NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WILLIE JONES,	:	No. 607 WDA 2014
Appellant	:	

Appeal from the PCRA Order, March 17, 2014,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0008530-2007

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED FEBRUARY 1, 2016**

Willie Jones appeals from the March 17, 2014 order dismissing his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546, following his convictions of rape of a child, statutory sexual assault, aggravated indecent assault, sexual assault, indecent assault, and endangering the welfare of children.[1] We affirm.

The trial court provided the following facts:

> At trial, the Commonwealth presented evidence through the victim, her mother, and brother. Additionally, various investigating officers and a forensic scientist testified. The defendant presented evidence through the testimony of himself in addition to friends who were present on the evening of the last alleged crime. The last incident in question occurred on March 22, 2007, when the

[1] 18 Pa.C.S.A. §§ 3121(c), 3122.1, 3125(a)(7), 3124.1, 3126(a)(7), and 4304(a), respectively.

victim was eight years old. The victim, who was the niece of the defendant's girlfriend, spent considerable time at the home of her aunt and the defendant. It was common for the victim and her siblings to stay overnight at their aunt's in order to accommodate their mother's work schedule. The victim testified that on the last occasion that she stayed over [at] her aunt's, the defendant, who she referred to as "Uncle Willie," touched his private part with her private part. She and the other children were in their beds when the defendant came in and told the victim to take off her clothes, which consisted of her pants and underwear. The defendant also took off his pants. The defendant subsequently had intercourse with the victim. The victim testified that if felt like the defendant was peeing inside her. The victim testified that the defendant told her not to tell as he would get in trouble. The nine-year-old victim also testified that this had occurred more than once, expressing that it was more like six, seven, or eight times. The victim's older brother, who was in the same bedroom on the night of this last occurrence, while appearing to be sleeping, witnessed what had occurred in the bedroom. He testified at trial that subsequent to observing what had occurred, he told his mother the following day.

The victim's mother testified that because of her work schedule at a hospital, and the close proximity of her sister, during school nights the children would stay overnight at her sister's. The mother testified that on March 23, 2007, her son had told her what he had observed and that she had contacted the McKeesport police and taken her daughter to the hospital. At trial, various officers and detectives of the McKeesport police department testified regarding their investigation of the sexual assaults. On March 23, 2007, Officer Michelle Melli of the city of McKeesport police, after obtaining consent to search the residence occupied by the defendant, obtained sheets, blankets, pillows, and clothing which the victim had been wearing. The victim identified her clothing that she was wearing at

> the time of the incident. Her underwear that she was wearing at the time of the incident was subsequently sent to the crime lab for analysis.
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> On April 5, 2007, Detective Christopher Halaszynski of the McKeesport Police Department arrested the defendant, gave him his ***Miranda***[2] rights, and subsequently interviewed the defendant. The detective testified that the defendant told him "he never meant to hurt her, he wasn't thinking" and that it happened only twice. Subsequently, the defendant gave a recorded statement that was played before the jury. The Commonwealth additionally presented a forensic scientist from the Allegheny County Medical Examiner's Office with regard to the results of the forensic serology and DNA analysis. The analysis of the victim's underwear revealed a sperm stain that contained an identical DNA match to that of the defendant.
>
> The defense asserted that the story was a fabrication, that the recorded statement was made under distress and presented its argument to the jury that the DNA may have been transferred from the other laundry. The defendant presented two witnesses who testified that they were at the residence of the defendant on March 22, 2007, and played cards with the defendant that evening until approximately 6:00 a.m. the next morning. These witnesses testified before the jury that they did not see the defendant go upstairs where the children were sleeping that evening. The defendant also testified on his own behalf, denying any of the alleged occurrences and asserting that the recorded statement was made out of fear.

Trial court opinion, 6/17/09 at 2-4.

A jury trial was held on July 21-23, 2008, resulting in appellant's conviction of the aforementioned charges. Appellant was represented at trial

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

by David S. Shrager, Esq.[3] On December 4, 2008, appellant was sentenced to an aggregate term of 15-30 years' incarceration, to be to be followed by a five-year probation term upon his release from prison. Appellant appealed the judgment of sentence to this court, and the judgment of sentence was affirmed on March 25, 2010. ***See Commonwealth v. Jones***, No. 2138 WDA 2008, unpublished memorandum (Pa.Super. filed March 10, 2010).[4] Attorney Shrager represented appellant on his direct appeal.

On May 4, 2010, appellant filed a motion for relief pursuant to the PCRA. After several extensions of time were granted by the trial court, appellant filed an amended PCRA petition on January 9, 2012. Following a hearing, the PCRA court granted appellant's request for a new trial, on the grounds that trial counsel failed to ask for the jury to be polled following the announcement of the verdict. The Commonwealth appealed the PCRA court's order to this court, which reversed the PCRA court on July 23, 2013. ***See Commonwealth v. Jones***, 71 A.3d 1061 (Pa.Super. 2013). Appellant appealed this court's decision to the Supreme Court of Pennsylvania on August 20, 2013, and the court denied the appeal on January 24, 2014. ***Commonwealth v. Jones***, 84 A.3d 1062 (Pa. 2014).

