NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ELIJAH MILLER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1046 EDA 2011

Appeal from the PCRA Order dated September 16, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0305341-2005.

BEFORE: PANELLA, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.: Filed: February 22, 2013

Appellant, Elijah Miller, appeals *pro se* from the order entered on September 16, 2010 in the Criminal Division of the Court of Common Pleas of Philadelphia County that denied his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

In its opinion filed on December 23, 2011, the PCRA court set forth a thorough recitation of the historical facts in this case which we incorporate by reference. ***See*** PCRA Court Opinion, 12/23/11, at 1-3. Consequently, we recount below only the relevant procedural facts that precede the commencement of the present appeal.

On October 7, 2005, a jury convicted Appellant of two counts of attempted murder and aggravated assault and one count each of criminal conspiracy, burglary, possession of an instrument of crime, and carrying a

*Former Justice assigned to the Superior Court.

firearm without a license. Thereafter, on January 27, 2006, the trial court sentenced Appellant to an aggregate term of 63½ to 127 years' imprisonment.

On August 20, 2009, Appellant filed a *pro se* petition under the PCRA. The PCRA court appointed counsel who, on May 24, 2010, petitioned for leave to withdraw pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). After Appellant objected to the petition for leave to withdraw, PCRA counsel supplemented the request. On August 6, 2010, the PCRA court issued notice of its intent to dismiss Appellant's petition for collateral relief pursuant to Pa.R.Crim.P. 907. The PCRA court formally dismissed Appellant's petition and granted counsel's petition to withdraw on September 16, 2010. ***See*** Docket Entry of 9/16/10 (noting dismissal of petition and that PCRA counsel was permitted to withdraw); ***see also*** PCRA Court Opinion, 12/23/11, at 1 and 12 (setting forth procedural history and noting PCRA court's agreement with appointed counsel's ***Turner/Finley*** letter). Appellant filed the instant notice of appeal on March 21, 2011, after the PCRA court reinstated his appellate rights.

In his brief, Appellant alleges that trial counsel was ineffective in:

> (1) [f]ailing to move for a judgment of acquittal on the charges of attempted murder or otherwise preserve for appellate review a challenge to the sufficiency of the evidence of shared intent to support the attempted murder charge.

(2) [f]ailing to object and/or [move] for a mistrial when the prosecutor improperly elicited, through a police detective's testimony, an [extrajudicial] statement, implicating petitioner in the charged incident in direct violation of his Sixth Amendment right to confrontation.

(3) [f]ailing to [move] for a mistrial when the prosecutor allegedly engaged in improper vouching by introducing, through a detective's testimony, an [extrajudicial] statement implying that the Commonwealth was in possession of evidence of Appellant's guilt, which was not presented to the jury.

(4) [f]ailing to object and/or request a curative instruction when the prosecutor allegedly misstated the law of accomplice liability, suggesting that the jurors could find the petitioner guilty of attempted murder as an accomplice without regard to whether he shared the specific intent to kill with his co-defendants.

(5) [f]ailing to ensure that jurors were properly informed that in order to find Appellant guilty of attempted murder as an accomplice, they had to find beyond a reasonable doubt that he shared with his co-defendants a specific intent to kill.

(6) [f]ailing to object and/or request supplemental jury instructions when the trial judge, in her charge, gave a "general" accomplice instruction that failed to include the requirement of shared intent regarding the attempted murder charges.

(7) [f]ailing to object to the Commonwealth's witness' comment on Appellant's post-arrest silence after being elicited by the prosecutor during direct examination.

(8) [f]ailing to file a motion to sever when a co-defendant's intentions were to assign sole culpability to petitioner during trial.

See Appellant's Brief at 4, 4A, and 4B.

We have carefully reviewed the submissions of the parties, the certified record, and the opinion of the PCRA court filed on December 23, 2011.[1] Based upon our review, we are satisfied that the trial court's determinations are supported by the record and free of legal error; accordingly, we affirm the order denying Appellant's petition for collateral relief. ***See Commonwealth v. G.Y.***, 2013 WL 85980, *5 (Pa. Super. 2013) ("In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error.") Furthermore, because we conclude that the PCRA court's opinion adequately and accurately addresses each of the claims raised by Appellant, we adopt the PCRA court's opinion as our own. The parties are instructed to include a copy of the PCRA court's opinion with all future filings pertaining to our disposition in this appeal.

