NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RAYMOND E. HAUN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 935 MDA 2012

Appeal from the Order Entered May 9, 2012
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0001493-2004

BEFORE: MUSMANNO, J., BENDER, J., and COLVILLE, J.*

MEMORANDUM BY BENDER, J. Filed: January 4, 2013

Raymond E. Haun (Appellant) appeals from the order denying his petition for post-conviction relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541 – 9546. Appellant claims that his trial counsel provided ineffective assistance of counsel (IAC) by failing to object to irrelevant and prejudicial testimony, by failing to object to inflammatory statements by the prosecutor during closing argument, and by failing to file post-sentence motions and appeal the judgment of sentence. Because we conclude that the PCRA court's dismissal of Appellant's PCRA petition was supported by the record and free of legal error, we affirm.

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* Retired Senior Judge assigned to the Superior Court.

All of Appellant's convictions in this case arose out of the sexual abuse he inflicted upon his stepdaughter (the Victim), beginning when the Victim was seven years old and continuing until she was ten years old (spanning from 1994 until 1997). The Victim testified that Appellant would bring her into his bedroom at night and force her to masturbate him, to the point of ejaculation, approximately four to five times a week for the duration of the abuse. N.T. Trial, 1/27/05, at 45 – 47. Occasionally, Appellant would require the Victim to remove her shirt when these events occurred. ***Id***. at 50. On one occasion, Appellant attempted to insert his finger into the Victim's vagina. ***Id***. at 52 – 53. On at least three occasions, Appellant attempted to force the Victim to perform oral sex on him, and on one other occasion, he attempted to perform oral sex on the Victim. ***Id***. at 54 - 56.

The Victim testified that the abuse was "always" accompanied by threats from Appellant intended to keep her silent. ***Id***. at 57. He would threaten to kill the Victim and her mother. ***Id***. He also told the Victim that she would be "sent away to a home for bad little girls" if she reported the sexual abuse, and that her mom would hate her for it. ***Id***. She stated that she was very afraid of Appellant, a fear that remained at the time of her testimony. ***Id***. at 57 – 58.

On January 28, 2005, following a jury trial, Appellant was convicted of one count of involuntary deviate sexual intercourse (IDSI), 18 Pa.C.S. § 3123; one count of attempted aggravated indecent assault, 18 Pa.C.S. § 3125; one count of endangering the welfare of children, 18 Pa.C.S. § 4304;

one count of corruption of minors, 18 Pa.C.S. § 6301; and more than 520[1] counts of indecent assault, 18 Pa.C.S. § 3126. On June 30, 2005, the trial court determined that Appellant was a sexually violent predator (SVP) and sentenced him to an aggregate term of 27 - 97 years' incarceration. Appellant did not file post-sentence motions, nor did he file a direct appeal from the judgment of sentence.

On June 7, 2006, Appellant filed a *pro se* PCRA petition. Former PCRA counsel filed an amended PCRA petition on February 12, 2007, with additional amendments incorporated in a supplemental amended PCRA petition filed on September 6, 2007. The fully amended PCRA petition was denied by the PCRA court on November 4, 2008. The PCRA court denied the PCRA petition solely on the basis that Appellant was ineligible to pursue ineffective assistant of counsel claims under the PCRA because he admitted guilt.[2] On appeal from that decision, this Court reversed and remanded, holding:

> that since a defendant must await collateral review to present an ineffectiveness claim, and since that claim is subject to the same standard for an ineffectiveness claim raised on direct appeal, the provision within Section 9542 [of the PCRA] regarding innocence cannot, under our current precedent, be interpreted in a manner

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[1] The Commonwealth asserts that there are 521 convictions for indecent assault, whereas Appellant's count totals 522.

[2] Appellant admitted to committing at least some of the crimes during the sentencing hearing.

> that would require a showing of innocence before the petitioner could advance an ineffectiveness claim under the PCRA.

Commonwealth v. Haun, 984 A.2d 557, 561-62 (Pa. Super. 2009) *aff'd*, 32 A.3d 697 (Pa. 2011). Our Supreme Court granted allowance of appeal and affirmed the decision of the Superior Court, concluding, in a unanimous opinion, that "a concession of guilt does not, *per se*, foreclose prisoner access to the PCRA." 32 A.3d at 705. On remand, the PCRA court denied Appellant's claims on the merits. The instant appeal followed.

As all of Appellant's claims concern allegations of the ineffective assistance of counsel, we begin by addressing the appropriate scope and standard of review common to each claim:

> As a general proposition, an appellate court reviews the PCRA court's findings to see if they are supported by the record and free from legal error. The court's scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in the light most favorable to the prevailing party.

Commonwealth v. Duffey, 889 A.2d 56, 61 (Pa. 2005) (internal citations omitted).

> To prevail on a claim of ineffective assistance of counsel, a petitioner must overcome the presumption that counsel is effective by establishing all of the following three elements, as set forth in ***Commonwealth v. Pierce***, 515 Pa. 153, 527 A.2d 973, 975–76 (1987): (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) the petitioner suffered prejudice because of counsel's ineffectiveness. ***Commonwealth v. Dennis***, 597 Pa. 159, 950 A.2d 945, 954 (2008). With regard to the second, reasonable basis prong, "we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis." [***Commonwealth v. Washington***,

> 927 A.2d 586, 594 (Pa. 2007)]. We will conclude that counsel's chosen strategy lacked a reasonable basis only if Appellant proves that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." ***Commonwealth v. Williams***, 587 Pa. 304, 899 A.2d 1060, 1064 (2006) (citation omitted). To establish the third, prejudice prong, the petitioner must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's ineffectiveness. ***Dennis***, ***supra*** at 954. "We stress that boilerplate allegations and bald assertions of no reasonable basis and/or ensuing prejudice cannot satisfy a petitioner's burden to prove that counsel was ineffective." ***Commonwealth v. Paddy***, 15 A.3d 431, 443 (Pa. 2011).

Commonwealth v. Chmiel, 30 A.3d 1111, 1127 - 28 (Pa. 2011). "A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim." ***Commonwealth v. Wharton***, 811 A.2d 978, 986 (Pa. 2002).

Appellant's first claim asserts that trial counsel rendered IAC by failing to object to portions of the testimony of several Commonwealth's witnesses that Appellant argues were either irrelevant, unduly prejudicial, or both. Appellant complains that his trial counsel failed to object when the Commonwealth repeatedly proffered testimony concerning numerous alleged incidences of Appellant's violence towards members of Victim's family, and counsel failed to object to cruelty Appellant allegedly inflicted upon family pets and animals in general. Appellant also complains that trial counsel failed to object to the Commonwealth's proffer of testimony concerning his attempted suicides, his admission to psychiatric treatment facilities, his illicit use of drugs, and evidence he claims was intended to provoke sympathy for the Victim. Appellant protests that "[w]itness after witness took the stand to cumulatively testify to specific bad acts some of which were not even

observed by the victim[,]" and "[t]rial counsel objected to virtually none of this evidence …." Appellant's Brief, at 23. Appellant contends that even if some of that evidence was relevant and admissible, the prejudicial effect generated by the quantity and quality of that evidence outweighed any legitimate probative value.