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[3] Attorney Shrager died in 2014.

[4] The only issue appellant raised for this court's review on direct appeal was whether the trial court committed "an abuse of discretion in the sentence imposed upon the appellant at his sentencing[.]" ***Jones***, No. 2138 WDA 2008 at *2.

On February 13, 2014, the PCRA court issued a notice of intention to dismiss the remaining issues in appellant's PCRA petition. The PCRA court dismissed appellant's PCRA petition on March 17, 2014. On April 16, 2014, appellant filed a notice of appeal. The PCRA court ordered appellant to produce a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) on August 4, 2014. Appellant complied with the PCRA court's order on September 30, 2014, and the PCRA court filed an opinion pursuant to Pa.R.A.P. 1925(a).

Appellant raises the following issues on appeal:

> I. [APPELLANT] SHOULD HAVE BEEN GRANTED A MISTRIAL ***SUA SPONTE*** WHEN THE COMMONWEALTH VIOLATED HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT, AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A MISTRIAL OR OBJECT TO THE PROSECUTOR'S IMPROPER QUESTIONING.
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> II. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A VERDICT OF GUILT AS TO THE ALL [SIC] OF THE CHARGES.
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> III. THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE, AND TRIAL COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE PROPERLY UNDER PA.R.CRIM.P. 607.
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> IV. [APPELLANT] WAS ENTITLED TO A JURY INSTRUCTION WITH REGARD TO THE GENUINENESS AND VOLUNTARINESS OF HIS STATEMENTS TO THE POLICE AND TRIAL COUNSEL'S FAILURE TO REQUEST THE PROPER CHARGE OR PRESERVE THE ISSUE FOR APPEAL AMOUNTED TO INEFFECTIVE ASSISTANCE.

V. THE SENTENCE IS ILLEGAL WHERE [APPELLANT] WAS SENTENCED ON COUNTS OF SEXUAL ASSAULT AND INDECENT ASSAULT AS WELL AS RAPE, BUT SEXUAL ASSAULT AND INDECENT ASSAULT ARE LESSER INCLUDED OFFENSES OF RAPE. ***COMMONWEALTH V. BUFFINGTON***, 828 A.2D 1024 (PA. 2003); ***COMMONWEALTH V. BARANIAK***, 504 A.2D 931 (PA. SUPER. 1986); ***COMMONWEALTH V. BROWN***, 434 A.2D 838 (PA. SUPER. 1981); 42 PA.C.S. §9765.

VI. THE DETERMINATION THAT [APPELLANT] IS A SEXUALLY VIOLENT PREDATOR WAS IN ERROR WHERE THERE WAS NO CLEAR AND CONVINCING EVIDENCE AS ESTABLISHED UNDER THE STATUTORY CRITERIA IN MEGAN'S LAW II BY WHICH TO LABEL HIM AS SUCH. DR. PASS MERELY TESTIFIED IN A CONCLUSORY MANNER THAT HE FOUND "THE BEHAVIOR DEMONSTRATED DURING THE COMMISSION OF THE INSTANT OFFENSE MEETS THE CLASSIFICATION CRITERIA AS OUTLINED WITHIN THE AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL, THE 4TH EDITION, REVISED, FOR PEDOPHILIA, NO. 302,2." (SENTENCING HEARING, 32)

VII. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING [APPELLANT] AS DETAILED BELOW AND PREVIOUS COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT, PRESERVE AND RAISE THESE ISSUES:

A. [APPELLANT'S] SENTENCE IS UNREASONABLE, MANIFESTLY EXCESSIVE, AND AN ABUSE OF DISCRETION WHEN THE COURT DID NOT STATE SUFFICIENT REASONS ON THE RECORD FOR [APPELLANT'S] SENTENCE. THE COURT MUST NOTE ON THE

RECORD THAT IT CONSIDERED THE FOLLOWING CRITERIA: (1) THE PERTINENT CRITERIA OF THE SENTENCING CODE, (2) THE CIRCUMSTANCES OF THE OFFENSE FOR WHICH THE OFFENDER IS BEING SENTENCED, AND (3) THE CHARACTER OF THE DEFENDANT. ***SEE COMMONWEALTH V. BEASLEY***, 391 PA. SUPER. 287, 570 A.2D 1336, 1338 (1990). FAILURE TO PROVIDE A CONTEMPORANEOUS WRITTEN STATEMENT CONSTITUTES REVERSIBLE ERROR REQUIRING RESENTENCING. ***SEE COMMONWEALTH V. EGAN***, 451 PA. SUPER. 219, 679 A.2D 237, 239 (1996).

