NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ALI MARSH	:	
Appellant	:	No. 2391 EDA 2024

Appeal from the PCRA Order Entered August 22, 2024
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0005820-2012

BEFORE: BOWES, J., OLSON, J., and McLAUGHLIN, J.

MEMORANDUM BY McLAUGHLIN, J.: **FILED NOVEMBER 16, 2026**

Ali Marsh appeals from the order dismissing his Post Conviction Relief Act ("PCRA") petition. ***See*** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

This Court previously summarized the facts as follows:

> On March 5, 2012, shortly after 3:00 a.m., [Marsh] and his co-conspirator Charles Davis broke into the home of John Paul Sr., and his wife, Sherrel, and demanded money. When told there was none, they fatally shot Mr. Paul. They also shot his wife, Sherrel, about a dozen times, but she survived, although she required multiple surgeries and still carries bullets and bullet fragments within her.
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> [Marsh] was also shot in the leg during the melee. The bullet moved down his left leg to his ankle. He was bleeding profusely. The co-conspirators fled by car. A neighbor of the Pauls heard the gunfire and saw the conspirators depart. Davis and [Marsh] rendezvoused with Davis['s] wife, Nicole Walton. Sometime during this trip [Marsh] called his then-girlfriend, Nija Pasture. At trial, Pasture testified that [Marsh] told her that "shit went bad" and he got shot.
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> [Marsh] needed medical attention for the bullet wound in his ankle, but did not want to risk apprehension in a

> Philadelphia hospital, so Walton drove him (and Davis) to Union Hospital in Elkton, Maryland. [Marsh] checked in using the name Jabbar Rice. However, he was soon transferred to a hospital in Christiana, Delaware for treatment.
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> Still using the name Jabbar Rice, [Marsh] told Delaware hospital personnel that he had been robbed, and shot, in Delaware. Maryland state trooper Alan Flaugher was dispatched to investigate the shooting. He soon realized that [Marsh] had given him a false name. Nevertheless, he identified [Marsh] through FBI fingerprint records, and linked him to the murder in Philadelphia. Delaware police, now assisted by Philadelphia homicide detective John Harkins, obtained a search warrant to have blood drawn from [Marsh]. DNA testing later confirmed that blood on the Pauls['] porch and on the street outside belonged to [Marsh]. [Marsh] checked out of the hospital before the scheduled removal of the bullet, apparently against medical advice.
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> A day or two later he appeared at Ms. Pasture[']s residence. She took him to buy some clothes and they began moving from one hotel to another until a few days later when they were apprehended.
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> . . . Over [Marsh's] objection, the trial court allowed Walton[']s testimony that when she picked up her husband, Davis, he told her, "We got into some shit and [Marsh] got shot," under the co-conspirator exception.
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> Also during trial, after his counsel finished cross-examining [Marsh's] girlfriend, Nija Pasture, a lawyer sitting in the courtroom as a spectator, said to [Marsh's] counsel, "Why did you cross[-]examine her? She didn[']t hurt you." [Marsh's] counsel made a motion for a mistrial which the trial court denied.

Commonwealth v. Marsh, No. 2442 EDA 2015, 2016 WL 5419210, *1-2 (Pa.Super. filed Aug. 11, 2016) (unpublished mem.) (citations and footnote omitted).

Marsh was found guilty of first-degree murder, attempted murder, robbery, burglary, conspiracy, possessing instruments of crime, and violations of the Uniform Firearms Act.[1] Marsh was sentenced to life imprisonment for first-degree murder, along with an aggregate consecutive sentence of 56 to 112 years for the remaining convictions. Marsh filed a post-sentence motion, which was denied. On August 11, 2016, this Court affirmed Marsh's judgment of sentence.

In October 2017, Marsh filed a timely *pro se* PCRA petition. Counsel entered his appearance and filed an amended PCRA petition. Marsh filed two more amended petitions. After a bifurcated hearing, the court dismissed Marsh's PCRA petition. This appeal followed.

Marsh raises the following issues:

> 1. Did the Commonwealth violate due process of law when it failed to provide trial counsel information that the police were considering alternative suspects and that there was drug activity in the immediate area?
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> 2. Was [Marsh's] right to confront a witness against him violated by a detective's testimony regarding a C[AT] scan and was appellate counsel ineffective for failing to raise this preserved claim on direct appeal?
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> 3. Was trial counsel ineffective for failing to object to opinion testimony of Nija Pasture as to her interpretation of statements made by [Marsh], when such opinions were offered without sufficient factual foundation?
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> 4. Was trial counsel ineffective for failing to request an instruction advising the jury to give the testimony of Nija

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[1] 18 Pa.C.S.A. §§ 2502(a), 901, 3701, 3502, 903, 907, 6106, and 6108, respectively.

Pasture and Nicole Walton "special scrutiny" because each had a penal interest in testifying for the Commonwealth?

5. Was trial counsel [] ineffective for failing to request a curative instruction after a non-party attorney in the gallery directed disruptive and prejudicial statements to trial counsel in the presence of the jury?

6. Was [Marsh] denied his rights to due process and the effective assistance of counsel where trial counsel failed to object to improper, prejudicial prosecutorial argument and/or failed to request an appropriate curative instruction?

7. Was trial counsel ineffective for failing to request a limiting instruction to cure the potential for improper consideration of prior bad act evidence?

8. Was [Marsh] deprived of the effective assistance of trial counsel and due process of law, when the jury never learned that Nicole Walton testified pursuant to a use immunity order issued in the co-defendant's trial and that the Commonwealth considered seeking immunity for her in [Marsh's] trial?

