IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-0001662-2012**
	:	**CP-41-CR-0001990-2013**
vs.	**:**	
	:	**CRIMINAL DIVISION**
	:	
KENNETH MARTIN,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This Opinion is written in support of the court's denial of the PCRA petition filed by Appellant, Kenneth Martin.

The factual background of the case was set forth by the Superior Court in its Opinion filed on June 6, 2018:

> Appellant and Noor Ford were acquaintances. Mr. Ford had been selling heroin for Appellant and owed him approximately $1,000.00. On June 19, 2012, Mr. Ford was staying in Room 214 at the Econo Lodge in Williamsport, Pennsylvania. Around 11:00 a.m., Appellant and two other men entered Mr. Ford's room without permission. Appellant aimed a semi-automatic pistol at Mr. Ford and threatened to shoot him unless Mr. Ford produced the money owed.
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> When Mr. Ford replied that he did not have any money, Appellant pistol whipped Mr. Ford and knocked him over. Appellant's companions began to punch and kick Mr. Ford, eventually knocking him unconscious. The three men ransacked Mr. Ford's room, stealing money, heroin, an X-box video game console, backpack, duffel bag and Mr. Ford's phone. Video surveillance from the Econo Lodge showed Appellant and two other men leaving with the duffel bag and a backpack.
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> One of the assailants took photographs of Appellant punching Mr. Ford in the head during the assault and of Mr. Ford's

swollen and bloody face after the incident. The images were then posted to social media accounts with suggestions that Mr. Ford had been beaten due to a drug debt.

Mr. Ford called a friend, who assisted him in reaching a hospital. Hospital personnel treated his injuries and contacted the police. Trooper Tyson Havens had known Mr. Ford for a few years prior to this June 2012 incident. Prior to going to the hospital, Trooper Havens went to the Econo Lodge to view the room where Mr. Ford was assaulted and saw the blood splatter and layout of the room. Trooper Havens also viewed the surveillance footage from the Econo Lodge, which enabled him to identify two of the assailants as Terrence Forsythe, also known as "Tee Pain", and Michael Wills.

Next, Trooper Havens visited Mr. Ford in the hospital. Mr. Ford told Trooper Havens that he was "struck with a pistol, punched and kicked by an individual named Snoop, by an individual named Dark, and by a third individual whose name he did not know." Mr. Ford also gave Trooper Havens the number for his stolen iPhone. This number was used to post photographs of the assault on Instagram.

During a second interview with police, Mr. Ford described the assailant he knew as "Snoop", to be a man with the number "13" tattooed between his eyes. Based on the description of the tattoo, Trooper Havens was able to identify "Snoop" as Appellant. During a third interview, Mr. Ford signed a statement typed by Trooper Havens after making several redactions out of fear for his safety because of threats from Appellant.

During the course of the investigation, Helena Yancey, the mother of one of Mr. Ford's children, informed Mr. Ford that photographs of the assault had been posted on Instagram. Mr. Ford informed Trooper Havens, who requested Ms. Yancey forward screenshots of the photographs to him. Upon further investigation, Trooper Havens determined that numerous Instagram accounts had posted or commented on the photographs. Using this information, Trooper Havens secured a court order to obtain from Instagram the images and comments posted, as well as all relevant account information. Instagram complied with the court order, providing a zip drive containing the photographs and account information along with the certificate of authenticity.

In September 2012, Mr. Ford failed to appear at the

scheduled preliminary hearing. As a result, the Commonwealth asserted that Mr. Ford was unavailable as a witness and sought to introduce his statements made to the police. The Commonwealth further asserted that Appellant waived his right to confront the witness because he was responsible Mr. Ford's unavailability. The trial court did not rule from the bench but indicated that an order would issue later that day. Thus, the hearing was continued. No such order appears in the record. Nevertheless, five days later, the hearing continued, and the court referenced its prior ruling on Mr. Ford's unavailability and permitted the Commonwealth to introduce statements made by Mr. Ford to the police.

At the conclusion of the hearing, the trial court held for court all of the charges except for burglary. In June 2013, the Commonwealth refiled the burglary charges at docket No., CP-41-CR-0001990-2013. Prior to a second preliminary hearing on the burglary charge, Mr. Ford was located and held on a material witness warrant. The burglary charge was held for court, and the trial court granted the Commonwealth's motion to consolidate the charges against Appellant.

At a hearing held in March 2014 to address an omnibus motion filed by Appellant, Mr. Ford testified that he could not remember the assault or any statements made to Trooper Havens. The trial court admitted the statements given to Trooper Havens over Appellant's standing objection. At the conclusion of the hearing, the court stated that it would review the evidence and issue an opinion.

In its opinion, the trial court stated that:

> The Commonwealth first argues that this court is bound … to the coordinate jurisdiction rule. The coordinate jurisdiction rule provides that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions. Departure from this principle, however, is allowed "in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or the evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed."
> Here, there was a change in the facts or evidence giving rise to the dispute in the matter. When Judge

Butts made her forfeiture by wrongdoing ruling, Mr. Ford was not available for the preliminary hearing because he could not be located. The Commonwealth presented audio and written statements from Ford and testimony from Trooper Havens that Ford left town and refused to disclose his whereabouts because he was concerned for his safety and the safety of his family. Ford has since been located and detained on a material witness warrant. The Court finds that this is a sufficient change in the facts to justify a reexamination of the forfeiture by wrongdoing ruling. Despite this change in the facts, however, the court reaches the same conclusion. Although Ford was physically present to testify, he allegedly could not remember any of the conversations or statements he made to Trooper Havens. …

… It was apparent to the court that Ford was feigning a lack of memory to avoid admitting anything in Appellant's presence. In fact, in several of the previous written and recorded statements Ford specifically asked Trooper Havens if the statements would be disclosed to Appellant. Notably, Ford never denied making the statements that Trooper Havens had attributed to him.

Despite Ford's claim of lack of memory, he admitted that his signature was on the letter admitted as Commonwealth's Exhibit 4. This letter states in relevant part: "You expect me to testify on your behalf then get shipped to a Philly jail where Im [sic] told more then [sic] once someone will get to me? This is where doing the right thing can depend on how you view things...

This letter was also consistent with and similar to recorded statements Mr. Ford made to Trooper Havens and Williamsport Bureau of Police Agent Stephen Sorage, as well as another letter that was sent to Judge Butts, which the Commonwealth submitted as exhibits through a motion to reopen the record…

As a whole, the evidence presented by the Commonwealth established forfeiture by wrongdoing to a preponderance of the evidence. In light of this ruling, Mr. Ford's statements are not considered hearsay and are admissible pursuant to Pa.R.E. 804(b)(6).

