

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	CR-394-2010
v.	:	CRIMINAL DIVISION
	:	
ANTWINE JACKSON,	:	PCRA PETITION

OPINION AND ORDER

In this matter, the Commonwealth charged Defendant with possession with intent to deliver and other drug-related charges for offenses occurring on January 21, 2010, and January 28, 2010. Following a jury trial, the Court found Defendant guilty of all of the charges. On December 15, 2010, the Court sentenced Defendant to an aggregate sentence of three (3) to six (6) years. After the filing of post-sentence motions and a subsequent appeal, our Superior Court affirmed this Court's sentence by its Memorandum Opinion filed on November 22, 2011.

On February 21, 2012, Defendant filed a *pro se* PCRA¹ Petition. On March 13, 2012, the Court appointed E.J. Rymza, Esquire, to represent Defendant in his PCRA proceedings. The Court scheduled an initial PCRA conference for May 8, 2012. Upon agreement of the parties, the Court continued that conference to July 10, 2012. On July 10, 2012, appointed defense counsel informed the Court that the opening and closing trial statements were still being transcribed. Based upon these transcript requests, the Court ordered defense counsel to submit an amended PCRA petition within thirty (30) days of his receipt of these transcripts. Defense counsel filed an Amended PCRA Petition on September 7, 2012.

In Defendant's Amended PCRA Petition, he alleges that his trial counsel was ineffective for three (3) reasons. Initially, Defendant argues that his counsel was ineffective for failing to

¹ Post Conviction Relief Act, 42 Pa. C.S. §§ 9541-9546.

object to the testimony of Agent Heckman and Informant Cedric Williams; these individuals testified about prior bad acts of Defendant, allegedly in violation of Pa. R.E. 404. Defendant also argues that his counsel was ineffective for failing to request a cautionary instruction or jury charge regarding the guilty plea of his co-defendant; Defendant believes that the jury could have improperly considered his co-defendant's guilty plea as an admission of Defendant's guilt. Lastly, Defendant argues that his counsel was ineffective for failing to object to the prosecutor's closing argument; Defendant argues that the prosecutor improperly included his own opinions and bolstering statements during his closing arguments. The Court finds that Defendant's trial counsel was not ineffective and that Defendant's three claims lack arguable merit. Additionally, Defendant alleges that he is entitled to relief based on the cumulative effect of his trial counsel's errors. Likewise, the Court finds this claim lacks merit.

I. Legal Standard – Ineffective Assistance of Counsel

In order to succeed on a claim for ineffective assistance of counsel, Defendant must overcome the presumption of counsel effectiveness by proving the following three factors, that: (1) Defendant's underlying claim has arguable merit, (2) trial counsel had not reasonable basis for her action or inaction, and (3) the performance of trial counsel prejudiced Defendant.

Commonwealth v. Chimel, 1111, 1127 (Pa. 2011) (referencing *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa. 1987)). *See also Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa. Super. Ct. 2006), *appeal denied*, 907 A.2d 1102 (Pa. 2006) (citing *Commonwealth v. Lynch*, 820 A.2d 728, 733 (Pa. Super. 2003)). Actual prejudice must occur; that is trial counsel's ineffectiveness must have been so evasive that it is reasonable it had an adverse impact on the

proceeding's outcome. *Sampson*, 900 A.2d at 890 (citing *Commonwealth v. Howard*, 645 A.2d 1300, 1307 (Pa. 1994)). With this standard in mind, the Court turns to Defendant's claims.

II. Testimony of Agent Heckman and Informant Cedric Williams

Defendant first argues that his trial counsel was ineffective because she failed to object to the testimony of his prior bad acts offered by Commonwealth witnesses (Agent Heckman and Informant Williams). Defendant objects to the following exchange that occurred during the direct examination of Agent Heckman:

[Prosecutor]: And you may have said this before but did Mr. Williams indicate that he had purchased cocaine from Mr. Jackson prior; is that correct?

