who asked Stokes if she could purchase crack cocaine from him.[11] N.T. 12/13/2005 at 63-64. Stokes told Gatlin that he did not have any drugs to sell. Id. at 65. On the way back to her house, Gatlin noticed a dark blue, four-door car parked across the street from her house. Id. at 66. After seeing the car flash its headlights, Gatlin approached the car and recognized petitioner as the driver and Khalib Hurst (Hurst) in the passenger's seat.[12] N.T. 12/14/2005 at 41. Gatlin saw Hurst reach under the passenger's seat of the car, grab something, put it under his coat, get out of the car and walk towards the New Deli Market. N.T. 12/13/2005 at 69. Petitioner then directed Gatlin to go into her house. Id. at 70.

When she arrived at the steps to her house, located across the street from where petitioner's car was parked, Gatlin watched petitioner get out of the car and walk towards Stokes. Id. at 71-72. Gatlin observed petitioner step off the sidewalk and fire a shot from a gun.[13] Id. At that point, she

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[11] Gatlin admitted that she used cocaine around the time leading up to the murder "roughly three to four times per week" and that she had used the drug on the day of the crime twice, the last use being roughly three hours prior to the shooting. N.T. 12/13/2005 at 94, 99.

[12] Petitioner was referred to throughout trial by his full name "Paul Parks," as well as by his nickname, "P.J." N.T. 12/14/2005 at 277. Hurst was also known as "Brick" and "Brickhead." Id. at 151.

[13] Around 8:30 PM, police arrived at the 4900 block of N. 16th Street and found Stokes laying in the street. N.T. 12/13/2005 at 52-53; 12/14/2005 at 55. Shortly after arriving at the scene, police took Stokes to the hospital, where he ultimately died. N.T. 12/15/2005 at 59. At trial, Assistant Medical Examiner Dr. Ian Hood testified that Stokes died as a result of four gunshot wounds to various parts of his body. Id. at 75.

turned toward her house and began to run away. Id. On the way to the house, Gatlin heard five or six more shots; she heard one final loud bang as she opened her door. Id. at 78-79.

Around the same time, Damon Toney (Toney) was using a pay phone outside the New Deli Market; he noticed Stokes exit the New Deli Market and cross the street to converse with petitioner. Id. at 275-77. Shortly thereafter, Toney heard gunshots and observed petitioner shooting. Id. at 276-77. Subsequently, Toney went over to Stokes and noticed a "blue car take off." Id. at 277.

About fifteen minutes after Gatlin had entered her house, Malik Mustafa (Mustafa) knocked on her front door; once she opened the door, Mustafa told her that there was a cellphone call for her. N.T. 12/13/2005 at 79. Initially, Gatlin refused to take the phone. Id. at 81. When Mustafa insisted, Gatlin took the phone and recognized petitioner's voice on the other end of the line. Id. at 82-84. Petitioner told her, "Don't put my name in that." Id. at 82. Petitioner added, "You didn't see nothing." Id.

Roughly two months after the shooting, Mustafa attended a party with petitioner, Hurst and Julani Christmas (Christmas). N.T. 12/14/2005 at 151. The group discussed Stokes' death. Id. Christmas confronted petitioner about having shot Stokes; petitioner responded, "I had to do what I had to do. It looked like he was reaching." Id.

LEGAL ANALYSIS

The defendant raises the following issues on appeal:[14]

1. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to object to providing Mustafa's statement, which contained a "confession" by petitioner, to the jury during deliberations.

2. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to object to hearsay contained in the statement of Malik Mustafa, violating petitioner's Sixth Amendment right to confrontation.

[14] These issues have been rephrased and reordered for ease of disposition.

3. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to lodge a timely objection to Mr. Mustafa's statement to police that he had seen petitioner with guns in the past.

4. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to request a mistrial based on the Commonwealth's late disclosure of an alleged inculpatory statement made by Stokes' girlfriend, Sonia Washington.

5. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to secure an expert witness to explain the effects of crack cocaine on a witness.

6. The PCRA Court erred in denying the claim that appellate counsel was ineffective for failing to claim that the verdict was against the weight of the evidence.

7. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to call witnesses to testify about petitioner's character for non-violence.

1. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to object to providing Mustafa's statement, which contained a "confession" by petitioner, to the jury during deliberations.

Petitioner alleges that this Court erred in denying the claim that trial counsel was ineffective for failing to object to providing Mustafa's statement to the jury during deliberations, as it contained a confession from petitioner, and, therefore, violated Pa.R.Crim.P. 646(C)(2). This claim failed.

Trial counsel is presumed effective, and under 42 Pa.C.S. § 9543(a), petitioner has the burden of proving ineffective assistance of counsel. Commonwealth v. Balodis, 747 A.2d 341, 343 (Pa. 2000). In order to be eligible for PCRA relief due to ineffective assistance, petitioner is required to prove that such assistance "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). Petitioner "must prove (1) that the underlying claim has arguable merit, (2) that counsel's conduct was without a reasonable basis designed to effectuate his or her client's interest, and (3) that counsel's ineffectiveness prejudiced [petitioner]." Commonwealth v. Allen, 833 A.2d 800, 802. (Pa.Super. 2003) (citations omitted). "All three prongs of this test must be satisfied. If [illegible]

even one prong of the test, his conviction will not be reversed on the basis of ineffective assistance of counsel."[15] Commonwealth v. O'Bidos, 849 A.2d 243, 249 (Pa.Super. 2004).

