

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
WILLIAM JACKSON,		
Appellant		No. 1601 EDA 2012

Appeal from the PCRA Order of May 4, 2012,  
in the Court of Common Pleas of Philadelphia County,  
Criminal Division at No. CP-51-CR-0807401-2006

BEFORE: OLSON, WECHT and COLVILLE\*, JJ.

MEMORANDUM BY COLVILLE, J.:

Filed: February 26, 2013

This is a *pro se* appeal from the order dismissing Appellant's petition filed pursuant to the Post Conviction Relief Act ("PCRA").

Appellant was convicted of, *inter alia*, murder of the first degree. Following an unsuccessful direct appeal, Appellant timely filed a *pro se* PCRA petition. Counsel was appointed; counsel subsequently sought permission to withdraw pursuant to the procedure set forth in ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). The PCRA court issued notice of intent to dismiss; Appellant filed a *pro se* response thereto. The order on appeal followed.

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\*Retired Senior Judge assigned to the Superior Court.

On appeal, Appellant challenges the PCRA court's denial of relief, asserting that the following four claims of trial counsel's ineffectiveness were meritorious and that PCRA counsel should have included them in an amended PCRA petition: (1) failure to conduct investigation into potential witnesses; (2) failure to request jury instructions on the decedent's prior acts of violence; (3) failure to object to the opening and closing arguments of the Commonwealth; and (4) failure to object to a violation of a sequestration order.

Our standard of review of the denial of PCRA relief is limited to examining whether the court's rulings are supported by the evidence of record and free of legal error. *Commonwealth v. Anderson*, 995 A.2d 1184, 1189 (Pa. Super. 2010). Further, it is an appellant's burden to persuade this Court that the PCRA court erred and that relief is due. *Commonwealth v. Bennett*, 19 A.3d 541, 543 (Pa. Super. 2011). To establish ineffectiveness of counsel, a PCRA petitioner must show the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. *Commonwealth v. Cox*, 983 A.2d 666, 678 (Pa. 2009).

Following a thorough review of the record, the briefs of the parties, the relevant law, and the well-crafted opinion of the PCRA court, we find that the trial court properly denied relief on Appellant's first three claims. Finding no error on the part of the PCRA court, and determining that the PCRA court opinion adequately and accurately disposes of these claims, we adopt the PCRA court's opinion as our own.

In Appellant's fourth issue, the underlying claim is that trial counsel should have objected to the testimony of Tahera Cooper on the basis that she had been present in the courtroom during the trial in violation of a sequestration order. We find this claim to be without merit as Appellant has failed to establish that any such sequestration order existed. Appellant cites to a motion made by his counsel for sequestration of witness at a pre-trial hearing on a suppression motion; however, he does not establish that any similar order existed for trial. Having failed to prove the merits of the underlying claim, Appellant is not entitled to relief on his appellate claim.

Order affirmed.

PHILADELPHIA COURT OF COMMON PLEAS  
CRIMINAL TRIAL DIVISION

FILED  
JUL 17 2012  
Post Trial Unit

COMMONWEALTH

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CP-51-CR-0807401-2006

v.

:

WILLIAM JACKSON

:

Superior Court No.  
1601 EDA 2012

Sarmina, J.

:

July 17, 2012

OPINION

PROCEDURAL HISTORY

On June 29, 2007, following a jury trial before this Court, William Jackson (petitioner) was found guilty of first-degree murder (H-1), possessing an instrument of crime (PIC) (M-1), firearms not to be carried without a license (F-3), and carrying a firearm on public streets or public property in Philadelphia (M-1).<sup>1</sup> Sentencing was deferred until July 6, 2007, at which time petitioner was sentenced to the mandatory term<sup>2</sup> of life imprisonment for the first-degree murder charge.<sup>3</sup>

On July 13, 2007, petitioner filed post-sentence motions. These motions were denied by operation of law on November 14, 2007. Petitioner filed a timely notice of appeal on December 11, 2007. The Superior Court affirmed petitioner's judgment of sentence on August 20, 2009.<sup>4</sup>

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<sup>1</sup> 18 Pa.C.S. §§ 2502(a), 907(a), 6106, and 6108, respectively.

<sup>2</sup> 18 Pa.C.S. § 1102(a)(1).

<sup>3</sup> For the charge of firearms not to be carried without a license petitioner was sentenced to a term of not less than 3 years nor more than 7 years confinement, to run concurrently with the sentence for first-degree murder. The charges of carrying a firearm on public streets and possessing an instrument of crime were deemed "merged" for purposes of sentencing.

<sup>4</sup> Commonwealth v. Jackson, No. 3250 EDA 2007, slip. op. (Pa.Super., Aug. 20, 2009) (unpublished memorandum opinion).