Order affirmed.

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[1] For clarity and brevity, the PCRA court's opinion addressed Appellant's second and third issues under heading "II" and addressed Appellant's fifth and sixth issues under heading "IV".

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION
v.	
ELIJAH MILLER	CP-51-CR-0305341-2005 1046 EDA 2011

OPINION

SHREEVES JOHNS, J.

On August 20, 2009, Appellant filed a pro-se petition under the Post Conviction Relief Act ("PCRA"). On May 24, 2010, Appellant's PCRA attorney filed a Finley Letter. On June 4, 2010, Appellant objected to the Finley letter. On July 29, 2010, appellant's PCRA attorney filed a supplemental Finley letter. On August 6, 2010, this Court mailed appellant the Notice of Dismissal Pursuant to Pennsylvania Rule of Criminal Procedure 907. On August 20, 2010, Appellant filed his objection to the Notice of Dismissal and the Finley letter. On September 16, 2010, this Court formally dismissed appellant's PCRA petition. On October 29, 2010, appellant filed a second PCRA petition seeking reinstatement of his appellate rights because he had not received this Court's formal dismissal of September 16, 2010. On February 28, 2011, Appellant's appellate rights were reinstated. Accordingly, on March 21, 2011, Appellant filed his notice of appeal to our Superior Court.

Appellant's PCRA petition contended that his conviction was wrongful and unconstitutional on the basis of ineffective assistance of counsel. He argued that his counsel was ineffective based on the following grounds:

(1) Failing to move for a judgment of acquittal on the charges of Attempted Murder or otherwise preserve for appellate review a challenge to the sufficiency of the evidence of shared intent to support the attempted murder charge.

(2) Failing to object and/or motion for a mistrial when the prosecutor improperly elicited, through a police detective's testimony, an out of court statement, implicating petitioner in the charged incident in direct violation of his Sixth Amendment right to confrontation.

(3) Failing to motion for a mistrial when the prosecutor allegedly engaged in improper vouching by introducing, through a detective's testimony, an out of court statement implying that the Commonwealth was in possession of evidence of Appellant's guilt, which was not presented to the jury.

(4) Failing to object and/or request a curative instruction when the prosecutor allegedly misstated the law of accomplice liability, suggesting that the jurors could find the petitioner guilty of Attempted Murder as an accomplice without regard to whether he shared the specific intent to kill with his co-defendants.

(5) Failing to ensure that jurors were properly informed that in order to find Appellant guilty of Attempted Murder as an accomplice, they had to find beyond a reasonable doubt that he shared with his co-defendants a specific intent to kill.

(6) Failing to object and/or request supplemental jury instructions when the trial judge, in her charge, gave a "general" accomplice instruction that failed to include the requirement of shared intent regarding the attempted murder charges.

(7) Failing to object to the Commonwealth's witness' comment on Appellant's post-arrest silence after being elicited by the prosecutor during direct examination.

(8) Failing to file a motion to sever when co-defendant's intentions were to assign sole culpability to petitioner during trial.

STATEMENT OF FACTS

On June 14, 2004, the complainants, Braheem Golphin and Michael Mayberry, were sleeping in Mr. Golphin's residence located at 838 North 43rd Street in the city and county of Philadelphia. Around 4:07a.m., Mr. Golphin, was awakened by three men standing in his bedroom demanding money. Before Mr. Golphin had a chance to respond to their demands, Appellant shot him once in the right calf. (N.T.,10/03/2005, p.59). Mr. Mayberry, awakened by the gunshot and voices coming from Mr. Golphin's room, walked towards the room. Mr. Mayberry observed one male, Appellant, standing next to Mr. Golphin's bed, a second male, co-defendant Keon Sloan, standing in the middle of the bed, and a third male, co-defendant Laurenn Harvin, sitting in the hallway closet near Mr. Golphin's bedroom door. (N.T., 09/29/2005, p.45-47; 10/03/2005, p.57-59).