With respect to the "reasonable basis" prong, courts "do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis." Commonwealth v. Hanible, 30 A.3d 426, 439 (Pa. 2011), *quoting* Commonwealth v. Washington, 927 A.2d 586, 594 (Pa. 2007). A PCRA petitioner bears the burden to prove that counsel's strategic decision was so unreasonable that "no competent lawyer would have chosen it," or that the "alternatives not chosen offered a potential for success substantially greater than the tactics utilized." Commonwealth v. Rega, 933 A.2d 997, 1018-19 (Pa. 2007); Commonwealth v. Clark, 626 A.2d 154, 157 (Pa. 1993).

To satisfy the final prong of the inquiry, petitioner must show that he was prejudiced by trial counsel's act or omission. Allen, 833 A.2d at 802. Petitioner is prejudiced by trial counsel's actions when he demonstrates that "but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." Commonwealth v. Kimball, 724 A.2d 326, 333 (Pa. 1999). A petitioner must show that because of trial counsel's actions or omissions, a "reliable determination of guilt was not made at trial." Commonwealth v. Lassen, 659 A.29 999, 1011 (Pa.Super. 1995).

During deliberations, the jury requested to see Mustafa's May 26, 2004 statement to police. N.T. 12/16/2005 at 4-13. As counsel did not object, and as a witness's statement is not one of the items prohibited by Pa.R.Crim.P. 646(C), this Court permitted the statement to be given to the jury. Id. at 28. In the statement, Mustafa was asked by the interviewing officers, "Did you have any

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[15] Petitioner strenuously argued throughout his pleadings that the proper standard to use in determining prejudice is outlined in Commonwealth v. Story, 383 A.2d 155 (Pa. 1978). The Supreme Court in [illegible] PCRA prejudice inquiry but to a direct appeal "harmless error" inquiry. In Commonwealth v. Pierce, Justice Hutchinson's concurring opinion clarified that Story does not bear on ineffectiveness of counsel claims. 527 A.2d 973, 981 (Pa. 1987) (Hutchinson, J., concurring). The ineffectiveness test requires "a defendant to show his counsel's performance was deficient and that this deficiency prejudiced his defense." Id. "It is not, nor does it embody, a harmless error analysis." Id.

conversations with [petitioner]...about the shooting?" Mustafa replied that petitioner had stated, "I had to do whta [sic] I had to do, it looked like he was reaching." Amended Petition, Exhibit B, 4/5/2010.

Pa.R.Crim.P. 646(C) enumerates four items which the jury is specifically prohibited from possessing during deliberations. A "written or otherwise recorded confession by the defendant" is one such item. Pa.Crim.P. 646(C)(2). When such a "confession by the defendant" is given to the jury, the "prejudice inherent in the jury having a copy of a written confession in its possession during deliberations" requires that the judgment of sentence be vacated, regardless of whether counsel otherwise performed effectively." Young, 767 A.2d 1072, 1076 (Pa.Super. 2001).[16] Our courts have construed the exceptions enumerated in Rule 646(C) narrowly. See, e.g., Commonwealth v. Williams, 9 A.3d 613, 616 (Pa. 2010) (finding that playing an audiotape of trial testimony to the jury in the jury room did not violate Rule 646(C)'s prohibition on permitting the jury "to have" a transcript of trial testimony). To fall within Rule 646 (C)(2)'s proscription of "any written or otherwise recorded confession by the defendant," the plain language requires that the "confession" is made "by the defendant." Our courts have found "confessions by the defendant" where the defendant signed or adopted a statement containing an alleged admission of an element of a crime. See Young, 767 A.2d at 1073 (considering the defendant's signed statement to police confessing to the shooting a "confession"); see also Commonwealth v. Terry, 462 A.2d 676, 678 (Pa. 1983) (holding that the defendant's signed statement confessing to bludgeoning a prison guard to death constituted a "confession"); see also Commonwealth v. Dennison, 385 A.2d 1021, 1023 (Pa.Super. 1978) (finding that the defendant's love letter in which he admitted to being a child's father to be a "confession" to the charge of "failing to support a bastard child").

[16] At the time of Young, the rule at issue was embodied in Pa.R.Crim.P. 1114.

Pa.R.Crim.P. 646(C)(2) does not apply here. The instant case does not involve a "confession by the defendant." Whereas the statements considered "confessions" in Young, Terry, and Dennison were each authored and adopted by the defendant, the statement given to the jury was neither written nor endorsed by petitioner. The statement read to the jury was Malik Mustafa's statement; it simply included an extrajudicial inculpatory statement by petitioner in Mustafa's presence. The fact that the statement given to the jury was made *by Mustafa*, not petitioner, means that it does not fall within the parameters of Pa.R.Crim.P. 646(C)(2). Mustafa's statement cannot be categorized as a "confession by the defendant" within the language of Pa.R.Crim.P. 646(C)(2). Therefore, trial counsel cannot be deemed ineffective for failing to argue that the submission of this statement to the jury violated Pa.R.Crim.P. 646(C)(2). This claim lacked arguable merit and failed.

2. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to object to hearsay contained in the statement of Malik Mustafa, violating petitioner's Sixth Amendment right to confrontation.

Petitioner alleges that this Court erred in denying his claim that trial counsel was ineffective for failing to object to hearsay contained in Mustafa's statement, which violated petitioner's rights to confrontation. Petitioner claimed that the bolded portions of Mustafa's statement constituted inadmissible hearsay:

> It was darn close to summertime, right before I got locked up in June. We were all at Julani Christmas's house. It was me, [Hurst, petitioner, and Christmas]. We were all sitting around talking, and then we were talking about [Stokes] getting shot.
>
> **And then [Christmas] said it was stupid for [petitioner] to shoot [Stokes] over some stupid stuff.** I was just sitting back, being quiet. [Petitioner] was saying, "I had to do what I had to do. It looked like he was reaching." We were all like, "Yeah, I know." **[Hurst] said, "Man, he," meaning [petitioner,] "had to do it. He, [Stokes], shouldn't have stepped to him like that. It looks like he was reaching."**

N.T. 12/14/2005 at 151.

(2)(A) Trial counsel was not ineffective for failing to object on Confrontation Clause grounds

The Confrontation Clause of the Sixth Amendment is not congruent with the state-law bar against hearsay. Commonwealth v. Carter, 932 A.2d 1261, 1264-65 (Pa. 2007); see also Commonwealth v. Allshouse, 36 A.3d 163, 173 (Pa. 2012) ("[I]f statements are nontestimonial, 'the confrontation clause places no restriction on their introduction except for the traditional imitations upon hearsay evidence.'"). The Confrontation Clause protects the right of the accused "to be confronted with the witnesses against him" by prohibiting the introduction of "testimonial" statements made by an unavailable declarant, unless the accused had a prior opportunity to cross-examine. Id. at 59.

> To be sure, the Confrontation Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands not that evidence be reliable but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Commonwealth v. Yohe, 39 A.3d 381, 385 (Pa.Super. 2012), *citing* Commonwealth v. Holton, 906 A.2d 1246, 1253 (Pa.Super. 2006).

However, when "non-testimonial" statements are at issue, there is no need to scrutinize their admission through the Confrontation Clause lens. Holton, 906 A.2d at 1253. Accordingly, we must determine whether the statements at issue were "testimonial" or not. The Crawford Court did not define "testimonial"; however, Crawford identified a "core" class of testimonial statements: those made in affidavits, depositions, prior testimony at a preliminary hearing, before a grand jury, or at a former trial, or given during police interrogations. Commonwealth v. Abrue, 11 A.3d 484, 491 (Pa.Super. 2010). In each example of classic "testimonial" evidence, there is a degree of "formality to the statement." Holton, 906 A.2d at 1253, *citing* U.S. v. Hendricks, 395 F.3d 173, 181 (3d Cir. 2005).

In recent years, both the United States Supreme Court and the Pennsylvania Supreme Court have provided additional guidance when determining whether a statement is "testimonial."

> In sum, in analyzing whether a statement is testimonial, and, therefore, subject to the protections of the Confrontation Clause under Crawford, a court must determine whether the primary purpose of the interrogation was to establish or prove past events relevant to a later criminal prosecution. In making the determination as to the primary purpose of an interrogation, a court first should determine whether the interrogation occurred during the existence of an ongoing emergency, or what was perceived to be an ongoing emergency. Although the existence – actual or perceived – of an ongoing emergency is one of the most important factors, this factor is not dispositive because there may be other circumstances, outside of an ongoing emergency, where a statement is obtained for a purpose other than for later use in criminal proceedings. In determining the primary purpose of an interrogation, a court must also objectively evaluate the circumstances surrounding the interrogation, including the formality and location, and the statements and actions of both the interrogator and the declarant.

Allshouse, 36 A.3d at 175-76.

The "primary purpose" test requires that a court examine "*all of the relevant circumstances*" in order to determine "whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial." Id. at 181 (emphasis in original). It is reasonable to assume that a declarant who makes a statement in a casual setting amongst friends does not consider that his words will be used at a later trial. Crawford, 541 U.S. at 51 ("[A] witness who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."); see also Holton, 906 A.2d at 1253 (noting that the Third Circuit, in U.S. v. Hendricks, 395 F.3d 173, 182 (3d Cir. 2005), remarked that surreptitiously monitored conversations were more similar to casual statements to friends, and thus "are not 'testimonial' for the purposes of Crawford").

