NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. AARON EDMUNDS TYSON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 574 EDA 2012

Appeal from the PCRA Order February 1, 2012
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0000817-2003

BEFORE: DONOHUE, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.: Filed: February 1, 2013

Appellant, Aaron Edmunds Tyson, appeals from the order entered February 1, 2012, denying his petition under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

We have previously explained the facts underlying Appellant's two convictions for first-degree murder.

> On April 24, 2002, Appellant, Otis Powell ("Powell") and Kasine George ("George") [drove to a Stroudsburg, Pennsylvania crack house that they controlled. Appellant left the car in order to resupply the house with drugs. When Appellant returned to the vehicle, Appellant] stated that two white boys had just pulled a gun on him. George described Appellant as angry at that time. Appellant, who was at that point a passenger in the car, took a [nine-millimeter] handgun from the center console. [Appellant then] racked the slide of the gun, thus arming it. Appellant told Powell, who was driving, to pull out from the location where the vehicle was parked.

*Former Justice assigned to the Superior Court.

> Appellant pointed to a van and indicated [that] it was being driven by the two who had pulled a gun on him. With Powell driving, the three followed the van to a club. When the two white men entered that club, Powell gave George a knife [and directed] him to puncture the tires on the van. George did so to at least one of the tires. When George returned to the car, Appellant was in the driver's seat. Powell was now a passenger and he asked Appellant for the gun. After five or ten minutes, the two white men exited the bar, entered the van and left the location.
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> With Appellant now driving, the three again followed the van. [The van] eventually stopped due to the flat tire. At that point, Appellant and his two companions were going to exit the car, but Powell told the other two to wait. Powell then walked to the van. As he did so, Appellant backed the car to a point where he and George could see what was transpiring [around] the van. At that point, Powell shot [the] two occupants [of the van], Daniel and Keith Fotiathis. . . . [Powell] then ran back to the car. Powell, George[,] and Appellant left the scene [with Appellant driving] the vehicle. The three discussed whether they should go to New York[,] but eventually decided to return to their nearby home.
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> [Daniel Fotiathis] was shot in the neck, the lower right chest[,] and the lower right back. Gunshots struck [Keith Fotiathis] in the lower right back, [the] right elbow[, and the] right wrist. Trial testimony established multiple gunshot wounds as the causes of death for the victims. The manner of each death was homicide. Police found eight shell casings from a [nine-millimeter handgun] at the scene.
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> George was later arrested on drug charges. Thereafter, [George] provided information to authorities regarding the instant case. Appellant was eventually arrested and charged with the homicide of both victims.

Commonwealth v. Tyson, 947 A.2d 834 (Pa. Super. 2008) (unpublished memorandum) at 6-8, *appeal denied*, 989 A.2d 917 (Pa. 2009).

Appellant's jury trial occurred from May 3, 2006 to May 9, 2006. At the conclusion of Appellant's trial, the jury found Appellant guilty of two counts of murder in the first degree, as an accomplice in the murders of Daniel and Keith Fotiathis. On July 17, 2006, the trial court sentenced Appellant to the mandatory term of life in prison without the possibility of parole.

Appellant filed a timely post-sentence motion and raised a number of claims, including claims that his trial counsel rendered ineffective assistance.[1] After the trial court considered, and rejected, all of Appellant's claims on the merits, Appellant filed a timely notice of appeal to this Court. ***See*** Trial Court Opinion, 2/15/07, at 1-26. On appeal, we concluded that Appellant's assertions of error were meritless. Moreover, in accordance with ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), we dismissed Appellant's ineffective assistance of trial counsel claims without prejudice, so that Appellant could raise the issues within the context of a post-conviction collateral relief proceeding. We thus affirmed Appellant's judgment of sentence and, on February 23, 2010, our Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Tyson***, 947 A.2d 834

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[1] Following Appellant's trial, Appellant's trial counsel resigned from his position as a special public defender. As a result, prior to Appellant's sentencing, Appellant received new appointed counsel. ***See*** Trial Court Order, 6/15/06, at 1.

(Pa. Super. 2008) (unpublished memorandum) at 8-18, *appeal denied*, 989 A.2d 917 (Pa. 2009).