9. Was trial counsel ineffective when he failed to object when the trial court failed to provide adequate opening instructions, thus abusing its discretion and violating [Marsh's] right to a fair trial[?]

10. Is [Marsh] entitled to relief based on the cumulative impact of trial counsel's ineffectiveness and the various due process violations briefed herein?

Marsh's Br. at 2-3 (unnecessary capitalization omitted).

We review an order dismissing a PCRA petition to determine whether the order "is supported by the evidence of record and is free of legal error." ***Commonwealth v. Cruz***, 223 A.3d 274, 277 (Pa.Super. 2019) (citation omitted). We will not disturb the PCRA court's findings "unless there is no support for the findings in the certified record." ***Id.*** (citation omitted). "We

apply a *de novo* standard of review to the PCRA court's legal conclusions." ***Commonwealth v. Davis***, 326 A.3d 988, 992 (Pa.Super. 2024) (citation omitted).

Brady **Issue**

Marsh first argues that the Commonwealth failed to disclose certain information that was contained in the District Attorney's File and Homicide File (the "Files") prior to trial in violation of ***Brady***[2] and due process. First, he argues that the Files contained documents indicating that "the police believed that there was drug activity in the area of the Paul home, including that the decedent may have been involved in marijuana sales." Marsh's Br. at 26. Second, he maintains that the Files "also indicated that other people were under consideration as suspects, including one unidentified person, whose fingerprint was found on the inside of a storm door." ***Id.*** According to Marsh, this evidence could have bolstered his claim that he was merely present at the scene buying drugs and was shot during a drug transaction, and that the victims were shot and killed by other people not connected to Marsh. In his view, the documents in the Files contained three types of exculpatory information: "1) alternative suspects; 2) support for [Marsh's] narrative that he was shot while others were present either inside or outside of the Paul home; and 3) support for [Marsh's] narrative that he was present at the location to buy drugs." ***Id.*** at 28. Marsh maintains that this evidence was

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[2] ***See Brady v. Maryland***, 373 U.S. 83 (1963).

material under ***Brady*** and "[i]ndividually, or cumulatively, this new and previously suppressed information could have reasonably led to a different result." ***Id.*** at 31.

To establish a ***Brady*** violation, the claimant must prove: "(1) the evidence at issue was favorable to the accused, either because it is exculpatory or because it impeaches; (2) the evidence was suppressed by the prosecution, either willfully or inadvertently; and (3) prejudice ensued." ***Commonwealth v. Roney***, 79 A.3d 595, 607 (Pa. 2013) (citation omitted). A defendant has the burden to "prove, by reference to the record, that evidence was withheld or suppressed by the prosecution." ***Id.*** (citation omitted). Further, "[t]he evidence at issue must have been 'material evidence that deprived the defendant of a fair trial.'" ***Id.*** (citation omitted). "Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Id.*** (citation omitted). As to ***Brady*** claims advanced under the PCRA, a claimant must establish that the alleged ***Brady*** violation "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Commonwealth v. Ly***, 980 A.2d 61, 76 (Pa. 2009) (citation omitted).

Further,

> ***Brady*** does not require the disclosure of information that is not exculpatory but might merely form the groundwork for possible arguments or defenses, nor does ***Brady*** require the

> prosecution to disclose every fruitless lead considered during a criminal investigation. The duty to disclose is limited to information in the possession of the government bringing the prosecution, and the duty does extend to exculpatory evidence in the files of police agencies of the government bringing the prosecution. ***Brady*** is not violated when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from other sources.

Commonwealth v. Sandusky, 203 A.3d 1033, 1062 (Pa.Super. 2019) (cleaned up). Lastly, "***Brady*** sets forth a limited duty, not a general rule of discovery for criminal cases." ***Roney***, 79 A.3d at 608. "[T]here is no generalized constitutional right to discovery in a criminal case, and ***Brady*** did not create one." ***Id.*** (citation omitted).

Here, the PCRA court found that Marsh's claim was without merit because the evidence was not material for purposes of ***Brady***. It explained:

> After looking at the totality of the evidence, [t]his [c]ourt finds there is not a reasonable probability that the trial would have resulted in a different outcome, but for the failure to turn over the early police investigative notes indicating rumors and other possible doers, against whom no inculpatory evidence had ever been developed.
>
> [Marsh] would have [t]his [c]ourt believe that, if he only had information that the police were attempting to investigate other people, there is a reasonable probability that the jury would believe that he was merely present when he was shot by an unknown robber. It is important to note that the documents cited by [Marsh] do not identify others as individuals who participated in the home invasion. These documents list names of people who could have been involved, based on tips received by police and individuals who police knew frequented the area at the time of the shooting. At the time of the shooting, before police had the opportunity to locate and identify [Marsh] in Delaware, police were following any possible lead. Looking at the

> evidence presented at trial, including phone tracking information, conspirator statements, [Marsh's] blood at the door, and prolonged evidence of consciousness of guilt, [t]his [c]ourt finds that it is not reasonably likely that the outcome of trial would have been any different.

PCRA Court Opinion, filed 10/29/25, at 4.

The court did not err. Marsh failed to establish that had the information been disclosed to the defense, there is reasonable probability that its production would have caused a different result at trial. The Commonwealth presented sufficient evidence of Marsh's guilt and Marsh's purported ***Brady*** evidence was not material. This claim fails.

