

**IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH	:	
	:	
v.	:	No.: 97-10,190
	:	
MICHAEL DOUGHERTY,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is Defendant's Post Conviction Relief Act (PCRA) petition, filed August 23, 2005. Defendant was convicted of Aggravated Assault, Simple Assault and Recklessly Endangering Another Person and is currently serving a five (5) to twenty (20) year sentence. Following the guilty verdict, counsel for Defendant filed a notice of appeal, but failed to file a brief and the appeal was dismissed on August 3, 2000. Defendant's right to file a direct appeal was reinstated nunc pro tunc on February 14, 2002. On June 19, 2003, the Superior Court affirmed the judgment of sentence. Defendant filed a PCRA petition on August 11, 2003, which the Court erroneously held to be a second petition and untimely. Based on the error, the Superior Court remanded the matter to this Court for appointment of counsel and the opportunity to file an amended PCRA petition. After several conflicts with assigning counsel to represent Defendant, Donald Martino, Esq., was appointed on March 29, 2005. Following the preparation of transcripts, the present petition was timely filed.

Defendant's petition first contends that trial counsel was ineffective for failing to request that the Court recuse itself from presiding at trial. The petition alleges that trial counsel should have requested recusal because the Court presided over a Protection from Abuse (PFA) matter

based on the same facts surrounding the Defendant's criminal charges. The Court ruled on pre-trial motions and made rulings pertaining to evidence at trial which, the petition alleges, were affected by the Court's prior knowledge of the facts surrounding the issues at trial and failure to request recusal "prejudiced [Defendant's] rights and denied him the right to a fair and impartial jurist and trial." (Defendant's petition, n. 48).

In order to make a claim for ineffective assistance of counsel, the Defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable, and; (3) counsel's ineffectiveness prejudiced defendant. *Commonwealth v. Beasley*, 544 Pa. 554; 678 A.2d 773, 778 (1996). Counsel's effectiveness is presumed, so the burden of establishing ineffectiveness rests squarely with the Defendant. Generalized ineffectiveness claims raised in a vacuum must be rejected. *Commonwealth v. Lilliock*, 1999 PA Super 244; 740 A.2d 237 (1999).

Whether a trial judge should recuse herself depends upon, "the type of evidence that the judge hears; if the evidence is inadmissible and is of a highly prejudicial nature, the judge should recuse [her]self or declare a mistrial if it is too late for recusal." *Commonwealth v. Lee*, 262 Pa.Super. 280, 291, 396 A.2d 755, 760 (1978). The judge should also recuse herself whenever there is substantial doubt as to her ability to preside impartially. *Commonwealth v. Boyle*, 498 Pa. 486, 490, 447 A.2d 250, 252 (1982). "[W]hile it may be the better practice to have a different judge preside over trial than preside over pre-trial proceedings, such a practice is not constitutionally required and has not been made the basis for setting aside a verdict reached in an otherwise proper trial." *Commonwealth v. Baxter*, 282 Pa.Super. 467, 422 A.2d 1388 (1980). This principle appears to be based on "the prevailing view that judicial fact-finders are capable of

disregarding most prejudicial evidence." *Commonwealth v. Council*, 491 Pa. 434, 421 A.2d 623 (1980); *see also Commonwealth v. Lewis*, 314 Pa.Super. 298, 303-04, 460 A.2d 1149, 1151-52.

The Court finds that presiding over the PFA proceedings did not per se hinder its ability to preside impartially over pre-trial motions and evidentiary rulings at trial. Defendant's petition sets forth what may have been a reasonable basis for a motion for recusal. However, for purposes of a claim of ineffective assistance, trial counsel cannot be said to have acted unreasonably in refraining from making such a request. The presumption that the Court is capable of disregarding most prejudicial evidence weighs heavily against Defendant's assertion. This is especially so where, as here, the Court played a very limited role in matters of fact-finding and credibility prior to and throughout the jury trial.

Defendant next asserts that counsel was ineffective for failing to appeal the sufficiency of the evidence at trial. The petition alleges that the evidence presented at trial does not support a conviction for aggravated assault. A person is guilty of aggravated assault if he: "(1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa.C.S. § 2702. Further, "[i]t is well settled that malice must be present to sustain a conviction for aggravated assault. . . . it is not sufficient to show mere recklessness as codified at 18 Pa.C.S. § 302(b)(3); but rather, it must be shown that the defendant consciously disregarded an *unjustified and extremely high risk* that his actions might cause death or serious bodily harm." *Commonwealth v. Myers*, 1998 Pa.Super. LEXIS 3897, 722 A.2d 1074, 1077 (1998).

The Court finds that the evidence was sufficient to support the jury's guilty verdict and therefore the claim of ineffective assistance must fail. The petition asserts that, "the Commonwealth did not present any testimony or evidence informing the jury what actions

Michael Dougherty performed to cause Stacy Tupper's injuries." (Defendant's petition, n. 59). The jury heard testimony from the victim that Defendant had his hand at her throat and she could recall him throwing her to the ground. Defense counsel challenged her ability to recall the incident; however the jury could ultimately find based on the testimony the Commonwealth's account of the incident beyond a reasonable doubt, particularly when combined with physical evidence of the injuries and the testimony from the medical expert. (N.T. 6/15/99, pp. 109, 120; see also pp. 16, 34-35).