Following the Supreme Court's March 9, 2010 denial of petitioner's Petition for Allowance of Appeal,<sup>5</sup> on November 23, 2010, petitioner filed a *pro se* PCRA petition, pursuant to the Post-Conviction Relief Act (PCRA).<sup>6</sup> On July 11, 2011, petitioner filed an amended *pro se* PCRA petition.

PCRA counsel was appointed on September 20, 2011. On November 29, 2011, after investigation, counsel filed a Finley letter<sup>7</sup>, having concluded that petitioner's PCRA petition and the trial record presented no issues of arguable merit. This Court, after conducting its own independent review, found that petitioner's claims were without merit and, on February 8, 2012, issued a notice to petitioner as required by Pa.R.Crim.P. 907 (907 Notice). On February 27, 2012, petitioner filed a *pro se* response to the 907 Notice, wherein petitioner raised additional claims. On March 9, 2012, PCRA counsel filed an Amended Finley letter. After reviewing these additional claims, this Court found they were without merit and, on May 4, 2012, dismissed the petition consistent with the 907 Notice and permitted counsel to withdraw. On May 29, 2012, petitioner filed a timely *pro se* notice of appeal.

## FACTS

On the night of April 5, 2006, Anthony Patterson (victim) was in his apartment at 2443 North 11<sup>th</sup> Street in Philadelphia, watching his two sons. Notes of Testimony (N.T.) 6/28/2007 at 61. At approximately 9:00 p.m., he received a call from his wife, Tahera Cooper, on their apartment's landline telephone. Id., 57-58. Their conversation was interrupted when the victim received a "chirp"<sup>8</sup> on his Nextel Instant Connect phone. Id. at 59-60. The victim told Ms. Cooper

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<sup>5</sup> Commonwealth v. Jackson, No. 503 EAL 2000, slip. op. (Pa., March 9, 2010) (unpublished memorandum opinion).

<sup>6</sup> 42 Pa.C.S. § 9541 *et seq.*

<sup>7</sup> Commonwealth v. Finley, 550 A.2d 213 (Pa.Super 1988). The Finley letter also complied with Commonwealth v. Friend, 896 A.2d 607 (Pa.Super. 2006).

<sup>8</sup> A "chirp" is similar to a walkie-talkie call that some cellular phones are capable of receiving and sending. N.T. 6/28/2007 at 59-60.

the caller was "Will" and that "he was going to meet up with Will up on the tenth floor."<sup>9</sup> Id. at 60-61. The victim and Ms. Cooper commonly referred to petitioner as "Will." Id. at 58.

At approximately 10:00 p.m., Officers Jean Marie-Spicer and Thomas Robinson received a radio call of "gunshots coming from the 2443 North 11<sup>th</sup> Street apartments". N.T. 6/28/2007 at 12. As they arrived outside the building, the officers observed petitioner exiting the building. Id. at 13-14. Officer Spicer noticed petitioner appeared to be carrying a firearm under his sweatshirt and pursued him on foot. Id. at 14-15. Officer Spicer followed petitioner to Fotteral Square Park where she then pulled out her firearm and said, "Hold it, police." Id. at 14-15. Petitioner immediately fled and attempted to exit the park. Id. at 16. At the edge of the park, petitioner lost his footing and was apprehended and placed under arrest. Id. at 31-32. Petitioner was found to have two firearms on his person, a Colt .357 Magnum revolver, found in his sweatshirt, and a semi-automatic Glock 9 millimeter, found in the waistband of petitioner's pants.<sup>10</sup> Id. at 32-33. The .357 Magnum had two empty chambers. Id. Petitioner also had a box of twenty .357 Magnum Hydro-shock bullets. Id. Finally, petitioner was later found to be carrying a blue and black Nextel cell phone with a broken antenna that was identified as belonging to the victim. Id. at 45, 190-91.

While other police officers were apprehending petitioner, Officer Kyle Bey, Sergeant Melso, and Officer Russell Seiberlich investigated the apartment building at 2443 North 11<sup>th</sup> Street. N.T. 6/27/2007 at 56-57. Officer Bey and the other officers travelled to the tenth floor and proceeded to the stairwell of the apartment building, where they found the body of the victim. Id. at 58. The victim was pronounced dead at Temple University Hospital the same day. Id. at 39.

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<sup>9</sup> Petitioner set this meeting up while he was under house arrest and had to cut off his ankle bracelet in order to go to this meeting with the victim. N.T. 6/27/07 at 154.

<sup>10</sup> Kenneth Lay, ballistics expert, testified he was able to determine to a reasonable degree of scientific certainty that the two fired cartridge casings he received were fired from the .357 Magnum revolver taken from petitioner. N.T. 6/28/2007 at 99.