B. THE COURT FAILED TO CONSIDER ALL OF THE RELEVANT AND PROPER SENTENCING FACTORS, INCLUDING, BUT NOT LIMITED TO: [APPELLANT'S] PRIOR RECORD SCORE (PRS) OF ZERO (0), THE INSTANT CONVICTION BEING [APPELLANT'S] FIRST ADULT CONVICTION, AND OTHER FACTORS DISCUSSED IN THE PRESENTENCE INVESTIGATION REPORT, SUCH AS [APPELLANT] WAS BORN ADDICTED TO CRACK COCAINE AND NEVER KNEW HIS FATHER, HE HAS BEEN ON SOCIAL SECURITY DISABILITY (SSD) HIS ENTIRE LIFE, AND HAS AN OFFICIAL DIAGNOSES [SIC] (BY DR. CHRISTINE MARTONE) AS HAVING A HISTORY OF DYSTHYMIA AND A HISTORY OF LEARNING DISABILITY.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO CONSECUTIVE

LENGTHY PERIODS OF PROBATION, TOTALING TEN (10) YEARS OF PROBATIONARY SUPERVISION, WHICH IS SUBSTANTIALLY LONGER THAN THE AGGRAVATED RANGE SENTENCE FOR THESE CRIMES.

D. THE TRIAL COURT FAILED TO CONSIDER THE FACTORS LISTED IN 42 PA. C.S.A. § 9721(B), NAMELY, THAT "THE SENTENCE IMPOSED SHOULD CALL FOR CONFINEMENT THAT IS CONSISTENT WITH THE PROTECTION OF THE PUBLIC, THE GRAVITY OF THE OFFENSE AS IT RELATES TO THE IMPACT ON THE LIFE OF THE VICTIM AND ON THE COMMUNITY, AND THE REHABILITATIVE NEEDS OF THE DEFENDANT."

VIII. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE WITHIN ISSUES BY POST-SENTENCE MOTION, A MOTION TO WITHDRAW GUILTY PLEA AND FOR FAILING TO RAISE THESE ON APPEAL.

Appellant's brief at 4-7.

PCRA petitions are subject to the following standard of review:

> "[A]s a general proposition, we review a denial of PCRA relief to determine whether the findings of the PCRA court are supported by the record and free of legal error." ***Commonwealth v. Dennis***, 609 Pa. 442, 17 A.3d 297, 301 (Pa. 2011) (citation omitted). A PCRA court's credibility findings are to be accorded great deference, and where supported by the record, such determinations are binding on a reviewing court. ***Id.*** at 305 (citations omitted). To obtain PCRA relief, appellant must plead and prove by a preponderance of the evidence: (1) his conviction or sentence resulted from one or more of the errors enumerated in 42 Pa.C.S. § 9543(a)(2); (2) his

> claims have not been previously litigated or waived, ***id.*** § 9543(a)(3); and (3) "the failure to litigate the issue prior to or during trial . . . or on direct appeal could not have been the result of any rational, strategic or tactical decision by cousel[.]" ***Id.*** § 9543(a)(4). An issue is previously litigated if "the highest appellate court in which [appellant] could have had review as a matter of right has ruled on the merits of the issue[.]" ***Id.*** § 9544(a)(2). "[A]n issue is waived if [appellant] could have raised it but failed to so before trial, at trial, . . . on appeal or in a prior state postconviction proceeding." ***Id.*** § 9544(b).

Commonwealth v. Treiber, 121 A.3d 435, 444 (Pa. 2015). Before we can begin to address appellant's issues on the merits, we must first determine if appellant's issues were properly preserved for appeal, and if so, whether his issues are cognizable for the purposes of collateral review. We shall review each issue to determine whether it has been properly preserved for appeal and is cognizable for collateral review individually.

I.

Under his first issue for our review, appellant claims that his right to remain silent under the United States Constitution[5] and the Pennsylvania Constitution[6] was violated by the Commonwealth, and a mistrial would have been granted but for trial court error and counsel ineffectiveness. (***See*** appellant's brief at 15.) Under the PCRA, an individual is eligible for post-conviction relief if the conviction was the result of "a violation of the

[5] U.S. Const., Amend. V.

[6] Pa. Const., Art. I, § 9.

Constitution of this Commonwealth or the Constitution or laws of the United States 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)(i).

The PCRA also permits relief when a conviction is the result of "ineffective 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." ***Id.*** at § 9543(a)(2)(ii). For cases in which a claim of trial error is being raised under the guise of an ineffective assistance of counsel claim, this court has issued the following warning:

> PCRA claims are not merely direct appeal claims that are made at a later stage of the proceedings, cloaked in a boilerplate assertion of counsel's ineffectiveness. In essence, they are extraordinary assertions that the system broke down. To establish claims of constitutional error or ineffectiveness of counsel, the petitioner must plead and prove by a preponderance of evidence that the system failed (***i.e.***, for an ineffectiveness or constitutional error claim, that in the circumstances of his case, including the facts established at trial, guilt or innocence could not have been adjudicated reliably), that his claim has not been previously litigated or waived, and where a claim was not raised at an earlier stage of the proceedings, that counsel could not have had a rational strategic or tactical reason for failing to litigate these claims earlier.