Appellant, then, made eye contact with Mr. Mayberry, and raised his hand toward Mr. Mayberry's direction. (N.T., 09/29/2005, p.45-50). Almost simultaneously, as Mr. Golphin observed Appellant pass his gun to Sloan, he, also, observed Harvin shooting in the same direction where Mr.

Mayberry had been standing. (N.T, 10/03/2005, p, 63-65). Sloan, then, turned the gun on Mr. Golphin and shot at him in the direction of his head and chest until the gun was emptied. (N.T, 10/03/2005, p, 61-62). During this time, as Mr. Mayberry attempted to take cover his bedroom, he was shot four or five times by Harvin. Mr. Mayberry retrieved the gun from Harvin's grip and a fight ensued. Several moments later, another cohort walked in, stood over Mr. Mayberry, and shot him multiple times. Mr. Mayberry was shot a total of 13 times throughout his entire body. (N.T., 09/29/05, p. 47-50, 67). He was found lying in a pool of his own blood. Mr. Mayberry suffered permanent physical injuries to his stomach, as well as, total paralysis throughout his body.[1] (N.T. 09/29/05, p. 55-56). Mr. Golphin suffered a gunshot wound to his right calf.

All of the assailants were known to Mr. Golphin from the neighborhood; they were originally identified by their street names of "Laj," "Hoav (sic)," and "Pony". (N.T., 09/29/05, p. 36-37-50, 69, 77, 92, 99, 10/03/2005, p. 57-58, 88). Hoav, later identified as Laurenn Harvin, was identified by both, Mr. Mayberry and Mr. Golphin, and arrested on June 17, 2004. (N.T., 10/05/2005, p. 101). "Laj", later identified as Elijah Miller was identified by Mr. Golphin and arrested on June 15, 2004. (N.T. 10/03/05, p. 57, 79-82, 101).

DISCUSSION

Appellant argues that this Court erred in dismissing his PCRA petition because his trial counsel was ineffective.[2] When examining an order denying post-conviction relief, the appellate court's scope of review is whether the PCRA court's determination is supported by the record, and otherwise, free of legal error. Commonwealth v. Reaves, 592 Pa. 134, 923 A.2d 1119 (Pa. 2007). The PCRA court's findings will not be disturbed, unless there is no support for the findings in the certified record. Commonwealth v. Touw, 2001 Pa. Super 229, 781 A.2d 1250 (Pa. Super. 2001). The appellate court's review is limited by the parameters of the PCRA and must be viewed in the light must favorable to the prevailing party.

[1] Mr. Mayberry still had six bullets that remained in his body. (N.T., 09/29/2005, p. 67).
[2] Please refer to the Statement of Issues.

Reaves, 592 Pa. at 141, 923 A.2d at 1124 (citing Commonwealth v. Duffey, 585 Pa. 493, 889 A.2d 56, 61 (Pa. 2005)).

In order for appellant to prevail on a claim of ineffective assistance of counsel, he must establish (1) that the claim is of arguable merit, (2) that counsel's performance was without reasonable basis, and (3) that there is a reasonable probability that but for counsel's error the outcome of the trial would have been different. Commonwealth v. Smith, 606 Pa. 127, 995 A.2d 1143 (Pa. 2010). Failure to satisfy any prong of the test requires the claim to be dismissed. Id. Additionally, if the prejudice prong of the ineffectiveness claim has not been met, it may be dismissed on that basis alone .... Commonwealth v. Jones, 571 Pa. 112, 126, 811 A.2d 994, 1002-1003 (2002). Counsel is presumed competent and an appellant must overcome this burden by a preponderance of the evidence. Further, counsel is not ineffective in failing to assert a baseless claim. Commonwealth v. Stewart, 450 A.2d 732, (1982)

I. Trial Counsel was not ineffective for failing to move for judgment of acquittal on the charge of attempted murder because the prosecution presented sufficient evidence to override a motion for judgment of acquittal.