At trial, petitioner testified on his own behalf and presented his version of the events to the jury. N.T. 6/28/2007 at 131. Petitioner admitted that he shot and killed the victim, but claimed to have done so in self-defense. Id. at 132. He testified that the victim requested he meet him at the victim's building. Id. at 133-35. When he arrived, the two walked up to the stairwell of the tenth floor. There, petitioner claimed, the victim pulled his gun and began threatening petitioner for killing one of the victim's young associates. Id. at 137-40, 142. Petitioner stated he shoved the victim's gun away and shot him twice with his own weapon, ran down the stairs, and out of the building. Id. at 140, 144-47. Petitioner stated he feared for his life and felt he had no other way of defending himself than to shoot the victim. Id. at 146-47.

## LEGAL ANALYSIS

On appeal petitioner raises the following issues:<sup>11</sup>

1. PCRA counsel rendered ineffective assistance when he failed to allege the ineffectiveness of trial counsel for failure to conduct an interview with Lawrence Walker and Terrance Freeman,<sup>12</sup> two potential witnesses for the defense.
2. PCRA counsel rendered ineffective assistance for failure to allege the ineffectiveness of trial counsel for failure to submit a timely request for jury instructions on the victim's prior acts of violence, and the ineffective assistance of direct appeal counsel for failure to preserve the claim.
3. The prosecutor committed misconduct when she expressed her personal belief and opinion as to the truth and falsity of the testimony and evidence concerning the guilt of petitioner.
4. Ineffective assistance of trial counsel.

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<sup>11</sup> The claims have been rephrased for ease of disposition.

<sup>12</sup> In petitioner's 1925(b) Statement and his response to PCRA counsel's Finley letter and this Court's 907 Notice, petitioner spells Mr. Freeman's name as "Terrence." This Court, however, will spell Mr. Freeman's name as "Terrance," consistent with the Notes of Testimony. N.T. 6/28/2007 at 118.

5. Ineffective assistance of direct appeal counsel for failure to preserve available claims.

*Ineffective Assistance of Counsel for Failing to Interview Witnesses*

Petitioner first claims PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to interview two potential witnesses, Lawrence Walker and Terrance Freeman. This claim is without merit.

According to the Pennsylvania Supreme Court in Commonwealth v. Balodis, 747 A.2d 341, 343 (Pa. 2000), counsel is presumed effective, and under 42 Pa.C.S. § 9543(a), the petitioner has the burden of proving ineffective assistance of counsel. In order to be eligible for PCRA relief due to ineffective assistance, a petitioner is required to prove that such assistance "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). A PCRA petitioner "must prove (1) that the underlying claim has arguable merit, (2) that counsel's conduct was without a reasonable basis designed to effectuate his or her client's interests, and (3) that counsel's ineffectiveness prejudiced the appellant." Commonwealth v. Allen, 833 A.2d 800, 802 (Pa.Super. 2003) (citations omitted). "All three prongs of this test must be satisfied. If [a petitioner] fails to meet even one prong of the test, his conviction will not be reversed on the basis of ineffective assistance of counsel." Commonwealth v. O'Bidos, 849 A.2d 243, 249 (Pa.Super. 2004).

In order to prove that trial counsel was ineffective for failure to interview a witness, petitioner must prove: (1) the existence and availability of the witness; (2) counsel's awareness of, or duty to know of, the witness; (3) the willingness and ability to cooperate and appear on behalf of the petitioner; and (4) the necessity of the proposed testimony in order to avoid prejudice.

Commonwealth v. Priovolos, 715 A.2d 420, 422 (Pa. 1998)(internal citations omitted). Petitioner first argues trial counsel erred in not interviewing Lawrence Walker. However, petitioner did not establish how Mr. Walker's testimony would have benefited the defense. Petitioner argues that Mr.



Walker would have testified that the two guns found on petitioner by the police had been stolen by the victim from Mr. Walker. It is not evident how this information would have aided petitioner's defense of self-defense. In its 907 Notice, this Court encouraged petitioner to provide additional information demonstrating how this evidence would have aided petitioner. However, petitioner failed to do so in his response to the 907 Notice. Therefore, petitioner has not satisfactorily demonstrated that he was prejudiced by the absence of this testimony.

