APPENDIX "A"

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DARRELL JOHNSON	:	
Appellant	:	No. 1398 EDA 2020

Appeal from the PCRA Order Entered June 25, 2020
In the Court of Common Pleas of Montgomery County Criminal Division
at No(s): CP-46-CR-0007273-2016

BEFORE: BOWES, J., LAZARUS, J., and McLAUGHLIN, J.

MEMORANDUM BY McLAUGHLIN, J.: **FILED JUNE 30, 2021**

Darrell Johnson appeals from the order dismissing his Post Conviction Relief Act ("PCRA") petition. ***See*** 42 Pa.C.S.A. §§ 9541-9546. Johnson maintains that he is entitled to relief because his trial counsel was ineffective for failing to request an alibi instruction and for stipulating that he sent letters found in his girlfriend's home. We affirm.

We previously summarized the relevant facts as follows:

> On August 20, 2016, at about 10:30 p.m., the victim, Anthony Gibbons, went to a bar with [Johnson's] cousin and accomplice in this crime, Latia Lofton. While they were at the bar, Lofton went in and out of the restroom multiple times, and used her cellphone to send text messages and make a phone call. When Gibbons and Lofton went outside to smoke a cigarette at Lofton's request, [Johnson] approached them with his face covered. [Johnson] was carrying a gun, and he snatched Lofton's pocketbook. [Johnson] put the gun to Gibbons' head and demanded his cellphone, keys and money. Gibbons complied, and then pulled his own gun from his car. Both men started shooting, and Gibbons was struck in his

> foot and back. The bar owner called 911, and police and an ambulance responded to the scene.
>
> Police recovered Lofton's cellphone, and downloaded and reviewed text messages from the night of the robbery indicating that she and [Johnson] planned the robbery together. One of the text messages read: "You gone [sic] see us out front. We in parking lot. Take my purse too." Lofton eventually gave a statement to police confirming her involvement in the robbery. Cell site analysis performed on [Johnson's] cellphone placed him in the general vicinity of the bar on the night of the incident. Police recovered a handgun from [Johnson's] home during a search of his residence. The gun matched the firearm used in the robbery, and DNA testing showed [Johnson's] DNA on the gun, along with two other contributors.

Commonwealth v. Johnson, 192 A.3d 1149, 1151 (Pa.Super. 2018) (citations omitted).

At trial, Johnson's counsel stipulated that Johnson had sent five letters that police found in Johnson's girlfriend's residence. The stipulation stated, "The letters recovered from Shonda Gelermo's home on March 16, 2017, are stipulated as being sent by the defendant." N.T., 3/23/17, at 83. The prosecution introduced the letters into evidence during the testimony of Detective Jeffrey Koch. Detective Koch read the letters to the jury. In the first letter, dated September 17, Johnson stated that he had a dream in which the true shooter of the victim came forward. ***Id.*** at 86-87. In the second letter, dated September 25, Johnson suggested that his girlfriend provide testimony that they were having dinner together on the night of the shooting. ***Id.*** at 87-89. In the third letter, dated October 11, Johnson asked his girlfriend to talk to his aunt about Latia Lofton possibly testifying against him and stated that Lofton must say that the text messages she sent were not meant for him. ***Id.***

at 89-91. In the fourth letter, entitled "Xmas," Johnson asked his girlfriend to talk to Lofton to ask her not to incriminate him and to tell her that she did not know her rights when she spoke with the police. ***Id.*** at 91-92. In the last letter, dated March 9, Johnson gave his girlfriend advice on how to testify and told her what her testimony should be if she testified at trial. ***Id.*** at 95-97.

In defense, Johnson presented the testimony of his sister and brother, Zakiyha Henderson and Gregory Boyd, Jr. Henderson testified that she saw Johnson at a barbeque on the evening of the shooting. ***Id.*** at 109. She said that she arrived at the barbeque a little before 4:00 p.m. and stayed there until 2:00 a.m. ***Id.*** Henderson recalled that she first saw Johnson at the barbeque around 4:15 p.m. ***Id.*** at 110. She then saw Johnson a second time later at the barbeque before it was completely dark outside. ***Id.*** at 110-111. Henderson did not know when Johnson left the barbeque. ***Id.*** at 111.