In the case *sub judice*, Mustafa appeared in court and testified. As he was not an "unavailable" declarant, the Confrontation Clause did not bar Mustafa's prior statements. See Commonwealth v. Dyarman, 33 A.3d 104, 106 (Pa.Super. 2011) (stating that the Confrontation Clause only bars the introduction of "testimonial" statements who do not testify at trial). The

statements at issue were made by Christmas and Hurst while speaking to Mustafa and petitioner. These four acquaintances were "sitting around talking" while at Christmas's house "darn close to summertime." N.T. 12/14/2005 at 151. In this casual setting, Christmas remarked, "[I]t was stupid for [petitioner] to shoot [Stokes] over some stupid stuff." Id. Hurst added, "Man, he . . . had to do. He, [Stokes], shouldn't have stepped to him like that. It looks like he was reaching." Id.

Given the casual circumstances in which these statements were made, a reasonable person would not have expected the words uttered to be used at a later trial. In an informal, relaxed setting, Christmas and Hurst shared their perspective on Stokes' shooting with the person they believed to have been the shooter. The "primary purpose" of each statement was not "to establish or prove past events relevant to a later criminal prosecution." Accordingly, these statements were non-testimonial and their introduction at trial did not violate petitioner's rights under the Confrontation Clause. Counsel was not ineffective for failing to object on Confrontation Clause grounds.

(2)(B) Trial counsel was not ineffective for failing to object on hearsay grounds

Petitioner maintained that, even if his right to confrontation was not violated, trial counsel was ineffective for failing to object, as the statement was comprised of inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Hearsay "is generally inadmissible at trial unless it falls into an exception to the hearsay rule." Commonwealth v. McEnany, 732 A.2d 1263, 1272 (Pa.Super. 1999). As this statement fell within an exception to the bar against hearsay, trial counsel was not ineffective for failing to object to its admission.

Pa.R.E. 803(25)(B) provides an exception to the bar against hearsay for "adoptive" or "implicit" or "tacit" admissions: statements in "which the party has manifested an adoption or belief in its truth."

> The rule of evidence is well established that, when a statement made in the presence and hearing of a person is incriminating in character and naturally calls for a denial but is not

> challenged or contradicted by the accused although he has opportunity and liberty to speak, the statement and the fact of his failure to deny it are admissible in evidence as an implicit admission of the truth of the charges thus made.

Commonwealth v. DiNicola, 866 A.2d 329, 339-40 (Pa. 2005).

In Commonwealth v. Coccioletti, two friends made "inculpatory declarations in each other's presence, and if incorrect would have naturally been denied." 425 A.2d 387, 392 (Pa. 1981). The friends' silence in response to the respective inculpatory declarations allowed for the admission of such declarations "as implied admissions by the silent and acquiescing accused." Id.

In the instant case, Christmas and Hurst both made statements indicating their belief that petitioner was responsible for having killed Stokes. Not only did petitioner fail to deny those inculpatory declarations, but he also actually echoed his friends' statements, explicitly endorsing their sentiments. Petitioner followed Christmas's comment by saying, "'I had to do what I had to do. It looked like he was reaching.'" N.T. 12/14/2005 at 151. Petitioner's affirmative response to Christmas's statement, and his silence following Hurst's statement, manifested a belief in the truth of the content of those two declarations. Accordingly, those statements fall within the Pa.R.E. 803(25)(B) exception to the bar on hearsay. As this claim lacks arguable merit, trial counsel was not ineffective for failing to object.

3. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to lodge a timely objection to Mr. Mustafa's statement to police that he had seen petitioner with guns in the past.

Petitioner's third claim is the PCRA court erred in denying the claim that trial counsel was ineffective for failing to object to Mustafa's statement that he had seen petitioner with guns in the past. The Commonwealth introduced Mustafa's statement, in which he had been asked by detectives whether he had ever seen petitioner or Hurst "with guns." N.T. 12/14/2005 at 152. Mustafa replied, "Yeah, of course." Id. Petitioner contended that that the statement was

objectionable because the Commonwealth failed to establish a time frame as to when Mustafa had made this observation.

On direct appeal, petitioner claimed that the trial court committed prejudicial error by overruling an objection concerning the admission of Mustafa's statement that he had seen petitioner with guns in the past. The Superior Court found that this issue had not been properly preserved and thus was waived until collateral attack. Commonwealth v. Parks, No. 2202 EDA 2006, slip op. (Pa.Super., Sept. 10, 2007) (memorandum opinion). Nonetheless, the Superior Court stated that, "even if we were to address the merits of his claim, we would determine he is not entitled to relief." Id. at 9. This Court adopts the reasoning employed by the Superior Court as to why this evidence was properly admitted:

> It is within the trial court's discretion to admit evidence that a defendant possessed a weapon because it may tend to prove that the defendant had a weapon similar to the one used in the charged crime. See Commonwealth v. Lark, 462 A.2d 1329, 1336 (Pa.Super. 1983) (Lark I) (citation omitted), *aff'd*, 477 A.2d 857 (Pa. 1984); Commonwealth v. Williams, 640 A.2d 1251, 1260 (Pa. 1994) (finding evidence of appellant's prior possession of guns was properly admitted to show, among other things, easy access to guns.) Any uncertainty that the weapon is not the actual weapon used in the crime goes to the weight, not the admissibility of the evidence. Lark I, *supra* at 1336. Finally, the degree of temporal remoteness also affects the weight not that admissibility of the evidence. Commonwealth v. Showers, 681 A.2d 746, 754 (Pa.Super. 1996) (quotation omitted (stating that any remoteness affects weight of evidence not admissibility, and that remoteness is question best left to trial court discretion), *appeal denied*, 685 A.2d 544 (Pa. 1996), *cert. denied*, 520 U.S. 1213 (1997); Commonwealth v. Scarfo, 611 A.2d 242, 270 (Pa.Super 1992) (stating temporal remoteness of prior bad acts is of no consequence because such remoteness affects the weight of the evidence not admissibility), *appeal denied*, 631 A.2d 1006 (Pa. 1993).
>
> Here, the witness's statement that, "of course" he had seen Appellant and/or his co-conspirator with guns suggests ready access to guns on their part and supports the inference that such possession was a routine and non-remote occurrence. See Williams, *supra*; Lark II, *supra* at 497; Lark I, *supra* at 1336; Showers, *supra*; Scarfo, *supra*; McHarris, *supra*. Thus, even in the absence of evidence positively connecting those guns to the charged crimes in this case, we would find that the disputed portion of his statement was admissible. Id. For the foregoing reasons, we would find that the trial court did not abuse its discretion in permitting the introduction of this evidence. See Einhorn, *supra*; Dusanet, *supra*.

Commonwealth v. Parks, No. 2202 EDA 2006, at *10-11.

As Mustafa's statement that he had seen petitioner with a gun in the past was admissible, petitioner's claim lacked arguable merit.

Furthermore, petitioner failed to demonstrate that he was prejudiced by the admission of this evidence. Petitioner did not demonstrate a "reasonable probability" that, but for trial counsel's failure to act, the outcome of the proceedings would have been different. Even if trial counsel had successfully prevented the Commonwealth from introducing Mustafa's statement that he had seen petitioner with a gun previously, the evidence supporting petitioner's guilt was still overwhelming. Two eyewitnesses – Gatlin and Toney – saw petitioner approaching Stokes outside of the New Deli Market and then heard a number of gunshots. Gatlin had interacted with petitioner shortly before the shooting; after petitioner told Gatlin that he did not have any drugs to sell to her, he told her to return to her house. Following the shooting, Mustafa appeared at Gatlin's door and insisted that she take the cell phone in his hand and speak to the person on the other end of the call. Gatlin recognized the voice on the other end as petitioner; he warned her, "Don't put my name in that . . . You didn't see nothing." In combination with two eyewitness accounts indicating that petitioner shot Stokes, the Commonwealth also set forth evidence demonstrating that petitioner attempted to pressure a witness not to testify against him. Cumulatively, this evidence was "overwhelming." See Commonwealth v. Ragan, 645 A.2d 811, 820 (Pa. 1994) (holding that the testimony of two eyewitnesses constituted "overwhelming" evidence of guilt). Accordingly, petitioner also failed to demonstrate prejudice and this Court properly determined that this claim failed.

4. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to request a mistrial based on the Commonwealth's late disclosure of an alleged inculpatory statement made by Stokes' girlfriend, Sonia Washington.

Petitioner claims that this Court erred in denying his claim that trial counsel was ineffective for failing to request a mistrial as a result of the Commonwealth's belated disclosure of Sonia Washington's (Washington) inculpatory statement to Stokes' mother, Rosa Stokes.

At the end of the second-to-last day of trial, trial counsel informed the Court that he had attempted to serve Washington with a subpoena, as police had shown her a photo spread with petitioner's photograph in it, and she did not identify petitioner as the shooter. N.T. 12/14/2005 at 335. Additionally, Washington had stated that she saw the perpetrator flee in a "cream-colored" getaway car. Id. at 340. Washington's recollection that the getaway car was "cream-colored" could have been used to contradict testimony presented at trial that petitioner, who had been spotted in a blue car just prior to the shooting, was the perpetrator. After trial counsel asked the Court to issue a bench warrant to secure Washington's presence, the trial prosecutor informed the Court that Washington had previously spoken to Stokes' mother, Rosa Stokes, and made an inculpatory statement. Id. at 331-33. "Ms. Washington told Mrs. Stokes that the shooter is Mr. Parks. And if she comes into court – if you compel her to come into court, she may very well say that." Id. at 333. As Pa.R.Crim.P. 573(B)(1)(b) requires that all "inculpatory statements" be disclosed, petitioner argued that trial counsel was ineffective for failing to make a motion for a mistrial.

In order to establish that his claim had arguable merit, petitioner shouldered the burden to prove that a mistrial was warranted. Commonwealth v. Johnson, 815 A.2d 563, 576 (Pa. 2002). "Mistrials should be granted only when an incident is of such a nature that its unavoidable effect is to deprive appellant of a fair trial." Id., *citing* Commonwealth v. Lewis, 567 A.2d 1376, 1383 (Pa. 1989). A prosecutor's failure to provide all "inculpatory statements" to the defense in a timely fashion does not automatically trigger a mistrial. See Commonwealth v. Sullivan, 820 A.2d 795, 804 n.8 (Pa.Super. 2003) (discussing how the Commonwealth's decision not to "capitalize" on the belated disclosure of an inculpatory statement meant that the defendant was not prejudiced and the request for a mistrial was "out of proportion to the discovery violation alleged").