Next, petitioner argues that trial counsel was ineffective for not interviewing Mr. Freeman. However, petitioner has failed to satisfy the criteria set forth in Priovolos, as Mr. Freeman was not available to testify on petitioner's behalf or even responsive to compulsory process. At trial, the prosecutor informed the Court that the Commonwealth had subpoenaed Mr. Freeman in order to have him testify on their behalf, yet had been unable to locate him. N.T. 6/28/2007 at 118-25. Defense counsel informed the Court that he did not know Mr. Freeman's location. Id. at 124. Thus, the witness was not available to testify. Furthermore, trial counsel noted that the prosecution's intent to call Mr. Freeman as a witness indicated to him that the witness's testimony would likely be unfavorable to petitioner. Id. at 124-25. Trial counsel stated he believed calling this witness would "assist [the] Commonwealth in proving their case." Id. Therefore, because the witness was unavailable and because his testimony was helpful to the Commonwealth and would have been damaging to petitioner, trial counsel was not ineffective.

Petitioner has thus failed to prove that trial counsel was ineffective for not interviewing these witnesses.

*Ineffective Assistance of Counsel for Failing to Timely Submit a Request for a Jury Charge*

Petitioner's second claim is that both PCRA counsel and direct appeal counsel were ineffective for failing to raise trial counsel's alleged ineffectiveness when he failed to submit a timely request for jury instructions concerning the victim's prior acts of violence and convictions. In his response to this Court's 907 Notice, petitioner expounded upon this claim. Petitioner stated that trial counsel was not only ineffective for failing to submit a timely request but also for failing to secure and present case law supporting his position that the Court should issue an instruction concerning the purpose of admitting the victim's past violent acts. This claim is without merit.

This Court will first address the allegation that direct appeal counsel was ineffective. "As a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002).<sup>13</sup> Therefore, because direct appeal counsel could not challenge trial counsel's ineffectiveness, this portion of petitioner's claim is without merit.

Petitioner also alleges that PCRA counsel was ineffective for not raising trial counsel's ineffectiveness for failing to timely submit case law in support of a jury instruction regarding the victim's prior violent acts. This claim is also without merit.

Petitioner testified the victim pointed a gun at him and accused him of shooting one of his young associates. Petitioner stated he feared for his life and felt he had no other way of defending himself than to shoot the victim. After petitioner's testimony, the prosecution and defense counsel agreed to a stipulation that the Clerk of Quarter Sessions, if called, would testify that the victim was arrested for robbery, though an unarmed robbery, and pled guilty to robbery as a felony of the

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<sup>13</sup> Some petitioners have attempted to overcome this general rule by appealing to Commonwealth v. Bomar, 826 A.2d 831, 854-55 (Pa. 2003). However, recent case law has explicitly rejected Bomar, instead favoring the general rule that ineffective assistance of counsel claims should not be raised until the collateral review stage. See, Commonwealth v. Liston, 977 A.2d 1089, 1100 (Pa. 2009) (C.J. Castille, concurring) (stating that "... there is no 'Bomar exception' to Grant."); Commonwealth v. Barnett, 25 A.3d 371, 375 (Pa.Super. 2011) (adopting the rule that "going forward, the lower courts should not indulge hybrid review by invoking Bomar") (emphasis in original).

second degree.<sup>14</sup> N.T. 6/28/2007 at 203-04. Prior to the stipulation, trial counsel requested that the Court instruct the jury in its final charge that this evidence was not admitted to sully the good name of the victim, but to demonstrate that he might have been the aggressor. *Id.* at 198-99. The Court asked counsel to present it with case law concerning this special instruction. *Id.* Trial counsel failed to supply this case law and the jury instruction was not given. N.T. 6/29/2007 at 6-9.

In his response to the 907 Notice, petitioner relies upon Commonwealth v. Fisher, 493 A.2d 719 (Pa. 1985) in support of his claim that trial counsel was ineffective for failing to secure and present case law to this Court. In Fisher, the appellant stabbed the victim twice in the chest, but claimed he did so in self-defense after the victim tackled him and repeatedly struck him in the head with his fists. Fisher, 493 A.2d at 720-21. In order to demonstrate that appellant reasonably feared for his life, appellant introduced evidence of two previous occasions when the victim had beaten him. *Id.* at 723. Appellant requested that a jury instruction be given explaining that the two acts of violence perpetrated on the appellant were admissible for the purpose of determining whether appellant reasonably believed he was faced with imminent death or serious bodily injury. *Id.* This request was denied by the trial court. *Id.* On appeal, the appellant claimed trial counsel was ineffective for failing to timely submit a proposed jury charge. *Id.* The Superior Court agreed and held that, since the victim's initial aggression was of non-deadly force, a charge instructing the jury of the relevance of the victim's prior acts on the defense of justification was appropriate. *Id.* at 724.

