IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**
	:
vs.	**: No. CR-525-2012**
	:
WILLIAM J. KEMP,	**: PCRA**
Defendant	**:**

OPINION AND ORDER

Before the court is Defendant's Post-Conviction Relief Act (PCRA) Petition. Following a jury trial, on September 17, 2013, Defendant William Kemp was found guilty of, among other things, third degree murder, aggravated assault, recklessly endangering another person and possession of instruments of crime. On January 29, 2014, Defendant was sentenced to a term of imprisonment of 20 to 40 years.

Defendant filed a timely post-sentence motion which was denied on June 9, 2014. Defendant filed a timely appeal to the Pennsylvania Superior Court. On June 8, 2015, the Superior Court affirmed Defendant's judgement of sentence. Subsequently, Kemp filed a petition for allowance of appeal, which the Supreme Court denied on February 10, 2016.

On February 29, 2016, Defendant filed a pro se Post-Conviction Relief Act (PCRA) petition. Counsel was appointed and filed an Amended PCRA petition on June 7, 2016. Following argument, the court granted an evidentiary hearing on two of Defendant's claims. See Order dated October 22, 2016. The court denied an evidentiary hearing on the remaining claims.

The two claims were as follows: (1) whether trial counsel was ineffective for

failing to call character witnesses on Defendant's behalf; and (2) whether trial counsel provided ineffective assistance of counsel by opening the door through questioning of defense witness Kristin Smith, allowing the Commonwealth to introduce rebuttal testimony concerning Defendant's statements made during a December 2009 dependency hearing.

In analyzing claims of ineffective assistance of counsel, the court presumes that counsel was effective unless the PCRA petitioner proves otherwise. ***Commonwealth v. Cox***, 983 A.2d 666, 678 (Pa. 2009). In order to succeed on a claim of ineffective assistance of counsel, the petitioner must prove the following: (1) that the underlying claim is of arguable merit; (2) that counsel's performance lacked a reasonable basis; and (3) that the ineffectiveness of counsel caused the petitioner prejudice. ***Id;*** *see also* ***Commonwealth v. Fulton,*** 83 A.2d 567, 572 (Pa. 2003); ***Commonwealth v. Faurelus***, 147 A.3d 905, 911 (Pa. Super. 2016).

"Where the underlying claim lacks arguable merit, counsel cannot be deemed ineffective for failing to raise it." ***Commonwealth v. Jarosz***, 2016 PA Super 281, 2016 Pa. Super. LEXIS 757, *5 (December 13, 2016), citing ***Commonwealth v. Koehler,*** 36 A.3d 121, 140 (Pa. 2012). All three prongs must be proven and a petitioner's failure to prove any one prong results in the ineffectiveness claim being deemed without merit. ***Jarosz, id.; Commonwealth v. Daniels,*** 963 A.2d 409, 419 (Pa. 2009).

With respect to Defendant's claim that trial counsel was ineffective for failing to call character witnesses on Defendant's behalf, the court conducted an evidentiary hearing.

The first witness to testify was Gerald Zeidler. He testified that he is presently employed as a police officer in Bloomsburg where he has been so employed for a little over two years. Prior to that, he was employed as a police officer in Danville for approximately ten years. He has known Defendant as a friend for the past 20 years.

He and Defendant were former co-workers at Computer Land in Williamsport. They got to know each other as well as other individuals. He named numerous individuals who knew Defendant. Mr. Zeidler, many of the other co-workers and Defendant maintained their relationship over the past twenty years even after they stopped working at Computer Land.

With respect to Defendant's reputation in the community for truthfulness, both prior to and after the murder, Mr. Zeidler testified that Defendant's reputation was that he was "honest to a fault." According to Mr. Zeidler, all of Defendant's friends considered Defendant to be truthful and honest.

With respect to the reputation testimony regarding Kemp's honesty and truthfulness, the Commonwealth objected to such claiming that during the trial the Commonwealth did not attack Kemp's reputation for truthfulness or honesty. The court reserved its decision with respect to such. After review of the relevant controlling authority, the court agrees with the Commonwealth.

During the trial in this matter, Defendant was extensively cross-examined with respect to his version of the events. The Commonwealth clearly attacked Defendant's credibility with respect to said version. However, the Commonwealth did not attack

Defendant's community reputation for truthfulness generally. Additionally, Defendant's reputation for truthfulness was not pertinent to any of the underlying criminal offenses. Accordingly, Defendant's reputation for truthfulness and honesty would not be relevant or admissible.