Thus, the court found that there had been forfeiture by wrongdoing and the statements of Mr. Ford were admissible. The court denied Appellant's motion.

In June 2015, trial commenced before the Honorable Dudley N. Anderson. However, there were several disruptive incidents involving supporters of Appellant that made jurors sufficiently uncomfortable that a mistrial was declared. A new trial was scheduled before the Honorable Michael J. Williamson, but on the day before it was to begin, this case was reassigned from Judge Williamson to the Honorable Marc F. Lovecchio. As a result of the sudden reassignment, prior to trial, Appellant presented an oral motion to dismiss, alleging improper ex parte communication between the prosecutor's office and President Judge Nancy L. Butts. According to Appellant, he was prejudiced by the removal of Judge Williamson.

On the day of trial, the court conducted a hearing on the motion and permitted Appellant to call District Attorney Eric Linhardt to testify. He testified that he was:

> concerned about his -- at best I would describe it as unprofessional conduct during those three trials [earlier in the week] and what I believed was possible judicial misconduct, that I felt I had a responsibility to let the president judge know about that … I didn't ask that he be reassigned to other criminal cases. I just asked that he not preside over any more cases in the county because I didn't think it was appropriate that he was presiding over trials.

Following the hearing, the trial court denied the motion, concluding that the Appellant's assertions of prejudice were merely speculative.

The Commonwealth then proceeded on its motion to have Mr. Ford again declared unavailable as a result of Appellant's wrongdoing. The parties agreed that Mr. Ford could testify in the presence of the jury. Mr. Ford stated he could not remember the assault. Thus, Judge Lovecchio again found that Mr. Ford was unavailable. The court found further that Appellant had forfeited his right to cross-examine Mr. Ford because of his own wrongdoing. The trial court then permitted the Commonwealth to introduce Mr. Ford's prior oral and written statements.

Following the trial, the jury convicted Appellant of [burglary, two counts of robbery, two counts of conspiracy,

> aggravated assault, criminal trespass, terroristic threats, theft, receipt of stolen property, simple assault, and recklessly endangering another person.] On July 7, 2016, Appellant was sentenced to four and one-half to ten years of incarceration for burglary, followed by a consecutive sentence of three to ten years for one count of robbery, for an aggregate sentence of seven and one-half to twenty years of incarceration. Appellant timely filed a post-sentence motion, a supplemental post-sentence motion, and additional motions for bail and modifications of bail.

1962 MDA 2016, at 1-10 (footnotes and citations to the record omitted).

Appellant timely appealed. On appeal, Appellant asserted that (1) the trial court erred in permitting a witness to testify before a jury and subsequently rule the witness was unavailable; (2) the trial court erred substantively in determining that Appellant had forfeited his right to confrontation by wrongdoing; (3) the trial court erred in denying Appellant's motion to dismiss based upon prosecutorial misconduct when the district attorney contacted the president judge to have a judge removed from hearing a case; and (4) the trial court erred in permitting lay testimony concerning Instagram and its authenticity. In its decision filed on June 26, 2018, the Superior Court rejected Appellant's claims and affirmed his judgment of sentence. Appellant filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on December 26, 2018.

Appellant filed his first uncounseled PCRA Petition on February 25, 2019. The court appointed counsel to represent Appellant, but he subsequently retained private counsel who filed amended petitions, witness certifications and amended witness certifications on his behalf on June, 28, 2019, September 24, 2019, and November 12, 2019.

On March 2, 2020, the court held a conference and argument with counsel on whether the court should conduct an evidentiary hearing on some, all, or none of the issues asserted in Appellant's PCRA petition. Appellant participated via videoconferencing. At the

argument, Appellant's counsel requested additional time to submit a signed witness certification from Jermaine Mullen. The court granted this request. Appellant's counsel submitted such a certification to the court and the prosecutor via email on May 5, 2020; it was filed of record on June 12, 2020.[1]

The court reviewed the petitions and witness certifications. In an Opinion and Order entered on July 21, 2020, the court granted Appellant an evidentiary hearing on his claims that counsel was ineffective for failing to request a mistrial and failing to call Jermaine Mullen as a witness. With respect to all other claims, the court gave Appellant notice of its intent to dismiss them without holding an evidentiary hearing.

The court held the evidentiary hearing on September 24, 2020. In an Opinion and Order entered on October 27, 2020, the court denied all of Appellant's PCRA claims.

Appellant filed a timely notice of appeal. Appellant asserts thirteen issues in his concise statement of errors complained of on appeal.

Appellant first asserts the court erred in denying Appellant's PCRA petition in its entirety. This assertion is vague and boilerplate. The court is unable to address this issue standing alone. However, the court believes that the remaining errors complained of on

[1] In light of the challenges presented by the COVID-19 pandemic and the fact that that the court and the prosecutor received the witness certification via email on May 5, the court considered the certification timely filed regardless of the deadline set forth in the court's order.

appeal constitute the specific claims that Appellant asserts the court should have granted.

Appellant avers the court erred by holding that trial counsel was not ineffective for failing to object to the prosecutor's argument encouraging the jury to send a message to the community that was improper and prejudicial.

Counsel is presumed to be effective. *Commonwealth v. Sepulveda,* 55 A.3d 1108, 1117 (Pa. 2012). The burden is on the petitioner to prove counsel's ineffectiveness by a preponderance of the evidence. *Commonwealth v. Cross*, 634 A.2d 173, 175 (Pa. 1993); *Commonwealth v. Miller*, 231 A.3d 981, 991-92 (Pa. Super. 2020). To be entitled to relief on an ineffectiveness claim, the petitioner must establish that: "(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or failure to act; and (3) he suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability the result of the proceeding would have been different." *Commonwealth v. Epps*, 2020 PA Super 232, 2020 WL 5651759, *2 (Pa. Super. 2020), citing *Commonwealth v. Treiber,* 121 A.3d 435, 445 (Pa. 2015). A failure to establish any one of these prongs warrants a denial of the ineffectiveness claim. *Commonwealth v. Harper,* 230 A.3d 1231, 1236 (Pa. Super. 2020).

The court need not analyze the elements of an ineffectiveness claim in any particular order, if a claim fails under any prong of the ineffectiveness test, the court may proceed to that element first. *Sepulveda,* 55 A.3d at 1117-18. Counsel's assistance is deemed constitutionally effective once the court determines that the defendant has not established any one of the prongs of the ineffectiveness test. *Commonwealth v. Rolan,* 964 A.2d 398, 406 (Pa. Super. 2008), citing *Commonwealth v. Harvey*, 812 A.2d 1190, 1196 (Pa. 2002).