Claims of Ineffectiveness of Trial Counsel

Marsh's remaining issues raise claims of trial counsel's ineffectiveness. "[C]ounsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on [the petitioner]." ***Commonwealth v. Rivera***, 10 A.3d 1276, 1279 (Pa.Super. 2010). To obtain relief based on a claim of ineffectiveness, a petitioner must establish: "(1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result." ***Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014). Prejudice in this context means that, "absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different." ***Commonwealth v. Velazquez***, 216 A.3d 1146, 1149 (Pa.Super. 2019) (citation omitted). A failure to meet any of these prongs bars a petitioner from obtaining relief. ***Commonwealth v. Sneed***, 45 A.3d 1096, 1106 (Pa. 2012). "Counsel will not be deemed

ineffective for failing to raise a meritless claim." ***Commonwealth v. Spotz***, 896 A.2d 1191, 1210 (Pa. 2006).

Ineffectiveness Claim Regarding Testimony About the CAT Scan:

At trial, Detective John Harkins of the Philadelphia Police Department testified that he reviewed a CAT scan of Marsh's injured leg that was taken at the hospital in Delaware. N.T., 9/25/14, at 36. When Detective Harkins began to describe what he observed on the CAT scan, defense counsel objected because the CAT scan was not given in discovery and the doctor who performed the scan was not there to testify about it. ***Id.*** at 37-38. The court sustained the objection in part and overruled it in part. ***Id.*** at 38. The court permitted Detective Harkins to describe what he saw on the CAT scan but "[l]imit it to that." ***Id.*** Detective Harkins then testified that he observed a 10-millimeter bullet lodged in Marsh's leg on the scan. ***Id.*** at 37-38.

Marsh argues that his right to confront a witness against him was violated by Detective Harkins' testimony and appellate counsel was ineffective for failing to raise this preserved claim on direct appeal. He claims that Detective Harkins' testimony that the bullet measured 10 millimeters in diameter "proved pivotal to the prosecution's narrative, as it placed [Marsh] inside [the victims' home], while the shooting was underway – alleging that the .40 caliber handgun that had left 6 fired cartridge casings inside the residence, was the same weapon responsible for the projectile in [Marsh's] foot." Marsh's Br. at 32. Marsh points out that "[b]allistic expert testimony later established that .40 caliber projectiles – one of the calibers retrieved

from the scene of the shooting – measure 10mm in diameter." ***Id.*** at 32 n.9. Marsh argues that "this was the only physical evidence that purported to place [him] inside the home." ***Id.*** at 32.

Marsh asserts that "[t]he Commonwealth presented no doctor, radiologist, lab technician or other medical professional with expertise in this area to lay a foundation for the scan's admission, nor establish its authenticity, nor the truth of the content of [Detective] Harkins' testimony." ***Id.*** In Marsh's view, "Detective Harkins did not have the expertise required to render the opinion that the artifact visible in the CAT scan was [a] bullet, nor to its dimensions" and "[i]f [Detective] Harkins was told what he was looking at by a physician, then those statements are prohibited hearsay." ***Id.*** at 33. He highlights that he presented the testimony of Dr. David Smoger, the Chairman of the Radiology Department at Holy Redeemer Hospital, at the PCRA hearing. ***Id.*** at 35. Dr. Smoger testified that it would not be possible for a person who is not trained in medicine or radiology to read a CAT scan to provide the actual measurements, and opined that Detective Harkins "maybe . . . heard somebody say something" about the bullet's measurements. ***Id.*** (citing N.T., 1/5/23, at 39). Marsh argues that Detective Harkins' testimony violated his Sixth Amendment right to confrontation, Pa.R.E. 701 (Opinion Testimony by Lay Witnesses), and/or Pa.R.E. 801(c) (defining "hearsay"). ***Id.*** at 33, 36. According to Marsh, "[w]ithout the evidence that purported to place the same kind of bullet used in the murder of [the victim] in [Marsh's] leg, there is a reasonable probability that the outcome of the trial would have been

different." ***Id.*** at 37. He concludes that appellate counsel was ineffective for failing to raise this claim on direct appeal. ***Id.***

The reasonable basis prong of the ineffectiveness test does not require counsel representing a criminal defendant in an appeal to argue every possible claim on appeal. "[A]ppellate counsel is entitled, as a matter of strategy, to forego even meritorious issues in favor of issues he believes pose a greater likelihood of success." ***Commonwealth v. Blakeney***, 108 A.3d 739, 750 (Pa. 2014) (citation omitted). Appellate counsel may strategically decide to "winnow out weaker claims in favor of pursuing claims that counsel believes offer a better chance of relief." ***Commonwealth v. Pou***, 201 A.3d 735, 740-41 (Pa.Super. 2018). "Appellate counsel need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." ***Commonwealth v. Williams***, 141 A.3d 440, 471 (Pa. 2016) (citation omitted).

Here, Marsh's trial/appellate counsel, Coley Renyolds, Esq., testified at the PCRA hearing that he had a strategic basis on which to not raise the issue on appeal. He testified as follows:

> [PCRA Counsel] Q. The Court allowed testimony from Detective Harkins regarding the diameter or length of the projectile that was in Mr. Marsh's leg at the time he was seen in the hospital, correct?
>
> [Trial/Appellate Counsel] A. I believe the diameter.
>
> Q. And that was over your objection?
>
> A. Correct.