Commonwealth v. Rivers, 786 A.2d 923, 929 (Pa. 2001).

We first look to whether appellant's claims have been previously litigated or waived. The PCRA requires that, in order for a petitioner to be eligible for relief, his or her claim cannot have been "previously litigated or waived." 42 Pa.C.S.A. § 9543(a)(3). The PCRA mandates that an issue is waived if "the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." 42 Pa.C.S.A. § 9544(b). Our supreme court has stated that "a PCRA petitioner's waiver will only be excused upon a demonstration of ineffectiveness of counsel in waiving the issue." ***Commonwealth v. Albrecht***, 720 A.2d 693, 700 (Pa. 1998).

When considering whether counsel was ineffective, we are governed by the following standard:

> The governing legal standard of review of ineffective assistance of counsel claims is well-settled:
>
> > [C]ounsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. ***Strickland v. Washington***, 466 U.S. 668 (1984). This Court has described the ***Strickland*** standard as tripartite by dividing the performance element into two distinct components. ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987). Accordingly, to prove counsel ineffective, the petitioner must demonstrate that (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an

> objective reasonable basis; and (3) the petitioner was prejudiced by counsel's act or omission. ***Id.*** A claim of ineffectiveness will be denied if the petitioner's evidence fails to satisfy any one of these prongs.
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> ***Commonwealth v. Busanet***, 54 A.3d 34, 45 (Pa. 2012) (citations formatted). Furthermore, "[i]n accord with these well-established criteria for review, [an appellant] must set forth and individually discuss substantively each prong of the ***Pierce*** test." ***Commonwealth v. Fitzgerald***, 979 A.2d 908, 910 (Pa.Super. 2009).

Commonwealth v. Perzel, 116 A.3d 670, 671-672 (Pa.Super. 2015).

Here, appellant did not raise this issue on direct appeal; however, his failure to do so is excused because he is alleging ineffective assistance of counsel. While appellant's first issue is not waived for failing to raise it at his first opportunity, the issue is waived for failing to include it in his concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b).

Any issue not included in an appellant's concise statement of matters complained of on appeal is waived. Pa.R.A.P. 1925(b)(4)(vii); ***Commonwealth v. Elia***, 83 A.3d 254, 263 (Pa.Super. 2013), ***appeal denied***, 94 A.3d 1007 (Pa. 2014), quoting ***Commonwealth v. Hill***, 16 A.3d 484, 494 (Pa. 2011). In his concise statement of matters complained of on appeal, when addressing his first issue, appellant addressed an issue involving another defendant with no relation to the instant case. Therefore, this issue is waived.

II.

Appellant's second issue challenges whether the evidence presented by the Commonwealth was sufficient to warrant appellant's convictions. As noted above, an issue presented for collateral review cannot have been previously litigated or waived. 42 Pa.C.S.A. § 9543(a)(3).

This court has previously held that a claim challenging the sufficiency of the evidence is cognizable under the PCRA:

> A claim that guilt has not been proven beyond a reasonable doubt clearly alleges a violation of the federal constitution. In addressing the viability of a sufficiency of the evidence claim in a first PCRA petition, this court stated:
>
> > We agree that the issue is ***cognizable*** under the PCRA. Our disposition in the prior appeal did not turn on the ***merits*** of the claim; therefore, it has not been previously litigated under 42 Pa.C.S.A. § 9543(a)(2). Moreover, appellant's waiver of the claim on direct appeal is excusable under the PCRA in light of counsel's alleged ineffectiveness, ***see id.*** § 9543(a)(2)(ii) and because the claim involves the sufficiency of the evidence, which necessarily implicates the "truth determining process," ***see id.***, and raises a question whether an "innocent individual" has been convicted. ***See id.*** § 9543(a)(2)(ii).
>
> ***Commonwealth v. Perlman***, 572 A.2d 2, 4 (Pa. Super. 1990) (emphasis in original) (footnote omitted).

Commonwealth v. Hanes, 579 A.2d 920, 924 (Pa.Super. 1990).

Here, appellant makes no allegation that Attorney Shrager was ineffective for failing to raise a sufficiency of the evidence claim during trial or on direct appeal. Appellant's first opportunity to raise a sufficiency of the evidence claim was on direct appeal to this court. Since he has failed to so, and his failure was not the result of ineffective assistance of either trial or appellate counsel, his sufficiency of the evidence challenge is waived. ***See*** 42 Pa.C.S.A. §§ 9543(a)(3), 9544(b); ***Commonwealth v. Abdul-Salaam***, 808 A.2d 558, 560 (Pa. 2001) (reaffirming that an issue is waived if the petitioner fails to raise the issue either before or during trial, or during unitary review of appeal).[7]

III.

