

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

<b>COMMONWEALTH</b>	:	<b>No. CR-452-2010</b>
	:	<b>CR-1294-2010</b>
<b>vs.</b>	:	<b>CR-1148-2013</b>
	:	
	:	<b>Notice of Intent to Dismiss Defendant's</b>
<b>CHRISTOPHER SCHENCK,</b>	:	<b>PCRA Petition Without Holding</b>
<b>Defendant</b>	:	<b>An Evidentiary Hearing and</b>
	:	<b>Order Granting Counsel's Motion to</b>
	:	<b>Withdraw</b>

**OPINION AND ORDER**

This matter came before the court on Defendant's Post Conviction Relief Act (PCRA) petition.

By way of background, under docket 452-2010 Defendant was charged with theft by unlawful taking and receiving stolen property. On July 15, 2010, Defendant pled guilty to theft by unlawful taking and was sentenced to six (6) months' supervision under the Intermediate Punishment Program to be served consecutively to the sentence he was serving under docket 270-2009. Defendant did not file any post-sentence motions or an appeal.

Under docket 1294-2010, Defendant was charged with two counts of forgery. On September 27, 2010, Defendant pled guilty to both counts and was sentenced to twenty-four (24) months' supervision under the Intermediate Punishment Program on each count to be served concurrently to each other but consecutively to any sentences Defendant was currently serving. Defendant did not file any post-sentence motions or an appeal.

Subsequently, under docket 1148-2013, Defendant was charged with aggravated assault of a child, endangering the welfare of children, simple assault of a child and recklessly endangering another person. A jury convicted Defendant of these charges on

April 15, 2015.

On June 30, 2015, Defendant was sentenced under docket 1148-2013, and his Intermediate Punishment sentences were revoked and he was re-sentenced under dockets 452-2010 and 1294-2010. The court imposed an aggregate sentence of thirteen (13) to thirty-one (31) years' incarceration in a state correctional institution.

On July 7, 2015, Defendant filed a post-sentence motion that listed all three docket numbers, but the only relief sought was a new trial or judgment of acquittal with respect to his convictions under docket 1148-2013. The court denied Defendant's post-sentence motion in an Opinion and Order entered on September 3, 2015.

On October 2, 2015, Defendant filed a notice of appeal that listed all three docket numbers. On appeal, Defendant challenged the weight and sufficiency of the evidence to support his convictions under docket 1148-2013. In a memorandum decision filed on August 30, 2016, the Pennsylvania Superior Court affirmed Defendant's judgment of sentence. Defendant filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on February 7, 2017.

On August 28, 2017, Defendant filed a *pro se* PCRA petition. In his petition, Defendant asserted two claims of ineffective assistance of counsel: (1) trial counsel was ineffective for failing to raise in his post-sentence motion a claim of inconsistent statements of a Commonwealth witness; and (2) appellate counsel was ineffective for failing to raise during direct appeal a claim that the trial court erred in failing to allow cross-examination of a Commonwealth witness. These claims related solely to Defendant's convictions under docket 1148-2013.

As this was Defendant's first PCRA petition and he was indigent, the court appointed counsel to represent Defendant and directed counsel to file either an amended PCRA petition or a "no merit" letter pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988)(en banc). Counsel filed a motion to withdraw which included a *Turner/Finley* no merit letter.

After an independent review of the record, the court also finds that Defendant is not entitled to relief.

The PCRA is the sole means of obtaining post-conviction collateral relief in this Commonwealth. 42 Pa. C.S.A., § 9542. Counsel is presumed to have rendered effective assistance and the burden is on the PCRA petitioner to prove otherwise. *Commonwealth v. Treiber*, 121 A.3d 435, 445 (Pa. 2015); *Commonwealth v. Philistine*, 53 A.3d 1, 10 (Pa. 2012). To do so, the petitioner must show that (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. Spatz*, 84 A.3d 294, 311 (Pa. 2014).

Defendant first asserts that trial counsel was ineffective for failing to raise in his post-sentence motion the claim of inconsistent statements of Commonwealth witness, Leigh McCarty. The court finds that Defendant is not entitled to relief on this claim.

This claim lacks arguable merit. Trial counsel brought out the witness's allegedly inconsistent statements during his cross-examination of the witness. Trial Transcript, April 13, 2105, at 111-113, 119-123, 125-127, 131-133. Trial counsel also argued those inconsistencies in his closing argument to the jury. Trial Transcript, April 14, 2015, at 54-57. It was within the jury's province, as fact-finder, to weigh the evidence,

determine the credibility of witnesses and believe all, part, or none of the evidence presented. *Commonwealth v. Sanchez*, 623 Pa. 253, 82 A.3d 943, 972 (2013). It is only when the evidence is so inconsistent or irreconcilable that the verdict shocks one's sense of justice that inconsistent statements justify a new trial. *See Commonwealth v. Hawkins*, 549 Pa. 352, 701 A.2d 492, 501 (1997). In other words, the jury was permitted to believe Ms. McCarty's testimony unless her testimony was so inconsistent as to render the verdict against the weight of the evidence.