The Commonwealth argues that all of the prior bad acts in question were admissible under exceptions to the evidentiary prohibition against the admission of prior bad acts, and that the effect of the evidence of prior bad acts was more probative than prejudicial. The Commonwealth asserts that the evidence was primarily admissible in order to demonstrate why Victim delayed reporting the abuse for the better part of a decade, and the Commonwealth also asserts that the evidence of prior bad acts was admissible under the *res gestae* exception. Under either exception, the Commonwealth contends that the probative value of such evidence far outweighed its prejudicial effect.

We begin our analysis with the relevant rules of evidence. "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402. The prohibition against the use of evidence of prior bad acts (and explicit exceptions to that prohibition), assuming the relevancy of such evidence, is encapsulated in Pa.R.E. 404(b):

(b) Other crimes, wrongs, or acts.

> (1) 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.
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> (2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
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> (3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.
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> (4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Pa.R.E. 404(b).

Our Supreme Court has summarized the admissibility of evidence of prior bad acts thusly:

> Evidence is admissible if it is relevant—that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact … —and its probative value outweighs the likelihood of unfair prejudice. … [E]vidence of prior bad acts, while generally not admissible to prove bad character or criminal propensity, is admissible when proffered for some other relevant purpose so long as the probative value outweighs the prejudicial effect. This Court has recognized many relevant purposes, other than criminal propensity, for which evidence of other crimes may be introduced ….

Commonwealth v. Boczkowski, 846 A.2d 75, 88 (Pa. 2004) (internal citations omitted).

Generally speaking, evidence of prior bad acts is barred not because of irrelevancy, but rather because the risk of unjust prejudice from such

evidence is high despite its relevancy. Our Supreme Court recently elaborated on this point:

> Character evidence (whether good or bad) is, of course, relevant in criminal prosecutions; that is why an accused has the right to introduce evidence of good character for relevant character traits. ***See*** Pa.R.E. 404(a)(1). Evidence of separate or unrelated "crimes, wrongs, or acts," however, has long been deemed inadmissible as character evidence against a criminal defendant in this Commonwealth as a matter not of relevance, but of policy, *i.e.*, because of a fear that such evidence is so powerful that the jury might misuse the evidence and convict based solely upon criminal propensity.

Commonwealth v. Dillon, 925 A.2d 131, 136-37 (Pa. 2007).

Within this framework, exceptions to the inadmissibility of prior bad acts evidence evolved in the context of cases involving sexual assault.

> Generally, there are three principles upon which evidence addressing the timeliness of a sexual assault complaint has been deemed relevant and admissible: (1) as an explanation of an inconsistency/silence; (2) as corroboration of similar statements; or (3) as a *res gestae* declaration. 4 Wigmore on Evidence § 1134 (Chadbourn rev. 1972).

Id. at 137.

The "explanation of an inconsistency/silence" exception applies when there is a delay in reporting or lack of a prompt complaint alleging sexual abuse. Our Supreme Court outlined the justification for the exception in ***Dillon***:

> In sum, both the common law experience and the judgment of the General Assembly have led to a recognition of the relevance of the promptness of a complaint of sexual abuse, and this Court has separately recognized the reality that a sexual assault prosecution oftentimes depends predominately on the victim's credibility, which is obviously affected by any delay in reporting

> the abuse. Revealing the circumstances surrounding an incident of sexual abuse, and the reasons for the delay, enables the factfinder to more accurately assess the victim's credibility. Moreover, this Court has acknowledged that juries in sexual assault cases expect to hear certain kinds of evidence and, without any reference to such evidence during the trial, a jury is likely to unfairly penalize the Commonwealth, the party with the burden of proof.

Id. at 138 - 39 (internal citations omitted). Given these concerns, the ***Dillon*** court held that evidence of prior bad acts, when utilized to demonstrate the reason for a lack of a prompt complaint regarding sexual abuse, was admissible in the Commonwealth's case-in-chief and was not limited to rebuttal of defense strategies that paint the delay to report as adversely affecting a victim's credibility. ***Id***.; ***see also Commonwealth v. Page***, 965 A.2d 1212, 1220 (Pa. Super. 2009) (citing ***Dillon*** in holding that "[t]he testimony of [Page]'s abuse of the victim's mother was relevant to show the reason for the delay in reporting the abuse, as well as to support the victim's testimony that she feared [Page] and believed that he would carry out the threats he made against her and her mother.").

Still, the admissibility of such evidence does not render it immune from challenges on the basis of its potential to invoke undue prejudice:

> Finding that the evidence is relevant to the Commonwealth's case-in-chief does not end the inquiry. In instances where evidence of other crimes, wrongs, or acts is offered for a purpose other than to show conformity of action, such evidence may still be excluded if the probative value of the evidence is outweighed by its potential for prejudice. Pa.R.E. 404(b)(3). The probative value of the evidence might be outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, pointlessness of presentation, or unnecessary presentation of cumulative evidence. Pa.R.E. 403.

> The comment to Pa.R.E. 403 instructs that: "'Unfair prejudice' means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403 cmt. Additionally, when weighing the potential for prejudice, a trial court may consider how a cautionary jury instruction might ameliorate the prejudicial effect of the proffered evidence. Pa.R.E. 404(b) cmt.
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> Evidence will not be prohibited merely because it is harmful to the defendant. This Court has stated that it is not "required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged." [***Commonwealth v. Lark***, 543 A.2d 491, 501 (Pa. 1988)]. Moreover, we have upheld the admission of other crimes evidence, when relevant, even where the details of the other crime were extremely grotesque and highly prejudicial. ***See Commonwealth v. Billa***, 521 Pa. 168, 555 A.2d 835, 841 (1989) (upholding the trial court's admission of evidence that the defendant had committed a prior rape, including testimony from the prior rape victim); ***see also Commonwealth v. Gordon***, 543 Pa. 513, 673 A.2d 866, 870 (1996) (allowing evidence of defendant's previous sexual assaults).

Dillon, 925 A.2d at 141.