In his third issue, appellant alleges that the weight of the evidence did not warrant his convictions, and that Attorney Shrager was ineffective for failing to properly raise the issue under Pa.R.Crim.P. 607. In order to determine whether this issue has arguable merit pursuant to the ***Pierce*** test, we shall review appellant's weight of the evidence claim on its merits.

> An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:
>
> > Appellate review of a weight claim is a ***review of the exercise of discretion, not of the underlying question of whether the verdict is against the***

[7] The "catch-all" appellant attempts to raise in Issue VIII is not sufficient to perfect his insufficiency of the evidence claim.

> ***weight of the evidence***. ***Commonwealth v. Brown***, 648 A.2d 1177, 1189 (Pa. 1994). Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. ***Commonwealth v. Farquharson***, 354 A.2d 545 (Pa. 1976). One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Widmer, 744 A.2d 745, 753 (Pa. 2000).

This does not mean that the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is unfettered. In describing the limits of a trial court's discretion, we have explained:

> The term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused where the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will.

Widmer, 744 A.2d at 753 (citation omitted).

Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa. 2013) (emphasis in original).

Appellant's weight of the evidence argument is grounded in the theory that the victim's testimony "was so unreliable and contradictory that it led to a verdict based on conjecture." (Appellant's brief at 25.) First, appellant claims that the victim testified that appellant "inserted his penis into her vagina and ejaculated." (***Id.*** at 26.) Appellant further claims that the victim testified that "it felt like he peed inside her and that it was cold." (***Id.***) A careful review of the record does not produce such testimony. The record indicates that the victim testified as follows on direct examination:

> Q: Okay. What part of Uncle Willie would touch you?
>
> A: His private part with my private part.
>
> Q: Now, when you say your private part, can you tell me what that is usually used for?
>
> A: To go to the bathroom.
>
> Q: Okay, and Uncle Willie's private part, did it touch the outside of your private part or the inside or both?
>
> A: Both.
>
> Q: Okay, and can you tell me what that felt like, [S.]?
>
> A: Like he was peeing inside of me.

Notes of testimony, 7/22/08 at 64.

Appellant also cites testimony from Walter Lorenz of the Allegheny County Medical Examiner's Office who testified that he could not "say to a reasonable degree of certainty that there was a penetration in this case." (***Id.*** at 249.) Lorenz, however, also testified that his scientific findings did provide an indication of possible penetration. (***Id.***) Lorenz also testified that the DNA sample found on the victim's underwear matched a sample obtained from appellant. (***Id.*** at 242.)

A fact-finder is free to believe all, part, or none of the evidence presented. ***Commonwealth v. Mosley***, 114 A.3d 1072, 1087 (Pa.Super. 2015) (citations omitted). This court cannot assume the task of assessing the credibility of the witnesses or evidence presented at trial, as that task is within the exclusive purview of the fact-finder. ***Commonwealth v. Hankerson***, 118 A.3d 415, 420 (Pa.Super. 2015) (citations omitted). The jury found the victim and Lorenz to be credible when it convicted appellant of all charges against him. The trial court found appellant's weight of the evidence claim to be "wholly without merit and frivolous." (Trial court opinion, 10/9/14 at 2.)

We find that the trial court did not abuse its discretion when it denied appellant's weight of the evidence claim, and as a result, appellant cannot meet the first prong of the ***Pierce*** test for ineffective assistance of counsel. Therefore, this issue has no merit.

IV.

In his fourth issue, appellant claims that Attorney Shrager's failure to request a jury instruction regarding the "genuineness and voluntariness" of his statements to the police and subsequent failure to raise or preserve the issue for appeal result in Attorney Shrager's assistance being ineffective.

The second prong of the ***Pierce*** test requires a petitioner to prove by a preponderance of the evidence that the underlying act or omission by trial counsel which rendered his or her assistance ineffective lacked a reasonable basis. When determining whether trial counsel's actions or omissions had any reasonable basis, we are governed by the following standard:

> In gauging the performance of an attorney at trial, the process must entail a comparison of the course adopted by counsel with the alternatives available. . . . The test is not whether alternatives were more reasonable, employing a hindsight evaluation of the record. . . . "[A] finding of ineffectiveness could never be made unless we concluded that the alternatives not chosen offered a potential for success ***substantially*** greater than the tactics actually utilized."
>
> ***Commonwealth v. Collins***, 545 A.2d 882, 885 (Pa. 1988) (emphasis in original), quoting ***Commonwealth ex rel. Washington v. Maroney***, 235 A.2d 349 (Pa. 1967). The balance tips in favor of finding that counsel's assistance was effective should we conclude that his or her decisions had ***any*** reasonable basis.

Commonwealth v. Kilgore, 719 A.2d 754, 756-757 (Pa.Super. 1998).