> Q. Do you remember representing Mr. Marsh on direct appeal?
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> A. I did.
>
> Q. You raised six issues. The issue about the CAT scan was not one of the six. Do you recall having a strategy for not including that hearsay-confrontation clause issue in your direct appeal?
>
> A. Say that again.
>
> THE COURT: Why wouldn't you have included that as one of your basis of appeal?
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> THE WITNESS: Clearly Mr. Marsh was at the scene. His blood was there. Now whether he got shot there or not, I do not remember his testimony. But who shot him did not change the fact that he was there, so I did not see it as my best issue going forward.

N.T., 3/9/22, at 13-14.

Upon review, we find that the PCRA court did not err in rejecting this claim. Attorney Renyolds specifically testified that he did not pursue the issue because he believed that six other issues had the better chance of success and decided to forgo the instant issue because it was a weaker claim. Such an approach has been found to be a reasonable one. ***Pou***, 201 A.3d at 740-41. Because counsel had a reasonable basis for forgoing the claim about the detective's CAT scan testimony, counsel was not ineffective for not presenting it on direct appeal.

Ineffectiveness Claim for Failing to Object to Nija Pasture's Testimony:

As set forth previously, Nija Pasture, Marsh's then-paramour, testified at trial that Marsh called her on the way to the hospital on the day of the incident and told her that "shit went bad" and he got shot. Pasture told the

police that she interpreted Marsh's statement that "shit went bad" as meaning that an attempted robbery had failed, since Marsh had previously told her that he needed money and needed to rob someone to get the money. Pasture's statement to the police was read at trial. ***See*** N.T., 9/25/14, at 102-04.

Marsh argues that counsel should have objected to Pasture's interpretation of what he told her because it was based on speculation. His argument on this issue, in full, is as follows.

> Without any recollection as to when those conversations had been, Pasture was purely speculating as to their relevance to the statements [Marsh] made to her on March 5, 2012. Without any factual foundation [or] support for her opinion, such testimony was inadmissible speculation, and should have been objected to by trial counsel. Counsel was therefore ineffective for failing to object. Without this testimony there is a reasonable probability that the outcome of the trial would have [been] different.

Marsh's Br. at 39.

Marsh provides no case law in support of his claim and offers only conclusory statements without any further development. Marsh also does not explain how the outcome of the trial would have been different absent Pasture's testimony. Accordingly, this issue is waived. ***See, e.g., Commonwealth v. Arias***, 286 A.3d 341, 349 (Pa.Super. 2022) (an "[a]ppellant's failure to develop [his] claims with argument, applicable authority, and pertinent analysis results in the waiver of his claims"); ***Commonwealth v. Williams***, 959 A.2d 1252, 1258 (Pa.Super. 2008) (an

"[a]ppellant's failure to properly develop [a] claim and to set forth applicable case law to advance it renders th[e] issue [] waived").

Ineffectiveness Claim for Failing to Request Jury Instruction as to the Testimony of Nija Pasture and Nicole Walton:

Marsh argues that trial counsel was ineffective for failing to request a jury instruction to give the testimony of Nija Pasture and Nicole Walton "special scrutiny." Marsh's Br. at 40. He asserts that both witnesses testified for the Commonwealth and "[e]ach were charged for their involvement in this case and agreed to cooperate under pain of prosecution or parole violations, or both." ***Id.*** Marsh maintains that counsel should have requested Pennsylvania Suggested Standard Criminal Jury Instruction § 4.06, which instructs the jury to give certain testimony special scrutiny. ***Id.***

When reviewing a challenge to a jury instruction:

> [W]e must review the jury charge as a whole to determine if it is fair and complete. A trial court has wide discretion in phrasing its jury instructions, and can choose its own words as long as the law is clearly, adequately, and accurately presented to the jury for its consideration. The trial court commits an abuse of discretion only when there is an inaccurate statement of the law.

Commonwealth v. Baker, 963 A.2d 495, 507 (Pa.Super. 2008) (citation omitted). Moreover,

> [a] jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. Consequently,

> the trial court has wide discretion in fashioning jury instructions.

Id. (citation omitted). Further, "[t]he Suggested Standard Jury Instructions themselves are not binding and do not alter the discretion afforded trial courts in crafting jury instructions; rather, as their title suggests, the instructions are guides only." ***Commonwealth v. Eichinger***, 108 A.3d 821, 845 (Pa. 2014).

Pennsylvania Suggested Standard Criminal Jury Instruction § 4.06 provides as follows:

> **4.06 Certain Testimony Subject to Special Scrutiny**
>
> You should examine closely and carefully and receive with caution the testimony of *[name of witness]* [any witness] if you find that [he] [she] [was previously hypnotized] [admitted that [he] [she] committed perjury at another trial] *[give specific situation]*.

Pa. SSJI (Crim) § 4.06 (2024). The Subcommittee Note to Section 4.06 states:

> This instruction may be appropriate when the court wishes to caution the jury about testimony that falls into a category subject to special scrutiny, e.g., previously hypnotized witness, admitted perjurer, and, possibly, child witness. It should not be used with a category for which this manual gives a more specific instruction (e.g., accomplice testimony, informant).

Id. at Subcommittee Note.