Not every unwise, intemperate or improper remark by a prosecutor justifies a

mistrial or new trial. The prosecutor may make fair comment on the admitted evidence and may provide for rebuttal to defense arguments. Even an otherwise improper comment may be appropriate if it is a fair response to defense counsel's remarks. Any challenge to a prosecutor's comments must be evaluated in the context the comment was made. *Commonwealth v. Chimel,* 30 A.3d 1111, 1118 (Pa. 2011).

During defense counsel's closing argument, he argued that the jury's role was not to determine what happened in this case and it was not to sit in judgment of his client. Instead, the jury was sitting in judgment of the Commonwealth and whether or not it had proven its case beyond a reasonable doubt. Transcript, January 29, 2016 (Closing Arguments), at 4. Defense counsel then expounded upon the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, and Appellant's right not to testify. Closing Arguments, at 5-7, 19-20. He argued that the evidence consisted of hunches, speculation and innuendo and claimed that the prosecution was "looking through dirty glasses." Closing Arguments, at 7-9. He also made comments about the evidence or types of evidence that the prosecution had not presented such as the failure to recover any stolen property from Appellant and the lack of forensic evidence. Closing Arguments, at 17-19.

The prosecutor responded to trial counsel's arguments. With respect to defense counsel's arguments about sitting in judgment of the Commonwealth and Appellant's rights, the prosecutor stated:

> Another thing that [defense counsel] said which struck me as simply not being accurate is his initial assertion that you're not here today sitting in judgment of his client. That is the only reason you're here today, is sitting in judgment of his client. The judge is going to hand you a verdict slip with all the charges. You're going to see one name at the top. Kenneth Martin. He's the person on trial. He's the person whose case you are sitting in judgment of. So let's keep that in mind because that's really why all of us

are here.

[Defense counsel] raised some points about some legal principles that are very important and they are sacred. He raised the presumption of innocence, the Fifth Amendment right of his client not to testify. These are sacred rights and you should take them very seriously. But you know what else is just as sacred? The laws in your community, ladies and gentlemen. The laws that govern our behavior, the laws that prevent your neighbor, for instance, from coming inside your house without being invited and taking your wife's jewelry, the laws that prevent your neighbor from pulling out a gun if you get in an argument with him, the rules and laws that prevent your landlord from, say, whacking you over the head when you are late with your rent payment.

We have laws for a reason because there are certain standards, certain acceptable behaviors and certain unacceptable behaviors. If you have a debt with somebody the way to solve it isn't through physical violence. Call a lawyer. Call [defense counsel]. Take him to court. There are ways to settle disputes and physical violence is not one of those ways that is acceptable in our society. The law sets down boundaries, doesn't it? The laws are boundaries. Says, you shall not cross this line. If you cross this line you will be arrested, you will be prosecuted, you will be held responsible.

And I would assert to you that from what you've seen throughout the course of this trial I think you can conclude that [Appellant] in this case believed that those rules did not apply to him, and that's why your job here is so important, ladies and gentlemen. Your job to sit in judgment of this human being is so important because this man can file charges. This man can make an arrest but ultimately you have the final say. It's what you think that counts in the end ultimately. It's you the citizens of this community that have the final say in holding people accountable for breaking the laws. It's up to you. You have a great responsibility. It's an awesome responsibility. (Closing Arguments, at 23-25).

The prosecutor then discussed the evidence presented and how the evidence showed that Appellant was the person who committed these crimes. (Closing Arguments, 25-42). It was in this context that the prosecutor made the following final statement:

I want to thank you for your patience, as [defense counsel] did, and in closing I just want to remind you that this is the community that you all live in, and when a guy like [Appellant] assembles a group of people like that and does something this violent in broad daylight and walks away with stolen property casually like it's no big deal, it's up to you, the citizens of this community, to stop him in his tracks and say, you're not going to do something like this in my community. It's up to you. You're not going to

> carry a gun around in my community and use it for purposes like this. You're not going to knock someone unconscious and leave him on the floor bleeding without calling for help. Today is the day for you to send a message that nobody is above the law so I would urge you to hold [Appellant] responsible for what he's done and find him guilty of all counts. (Closing Arguments, at 42).

When viewed in context, the prosecutor's statements were an impassioned argument for the jury to send a message **to Appellant** that he was not above the law and to hold him responsible for his actions. He did not ask the jurors to send a message to the community or the justice system. He asked the jurors (as the representatives of the community) to send a message to Appellant.

"Prosecutorial remarks encouraging a jury to 'send a message' to the defendant, rather than the community or the criminal justice system, do not invite consideration of extraneous matters and are not considered misconduct….Every verdict sends a message of some sort to the parties, and clearly the message of 'guilty' is sought by prosecutors as a matter of course." *Commonwealth v. Patton*, 604 Pa. 307, 985 A.2d 1283, 1288 (2009).

Defense counsel made an argument impassioned and thorough. The prosecutor made remarks with passion and oratorical flair, which were a fair comment on the evidence and an appropriate response to defense counsel's arguments.[2] Accordingly, the court found

[2] While the court finds the prosecutor's comments were not improper in this case, it may be a better practice for the prosecutor to retire the phrase "send a message." As the Pennsylvania Supreme Court warned in *Patton*: "prosecutors would do well to put 'send a message' on the taboo list, lest this Court be compelled in the future to send its own message in the form of a rule with more restraints." 985 A.2d at 1289.

that Appellant's claim of ineffectiveness had no arguable merit. See *Commonwealth v. Ligon,* 206 A.3d 515, 520-521 (Pa. Super. 2019).

Appellant next asserts that the court erred by holding that trial counsel was not ineffective for failing to ask for a mistrial when the Commonwealth played a recording regarding Mr. Ford being threatened in violation of the court's prior ruling.

While there may be a factual dispute as to what exactly was played and what the jury heard, after reviewing the trial transcript, it was clear to the court that outside the presence of the jury, the court heard certain statements made by Ford and granted Martin's request to preclude said statements. Despite the court's ruling, the Commonwealth erroneously played a portion that Mr. Rymsza had objected to and the court precluded. Specifically, the jury heard the following statement by Mr. Ford:*"I don't want them to come after me."*

As soon as this was inadvertently played by the Commonwealth, Mr. Rymsza objected to it again and that objection was sustained.

While Mr. Rymsza could not recall what specifically was played to the jury, he did not request a mistrial for numerous reasons. First, the statement did not mention Appellant by name. There were several individuals in the room at the time of the alleged incident and the statement could have referenced any of them if Mr. Ford was referring to them. Mr. Rymsza did not find the statement "objectionable enough" to warrant a mistrial. Mr. Ford had already testified that he didn't remember anything, the jury saw photos implicating Appellant and depicting Mr. Ford's injuries, and the jury as well saw surveillance videos.

