NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. AMIR RASHEID ALLEN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1504 WDA 2012

Appeal from the PCRA Order September 10, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No.: CP-02-CR-0007576-2005

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: March 12, 2013

Appellant, Amir Rasheid Allen, appeals from the order denying his first petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 (PCRA). We affirm.

On June 6, 2005, the Commonwealth filed a criminal information charging Appellant with one count of criminal homicide related to his shooting of the victim, Robert Yetts, on April 8, 2005. As aptly stated by the trial court:

> At trial, [Appellant] was positively identified by Melissa Yetts, a woman with whom he had a relationship, as the person who shot the victim. She provided his name and a description of his vehicle[, a grey Park Avenue], to the police within minutes of the shooting. She described an altercation that had occurred the

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* Retired Senior Judge assigned to the Superior Court.

> evening before between the victim and [Appellant]. Ms. Yetts also testified that after the shooting, while [Appellant] was in the Allegheny County Prison, he telephoned her and told her that ". . . he was sorry; he didn't mean to hurt anybody. He just meant to scare him."

(PCRA Court Opinion, 9/12/12, at 2). Appellant presented the alibi testimony of Lesley R. Johnson and Kika Kennedy, who testified that Appellant was with them on the morning of April 8, 2005. On October 10, 2006, the jury convicted Appellant of first degree murder and the court imposed a mandatory life sentence.

Appellant filed a direct appeal and this Court affirmed his judgment of sentence, concluding, in relevant part, that Appellant had waived his issue regarding the alibi witness jury instruction for failing to preserve it in the trial court or in his Rule 1925(b) statement. (***See Commonwealth v. Allen***, 437 WDA 2007, at 5-6 (Pa. Super. 2008) (unpublished memorandum)). On April 1, 2009, our Supreme Court denied Appellant's petition for allowance of appeal. (***See Commonwealth v. Allen***, 968 A.2d 231 (Pa. 2009)).

On March 26, 2010, Appellant filed a timely *pro se* first PCRA petition. The PCRA court appointed counsel who filed an amended petition alleging after-discovered evidence that Quinn Lee Bowman actually shot Mr. Yetts, and ineffective assistance of counsel claims. On January 6, 2012, the court ordered that a PCRA hearing would be held on the after-discovered evidence issue and dismissed his three claims of ineffective assistance of counsel. On

April 26, 2012, at the first PCRA hearing, the court ordered that witness, Quinn Lee Bowman, undergo a mental health evaluation. After being found competent to testify, Bowman did so at Appellant's second PCRA hearing held on May 7, 2012.

Bowman testified that he was incarcerated in the same facility as Appellant on a six to twelve-year sentence for armed robbery and that he was eligible for parole in 2013, at which time he would serve a fifteen-year and eight-month federal sentence. (***See*** N.T. PCRA Hearing, 5/07/12, at 8-9). He stated that he had sold cocaine to Mr. Yetts three or four times before the shooting. (***See id.*** at 9-10). Bowman further testified that, on the night before the shooting, he was driving a bluish-gray Park Avenue that he had borrowed from someone named Tee in exchange for eight bags of heroin. (***See id.*** at 11). According to Bowman, he met Mr. Yetts that night to sell him cocaine, but that, after Mr. Yetts walked up to his car, he stole cocaine from Bowman at gunpoint. (***See id.*** at 11-12).

Bowman testified that, the next morning, he returned to the same area in the Park Avenue, looking for Mr. Yetts because he "perceived" that Mr. Yetts "was going to come out of that area where I sold him the cocaine" so he waited for him from six or seven a.m. and then encountered him between eighty-thirty and nine a.m. (***Id.*** at 15; ***see id.*** at 14-15). Bowman testified that, from inside his vehicle, he observed Mr. Yetts with a female and two children, that he told Mr. Yetts to get away from his family, that the

two men argued, and that he shot Mr. Yetts one time in the chest. (***See id.*** at 16-17).