[Heckman]: Mr. Williams had actually told me during my debrief of him between December 2009 and January of 2010 he estimated that he purchased crack cocaine off Mr. Jackson 30 to 50 times.

Tran., 10/13/10, pg. 16. Trial counsel did not object to this statement.

Additionally, Defendant argues that Informant Williams testified about his prior bad acts. In support of this claim, Defendant cites to the portion of the trial transcript where Informant Williams testified about purchasing drugs from Defendant on January 21, 2010. *Id.* at 56. Defendant was convicted of selling drugs to Informant Williams on that date; therefore, Defendant's claim has no merit as it pertains to Mr. Williams' testimony.²

Turning back to Agent Heckman's testimony, the Court finds that Defendant's claim also lacks merit. Viewing the context in which Agent Heckman made his now-contested statement,

² At one point, Defendant testified: "I don't recall the exact - - the dates, okay. But, I remember purchasing from Antwine Jackson. I don't want to get anything - - the dates whether it was the 21st or the 22nd because I don't remember the actual date. I'm sorry." Tran., 10/13/10, pg. 57. This statement cannot support Defendant's argument either.

the Court believes that the statement was admissible under Pa. R.E. 404(b) for identity purposes. Evidence of prior bad acts is inadmissible to prove the character of a person; however, evidence of prior bad acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, *identity* or absence of mistake or accident. Pa. R.E. 404(b); *Commonwealth v. Busanet*, 54 A.3d 35, 62 (Pa. 2012). After reviewing the questioning that preceded the above-mentioned exchange, the Court believes that the evidence is admissible to prove Defendant's identity.

Preceding Agent Heckman's testimony about Defendant's prior deals with Mr. Williams, Agent Heckman testified concerning Mr. Williams; specifically, Agent Heckman testified about how he met Mr. Williams and how Mr. Williams became a confidential informant. Tran., 5/3/12, pgs. 13-15. Agent Heckman testified that Mr. Williams told the agent about Defendant selling cocaine. *Id.* at 15.

[Prosecutor]: Okay. And at some point prior to January 21st, did you ride around and did Bob - - or did Mr. Williams indicate where Mr. Jackson was residing or where he had purchased cocaine from?

[Heckman]: He - - Mr. Williams actually showed us various residences throughout the city of suspected drug activity. In addition to Mr. Jackson and he did point out William Colon's residence as one of the spots that Mr. Jackson frequented.

Id. at 15-16. After this questioning, the previously quoted discussion about the prior drug transactions occurred. *Id.* at 16. Thus, the Court believes that the agent's testimony was properly admitted to prove that Mr. Williams knew Defendant through their prior dealings and properly identified him to the police.

The Court notes that the prosecution did not emphasize the agent's statement about Defendant's alleged prior dealings with Mr. Williams throughout any remaining part of the trial.³ Yet, the first question that Defendant's trial counsel postured to Mr. Williams was: "Good morning, Mr. Williams. You said you purchased drugs from Mr. Jackson about four or five times, right?" Tran., 10/13/10, pg. 68. Defendant's trial counsel used this evidence to negate Mr. William's credibility, a defense strategy throughout Defendant's trial.

Therefore, the Court concludes that Defendant's trial counsel was not ineffective for failing to object to the admissible testimony concerning Defendant's prior bad acts. *See Busanet*, 54 A.3d at 60-61 (testimony from a Commonwealth witness that the defendant both asked the witness to sell drugs and employed juveniles to do the same was admissible under 404(b) to prove Defendant's motive to commit the underlying crimes). Defendant's first ineffectiveness claim lacks arguable merit.