As to this claim, Appellant argued that the unavoidable effect of the jury

hearing this was to deprive him of a fair trial, noting that the bell had already been rung. Appellant argued that Mr. Rymsza did not have a reasonable basis to not request a mistrial and that Appellant was prejudiced as a result.

The Commonwealth countered that Appellant failed to establish what exactly was played to the jury but even so, it was insufficient to warrant a mistrial. More specifically, there was no reference to Appellant and the victim's statement was generally a state of concern over his safety, similar to any victim's concerns.

The court found that this claim lacked arguable merit. A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. *Commonwealth v. Chamberlin,* 30 A.3d 381, 422 (Pa. 2011). As a general rule, the trial court is in the best position to gage potential bias and deference is due to the trial court when the grounds for the mistrial relate to jury prejudice. *Commonwealth v. Walker,* 954 A.2d 1249, 1255-1256 (Pa. Super. 2008).

The court could not conclude that this incident, which was very brief and innocuous, had the unavoidable effect of depriving Appellant of a fair trial, particularly since Appellant's name was never mentioned. As this was a significant case involving reluctant witnesses, the court would trust that every juror with even the merest scintilla of common sense would realize that there are likely to be witnesses who might be concerned in general about testifying. *See Commonwealth v. Johnson,* 815 A.2d 563 (Pa. 2002)(in a homicide case, every juror with the merest scintilla of common sense would realize that there are likely going to be grieving relatives for the victims; therefore, counsel was not ineffective for failing to request a mistrial when the victim's aunt began crying in the courtroom).

Moreover, while Mr. Rymsza could not recall the incident or why he would not have requested a mistrial, such request would have been futile, as the court would not have granted a request for a mistrial.

Appellant next avers the court erred by holding that trial counsel was not ineffective for failing to raise a specific objection that the trial court's ruling disallowing Mr. Ford as a witness in the defense case-in-chief violated Appellant's 6th Amendment and Pennsylvania Constitutional rights to call witnesses, present a defense, and to due process of law.

During the trial, on January 28, 2016, the Commonwealth called Noor Ford as a witness. (Transcript, 01/28/2016, at 97). He testified that he could not recall even being at the Econo Lodge on June 19, 2012; let alone what happened. (Transcript, at 97-99). The Commonwealth made a motion to have Mr. Ford declared unavailable pursuant to Pennsylvania Rule of Evidence 804(a)(3). (Transcript, at 99). Over Appellant's objection, which included a Sixth Amendment confrontation claim, the court granted the Commonwealth's motion. (Transcript, at 99, 105).

Subsequently, following the limited direct exam of Mr. Ford, the Commonwealth objected to Appellant cross-examining Mr. Ford. (Transcript, at 99-100). The Commonwealth specifically argued that Appellant had forfeited his confrontation rights. (Transcript, at 108). Appellant also raised the issue as to whether he could call Mr. Ford in his case in chief. (Transcript, at 111).

Appellant specifically argued that by denying him the right to call Mr. Ford, the court "denied my right to confrontation." (Transcript, at 112). Appellant argued that the court's ruling didn't strip away his right to confrontation. (Transcript, at 117). Appellant also

argued that if the court found Mr. Ford unavailable, Appellant was entitled to cross-examine Mr. Ford but if not, to call him on direct. (Transcript, at 122-123).

Appellant asserted in his PCRA that the forfeiture by wrongdoing decision did not affect his constitutional right to call Mr. Ford as a witness during his case in chief; therefore, Mr. Ford's testimony would have been admissible. (PCRA Second Amended Supplemental Petition, paragraph 55). Appellant also asserted that the forfeiture by wrongdoing doctrine only extinguished his confrontation rights and had no effect on his rights to call witnesses on his behalf or to present a defense. (PCRA Second Amended Supplemental Petition, paragraph 59). Appellant argued that his rights pursuant to the Sixth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution were violated when he was precluded from calling Mr. Ford as a witness in his case in chief. (PCRA Second Amended Supplemental Petition, paragraph 63). Further, Appellant argued that he was prejudiced by this error because there was a reasonable probability that but for the error, Mr. Ford would have been permitted to testify during Appellant's case in chief and would have provided relevant testimony in support of Appellant's defense. (PCRA Second Amended Supplemental Petition, paragraph 70).

In sum, Appellant argued that counsel was ineffective for failing to object or to pursue on appeal that, despite the court's ruling that he forfeited his right to confront Mr. Ford, the court should have permitted Appellant to call Mr. Ford as a witness in his case in chief pursuant to his constitutional rights to both due process and compulsory process.

The court found that Appellant's claim was without merit. First, Appellant waived this claim because Appellant never called nor attempted to call Noor Ford during his case in chief. Indeed, while the issue was being discussed, defense counsel indicated to the

court that he had not determined if he would call Mr. Ford as a witness. "To be candid, I don't know if I am going to call him as a witness." (Transcript, at 123).

In conjunction with this, calling Mr. Ford as a witness might have been nothing more than mere subterfuge to get evidence before the jury that would not otherwise have been admissible. To allow Appellant to call Mr. Ford, who had already testified that he did not remember anything, would have essentially been a ruse. Appellant's compulsory process rights could not have been violated since defense counsel had not interviewed Mr. Ford, did not know anything about what Mr. Ford would say, and Mr. Ford's proposed testimony would not have produced any admissible evidence. See *Commonwealth v. Williams,* 537 Pa. 119, 640 A.2d 1251, 1259-1260 (Pa. 1994).

Next, as argued by Appellant, both the Sixth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution grant criminal defendants specified rights in connection with criminal proceedings. The confrontation clause grants defendants the right to confront and cross-examine witnesses. The compulsory process clause grants defendants the right to call witnesses in their defense.

These rights, however, are not absolute, and must occasionally give way to considerations of public policy, such as testimonial privileges, and the necessities of the case. *Commonwealth v. Campion,* 672 A.2d 1328, 1331 (Pa. Super. 1996); *Commonwealth v. Gibbs,* 642 A.2d 1132, 1135 (Pa. Super. 1994); *Commonwealth v. Allen,* 462 A.2d 624, 627 (Pa. Super. 1983).

The right to compulsory process does not guarantee the defendant the right to secure the attendance and testimony of any and all witnesses. *Williams,* 640 A.2d at 1260. In fact, case law supports the conclusion that a party waives, forfeits, or abandons that right

when the party is responsible for the witness's practical or legal unavailability. *Commonwealth v. Holloman,* 621 A.2d 1046 (Pa. Super. 1998) (prosecutor's comments did not cause witness not to testify so no compulsory process violation); *Commonwealth v. Ryan,* 446 A.2d 277, 281 (Pa. Super. 1982) (defendant knew witness well and did not attempt to subpoena him) ; *Commonwealth ex rel Jennings v. Moroney,* 118 A.2d 287 (Pa. Super. 1955) (defendant did not request compulsory process until day before trial).