The trial prosecutor's late disclosure that she learned of Washington's inculpatory statement to Rosa Stokes did not deprive petitioner of a fair trial. The Commonwealth did not call

Washington to testify, nor did the Commonwealth introduce her statement into evidence. Furthermore, petitioner was informed that this Court would have issued a bench warrant to secure Washington's presence if he made such a request. But after conferring with trial counsel, petitioner knowingly, intelligently and voluntarily decided that it was not in his best interest to call Washington to testify.[17]

> THE COURT: So it's time to make your decision. Did you need to discuss it further with your attorney? I'll let you do that.
> ADA FEENEY: For the record, if I can put on the record, I think the only thing Ms. Washington says that will help their case is the car is cream-colored and not blue. And that's basically it. She doesn't make a photo ID. But that's the extent of her earth-shattering testimony balanced against the fact that she might very well come in here and point him out as the shooter.
> PETITIONER: Can I discuss it one more time?
> MR. MANDELL: Sure. Do you want to do it here or in the back?
> PETITIONER: In the back.
> MR. MANDELL: Can we?
> THE COURT: Sure.
> (Petitioner conferred with attorney)
> THE COURT: Yes. So you discussed it further with your attorney?
> PETITIONER: Yes, Your Honor.
> THE COURT: So what is your choice? Me, I always prefer a search for the truth and to let the chips fall where they may. And if she says it wasn't you, then you're going to walk out of here a free man. If she says it is you, you may still walk out a free man, because you never know what the jury says or will do. But today you can't choose not to have her brought in or later you decide or find out she may have gone the other way on it, and now you want to claim you're entitled to a new trial. And that's, of course, assuming you're convicted. Obviously, if you're found not guilty, then, obviously, it's over and done with, and whatever. It is time for you to say either you want her and she will be in here tomorrow and will testify and give evidence, whatever it is, it is –
> PETITIONER: I don't want her.
> THE COURT: Are you sure?
> PETITIONER: Yes.
> THE COURT: Do you understand that you will never be able to raise that issue again?
> PETITIONER: Yes.
> THE COURT: Did anyone threaten or pressure you or make any false representations to have you forego having her come in here?

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[17] A defendant who makes a knowing, voluntary and intelligent decision concerning trial strategy is foreclosed from later claiming that his attorney was ineffective on the basis of *that* decision. Commonwealth v. Paddy, 800 A.2d 294, 316 (Pa. 2002) (holding that "a defendant who makes a knowing, voluntary, and intelligent decision concerning trial strategy will not later be heard to complain that trial counsel was ineffective on the basis of that decision"); see also Commonwealth v. Rios, 920 A.2d 790, 803 (Pa.Super. 2007) (holding that where the PCRA petitioner had been "presented with the option of calling alibi witnesses" at trial in a colloquy with the Court, but "decided nevertheless not to do so," his allegation of trial counsel's ineffectiveness lacked arguable merit).

DEFENDANT: No.
THE COURT: Do you understand that foregoing having her come in here – in other words, she won't be here?
DEFENDANT: Yeah.
THE COURT: That's your choice, that she not be here?
DEFENDANT: Yeah, that's my point.

Id. at 339-42.

Washington's inculpatory statement was never heard by the jury. As petitioner recognized that it was potentially damning, he chose to keep Washington from testifying. Even if the Commonwealth's belated disclosure of Washington's statement to Mrs. Stokes technically violated Pa.R.Crim.P. 573(B)(1)(b), a mistrial would have been "out of proportion to the discovery violation alleged." Accordingly, trial counsel was not ineffective for failing to move for a mistrial.

5. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to secure an expert witness to explain the effects of crack cocaine on a witness.

Petitioner claims this Court erred in denying his claim that trial counsel was ineffective for failing to secure an expert witness[18] to explain how crack cocaine might have affected Michele

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[18] Petitioner attached an affidavit from Shirley C. Bryant to his pleadings. Ms. Bryant stated:

> I am an expert in which I specialize, in the affects [sic] of long term and short term behavior of a person addicted to crack cocaine. Including the affects [sic], such a person would have after consuming this substance and during the craving stages [sic]. I also will be available to testify at any hearing in regards to this matter.

Affidavit of Shirley C. Bryant, 6/28/2010.

In the January 11, 2013 907 Notice, this Court informed petitioner that he failed to allege that Ms. Bryant would have been available and willing to testify at petitioner's trial on his behalf. A PCRA petitioner alleging ineffective assistance of counsel for failure to call a witness must demonstrate (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 witness was so prejudicial as to have denied the defendant a fair trial. Commonwealth v. Clark, 961 A.2d 80, 91 (Pa. 2008); see also Commonwealth v. Chmiel, 30 A.3d 1111 (Pa. 2011) (applying the five-pronged test of ineffectiveness for failure to call a witness to the context of expert witnesses). The 907 Notice informed petitioner that he failed to demonstrate that Ms. Bryant satisfied prongs two through five of this test.