Failure to object to evidence of abuse of animals

With these standards guiding our analysis, we first address the testimony of several witnesses concerning Appellant's abuse of animals. Victim's testimony contained three references to Appellant's abuse of animals. Victim testified that Appellant once came into her room and picked up her guinea pig, snapped its neck in front of her, and then forced her to watch as he fed the animal to his boa constrictor. N.T., 1/27/05, at 42. Victim also testified that Appellant once threw a puppy to the ground so hard that "he shattered every single bone in her body …." ***Id***. at 59. She also

stated that there were numerous occasions when she observed Appellant shooting at animals with a BB gun from a sliding glass door at their home. ***Id***. at 60. She said Appellant would "shoot cats and birds and chipmunks and squirrels, anything that walked in front of the path of the BB gun he shot at." ***Id***. Victim testified that when Appellant committed these acts of cruelty against animals, he would use the opportunity to threaten her. "After every time he ever killed an animal, he'd turn around and look at me and say: Now, remember what'll happen to you if you every say anything." N.T., 1/27/05, at 59. Several other witnesses corroborated these acts of violence against animals. ***Id***. at 130 – 31; 184; 186 – 87; 244; 247 – 48. Appellant's trial counsel failed to object to any of the testimony concerning Appellant's cruelty to animals.

In addressing Appellant's IAC claim, the PCRA court concluded that "[i]n the case at bar, the Court believes the violent acts against animals and against other family members were relevant to explain the victim's delay in reporting, pursuant to ***Page*** and ***Dillon***[,]" and thus were firmly rooted within an exception to Pa.R.E. 404(b)'s prohibition of prior bad acts evidence. PCRA Court Opinion (PCO), 5/9/12, at 5. The PCRA court went on to conclude that "the prejudicial effect did not outweigh the probative value because the prior bad acts were highly probative to the credibility of the victim given her delay in reporting, as well as highly probative to developing the complete sequence of events." ***Id***. at 6.

The testimony regarding Appellant's acts of cruelty towards animals certainly constitute evidence of "prior bad acts" or "wrongs" within the meaning of Pa.R.E. 404(b). That evidence was relevant, however, to question of why Victim failed to promptly report Appellant's repeated sexual abuse. Indeed, as Victim testified, these acts of cruelty against animals were accompanied by threats by Appellant intended to keep Victim from reporting the sexual abuse she endured at his hand. Thus, we have little reservation in concluding that the PCRA court's determination that evidence of Appellant's cruelty to animals fits firmly within the ***Dillon*** exception to Pa.R.E. 404(b).

The question remains, however, whether the probative value of the animal cruelty evidence outweighed its (undue) prejudicial effect. We agree with Appellant that evidence of Appellant's cruelty to animals is intrinsically prejudicial. Furthermore, evidence of animal cruelty that was not directly related to Appellant's threat (Victim's mother's testimony regarding the killing of two doves that was not witnessed by Victim) is simultaneously less probative and more prejudicial then the evidence directly related to the threat (Appellant's killing of Victim's guinea pig). We also agree with Appellant that introduction of the animal cruelty evidence risked the possibility that the jury would become distracted from the task of addressing the specific allegations of wrongdoing in this case and, instead, premise their verdict on conduct not charged or on their distaste for the character of a defendant. Accordingly, we find that there is arguable merit to the claim

that an objection should have been made pursuant to Pa.R.E. 403 to some or all of the evidence of animal cruelty.

At the PCRA hearing, trial counsel acknowledged his failure to make any on-the-record Pa.R.E. 403 objections to the animal cruelty evidence. N.T., 3/17/08, at 39 – 40. Trial counsel cited his understanding of ***Dillon***, ***supra***, to justify these omissions. He agreed that such evidence was "of an extremely inflammatory character[,]" yet he inexplicably refused to acknowledge that such evidence was prejudicial to Appellant, stating "I don't agree with you. I can't comment. That's up to the jury to decide." N.T., 3/18/08, at 40.

It is axiomatic, however, that inclusion or exclusion of evidence subject to scrutiny under Pa.R.E. 403 is a judicial function. Furthermore, the ***Dillon*** court specifically stated that "[i]n instances where evidence of other crimes, wrongs, or acts is offered for a purpose other than to show conformity of action, *such evidence may still be excluded if the probative value of the evidence is outweighed by its potential for prejudice*." ***Dillon***, 925 A.2d at 141 (emphasis added). Thus, trial counsel did not have a reasonable basis to refrain from objecting to the evidence of animal cruelty.

The crux of Appellant's IAC claim can thus be distilled into a question of prejudice. On one hand, there is the question of whether the "probative value is outweighed by the danger of unfair prejudice" under Pa.R.E. 403. That particular issue is entwined with the first prong of the IAC test – whether an objection to the animal cruelty evidence would have presented

an issue of arguable merit. In acknowledging that the balance between probative value and undue prejudice from the animal cruelty evidence presents such a close call for the trial court, we hypothesize that both a decision to permit some or all of the animal abuse evidence and a contrary decision not to permit some of that evidence under Pa.R.E. 403 are both decisions that could survive appellate scrutiny under an abuse of discretion standard. Accordingly, we decline to dismiss this claim as lacking arguable merit, because it is conceivable that had an objection been lodged by trial counsel, at least some of the animal cruelty evidence could have been precluded without running afoul of Pa.R.E. 403 jurisprudence.

An objection to some of the animal cruelty testimony, though infused with arguable merit, cannot establish the third prong of an IAC claim unless there is "a reasonable probability that the outcome of the proceedings would have been different …." Pa.R.E. 403. It is at this stage of the analysis that we conclude Appellant has failed to meet his burden. Several factors influence our decision.

We begin by reiterating that the probative value of such evidence was substantial in this case, both in that it directly justified Victim's delay in reporting the sexual abuse. We note that Victim specifically testified that "[a]fter every time [Appellant] ever killed an animal, he'd turn around and look at me and say: Now, remember what'll happen to you if you ever say anything." N.T., 1/27/05, at 59. Thus, it was not superfluous to introduce evidence of multiple instances of animal cruelty in order to demonstrate both

the severity and frequency of Appellant's threats. Even the evidence not directly witnessed by Victim, such as when Appellant's estranged wife testified that he had snapped the necks of two doves she possessed, buttressed Victim's testimony by demonstrating that Victim was not the only person to have witnessed what might otherwise be unbelievable acts of cruelty.

The most inflammatory portion of the animal cruelty evidence was that which was simultaneously most justifiable under a probative/prejudicial value standard: the testimony of Victim that Appellant had snapped the neck of her guinea pig, fed it to his snake, while warning her to remember what she observed should she have thoughts about saying anything about the sexual abuse he was inflicting upon her. The remaining animal cruelty evidence of concern approaches, but does not eclipse, the gravity of that testimony.

Appellant argues, in part, that the prejudice resulting from such evidence was cumulatively outcome determinative. We disagree. We reject the supposition that additional, yet predominantly similar evidence of animal cruelty can simply be aggregated to increase the prejudicial impact of such evidence overall. Rather, once the proverbial cat was out of the bag, additional evidence of animal cruelty accumulated in accordance with the law of diminishing returns. The third and fourth occasion in which evidence of animal cruelty was presented to the jury was simply unlikely to present the

same degree of prejudicial impact as the introduction of such evidence in the first instance.