Appellant's conduct in causing Mr. Ford to be unavailable resulted in his forfeiting not only his right to confront to Mr. Ford but also his right to compel Mr. Ford to testify on his behalf.

While the Pennsylvania courts are emphatic about the importance of constitutional rights, no right is absolute. *Commonwealth v. Ludwig,* 527 Pa. 472, 479, 594 A.2d 281, 284 (1991). The right asserted by the defendant to offer testimony of witnesses is, in plain terms, the right to present a defense. *Washington v. Texas,* 388 U.S. 14, 23 (1967). This right is a fundamental element of due process of law. *Id.*

The forfeiture by wrongdoing principle has been described by the Pennsylvania courts as a "waiver by misconduct rule." *See Commonwealth v. Laisch*, 777 A.2d 1057, 1068 (Pa. 2001)(Castille, J., dissenting). One who wrongfully procures the absence of a witness is in a weak position to complain about losing the chance to confront that witness. *U.S. v. White*, 116 F.3d 903 (D.C. Cir. 1997)(per curiam). The forfeiture principle is designed to prevent a defendant from thwarting the operation of the criminal justice system. *Id.* at 912. The theory in support of forfeiture is based on the fact that the witness is "rendered unavailable to testify at trial" because of the defendant's wrongful acts. *Giles v. California,* 554 U.S. 353, 359, 128 S.C. 2678, 2682 (2008).

It makes no sense that a witness can be rendered unavailable or essentially kept away from trial, yet be called as a witness. A finding of unavailability renders the witness absent. As indicated in *Giles,id.,* the distinction advanced by defendant would eviscerate the forfeiture by wrongdoing rule. A defendant should not be permitted to benefit from his own wrong. *Giles,* 554 U.S. at 365. When a witness is absent by the defendant's wrongful procurement, the defendant is in no position to assert that his Constitutional rights have been violated by not being able to call that witness. See, *id.* The Constitution does not guarantee rights to an accused person against the legitimate consequences of his own wrongful acts. *Id.*, citing, *Reynolds v. United States,* 98 U.S. 145, 159 (1878).

Finally, Appellant cannot establish prejudice. There is no alleged fact that would have been advanced by Mr. Ford that could have resulted in a different verdict or even cast doubt upon the reliability of the verdict. At trial, Mr. Ford indicated that he could not remember **anything** due to his drug usage. Appellant now contends that Ford would testify that he does not recall Appellant being there. This is still a lack of memory. It is not an assertion that Mr. Ford recalls the incident and Appellant was not present. Furthermore, while Appellant also alleges that Mr. Ford could explain why he may have said certain things to Trooper Havens, the certification attached to the PCRA failed to reference any specifics whatsoever.

Appellant also contends the court erred in holding that trial counsel was not ineffective for failing to object to Trooper Havens' testimony regarding Jessica Brown that was irrelevant and more prejudicial than probative.

During day one of the trial, on January 28, 2016, the Commonwealth presented testimony from Trooper Havens. Trooper Havens went to the hospital and he

interviewed Mr. Ford. Mr. Ford made a statement that his assailant was "Snoop" whose girlfriend was Jessica Brown. Trooper Havens had encountered Jessica Brown and Appellant walking into a pretrial bail hearing together.

During Trooper Haven's testimony, he indicated that Appellant's girlfriend was "a person named Jessica Brown." (Transcript, 1/28/2016, at 188). He further indicated that he "got to know" Jessica Brown because a year or two earlier, he arrested a person for drug dealing and she was with him. (Transcript, at 188-89). Further, Trooper Havens testified that he would encounter her on the street on a regular basis when he was "in a criminal interdiction unit." (Transcript, at 189). Trooper Havens identified Ms. Brown as Appellant's girlfriend who was with him at a prior hearing. (Transcript, at 188-190).

Appellant claims that trial counsel was ineffective in not objecting to this evidence as it was not relevant and even if relevant, it was overly prejudicial.

More specifically, Appellant argued that the evidence insinuated that he was in a sexual relationship with and was frequently with a person known for drugs, drug dealing and crime, and also tended to show that Appellant was a person known for drugs, drug dealing and crime. (Second Amended Supplemental PCRA Petition, paragraph 84).

The court found that Appellant's claim was without arguable merit.

The admissibility of evidence is within the discretion of the court. *Commonwealth v. Johnson,* 42 A.3d 1017, 1027 (Pa. 2012). The determinative standard is relevancy. Pa. R.E. 402.

Relevant evidence is admissible if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference regarding a material fact. *Commonwealth v. Wade,* 226 A.3d 1023, 1032 (Pa. Super. 2020). In other words,

evidence is relevant if the inference sought to be raised by it bears upon a matter at issue and renders the desired inference more probable than it would be without the evidence. *Commonwealth v. Elliott,* 80 A.3d 415, 446-47 (Pa. 2013). The court may exclude relevant evidence if its probative value is outweighed by a danger of unfair prejudice. Pa.R.E. 403. "'Unfair prejudice' means a tendency to suggest a decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403, cmt.

Further, the admissibility of evidence is a matter addressed to the sound discretion of the trial court and may not be reversed absent a showing of abuse of discretion. *Commonwealth v. Cox,* 115 A.3d 333, 336 (Pa. Super. 2015). An abuse of discretion is not a mere error in judgment but rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness or a misapplication of the law. *Id.*

In addressing the relevancy of the testimony, and while the court appreciated counsel's zealous advocacy, Appellant's interpretation of the testimony was factually inaccurate. The testimony did not insinuate that Appellant was in a "sexual relationship" or was "frequently" with someone "known for drugs, drug dealing and crime." There was no testimony whatsoever upon which an inference could be made that Ms. Brown was "known for drugs, drug dealing and crime." There was no testimony as to the nature of the relationship between Appellant and Ms. Brown except that she was his girlfriend. There was no testimony whatsoever as to how long they had been in a relationship, let alone that he "frequently" was with her.

Trooper Havens got to "know her", because she was previously with someone who he arrested for drug dealing, not that she was known for drugs, drug dealing or crime.

He also encountered her on the street on a regular basis while he was working in a criminal interdiction unit. There was no testimony whatsoever about her being known for drugs, drug dealing or crime. Moreover, even if the evidence could somehow be construed as Ms. Brown being previously associated with criminal activity, it did not implicate Appellant in any way in those activities.

