

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT EDWARD LASKY,	:	
	:	
Appellant	:	No. 827 MDA 2012

Appeal from the Order entered on April 2, 2012  
in the Court of Common Pleas of Lackawanna County,  
Criminal Division, No. CP-35-CR-0001615-2000

BEFORE: MUSMANNO, BENDER and COLVILLE\*, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: March 11, 2013

Robert Edward Lasky ("Lasky") appeals from the denial of his first Petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA").

**See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

After being charged with a variety of sexual offenses committed against his girlfriend's minor daughter, Lasky was tried and convicted, on November 1, 2001, of rape, sexual abuse of children, aggravated indecent assault, indecent assault of a victim under the age of 13, indecent assault of a victim under the age of 16, endangering the welfare of children, and corruption of minors.<sup>1</sup> The trial court sentenced Lasky, on July 12, 2002, to an aggregate prison term of 10½ to 31 years. Following a protracted

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<sup>1</sup> We note that this Court has set forth a recitation of the underlying facts of this case. **See Commonwealth v. Lasky**, 964 A.2d 944 (Pa. Super. 2009) (unpublished memorandum at 1-3).

\*Retired Senior Judge assigned to the Superior Court.

procedural history that is not relevant to this case, this Court affirmed Lasky's convictions, but vacated the sentence and remanded the case for re-sentencing. **See Lasky**, 964 A.2d 944 (unpublished memorandum). On November 23, 2009, the trial court re-sentenced Lasky to an aggregate prison term of 9½ to 30 years. This Court affirmed the judgment of sentence. **See Commonwealth v. Lasky**, 24 A.3d 447 (Pa. Super. 2011) (unpublished memorandum).

Lasky, through counsel, filed a timely PCRA Petition. At the hearing on the Petition, Lasky, through counsel, withdrew all of his claims except for an ineffective assistance of trial counsel claim. Thereafter, the PCRA court denied Lasky's PCRA Petition. Lasky filed a timely Notice of appeal.<sup>2</sup>

On appeal, Lasky raises the following question for our review:

Did the [PCRA] court err in determining that trial counsel was effective despite the fact that trial counsel represented to the jury in his opening statement that [Lasky] would testify when in fact that decision was not final, and [Lasky] ultimately elected not to testify?

Brief for Appellant at 4 (capitalization omitted).

This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error.

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<sup>2</sup> We note that following his appeal of the PCRA court's denial of his first PCRA Petition, Lasky filed a second PCRA Petition on August 3, 2012. The PCRA court concluded that it lacked jurisdiction to address the second Petition because his first PCRA Petition was pending on appeal. The PCRA court further found that the second Petition was untimely filed. Nevertheless, the PCRA court addressed Lasky's claims in an Opinion dated November 29, 2012. However, in this case, we will only address Lasky's sole claim raised at the hearing on the first PCRA Petition and on appeal.

Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record.

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

Lasky contends that his trial counsel was ineffective for stating to the jury during the opening statement that Lasky would testify on his own behalf when that decision had not been finalized and when he ultimately decided not to testify. Brief for Appellant at 8. Lasky argues that counsel stated to the jury that Lasky would provide his own version of the events for the jury to consider. *Id.* at 10-11. Lasky asserts that he decided not to testify following an outburst by the victim's mother after the close of the Commonwealth's case. *Id.* at 11. Lasky claims that even though the outburst was out of counsel's control, he should have been aware of the possibility of outside factors altering the decision to testify. *Id.* Lasky argues that there was no reasonable basis for counsel's statement and that the outcome of trial may have been different. *Id.* at 8. Lasky cites to ***Commonwealth v. Montgomery***, 626 A.2d 109 (Pa. 1993), to support his claims. Brief for Appellant at 9.

To succeed on an ineffectiveness claim, Lasky must demonstrate by the preponderance of the evidence that

(1) [the] 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 proceedings would have been different.

***Commonwealth v. Ali***, 10 A.3d 282, 291 (Pa. 2010). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim.

***Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010). Counsel is presumed to be effective and the burden is on the appellant to prove otherwise. ***Commonwealth v. Hanible***, 30 A.3d 426, 439 (Pa. 2011).