However, in Commonwealth v. Watley, 699 A.2d 1240 (Pa. 1997), the Supreme Court distinguished the Superior Court's holding in Fisher regarding a special jury instruction concerning prior violent acts by the victim. In Watley, petitioner also alleged he shot the victim in self-defense,

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<sup>14</sup> In Commonwealth v. Amos, 445 Pa. 297, 302-03 (Pa. 1971), the Pennsylvania Supreme Court held that prior convictions involving aggression by the victim of a homicide may be introduced into evidence when self-defense is asserted in order to (1) corroborate petitioner's knowledge of the victim's quarrelsome and violent character to prove petitioner reasonably believed his life to be in danger, or (2) to prove violent propensities of the victim to show the victim was the aggressor.

as the victim had previously threatened to kill petitioner and had allegedly fired shots at him. 699 A.2d at 1242. On appeal, petitioner relied upon Fisher to claim that trial counsel was ineffective for failing to request a special jury instruction concerning the victim's prior violent acts against petitioner and his reputation for violence. Id. The Supreme Court found Fisher distinguishable from Watley because, in Fisher, the defendant used deadly force in response to non-deadly aggression by the victim. Therefore, Fisher needed to introduce the two prior altercations in order to demonstrate the reasonableness of his belief that his life was in danger. Id. at 1245. In Watley, the Court specifically held that Fisher does not stand for the proposition that in every case in which the claim of self-defense is raised the jury must be instructed as to the purpose for which the prior acts of violence evidence is being admitted. Rather, the trial court must consider the factual circumstances in which the claim of self-defense arises. The Watley Court found that, in the case before them, being fired upon with a weapon was so obviously life threatening that the jury did not require any further explanation from the court. Id. Watley's testimony, if believed by the jury, was enough to demonstrate his belief was reasonable. Id.

In the instant case, petitioner testified he feared for his life when the victim threatened him with a firearm. Similar to petitioner in Watley, petitioner's testimony that he was threatened by the victim with a firearm was enough to demonstrate reasonable fear and, therefore, this Court was not required to give the jury an instruction as to the purpose for which the victim's prior violent act was relevant. Therefore, counsel was not ineffective in failing to pursue this jury instruction and petitioner's claim is without merit.<sup>15</sup>

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<sup>15</sup> Trial counsel did argue to the jury that they should take into consideration the victim's robbery conviction when determining who the aggressor in the situation was. N.T. 7/28/2007 at 237.

*Ineffective Assistance of Counsel for Failing to Object to Prosecutorial Misconduct*

Petitioner's third claim alleges the prosecutor committed misconduct in expressing her personal belief and opinion regarding the truth and falsity of testimony and evidence concerning the guilt of petitioner. This claim is without merit.

Although petitioner did not couch this claim in terms of ineffective assistance of counsel in his 1925(b) Statement, it was correctly raised as such in his response to this Court's 907 Notice. There, he claimed that PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness for not objecting to the prosecutor interjecting her belief and opinion as to the truth or falsity of testimony and evidence concerning petitioner's guilt. Therefore, this Court will address the issue as it was correctly raised in petitioner's response.<sup>16</sup>

During her closing argument, the prosecutor stated, "I will submit to you that's what this case is about, not the telling of the truth but the spinning of the truth. The spinning of the truth by this defendant from the very moment he is caught by those police, until the moment he took the stand today, until the moment counsel closed."<sup>17</sup> N.T. 6/28/2007 at 239. "Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict." Commonwealth v. Stokes, 839 A.2d 226, 230 (Pa. 2003), quoting Commonwealth v. Fisher, 813 A.2d 761, 768 (Pa. 2002).

Furthermore, according to the Pennsylvania Supreme Court in Commonwealth v. Chmiel:

In determining whether the prosecutor engaged in misconduct, courts must keep in mind that comments made by a prosecutor must be examined within the context of defense counsel's conduct. It is well settled that the prosecutor may fairly respond to points made in the defense closing. A remark by a prosecutor, otherwise improper,

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<sup>16</sup> This Court recognizes that petitioner is *pro se*.

<sup>17</sup> Petitioner does not specifically point out a section in the Notes of Testimony where the misconduct occurred. This Court, after reading the Notes of Testimony, believes the quoted text to be the statement petitioner alleges to be misconduct.

may be appropriate if it is in fair response to the argument and comment of defense counsel. Moreover, prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair.

889 A.2d 501, 543-44 (Pa. 2005).

In Commonwealth v. Johnson, 588 A.2d 1303 (Pa. 1991), the prosecutor in a closing argument characterized the defendant's testimony as a lie in a rape case where defendant's testimony directly contradicted the victim's. Defendant appealed, alleging prosecutorial misconduct. The Supreme Court held that the statements were not prejudicial because the case was ultimately decided on the basis of credibility and the statements of the victim and defendant conflicted. Id. at 1307. The Court stated that, "[g]iven these circumstances, it would be difficult to conceive of any other approach when closing to the jury than that employed by the prosecutor here." Id.; see also, Commonwealth v. Judy, 978 A.2d 1015, 1028 (Pa.Super. 2009).