Although trial counsel did not use the express phrase "inconsistent statements" in his post-sentence motion, counsel asserted in Defendant's post-sentence motion claims that the evidence was insufficient and the verdict was against the weight of the evidence. These claims were based, at least in part, on the witness's allegedly inconsistent statements regarding the bruises that were present before she left the child in Defendant's care. Both this court and the Superior Court rejected these claims for judgment of acquittal and a new trial. The inconsistencies in the witness's testimony were relatively minor. Furthermore, the inconsistencies were explained at least somewhat by the fact that Ms. McCarty was interviewed by the police before she saw all of the child's injuries, as the child was covered when she first saw him at the hospital. Trial Transcript, April 13, 2015, at 92.

Defendant also did not suffer prejudice. Even if trial counsel had specifically asserted a claim related to the inconsistent statements of Ms. McCarty, Defendant would not have been entitled to a judgment of acquittal or a new trial. Both this court and the Superior Court found that the evidence presented overwhelmingly established Defendant's guilt.

Defendant also complains that trial counsel never asked Ms. McCarty which

statement was true. It is apparent from the record, however, that trial counsel did not want the jury to believe Ms. McCarty at all. He wanted the jury to find that the child was injured the night before when Ms. McCarty left the child alone in the bathtub.

In law school, attorneys are taught not to ask one question too many. Asking Ms. McCarty which statement was true would be asking one question too many. It would give Ms. McCarty the opportunity to explain away any inconsistencies in her statements and squarely place the blame for the child's injuries on Defendant.

Defendant also contends that appellate counsel was ineffective for failing to appeal the trial court's failure to allow counsel to cross-examine Ms. McCarty regarding her habit of leaving the child alone in the bathtub. Defendant notes that appellate counsel included this issue in the concise statement of errors on appeal, but he did not pursue the issue before the Superior Court.

The court finds that this issue lacks merit. Evidence is relevant if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact. *Commonwealth v. Weakley*, 972 A.2d 1182, 1188 (Pa. Super. 2009). The court found that, absent evidence that leaving the child unattended caused injury to the child, the evidence was not relevant; it was only an attempt to smear the witness's reputation as a mother. Trial Transcript, April 13, 2015, at 134. "Evidence that is not relevant is not admissible." Pa. R. Evid. 402.

Even assuming for the sake of argument that the court erred, Defendant was not prejudiced, because several questions on this subject matter were asked and answered before the prosecutor objected.

On cross-examination, defense counsel was permitted to ask the following series of questions:

Q. All right. When you put [the child] in the bathtub at this period of time isn't it true that you would leave [him] alone in the tub?

A. Yes.

Q. You would put water in the bathtub and put your two, two-and-a-half-year-old child in the tub with water, correct?

A. Yes.

Q. And then leave him there, correct?

A. I could still see him where I was standing.

Q. You left him in the tub by himself?

A. I could still see him, but he was by himself.

Q. So you would stand somewhere outside of the bathroom leaving him alone in the tub but where you could observe him?

Trial Transcript, April 13, 2015, at 133-134.

At this point, the Commonwealth objected to the relevance of the question and the parties approached sidebar. The court asked how the evidence was relevant. Trial counsel argued that the injuries were caused accidentally and, from an alternative perpetrator standpoint, he was entitled to get into the idea of whether the child was left alone unsupervised in the bathtub. The court asked where was the proof that leaving the child alone in the tub caused injury to the child. The court indicated that it would agree with defense counsel if there was evidence that the child was somehow hurt when Ms. McCarty left the child unattended in the bathtub. Trial counsel indicated that he would substantiate it through the Commonwealth's expert who would state that "it's dangerous." The court found

the fact such a practice was dangerous didn't advance the inquiry. It would only throw out a suspicion and be speculative at best without additional evidence that the child was injured as a result of being left unattended. When the discussion at sidebar had concluded, the court sustained the objection on the record and told counsel he could move on to another line of questioning.

The court did not strike any of the questioning or the witness's answers prior to the prosecutor lodging his objection. Therefore, the jury was aware that the witness left the child unattended in the bathtub the night before he was taken to the hospital with multiple injuries, and Defendant did not suffer any prejudice as a result of counsel not being permitted to ask essentially the same question a second time.

Furthermore, the Commonwealth presented ample evidence to show that the child's injuries occurred after his mother left for work and were not caused as a result of the various accidental explanations Defendant gave to the police, emergency responders, and the medical staff at Geisinger Medical Center. The downstairs neighbors testified about loud thumping and banging they heard coming from upstairs between the hours of 7:00 and 10:00 a.m. Dr. Paul Bellino, one of the Commonwealth's expert witnesses, testified that the child's injuries could not have been caused by accidentally hitting his head in the bathtub, falling down steps, or tripping or falling and hitting his head on a carpeted floor, which were Defendant's various explanations for the child's injuries. Trial Transcript, April 13, 2015, at 226-231, 239-242.

Defendant was not prejudiced because further inquiry on this topic would not have changed the outcome of the trial.

**ORDER**

AND NOW, this \_\_\_\_ day of March 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this Court's intention to dismiss Defendant's PCRA petition without holding an evidentiary hearing. 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.

Since the court has found that Defendant's petition lacks merit, the Court also grants counsel's motion to withdraw. Defendant may represent himself or hire private counsel, but the court will not appoint counsel to represent Defendant further in this matter.

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
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