Boyd also testified that he saw Johnson at the barbeque. ***Id.*** at 153-154. He said that he arrived at the barbeque around 4:30 p.m. and had a "nice amount of interaction" with Johnson. ***Id.*** at 154-155. Boyd stated that he left the barbeque around midnight and did not know whether Johnson was there when he left. ***Id.*** He did not recall the last time in the evening he saw Johnson. ***Id.*** at 156.

Johnson took the stand and testified that he arrived at the barbecue in the late afternoon and stayed there for approximately two-and-a-half hours. ***Id.*** at 120. He said that he then went home to change clothes and returned to the barbeque around 9:00 p.m. ***Id.*** at 120-121. Johnson testified that he

left the barbeque "well in the hours of almost 12:00-ish, close to that hour," and then went to his mother's house where he was living at the time. ***Id.*** at 122. He stated that he could not have been at the robbery because he was at the barbeque during the relevant time. ***Id.*** at 139.

Johnson further testified that he wrote only the letters dated September 17 and March 9, but claimed that he "fabricated" their content to "support [his] suspicions" that his letters "were being tampered with." ***Id.*** at 130, 143-144, 147-149. Johnson denied writing the letters dated September 25 and October 11 and the letter entitled "Xmas." ***Id.*** at 145-147.

At the conclusion of the trial, the jury found Johnson guilty of robbery, criminal conspiracy, aggravated assault, persons not to possess firearms, and firearms not to be carried without a license. The court sentenced him to 25 to 50 years' incarceration.

Johnson appealed and we affirmed his judgement of sentence. ***Johnson***, 192 A.3d at 1151. The Pennsylvania Supreme Court denied Johnson's petition for allowance of appeal on January 11, 2019. On September 20, 2019, Johnson filed the instant PCRA petition *pro se*. The court appointed PCRA counsel, who filed an amended PCRA petition. The Commonwealth filed an answer and moved to dismiss the petition. The PCRA court issued a Pa.R.Crim.P. 907 notice of intent to dismiss the petition without a hearing, and ultimately dismissed it on June 25, 2020. This timely appeal followed.

Johnson raises the following issues in this appeal:

1. Did the Trial Court err as a matter of law and discretion in denying [Johnson's] claim that trial counsel was ineffective for neglecting to request and preserve an Alibi Instruction (Pa.SSJI Crim. 3.11)?

2. Did the Trial Court err as a matter of law and discretion in denying [Johnson's] claim that trial counsel was ineffective for entering into numerous stipulations with the Commonwealth regarding the content and admissibility of the five letters allegedly sent by [Johnson] without first obtaining [Johnson's] approval when said stipulations were in contrast to [Johnson's] approval when said stipulations were in contrast to [Johnson's] defense and trial testimony?

3. Did the Trial Court err as a matter of law and discretion in denying [Johnson's] claim that trial counsel was ineffective for failing to conduct a colloquy with [Johnson] before agreeing to the stipulation regarding the content and admissibility of the five letters allegedly sent by [Johnson]?

4. Did the Trial Court err as a matter of law and abuse its discretion in denying [Johnson's] PCRA Petition without conducting an evidentiary hearing on the issues that were made known to the Trial Court in [Johnson's] PCRA?

Johnson's Br. at 4-5.

On appeal from the denial or grant of relief under the PCRA, our review is limited to determining "whether the PCRA court's ruling is supported by the record and free of legal error." ***Commonwealth v. Presley***, 193 A.3d 436, 442 (Pa.Super. 2018) (citation omitted).