The evidence was relevant evidence to establish that Appellant was "Snoop." Trooper Havens explained to the jury how he knew who Ms. Brown was and how she may have been involved with Appellant in light of the fact that she was mentioned in the interview with Mr. Ford. The evidence or testimony was not unduly prejudicial to Appellant.

Appellant next asserts that the court erred by holding that trial counsel was not ineffective for withdrawing his hearsay objection to Trooper Havens' testimony that an attorney called Appellant "Snoop" and Appellant responded to that name.

During the trial on January 28, 2016, Trooper Havens was asked if he ever heard Appellant answer to the name "Snoop." (Transcript, 01/28/2016, at 190). Trooper Havens indicated "yes…as recently as today with attorney Jerry Lynch." (Transcript, at 190-191). Defense counsel objected on hearsay grounds but then withdrew the objection following the court indicating that it did "not understand." (Transcript, at 191). Trooper Havens then testified that earlier in the day, Attorney Lynch had been seated in the courtroom and during a break said "Hi Snoop, how you doing?" and Appellant engaged him in a greeting back and forth. (Transcript, at 191).

Appellant argued that the question from Attorney Lynch "Hi, Snoop, how you doing" was inadmissible hearsay. Appellant further argued that trial counsel was ineffective for withdrawing the objection and that Appellant suffered prejudice as a result.

The court found that this claim was without arguable merit.

Pursuant to Pennsylvania Rule of Evidence 801, hearsay is a statement that the declarant does not make while testifying at trial and a party offers in evidence to prove the matter asserted in the statement. A statement, as alleged in this issue, is a person's oral assertion, if the person intended it as an assertion. While questions may be considered hearsay if they include implied assertions, *Commonwealth v. Parker,* 104 A.3d 17, 24 (Pa. Super. 2014), a greeting does not constitute hearsay because it does not rise to the level of an assertion. See Pa. R. E. 801, cmt. ("Communications that are not assertions are not hearsay. These would include … greetings….").

In this case, the greeting was not intended as an assertion. Its only import was the fact that it was made and then Appellant responded. *Commonwealth v. Tselepis,* 181 A.2d 710, 712 (Pa. Super. 1962). An out-of-court statement offered to explain a course of conduct is not hearsay. *Commonwealth v. Cruz,* 414 A.2d 1032, 1035 (1980).

Furthermore and assuming that it was hearsay and should have been precluded, Appellant was not prejudiced. This court is not at all concerned that because of counsel's apparent error, the result of the trial was unreliable. The admission of the greeting/question by Attorney Lynch does not create a reasonable probability that the result of the trial would have been different.

Some of Appellant's factual assertions as set forth in his petition also were without basis in the record. First, at trial there was no testimony that Mr. Lynch was a "member of the defense Bar." There was no testimony as to how well Mr. Lynch knew Appellant or to support the inference that Mr. Lynch knew Appellant "well enough." There is no support in the record that the statement allowed the Commonwealth to credibly establish

that Appellant went by the name Snoop simply because Mr. Lynch greeted him as Snoop. Trooper Havens testified that in response, Appellant "engaged him in a greeting back and forth." (Transcript, at 191).

Moreover, any alleged error was harmless as there was an abundance of evidence that Appellant went by the nickname Snoop. "Mr. Ford called Snoop." (Transcript, at 195). "Snoop as being the person in the sweats" (Transcript, at 200). Mr. Ford identified Martin as "Snoop." (Transcript, at 203-204). Mr. Ford "identified Snoop as Kenneth Martin." (Transcript, at 205). The telephone number associated with an Instagram account for "Snoop" matched Appellant's (Transcript 01/29/2016, at 26). Appellant's picture was depicted on "Snoop's" Instagram (Transcript, at 32-33). Mr. Ford's picture was posted on "Snoop's Instagram page with detailed information about Mr. Ford's injuries and owing Snoop a debt." (Transcript, at 34-35).

Appellant also avers the court erred by holding that trial counsel was not ineffective for failing to confront Trooper Havens with Mr. Ford's statements that he did not trust Trooper Havens and related statements made during the pre-trial hearings.

At an omnibus hearing in this matter, Mr. Ford indicated, among other things, that he did not trust Trooper Havens, Trooper Havens illegally searched his home, Mr. Ford knew multiple "Snoops", and one of the reasons he did not testify is that he did not trust the prosecution.

Appellant argues that his trial counsel failed to impeach Trooper Havens regarding these statements, that impeaching Trooper Havens' credibility was "more important than a normal case", that the statements would have led the jury to question Trooper Havens' credibility and that impeaching the credibility of Trooper Havens on these

grounds would have provided a substantially greater chance of gaining an acquittal at trial, than not impeaching Havens.

During trial, outside the presence of the jury, the court discussed with counsel proposed testimony about why Mr. Ford was afraid of testifying. (Transcript, 1/28/2016, at 123-124). Appellant's trial counsel noted that he couldn't cross-examine Trooper Havens regarding Mr. Ford's state of mind and why he said the things he said. (Transcript, at 126). Subsequently, the court granted defense counsel's oral motion to preclude the Commonwealth from introducing hearsay statements of Mr. Ford relating to the alleged wrongdoing. (Transcript, at 129). The court concluded that any "mention" of post-incident conduct alleged against Appellant would severely prejudice him. (Transcript, at 129). By way of a request for clarification, the court was precluding the Commonwealth "in any form through any witness" from introducing any testimony that Mr. Ford was allegedly scared or threatened by Appellant or "anyone else." (Transcript, at 132).

Given Appellant's motion and the granting of it by the court, the court failed to find any arguable merit in this ineffectiveness claim. Clearly, counsel's decision to preclude the testimony resulted in Appellant being precluded from offering opposing testimony. In other words, to offer such testimony would likely have opened the door to testimony regarding all the reasons Mr. Ford did not testify, including testimony that Mr. Ford was scared of or threatened by Appellant.

Appellant next asserts the court erred by holding that trial counsel was not ineffective for failing to argue the incorrect legal standard after the Commonwealth requested *ex parte* that Judge Williamson be removed from the case. Appellant also asserts that the court erred by holding that trial counsel was not ineffective for arguing for an improper

remedy as a result of judge shopping. The court will address these claims together in that they essentially relate to the same issue.

Appellant argued that his trial counsel was ineffective in two ways relating to his claim that the Commonwealth was judge shopping. First, Appellant argued that his trial counsel should have argued that the case should have been returned to Judge Williamson, versus being dismissed, based upon the appearance of an impropriety and not actual prejudice.