III. Failure to Request Instruction or Charge Regarding Co-Defendant's Plea

Defendant next argues that his trial counsel was ineffective for failing to request a cautionary instruction or a jury charge on the prosecutor's comment regarding a co-defendant's guilty plea; specifically, Defendant believes that his trial counsel should have requested an instruction that cautioned the jury that it could not convict Defendant based upon his co-defendant's guilty plea. The prosecutor mentioned this guilty plea once during the trial; in his fifth sentence to the jury, the prosecutor stated: "[Defendant's] co-conspirator, Mr. William Colon, previously plead guilty to the charges." Supp. Tran., filed 8/20/12, pg. 2. Mr. Colon's

³ Mr. Williams also testified that he purchased drugs before from Mr. Jackson. Tran., 10/13/10, pg. 56. However, this transaction was merely the prosecutor asking if Mr. Williams purchased drugs from Mr. Jackson before and Mr. Williams responding affirmatively. *Id.* This testimony was not complained of in the instant PCRA petition. However, it would likewise be admissible identity testimony under Pa. R.E. 404(b).

plea was only discussed this one time.⁴ Defendant's trial counsel did not object to this comment, nor did she request any curative instruction or final jury charge. Again, the Court finds that Defendant's ineffectiveness claim lacks merit because evidence was not presented regarding Mr. Colon's plea; the prosecutor made only one comment during the first minutes of the prosecutor's opening statement.

In *Commonwealth v. Chimel*, 30 A.3d 1111 (Pa. 2011), our Supreme Court addressed the standard for improper prosecutorial comments:

[t]he standard by which the court considers allegations of improper prosecutorial comments is a stringent one: "Comments by a prosecutor constitute reversible error only where their unavoidable effect is to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict."

Id. at 1147 (citing *Commonwealth v. Tedford*, 960 A.2d 1, 33 (Pa. 2008)).

Generally, when the prosecution enters evidence of a co-defendant's plea, a cautionary instruction is given. *See Commonwealth v. Geho*, 302 A.2d 463 (Pa. Super. Ct. 1973) (when co-defendants plead guilty during the course of an un-severed criminal trial, the trial court properly provided a curative instruction that these pleas cannot be used to prove the guilt of the remaining defendant). *See also Commonwealth v. Boyer*, 856 A.2d 149 (Pa. 2004) (trial court erred when it took judicial notice of a co-defendant's plea without a cautionary instruction). In this instance, the prosecutor made a statement during his opening argument that Mr. Colon, Defendant's co-conspirator, pleaded guilty. Supp. Tran., filed 8/20/12, pg. 2. However, this plea was not

⁴ The other pages cited by Defendant in his Amended PCRA Petition show that evidence was introduced regarding Defendant's conspiracy with Mr. Colon and that the Court did not provide any cautionary or closing instruction regarding Mr. Colon's plea. Tran., 10/13/10, pgs. 28-32 and 101-121.

mentioned throughout the remainder of the trial. No evidence was entered regarding this plea, nor was any testimony received from Mr. Colon.

It is well-settled that opening and closing arguments are not considered evidence. *Chimel*, 30 A.3d at 1146; *Commonwealth v. Ligon*, 773 A.2d 1231, 1238 (Pa. 2001). In this instance, the Court instructed the jury that the opening and closing statements of the attorneys are not evidence; specifically, during the Court's opening instructions, it stated:

as I told you earlier, you are the sole judges of the facts and it is your recollection of the evidence that you will hear and not mine, nor the lawyers, on which you must rely during your deliberations. You are not bound by the opinions you think counsel or I have expressed concerning the guilt or innocence of the Defendant, *credibility of the evidence*, or any other facts to be proven. Now even though the *statements and arguments of the lawyers are not binding on you and are not evidence*, you should consider them carefully. It is proper for you to be guided by the statements and arguments of the attorneys if they are supported by the evidence and appeal to your reason and judgment.

Tran., 10/13/10, pgs. 6-7. This language is nearly identical to the standard jury instructions suggested by the Pennsylvania Bar Institute.⁵ Almost immediately after these instructions were given, the prosecutor stated that Defendant's co-conspirator pleaded guilty to the charges. Supp. Tran., filed 8/20/12, pg. 2. Yet, no evidence was provided to support this statement. No other statements were made regarding Mr. Colon's plea throughout the rest of the trial. The Court has to presume that the jury followed its instructions. See *Chimel*, 30 A.3d at 1147; *Commonwealth v. Flor*, 998 A.2d 606, 632 (Pa. 2010).