Asked to describe his relationship with Appellant, Bowman testified that he did not know Appellant, but that in June or July of 2008 he overheard Appellant talking about someone named "Hans," the name by which Bowman knew Mr. Yetts. (***Id.*** at 21). He further testified that, a few days later, Bowman approached Appellant and admitted to him that he had killed Mr. Yetts. (***See id.*** at 24).

After taking the matter under advisement, the PCRA court denied Appellant's petition by order dated September 10, 2012. This timely appeal followed.[1]

Appellant raises four questions for our review:

> 1. Did the [PCRA] court err in denying Appellant's PCRA petition after two hearings since Quinn Lee Bowman revealed and testified to newly discovered evidence that he was the killer of Robert Yetts, and that Appellant had absolutely nothing to do with the murder?
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> 2. Did the [PCRA] court err in denying Appellant's PCRA petition since trial/appellate counsel was ineffective for failing to preserve a claim that the trial court erred in its alibi charge since it failed to convey that Appellant's failure to prove his alibi cannot be used as evidence of guilt, causing this claim to be waived on direct appeal?

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[1] The PCRA court did not order Appellant to file a Rule 1925(b) statement of errors and, in its October 12, 2012 order referred to its September 12, 2012 memorandum for the reasons it denied the petition. ***See*** Pa.R.A.P. 1925.

> 3. Did the PCRA court err in denying Appellant's petition since trial/appellate counsel was ineffective for failing to timely object to, ask for a curative instruction or raise an issue on appeal that the trial court erred in failing to grant a mistrial after Melissa Yetts, unexpectedly, testified that Appellant apologized for shooting the victim?
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> 4. Did the [PCRA] court err in denying Appellant's PCRA petition since trial/appellate counsel was ineffective for failing to cross-examine Melissa Yetts about a card that she sent to Appellant while he was incarcerated after the shooting?

(Appellant's Brief, at 3).

Our standard of review for an order denying PCRA relief is well-settled:

> This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that a petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence.

Commonwealth v. Carter, 21 A.3d 680, 682 (Pa. Super. 2011) (citations and quotation marks omitted). Further,

> A PCRA court's credibility findings are to be accorded great deference. ***Commonwealth v. Johnson***, 600 Pa. 329, 356, 966 A.2d 523, 539 (2009) ("A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts."). Indeed, where the record supports the PCRA court's credibility determinations, such determinations are binding on a reviewing court.

Commonwealth v. Dennis, 17 A.3d 297, 305 (Pa. 2011) (one citation omitted).

In Appellant's first issue, he argues that the PCRA court erred when it found that he is not entitled to relief under section 9543(a)(2)(vi) of the PCRA because Bowman "revealed and testified to newly discovered evidence that he was the killer of Robert Yetts, and that Appellant had absolutely nothing to do with the murder." (Appellant's Brief, at 9). Appellant's issue is waived.

The argument section of Appellant's brief addressing this issue violates the requirements of the Pennsylvania Rules of Appellate Procedure. (***See*** Appellant's Brief, at 9-14). Pursuant to Pennsylvania Rule of Appellate Procedure 2119(a), an appellant's brief must contain "such discussion and citation of authorities as are deemed pertinent." Pa.R.A.P. 2119(a); ***see also*** Pa.R.A.P. 2119(b). However, Appellant's brief contains only boilerplate law on the PCRA and the standard of review of denials of PCRA relief. (***See*** Appellant's Brief, at 9-10). Also, although Appellant alleges that Bowman's testimony was after-discovered evidence, he offers no pertinent law or discussion in support of this argument, other than quoting section 9543(a)(2)(vi) of the PCRA. (***See id.*** at 9-14). Instead, Appellant merely offers a lengthy, self-serving recitation of Bowman's testimony. (***See id.*** at 11-14). Therefore, this issue is waived. Moreover, it would not merit relief.

> To be entitled to relief under the PCRA on th[e] basis [of after-discovered evidence], the petitioner must plead and prove by a preponderance of the evidence "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it

had been introduced." 42 Pa.C.S.A. § 9543(a)(2)(vi). As this Court has summarized:

> To obtain relief based on after-discovered evidence, [an] appellant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted. The test is conjunctive; the [appellant] must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted. Further, when reviewing the decision to grant or deny a new trial on the basis of after-discovered evidence, an appellate court is to determine whether the PCRA court committed an abuse of discretion or error of law that controlled the outcome of the case.