Finally, it is indispensable to our conclusion that the trial court issued an instruction that cautioned the jury as to the limited purpose of the prior bad acts evidence, and that in doing so, the court specifically identified the testimony concerning Appellant's abuse of animals. The trial court instructed the jury that:

> The evidence of alleged acts of violence by the defendant has been offered to provide you with information on the circumstances which prevailed in the household of which the victim was apart [sic] which may have impacted upon her reluctance to report the assaults until after the defendant left the household in May of 2004 when she was 17 years old. However, the defendant is not charged with the acts of physical violence nor is he charged with cruelty to animals.

N.T., 1/28/05, at 410 – 11.

Later, the trial court told the jury:

> With respect to each type of evidence, I have offered you its evidentiary purpose at trial. I would caution you that this evidence must not be used by you for any purpose other than what I have just stated. Specifically you must not regard this evidence as showing simply that the defendant is a person of bad character or criminal tendencies from which you might be inclined to infer guilt.
>
> If you find the defendant guilty of the charges which are before you, it must be based – it must be because you are convinced by the evidence that he committed these crimes charged and not because you believe that he is a wicked person or has committed other improper conduct.

Id. at 411 – 12.

In sum, the highly probative value of the initial introduction of animal cruelty evidence, the diminishing prejudicial value of additional animal cruelty evidence after such evidence was initially revealed to the jury, and the presence of relevant, cautionary jury instructions all lead us to the conclusion that the prejudice Appellant endured due to evidence of animal cruelty overall was not outcome determinative.[3]

Failure to object to other uncharged violent acts

Appellant also complains that trial counsel provided IAC by failing to object to the testimony of the Victim and several other witnesses regarding acts of violence attributed to Appellant for which he was not charged. The PCRA court determined, as it had with regard to the evidence of animal cruelty, that the evidence of uncharged violence was relevant to explain the Victim's delay in reporting the sexual assaults. PCO at 5. The court also found that probative value of that evidence exceeded the risk of unfair

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[3] The PCRA court concluded that trial counsel did not provide IAC because his failure to object was supported by a reasonable basis designed to effectuate his client's interests. We find that conclusion to lack support on the record, because trial counsel testified that he did not object premised upon his misreading of ***Dillon***, ***supra***. While counsel had a reasonable basis to refrain from objecting to the admissibility of the prior bad acts evidence, he did not have a reasonable basis to fail to object pursuant to Pa.R.E. 403. Nevertheless, "we may affirm the decision of the trial court if there is any basis on the record to support the trial court's action; this is so even if we rely on a different basis in our decision to affirm." ***Commonwealth v. Brooks***, 875 A.2d 1141, 1144 (Pa. Super. 2005) (quoting ***Commonwealth v. Heilman***, 867 A.2d 542, 544 (Pa. Super. 2005).

prejudice. ***Id***. at 6. Appellant complains that the following evidence should have been objected to by trial counsel.

There were several instances during Appellant's trial when the testimony of the Commonwealth's witnesses referenced Appellant's uncharged violent acts. The Victim testified that Appellant "… would just get up and hit me and punch [me] …." N.T., 1/27/05. At 61. When she would try to run away, she said Appellant would "chase me half[way] up the stairs, and he would take his arm and hook it around my legs to trip me so I would smack my chin and lips off the stairs." ***Id***. She said Appellant physically abused her beginning when she was seven and continuing until she was fifteen. ***Id***. When he hit her, "[h]e would hit anywhere that he could find a body part to hit." ***Id***. at 63. The hitting included the use of a closed fist as well as slapping. ***Id***.

The Victim also testified that she witnessed Appellant abuse all of her brothers and sisters. She said she "used to see him get up and just hit my brothers and punch them just for no reason." ***Id***. at 62. She said Appellant would make wooden paddles on which he wrote the children's names. Each time he hit a child with the paddle, he would notch a tally mark next to the child's name. ***Id***. She said the abuse of her younger siblings began when they were as young as five. ***Id***.

The Victim's sister corroborated the testimony concerning Appellant's use of wooden paddles on the children. ***Id***. at 128. The sister also reported an incident when she was a teenager when Appellant punched her in the

back of the head in front of her friends after picking her up from a bowling alley. ***Id***. at 128 – 29. The Victim's brothers testified that Appellant frequently hit them with the wooden paddles. ***Id***. at 243; 247. One of the brothers told the court he was still afraid of Appellant. ***Id***. at 248.

Victim's mother testified that she never observed Appellant's acts of violence against the children, but that they repeatedly told her about it. ***Id***. at 182. She observed "a lot of markings" on her youngest child. ***Id***. at 182. When she discovered the paddles, she would break them. ***Id***. at 184. She said that she explicitly told Appellant that he was not permitted to "touch or correct my children in that fashion." ***Id***. at 183. Though at first the Victim's mother said that Appellant never physically abused her, she later revised that denial by saying that Appellant violently pushed her in 2004. ***Id***. at 184; 189 – 90. Because of that incident, the mother filed for a Protection from Abuse order. ***Id***. at 197.

Consistent with our analysis of the animal cruelty evidence, we conclude the use of the above evidence of Appellant's violence towards the Victim and the Victim's family members is firmly rooted within the ***Dillon*** exception to Pa.R.E. 404(b)'s prohibition of prior bad acts evidence. The evidence established that Appellant created an aura of terror and fear that permeated the home, thus substantiating the Victim's delay in reporting the sexual abuse Appellant inflicted on her. Accordingly, there is no arguable merit to the claim that trial counsel should have objected to that evidence as being irrelevant or inadmissible.

Despite the evidence's relevance and admissibility, however, there was arguable merit to the claim that trial counsel should have objected to some or all of the evidence of uncharged violent acts as being unduly prejudicial pursuant to Pa.R.E. 403. We also conclude that trial counsel's misreading of ***Dillon***, ***supra***, demonstrates that he lacked a reasonable basis for failing to object to at least some of the evidence of uncharged violent acts.

Addressing the third prong of the IAC test, however, we conclude that probative value of such evidence was substantial in this case, both in that it directly justified Victim's delay in reporting the sexual abuse as Appellant had created a climate of terror and fear in the home. As with the animal cruelty evidence, the testimony that referenced acts of violence not witnessed by Victim does not directly demonstrate her reason for delay, but it does corroborate her testimony concerning the presence of abuse within the home.