Here, the record belies Marsh's claim that Walton was given immunity for her testimony. Walton specifically testified, and the Commonwealth agreed, that Walton was not given any deals by the Commonwealth. ***See*** N.T., 9/24/14, at 127-29. As to Pasture's testimony, Marsh fails to show he was prejudiced by the lack of a special scrutiny instruction. At trial, Pasture

testified that she had not received a deal from the Commonwealth but anticipated getting a deal at her sentencing for her involvement in this case. ***See*** N.T., 9/25/14, at 113-14. The jury was thus made aware of Pasture's cooperation with the Commonwealth. Moreover, the trial court instructed the jury to judge the credibility and reliability of the witnesses, to consider whether a witness had an interest in the outcome of the case, and to consider whether bias, prejudice, or other motive affected a witness's testimony. ***See*** N.T., 9/29/14, at 76-78. Further, there was extensive evidence against Marsh implicating him in the murder, including phone tracking information, co-conspirator statements, Marsh's blood at the door, and consciousness of guilt. Marsh fails to demonstrate that there is a reasonable probability the outcome of the trial would have been different had a special scrutiny instruction been given. No relief is due.[3]

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[3] Marsh cites ***Commonwealth v. Chmiel***, 639 A.2d 9, 13 (Pa 1994), in support of his argument that counsel should have asked for a special scrutiny instruction. However, ***Chmiel*** involved a different jury instruction – the corrupt and polluted source instruction involving accomplices. ***See*** Pa. SSJI (Crim) § 4.01 (2024). "[I]n any case where an accomplice implicates the defendant, the judge should tell the jury that the accomplice is a corrupt and polluted source whose testimony should be viewed with great caution." ***Chmiel***, 639 A.2d at 13. The corrupt and polluted source charge "is designed specifically to address situations where one accomplice testifies against the other to obtain favorable treatment." ***Commonwealth v. Smith***, 17 A.3d 873, 906 (Pa. 2011).

In any event, the corrupt and polluted source charge would not have been applicable because Pasture and Walton were not accomplices to the crime. There was no allegation that either witness was involved in the crime. Rather, their only involvement occurred after the robbery and murder when
(Footnote Continued Next Page)

Ineffectiveness Claim for Failing to Request Curative Instruction After Non-Party Made Statement in the Gallery:

As set forth previously, after Marsh's counsel finished cross-examining Pasture, a lawyer sitting in the courtroom as a spectator said to Marsh's counsel, "Why did you cross[-]examine her? She didn't hurt you." N.T., 9/25/14, at 136-37. The statement was made as the jury was about to exit the courtroom for a lunch break and was transcribed by the court reporter. ***Id.*** After the recess, Marsh's counsel made a motion for a mistrial. The following exchange transpired:

> [Defense Counsel]: Prior to the conclusion before we broke for lunch, Mr. Joe Santaguida, who was obviously not testifying, was sitting in the front row, made a comment to me in front of the jurors which I believe the jurors heard because they all turned and looked at Mr. Santaguida, "Why did you question her? She didn't hurt you," the implication being that now I messed up the case and she did hurt me.
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> THE COURT: Well, I don't know if the jurors did hear. I saw them standing up but I was watching the jurors going out. I think they were almost out. But, you know, okay. But continue. I don't want to interrupt you.

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they hindered the apprehension of Marsh. ***See, e.g.***, N.T., 3/9/22, at 19-20 (PCRA counsel acknowledging that Pasture and Walton were only charged with hindering apprehension, were not accomplices, and there was no allegation by the Commonwealth that they were involved in the perpetration of the crime). "It is clear that jury instructions regarding particular crimes or defenses are not warranted where the facts of the case do not support those instructions." ***Commonwealth v. Washington***, 692 A.2d 1024, 1028 (Pa. 1997). Thus, Marsh's counsel cannot be deemed ineffective for failing to request a jury instruction that was inapplicable. ***See Commonwealth v. Spotz***, 18 A.3d 244, 299-300 (Pa. 2011) ("Counsel will not be held ineffective for failing to request an instruction to which his client was not entitled").

> [Defense Counsel]: So I'm moving for a mistrial based on that, Judge.
>
> THE COURT: And that's denied.

Id. at 139.

Marsh argues that trial counsel was ineffective for failing to request a curative instruction. He emphasizes that "Pennsylvania courts have made it a practice to proffer a curative instruction when such an outburst is observed by the jury." Marsh's Br. at 43 (citing ***Commonwealth. v. Philistin***, 774 A.2d 741, 743 (Pa. 2001)). Marsh argues that a curative instruction would have abated the prejudice he suffered by the outburst. ***Id.*** at 44. In his view, "[c]ounsel had no reasonable strategic justification for his failure to request a curative instruction, and there is a reasonable probability of a different outcome if the required prejudice-diffusing steps had been taken." ***Id.*** at 44-45.

"The trial court has discretion to determine whether a party was prejudiced by a spectator's conduct." ***Commonwealth v. Sanchez***, 36 A.3d 24, 47 (Pa. 2011). "The trial court may implement any appropriate remedy requested, including offering a remedial instruction, removing the responsible spectator, or declaring a mistrial." ***Id.*** "[U]nless the unavoidable effect of the incident is to deny the defendant a fair trial, there is no error." ***Philistin***, 774 A.2d at 743 (citation omitted).

At the PCRA hearing, Marsh's trial counsel explained his reason for not requesting a curative instruction:

> [PCRA Counsel]: Did you have any -- you moved for a mistrial after that -- I will call it an outburst, and I do not mean that in a derisive sense -- is there any reason why you did not ask for a curative instruction after the mistrial was denied?
>
> [Trial Counsel]: I do remember this. I do not know if the jurors were paying attention to him for one. I know that the jurors were standing up and moving out of the room [at] the time he said something. I do not know that I felt again that I wanted to emphasize something that Mr. Santaguida said. Jurors do not know him or what his rol[e] was. For me to then bring it back and make it something important, especially since he was criticizing me, I didn't want to do that.