Commonwealth v. Foreman, 55 A.3d 532, 537 (Pa. Super. 2012) (case citations and footnote omitted).

Here, Appellant has met the first prong of this test. Appellant's trial occurred in 2006 and he did not know about Bowman until 2008. However, we conclude that the nature and substance of Bowman's confession is both corroborative and cumulative of the evidence presented at trial where the essence of Appellant's defense was that he did not shoot the victim. (***See*** N.T. Trial, 10/10/06, at 237-51). Further, the Commonwealth's case against Appellant relied on the testimony of Melissa Yetts, Appellant's ex-paramour, who identified Appellant as the person who shot the victim from his grey Park Avenue in broad daylight on the morning of April 8, 2005, providing his name and a description of his vehicle to the police within minutes of the

shooting. (***See*** N.T. Trial, 10/05/06, at 28, 30, 32). She further described an altercation that had occurred the evening before between the victim and Appellant. (***See id.*** at 24-27). Finally, Melissa Yetts testified that Appellant called her from the Allegheny prison after the shooting and apologized for shooting the victim, stating that "[h]e just meant to scare him." (***Id.*** at 32; ***see id.*** at 31-32). At trial, Appellant attempted to impeach Yetts's testimony with that of alibi witnesses, Lesley R. Johnson and Kika Kennedy, who each testified that Appellant was with her on the morning of April 8, 2005. (***See*** N.T. Trial, 10/06/06, at 155-66).

Because Melissa Yetts testified for the Commonwealth at Appellant's trial and unequivocally identified Appellant as the perpetrator, Bowman's later confession to the crime directly contradicts Yetts's trial statements. Therefore, the confession impeaches Melissa Yetts. Bowman's testimony also is cumulative of Appellant's alibi witnesses who stated that Appellant was not at the scene of the crime. Therefore, because Bowman's confession is cumulative, corroborative, and offered solely for impeachment purposes, the court properly found that it was not after-discovered evidence for purposes of the PCRA. ***See Foreman***, ***supra*** at 537; ***see also Commonwealth v. Padillas***, 997 A.2d 356, 367 (Pa. Super. 2010) (concluding that proffered confession that someone other than appellant committed crime would not be admitted as after-discovered evidence because it was cumulative, corroborative, and offered solely for

impeachment purposes where Commonwealth had relied on informer testimony and essence of appellant's defense was that he was innocent).

Finally, we conclude that the record supports the PCRA court's credibility and weight of the evidence findings that, had Bowman testified, the outcome of Appellant's trial would not have been any different. (***See*** PCRA Ct. Op., 9/12/12, at 6). The PCRA court found Melissa Yetts "completely credible," Bowman "not credible," and the evidence of Appellant's guilt "overwhelming." (***Id.*** at 2, 6). Given our review of the entire record and the dubious nature of Bowman's confession, we cannot say that a new jury presented with all the evidence, including the confession, would likely reach a different verdict upon retrial. We decline Appellant's invitation to reassess credibility and the weight of the evidence. (***See*** Appellant's Brief, at 8, 12); ***see also Dennis***, ***supra*** at 305. Appellant's first issue does not merit relief.

In Appellant's second through fourth issues, he argues that the PCRA court erred in denying his petition because trial counsel was ineffective on three different bases. (***See*** Appellant's Brief, at 3, 14-21). These issues are waived and would not merit relief.

Pursuant to section 9543(a)(2)(ii) of the PCRA, a petitioner is eligible for relief if he proves by a preponderance of the evidence that his conviction or sentence resulted from "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining

process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii).