On November 19, 2010, Appellant filed a timely, *pro se* PCRA petition. Following the appointment of counsel, counsel filed an amended PCRA petition and claimed that Appellant's trial counsel was ineffective for, among other things: 1) "fail[ing] to request a jury instruction which specifically instructed the jury that[, in order to find Appellant guilty of being an accomplice to first-degree murder, the jury must find that Appellant] had [the] specific intent to commit first[-]degree murder;" 2) failing to object to "the Commonwealth's purported [trial] theory[,] that the motive for the shooting of the Fotiathis brothers was because they 'interrupted' the alleged 'drug ring;'" 3) failing to timely and properly present "the alibi witnesses;" 4) failing to present Omar Powell as a witness; 5) failing to object to the jury array; 6) failing to object to the Commonwealth's closing argument; and, 7) failing to object to "the introduction of a photograph of the victim and his daughter." Appellant's Amended PCRA Petition, 3/31/11, at 1-4.

The PCRA court conducted an evidentiary hearing and heard testimony from Appellant, Appellant's trial counsel, Appellant's direct appeal counsel, and a purported witness named Omar Powell. N.T. PCRA Hearing, 10/4/11, at 1-55.

On February 1, 2012, the PCRA court entered an order denying Appellant's PCRA petition and, on March 22, 2012, the PCRA court issued a comprehensive, 62-page opinion, discussing the reasons why it denied

Appellant post-conviction collateral relief. PCRA Court Opinion, 3/22/12, at 1-62. Moreover, after receiving Appellant's court-ordered, concise statement of errors complained of on appeal, the PCRA court authored another 18-page opinion, further discussing why Appellant's claims were meritless.[2] PCRA Court Opinion, 4/17/12, at 1-18.

Appellant filed a timely notice of appeal and now raises the following claims to this Court:[3]

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[2] We remark that both PCRA court opinions were thorough, well-analyzed, and well-written. However, at various points throughout the two PCRA court opinions, the court concluded that Appellant had waived a certain ineffective assistance of counsel claim, as Appellant either failed to raise the claim on direct appeal or failed to "properly layer" the ineffectiveness claim. Although, with respect to almost every claim, the PCRA court rendered an alternative holding and properly discussed the merits the claim, we disagree with the conclusion that Appellant was required to raise any of the ineffective assistance of counsel claims on direct appeal or that, within the current petition, Appellant needed to "layer" his ineffectiveness claims. Indeed, our Supreme Court decided ***Grant*** in 2002 – which was four years prior to Appellant's trial – and expressly held:

> as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review. Thus, any ineffectiveness claim will be waived only after a petitioner has had the opportunity to raise that claim on collateral review and has failed to avail himself of that opportunity. . . . Simply stated, a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness.

Grant, 813 A.2d at 738.

[3] The PCRA court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate
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> [1.] It was ineffective assistance of counsel to fail to request a jury instruction concerning intent to commit first[-]degree murder.
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> [2.] It was ineffective assistance of counsel to allow the Commonwealth to introduce evidence of drug dealing when such evidence was irrelevant and highly prejudicial.
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> [3.] It was ineffective assistance of counsel to fail to timely and properly present, serve notice of, and investigate alibi witnesses.
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> [4.] It was ineffective assistance of counsel to not present the witness whose testimony provided a key reason why [Appellant's] codefendant was acquitted.
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> [5.] It was ineffective assistance of counsel to fail to object to the jury array.
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> [6.] It was ineffective assistance of counsel to fail to object to the Commonwealth's closing argument which attributed a statement to [Appellant] that he never made.
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> [7.] It was ineffective assistance of counsel to fail to object to prejudicial photographs as evidence.

Appellant's Brief at 3.

As we have stated:

> This Court's standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. In evaluating a PCRA court's decision, our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at

(Footnote Continued) ––––––––––––––––––––

Procedure 1925(b). Appellant complied and, within his Rule 1925(b) statement, Appellant listed the claims he currently raises on appeal.

> the [PCRA court] level. We may affirm a PCRA court's decision on any grounds if it is supported by the record.

Commonwealth v. Rivera, 10 A.3d 1276, 1279 (Pa. Super. 2010) (internal citations omitted).

To be eligible for relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from "one or more" of the seven, specifically enumerated circumstances listed in 42 Pa.C.S.A. § 9543(a)(2). One of these statutorily enumerated circumstances is the "[i]neffectiveness 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).

Counsel is, however, presumed to be effective and "the burden of demonstrating ineffectiveness rests on [A]ppellant." ***Rivera***, 10 A.3d at 1279. To satisfy this burden, Appellant must plead and prove by a preponderance of the evidence that:

> (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and, (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different.