"[W]here the prosecution has merely introduced evidence denying or contradicting the facts to which the defendant testified, but has not assailed the defendant's community reputation for truthfulness generally, evidence of the defendant's alleged reputation for truthfulness is not admissible." ***Commonwealth v. Kennedy***, 2016 PA Super 273, 2016 Pa. Super. LEXIS 734, *23 (December 6, 2016)(quoting ***Commonwealth v. Constant***, 925 A.2d 810, 823 (Pa. Super. 2007), overruled on other grounds, ***Commonwealth v. Minnis***, 80 A.3d 1047 (Pa. Super. 2014) (*en banc*)).

In other words, when truthfulness is not relevant to the underlying criminal offenses, a defendant may only call witnesses to testify as to his truthfulness when (a) he chooses to testify on his own behalf; and (b) the Commonwealth attacks the defendant's truthfulness through cross-examination or by other witness' testimony. ***Kennedy, id.*** (citing ***Commonwealth v. Minich***, 4 A.3d 1063, 1070 (Pa. Super. 2010)). While Rule 608 (a) of the Pennsylvania Rules of Evidence permits a testifying defendant to call witnesses to testify as to his truthful character whenever the Commonwealth attacks his general reputation for truthfulness during trial, Rule 404(A)(2)(a) permits a defendant to call a witness to testify as to his truthful character only when the defendant's reputation for truthfulness is pertinent to the underlying criminal offense.

Defendant does not argue that the Commonwealth attacked his general reputation for truthfulness and this Court's review of the record reveals no such attack on his general reputation for truthfulness. Accordingly, Defendant was not entitled to call witnesses to testify to his truthfulness. This does not, however, end the inquiry with respect to Mr. Zeidler. He also testified that Defendant had a universal reputation of being a nonaggressive and nonviolent person both before and after the murder charge.

After seeing a television news report about the murder, Mr. Zeidler visited Defendant at the Lycoming County Prison. They discussed Mr. Zeidler "being a character witness." During the trial, from September 9 through September 17, 2013, Mr. Zeidler would have been available to testify "depending on the day." He could not recall his work schedule. He did remember receiving a telephone call at one time from a representative of the defense team but never heard from that person again. He was not subpoenaed or asked to be present at trial and accordingly did not attend.

He did clearly indicate, however, that if he would have been subpoenaed he would have been present and even if he had not been subpoenaed he was willing to testify as long as there was no emergency at work requiring "all available law enforcement personnel" to be present.

He could not recall the specific date and time that he discussed his possible testimony with a member of the defense team but he did recall receiving a voicemail and then returning the call. He did end up speaking with, he believes, "Mr. Miele" but could not recall the entire conversation.

Regarding Defendant's reputation in the community for being a nonaggressive and nonviolent person, Mr. Zeidler was extensively cross-examined regarding specific alleged incidents of violence and aggression including but not limited to Defendant threatening to kill himself, Defendant threatening to harm someone, Defendant pulling a knife on someone at Wegmans, Defendant talking to a mental health professional for aggressive behavior, Defendant refusing to follow the directives of constables, Defendant slapping his wife in the face because she woke him up, Defendant allegedly slapping or choking Kristin Smith, and Defendant carrying a firearm because he did not want to get into a fight that he would not lose. Mr. Zeidler was not aware of any of these incidents or allegations.

Amy Embick next testified on behalf of Defendant. While she presently lives in New Mexico, prior to moving, she had lived in Clinton County for a large period of time. Defendant is her brother. Obviously, she knows people that know her brother and has known her brother his entire life. She described in detail all of her friends and acquaintances who also were friends or acquaintances of her brother.

She was permitted over the Commonwealth's objection to testify as to Defendant's reputation for truthfulness and honesty but consistent with this court's decision as set forth above, the court will not consider such.

She testified as well to Defendant's reputation in the community for being nonviolent and peaceful. She testified that "everybody I ever talked to said he was nonviolent." She added that his reputation for being nonviolent did not change after the

charges were filed.

Following the charges, she was not allowed by her husband to have any contact with her brother. Defendant did, however, contact her and asked her to testify as a character witness.