Johnson's issues involve claims of ineffectiveness of trial counsel. "[C]ounsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant." ***Commonwealth v. Rivera***, 10 A.3d 1276, 1279 (Pa.Super. 2010). To obtain relief based on a claim of ineffectiveness, a petitioner must establish: "(1) his underlying claim is of

arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result." ***Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014) (citation omitted). Prejudice in this context means that "absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different." ***Commonwealth v. Velazquez***, 216 A.3d 1146, 1149 (Pa.Super. 2019) (citation omitted). A failure to meet any of these prongs bars a petitioner from obtaining relief. ***Commonwealth v. Sneed***, 45 A.3d 1096, 1106 (Pa. 2012).

Johnson's first issue is that the PCRA court erroneously denied his claim that trial counsel was ineffective for failing to request an alibi instruction. Johnson's Br. at 17. He contends that he presented an alibi defense through the testimony of two witnesses, Zakiyha Henderson and Gregory Boyd, Jr., as well as his own testimony that he was at the barbeque and then went home to his mother's house during the time the shooting occurred. ***Id.*** at 21, 23. Johnson concludes that "[e]ven if [t]rial [c]ounsel felt that the alibi testimony was not the strongest, he should have requested an [a]libi [i]nstruction as it would have advanced his [] defense." ***Id.*** at 25-26.

"An alibi is a defense that places a defendant at the relevant time at a different place than the crime scene and sufficiently removed from that location such that it was impossible for him to be the perpetrator." ***Commonwealth v. Sileo***, 32 A.3d 753, 767 (Pa.Super. 2011) (citation omitted). "Where [alibi] evidence has been introduced, a defendant is entitled to an alibi instruction to alleviate the danger that the jurors might

impermissibly view a failure to prove the defense as a sign of the defendant's guilt." ***Commonwealth v. Bryant***, 855 A.2d 726, 741 (Pa. 2004) (citation omitted). Nevertheless, an alibi instruction "is required only in cases where a defendant's explanation places him at the relevant time at a different place than the scene involved and so far removed therefrom as to render it impossible for him to be the guilty party." ***Commonwealth v. Collins***, 702 A.2d 540, 545 (Pa. 1997).

Here, the PCRA court concluded that Johnson could not prove prejudice because the evidence supporting Johnson's alibi was weak and the evidence against him was overwhelming. PCRA Court Opinion, filed Sept. 4, 2020, at 9. The court pointed out that since the police were called to the scene around 11:35 p.m., and neither Henderson nor Boyd knew when Johnson left the barbeque, their testimony did not support an alibi defense. ***Id.*** The court further observed that Johnson did not testify that he was at the barbeque at 11:35 p.m.; rather, he stated that he left the barbeque at "almost 12:00-ish[, close to that hour.]"[1] ***Id.*** On the other hand, the court found that there was overwhelming evidence that placed Johnson at the scene of the robbery, including accomplice testimony and cell site analysis evidence. ***Id.***

The PCRA court did not err. The only support for Johnson's claimed alibi was his own testimony, which the jury would likely have viewed as self-serving, and he did not even clearly state in his testimony that he was at the

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[1] ***See*** N.T., 3/23/17, at 122.

barbecue at the relevant time. In contrast, the evidence that he was the perpetrator was strong. That evidence included: Lofton's testimony that Johnson planned the robbery with her; text messages between Lofton and Johnson; the fact that Johnson gave Lofton $300 shortly after the robbery; cell site analysis that placed Johnson in the general vicinity of the bar on the night of the incident; a handgun recovered from Johnson's home that matched the firearm used in the robbery; and evidence that Johnson's DNA was found on the gun. We cannot say that the PCRA court erred in concluding that Johnson's allegations were insufficient to undermine confidence in the verdict. The court properly dismissed this claim.

Johnson's next issue is that the court erred in denying his claim that trial counsel was ineffective for "entering into numerous stipulations" regarding "the content and admissibility of the five incriminating letters allegedly sent by [Johnson] without first obtaining [Johnson's] approval when said stipulations were in contrast to [Johnson's] defense and trial testimony." Johnson's Br. at 17. Johnson maintains that counsel never consulted with him before trial regarding the stipulation and that he told counsel prior to trial that he did not write all five letters. ***Id.*** at 32-33. Johnson further contends that he was unsure whether he was going to testify, but "after hearing the stipulation and the letters read in court, [he] felt obligated to take the stand and testify at trial that he did not send all five of these letters, which testimony was contrary to the stipulation agreed to by his own attorney." ***Id.*** at 33. He

argues that this undermined his credibility since his testimony that he did not write all five letters was contrary to the stipulation. ***Id.*** at 35-37.