Appellant argues that his trial counsel was ineffective for failing to move for a judgment of acquittal on the charges of attempted murder or otherwise preserve for appellate review a challenge to the sufficiency of the evidence of the element of shared intent to support the attempted murder charge. In Pennsylvania, trial counsel is not ineffective for failing to move for a directed verdict at completion of the prosecution's case, when the prosecution has presented a prima facie case and there was sufficient evidence to sustain a guilty verdict. Commonwealth v. Stewart, 304 Pa. Super. 382, 450 A.2d 732, (1982). The test for ruling upon a motion for a directed verdict is whether "the prosecution's evidence, and all inferences arising there from, considered in the light most favorable to the prosecution are insufficient to prove beyond a reasonable doubt that the accused is guilty of the crimes charged." Id. at 388(quoting Commonwealth v. Finley, 477 Pa. 382, 382, 383 A.2d 1259, 1260 (1978)).

In order to sustain a conviction of attempted murder the Commonwealth must prove beyond a reasonable doubt that a defendant took a substantial step towards an intentional killing of another human

being. Commonwealth v. Anderson, 650 A.2d (1992). An intentional *killing is k*illing by means of ... any ... kind of willful, deliberate and premeditated killing. **18 Pa. C.S. § 2502.** Additionally, a defendant's aid in the commission of an underlying crime need not be substantial for defendant to be found guilty as an accomplice, and will be sufficient to establish the requisite shared intent so long as it was offered to the principal to assist him in committing or attempting to commit the crime." Commonwealth v. Shank, 883 A.2d 658 (2005). Nonetheless, to be found guilty of attempted murder as a conspirator or accomplice the intent must be specific. Commonwealth v. Anderson, 650 A.2d (1992).

In this case, the Commonwealth's witnesses', Mr. Golphin and Mr. Mayberry, testimonies established the following evidence. On June 14, 2004, around 4:07a.m., Appellant and two of his cohorts entered Mr. Golphin's room and demanded money. Before Mr. Golphin could even answer, Appellant shot him in the calf. Appellant, then, passed the gun to his co-defendant-Sloan who repeatedly attempted to shoot Mr. Golphin in the head and chest area. But for Mr. Golphin's ability to hide in the space between his bed and the wall, Mr. Golphin would have been killed.

Furthermore, upon observing Mr. Mayberry near the door of Mr. Golphin's room, Appellant raised a gun in his direction. Co-defendant, Harvin, then, immediately started shooting at Mr. Mayberry. Co-defendant, Harvin, and his cohorts chased Mr. Mayberry back into his bedroom, whereby he was shot 13 times. Mr. Mayberry suffered permanent physical injuries to his stomach, as well as, partial paralysis throughout his body.

Given the above evidence, the Commonwealth presented sufficient evidence beyond a reasonable doubt that Appellant shared the same intent as his co-defendants to murder complainants. Appellant passed a gun to codefendant-Sloan, who, then, emptied his gun clip by attempting to shoot Mr. Golphin in the head and chest. Appellant then directed co-defendant Harvin to shoot Mr. Mayberry. Thus, Appellant's actions satisfied the requisite shared intent to establish that he was guilty of Attempted Murder as an accomplice. Consequently, Appellant has failed to demonstrate that his trial counsel was ineffective for failing to move for a judgment of acquittal at the close of the evidence and thus, Appellant's claim was without merit.

II. Trial counsel was not ineffective for failing to object or motion for a mistrial when the prosecutor allegedly elicited an out of court statement through a police detective's testimony.[3]

Appellant, next, argues that his trial counsel was ineffective for failing to object or motion for a mistrial when the prosecutor allegedly elicited, an out of court statement, through a police detective's testimony that implicated appellant in the charged incident in direct violation of his sixth amendment right to confrontation. He, further, argues that this alleged elicitation by the prosecutor was improper vouching. The relevant testimony is as follows:

> ***PROSECUTOR:*** *How did you get involved in the investigation?*
>
> ***COMMONWEALTH WITNESS*** *(Detective William Farrell): My lieutenant...made me aware of an incident that occurred [at] 838 North 43rd Street... a robbery/shooting. At that point, Detective Sharkey, Detective Krystopa, [I] started the investigation. I contact[ed] a confidential informant that I kn[e]w in the area.*
>
> ***DEFENSE COUNSEL*** *(Mr. Keaney): Objection.*
>
> ***COURT:*** *Sustained as to what was said by the confidential informant.*
>
> ***COMMONWEALTH WITNESS*** *(Detective William Farrell): Based on information received, I went to 906 Markoe Street, where I arrested [Appellant].*
>
> ***PROSECUTOR:*** *Where did you get the information and why was he arrested that day?*
>
> ***COMMONWEALTH WITNESS*** *(Detective William Farrell): Detective Maurizio... had received information regarding the identification of [Appellant] and he had [an] affidavit approved from the District Attorney's Office to arrest [Appellant]. ... I went to 906 Markoe Street and arrested him at that time.*

(N.T., 10/05/2005, p. 25-26).

Generally, an out of court statement offered for the truth of the matter asserted is not admissible. Commonwealth v. Palsa, 555 A.2d 808, 812 (Pa. 1989). However, an out of court statement that is an explanation of law enforcement conduct that leads to a defendant's arrest may be admissible because it is offered to show the information upon, which the agents reacted and not offered for the truth of the matter

[3] The discussion under heading II addresses issue#2 and issue#3 from appellant's PCRA petition.

asserted. Id. at 810, 812. Furthermore, for such a statement by a prosecutor to be considered improper bolstering or vouching the prosecutor must assure the jury that the witness is credible, and such assurance is based on either the prosecutor's personal knowledge or other information not contained in the record." Commonwealth v. Cousar, 928 A.2d 1025 (Pa. 2007).

In this case, appellant failed to show that the prosecutor elicited an improper statement or that the prosecutor improperly vouched for a statement the detective or by a confidential informant. Based on the above testimony, before Detective Farrell had a chance to testify about a statement made by a confidential informant, a co-defendant's trial counsel objected, and this Court sustained the objection. Thus, contrary to appellant's argument the prosecutor never elicited any out of court statement through Detective Farrell. The detective, however, explained the steps taken in arresting appellant.

Moreover, because there was no elicitation of an out court statement by a confidential informant, the prosecutor did not engage in improper vouching. The prosecutor never stated that Detective Farrell or the alleged confidential informant was credible based on the prosecutor's knowledge or other information not contained in the record. Consequently, appellant failed to establish that his trial counsel was ineffective for failing to object or motion for a mistrial due to an improperly elicited statement or because improper vouching by the prosecutor. Therefore, Appellant's claim was meritless.

III. Trial counsel was not ineffective for failing to object or request curative instructions when the prosecutor misstated the law.

Appellant argues that his trial counsel was ineffective for failing to object or to request a curative instruction when the prosecutor misstated the law of accomplice liability during his closing argument. The relevant portions of the prosecutor's closing argument are as follows:

> ***PROSECUTOR**: Her Honor is going to give a better definition of the crimes charged...Conspiracy for the most part is... defined as an agreement between two people to commit a crime... [I]n Pennsylvania [you need more than an] agreement ... [For example,] you have a getaway driver and the person that goes inside and actually grabs the money.... Both of them are guilty of robbery... [As for] accomplice liability... you are guilty of the overt acts...commit[ted] in furtherance of the conspiracy.[F]or instance, in the example...[of the robbery]... if the person [that] goes inside shoots somebody*

and kills them....The person outside did nothing.... the person outside is guilty, as well [under accomplice liability].

...the fact that all three of these defendants were inside there, they were unlawfully inside that house and once they started shooting...it doesn't matter who shoots [Mr. Mayberry]. They're all guilty of all crimes.

(N.T., 10/06/2011, p. 109-11).

In Pennsylvania, "[a defendant is] not prejudiced when the prosecution recites general definitions of the crimes charged and argues that the evidence presented satisfied the definitions. Commonwealth v. Gwaltney, 479 Pa. 88, 387 A.2d 848 (Pa. 1978). Moreover, where the trial court thereafter emphasizes to the jury that the court's instructions and not counsel's remarks concerning the law are controlling, procedure will be found proper". Id.