She recalled having both representatives of the Commonwealth and Public Defender's office speak with her regarding Defendant's reputation for violence or nonviolence. She did remember speaking with Bill Miele. After she ended up speaking with him, however, he never again contacted her. While she was not allowed by her husband to attend the trial, she would have testified if she was subpoenaed. She was not subpoenaed.

While her husband did not permit her to essentially "leave the house" and was both "abusive and controlling," he could not have stopped her from attending and testifying if she was subpoenaed.

With respect to Defendant's reputation for being nonviolent, she too was cross-examined regarding numerous specific incidents of alleged violence including the following: Defendant's threats to kill himself, Defendant's threats to blow his brains out, Defendant wanting to harm their mother, Defendant pulling a knife on a person at Wegmans, Defendant speaking with mental health professionals about threats, Defendant refusing to follow directives of the constable and refusing to "come out" to be arrested, Defendant slapping his wife, Defendant hitting and/or choking Kristen Smith, Defendant always carrying a gun, and Defendant indicating that he always carried a gun because he did not want to get into a fight he couldn't lose. She conceded on cross-examination that she was of

the opinion that her brother shot and killed the other individual because he had no choice. She noted that his reputation amongst his friends was that he would not do anything unless "he had to." She clarified that unless Defendant thought that he was threatened, that his kids were being threatened or that a family member was being threatened, he would not resort to violence.

Robert Cronin next testified. He is presently employed by Casale & Bonner practicing primarily criminal defense work. He had worked for the Lycoming County Public Defender's office from 2006 to 2010 and from 2012 to 2015. He and Bill Miele, the Chief Public Defender, were co-counsel for Defendant in connection with the murder and related charges.

He noted that the defense focus was first self-defense and alternatively heat of passion for voluntary manslaughter. He conceded that Defendant's reputation for truthfulness was not "as much an issue" although Defendant's reputation for being non-violent and peaceful was "a concern" and directly related to Defendant's claim of self-defense. Prior to trial, Mr. Cronin met with Defendant on numerous occasions. Among other things, they discussed character witnesses. Defendant wanted to call character witnesses and gave to Mr. Cronin specific names and as much contact information as "he could."

Mr. Cronin did not recall being told that Defendant's sister Amy Embick was willing to testify although he did speak with Mr. Zeidler. According to Mr. Cronin, Mr. Zeidler indicated that he was not willing to testify because of his employment as a police officer and "did not want to get involved." According to Mr. Cronin, Mr. Zeidler would not

cooperate and accordingly, it was decided not to even attempt to utilize him as a character witness.

In fact, the defense decided not to call any character witnesses for two reasons. First, it would open the door to specific instances of violence which the defense wanted to keep out and second, a majority if not all of the proposed character witnesses were "not valid character witnesses." In other words, they could testify as to their own impressions but not as to Defendant's reputation in the community.

Mr. Cronin recalls speaking to Defendant about this "trial strategy" not to call character witnesses. He recalls Defendant noting that he had faith in "our defense" and that he would "listen" to his attorneys.

In explaining the opening of the door to specific instances of violence, the defense team was particularly concerned that if reputation witnesses were called, they could be cross-examined regarding Defendant: pulling a knife for no valid reason; regularly carrying a gun; having a permit to use a gun; carrying the gun because he did not want to get into a fight that he might lose; getting into incidents his mother; and using a weapon in a public place against an unarmed person. Mr. Cronin explained that if all of these specific incidents were brought out before a jury, the defense was extremely concerned that Defendant "was likely to get convicted of first degree murder." These incidents showed, in Mr. Cronin's opinion, a specific propensity for violence.

Further and on cross-examination, Mr. Cronin admitted that there were numerous other incidents that may have been admitted and which would have clearly been

detrimental to Defendant including, but not limited to, Defendant making suicidal threats, Defendant threatening to blow his brains out, Defendant wanting to harm his mother, Defendant talking to mental health workers regarding incidents and threats, Defendant slapping his wife and the Defendant choking Kristen Smith. As a supplement, the Commonwealth introduced numerous police reports as exhibits all referencing alleged acts of violence by Defendant.

While Mr. Cronin was unsure that all of the proffered bad acts evidence would come in, he knew that much of it would and that for strategic purpose the defense was not willing to risk calling any character witnesses. He was concerned that calling character witnesses would open the door and essentially lead to a first degree homicide conviction.