Commonwealth v. Fulton, 830 A.2d 567, 572 (Pa. 2003). "A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim." ***Id.***

First, Appellant claims that trial counsel was ineffective for failing to object to the trial court's "accomplice liability" jury instruction. According to Appellant, the trial court failed to instruct the jury that, "[i]n order to [convict Appellant] of murder in the first degree as an accomplice, the Commonwealth [was] required to show that [Appellant] had the specific intent to commit first[-]degree murder." Appellant's Brief at 8. Appellant claims that our Supreme Court's opinion in ***Commonwealth v. Huffman***, 638 A.2d 961 (Pa. 1994)[4] is "exactly on point" and demands that he receive a new trial. Appellant's Brief at 8. We disagree.

Our Supreme Court has held:

> It is well-settled that when reviewing the adequacy of a jury instruction, we must consider the charge in its entirety to determine if it is fair and complete. The trial court has broad discretion in phrasing the charge and the instruction will not be found in error if, taken as a whole, it adequately and accurately set forth the applicable law.

Daniels, 963 A.2d at 430 (internal citations omitted).

Before a jury may find a defendant guilty of first-degree murder as an accomplice, the jury must find – beyond a reasonable doubt – that the defendant possessed the specific intent to kill. 18 Pa.C.S.A. § 306(d); 18

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[4] Our Supreme Court has since partially overruled ***Huffman***. Within both ***Commonwealth v. Daniels***, 963 A.2d 409, 429 (Pa. 2009) and ***Commonwealth v. Maisonet***, 31 A.3d 689, 694 n.2 (Pa. 2011), our Supreme Court recognized that ***Huffman*** erroneously failed to view the trial court's jury instruction as a whole. ***See Maisonet***, 31 A.3d at 694 n.2 (citing ***Daniels*** for the proposition that the high Court "has since effectively overruled ***Huffman***").

Pa.C.S.A. § 2502(a); ***Commonwealth v. Koehler***, 36 A.3d 121, 155 (Pa. 2012). Thus, in ***Huffman***, our Supreme Court held that it was erroneous for a trial court to instruct the jury "that they may find an accomplice guilty of murder in the first degree even if he did not have the specific intent to kill." ***Huffman***, 638 A.2d at 962. As the PCRA court has thoroughly explained, however, the trial court's jury instructions in this case – when considered as a whole – "adequately and accurately set forth the applicable law" regarding accomplice liability. ***Daniels***, 963 A.2d at 430. Moreover, the instructions indeed informed the jury that, to convict Appellant of first-degree murder as an accomplice, the jury was required to find that Appellant independently possessed the specific intent to kill. As the PCRA court explained:

> The record reflects that the trial [court] instructed the jury on murder [in] the first degree . . . [and that this instruction] included a definition of specific intent. The trial [court] also instructed the jury on accomplice liability as follows:
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> > You may find [Appellant] guilty of the crime without finding that he personally performed the acts required for the commission of that crime. [Appellant] is guilty of a crime if he is an accomplice of another person who commits the crime. He is an accomplice if with the intent to promote or facilitate the commission of a crime[,] he encourages, requests or commands the other person to commit it or agrees or aids or agrees to aid or attempts to aid the other person in planning, organizing, [or] committing it.
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> > You may find [Appellant] guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed[and] that [Appellant] was an accomplice of the person who actually committed the crime. And it

> does not matter whether the person who you believe committed the crime has been convicted of a different crime or different degree of the crime or has immunity from prosecution or conviction.
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> [N.T. Trial, 5/9/06, at 694.]
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> The trial transcript further reflects that during deliberations, the jury returned to the courtroom and asked for clarification on the difference between first and third degree murder. The trial [court] responded by restating the elements that must be established for first degree murder, third degree murder and accomplice liability. After restating the elements of first degree murder, the [trial court repeated and clarified] the definition[] of specific intent. . . . The [trial court] also instructed the jury that: "in this particular case because there is a charge of an accomplice almost by definition it encompasses the concept of first degree murder by its very definition, an accomplice with the planning and the coordination if you, in fact, found to be so indicate that was first degree murder."
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> [After reviewing these] jury instructions, as a whole, [it is apparent] that the instructions were sufficient to inform the jury that in order to find [Appellant] guilty of first degree murder as an accomplice, the Commonwealth must [have] establish[ed] beyond a reasonable doubt that [Appellant] had the shared specific intent to kill the Fotiathis [b]rothers. Furthermore, the evidence presented to the jury during trial revealed that [Appellant's] conduct was willful, deliberate[,] and premeditated and that he actively participated in the murders by aiding the shooter, Otis Powell. [Appellant] identified the intended victims to Otis Powell and Kasine George; he told Powell to drive the car in pursuit of the victims and later drove the car himself while still following the victims; he produced the murder weapon, which he gave to Powell who used it to inflict fatal wounds to vital areas of the victims' bodies; and[,] after the shooting, he aided Powell in fleeing the scene. The actions of [Appellant] were overt and clearly showed [that Appellant intended to murder the victims].