In this case, the prosecutor recited his understanding of conspiracy and accomplice liability. The prosecutor, then, used a general example of a bank robbery to assist the jurors' understanding of the conspiracy and accomplice liability charges. Furthermore, the prosecutor informed the jury that this Court would provide the jury with a better definition of the crimes charged. Following closing arguments, this Court clearly instructed the jury that they were not bound by the law provided by counsel during the closing arguments, but rather, they were to apply the law as she instructed. (N.T., 10/06/2005, p.113).

Based on the aforementioned facts, it is clear that the prosecution did not engage in any misstatement of the law of conspiracy and accomplice liability or engage in misconduct during his closing argument. As such, Appellant was not prejudiced by the statements, and thus, his trial counsel was not ineffective for allegedly failing to request curative instructions. Consequently, Appellant's claim was without merit and was properly denied.

IV. Trial Counsel was not ineffective for failing to ensure that jurors were properly informed of the requirement of shared intent for attempted murder as an accomplice or request supplemental instructions because given the instructions as an whole, the jury was properly informed of all of the required elements.[4]

Appellant argues that his trial counsel was ineffective for failing to ensure that jurors were instructed that they had to find that he shared a specific intent to kill in order to find him guilty of attempted murder as an accomplice. Appellant, additionally, argued that his trial counsel was ineffective for failing to request supplemental jury instructions when this Court recited "general" accomplice liability instructions. The following is pertinent portions of the jury charge by this Court:

> ***COURT:*** *[A defendant is guilty of a crime...as an accomplice] if with the intent to promote or facilitate the commission of the crime they solicit, command, encourage, request the other person to commit it; or they aid, agree to aid... .*
>
> *[A defendant is guilty of attempted murder if the] killing is with the specific intent to kill ... [and] willful, deliberate and premeditated.... All that is necessary [for premeditation] is ... time enough so the defendants can and do fully form the intent to kill ....when deciding if they held a specific intent to kill... consider...words, conduct, and the attending circumstances that show their state of mind.... A person cannot be guilty of an attempt to commit a crime unless he has a firm intent to commit that crime... and a substantial step has been taken.*

(N.T., 10/06/2005, p.131-34, 143-44).

Generally, a court's jury instructions must be read in their entirety to determine if they are fair and complete. The trial court has broad discretion in phrasing the charges. Commonwealth v. Daniels, 963 A.2d 409,410 (S. Ct. Pa 2009). The jury instructions will not be found in error if, taken as a whole, it adequately and accurately sets forth the applicable law. Id.

In this case, the jury was charged with, but not limited to, accomplice liability, co-conspirator liability, and attempted murder. In all three charges this Court specifically explained to the jury that they must find that Appellant and his cohorts acted with a specific and firm intent to commit a crime. The charge for attempted murder coupled with the conspiracy and accomplice charge was sufficient as proper

[4] This discussion under heading IV addresses issue#5 and issue#6 from appellant's PCRA petition.

jury instructions for the crimes charged. Thus, trial counsel was not ineffective for failing to ensure or request supplemental instructions. Therefore, Appellant's claim is meritless.

V. Trial counsel was not ineffective for failing to object to the Commonwealth's witness comment on the Appellant's post arrest silence.

Appellant argues that his trial counsel was ineffective for failing to object to the commonwealth's witness, Detective Farrell, comment on Appellant's post arrest silence. The relevant testimony is as follows:

> ***PROSECUTOR:*** *If you can tell us from where [Appellant] was arrested, how far away from that is 838 N.43rd Street?*
>
> ***COMMONWEALTH WITNESS*** *(Detective William Farrell): Approximately two blocks.*
>
> **PROSECUTOR:** What, if anything, did you do after that?
>
> ***COMMONWEALTH WITNESS*** *(Detective William Farrell): We brought [Appellant] back to headquarters and advised him of his charges, asked him if he wanted to make a statement. He declined....*

(N.T., 10/05/2005, p. 26).

Under Pennsylvania law, references to a defendant's post arrest silence will not warrant a new trial if the statement is shown to be harmless. Commonwealth v. Story, Pa. 383 A.2d 155 (1978). In determining whether an error is harmless the court should determine: (1) whether the error was prejudicial, and if prejudicial, (2) whether prejudice was *de minimis*; and (3) whether erroneously admitted evidence was merely cumulative of other untainted, substantially similar evidence; or whether evidence of guilt was so overwhelming, as established by properly admitted and non-contradicted evidence, that the prejudicial effect of error was insignificant. Id.