Defendant testified on December 2, 2016. He testified that he and Mr. Cronin specifically talked about character witnesses soon after Mr. Cronin became involved. At first Mr. Miele and Ms. Longo were representing Defendant and then Mr. Cronin took over for Ms. Longo. According to Defendant, "it was an ongoing discussion between" them and his attorneys "were aware of [it] for the duration."

He provided to his attorneys on an ongoing basis, names and some contact information for character witnesses. He "absolutely" wanted to utilize character witnesses.

He noted that at the "onset of trial" his attorneys were concerned about calling character witnesses in that the "Children & Youth stuff" would come out. During trial, character witnesses were not called and according to Defendant, this was "a very sore point." It was his understanding that the decision was made not to call character witnesses because

of the concern that the Children & Youth statements would come in. The “only reason” his counsel ever gave him for not calling character witnesses was “the potential admission of the 2009 Children & Youth statements.”

Failing to call character witnesses may have arguable merit because character evidence in and of itself can raise reasonable doubt in a jury’s mind, and may be the only evidence available to a defendant in some cases. ***Commonwealth v. Luther***, 463 A.2d 1073, 1077 (Pa. Super. 1983).

In this case, however, the court finds that defense counsel had a reasonable basis for not calling the character witnesses. By calling the witnesses for peacefulness and nonviolence, Defendant would have opened the door not only to the statements at the 2009 Children and Youth hearing but a host of other specific instances of violent conduct by Defendant. As the Commonwealth did during cross-examination of the character witnesses during the PCRA hearing, quite effectively, each of the character witnesses would have been questioned regarding close to if not more than ten specific incidents of violent and non-peaceful behaviors by Defendant.

It was certainly reasonable for defense counsel to want to avoid such. As Mr. Cronin testified, Defendant was facing a first degree homicide charge. The strategy was to hopefully obtain an acquittal based on self-defense or, at the most, a voluntary manslaughter conviction. Opening the door would expose the jury to evidence extremely prejudicial to Defendant. While it was a close call, this court cannot say that it was an unreasonable call.

Further, the court cannot conclude that Defendant was prejudiced by trial counsel's failure to call character witnesses. The failure to call witnesses was part of counsel's overall trial strategy and the court cannot conclude that if the character witnesses had been called, it is likely that the jury verdict would have been different.

The next issue concerns Defendant's contention that trial counsel provided ineffective assistance by opening the door through questioning of defense witness Kristin Smith, which allowed the Commonwealth to introduce rebuttal testimony concerning the Defendant's statements made during the December 2009 dependency hearing.

Kristin Smith testified on September 16, 2013. Defendant had previously been her boyfriend. They were together for three years, including on the date of the incident on February 13, 2012. (Trial Transcript, September 16, 2013, p. 3).

During her testimony, she was asked by defense counsel whether she was aware that there was a firearm in Kemp's SUV. She indicated that she was so aware. She was then specifically asked: "Do you know why he kept it in the SUV?" She answered "I didn't want it in my house." (Trial Transcript, September 16, 2013 pp. 9-10). She elaborated further that Defendant "always had the firearm" and that "it had been in the vehicle for quite a while." (Trial Transcript, September 16, 2013, p. 10).

Upon cross-examination, the Commonwealth asked Ms. Smith: "Okay, now you had indicated that the only reason why the gun is not in the house is because you wouldn't let the gun in the house, and he never did anything that would lead you to believe that he would use it in the commission of a crime; is that right?" To which Ms. Smith

answered "correct." (Trial Transcript, September 16, 2013, p. 14).

Subsequently, over Defendant's objection, the court held that defense opened the door to Kemp's prior statements from a dependency hearing. The court permitted the Commonwealth to present testimony that when asked why he carried a gun, Defendant stated that he did not have any desire to get into a fight that he could not win and what was the point of having guns and the permit to carry if [he was] not going to use it.

More specifically, the Commonwealth was permitted to introduce statements Defendant made at a September 2009 dependency hearing on a petition filed by the Clinton County Children & Youth Services, at which Defendant, explaining why he carries a gun and knife, stated "well, honestly, because I have a right to; and I feel like I should exercise [it]. And what's the point in having the guns and the permit to carry if you are not going to make use of it…if I don't have the .45 on my hip, I would have a knife in my pocket at almost all times."