It is well-settled in this Commonwealth that:

> [C]ounsel is presumed effective, and a [petitioner] bears the burden of proving otherwise. In order to be entitled to relief on a claim of ineffective assistance of counsel, the PCRA petitioner must plead and prove by a preponderance of the evidence that: (1) the underlying claim has arguable merit; (2) counsel whose effectiveness is at issue did not have a reasonable basis for his action or inaction; and (3) the PCRA petitioner suffered prejudice as a result of counsel's action or inaction.

Commonwealth v. Steele, 961 A.2d 786, 796 (Pa. 2008) (citing ***Commonwealth v. Pierce***, 527 A.2d 973 (Pa. 1987) (some citations omitted). "Where it is clear that a petitioner has failed to meet any of the three, distinct prongs of the ***Pierce*** test, the claim may be disposed of on that basis alone . . . ." ***Id.*** at 797 (citation omitted). Furthermore, "a petitioner must set forth and individually discuss substantively each prong of the ***Pierce*** test." ***Id.*** (citations omitted).

In this case, Appellant utterly fails to "set forth and individually discuss substantively each prong of the ***Pierce*** test," instead discussing the arguable merits of his underlying claims, abandoning the last two prongs of the test. ***Id.***; (***see*** Appellant's Brief, at 14-21). Accordingly, we conclude that Appellant has failed to meet his burden of pleading and proving counsel's ineffectiveness, and his second through fourth issues do not merit relief. ***See Steele***, ***supra*** at 796-97. Moreover, these claims would not

merit relief, even if he had met his burden of pleading all three prongs of the ***Pierce*** test.

In Appellant's second issue, he argues that counsel was ineffective in failing to preserve a claim that the trial court erred in its alibi charge by including the word, "necessarily," "causing it to be waived on direct appeal." (Appellant's Brief, at 16, 18; ***see id.*** at 14-19). We disagree.

> Our standard of review for the trial court's instructions to a jury is well established. When reviewing a challenge to part of a jury instruction, we must review the charge as a whole to determine if it is fair and complete. Reversible error occurs [o]nly where there is an abuse of discretion or an inaccurate statement of the law.

Commonwealth v. Hanford, 937 A.2d 1094, 1097 (Pa. Super. 2007), *appeal denied*, 956 A.2d 432 (Pa. 2008) (citations and quotation marks omitted).

> An alibi instruction is proper so long as, when taken as a whole, the instruction makes clear to the jury that a defendant's failure to prove the alibi is not in and of itself a basis for a finding of guilt and that a reasonable doubt could arise based upon alibi evidence even where the defense evidence is not wholly believed.

Commonwealth v. Begley, 780 A.2d 605, 629 (Pa. 2001) (citation omitted).

> Thus, while a proper alibi instruction need not contain any "magic language," the charge must make it clear to the jury that alibi evidence, by itself or taken together with other evidence may tend to raise a reasonable doubt as to defendant's guilt. In short, the trial court must make it clear to the jury that the defendant's failure to prove alibi is not tantamount to guilt.

Commonwealth v. Allison, 622 A.2d 950, 953 (Pa. Super. 1993) (citation and some quotation marks omitted).

Here, the trial court instructed the jury, in relevant part, that:

> The fundamental principle of our criminal justice system is that any person accused of a crime, including the defendant here, is presumed under the law to be innocent. The mere fact that the defendant was arrested and accused of a crime is not evidence against him. In addition, there is no inference of guilt created by the fact that an information was filed or a trial was held.
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> The defendant is presumed innocent throughout the trial unless and until you conclude, based on careful and impartial consideration of the evidence, that the Commonwealth has proven the defendant's guilt beyond a reasonable doubt. It is not the defendant's burden to prove that he is not guilty. Instead, it is the Commonwealth that always has the burden of proving each and every element of the offenses charged beyond a reasonable doubt.
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> * * *
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> Now a defendant cannot be guilty of a crime unless he was at the scene of the alleged crime. The defendant has testified and offered evidence that he was not present at the scene. You should consider this evidence along with all other evidence in the case in determining whether or not the Commonwealth has met its burden of proving beyond a reasonable doubt that a crime was committed and that the defendant himself committed it.
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> The defendant's evidence that he was not present either by itself or together with other evidence may be sufficient to raise a reasonable doubt of guilt in your minds. Keeping in mind the defendant is not required to prove anything in a criminal case, the burden is solely upon the Commonwealth, and the failure to establish an alibi or that he was in another place is not necessarily evidence of his guilt.