The PCRA court has addressed Lasky's claims and determined that they are without merit. **See** PCRA Court Opinion, 4/2/12, at 4-8.<sup>3</sup> We adopt the sound reasoning of the PCRA court for the purpose of this appeal. **See**

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<sup>3</sup> As noted by the PCRA court, following Lasky's decision to not testify on his own behalf, the trial court instructed the jury that it could not use Lasky's election to exercise his constitutional right to remain silent against him. N.T., 11/1/01, at 50; **see also** PCRA Court Opinion, 4/2/12, at 6. Thereafter, the trial court provided a more comprehensive instruction during the jury charge. **See** N.T., 11/1/01, at 124-25 (stating, *inter alia*, that Lasky "has an absolute right founded on the constitution to remain silent," and that the jury could not "draw any inference of guilt or any inference adverse to the defendant from the fact that he did not testify."). The trial court further stated that the jury was only to consider the evidence that it had heard during the trial. N.T., 11/1/01, at 50; **see also id.** at 122-23 (stating that the Commonwealth has the burden of proving Lasky guilty and that the person accused of a crime is not required to present evidence or prove anything in his own defense). It is well-settled that juries are presumed to follow the trial court's instructions as to the applicable law. **See Commonwealth v. Passarelli**, 789 A.2d 708, 713 (Pa. Super. 2001).

*id.*<sup>4</sup>

As an addendum, we note that Lasky has not demonstrated that the result of his trial would have been different had counsel not told the jury that Lasky would testify during the opening statement. Indeed, at trial, the victim testified that Lasky touched her private parts with his private parts. N.T., 10/30/01, at 14-17. Furthermore, Dr. Andrea Taroli, Medical Director for the Children's Advocacy Center of Northeastern Pennsylvania, testified that the victim stated that Lasky had put his "private inside her private [and] it hurt[] a lot." N.T., 10/31/01, at 176-77; **see also** N.T., 10/29/01, at 34 (wherein Elizabeth Smiley ("Smiley"), the caseworker in this case, testified that the victim had stated that Lasky put "his private in my private," and that it "hurts a lot."). Dr. Taroli stated that the victim's statement was corroborated by her physical examination, which revealed that K.G. "had been repeatedly sexually assaulted." N.T., 10/31/01, at 183. The victim further stated that Lasky told her not to tell her mother because she would get mad and the police would take them away. **Id.** at 177; N.T., 10/29/01, at 34-35. The Commonwealth also presented statements that Lasky made to the police wherein he admitted that (1) he took naked pictures of the

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<sup>4</sup> We note that Lasky also cites to ***Commonwealth v. Sparks***, 539 A.2d 887 (Pa. Super. 1988), and ***United States v. Johnson***, 531 F.2d 169 (3d Cir. 1976), to support his claims. However, neither of these cases are applicable to facts of this case. Further, as to the ***Johnson*** decision, we note that "[d]ecisions of federal courts other than the United States Supreme Court are not binding on Pennsylvania state courts." ***Commonwealth v. James***, 12 A.3d 388, 394 (Pa. Super. 2010).

victim, (2) his penis "slid" into the victim's vagina, (3) the victim's hand "bumped" his penis when they took a bath together, and (4) he grabbed the victim's hand and placed it near his penis. N.T., 10/31/01, at 206-08. Finally, the victim's mother discovered photos of Lasky having sex with the victim, as well as naked photos of the victim on Lasky's digital camera. *Id.* at 22; *see also id.* at 176 (wherein Dr. Taroli testified that the victim stated that Lasky took pictures of her without her clothes on); N.T., 10/29/01, at 34 (wherein Smiley testified that the victim stated that Lasky took pictures of her with no clothes on). Thus, any potential ineffectiveness did not contribute to the verdict as the Commonwealth presented overwhelming evidence of Lasky's guilt. Based upon the foregoing, we conclude that the PCRA court properly denied Lasky's PCRA Petition.

Order affirmed.

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MARY F. RINALDI  
LACKAWANNA COUNTY

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CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
	:	
	:	
v.	:	CRIMINAL DIVISION
	:	
ROBERT EDWARD LASKY	:	
	:	
	:	00 CR 1615

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**MEMORANDUM AND ORDER**

**MAZZONI, J.**

**I. INTRODUCTION**

On or about January 24, 2012, Defendant Robert Lasky (“Lasky”) filed a “Motion for Post-Conviction Collateral Relief.” For reasons articulated herein, said motion is hereby **DENIED**.<sup>1</sup>

**II. PROCEDURAL BACKGROUND**

On November 1, 2001, Defendant Lasky was convicted of the following criminal

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<sup>1</sup> This motion was filed to the wrong docket number (00 CR 1614). It should have been filed to docket number 00 CR 1615. The charges associated with docket number 00 CR 1614 were *nolle prossed*.

offenses:

- A. Rape;
- B. Sexual Abuse of Children;
- C. Indecent Assault of a Victim under the Age of 13;
- D. Indecent Assault of a Victim under the Age of 16;
- E. Aggravated Indecent Assault;
- F. Corruption of Minors;
- G. Endangering the Welfare of Children.