The court specifically permitted the Commonwealth to introduce the challenged statements to rebut Ms. Smith's testimony. Ms. Smith testified that Defendant kept a gun in his car because the weapon was not permitted in her residence. The court reasoned that this testimony opened the door for the Commonwealth to rebut this evidence with Defendant's own statements about why he kept a gun in the vehicle. The Superior Court on appeal found no abuse of discretion in this court's determination that Defendant's prior statements were permissible to rebut the inference that if Ms. Smith had permitted Defendant's gun to be kept in her house, Defendant would not have kept the gun with him in

the car. (Superior Court Opinion, p. 15).

Mr. Cronin during trial was acutely aware of the fact that the Commonwealth wanted the Children & Youth statements to come in. Indeed, the Commonwealth vehemently argued previously during the trial, that Defendant had opened the door or that the statements should come in for other reasons. The court rebuffed the Commonwealth attempts and precluded the testimony.

Mr. Cronin testified that when he was questioning witnesses, he was "on eggshells so as not to open the door." When he called Ms. Smith and asked her the question regarding why Defendant kept the gun in the SUV, his purpose was to elicit testimony that Defendant did not "intend to kill or employ the gun criminally." Mr. Cronin explained that it went to either his self-defense or heat of passion arguments. He did not believe that it opened up the door. Obviously, both this court and the Superior Court disagreed.

In further explaining his reasoning, Mr. Cronin argued that he wanted testimony to show that the gun was always kept in the car and that when Defendant left the house that night, he did not leave with any criminal intent. He was concerned that the Commonwealth would argue that Defendant left with the gun in his car and that by doing so he intended to use it in any confrontation. Again, Mr. Cronin was particularly concerned about a first degree conviction.

While not believing that it would open the door, only "get me to the door without opening it", Mr. Cronin evaluated which was the higher priority. Specifically, keeping out the statements or causing reasonable doubt with respect to Defendant's intent.

Further, in retrospect, Mr. Cronin argued that the statements were not that harmful and did not "ultimately lead" to the conviction. He noted that Mr. Miele ably addressed the statements in his closing arguments and in Mr. Cronin's opinion "overcame any prejudice."

The Pennsylvania Supreme Court has concluded that "counsel's chosen strategy lacked a reasonable basis only if the petitioner proves that the alternative strategy not selected offered a potential for success greater than the course actually pursued." ***Commonwealth v. Elliott***, 80 A.3d 415, 427 (Pa. 2013).

"Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that has some reasonable basis designed to effectuate his client's interest." ***Commonwealth v. Colavita***, 993 A.2d 874, 887 (Pa. 2010). "A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." ***Id.***

Although trial counsel opened the door to the admission of Defendant's statements from the 2009 dependency hearing, the court cannot find that Defendant is entitled to a new trial as a result thereof.

First, counsel had a reasonable, strategic basis for his actions. Defendant was charged with an open count of homicide, and the District Attorney was strenuously advocating for a first degree murder conviction. Trial counsel wanted to show that Defendant did not intentionally take the gun and place it in his vehicle before driving Ms.

Radcliffe to her residence at 1017 Franklin Street. Counsel's first priority was making sure Defendant was not convicted of first degree murder.

Second, the jury could reasonably interpret the statements as Defendant possessed the gun and knives for self-defense. As the court noted in its decision on the motion in limine, Defendant indicated that he had the right to carry guns, he had a permit to carry guns, and he carries guns because of concerns about being attacked. Furthermore, in the statement "what's the point in having the guns and the permit to carry if you're not going to use it," the phrase "if you're not going to use it" referred to using the permit to carry guns in his vehicle and on his person, and not using the guns to murder people.

Third, the statements were introduced for limited purposes, i.e., to show other or additional reasons why Defendant had the gun in his vehicle, to evaluate the credibility of Kirstin Smith's testimony, and to rebut the inference that the only reason Defendant had the gun in the vehicle that night was because Ms. Smith would not permit him to keep the gun in their apartment. The statements were not admitted to show Defendant's intent or malice and were not utilized in that manner at trial. In fact, the District Attorney did not even mention these statements in his closing argument.

Defendant also did not meet his burden to show that he was prejudiced by counsel's actions. "To show prejudice the petitioner must demonstrate that there is a reasonable probability that, but for counsel's alleged unprofessional conduct, the result of proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Commonwealth v. Johnson***, 139 A.2d 1257,

1284 (Pa. 2016).