> [Our Supreme] Court has recognized that counsel are not constitutionally required to forward any and all possible objections at trial, and the decision of when to interrupt oftentimes is a function of overall defense strategy being brought to bear upon issues which arise unexpectedly at trial and require split-second decision-making by counsel. Under some circumstances, trial counsel may forego objecting to an objectionable remark or seeking a cautionary instruction on a particular point because objections sometimes highlight the issue for the jury, and curative instructions always do.

Commonwealth v. Charleston, 94 A.3d 1012, 1020 (Pa.Super. 2014), ***appeal denied***, 104 A.3d 523 (Pa. 2014), quoting ***Commonwealth v. Koehler***, 36 A.3d 121, 146 (Pa. 2012).

During the PCRA hearing, Attorney Shrager testified regarding his failure to request a jury instruction related to the voluntariness and genuineness of appellant's statements to the police.

> Q: And what would be the basis? What was your basis not requesting that instruction?
>
> A: I saw it was more effective -- I know you reviewed the case and you reviewed my closing. I thought my closing was effective and it contained all of the elements in terms of arguing that the statement, it was not voluntarily given, and I felt that would be the best way of approaching it and that's what I did. But you're right, there was no instruction.

Notes of testimony, 6/19/12 at 13-14.

A request for a jury instruction regarding voluntariness by Attorney Shrager would have highlighted the issue for the jury. This, however, also came with the risk as contemplated by this court in ***Charleston*** that a

request for an instruction by Attorney Shrager would have reminded the jury of appellant's confession. ***Charleston***, 94 A.3d at 1022. Moreover, appellant does not provide a jury instruction that he thinks Attorney Shrager should have proposed at trial. Much like the ***Charleston*** court, we consider this to be an "obvious reasonable basis not to seek an additional instruction," therefore appellant has not met the second prong of the ***Pierce*** test, and this issue is without merit. ***Id.***

V.

For his fifth issue, appellant avers that his convictions of rape of a child and sexual assault should have merged for sentencing purposes.[8] Appellant did not address the legality of his sentence upon direct appeal to this court, and he also did not allege that Attorney Shrager provided him with ineffective assistance relating to this particular issue. Our cases, however, hold that an issue relating to the legality of a sentence, such as the issue appellant currently raises, is non-waivable. ***Commonwealth v. Robinson***, 931 A.2d 15, 20 (Pa.Super. 2007) (***en banc***), citing ***Commonwealth v. Jacobs***, 900 A.2d 368, 373 (Pa.Super. 2006) (***en banc***) (citations omitted) (stating that cases involving merger and double jeopardy invoke the legality of the sentence). Since appellant's challenge relates to the legality of his

[8] The trial court sentenced appellant to a term of 15-30 years' imprisonment for the rape of a child conviction; for the sexual assault conviction, the trial court sentenced appellant to a term of five years' probation to be served consecutively with the prison sentence. (Notes of testimony, 12/4/08 at 23-24.)

sentence and is raised in a timely petition, we shall review the issue on its merits.

In his brief, appellant curiously cites several cases in which this court has held that, for sentencing purposes, a conviction of indecent assault merges into a conviction of rape. (***See*** appellant's brief at 41, citing ***Commonwealth v. Richardson***, 334 A.2d 700 (Pa.Super. 1975; ***Commonwealth v. Brown***, 434 A.2d 838 (Pa.Super. 1981); ***Commonwealth v. Smith***, 459 A.2d 777 (Pa.Super. 1983).) Appellant, however, was not sentenced for his conviction of indecent assault; therefore, his appeal relating to any sentence for indecent assault is without merit. (***See*** notes of testimony, 12/4/08 at 25).

For his argument that sexual assault is a lesser included offense of his rape conviction, appellant relies heavily on ***Commonwealth v. Buffington***, 828 A.2d 1024 (Pa. 2003). ***Buffington***, however, is inapposite to the facts of the present case. In ***Buffington***, our supreme court determined sexual assault to be a lesser-included offense of rape ***by forcible compulsion***. ***Id.*** at 1031 (emphasis added); see 18 Pa.C.S.A. § 3121(a)(3). As the court noted, "forcible compulsion encompasses a lack of consent." ***Buffington***, 828 A.2d at 1031, citing ***Commonwealth v. Berkowitz***, 641 A.2d 1161, 1163 (Pa. 1994). Unlike ***Buffington***, consent is not an element in the instant rape conviction.

We find ***Commonwealth v. Jackson***, 111 A.3d 1187 (Pa.Super. 2015), ***appeal denied***, 2015 WL 6044422 (Pa. 2015), to be more instructive in this case. In ***Jackson***, the defendant was convicted of rape by forcible compulsion and statutory sexual assault.[9] ***Id.*** at 1188. In a manner similar to the instant case, Jackson was sentenced to 10-20 years' imprisonment on the rape conviction, and was also sentenced to a term of five years' probation to be served consecutively to the prison term for the statutory sexual assault conviction.[10] ***Id.*** The ***Jackson*** court, while citing several instances in which the General Assembly explicitly stated its intentions regarding the merger doctrine, held that Jackson's convictions did not merge for sentencing purposes. ***Id.*** at 1190-1191.