PCRA Court Opinion, 4/17/12, at 6-7 (internal citations omitted).

We agree with the cogent analysis of the PCRA court and conclude that, since Appellant's underlying claim has no merit, Appellant's first ineffective assistance of counsel claim fails.

For Appellant's second claim on appeal, Appellant contends that his trial counsel rendered ineffective assistance by "allow[ing] the Commonwealth to introduce evidence of [Appellant's] drug dealing." Appellant's Brief at 24. Again, Appellant's underlying claim has no merit.

"Trial judges are afforded broad latitude and discretion in determining the admissibility of evidence. Their learned determinations will not be disturbed absent a finding of an abuse of discretion." ***Commonwealth v. Roefaro***, 691 A.2d 472, 474 (Pa. Super. 1997).

Under Pennsylvania law, evidence of "other crimes, wrongs, or acts" is "not admissible to prove the character of a person in order to show action in conformity therewith." Pa.R.E. 404(b)(1). Such evidence is, however, admissible to prove a defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Pa.R.E. 404(b)(2). Moreover, as our Supreme Court has held:

> evidence of other crimes may be relevant and admissible [] where such evidence was part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts. This special circumstance, sometimes referred to as the "*res gestae*" exception to the general proscription against evidence of other crimes, is also known as the "complete story" rationale, *i.e.*, evidence of other criminal acts is admissible "to complete the story of the crime on trial by proving its immediate context of happenings near in time

> and place." McCormick, Evidence, § 190 (1972 2d ed.) . . . ***see also Commonwealth v. Coyle***, 203 A.2d 782, 787 (Pa. 1964) (evidence of other crimes admissible as these crimes were interwoven with crimes for which defendant was being prosecuted).

Commonwealth v. Lark, 543 A.2d 491, 497 (Pa. 1988) (some internal quotations and citations omitted).

In the case at bar, one of the Commonwealth's theories at trial was that the victims were murdered because they interrupted and threatened Appellant's drug selling ring. As the trial court explained:

> Here, it is clear from the record that the Commonwealth's case paints a picture that the murder of Daniel and Keith Fotiathis was done [] in furtherance of an illegal drug selling ring. In the Commonwealth's opening statement, [the assistant district attorney] stated that:
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> > At the time of the murder, the main spot utilized by [Appellant] and Mr. George and their drug distribution ring [was] located on Second Street in Stroudsburg, next to, it used to be called the Exxon Gas Station Minimart by the shop right over there. . . . And this is where the world of Dan and Keith Fotiathis crossed with the drug dealers because Thursday[,] April 24th is when [Appellant] and Mr. George and Otis Powell, who I said was on the mend but he is up from Brooklyn hanging out with these guys, go to the house on Second Street to resupply, to reup. [Appellant], however, is accosted in the parking lot of this minimart by Keith Fotiathis, a white male, with kind of scraggly, long hair.
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> [N.T. Trial, 5/3/06, at 14-15.]
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> The Commonwealth's case revolved around the theory that Daniel and Keith Fotiathis were murdered out of fear of disturbing [Appellant's] drug ring. The portrayal of [Appellant] as a drug dealer was not used to show his propensity for committing bad acts, but rather the bad acts (*i.e.* his drug dealing) were part of a chain or sequence of

> events that formed the history of the case and were part of its natural development.

Trial Court Opinion, 2/15/07, at 19 (internal citations omitted).