In this case, the prosecutor's comments quoted above reinforced the fact that the jury had been offered differing accounts of the events in question and that, ultimately their decision would rest upon their judgment of whether or not petitioner was credible. As in Johnson, it would be difficult to conceive of an approach by a prosecutor that did not attempt to undermine a defendant's contradictory testimony. Viewed in context, the statement in question merely introduced an argument attempting to logically and persuasively summarize the Commonwealth's case against petitioner. In any event, the jury was instructed that arguments by either counsel do not constitute evidence. N.T. 6/27/2007 at 14; N.T. 6/29/2007 at 40. Therefore, there was no prosecutorial misconduct and, as such, trial counsel was not ineffective for failing to object to this statement and petitioner's claim is thus without merit.

#### *Ineffective Assistance of Counsel*

In his fourth claim, petitioner alleges generally that there was ineffective assistance of trial counsel. This claim is waived.

“Pa.R.A.P. 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal.” Commonwealth v. Lemon, 804 A.2d 34, 37 (Pa.Super. 2002). “When the trial court has to guess what issues an appellant is appealing, that is not enough for meaningful review.” Lemon, 804 A.2d at 37, *citing* Commonwealth v. Dowling, 778 A.2d 683, 686 (Pa.Super. 2001). Moreover, “when an appellant fails to adequately identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues.” Lemon, 804 A.2d at 37 (internal citations omitted).<sup>18</sup> Finally, the Superior Court has stated that “a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all.” Id. (internal citations omitted). In petitioner’s Statement of Errors Complained of on Appeal, petitioner failed to specify why or how trial counsel was ineffective. Inasmuch as this claim is too vague to permit meaningful review, this Court will not speculate as to the issue, or issues, which petitioner proposes to raise on appeal. However, this Court recognizes that petitioner is *pro se*. To the extent that he intended to re-raise the claims he raised during the PCRA proceedings, this Court will address them here, but views any other issues as waived.

First, in his *pro se* PCRA petition, petitioner claimed that trial counsel was ineffective for not allowing petitioner to participate in the defense strategy. This is without merit.

In his *pro se* petition, petitioner stated that he was not allowed to participate in his own defense and was told by trial counsel, “I’m the lawyer, I was appointed to represent you. I know what I’m doing an [sic] you’re not allowed to address this court [since] that’s my job, I’ve been ‘trained’ and I know the judge.” What petitioner appears to be referencing is what occurred during

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<sup>18</sup> See also, Commonwealth v. Heggins, 809 A.2d 908, 912 (Pa.Super. 2002) (“Since the Concise Statement did not sufficiently identify the issue for the trial court, the trial court was forced to guess as to the issues Appellant wished to raise on appeal. Even if the trial court correctly guessed the issues Appellant brings before this Court, the vagueness of Appellant’s Concise Statement renders all issues raised therein waived.”).

the trial when he spoke directly to this Court and asked for a mistrial.<sup>19</sup> N.T. 6/28/2007 at 104. The Court denied the request and asked that petitioner not speak directly to the Court and, instead, address the Court through his counsel. *Id.* at 109. If counsel later told petitioner not to speak directly to the Court he cannot be said to be ineffective for doing so since courts look unfavorably upon hybrid representation. See Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993). In any event, petitioner testified on his own behalf at trial and claimed he shot the victim in self-defense. This tends to show that, contrary to petitioner's claims, he did participate in his defense. Therefore, this claim is without merit.

Second, petitioner claimed that trial counsel was ineffective for failure to conduct any investigation and only visited him twice before trial. This claim is unsubstantiated and therefore fails.

In his *pro se* PCRA petition, petitioner claimed that trial counsel failed to do any investigation and only visited him twice before trial yet did not state what trial counsel should have investigated and what, specifically, more frequent visits with him in prison would have accomplished. This Court noted this in its 907 Notice and encouraged petitioner to provide the Court with further information concerning this claim. Petitioner failed to do so in his response to the 907 Notice and, therefore, petitioner's claim is unsubstantiated and thus fails.

Third, petitioner claimed in his *pro se* PCRA petition that trial counsel was ineffective for failure to call witnesses. After conducting an independent review, this Court found this claim to be without merit and informed petitioner of this in the 907 Notice. Petitioner failed to further substantiate this claim in his response to the 907 Notice. Therefore, this claim is still without merit.

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<sup>19</sup> Petitioner asked this Court to grant a mistrial on the basis that Tahera Cooper, the mother of the victim's children and the victim's common law wife, violated the sequestration order the day before yet was permitted to testify. N.T. 6/28/07 at 104.