In order to determine whether appellant's convictions of rape of a child and sexual assault merge for sentencing purposes, we shall utilize the same approach as the ***Jackson*** court:

> Our examination of this issue is one of statutory interpretation, which is a matter of law. Thus, our standard of review is ***de novo*** and our scope of review is plenary. ***Commonwealth v. Spence***, 91 A.3d 44, 46 (Pa. 2014).
>
> > When construing a [statutory provision] utilized by the General Assembly in a statute, our primary goal is "to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a).

[9] 18 Pa.C.S.A. §§ 3121(a)(1) and 3122.1, respectively.

[10] Jackson was also convicted of indecent assault by forcible compulsion and simple assault, but was not sentenced for either conviction. ***Id.***

> "Every statute shall be construed, if possible, to give effect to all its provisions." ***Id.*** However, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." ***Id.*** § 1921(b). "Words and phrases shall be construed according to rules of grammar and according to their common and approved usage." ***Id.*** § 1903(a). In other words, if a term is clear and unambiguous, we are prohibited from assigning a meaning to that term that differs from its common everyday usage for the purpose of effectuating the legislature's intent. Additionally, we must remain mindful that the "General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." ***Id.*** § 1922(1).
>
> ***Commonwealth v. Cahill***, 95 A.3d 298, 301 (Pa.Super.2014).

Jackson, 111 A.3d at 1188-1189.

The merger doctrine mandates that "no crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense." 42 Pa.C.S.A. § 9765; ***see also Commonwealth v. Tanner***, 61 A.3d 1043, 1046 (Pa.Super. 2013), citing ***Commonwealth v. Baldwin***, 985 A.2d 830, 833 (Pa. 2009) (requiring that all statutory elements be present in both offenses under the merger doctrine).

In order to determine whether appellant's two convictions merge for sentencing purposes, we must look to the language of the respective statutes. Rape of a child is defined as follows:

> **(c) Rape of a child.--**A person commits the offense of rape of a child, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age.

18 Pa.C.S.A. § 3121(c).

Sexual assault is defined as follows:

> Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.

18 Pa.C.S.A. § 3124.1.[11]

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[11] The defendant in ***Jackson*** was convicted and sentenced for statutory sexual assault, which contains similar language to sexual assault, the offense at issue in the instant case:

> **(a) Felony of the second degree.--**Except as provided in section 3121 (relating to rape), a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant to whom the person is not married who is under the age of 16 years and that person is either:
>
> (1) four years older but less than eight years older than the complainant; or

Here, the two offenses for which appellant was convicted and sentenced contain different elements. The rape of a child statute contains an element relating to the age of the complainant, while containing no language regarding consent. Inversely, the sexual assault statute has an element relating to whether the complainant consented to sexual intercourse or deviate sexual intercourse, but has no language relating to the age of the complainant. Because the two offenses for which appellant was convicted and sentenced contain different elements, the merger doctrine does not apply.

Therefore, we find that appellant's sentence for both rape of a child and sexual assault was legal, and appellant's fifth issue has no merit.

VI.

Under his sixth issue for our review, appellant avers that there was no clear and convincing evidence that he met the criteria to be designated as a sexually violent predator ("SVP"). At no point during his challenge of his designation as an SVP does appellant claim that Attorney Shrager provided ineffective assistance of counsel during the trial or on direct appeal in regards to his designation as an SVP. Appellant also failed to raise this issue

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> (2) eight years older but less than 11 years older than the complainant.

18 Pa.C.S.A. § 3122.1.

for this court's review on direct appeal. Therefore, for the reasons we provide under Issue II, ***supra***, we find that this issue is waived for the purposes of collateral review.

VII.

In his seventh issue for our review, appellant raises a challenge to the discretionary aspects of his sentence, and does so in four separate sub-issues, all of which allege that Attorney Shrager provided ineffective assistance of counsel. Of appellant's four sub-issues, only one is included in his PCRA petition. The three sub-issues that appellant raised on appeal that were not included in his PCRA petition are therefore waived. ***Commonwealth v. Lambert***, 797 A.2d 232, 241 (Pa. 2001), citing Pa.R.A.P. 302(a); ***Commonwealth v. Basemore***, 744 A.2d 717, 725 (Pa. 2000); ***Albrecht***, 720 A.2d at 704 (quotation and footnote omitted).

The one sub-issue that was not waived by appellant alleges that the trial court abused its discretion by not stating specific reasons on the record for appellant's sentence. Appellant further alleges that Attorney Shrager was ineffective for failing to "object, preserve, and raise [this] issue[]." (***See*** appellant's brief at 33.)