As the Superior Court noted in its June 26, 2018 Opinion, "A new trial was scheduled before the Honorable Michael J. Williamson but on the day before it was to begin, the case was assigned to [the undersigned]. As a result of the sudden reassignment, prior to trial, Appellant presented an oral motion to dismiss, alleging ex parte communication between the prosecutor's office and President Judge Nancy L. Butts. According to Appellant, he was prejudiced by the removal of Judge Williamson." Appellant suggested, "without support that Judge Williamson may have ruled favorably on his pretrial motions."

"On the day of trial, the court conducted a hearing on the motion and permitted Appellant to call District Attorney Eric Linhardt to testify. DA Lindhardt testified that he was: concerned about [Judge Williamson's]…at best I would describe it as unprofessional conduct during those three trials [earlier in the week] and what I believed was possible judicial misconduct, that I felt I had a responsibility to let the President Judge know about that…I didn't ask that he be reassigned to other criminal cases. I just asked that he not preside over any more cases in the county because I didn't think that it was appropriate that he was presiding over trials."

On the morning of the trial, the court met with counsel. Trial counsel for

Appellant argued that the case should be dismissed believing that the District Attorney "purposefully and in a calculated fashion" spoke with the President Judge to have the case removed from Judge Williamson. (Transcript, January 28, 2018, p. 7). Appellant argued that it smacked of judge shopping by the District Attorney's office. (Transcript, p. 8).

Following the testimony of then District Attorney Linhardt, Appellant renewed his motion to dismiss arguing that "there was ex parte communication" with President Judge Butts and that he was anticipating some favorable rulings from Judge Williamson. (Transcript, pp. 20-21). Trial counsel summarized saying "it was ex parte communication and I think it smacks of judge shopping. I think these charges should be dismissed." (Transcript, p. 22).

In response, the court inquired of counsel as to whether there was a prejudice requirement or other alternatives available to the court such as reassigning the case back to Judge Williamson. (Transcript, p. 23). Counsel declined, noting that prejudice can be presumed and that the misconduct was attributed to the Commonwealth and not judicial misconduct. (Transcript, pp. 24-25).

This court denied Appellant's motion to dismiss noting that there was no nexus between Mr. Linhardt's action and the decision of President Judge Butts. The court noted that it was "just speculation to guess why she did what she did." (Transcript, p. 27). Furthermore, the court declined to dismiss the charges because Appellant did not establish prejudice. (Transcript, p. 27).

On direct appeal, Appellant argued that the court erred in denying the motion to dismiss. Appellant argued that the ex parte communication between the Commonwealth and Judge Butts was an impermissible attempt at judge shopping. Appellant conceded that

there was no direct evidence of judge shopping but suggested that the Commonwealth's actions created the appearance of an impropriety constituting prosecutorial misconduct warranting dismissal. (Superior Court Opinion, p. 18). The Superior Court concluded that there was no evidence of judge shopping, and therefore no undue prejudice. (Superior Court Opinion, p. 18).

While Appellant attempts to fashion the issue differently now, his appellate counsel never complained about any alleged court misconduct; the misconduct was alleged on the part of the Commonwealth. The Superior Court ruled that there was no evidence of judge shopping by the Commonwealth and therefore no undue prejudice. Appellant's claim was previously litigated. The Superior Court ruled on the merits of the issue. *Commonwealth v. Crispell,* 193 A.3d 919 (Pa. Super. 2018). Put simply, since Appellant was not entitled to dismissal because there was no judge shopping, he similarly would not be entitled to any other form of relief based on a lack of evidence of judge shopping.

Even if not previously litigated, Appellant's claim of ineffectiveness, although intriguing and clever, is without merit.

This was not an issue involving a request that the court recuse itself. Appellant presented no evidence that the Commonwealth either requested or preferred that the undersigned preside over the case.

Moreover, the fact that counsel may have argued an incorrect legal standard or not requested that Judge Williamson be reassigned to this case, assumes that there was at the very least some evidence of judge shopping. In fact, and as indicated above, there was no such evidence.

Finally, Appellant's interpretation of the cases he cited in favor of his

argument was flawed. The cases were factually or legally distinguishable.

In *Joseph v. Scranton Times,* 987 A.2d 633 (Pa. 2009), unlike in this case where there was no evidence of judge shopping, there was sufficient evidence of judicial impropriety concerning the assignment at trial of the case. *Id.* at 634. The evidence of record amply demonstrated that the assignment and trial of the case was "infected with the appearance of judicial impropriety." *Id.* at 635.

In *Commonwealth v. Darush,* 459 A.2d 727 (Pa. 1983), the issue concerned whether the remarks made by a judge raised a reasonable question concerning his impartiality. *Id.* at 730.

In *Commonwealth v. Wallace,* 561 A.2d 719 (Pa. 1989), the issue concerned the propriety of a judge denying a defendant's request to proceed non-jury because the judge determined that the defendant was judge shopping. *Id.* at 727. In *Commonwealth v. Kellam,* 489 A.2d 758 (Pa. Super. 1985), the issue was similar to that in *Wallace,* where the court's determination that the defendant was judge shopping was called into question. *Id.* at 761.

In *Commonwealth v. Pettiford,* 402 A.2d 532 (Pa. Super. 1979), the issues concerned whether the trial judge should have recused himself and whether the judge's refusal of the jury waiver because of judge shopping, was proper. *Id.* at 533.

Finally, in *Municipal Publications, Inc., v. Court of Common Pleas of Philadelphia County,* 489 A2d 1286 (Pa. 1985), the issue involved whether a judge should recuse himself when he had personal knowledge of disputed facts. *Id.* at 1288.

Here, the District Attorney's communications concerned alleged judicial misconduct by Judge Williamson in other cases over which Judge Williamson presided earlier in the week; the communications were not about this case.

Appellant next asserts the court erred by holding that trial counsel was not ineffective for failing to lodge an objection to the Instagram photograph of Appellant counting stacks of money.

In the court's 1925 (a) Opinion, the court noted that there was a photograph of Appellant posted on Instagram counting a few stacks of cash posted by someone that goes by the name Snoop-Rock (1925 (a) Opinion, p. 3).

At trial and on direct appeal, Appellant argued that there was no reliable evidence connecting the Instagram postings to him. (Superior Court Opinion, p. 21). The Superior Court concluded that the direct and circumstantial evidence presented by the Commonwealth tended to support the authentication of the photos of Mr. Ford's assault. (Superior Court Opinion, p. 23). The issue involved Mr. Ford's assault and the photograph at issue was properly admitted as circumstantial evidence of Appellant's use of the nickname Snoop and the authentication of the relevant photographs of Ford's assault. Therefore, the court found that this claim was without arguable merit.

Appellant also asserts the court erred by holding trial counsel was not ineffective for failing to call Jermaine Mullen as a witness for the defense.