The court's confidence in the outcome of this case has not been undermined. There were multiple, independent third party witnesses who testified that the victim and Mr. Updegraff were not chasing or attacking Defendant when he retrieved his firearm and went back onto the property to shoot the victim.

Malcolm Erb, who lived next door, testified that he heard Mr. Updegraff yelling at Defendant to get the f--- out of his house and off his property and he heard another voice say "I'm not going f---ing anywhere." He looked out his window and saw Mr. Updegraff stop at the rear corner of the van in the driveway, the victim stop about 15 feet past the van and Defendant walking toward his Durango. Mr. Updegraff and the victim were not chasing Defendant and Mr. Erb did not see them display any weapons. Once Defendant reached his Durango, Mr. Erb thought it was over; he thought Defendant would get into his Durango and go home. Instead, Defendant grabbed a gun from his vehicle, turned and started shooting toward the people in the driveway. Mr. Erb did not see anybody touch Defendant. (N.T., 9/10/13, at 71-80).

Randee Halstead and her son lived across the street. They initially thought the first two shots were fireworks. When they looked outside, however, they saw Defendant and the victim facing each other and standing five or six feet apart. They heard a third shot and saw the victim fall to the ground. They did not see Defendant and the victim arguing, fighting, struggling, or charging at each other. (N.T., 9/10/13, at 101-105, 126-129).

Brenda Dunkleburger also lived across the street from 1017 Franklin Street.

She heard a lot of yelling and screaming and went to her window. She saw three people in the driveway. Two of them, Mr. Updegraff and Defendant, were pushing and shoving each other next to the van. There was no punching or kicking and no one was being beaten. She did not see Mr. Updegraff or the victim in possession of a knife, gun or any other weapon. She saw Mr. Updegraff and the victim escort Defendant off of the property and then head back toward the house. She thought the incident was over and Defendant was going to leave. All of a sudden she heard gunshots. She looked and saw the flash of a muzzle. Defendant was shooting up the driveway. At the time Defendant fired the shots, neither Updegraff nor the victim were physically or verbally threatening him. She did not see or hear anything that would lead her to believe Defendant was in fear for his life. (N.T., 9/10/2013, at 158-172).

The physical evidence also supported the testimony of the Commonwealth's witnesses. The location of the shell casings and bullet marks supported the neighbor's and Mr. Updegraff's testimony that Defendant fired two shots as he returned onto the property, he shot the victim twice -once in the neck and once in the back of the head, and he fired another shot before he was disarmed. The lack of blood inside the residence supported Mr. Updegraff's testimony that he did not beat up Defendant inside the residence, but rather that he pushed or grabbed Defendant and then escorted him outside. The location of the blood outside the residence supported Mr. Updegraff's testimony that Mr. Updegraff punched and kicked Defendant to wrest the gun from Defendant's hands after Defendant shot the victim.

Furthermore, Defendant's own testimony undercut his self-defense claims. He escaped from the residence and made it safely back to his vehicle. (N.T., 9/16/2013, at

64-65.) He did not know how he ended up back on the property. (Id. at 153, 157). He claimed that he "ascertained" the situation before firing his weapon, but he testified that he did not see either the victim or Mr. Updegraff in possession of any weapon. (See id. at 71, 73, 88). Though Defendant testified that he could not find his car keys to drive away, he just didn't think about running away on foot from 1017 Franklin Street toward Washington Boulevard. (Id. at 64).

Finally, the court found that the facts of this case did not support a jury instruction for voluntary manslaughter based on "heat of passion" and this ruling was upheld in Defendant's direct appeal.

Under all of the facts and circumstances of this case, even if defense counsel had not opened the door to the introduction of Defendant's statements at the 2009 dependency hearing, there is not a reasonable probability that the outcome of these proceedings would have been different. Therefore, Defendant was not prejudiced by counsel's actions, and he is not entitled to a new trial.

Accordingly, the following order is entered.

ORDER

AND NOW, this 15th day of March 2017, for the reasons set forth in this opinion and the opinion entered on October 24, 2016, the court DENIES Defendant's Post Conviction Relief Act (PCRA) petition.

Defendant is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal

with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. The form and contents of the Notice of Appeal shall conform to the requirements set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Defendant may lose forever his right to raise these issues.

The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By The Court,

____
Marc F. Lovecchio, Judge

cc: CA
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