We do not dispute the highly prejudicial value of this evidence; however, as was the case with the evidence of animal cruelty, the trial court issued several cautionary instructions to limit the degree of undue prejudice. N.T., 1/28/05, at 410 – 12. Furthermore, the volume of testimony concerning the acts of uncharged violence was not excessive. Very few details were provided regarding the acts that were reported, and the details that were provided were not particularly gruesome. Thus, no more detail was provided than what was necessary to demonstrate the climate of fear that Appellant imposed on the family and, therefore, on the Victim, leaving

her too scared to promptly report the sexual abuse that Appellant had inflicted upon her. Much of the complained of testimony provided by witnesses other than the Victim consisted of no more than a single answer or two. The prosecutor never engaged in a lengthy exploration of those events.

Accordingly, we conclude that no particular piece of testimony concerning uncharged violent acts constituted outcome determinative prejudice under the IAC test. For the same reasons noted above concerning the evidence of animal cruelty, we reject the argument that the undue prejudice flowing from the cumulative effect of this evidence breached into territory that would distract the jury or incline them to convict on propensity evidence alone. The volume of evidence of uncharged violent acts was proportional to what was fair and necessary to establish the basis for Victim's failure to promptly report sexual abuse in this instance. Consequently, we conclude that Appellant's IAC claim with respect to the failure to object to uncharged acts of violence fails.

Failure to object to evidence of Appellant's suicide attempts, mental health commitments, and drug use

Appellant also argues that trial counsel provided IAC for failing to object to references to Appellant's suicide attempts, commitments for mental health issues, and drug abuse. The trial court found such evidence admissible under the *res gestae* exception to Pa.R.E. 404, and that its probative value was not outweighed by the potential for undue prejudice.

PCO, at 5 – 6. As with the other prior bad acts issues, the trial court determined that counsel had a reasonable basis for not objecting.

Initially, we note that the record of the PCRA hearing fails to demonstrate that trial counsel was specifically confronted regarding his failure to object to references to Appellant's mental health commitments and drug use. Concern regarding the evidence of Appellant's drug use was raised, to a limited extent, in the context of evidence of Appellant's suicide attempts, as it had been revealed that one of Appellant's suicide attempts had involved an overdose. N.T., 3/17/08, 46 – 47. However, the record does not demonstrate any inquiry into whether trial counsel had a reasonable basis for failing to object to references to Appellant's mental health commitments or purported drug abuse. Thus, we conclude that the aspect of Appellant's IAC claim that pertains to trial counsel's failure to object to evidence of Appellant's mental health commitments has been waived. We will consider evidence of Appellant's drug use to the extent it arose in the context of trial counsel's failure to object to references to his suicide attempts, but we otherwise conclude that Appellant has waived the claim that is premised upon the notion that trial counsel should have objected to the evidence of drug use as inadmissible or unduly prejudicial in its own right.

Two references were made to Appellant's suicide attempts during the testimony of witnesses during the course of the trial. The issue first arose during Victim's testimony. Appellant's sexual abuse of the Victim ended

when she confronted him by threatening to report the behavior to her mother. N.T., 1/27/05, at 64. The Commonwealth asked the Victim if anything unusual happened shortly after the confrontation that ended the sexual abuse. ***Id***. At that point, trial counsel asked for a sidebar. He objected to the prosecutor's solicitation of any testimony concerning Victim's opinion of reasons for Appellant's apparent suicide attempt that occurred a week following the confrontation. The trial court agreed, disallowing any testimony concerning the reason Appellant attempted to commit suicide at that time, but allowing Victim to testify as to the occurrence of the suicide attempt, admissible as evidence of consciousness of guilt. ***Id***. at 66. Victim then testified that "[i]t was about a week afterwards, and [Appellant] had overdosed on medication, and he almost died." ***Id***. at 67.

The second reference to suicide came about during Victim's mother's testimony. She recalled an occasion in 1995 when she went shopping with her daughter. When they returned home, Victim's mother saw Appellant "sitting in the living room with a noose and liquor bottles …." ***Id***. at 181. Trial counsel did not object. Later, during the PCRA hearing, trial counsel testified that he did not object to that testimony because it was his strategy to allow "the other suicide information to come in to show that was patterned behavior on [Appellant's] part and you cannot equate that to consciousness of guilt." N.T., 3/17/08, at 47.

We first note that trial counsel clearly tried, successfully, to permit Victim only a bare-bones reference to Appellant's suicide attempt. The

record of the sidebar demonstrates that the trial court planned to permit the reference to Appellant's suicide attempt as evidence of consciousness of guilt, and that trial counsel was at least successful in preventing Victim from opining on her beliefs concerning reason for the suicide attempt. Any concern regarding the risk of undue prejudice was sufficiently mitigated by both the limited nature of the testimony as well as trial counsel's subsequent strategy to discount the inference that the suicide was evidence of consciousness.

We conclude that trial counsel's strategy of allowing the subsequent reference to another suicide attempt was a reasonable (even if ultimately unsuccessful) strategy designed to defuse the inference that Appellant's suicide attempt was evidence of consciousness of guilt. Trial counsel was attempting to show that Appellant's suicide attempts were the result of ongoing mental health and/or drug abuse issues, rather than an expression of his guilty conscience over sexually abusing Victim.[4] Furthermore, in terms of the resulting prejudice, we are reluctant to view a suicide attempt as an event that presumptively creates a risk of undue prejudice against a defendant in the same manner or to the same degree as evidence of uncharged crimes or other prior wrongs might invoke undue prejudice. It does not take much effort to imagine a hypothetical wherein a defense

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[4] Evidence of Appellant's drug abuse and other mental health issues would also tend to support his theory.

attorney might draw attention to a defendant's suicide attempt in order to garner sympathy for a defendant. Accordingly, we conclude this final aspect of Appellant's first IAC claim fails because trial counsel's failure to object to the evidence of Appellant's suicide was a reasonable strategy designed to effectuate Appellant's interests by mitigating the negative inferences that might be drawn by the jury. We would also conclude, alternatively, that the resulting prejudice was not outcome determinative.

Failure to object to evidence eliciting sympathy for the victim

Appellant's second IAC claim posits that trial counsel should have objected to references to Victim's status as a cancer survivor. Appellant contends that the evidence was offered to encourage sympathy for the victim, an impermissible evidentiary purpose.

Appellant directs our attention to two incidences during the course of the trial when Victim's battle with cancer was exposed to the jury. First, during the prosecutor's direct examination of Victim, the follow exchange occurred:

> Q. Okay, And, [Victim], how old are you, and when is your birthday?
>
> A. I'm 18 years old and my birthday is […].
>
> Q. What do you do at this point in time? Are you in school? Do you work? What?
>
> A. I'm not in school right now due to cancer last year.
>
> Q. Okay. Are you going to finish school? Are you just going to get a job?
>
> A. I'm going for my GED, and then I'm going to get a job.

N.T., 1/27/05, at 42 – 43.