Defendant asserts that the Commonwealth failed to present any evidence that Michael Dougherty acted knowingly, intentionally or even recklessly and that the Commonwealth failed to present evidence of extreme indifference to the value of human life, or malice. (Defendant's petition, n. 63, 65-66) The Court disagrees. Based upon the victim's recollections as well as the medical expert's analysis of the injuries, the jury could find that the Defendant grabbed the victim around the throat and threw her to the ground with enough force to cause the resultant severe injuries. Based upon that action and injury, the jury could decide beyond a reasonable doubt that the Defendant caused the injuries knowingly, intentionally or recklessly and with the requisite malice.

The petition next contends that trial counsel was ineffective for failing to object to the prosecutor's statements made in closing arguments and that appellate counsel was ineffective for failing to pursue this issue on appeal. Defendant alleges that the prosecutor's remarks that Defendant was a "liar" prejudiced the jury. Defendant alleges that the prosecutor's remarks concerning a "rock, tire iron or hammer" had no basis of fact in the evidence presented to the jury. (Defendant's petition, n. 89).

The Court finds the underlying claims regarding the prosecutors remarks are without merit and therefore the ineffective assistance of counsel claim must fail. Defendant cites *Commonwealth v. Ragan* in support of his contentions. 538 Pa. 2, 645 A.2d 811 (1994). In that case, the Supreme Court stated:

“It is well-established that a prosecutor may not inject a highly prejudicial personal opinion of a defendant's credibility into evidence, thereby intruding upon the jury's exclusive function of evaluating the credibility of witnesses. *Commonwealth v. Kuebler*, 484 Pa. 358, 363, 399 A.2d 116, 118 (1979) (citing *Commonwealth v. Potter*, 445 Pa. 284, 287, 285 A.2d 492 (1971)). In light of this rule, we have held that a prosecutor's broad characterization of a witness' testimony as a big lie constitutes reversible error. *Id.* at 364, 399 A.2d at 119. However, we have also found that a prosecutor's assertion that a witness had lied does not warrant a new trial when the statement was a fair inference from irrefutable evidence rather than a broad characterization. *Commonwealth v. Floyd*, 506 Pa. 85, 484 A.2d 365 (1984). Under the present facts, the prosecutor followed his statement that appellant had presented a lying alibi defense with a recitation of the various incidents introduced at trial which indicated the bias of appellant's alibi witness Tameka Brown. Thus, the assertion that appellant's alibi defense had been fabricated was a fair inference based on the evidence and does not warrant a new trial.

Id., at 829. As in *Ragan*, the assertions at issue here were a fair inference based on the evidence.

The statements were made based on the inconsistent accounts given by Defendant, which were brought into evidence by the prosecution. There is a fair inference that an individual has lied when he has given diverging accounts of the same incident.

The prosecutor's remarks concerning a “hammer, tire-iron or rock” did not prevent the jury from properly weighing evidence introduced at trial. The prosecutor's remarks were made to illustrate the point he had just made, that: “The judge isn't going to tell you that we have to show the precise manner in which a crime occurred. . . . You're not going to assess how it occurred, under what circumstances, did he have a hammer in the car, did he get a tire iron out of the car and drive off with it, did he pick up a big rock and pile drive her in the head with the

rock.” (N.T. 6/16/99 p. 30). The implements described by the prosecutor were not meant to convey to the jury that they were involved in the incident in question, and the Court finds that the manner in which they were presented would not have created such an inference. The jury was not prevented from properly weighing the actual evidence by the prosecutor’s remarks, therefore the claim has no merit and the Court cannot find ineffective assistance of trial or appellate counsel for failure to object or raise the issue on appeal.

The petition contends that trial counsel was ineffective for failing to file a timely suppression motion, or appellate counsel was ineffective for failing to appeal the trial court’s refusal to hear Defendant’s motion in limine regarding pretrial statements and denial of Defendant’s request to suppress statements made to the Adult Probation Office (APO) regarding his guilt. The Court finds the claim without merit. The statements were not permitted as part of the Commonwealth’s case-in-chief. (see N.T. 6/15/1999 p.103). Insofar as it is alleged that Defendant’s confusion over its admissibility led to an involuntary waiver of his right to testify on his own behalf, the Court finds that said confusion, if any, did not prejudice Defendant. Had the Court suppressed the evidence and Defendant testified, the information given by Defendant to APO would then be admissible to impeach his testimony. Had the Defendant’s testimony been in conformity with the information given to adult probation, Defendant would have had no interest in its suppression. Trial counsel’s failure to file a suppression motion did not prejudice Defendant and appellate counsel’s failure to raise the issue on appeal was not unreasonable, therefore the ineffective assistance of counsel claims must fail.

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant’s PCRA petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. None will be scheduled. Pursuant to Pennsylvania Rule of Criminal

Procedure 907(1), the parties are hereby notified of this court's intention to deny the Petition. Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the Petition.

ORDER

AND NOW, this _____ day of October, 2005 the Court notifies the Defendant and his attorney that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.

By The Court,

Nancy L. Butts, Judge

xc: DA (KO)
D. Martino, Esq.
Hon. Nancy L. Butts
Judges
Gary Weber, Esquire
Law Clerk