As we noted ***supra***, in order for a PCRA petitioner to prevail on an ineffective assistance of counsel claim, he or she must meet all three factors prescribed by the ***Pierce*** court. ***See Pierce***, 527 A.2d at 975. As we also noted ***supra***, failure to meet any one of the ***Pierce*** prongs will result in the

failure of the PCRA petition for ineffective assistance of counsel. ***See Busanet***, 54 A.3d at 45.

Here, appellant fails to meet the first prong under ***Pierce***: that the underlying legal issue has arguable merit. ***Pierce***, 527 A.2d at 975. On direct appeal, appellant averred that the trial court "abuse[d its] discretion in the sentence imposed upon the appellant at his sentencing[.]" ***Jones***, No. 2138 WDA 2008 at *2. While a previous panel of this court found appellant's issue to be waived, the court did note the following in an alternative holding:[12]

> Moreover, even if we did not find waiver, [appellant] would nonetheless not be entitled to relief--he received a standard range sentence. Sentences imposed within the standard range of the sentencing guidelines are presumptively appropriate under the Sentencing Code. ***See Commonwealth v. Gause***, 659 A.2d 1014, 1016-1017 (Pa.Super. 1995). And we note that the record as [a] whole reflects due consideration by the trial court of the offense and considered the factors set out in 42 Pa.C.S.A. § 9721(b).

[12] Alternative holdings are valid holdings that constitute the law of the case. ***See Commonwealth v. Reed***, 971 A.2d 1216, 1220 (Pa. 2009) (where the Superior Court determined that Reed's claims were waived, and also determined that even if the claims had not been waived, they were without merit, and explained the basis for its conclusions, the alternative holding that Reed's claim regarding the admission of prior bad acts testimony was meritless was a valid holding that constituted the law of the case).

Id. at *3.[13] Based on a previous panel of this court's findings, appellant is unable to prove by a preponderance of the evidence the underlying legal claim that the trial court abused its discretion when sentencing appellant, therefore his claim that Attorney Shrager provided ineffective assistance of counsel is without merit.

VIII.

In his eighth and final issue raised for our review, appellant avers that Attorney Shrager was "ineffective for failing to preserve the within issues by post-sentence motion, a motion to withdraw guilty plea and for failing to raise these on appeal." Our supreme court has stated that when making a claim of ineffective assistance of counsel, a petitioner under the PCRA is not entitled to relief for ineffective assistance of counsel when the petitioner provides "boilerplate allegations of ineffectiveness." ***Commonwealth v. Wharton***, 811 A.2d 978, 987 (Pa. 2002), quoting ***Commonwealth v. Pettus***, 424 A.2d 1332, 1335 (Pa. 1981).

Appellant's argument for this issue is as follows:

> Here, [appellant] was found guilty after a jury trial. His counsel failed to make the appropriate objections, failed to file post-sentence motions and failed to adequately raise and preserve these issues for and on appeal. As such, trial counsel rendered ineffective assistance.
>
> . . . .

[13] It is proper to cite to a non-precedential decision of this court because it "recites [an] issue[] raised . . . affecting the same defendant in a prior action or proceeding." Superior Court I.O.P. 65.37.

> Counsel testified that he did not file any post-sentence motions because "knowing this Judge, knowing that there's absolutely no way he was going to reconsider, was part of what was in my mine [sic] in this particular case. I know the Judge. I knew it would be an exercise in futility with this man. . . ." Furthermore, counsel testified that on appeal his issue was going to be an excessive sentence "along with everything else." The PA Superior Court found that the only issued [sic] raised had been waived by counsel. Because counsel's testimony did not establish any reasonable basis for his actions or lack thereof, counsel was ineffective.
>
> Prejudice resulted from counsel's failure to raise or preserve these issues which were not raised for appellate review. Counsel could have had no reasonable basis to fail to properly raise and preserve these issues so that they can be reviewed by the Superior Court. [Appellant] has been denied the very basic and important right to competent counsel.

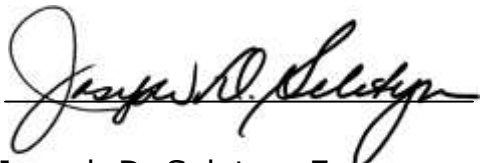
Appellant's brief at 50-51.

This argument provides little more than boilerplate allegations that Attorney Shrager provided appellant with ineffective assistance. Appellant fails to elaborate with specificity on which objections or post-sentence motions he thought trial counsel should have made during or after trial and subsequently raised and preserved for appeal. Without this information, appellant cannot meet the first prong of the ***Pierce*** test, which requires arguable merit to the underlying legal issue of an ineffective assistance claim. Therefore, appellant's eighth issue is without merit.

Order affirmed.

Judge Wecht did not participate in the consideration or decision of this case.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016