In this case, the mentioning of the Appellant's post arrest silence was harmless. The testimonial evidence presented by the Commonwealth's complainants was overwhelming and not contradicted by any evidence presented at trial. Prior to Appellant's arrest, he was positively identified by both complainants

as one of the perpetrators. Both victims, also, identified Appellant at trial and testified to knowing him prior to the night of the incident. The fact that the Appellant chose to remain silent during his arrest did not contribute to his guilty verdict. Appellant's guilty verdict was warranted by the victims' ability to recognize and identify him as one of the three perpetrators who viciously attacked them the night in question. Thus, appellant failed to show that his trial counsel was ineffective for failing to object to the Commonwealth's witness' comment on Appellant's post arrest silence. Consequently, Appellant's claim was without merit and properly dismissed.

VI. Trial Counsel was not ineffective for failing to file a motion to sever where co-defendants' alleged intention were to assign sole culpability to petitioner during trial.

Appellant's final argument is that his trial counsel was ineffective for failing to file a motion to sever, where his co-defendants planned to assign sole culpability to appellant. The decision of whether to sever trials of co-defendants is one within the sound discretion of the trial judge and will not be disturbed on appeal absent a manifest abuse of discretion. Commonwealth v. Stocker, 424 Pa. Super. 189 (Pa. Super. 1993); Commonwealth v. Payne, 2000 Pa. Super. 281 (Pa. Super 2000). Where defendants are charged with conspiracy, there is a strong preference for a joint rather than a separate trial. Payne , 2000 Pa. Super. at ¶ 10. Generally, a defendant's case should be severed only where the defenses of each are so antagonistic to the point where such individual differences are irreconcilable. Defenses become antagonistic only when the jury, in order to believe the testimony offered on behalf of one defendant, must necessarily disbelieve the testimony of his co-defendant. *Commonwealth v. Housman*, 604 Pa. 596, 986 A.2d 822, 834 (Pa. 2009), *quoting* Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367, 1373 (Pa. 1991). The defendant must also show that a joint trial would result in a real potential for prejudice, not just speculation that prejudice may result; mere hostility between defendants is not sufficient to require severance. Payne , 2000 Pa. Super. at ¶ 10. The fact that a defendant might save himself by placing the entire blame on the other is insufficient grounds to require severance. Id.

In this case, appellant failed to show that his defense and that of his co-defendants were so antagonistic that a joint trial would result in actual prejudice. The Commonwealth's evidence established that all three defendants entered the complainants' home on June 14, 2004, around 4 a.m. All three defendants, then, entered Mr. Golphin's room and appellant shot him in the right calf. Thereafter, appellant passed a firearm to co-defendant Sloan, who then shot at Mr. Golphin until the firearm was empty. Meanwhile, Mr. Mayberry was chased down by co-defendant Harvin and another cohort, who shot him 13 times throughout his body.

Based on the evidence presented by the Commonwealth, appellant failed to show that the jury would have to believe one of his co-defendants in order to find him guilty. All three defendants were convicted of the same offenses. Furthermore, even if one of appellant's co-defendants attempted to place all of the blame on him, it is still insufficient grounds to demonstrate real prejudice because there were no antagonistic defenses between appellant and his co-defendants. Thus, appellant's argument was without merit because he failed to meet the standard that would require a severance: antagonistic defenses. As such, his argument was properly dismissed.

CONCLUSION

All the claims raised in the Appellant's PCRA petition were without merit because he failed to demonstrate that his trial counsel was ineffective. Appellant's sixth and fourteenth amendment rights under the United Stated Constitution and Article I § 9 of the Pennsylvania Constitution were not violated. Consequently, this Court found itself in agreement with the Finley letter, and properly dismissed appellant's PCRA petition. As such, the dismissal of Appellant's PCRA petition should be upheld.

BY THE COURT:

K. SHREEVES-JOHNS, J.