Later, a letter the Victim wrote to her sister was read into evidence, and contained the passage, "I'm sorry I never told anyone, I was weak but now with my sickness I have to do something, and I'm stronger than ever." ***Id***. at 75. The Victim's sister, referencing the letter, stated during her testimony that "I said to her, because she was sick with her cancer and everything that was going on, I said I am going to tell you now that I'm not going to let this go." ***Id***. at 134. Finally, the prosecutor stated during her closing argument,

> Do you remember what [the Victim] told you? I went to school. I said a lot, but I was an excellent student. I got all As, and I guess that's kind of got squelched because of the cancer last year. Now she's going to end up with a GED. Basically she was an excellent student.

N.T., 1/28/05, at 357.

Appellant argues that Victim's "status as a cancer survivor and how that has impacted her was not relevant to the question of [Appellant's] guilt and was, moreover, highly prejudicial." Appellant's Brief, at 31. Appellant cites his position is supported by ***Commonwealth v. Story***, 383 A.2d 155, 159 (Pa. 1978). The PCRA court denied relief because "evidence regarding [Victim's] medical history was relevant because it helped explain [Victim's] delay in reporting the abuse …. Additionally, the probative value in explaining the delay outweighed the prejudicial effect of the evidence because the prejudicial effect was minimal, given that the cancer was unrelated to the abuse." PCO, at 6. The court went on to conclude that

there "was not a reasonable probability of a different outcome if [trial counsel] had objected to this evidence." ***Id***. at 7.

In ***Story***, the prosecutor introduced evidence in the form of photographs and the testimony of the deceased victim's widow. The character of the disputed evidence was described by the court as follows:

> Marilyn Wallace testified that she married the victim on January 22, 1966, and that they had a six year old daughter named Jennifer Ann, who attended school at the home for crippled children. She further testified that she was employed by the county police. Only after her husband's death did she begin working. She stated that her husband had been employed as a police officer for five years, that he was in the armed forces reserves and was attending college at the time of his death. Marilyn Wallace also testified that she last saw her husband alive on the morning that he was killed and that she was notified of his death at about noon. She then identified two photographs of the victim with their daughter which she had taken when the family was on vacation in Canada. The photographs were admitted into evidence over objection and shown to the jury.

Story, 383 A.2d at 157-58.

The Supreme Court found that:

> Here, Mrs. Wallace's testimony concerning her husband's family status and personal life, and her description of the photographs of her husband with his child have no "rational probative value" to the issue whether appellant feloniously killed Patrick Wallace. Rather, this evidence injected extraneous considerations into the case and prejudiced appellant by creating sympathy for the victim and his family.
>
> In its offer of proof, the Commonwealth stated that it thought that the jury was "entitled to know this man was married, he was a father, he in fact was a family man." The prosecutor further stated that the victim "is more than a body" and that the prosecutor wanted the jury "to get some feel for this activity of his life." It is evident that the Commonwealth explicitly sought

> to create sympathy for the victim and his family and to inflame the jury against appellant. We condemn such trial tactics.

Id. at 159. Accordingly, our Supreme Court held that the disputed evidence in ***Story*** was "totally irrelevant to the determination of appellant's guilt or innocence." ***Id***. at 160. As such, it was unnecessary to even reach the question of whether "the probativeness outweighed the prejudice[,]" and, therefore, the Supreme Court found the trial court had erred in permitting the admission of that evidence. ***Id***.

We do not find ***Story***'s holding controlling in the instant case. First, the prosecutor did not explicitly seek to admit the evidence of Victim's cancer for impermissible purposes suggested by the prosecutor in ***Story***. Second, the evidence of Victim's cancer was limited. There was neither discussion of her suffering nor any other inflammatory remarks. Finally, there was a purpose for the introduction of the evidence of Victim's cancer beyond mere bolstering or solicitation of sympathy.

As the PCRA court noted, the evidence was relevant to explain at least part of the long delay in reporting the abuse that occurred in this case. Appellant is correct in pointing out that the complaint was actually made during the course of Victim's cancer battle. However, Appellant is splitting hairs in this regard. Victim did not report the abuse at the beginning of her cancer battle, so there is at least some period of time, however short, that the cancer may have played a role in the delay.

More importantly, however, the evidence was relevant to show the context in which Victim ultimately did decide to report the abuse. As a

result of fighting to overcome her cancer, Victim felt empowered to bring the truth to light and overcome her fear of Appellant. Such evidence was relevant to the credibility of her accusations (the issue at the heart of the delay-in-reporting exception), as it tends to establish a reason for Victim's late-reporting other than fabrication.

Because we conclude the evidence of Victim's cancer was exposed to the jury in limited quantity and without excessive reference to her suffering or other inflammatory information concerning the illness, for more than one legitimate, probative purpose, and because it was more probative than prejudicial, there was no arguable merit to Appellant's claim that counsel should have objected. In any event, there was no reasonable probability that even a successful objection would have changed the outcome of the proceedings.

Failure to object to introduction of Victim's letter

Appellant's next IAC claim asserts that trial counsel rendered ineffective assistance of counsel by failing to object to "the use and entry into evidence" of the aforementioned letter from Victim to her sister. Appellant's Brief, at 32. Appellant complains that Victim's letter "recounted not only the sexual abuse she suffered but vividly described her cancer, and her motives in coming forward to prosecute. The letter also recounted several acts of unrelated violence by [Appellant] that she personally witnessed or had been recounted to her by others." ***Id***. Appellant contends

the letter was inadmissible hearsay and, therefore, it warranted an objection by trial counsel.

The PCRA court concedes that Victim's "letter was likely inadmissible hearsay," but nonetheless concluded that "it was mere surplusage." PCO, at 7. Accordingly, the court found trial counsel did not provide IAC in failing to object to the letter.

Our review of the contents of the letter supports the determination of the PCRA court. Nothing in the letter supplied evidence that was not already garnered through the testimony of the witnesses. Though objectionable as hearsay, the redundancy of the letter leads us to the conclusion that its mistaken admission did not elevate the resultant prejudice to an outcome determinative level. Accordingly, we find insufficient prejudice to satisfy the third prong of the IAC test.

Failure to object during prosecutor's closing argument

Appellant next claims that trial counsel provided IAC by failing to object to "highly inflammatory" statements by the prosecutor during closing argument. Appellant's Brief, at 34. Appellant contends that the prosecutor exceeded "permissible bounds of oratorical flair" in attacking the character of the defendant during closing argument. Appellant's Brief, at 34. Appellant argues that instead of sticking to the facts adduced at trial as they related to the crimes for which Appellant was charged, the prosecutor "created an animus from which the jury was compelled to hate this defendant not for what he did to one little girl during a distant three year period of her life but

for what he did to every living creature he came in contact with …." ***Id***. at 35.