N.T., 3/9/22, at 23-24.

Upon review, we find that trial counsel had a reasonable and strategic basis for not requesting a curative instruction. It was unclear whether the jury heard the spectator's statement and trial counsel did not want to draw attention to the statement. This claim fails.

Ineffectiveness Claim for Failing to Object to Prosecutorial Argument:

Marsh argues that trial counsel was ineffective for failing to object or request a curative instruction after the Commonwealth made an improper argument to the jury during its closing argument. Marsh's Br. at 45. Marsh asserts that the Commonwealth violated the "golden rule" when it asked the jury to imagine themselves in the shoes of the victims. ***Id.*** Marsh points out that "[s]uch exercises have been determined as a matter of law to be improperly prejudicial to defendants as they seek to elicit jury response based on emotionality and sympathy, rather than consideration of the facts in evidence." ***Id.*** Marsh argues that the Commonwealth's statement was

significant because "the nature of the charges against [him], and the facts of the case, created an unusually high risk of jurors confusing sympathy and empathy for the victim with evidence of [his] guilt." ***Id.*** at 46-47. He further asserts that "the prejudice suffered by [him] was significant because of the timing and context of the prosecution's violation" and that "[b]y taking advantage of the primacy effect, the prosecution flavored its entire closing with prejudice when it elected to begin its closing with improper argument." ***Id.*** at 47. According to Marsh, "[a] curative instruction should have been given to the jury to reinforce their duty to rule on the facts, not on sympathy," and counsel was ineffective for failing to request one. ***Id.***

"Our review of a prosecutor's comment and an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial." ***Commonwealth v. Jaynes***, 135 A.3d 606, 615 (Pa.Super. 2016). "[T]he prosecution is accorded reasonable latitude, may employ oratorical flair in arguing its version of the case to the jury, and may advance arguments supported by the evidence or use inferences that can reasonably be derived therefrom." ***Id.*** "A prosecutor has great discretion during closing argument and is free to present his or her closing arguments with logical force and vigor" as long as "there is a reasonable basis in the record for the prosecutor's comments." ***Commonwealth v. Cash***, 137 A.3d 1262, 1273 (Pa. 2016) (cleaned up). "Challenged prosecutor comments must be considered in the context in which they were made." ***Commonwealth v. Robinson***, 864 A.2d 460, 517 (Pa.

2004) (citation omitted). A prosecutor's comments do not constitute reversible error "unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds a fixed bias and a hostility toward the defendant such that they could not weigh the evidence objectively and render a true verdict." ***Commonwealth v. Stafford***, 749 A.2d 489, 498 (Pa.Super. 2000) (citation omitted).

Further, "even if the alleged statements by the prosecutor may have been improper, we have held that not every intemperate or uncalled for remark by a prosecutor requires a new trial." ***Robinson***, 864 A.2d at 517 (citation and internal quotation marks omitted). "[W]here the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict, then the error is harmless beyond a reasonable doubt." ***Id.*** (citation omitted).

Here, the contested portion of the Commonwealth's closing argument is as follows:

> We sit here in a clean, antiseptic courtroom, with bright lights, staffed with professionals who are here every[day] organized and doing the same thing, and the evidence is presented to you in a neat way, and the court reporter takes everything down and there's a sheriff in the room and everybody is safe. And that's how you received the evidence and that's how it has to be, because if you allowed yourself to feel and to see and to experience what that family experienced, you wouldn't be able to handle it. Neither would I.
>
> So I'm just going to ask you for the briefest of moments, not for long because it's too much, but for the briefest of

> moments to crack that door open and imagine. Imagine waking up, being woken up in the middle of the night in your family home, disoriented, groggy, stumbling out of your bedroom, facing two intruders that you don't know, chaos, gunfire, blood, pain, fear. That is what John Paul, Sherrell Paul and their two children experienced.

N.T., 9/29/14, at 28-29.

After the Commonwealth's closing argument, the court instructed the jury as follows:

> [Y]ou must not be swayed by any sympathy for [Marsh] or let your judgment be impaired by sympathy that you have for the victims in this case.
>
> After due deliberations, you should find the facts based exclusively on the evidence and you should apply those facts to the law that I'm about to give you and blend them together and then render a verdict in accordance with the facts and the law . . .
>
> Now, in making your determination of the facts, you are only to consider the evidence, not any thoughts outside of the evidence, the evidence that has been presented in court and the logical inferences that are derived from that evidence.

Id. at 72-74.

The PCRA court found that Marsh's claim lacked merit. ***See*** PCRA Ct. Op. at 5. We find that the underlying objection has arguable merit, but the ineffectiveness claim ultimately fails. In ***Commonwealth v. Cherry***, 378 A.2d 800, 804 (Pa. 1977), our Supreme Court held that it is impermissible for a prosecutor to ask jurors to imagine themselves as a victim of the crime. The Court explained that a prosecutor asking "the jurors to imagine themselves as victims improperly invoke[s] the sympathy of the jurors for [a victim]" and

such "remarks suggest[] that the jury should render a verdict based on sympathy for [a] witness rather than the guilt or innocence of [an] accused." ***Id.*** Here, the prosecutor asked the jury to imagine themselves as the actual victims of the crimes in contravention of ***Cherry***. We thus find Marsh's underlying claim has arguable merit. However, we find that he has failed to satisfy the prejudice prong of the ineffectiveness test.