In addition to the three prongs of any ineffectiveness claim, a petitioner must establish the following with respect to a claim of ineffectiveness for failure to call a potential witness:

> (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Sneed, 616 Pa. 1, 445 A.3d 1096, 1108-09 (2012).

While certainly Mr. Mullen existed, was available to testify, was willing to testify and Mr. Rymsza knew of his "existence", the court cannot conclude that the absence of the testimony was so prejudicial as to have denied Appellant a fair trial.

Prejudice in this respect requires the petitioner to show how the uncalled witness's testimony would have been beneficial under the circumstances of the case. *Commonwealth v. Williams,* 636 Pa. 105, 141 A.3d 440, 460 (2016). Therefore, the petitioner's burden is to show that testimony provided by the uncalled witness would have been helpful to the defense. *Id.*

While Appellant argues that Mr. Mullen's testimony would have been helpful to the defense in that it would have "negated the robbery charge," this argument assumes that the jury would have found Mr. Mullen's testimony credible. The court cannot reach such a conclusion, as the court did not find Mr. Mullen credible. Mr. Mullen had *crimen falsi* convictions and his version of the events changed. The prosecutor would have effectively cross-examined Mr. Mullen by utilizing his recorded statement against him. Mr. Mullen's statements were riddled with inconsistencies. Not only were there internal inconsistencies but there were also inconsistencies with respect to the other physical evidence in the case. One significant point concerned his relationship with Appellant. Mr. Mullen claimed that he did not know Appellant until after the incident, yet when Mr. Mullen was interviewed by Trooper Havens, Mr. Mullen referenced Appellant by his nickname "Snoop."

Furthermore, Mr. Rymsza had a reasonable basis for not calling Mr. Mullen as a witness. The test for deciding whether counsel had a reasonable basis for his action or inaction is whether no competent counsel would have chosen that action or inaction or the alternative not chosen offered a significantly greater potential chance of success.

Commonwealth v. Stewart, 84 A.3d 701, 706-707 (Pa. Super. 2013) (en banc); see also *Commonwealth v. Hopkins,* 231 A.3d 855, 874 (Pa. Super. 2020). Counsel's decisions will be considered reasonable if they effectuated his client's interests. *Commonwealth v. Miller,* 987 A.2d 638, 653 (Pa. 2009). The courts do not employ a hindsight analysis in comparing trial counsel's action with other efforts he may have taken. *Id.*

The court does not question whether there were other more logical courses of action which counsel could have pursued; rather the court must examine whether counsel's decision had any reasonable basis. *Commonwealth v. Mason,* 130 A.3d 601, 618 (Pa. 2015). Counsel's decision to refrain from a particular action does not constitute ineffectiveness if it arises from a reasonable conclusion that there will be no benefit and it is not the result of sloth or ignorance of available alternatives. *Hopkins,* 231 A.3d at 875, citing *Commonwealth v. Collins,* 545 A.2d 882, 886 (Pa. 1988).

Certainly, in this case, the court cannot conclude that the choice of Mr. Rymsza had no reasonable basis. As he explained, the credibility of Mr. Mullen was at issue, Mr. Mullen's testimony would have placed his client not only in the room but also involved in an altercation with Mr. Ford and utilizing Mullen would have been detrimental to Martin's defense. Mr. Rymsza had a reason for his decision and it was based on logic and experience.

The court found Mr. Rymsza's testimony credible. The defense presented at trial was that Appellant was not "Snoop" and he was not involved in the incident with Mr. Ford. Mr. Mullen's testimony would have been inconsistent with that defense. Mr. Mullen's testimony would have confirmed that Appellant was "Snoop" and that Appellant was involved in an altercation with Mr. Ford. Mr. Mullen's testimony would have made several of Appellant's convictions more likely, particularly his conviction for aggravated assault.

The prosecutor also would have been able to show that the portions of Mr. Mullen's statements that were inconsistent with the Commonwealth's case were lies. The prosecutor would have confronted Mr. Mullen with his *crimen falsi* convictions, his initial statement to the police that Mr. Mullen admitted was a lie, and other evidence in the case such as "Snoop's" postings on Instagram, which showed that Appellant intentionally beat up Mr. Ford over a debt. In light of the photographs of the injuries Ford sustained and the Instagram postings by "Snoop" that supported the Commonwealth's position, the jury would have rejected Mr. Mullen's claims that the incident was a mutual combat and that Appellant took the Xbox game system, games and CDs with Mr. Ford's consent.

Appellant asserts the court erred by holding the after discovered evidence of Mr. Ford's letter did not entitle Appellant to any relief.

In order to obtain relief on a substantive after discovered evidence claim, a PCRA petitioner must demonstrate that: the evidence has been discovered after trial and that it could not have been obtained at or prior to trial through reasonable diligence; it is not cumulative; it is not being used solely to impeach credibility; and it would likely compel a different verdict. *Commonwealth v. Diggs,* 220 A.3d 1112, 1117 (Pa. Super. 2019); *Commonwealth v. Payne,* 210 A.3d 299, 302 (Pa. Super. 2019).

Appellant alleges that a written statement by Mr. Ford dated February 10, 2017 is new evidence. The statement, which is attached as Exhibit A to the Supplemental PCRA Petition filed on June 28, 2019, states:

> On the incident regarding me and Kenneth Martin. I don[']t recall ever seeing Martin involve[d] in the situation. Any suggestion made is due to T[]rooper [H]aven[s'] forceful and personal agenda towards Martin. Haven[s] told me he has wanted Martin ever since he step[ped] foot in his town[,] which [led] me to believe it was unusual.

> This was obvious by forcing his way into relatives[’] homes unwarranted with no adult present, also his constant threats.

Appellant cannot sustain this claim because he has not pled nor can he prove that the statement could not have been obtained prior to trial through reasonable diligence. Further, while the statement that was written may be new, the information contained in it is not. At trial, Mr. Ford indicated that he could not remember anything due to his drug usage. Appellant now contends that Mr. Ford would testify that he does not recall ever seeing Appellant involved in the situation. This is still a lack of memory. It is not an assertion that Mr. Ford recalls the incident and Appellant was not present or did not participate in it. Furthermore, the remainder of the information in the statement would have been used solely to impeach the credibility of Trooper Havens.

Finally, Appellant asserts the court erred in holding that the cumulative effect of trial counsel’s errors did not violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant argues that the cumulative impact of the constitutional errors merits a new trial. Cumulative prejudice from individual claims may be assessed in the aggregate when the individual claims fail due to a lack of prejudice but there must be a specific, reasoned and record-supported argument. *Commonwealth v. Miller,* 212 A.3d 1114, 1131 (Pa. Super. 2019). In this case, there was none.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Helen Stolinas, Esquire
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