On July 12, 2002, Defendant Lasky was sentenced by this Court to 10 ½ to 31 years in prison. Defendant Lasky appealed the conviction and subsequent sentencing. By Memorandum dated September 1, 2009, the Pennsylvania Superior Court remanded the case to the trial court because, for sentencing purposes, the conviction of aggravated indecent assault should have merged with the conviction of the charge of rape. On November 23, 2009, Defendant Lasky was resentenced to 9 ½ to 30 years.<sup>2</sup> The defendant's motion for reconsideration was denied and Defendant Lasky took a timely appeal. In February 2011, the Superior Court affirmed the trial court's sentence.

On January 24, 2012, Defendant Lasky filed a motion for "Post Conviction Collateral Relief" and a hearing was scheduled for March 16, 2012 before the undersigned judge. On the date of the hearing, Defendant, by and through counsel, withdrew all of his challenges except for his claim that Defendant's trial counsel,

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<sup>2</sup> There was a long and tortured appellate procedural history, which is summarized in the Superior Court's unpublished Memorandum opinion of September 1, 2009.



Attorney Thomas Nolan, was ineffective for not calling Defendant to the stand, after trial counsel represented to the jury in his opening statement that Defendant would be testifying. Defendant further maintains that this matter became even more prejudicial when Defendant's trial counsel, during his closing statement, failed to explain to the jury Defendant's failure to testify.

By agreement of the parties, no testimony was taken on the date of the hearing and the parties submitted their respective positions on argument.

### III. STANDARD OF REVIEW

To be eligible for post-conviction relief under section 9543(a)(2)(ii) of the PCRA, Defendant must prove by a preponderance of the evidence that his conviction resulted from ineffective assistance of counsel which 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). Com. v. Cox, 581 Pa. 107, 120 (2004). The test for counsel ineffectiveness is the same under both the Pennsylvania and federal constitutions: it is the performance and prejudice paradigm enunciated in Strickland v. Washington, 466 U.S. 668 (1984), *see* Rompilla v. Beard, 545 U.S. 374, 380 (2005), and recognized in this Commonwealth in Com. v. Pierce, 515 Pa. 153 (1987). *See* Com. v. Mallory, 941 A.2d 686, 694 (Pa. 2008); Com. v. Williams, 581 Pa. 57, 71 (2004). Defense counsel is presumed to be effective and the burden to show otherwise lies with Defendant. Com. v. Natividad, 938 A.2d 310, 321 (Pa. 2007); Com. v. Singley, 582 Pa. 5, 19 (2005). Under the

constitutional ineffectiveness standard adopted in **Pierce**, the defendant bears the burden of establishing that: (1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate the defendant's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. **Mallory**, 941 A.2d at 966 n. 16; **Com. v. Spott**, 582 Pa. 207, 220 (2005).

"It is not essential to apply the [**Pierce**] test in any given order, and if the proponent of ineffectiveness fails to satisfy any one prong of the test, the entire claim fails." **Com. v. DiNicola**, 581 Pa. 550, 559 (2005). Counsel cannot be deemed ineffective for failing to raise a baseless issue, and only when the underlying issue is of arguable merit must further inquiry be made into the reasonableness of counsel's actions and the prejudice that those actions may have caused. **Com. v. Reyes**, 582 Pa. 317, 330 (2005). Conversely, if the defendant cannot demonstrate "that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met." **Com. v. Saranchak**, 581 Pa. 490, 503 (2005).

#### IV. DISCUSSION

At argument, the Defendant agreed that, at the outset of trial and before opening statements, he did intend to testify and address the criminal allegations against him. At

the close of the Commonwealth's case, the minor victim's mother made an outburst and quickly excited the courtroom. (N.T. 11/1/01 p. 28.) Defense counsel moved for a mistrial. The trial Court gave a cautionary instruction, (N.T. 11/1/01 p. 29), and inquired of the jury if anyone would be unable to follow the Court's instruction and would otherwise be unable to be fair and impartial. (N.T. 11/1/01 p. 46-47.) The jury responded that they could follow the judge's instruction and correspondingly be fair and impartial. Accordingly, the defendant's motion for a mistrial was denied. (N.T. 11/1/01 pg. 49.)<sup>3</sup>

Upon conferring with his client, trial counsel for Defendant, Attorney Thomas Nolan, noted on the record:

With regard to the position of my client I had time to confer with Robert Lasky during the last 10 or 15 minutes while the motion for the mistrial was pending. He has informed me that he has now decided not to testify because he doesn't believe that he can get a fair trial after the outbursts and because of the underlying circumstances that formed the basis for the motion for mistrial.

(N.T. 11/1/01 p. 48-49.)