Although petitioner did not state, in either his first or amended petition, which witnesses trial counsel should have called, PCRA counsel mentioned three names in his Finley letter – Terrance Freeman, Reggie Johnson, and Lawrence Walker. The Court will address these witnesses.

In order to establish that trial counsel was ineffective for failure to call a witness, petitioner must establish:

(1) that the witness existed, (2) that the witness was available at the time of trial, (3) that counsel was informed of the existence of the witness or should have known of the witness's existence, (4) that the witness was prepared to cooperate and would have testified on petitioner's behalf and (5) that the absence of the witness's testimony prejudiced petitioner.

Pursell, 724 A.2d at 306. Not only has petitioner not met his burden pursuant to Pursell, but a review of the record also demonstrates that petitioner believed the Commonwealth was going to call Terrance Freeman and nothing suggested that he asked or expected trial counsel to call this witness. During trial, this Court directly asked petitioner whether there were any witnesses he thought were going to be called but were not. Petitioner responded that he believed Terrance Freeman would be called to testify. N.T. 6/28/07 at 118. Petitioner further stated that he believed the Commonwealth would call Mr. Freeman. Id. Petitioner attempts to fault trial counsel for failing to call Mr. Freeman yet he testified that he believed the Commonwealth, not the defense, would call him as a witness.

Petitioner also stated he believed Reggie Johnson would be called to testify. Id. at 119. Petitioner explained to the Court that he wanted Mr. Johnson to testify to having spoken to the victim and that the victim said he was going to “take care of something.” Petitioner apparently intended to characterize the victim's statement as demonstrating he was planning on attacking petitioner. Id. at 120. The prosecutor advised the Court that the Commonwealth also had wanted Mr. Johnson to testify but that the Commonwealth had not had any success in tracking him down. Id. at 122. Trial counsel then brought to the Court's attention that he had counseled his client that it was best not to call this witness since the Commonwealth was looking for him, which meant that he

had information prejudicial to the defense. Id. at 124-25. It is clear then, from a review of the record, that a reasonable basis existed for trial counsel to not secure the presence of this witness and, therefore, petitioner's claim that trial counsel was ineffective is meritless. Commonwealth v. Williams, 640 A.2d 1251, 1264 (Pa. 1994) (holding that counsel's assistance is deemed effective once it is apparent that any reasonable basis for counsel's action existed.)

Finally, PCRA counsel mentioned a third witness in his Finley letter – Lawrence Walker. In his Finley letter, counsel stated that petitioner wanted this witness called to testify about a statement this witness had given to the police stating he believed the two guns found on petitioner when arrested by the police had been stolen by the victim from him (petitioner had, in turn, gotten the guns from the victim). As discussed *supra*, it is unclear how this testimony would have helped petitioner. Again, this Court's 907 Notice encouraged petitioner to provide information as to how this testimony would have aided his defense. Petitioner failed to do this. Therefore, petitioner has not proven that he was prejudiced by trial counsel's failure to call this witness. Thus, the petitioner's claims regarding each of the witnesses fails.

Fourth, petitioner claimed in his *pro se* PCRA petition that trial counsel was ineffective for directing petitioner not to call or send certified mail during the whole course of the trial. This claim is without merit.

Petitioner attached to his pleadings a letter from trial counsel where counsel apologized for his inability to accept phone calls from petitioner due to counsel's busy trial schedule. Trial counsel invited petitioner to communicate via letters, but instructed him not to send certified mail as counsel would be unavailable to sign for those letters. Petitioner's allegations that trial counsel asked him to not call during the course of the trial is inaccurate and, furthermore, trial counsel cannot be said to be ineffective for telling petitioner not to send him certified mail. If anything, trial counsel was trying to make sure that he was able to receive petitioner's mail by directing that it not be sent

certified. In his response to the 907 Notice, petitioner did not address nor add any information to further substantiate this claim; therefore, this claim still fails.

Fifth, petitioner claimed in his *pro se* PCRA petition that trial counsel was ineffective for failing to introduce evidence or testimony that petitioner had smoked marijuana prior to the incident. This claim is without merit.

Although petitioner does not flesh out this claim, it seems that petitioner was trying to raise a claim challenging trial counsel's failure to raise a voluntary intoxication defense<sup>20</sup> on the basis that petitioner had smoked marijuana just prior to the shooting. In order for this defense to be applicable, petitioner must show that he was so overwhelmed or overpowered by the marijuana that he lost his faculties and was incapable of forming a specific intent to kill. Commonwealth v. Carpenter, 617 A.2d 1263, 1268 (Pa. 1992), *citing* Commonwealth v. Breakiron, 571 A.2d 1035, 1041 (Pa. 1990); Commonwealth v. Reiff, 413 A.2d 672, 674 (Pa. 1980). Petitioner does not claim he lost his faculties and sensibilities because he smoked marijuana. Furthermore, during petitioner's testimony at trial, he did not state nor imply that his intoxication affected his ability to understand his actions. Therefore, this claim is without merit.