"[I]t is well settled in the law that attorneys' statements or questions at trial are not evidence." ***Commonwealth v. LaCava***, 542 Pa. 160, 666 A.2d 221, 231 (Pa. 1995). Further,

> The Commonwealth is entitled to comment during closing arguments on matters that might otherwise be objectionable or even outright misconduct, where such comments constitute fair response to matters raised by the defense, or where they are merely responsive to actual evidence admitted during a trial. ***See Commonwealth v. Trivigno***, 561 Pa. 232, 750 A.2d 243, 249 (2000) (plurality opinion) ("A remark by a prosecutor, otherwise improper, may be appropriate if it is in fair response to the argument and comment of defense counsel") (citing ***United States v. Robinson***, 485 U.S. 25, 31, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988)); ***Commonwealth v. Marrero***, 546 Pa. 596, 687 A.2d 1102, 1109 (1996). Furthermore, "prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair." ***Commonwealth v. Jones***, 542 Pa. 464, 668 A.2d 491, 514 (1995).

Commonwealth v. Culver, 51 A.3d 866, 876 (Pa. Super. 2012). Still, "our task on review is not one confined solely to an exercise in semantics. Rather, we must consider the practical effect of the statements on the jurors' ability to render an objective verdict." ***Commonwealth v. MacBride***, 587 A.2d 792, 796 (Pa. Super. 1991).

Appellant first directs our attention to the following comment by the prosecutor: "I think nobody can walk inside the defendant's head, but he's clearly treated a lot of living things as having no value, and how he's treating the children is – adjuncts to his own needs." N.T., 1/28/05, at 374

– 75. Appellant contends this statement is emblematic of the prosecutor's attempt to "aggressively expand[] the scope of the jury's focus in terms of its timeframe, number of victims, and types of criminal acts." Appellant's Brief, at 35.

Appellant next directs our attention to the following segment of the prosecutor's closing argument:

> If you look at the defendant from all we have seen of the defendant it is a me, me, me kind of defendant. Take care of me. I need drugs. I'm in pain. The doves' cooing is bothering me. The animals are bothering me. You didn't obey my rules. So, now you get hit. You weren't in by your curfew. So, now you get hit. Me, me – I'm not feeling well. I think I'll try suicide. Maybe I'll take some more drugs.

N.T., 1/28/05, at 374. Appellant also identifies numerous other comments made by the prosecutor during the closing argument that reflect a similar substance and tone. ***See*** Appellant's Brief, at 16 – 21.

Appellant asserts that ***LaCava***, ***supra***, and ***MacBride***, ***supra***, demonstrate the arguable merit of the instant IAC claim.

The appellant in ***LaCava*** asserted that his defense attorney provided ineffective assistance of counsel for failing to object to a portion of the prosecutor's argument during the penalty phase of a death penalty case. The prosecutor's comments consisted of a long diatribe characterizing drug dealers as "leech[es] on society" who "suck[] the life blood out of our community…." ***LaCava***, 666 A.2d at 236. Our Supreme Court addressed the issue as follows:

> Our review of the prosecutor's statements challenged in this appeal leads us to the conclusion that the sole purpose of the prosecutor's comments was to attempt to turn the jury's sentencing of appellant into a plebiscite on drugs and drug dealers and their destructive effect on society. The prosecutor attempted to expand the jury's focus from the punishment of appellant on the basis of one aggravating circumstance (i.e., that appellant killed a police officer acting in the line of duty), to punishment of appellant on the basis of society's victimization at the hands of drug dealers. The essence of the prosecutor's argument was to convince the jury to sentence appellant to death as a form of retribution for the ills inflicted on society by those who sell drugs. The prosecutor prejudiced the jury by forming in their minds a fixed bias and hostility toward appellant with these highly prejudicial statements. We believe the jury was unavoidably unable to dispassionately and objectively evaluate the evidence in a sober and reflective frame of mind.
>
> In short, the prosecutor painted a vivid picture that society is under heavy attack and that this jury was in a unique position to respond to that attack by sentencing appellant to death because he was a drug dealer rather than because he was a brutal killer of a police officer, a crime that society has deemed worthy of the death penalty. This, we believe, went far beyond the permissible limits of oratorical flair and aggressive advocacy.

Id. at 237.

The ***LaCava*** case is significantly distinguishable from the instant one. ***LaCava*** concerned the application of the death penalty, and the comments in question applied during the penalty phase of the trial. Put simply, the ultimate punishment was at stake, a circumstance not present in the instant case.

Furthermore, there is a significant difference *in kind* between the objectionable comments in ***LaCava*** and the complained-of comments in the instant case. In ***LaCava***, the prosecutor was using political and/or social commentary regarding larger societal problems that were far outside the

record to justify the state-sanctioned killing of the defendant in that case. In this case, by contrast, the prosecutor's comments may have skirted the line of permissible advocacy by drawing excessive attention to Appellant's character, but the references complained of were directly tied to evidence that was, in fact, admitted, even if that evidence was admitted pursuant to evidentiary exceptions to the general prohibition against the use of prior bad acts.

In ***MacBride***, a panel of this court found reversible error following several comments by the prosecutor that referred to the appellant as a "nut" and a "liar[,]" language the court found "stigmatizing." ***MacBride***, 587 A.2d at 797. MacBride fired his shotgun while, or immediately after, a hot-air balloon had passed over his home, causing significant distress to his horse and dog. ***Id***. at 793. There was significant dispute at trial whether the shot was fired in the general direction of the overhead balloon (as the victims alleged) or parallel to the ground (as the defendant alleged). However, the victims did not accuse the defendant of firing directly at the balloon or its riders. Other evidence had demonstrated that this situation was not unique or uncommon; hot-air balloons routinely flew over defendant's residential property, frequently causing distress to his animals. Appellant was charged and convicted of simple assault and reckless endangerment.

Above and beyond the repeated use of the stigmatizing terms, the prosecutor in ***MacBride*** said:

> We have a standard of conduct in this society, also property rights. People can fly over your property—ARCO Go Patrol helicopter, police helicopters, Action News, planes, whatever, helicopters. Let's take this example. Landowner A has a heart attack, falls down on his property, is rushed to the hospital, Southern Chester County Medical Center. They can't take care of him. They don't have adequate facilities. What do they do? They put him in a helicopter, fly him down to Philadelphia. They are cruising along. They make a big mistake, they cross over enemy lines, [defendant's property]. His dog starts going crazy because it's a helicopter. He gets the gun out—

Id. at 795.