We agree with the above analysis and further add that evidence of Appellant's drug dealing was also highly relevant to explain the motive behind the shootings. Indeed, at trial, the evidence demonstrated that the impetus for the shootings was when Keith Fotiathis pulled a gun on Appellant within Appellant's own drug distribution "turf." N.T. Trial, 5/4/06, at 223-226. As Mr. George testified, this action was particularly egregious to a drug dealer such as Appellant because, "in the drug trade[, it is necessary] to convey an appearance to others that you are a tough guy not to be screwed with. . . . It keeps the wolves at bay, and they are less likely to try you." ***Id.*** at 188. Given that it was necessary for Appellant, as a drug dealer, to appear strong – and given that Mr. Fotiathis made Appellant appear weak within his own drug distribution "turf" – it becomes readily apparent that Appellant's drug dealing was highly relevant in this case to explain the motive behind the murders. Certainly, evidence of Appellant's drug dealing was essential to explain why Appellant might have viewed the murder of the Fotiathis brothers to be an occupational necessity.

Thus, as Appellant's underlying claim has no arguable merit, Appellant's ineffectiveness of counsel claim fails.

Next, Appellant contends that trial counsel was ineffective for failing to present Omar Powell as a witness.[5] Omar Powell was the brother of the alleged shooter, Otis Powell. Appellant claims that, if Omar Powell were called at trial, Mr. Powell would have testified that "Kasine George had admitted to the [Fotiathis murders] and had bragged that someone else was going down for 'his bodies.'" Appellant's Brief at 27. Appellant's ineffectiveness claim is meritless.

Our Supreme Court has declared:

> To prevail on a claim of ineffectiveness for failure to call a witness, the appellant must demonstrate that: (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness' existence; (4) the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) the absence of the testimony prejudiced appellant.

Commonwealth v. Malloy, 856 A.2d 767, 782 (Pa. 2004).

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[5] Within Appellant's brief to this Court, Appellant listed a number of other "possible and important witnesses" that, Appellant contends, could have been called at trial. Appellant's Brief at 27. Yet, with the exception of Omar Powell, Appellant has not explained why counsel was ineffective for failing to call the listed witnesses. ***See id.*** Therefore, Appellant has only preserved the claim that counsel was ineffective for failing to call Omar Powell as a witness. ***See Commonwealth v. Clayton***, 816 A.2d 217, 221 (Pa. 2002) ("it is a well settled principle of appellate jurisprudence that undeveloped claims are waived and unreviewable on appeal"). Further, under this heading, Appellant claims – in passing – that trial counsel was ineffective for filing an untimely notice of alibi witnesses. Appellant's Brief at 26. This claim is completely undeveloped and, thus, waived. ***Clayton***, 816 A.2d at 221.

At the PCRA hearing, the PCRA court heard the testimony of Appellant, Appellant's trial counsel, and Omar Powell and concluded that trial counsel neither knew nor could have known of Omar Powell's purported testimony. Indeed, during the PCRA hearing, Appellant's trial counsel testified that he did not remember ever hearing the name of Omar Powell. N.T. PCRA Hearing, 10/4/11, at 16. Moreover, Omar Powell testified: "I don't think that [Appellant's trial counsel] ever knew [about my existence] because nobody never told him as far as anything that came out of [Otis Powell's] case." ***Id.*** at 52. Given this testimony, we agree with the PCRA court and conclude that Appellant's ineffectiveness claim fails, as counsel neither knew nor could have known of Omar Powell's purported testimony. ***Malloy***, 856 A.2d at 782.

Appellant's final three claims on appeal are waived, as they are completely undeveloped. Indeed, Appellant has provided this Court with no argument as to how trial counsel could be considered ineffective for failing to object: to the jury array, when Appellant has not even claimed that the purported "under-representation [of African-Americans on the jury was] due to the systematic exclusion of the group in the jury selection process;" to the Commonwealth's closing argument, when Appellant has not even identified the alleged prejudicial statement; or to the introduction of a photograph "showing the victim and his family," when Appellant has not provided any argument as to how the photograph caused him prejudice.

See Commonwealth v. Martin, 5 A.3d 177, 194-195 ("to establish a *prima facie* case that a jury pool selection method violates the Sixth Amendment, the defendant must show: (1) the group allegedly excluded is a distinctive group in the community; (2) representation of this group in the pool from which juries are selected is unfair and unreasonable in relation to the number of such persons in the community; and (3) the under-representation is due to the systematic exclusion of the group in the jury selection process") (internal quotations, citations, and corrections omitted); ***Clayton***, 816 A.2d at 221 (undeveloped claims are waived and unreviewable on appeal).

Order affirmed.