(N.T. Trial, 10/10/06, at 268, 281-82).

We conclude that the above charge met the requirements of a proper alibi instruction. It advised the jury that the Commonwealth bore the burden of proof and that Appellant need not prove anything. (***See id.***). Further, by instructing the jury that it "should consider [the alibi evidence] along with all other evidence . . . in determining whether or not the Commonwealth met its burden," the trial court properly conveyed that "a reasonable doubt could arise based upon alibi evidence even where the defense evidence is not wholly believed." (***Id.*** at 281); ***Begley***, ***supra*** at 629 (citation omitted). Finally, the language of which Appellant complains, "the failure to establish an alibi . . . is not necessarily evidence of . . . guilt," (N.T. Trial, 10/10/06, at 282), alerted the jury to the fact that, due to the Commonwealth's burden of proof, the failure to "prove the alibi is not in and of itself a basis for a finding of guilt." ***Begley***, ***supra*** at 629. Therefore, we conclude that the alibi instruction, when taken as a whole, advised the jury that Appellant's "failure to prove alibi is not tantamount to guilt." ***Allison***, ***supra*** at 953 (citation omitted). Accordingly, Appellant has failed to plead and prove that his underlying claim has merit and, even if he had met his burden of pleading the last two prongs of the ***Pierce*** test, his second issue would not merit relief. ***See Steele***, ***supra*** at 797.

In Appellant's third issue, he argues that the Commonwealth violated its duty to disclose evidence that Appellant apologized to Melissa Yetts for shooting the victim and, therefore, counsel rendered ineffective assistance

when he failed to request timely discovery sanctions or to appeal the trial court's denial of his motion for a mistrial. (***See*** Appellant's Brief, at 19-20). Even if Appellant had met his burden of pleading the three prongs of the ***Pierce*** test, this issue would lack merit.

Preliminarily we note that the argument section of Appellant's brief addressing this issue violates the requirements of the Pennsylvania Rules of Appellate Procedure. (***See*** Appellant's Brief, at 20-21). Pursuant to Pennsylvania Rule of Appellate Procedure 2119(a), an appellant's brief must contain "such discussion and citation of authorities as are deemed pertinent." Pa.R.A.P. 2119(a); ***see also*** Pa.R.A.P. 2119(b). However, Appellant's brief contains a string citation to a section of the PCRA and to a case, without any discussion of the contents of these legal authorities or their applicability to this issue. (***See*** Appellant's Brief, at 20). Therefore, this issue is waived. Moreover, it would not merit relief.

It is well-established that:

> [t]he rights and duties of the parties in pretrial discovery in criminal cases are governed by Pa.R.Crim.P. 305. Pursuant to this rule, the Commonwealth must comply with certain mandatory disclosure requirements. The prosecution does not violate discovery rules, however, where it does not provide the defense with evidence it does not possess and of which it is unaware during pretrial discovery.

Commonwealth v. Flood, 627 A.2d 1193, 1200-01 (Pa. Super. 1993), *appeal denied*, 641 A.2d 583 (Pa. 1994) (citation and footnote omitted).

In this case, on the morning of trial, the Commonwealth asked Melissa Yetts on direct examination if she spoke with Appellant after the shooting. In response, Ms. Yetts unexpectedly testified that Appellant had called her from jail and told her that "he was sorry; he didn't mean to hurt anybody. He just meant to scare [the victim]." (N.T. Trial, 10/05/06, at 31-32). Trial counsel did not object to this testimony at that time, but made a motion for a mistrial when trial resumed in the afternoon after two other witnesses had testified. (***See id.*** at 58). Counsel based the motion on the fact that the Commonwealth had not provided discovery concerning Ms. Yetts's telephone conversation with Appellant. (***See id.***). The Commonwealth responded that the first time it was aware of Appellant's telephone comment to Ms. Yetts was when she testified at trial and the police reports provided during discovery corroborated the Commonwealth's representation. (***See id.*** at 59; ***see also*** Trial Court Opinion, 11/08/07, at 7).