Petitioner responded to this Court's 907 Notice by attaching an affidavit from a different expert, Wayne Allen

> I have been studying the effects of crack cocaine and drug substance for 20 years. . . I explained to [petitioner's mother] that for a variety of reasons a witness who has ingested the substance usually becomes suspicious, easily agitated, will hallucinate, and have a disconnection with reality; Moreover [sic] if the person is experiencing what is called (the craving effect) which the body tells the mind that it needs more cocaine [sic]. (FN cont'd...)

Gatlin's perception of the shooting. Gatlin testified that she had used crack cocaine twice on the day of the shooting, the last use being roughly three hours prior to the incident. N.T. 12/13/2005 at 94. As expert testimony concerning Gatlin's ability to perceive events would not have been admissible, trial counsel was not ineffective for failing to present such testimony.

"Expert opinion may not be allowed to intrude upon a jury's basic function of determining credibility." Commonwealth v. Spence, 627 A.2d 1176, 1182 (Pa. 1993).

> Our supreme court has steadfastly adhered to the above principle and guarded the jury's role against both explicit and implicit invasion via expert testimony. Thus, certainly, as appellant correctly points out, an expert cannot be allowed to express an opinion as to the credibility of a specific witness or the truthfulness of that witness's testimony. However, the prohibition has extended to expert testimony reflecting upon general propensities shared by a class of witness, at least when the propensities discussed relate to the believability of the testimony of that class of witness.

Commonwealth v. Robinson, 5 A.3d 339, 342-43 (Pa.Super. 2010).

In Robinson, the defendant moved to allow a nationally recognized expert in the field of human memory, perception and recall to testify concerning eyewitness identification in general, as well as "the reliability of eyewitness identifications under circumstances similar to those present here." Id. at 342. The Robinson Court found that expert testimony, which sheds light on how an

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> (FN cont'd...) Basically a number of these combinations can alter what the user may have seen during that time period usage [sic].
>
> [Petitioner's mother] also informed me that the user did not come forward immediately after allegedly witnessing the shooting but came forth two weeks after the fact. This factor would make it extremely possible that the user could have created an entirely different scenario in his or her mind. This would increase these factors if the user had ingested more cocaine within that two week span. Based on the information given to me by [petitioner's mother] I would be available to testify at any hearing in regards to this matter.
>
> [Petitioner's mother] also asked if I would have been available in December of 2005 to testify to the above. I explained to her that depending on what my schedule was during that time period, had someone contacted me I would have made arrangements.

Affidavit of Wayne Allen, 1/30/2013.

While Mr. Allen provided more detail about the substance of his proposed testimony, petitioner failed to satisfy the third prong of this test. Even if Mr. Allen "would have made arrangements" to be available to testify in the instant matter, petitioner offered no reason to believe that trial counsel knew of Mr. Allen and would have asked Mr. Allen to make himself available.

eyewitness's mind operates, impermissibly infringed upon the jury's role in assessing the credibility of the witness. Id. at 344. Accordingly, the Superior Court affirmed the trial court's decision not to allow the proffered testimony; in doing so, Robinson held that expert testimony concerning an eyewitness's perception was impermissible. Id.; see also Commonwealth v. Selenski, 18 A.3d 1229, 1232 (Pa.Super. 2011) ("Specifically, this Court has repeatedly held that expert testimony on perception and witness credibility is not admissible in this Commonwealth.").

Mr. Allen's affidavit fell squarely within the range of prohibited testimony. He stated that his studies of crack cocaine over the last 20 years would have enabled him to testify about "what the user may have seen during [the] time period" in which she was using the substance. Affidavit of Wayne Allen, 1/30/2013. Mr. Allen's expert opinion about how Gatlin's perception might have been impacted by her use of crack cocaine would have infringed upon the jury's function to assess Gatlin's credibility and, thus it would not have been admissible. Accordingly, trial counsel was not ineffective for failing to secure Mr. Allen's testimony.

6. The PCRA Court erred in denying the claim that appellate counsel was ineffective for failing to claim that the verdict was against the weight of the evidence.

Petitioner claims that appellate counsel was ineffective for failing to claim that the verdict was against the weight of the evidence. Petitioner acknowledged that Mr. Mandell raised a "weight of the evidence" claim in the post-sentence motions that he filed on March 13, 2006. Petitioner's Request for Leave to Amend and Raise an Additional Claim, 7/13/2011 at 2. Petitioner claimed that Mr. Mandell was ineffective in his role as appellate counsel for failing to raise the "weight of the evidence" claim with the Superior Court. Id. at 2-3.

Petitioner's claim was rooted in the fact that petitioner was acquitted of the charge of possessing an instrument of crime (PIC), 18 Pa.C.S § 907:

> The only logical conclusion from this verdict, despite the Commonwealth presenting only evidence that petitioner was the shooter; is that the jury concluded that the alleged

accomplice was the shooter and that the petitioner was the accomplice of the shooter. Clearly, this verdict is "against the weight of the evidence."