The prosecutor's comments were brief and made at the beginning of the Commonwealth's lengthy closing argument.[4] Further, the court instructed the jury that arguments by counsel are not evidence. ***See*** N.T., 9/23/14, at 18-19. The court additionally instructed the jury to decide the case based only on the evidence and not based on "sympathy that you have for the victims[.]" ***See*** N.T., 9/29/14, at 72-74. We presume that juries follow the instructions of the trial court. ***See Commonwealth v. Wesley***, 753 A.2d 204, 210 (Pa. 2000). The court's instructions served as a cure for any improper prejudice that may have resulted from the prosecutor's comments. ***See Robinson***, 864 A.2d at 519 (finding trial court's instruction to the jury not to consider prosecutor's statements as evidence and to only consider pertinent facts cured any prejudice which may have been caused by the comments made by the prosecutor); ***Wesley***, 753 A.2d at 210 (concluding prosecutor's comments were not "so significant as to have any measurable influence on the jury's

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[4] The contested portion of the Commonwealth's closing argument only covered approximately one page out of 40 pages in the notes of testimony. ***See*** N.T., 9/29/14, at 27-67.

deliberation" because "the jury had sufficient evidence" to find defendant guilty beyond a reasonable doubt of first-degree murder; "[e]ven if the comments had some prejudicial effect, the cautionary instruction supplied by the trial court cured any potential harm to [the defendant]"). Marsh fails to establish prejudice. This ineffectiveness claim fails.

Ineffectiveness Claim for Failing to Request Limiting Instruction as to Prior Bad Act Evidence:

At trial, the jury heard testimony from Marsh and Pasture that they had engaged in a tax fraud scheme, unrelated to this case. Marsh testified that Pasture would give him falsified identification cards and Social Security numbers that he would use to file fake tax returns. N.T., 9/26/14, at 110-11. These fake identification cards were found in Marsh's possession when he was arrested and were seized by the police. ***Id.*** at 111. Marsh was not charged with a crime regarding the tax fraud scheme in the instant case.

Marsh argues that trial counsel was ineffective for failing to request a jury instruction that the testimony about the tax fraud was not admissible to show Marsh's bad character and his propensity to act in accordance with that character. Marsh's Br. at 48. In Marsh's view, counsel's failure to request such an instruction "was particularly aggravated by the similarities between the prior bad act testimony, *i.e.* theft by tax fraud, and the prosecution's narrative which placed [Marsh] at the scene of the crime for the purpose of committing a robbery." ***Id.*** at 49. He claims he suffered prejudice by the lack of an

instruction because "the jury could not have known on its own, the proper and improper uses of that evidence." ***Id.***

At the PCRA hearing, trial counsel testified that he wanted to bring up Marsh's involvement in the tax fraud scheme to explain why he was found with fake identification cards when he was arrested. Counsel stated that he was attempting to discredit the Commonwealth's theory that Marsh had fake identification cards as a plan to evade capture of the police. Counsel testified as follows:

> [PCRA Counsel] Q. Mr. Marsh testified, in fact, that yes, he was engaged in some tax shenanigans at the time. Do you recall that?
>
> [Trial Counsel] A. Yes.
>
> Q. The Court let that in. And I do not think you objected because it was proper to show consciousness of guilty [sic] at the time of his arrest. Does that ring a bell?
>
> A. I do not agree -- I will agree that I did not object.
>
> Q. Is there any tactic or strategy for not asking for a limiting instruction on admissible bad act that should not be used to judge propensity or to judge credibility of the witness -- of the defendant?
>
> A. First of all, the issue was that that was not our defense. It was not how Mr. Marsh presented those items to me. He presented those items to me that they were part of the fraud scam. I thought it would be better to have that out, then for the jury to think that it was a consciousness of guilt issue, flight, trying to avoid apprehension. After speaking with Mr. Marsh, we agreed that that is how we would approach those -- I think it was IDs and credit cards . . .
>
> Q. [G]iven that the jury heard about these bad acts, why didn't you ask for propensity instruction?

> A. Because with the jury, our theory, again, was to show why the IDs were there. I do not think juries are stupid. I think they understand. I am pretty sure I addressed in my closing what it was for and how they should address it, and I thought that was sufficient.

N.T., 3/9/22, at 25-27.

Upon review, we find that trial counsel had a reasonable, strategic basis for not requesting a limiting instruction. Counsel intentionally brought out testimony about Marsh's participation in a tax fraud scheme to undermine the Commonwealth's argument that Marsh was actively avoiding arrest or had a consciousness of guilt. Counsel did not want to downplay the evidence because he believed it was helpful to Marsh. No relief is due.

Ineffectiveness Claim as to Immunity of Nicole Watson:

Watson was the wife of Marsh's co-defendant, Davis, who provided a ride to Marsh to the hospital on the night of the incident. Davis was tried in a separate trial and Watson testified in Davis's trial pursuant to a use-immunity order. Marsh argues that his trial counsel was aware of this fact but was ineffective for failing to use the use-immunity order in cross-examining Watson at his trial. Marsh's Br. at 50. Marsh further argues a ***Brady*** violation occurred when the Commonwealth withheld the fact that it was considering obtaining immunity for Watson in Marsh's trial. ***Id.*** at 51-52. Marsh explains that "[w]hen counsel conducted his review of the [Files], he discovered a motion for use-immunity [as to Watson] that was drafted for [Marsh's] trial." ***Id.*** at 50 n.13. Marsh argues that "had the Commonwealth disclosed the potential for securing a second use-immunity order, it would have opened a

fresh avenue of attack – even after having immunity once, the witness required it a second time" and "[a] grant, or contemplation of, immunity to a key prosecution witness, qualifies as 'favorable evidence' that should have been disclosed." ***Id.*** at 52. Marsh further argues that "[t]he Commonwealth separately violated due process when it failed to correct Walton's testimony that she had no 'deals' with the Commonwealth." ***Id.*** at 51.