Johnson mischaracterizes the stipulation. There was only one stipulation about the letters, and it was that Johnson sent them. The purpose of the stipulation was to address authentication. ***See*** Pa.R.E. 901. There was no stipulation about the "content" of the letters.

The PCRA court rejected this claim on the ground that the stipulation did not prejudice Johnson, as the letters were admissible even in the absence of the stipulation. We agree. There was sufficient evidence to authenticate the letters circumstantially without the stipulation. For evidence to be admissible, it must be properly authenticated. Pa.R.E. 901(a); ***see Commonwealth v. Talley***, 236 A.3d 42, 59 (Pa.Super. 2020). To achieve authentication, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Pa.R.E. 901(a). Such evidence can be purely circumstantial evidence. Pa.R.E. 901(b). In ***Commonwealth v. Collins***, 957 A.2d 237, 266 (Pa. 2008), the Pennsylvania Supreme Court found circumstantial evidence sufficient to authenticate letters. There, the letters bore defendant's name and return address, used his prison identification number, and contained subject matter – including addressing the recipient by nicknames and referring to trial strategy – linking the letters to the defendant.

Although not identical to the evidence in ***Collins***, the circumstantial evidence here was sufficient to authenticate the letters. The letters were found at Johnson's girlfriend's home and they used language that one would use

with a paramour, such as addressing the recipient as "baby." The letters discussed aspects of Johnson's case and suggested testimony that would be favorable to Johnson. The letters also discussed conversations he had with his lawyer and testimony Lofton could give if she cooperated with police. One of the letters was signed "Darrell." These circumstances are sufficient, when considered in their totality, to authenticate the letters.

Furthermore, even if the letters were not in evidence, the evidence of Johnson's guilt was quite strong, including inculpatory testimony from his co-conspirator, Lofton, and the text messages between the two setting up the attack. Johnson has not shown that but for the stipulation, there is a reasonable probability the outcome of the trial would have been different. Thus, Johnson has failed to establish prejudice and the PCRA court properly dismissed this claim.

Johnson's third issue is that the trial court erred in rejecting his claim that counsel was ineffective for failing to conduct a colloquy with Johnson before agreeing to the stipulation regarding the letters. Johnson's Br. at 34. Johnson points to precedents stating that a colloquy is necessary "any time a defendant stipulates to evidence that virtually assures his conviction because such a stipulation is functionally the same as a guilty plea." ***Id.*** at 35 (quoting ***Commonwealth v. Eichinger***, 108 A.3d 821, 832 (Pa. 2014)).

Johnson's argument fails because the stipulation that the letters were sent by Johnson was not "functionally the same as a guilty plea." Rather, the letters were just one piece of evidence that the jury considered in finding

Johnson guilty. Indeed, as explained above, there was an abundant evidence of guilt independent of the letters.

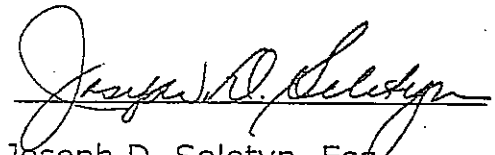
Johnson's final issue is that the PCRA court erred in denying his petition without holding a hearing. Johnson's Br. at 37. Johnson argues that there were genuine issues of material fact regarding his claims. ***Id.*** at 38-40.