As the record accurately reflects, and as admitted by Defendant himself, it is apparent that Defendant's decision not to testify was his and his alone. More importantly, this decision was made upon closure of the Commonwealth's case. This unexpected turn of events put Defense counsel in a rather difficult and somewhat

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<sup>3</sup>The Court's denial of Defendant's motion for a mistrial based on the outburst was raised on appeal before the Superior Court. In affirming the Court's denial of a mistrial on this issue, the Superior Court concluded:

[W]e detect no abuse on the part of the trial court in denying appellant's motion for a mistrial. The trial court heard all of the outbursts during the course of the trial and was able to gauge the effect of these outbursts on the jury. The court issued a strong cautionary instruction, and also polled the jury to determine whether they could continue to determine the facts of the case in a fair and impartial manner. We conclude that here, particularly since two of the "outbursts" were not recorded, the trial judge was in the best position to determine whether a mistrial was necessary. Thus, no relief is warranted on appellant's first claim.

(See Memorandum, Sept. 1, 2009, No. 477 MVA 2008.)

conflicting position, leaving Defense counsel with limited options. Acknowledging his client's wishes, does the defense counsel now make a representation to the jury in the form of an explanation and, if so, what does he say in an attempt not to highlight the conflicting posture in which he has now found himself entrenched? Does he simply say nothing about his client's decision not to testify, attack the Commonwealth's evidence to infuse reasonable doubt, and correspondingly rely on the Court's instructions? It is apparent from the record that Defense counsel had chosen the latter approach. Prior to closing arguments and after being informed of the defendant's decision, the trial Court did in fact instruct the jury that they were not to hold it against the defendant for exercising his constitutional right. (N.T. 11/1/01 p. 50.) Furthermore, a more comprehensive instruction was later given during the Court's charge. (N.T. 11/1/01 p. 125.)

The Defendant is claiming that his trial lawyer was ineffective for a series of events for which the Defendant, himself, is responsible. Looking at trial counsel's options, once his motion for mistrial was denied, this Court finds nothing ineffective about trial counsel's decision to proceed as he did.

In support of his position, Defendant cites Commonwealth v. Montgomery, 626 A.2d 109 (Pa. 1993). Defendant's reliance on this case is misplaced because the facts are significantly at variance with the case *sub judice*. In Montgomery, the defendant was charged and convicted of attempted rape and related offenses. Notwithstanding the victim's statement that the defendant used a blanket to clean the victim of his seminal fluid, the lab tests on the blanket were all negative. Relying on these test results, defense counsel in his opening made reference to the negative lab

findings. On the first day of trial, however, the defendant had further tests done on other areas of the blanket, which turned up to be positive for seminal fluid. The defendant at that point in time requested a mistrial, which was denied. The trial court's denial of request for mistrial was affirmed by the Superior Court.

On further appeal, the Pennsylvania Supreme Court reversed and remanded the case to the trial court. The Pennsylvania Supreme Court held, in pertinent part, as follows:

While trial counsel's statement of facts are not considered evidence, trial counsel's sincerity, competency and credibility on behalf of his client are intangibles which counsel is asking the jury to accept on his client's behalf. The jury's estimation of the reliability of defense counsel may well affect the jury's ability to be persuaded by counsel or to believe the defendant and his defense. Therefore, any event *outside of the control of defense counsel or the defendant* which jeopardizes counsel's truthfulness and integrity may well affect the defendant's defense and credibility.

In the past, we have indicated that events which affect the jury's estimation of the truthfulness and reliability of a defendant or any witness can weigh heavily in its final verdict. Commonwealth v. Jenkins, 476 Pa. 467 (1978). Here, the introduction into evidence of the results of the second test to the same jury that initially was told that no such positive results existed compromised trial counsel's credibility and advocacy on behalf of his client in at least two respects. First, counsel's initial statement to the jury was shown to be inaccurate. He was shown to be a liar and, therefore, his ability to be persuasive on his client's behalf was definitely threatened. Second, his statement on the lack of corroborating evidence indicated that his defense strategy would be to discredit the victim and the subsequent discovery of evidence put him in the impossible position of not being able to change his defense to mistaken identity, or consent without seeming more disingenuous to the jury.

We believe that both of these factors handicapped trial counsel's ability to be an effective advocate for Appellant or to prepare an adequate defense for his client before this jury and require that a new trial be awarded.

Commonwealth v. Montgomery, 626 A.2d at 113-14. (Emphasis added.)

Unlike Montgomery, the circumstances upon which Defendant Lasky predicates his ineffective claim *were caused exclusively by him*. Like Montgomery, defense counsel in the case *sub judice* also made a timely motion for mistrial with regard to the outbursts, which was denied. The issue of the outburst was addressed on appeal and dismissed as the basis for a new trial. Commonwealth v. Montgomery is not an ineffective assistance of counsel case. It is a case where recently disclosed evidence put defense counsel in a very compromising position.

Accordingly, Defendant's claims have little or no merit. The course of conduct pursued by trial counsel did have a reasonable basis. Assuming that defense counsel made some effort at explaining his client's refusal to testify, the outcome would likely have been the same. The evidence against the defendant was overwhelmingly persuasive.