It was this passage that drew the most attention of this Court, not the infrequent (but not isolated) use of the stigmatizing terms "nut" and "liar." The defendant had been likened by the prosecutor to a crazed nut who treated the balloon enthusiasts as dangerous enemy combatants invading his castle, a characterization not supported in any way by the record. This court explained:

> We are not presented herein with an unexplained assault on the balloonists or an attempt to terrorize or do physical violence to them. Although we do not condone defendant's use of force, the evidence is uncontradicted in that it supports an intent to draw the balloonists attention, perhaps even to frighten them, and to have them fly at a greater altitude while passing over defendant's property. At most, the jury could draw the inference that defendant was a frustrated and, perhaps, reckless landowner who had been bothered by hot-air-balloons for years through the disruption caused to his animals. But to characterize defendant as a "nut" suggests more than reckless behavior because it insinuates that defendant is a mindless and dangerous individual who had no reason whatsoever for his conduct. Clearly, this inference is belied by the record which shows a landowner motivated by the rather unremarkable desire to protect his property. Accordingly, we find that the prosecutor improperly expressed his personal opinion of defendant's character—and, indirectly, defendant's guilt or propensity to act recklessly ….

Id. at 797 (footnote omitted).

In the instant case, by contrast, the most 'inflammatory' of the prosecutor's comments during the closing were, in fact, supported by the evidentiary record. The largely inflammatory nature of the evidence stemmed from the barbarity of Appellant's acts (the factual basis of which is not at all in dispute), not the excessive oratorical flair of the prosecutor's references to them.

Appellant has vigorously argued about the inflammatory nature of the evidence, but we have concluded above that a large part of that evidence was admissible under a widely recognized exception to the prohibition against the use of prior bad acts, and also that it was not unduly prejudicial, whether analyzed separately or cumulatively. Consequently, it would be illogical to restrict the prosecutor's use of such evidence when arguing the Commonwealth's case during closing argument. Accordingly, we conclude that the instant IAC claim lacks arguable merit.

Failure to file appeal or post-sentence motions

Appellant next claims that IAC was provided by trial counsel when counsel failed to file post-sentence motions or file a direct appeal.

> [W]here there is an unjustified failure to file a requested direct appeal, the conduct of counsel falls beneath the range of competence demanded of attorneys in criminal cases, denies the accused the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, as well as the right to direct appeal under Article V, Section 9, and constitutes prejudice for purposes of Section 9543(a)(2)(ii) [of the PCRA]. Therefore, in such circumstances, and where the remaining

> requirements of the PCRA are satisfied, the petitioner is not required to establish his innocence or demonstrate the merits of the issue or issues which would have been raised on appeal.

Commonwealth v. Lantzy, 736 A.2d 564, 572 (Pa. 1999) (footnote omitted). Thus, when counsel fails to file a requested direct appeal, prejudice is presumed. There is no *per se* prejudice, however, when counsel fails to file a requested post-sentence motion. Our Supreme Court "declared that the failure to file post-sentence motions does not fall within the limited ambit of situations where a defendant alleging ineffective assistance of counsel need not prove prejudice to obtain relief." ***Commonwealth v. Liston***, 977 A.2d 1089, 1092 (Pa. 2009) (explaining ***Commonwealth v. Reaves***, 923 A.2d 1119 (Pa. 2007)). Still, if an attorney failed to file post-sentence motions (whether requested or not) and that failure resulted in waiver of meritorious discretionary aspects of sentencing claim on appeal, such an omission could theoretically constitute outcome-determinative prejudice warranting relief for IAC.

Trial counsel testified at the PCRA hearing that although he advised Appellant that he did not believe there to be meritorious issues warranting a direct appeal, he told Appellant "the choice was his …." N.T., 3/17/08, at 86 – 89. Trial counsel stated that he would have filed an ***Anders*** Brief had Appellant requested a direct appeal, but he said that Appellant never made such a request. ***Id***.

Appellant also testified at the PCRA hearing. He said that he was confused during the sentencing hearing and that he did not understand his

sentence. He said he was left with the impression that trial counsel would get back to him to explain the sentence and discuss the prospect of an appeal, but that trial counsel never got back to him. ***Id***. at 106 – 107. Though he wrote a letter to the judge admitting guilt and asking for forgiveness, he never wrote a letter complaining about his impression regarding trial counsel's lack of communication about the prospects of an appeal. ***Id***. at 110. He said he wrote letters and made calls to trial counsel, but he did not make copies or otherwise document those requests because he "didn't think [he] was [going to] have to go through all of that proving myself and everything." ***Id***. at 111- 12.

The trial court found trial counsel's testimony more credible, finding that Appellant "did not request a direct appeal …." PCO, at 9. Under such circumstances, we are constrained to agree with the trial court that trial counsel had a reasonable basis to not file a notice of appeal. We are required to give "great deference" to the credibility determinations of a PCRA court. ***See Commonwealth v. Johnson***, 966 A.2d 523, 539 (Pa. 2009) (stating "[a] PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts."). Appellant has failed to provide any basis on which to breach this scope of review. Accordingly, we agree with the PCRA court that trial counsel had a reasonable basis to refrain from filing a direct appeal, and

we would also conclude, for the same reason, that this claim lacks arguable merit .[5]

Appellant also contends that trial counsel provided ineffective assistance of counsel when counsel failed to file a post-sentence motion. However, Appellant fails to assert any argument indicating how he had been prejudiced by counsel's failure in this regard. There is "no absolute right to appeal the discretionary aspects of a sentence." ***Commonwealth v. Mouzon***, 812 A.2d 617, 621 (Pa. 2002), 42 Pa.C.S. § 9781(b). Furthermore, "[b]ald allegations of excessiveness are insufficient" to demonstrate that a sentence presents a substantial question[6] for appellate review. ***Commonwealth v. Reynolds***, 835 A.2d 720, 733 (Pa. Super. 2003) (applying ***Mouzon***). In light of these standards, we are constrained

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[5] Buried within Appellant's argument regarding trial counsel's failure to file a direct appeal, Appellant also asserts that trial counsel was ineffective for failing to adequately consult with Appellant about the possibility of filing an appeal. Appellant's Brief, at 41 – 42. While the record does reflect some deficiencies with trial counsel's cursory assessment of Appellant chances on direct appeal, that issue was not explicitly raised, nor even mentioned, in Appellant's Pa.R.A.P. 1925 Concise Statement. Hence, the claim has been waived. ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998) (holding that "[i]n order to preserve their claims for appellate review, Appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement will be deemed waived.).

[6] "In general, an appellant may demonstrate the existence of a substantial question by advancing a colorable argument that the sentencing court's actions were inconsistent with a specific provision of the sentencing code or violated a fundamental norm of the sentencing process." ***Commonwealth v. Kalichak***, 943 A.2d 285, 289 - 90 (Pa. Super. 2008).

to conclude that Appellant has not demonstrated how trial counsel's failure to file a post-sentence motion constituted prejudice in this case. Accordingly, Appellant's respective IAC claim fails as it lacks arguable merit.

We, therefore, conclude that the PCRA court's denial of Appellant's PCRA petition was both supported by the record and free of legal error.

Order affirmed.

Judge Colville concurs in the result.