⁵ Section 2.07 of the Pennsylvania Suggested Criminal Jury Instructions provide: "[y]ou should consider the statements and arguments of counsel carefully, even though they are not binding on you and are not evidence. You may be guided by them if the statements and arguments are supported by the evidence and appeal to your reason and judgment."

Therefore, based upon the Court's opening instructions, the failure of the prosecutor to present any evidence of the plea, and no subsequent mention of it throughout the trial, the Court does not believe that trial counsel's failure to request a curative instruction after the prosecution's opening statement was error; even if the failure may be deemed an error, it was a harmless error. Defendant's second ineffectiveness claim lacks arguable merit.

IV. Failure to Object to Prosecutor's Closing Statement

Defendant also alleges that his trial counsel was ineffective because she failed to object to the prosecutor's statements in closing argument that dealt with the credibility of the Commonwealth's confidential informant, Mr. Williams. Supp. Tran., filed 8/20/12, pgs. 22-24. During the prosecutor's closing statement, he talked generally about confidential informants and specifically about Mr. Williams. The prosecutor stated that when dealing with confidential informants in drug transactions, the Commonwealth has to work with individuals who tend to have criminal histories. *Id.* at 23. Additionally, the prosecutor provided that Mr. Williams wanted to be a "good citizen" and stop individuals, like the Defendant, from making a living off of people's bad habits. *Id.* at 23. The prosecutor also stated that Mr. Williams was not facing current charges, so he had no motive to come into Court and lie. *Id.* at 24. Defense counsel did not object during the prosecutor's closing statement. *See id.* at 16-25.

The Court believes that the prosecutor's comments in his closing argument properly addressed credibility issues raised by defense counsel. The crux of Defendant's closing argument was that the only evidence supporting the Commonwealth's charges was the uncorroborated testimony of Mr. Williams. Supp. Tran., filed 8/20/12, pg. 9. In her closing argument, defense counsel stated:

Mr. Williams was a Confidential Informant, he's not a reliable person and lying is part of his game. He got money out of the Government in exchange for his testimony but he is a criminal, he is a drug addict, and he's the Prosecution's best witness and you should expect more from our criminal justice system than Cedric Williams.

Id. at 9. During the latter part of her closing argument, defense counsel again provided to the jury that Mr. Williams is "not truthful." *Id.* at pg. 14.

In *Commonwealth v. Ragland*, 991 A.2d 336 (Pa. Super. Ct. 2010), *appeal denied*, 4 A.3d 1053 (Pa. 2010), our Superior Court outlined the well-established standard for prosecutorial misconduct in closing statements. *Id.* at 340.

The prosecutor is allowed to vigorously argue his case so long as his comments are supported by the evidence or constitute legitimate inferences arising from the evidence. In considering a claim for prosecutorial misconduct, our inquiry is centered on whether the defendant was deprived a *fair trial*, not deprived of a perfect one. Thus, a prosecutor's remarks do not constitute reversible error unless their unavoidable effect ... [was] to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict.

Id. at 340-41 (citing *Commonwealth v. Smith*, 985 A.2d 886, 907 (Pa. 2009)) (emphasis added).

Additionally, the Court must consider the prosecutor's statement in light of those arguments made in defense counsel's closing remarks. *Chimel*, 30 A.3d at 1146; *Ragland*, 991 A.2d at 341.

In determining whether the prosecutor engaged in misconduct, we must keep in mind that comments made by a prosecutor must be examined within the context of defense counsel's conduct. It is well settled that the prosecutor may fairly respond to points made in the defense closing. Moreover, prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair.