Id. at 5.

Inconsistent verdicts are permissible in Pennsylvania. Commonwealth v. States, 938 A.2d 1016, 1025 (Pa. 2007). The fact the jury returned an inconsistent verdict does not justify invading the province of the jury and inquiring into their deliberations. See Commonwealth v. Campbell, 651 A.2d 1096, 1100 (Pa. 1994) ("[A]n individualized assessment of the reason for the inconsistency [of verdicts] would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not make."); see Commonwealth v. Carter, 282 A.2d 375, 376 (Pa. 1971) ("An acquittal cannot be interpreted as a specific finding in relation to some of the evidence.") The jury's decision to acquit petitioner of PIC does not support any conclusion by this Court about the weight of the evidence presented. Accordingly, petitioner failed to bear his burden to demonstrate that appellate counsel was ineffective for failing to raise the "weight of the evidence" claim with the Superior Court on direct appeal.

7. The PCRA Court erred in denying the claim that trial counsel was ineffective for failing to call witnesses to testify about petitioner's character for non-violence.

On October 12, 2012, this Court held an evidentiary hearing pursuant to Pa.R.Crim.P. 908 (908 Hearing) concerning petitioner's claim that counsel was ineffective for failing to provide witnesses to testify about his character for non-violence. At the conclusion of the 908 Hearing, this Court informed petitioner that his claim failed.

At the 908 Hearing, petitioner called three witnesses: Keisha Parks (petitioner's sister), Ranee Campbell (petitioner's aunt), and Louise Parks (petitioner's mother). All three witnesses testified that petitioner's reputation in the community was as a peaceful, non-violent individual. N.T. 10/12/2012 at 7, 15, 20. However, on cross-examination each woman admitted that she was aware of petitioner's prior conviction for possessing drugs with the intent to deliver. Id. at 10, 17,

23. Additionally, Keisha Parks and Louise Parks admitted to having been aware that petitioner had also been convicted of possessing a firearm without a license.[19] Id. at 10, 23.

The Commonwealth called Mr. Mandell to testify about the reason that these witnesses were not called to testify. Mr. Mandell explained that he thought it would have been detrimental to petitioner's case to call character witnesses, as it would have permitted the Commonwealth to introduce petitioner's prior convictions.

> I was aware the defendant had three prior convictions for possessing controlled substances with the intent to distribute same and a weapons conviction. All of them had been – well, three of those cases were within, I believe, fix or six years of our trial. The other one was very recent. I think it might have even been the same years as my trial. I believe there is a case – I don't know the name off the top of my head – which has been cited against me in the past when I have attempted to utilize character witnesses in situations where the defendant has been convicted of drug selling and/or weapons offenses that could be introduced through the character witnesses which in my opinion, of course, would destroy them or destroy their credibility.

Id. at 44-45.

An attorney's failure to present character witnesses may constitute ineffective assistance of counsel. Commonwealth v. Harris, 785 A.2d 998, 1000 (Pa. 2001). However, an attorney who chooses not to present evidence of his client's good character is *not* constitutionally ineffective so long as the attorney had a "reasonable strategic basis" not to proffer such evidence. Commonwealth v. Van Horn, 797 A.2d 983, 988 (Pa.Super. 2002). In Van Horn, the PCRA Court held an evidentiary hearing, wherein the trial attorney testified that he did not call character witnesses

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[19] Character witnesses may be subject to cross-examination concerning the accused's prior convictions for crimes involving a relevant trait of character. Pa.R.E. 405(a)(2).

> A defendant who presents character testimony runs certain risks, however, character witnesses, like other witnesses, can be subjected to cross-examination. Such cross-examination may include questions regarding the defendant's prior convictions for crimes involving the relevant character trait. The purpose of this type of impeachment is to test the accuracy and completeness of the witness's knowledge of the defendant's reputation.

Commonwealth v. Ross, 856 A.2d 93, 101 (Pa.Super. 2004) (internal citations omitted).

As noted in Commonwealth v. Jones, *infra*, a conviction for drug-related activity is relevant to an individual's character for non-violence. 636 A.2d 1184, 1190 (Pa.Super. 1994).

because he believed that they would have been cross-examined as to the defendant's prior convictions. The Superior Court concluded that was "a reasonable trial strategy, and counsel was not ineffective on this basis." Id.; see also Commonwealth v. Jones, 636 A.2d 1184, 1190 (Pa.Super. 1994) (holding that counsel was not ineffective because "counsel may well have concluded that potential cross-examination of appellant's character witnesses regarding the drug activity in which appellant was engaged offered dangers which outweighed the doubtful value of their testimony regarding appellant's alleged reputation for non-violence"). Likewise, Mr. Mandell made a reasonable strategic decision in petitioner's best interest not to call these witnesses to testify. Counsel cannot be found ineffective on the basis of that decision.

Accordingly, this Court's dismissal of petitioner's PCRA petition should be affirmed.

BY THE COURT:

M. Teresa Sarmina

M. TERESA SARMINA, J.