Marsh did not raise this ***Brady*** claim in his PCRA petition. Rather, this issue was set forth for the first time in his Concise Statement of Matters Complained of on Appeal ("Concise Statement"), as follows:

> 2. A. The Commonwealth violated due process of law when it failed to disclose an unfiled and unsigned motion contained in the H-File showing that it considered obtaining use immunity for its witness Nichole Walton.
>
> 2. B. Alternatively, trial counsel was ineffective for failing to discover and use the alleged fact that Nicole Walton was granted use immunity at trial.

Concise Statement, filed 2/23/25, at ¶ 2. Since the ***Brady*** was claim was not raised in the PCRA court, it is waived. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal").

The PCRA court found Marsh's other claims to be without merit. It explained:

> [Marsh] first claims that the Commonwealth failed to turn over evidence that witness Nicole Walton was testifying at trial under an immunity agreement. In support of this claim, [Marsh] attaches a motion for immunity, signed by an ADA, found in the Commonwealth's trial file. This claim is without merit, however, because this motion was never filed with the courts and no immunity agreement was ever approved

> by the [c]ourts. [Marsh] has, essentially, attached DAO work product that was created in case such an immunity order would become necessary. However, because Ms. Walton testified at trial without the need for seeking immunity, the motion was never filed with the courts and Ms. Walton was never immunized. Indeed, the motion does not include a verification page signed by trial ADA Jennifer Seiber, and the attached order granting immunity is also unsigned by a judge.
>
> Since this prophylactic work product was never filed with the courts, and no immunity order was ever entered in this matter, the Commonwealth did not suppress any evidence of a grant of immunity.

PCRA Ct. Op. 3-4.

The PCRA court did not err. The record reflects that the Commonwealth drafted a motion seeking Watson's immunity in Marsh's case, but it was never filed. The fact that the Commonwealth contemplated immunity for Watson is inconsequential. The fact remains that Watson did not testify under immunity at Marsh's trial. Counsel cannot be deemed ineffective for failing to cross-examine Watson on a non-existent grant of immunity.

Ineffectiveness Claim as to the Court's Preliminary Instructions:

Marsh argues that trial counsel was ineffective when he failed to object to the trial court not providing allegedly adequate preliminary instructions, which violated his right to a fair trial. Marsh's Br. at 54. He asserts that the court failed to instruct the jury on "how the jury should evaluate objections and side bars; and how the presumption of innocence and how the charging document is not evidence." ***Id.*** at 55. In his view, the jury was never told what "overruled" and "sustained" meant regarding objections. ***Id.*** He points

out that such instructions are contained in the Pennsylvania Standard Jury Instructions. ***Id.***

"The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration." ***Commonwealth v. Hawkins***, 787 A.2d 292, 301 (Pa. 2001). We review a court's jury instruction "as a whole to determine if it was fair or prejudicial." ***Commonwealth v. Drummond***, 285 A.3d 625, 634 (Pa. 2022) (citation omitted). "We will not rigidly inspect a jury charge, finding reversible error for every technical inaccuracy, but rather evaluate whether the charge sufficiently and accurately apprises a lay jury of the law it must consider in rendering its decision." ***Id.*** at 634-35 (citation omitted)

Here, upon review, we find that Marsh's claim is without merit. During voir dire, the court explained the presumption of innocence to the jury:

> [O]ne of the fundamental principles of our system of criminal justice is that a defendant is presumed to be innocent. The fact that this individual was arrested and charged with a crime, that's not evidence. You can't go back into the jury deliberation room and start to deliberate with your fellow jurors and say, well, he was arrested.
>
> Every defendant is presumed innocent unless or until the Commonwealth has proven that individual guilty beyond a reasonable doubt, and that's a term I'll define in more detail as the trial progresses. The Commonwealth chooses to charge an individual. So therefore, the Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt.

N.T., 9/22/14, at 16.

Further, while the preliminary instructions did not define "overruled" and "sustained," the court explained to the jury what to do when the first objection was made at trial. ***See*** N.T., 9/23/14, at 90 (court sustained objection and instructed jury to "disregard" the testimony). Since Marsh's claim is without merit, counsel cannot be deemed ineffective. ***Spotz***, 896 A.2d at 1210.

Claim of Cumulative Impact of Trial Counsel's Ineffectiveness:

In his final issue, Marsh argues that he was entitled to relief due to the cumulative impact of counsel's ineffectiveness and his due process claims. This claim was not raised in the PCRA court or in Marsh's Rule 1925(b) statement. It is therefore waived. ***See*** Pa.R.A.P. 302(a); Pa.R.A.P. 1925(b)(4)(vii). Even if not waived, this issue fails. Because we have determined that there were no errors warranting relief, Marsh's allegation of cumulative error fails. ***See Commonwealth v. Tedford***, 960 A.2d 1, 56 (Pa. 2008) (citation omitted) ("[N]o number of failed claims may collectively warrant relief if they fail to do so individually").

Order affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/16/2026