* * * * *

It is settled that it is improper for a prosecutor to express a personal belief as to the credibility of the defendant or other witnesses. However, *the prosecutor may comment on credibility of witnesses*. Further, a prosecutor is *allowed to respond*

to defense arguments with logical force and vigor. *If defense counsel has attacked the credibility of witnesses in closing, the prosecutor may present argument addressing the witnesses' credibility.*

Ragland, 991 A.2d 341 (citing *Commonwealth v. Chimel*, 889 A.2d 501, 544 (Pa. 2005)) (emphasis added). *See also Commonwealth v. Judy*, 978 A.2d 1015, 1020 (Pa. Super. Ct. 2009). Generally, a prosecutor's remarks during a closing statement will not constitute a reversible error unless the effects of the comments prejudiced the jury, fixing a bias or hostility against the defendant in their minds so that the jury could not weigh the evidence objectively. *Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa. Super. Ct. 2006), *appeal denied*, 907 A.2d 1102 (Pa. 2006) (citing *Commonwealth v. Jubilee*, 589 A.2d 1112, 1114 (Pa. 1991)) (affirming PCRA Court's finding that a prosecutor's comment during his closing argument that a third-degree murder conviction would be tantamount to an acquittal and putting the firearm back in the hands of the defendant was rhetorical flair and not reversible error). *See also Commonwealth v. Manley*, 985 A.2d 256, 269-70 (Pa. Super. Ct. 2009), *appeal denied*, 996 A.2d 491 (prosecutor's statement during his closing argument regarding the defendant smoking blunts was appropriate because it was in response to defense counsel's argument that the defendant's slurred speech and wobbly demeanor was a result of him consuming alcohol at a party); *Judy*, 978 A.2d at 1024 (prosecutor's comments as to the credibility of the defendant was not unfair or prejudicial when the outcome of the case was controlled by the witnesses' credibility).

In this matter, the prosecutor's closing remarks were made in response to defense counsel's closing remarks. The prosecutor says as much when he begins discussing Mr.

William's credibility.⁶ The prosecutor's closing argument was not of the nature to prejudice the jury by forming a fixed hostility toward Defendant. The Court finds that no error was committed and that the prosecutor's comments were not improper. Thus, Defendant's third claim of ineffectiveness must fail because it lacks arguable merit.

V. Cumulative Effect

Lastly, Defendant argues that the cumulative prejudicial effect of his trial counsel's errors affords him relief. In *Busanet*, our Supreme Court addressed the cumulative effect issue, stating:

[i]t is well-settled that no number of failed ineffectiveness claims may collectively warrant relief if they fail to do so individually. Accordingly, where ineffectiveness claims are rejected for lack of arguable merit, there is no basis for an accumulation claim.

54 A.3d at 75 (citations omitted). In this instance, this Court rejects all three of Defendant's ineffectiveness claims for lack of arguable merit. Therefore, pursuant to *Busanet*, Defendant's cumulative effect claim cannot stand.

VI. Conclusion

Based upon the foregoing, the Court finds no basis upon which to grant the Defendant's Amended PCRA Petition. As the Court finds that no purpose would be served by conducting any further evidentiary hearing, none will be scheduled. Pursuant to Pennsylvania Rules of Criminal Procedure 907(1), the parties are hereby notified of the Court's intention to deny the amended petition. The Defendant may respond to this proposed dismissal within twenty (20)

⁶ In the middle of his closing argument, the prosecutor stated: "[t]he Defense wants to beat up on the credibility of both the officers involved in this, as well as the informant, Mr. Williams, and she wants to say, well, they didn't, you know - - no fingerprints, no photographs, they didn't take any pictures, they didn't have video, they didn't have a wire on them." Supp. Tran., filed 8/20/12, pg. 22.

days. If no response is received within that time period, the Court will enter an Order dismissing the amended petition.

ORDER

AND NOW, this 7th day of January, 2013, Defendant is hereby notified that it is the Court's intention to dismiss his Amended PCRA Petition, unless he files an objection to that dismissal within twenty days (20) of today's date. This Opinion and Order will be served on Defendant as set forth in Pa. R. Crim. P. 907(1).

BY THE COURT,

Date

Richard A. Gray, Judge

RAG/abn

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