Based on the foregoing, we conclude that, because the Commonwealth did not have a duty to disclose evidence that it did not possess, ***see Flood***, ***supra*** at 1200-01, Appellant has failed to plead and prove his underlying claim that counsel rendered ineffective assistance when he did not timely object to Melissa Yetts's testimony or appeal the trial court's denial of his

untimely motion for a mistrial.[2] Therefore, even if Appellant had met his burden of pleading the last two prongs of the ***Pierce*** test, his third issue would not merit relief. ***See Steele***, ***supra*** at 797.

In Appellant's fourth issue, he claims that "counsel was ineffective for failing to cross-examine Melissa Yetts about a card that she sent to Appellant while he was incarcerated after the shooting." (Appellant's Brief, at 20). Even were this issue not waived[3] for Appellant's failure to plead and prove all three prongs of the ***Pierce*** test, it would not merit relief.

At trial, Appellant testified that, after his arrest, he communicated with Melissa Yetts approximately twenty times by telephone, and also through letters. (***See*** N.T., 10/06/06, at 201). During Appellant's direct examination, his counsel attempted to admit into evidence a card allegedly sent from Ms. Yetts to Appellant with the words "I miss you" on it. (***See id.*** at 202). The trial court ruled the document inadmissible, stating that counsel was "attempting to impeach [Ms. Yetts] by offering extrinsic evidence which she was not confronted with." (***Id.*** at 203).

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[2] The court denied the motion for a mistrial because it was untimely and on the basis that the Commonwealth had no duty to produce evidence that it did not possess. (***See*** Trial Ct. Op., 11/08/07, at 5, 7-8).

[3] We note that this issue also is waived for the same briefing deficiencies as those observed in Appellant's third issue. (***See*** Appellant's Brief, at 20-21); ***see also*** Pa.R.A.P. 2119(a)-(b).

Although Appellant argues that the alleged card sent from Melissa Yetts to Appellant showed "that she erred in identifying [him] as the shooter and that she was now demonstrating remorse for her mistake[,]" Appellant fails to explain how the words, "I miss you," demonstrate mistaken identification or remorse. (Appellant's Brief, at 21). Additionally, Appellant's argument that introduction of the purported card would have "seriously challenged" Melissa Yetts's credibility because it would have shown that she "was on highly friendly terms with [Appellant] after he had allegedly killed her husband" is equally unavailing. (***Id.***). Ms. Yetts already had testified that she and Appellant were dating at the time of the shooting, that they had a good relationship that was physical, and she liked being with him. (***See*** N.T. Trial, 10/05/06, at 23-24). Finally, the card had no date or address on it and therefore did not establish that Melissa Yetts sent it to Appellant after the shooting. (***See*** N.T. Trial, 10/06/06, at 202).

Based on the foregoing, and Melissa Yetts's unequivocal identification of her paramour, Appellant, as the shooter of her estranged husband in broad daylight, we conclude that, even if Appellant had met his burden of pleading the three prongs of the ***Pierce*** test, his claim would lack merit. Appellant could not prove by a preponderance of the evidence that the outcome of the trial would have been different had counsel cross-examined Ms. Yetts on the purported card she sent to Appellant after the shooting.

See Steele, ***supra*** at 797.[4] Therefore, Appellant's fourth issue would not merit relief even were it not waived.

Order affirmed.

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[4] Appellant mentions that he spoke with trial counsel who admitted that "[t]here was no reasoned decision behind me not [introducing the card during cross-examination of Ms. Yetts]." (Appellant's Brief, at 21). However, we need not reach the question of whether counsel had a reasonable basis for his decision because we have concluded that Appellant cannot meet the prejudice prong of the ***Pierce*** test, and, therefore, we may dispose of his claim "on that basis alone." ***Steele***, ***supra*** at 797.