Sixth, petitioner claimed in his *pro se* PCRA petition that trial counsel was ineffective for failing to question Tahera Cooper concerning her bias against petitioner on the basis that she was related to the victim. This claim is without merit.

At trial, the jury heard through the testimony of Ms. Cooper that she was the victim's wife. N.T. 6/28/07 at 57. Trial counsel cannot be said to be ineffective for not further belaboring this point when the jury was already aware of the relationship between the witness and victim. Moreover, as Ms. Cooper's testimony was limited, an attempt to show a possible bias that she may

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<sup>20</sup> 18 Pa.C.S. § 308 states, "Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negate the element of the offense, except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder."

have harbored because of her relationship with the victim would not have created a reasonable possibility of the outcome being different in this case. This Court, in its 907 Notice, encouraged petitioner to provide further information regarding this claim, if there was any. Petitioner failed to do so. Therefore, petitioner's claim is unsubstantiated and thus fails.

Seventh, petitioner claimed in his *pro se* PCRA petition that trial counsel was ineffective for stipulating to Monique Adams' testimony in the absence of a full colloquy with petitioner to ascertain whether he understood the consequences of stipulating to this testimony. This Court found this claim to be without merit in its 907 Notice.

At trial the prosecution and defense agreed to stipulate that, if called, Monique Adams would testify that she resided in the building where the shooting occurred. She would also testify that at approximately 9:45 p.m. she was inside her apartment and heard: two gunshots, the fire door open, and the sound of someone running in the stairwell. However, she could not identify the person. N.T. 6/28/07 at 55-56. Petitioner has failed to show that he was prejudiced by this stipulation as the witness could not identify the person she heard. Even if the witness had identified the person as petitioner, petitioner himself testified that he shot the victim in the building and then ran down the stairs and out of the building. This Court noted this in its 907 Notice and encouraged petitioner to provide the Court with further information as to this claim. Petitioner failed to do so. Therefore, petitioner failed to substantiate how he was prejudiced and this claim therefore fails.

Finally, petitioner claimed in his response to this Court's 907 Notice that trial counsel was ineffective for failing to submit a timely request for a jury instruction as to the victim's prior acts of violence. As discussed *supra*, this claim is without merit.

#### *Ineffective Assistance of Direct Appeal Counsel in Failing to Preserve Claims*

In addition to claiming ineffective assistance of trial counsel, petitioner also claims the ineffective assistance of direct appeal counsel for failure to preserve available claims. As with

petitioner's general claims of ineffective assistance of trial counsel, the claim of ineffective assistance of direct appeal counsel is too vague to permit meaningful review. Therefore, this Court will not speculate as to the issue or issues petitioner proposes to raise on appeal and deems this claim waived.<sup>21</sup>

Accordingly, the dismissal of petitioner's petition should be affirmed.

BY THE COURT:

  
M. TERESA SARMINA, J.

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<sup>21</sup> This Court does recognize that petitioner is *pro se* and therefore, to the extent that petitioner intended to re-raise the one ineffective assistance of direct appeal counsel claim that he raised during PCRA, this Court will address it.

Petitioner alleged in his *pro se* pleadings that direct appeal counsel was ineffective for failing to raise the claim that trial counsel was ineffective for failing to demand the Commonwealth comply with the required rules of filing a bill of particulars. This claim is without merit.

Since Grant, ineffective assistance of counsel claims are to be raised on PCRA and not on direct appeal, and therefore, direct appeal counsel cannot be said to have been ineffective for failure to raise a claim that could not be raised on direct appeal. 813 A.2d at 738. Regardless, petitioner's underlying claim of ineffective assistance of trial counsel is without merit. Pursuant to Pa.R.Crim.P. 572, defense counsel is required to request that the Commonwealth furnish a bill of particulars before the Commonwealth has a duty to do so. While it is unclear whether trial counsel made this request, petitioner has failed to allege how he was prejudiced. "A bill of particulars is intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the statute of limitations." Commonwealth v. Chambers, 599 A.2d 630, 641 (Pa. 1991). Petitioner has failed to indicate how the lack of the bill of particulars hampered his defense. This Court in its 907 Notice encouraged petitioner to provide further information regarding this claim. However, petitioner failed to do so. Therefore, petitioner's claim is unsubstantiated and thus fails.