A PCRA petitioner does not have an absolute right to a hearing. ***Commonwealth v. Jones***, 942 A.2d 903, 906 (Pa.Super. 2008). A PCRA court may decline to hold a hearing if it determines that there are no genuine issues of material fact, the defendant is not entitled to PCRA relief, and no purpose would be served by any further proceedings. ***See*** Pa.R.Crim.P. 907(1). "[T]o obtain reversal of a PCRA court's decision to dismiss a petition without a hearing, an appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief, or that the court otherwise abused its discretion in denying a hearing." ***Commonwealth v. Hanible***, 30 A.3d 426, 438 (Pa. 2011) (citation omitted) (alteration in original).

We find no error in the PCRA court's decision to decline to conduct an evidentiary hearing. All of Johnson's claims involved ineffective assistance of counsel and the PCRA court was able to determine that even taking Johnson's factual allegations as true, Johnson could not meet at least one of the prongs of the ineffectiveness test. ***See Jones***, 942 A.2d at 906.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/30/2021

APPENDIX "B"

APPENDIX "B"

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-46-CR-0007273-2016
V.	:	
DARRELL JOHNSON	:	**1398 EDA 2020**

OPINION

CARPENTER J. **SEPTEMBER 4, 2020**

FACTUAL AND PROCEDURAL HISTORY

Appellant, Darrell Johnson, appeals from the final order of dismissal entered on June 25, 2020, dismissing his petition seeking post-conviction relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546, without a hearing.

The factual background as set forth by the Pennsylvania Superior Court in its memorandum opinion, affirming Appellant's judgment of sentence is as follows:

> On August 20, 2016, at about 10:30 p.m., the victim, Anthony Gibbons, went to a bar with Appellant's cousin and accomplice in this crime, Latia Lofton. While they were at the bar, Lofton went in and out of the restroom multiple times, and used her cellphone to send text messages and make a phone call. When Gibbons and Lofton went outside to smoke a cigarette at Lofton's request, Appellant approached them with his face covered. Appellant was carrying a gun, and he snatched Lofton's pocketbook. Appellant put the gun to Gibbons' head and demanded his cellphone, keys and money. Gibbons complied, and then pulled his own gun from his car. Both men started shooting, and

> Gibbons was struck in his foot and back. The bar owner called 911, and police and ambulance responded to the scene.
>
> Police recovered Lofton's cellphone, and downloaded and reviewed text messages from the night of the robbery indicating that she and Appellant planned the robbery together. One of the text messages read: "You gone [sic] see us out front. We in parking lot. Take my purse too." (N.T. Trial, 3/22/17, at 77, 87). Lofton eventually gave a statement to police confirming her involvement in the robbery. Cell site analysis performed on Appellant's cellphone placed him in the general vicinity of the bar on the night of the incident. Police recovered a handgun from Appellant's home during a search of his residence. The fun matched the firearm used in the robbery, and DNA testing showed Appellant's DNA on the gun, along with two other contributors.

Commonwealth v. Darrell Johnson, 2721 EDA 2017 (filed June 29, 2018) (memorandum decision).

On March 22, 2017, a three-day jury trial commenced, at the conclusion of which the jury found Appellant guilty of two counts of robbery, criminal conspiracy, aggravated assault, persons not to possess firearms, and firearms not to be carried without a license. Appellant was thereafter sentenced on July 19, 2017, to an aggregate term of not less than 25 nor more than 50 years' imprisonment.

Appellant filed a post-sentence motion, which was denied on August 17, 2017.[1] A timely appeal followed. On June 29, 2018, the Pennsylvania Superior Court affirmed Appellant's judgment of sentence, and

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1 This Court considered this post-sentence motion timely pursuant to the prisoner mailbox rule.

on January 11, 2019, the Pennsylvania Supreme Court denied his petition for allowance of appeal. No further appeal was sought.

On September 20, 2019, Appellant filed a *pro se* PCRA petition. PCRA counsel was appointed, who on December 6, 2019, filed an Amended PCRA petition on Appellant's behalf. The Commonwealth filed an Answer and Motion to Dismiss on February 7, 2020. This Court issued a Rule 907 pre-dismissal notice on February 13, 2020, notifying Appellant of this Court's intention to dismiss his Amended PCRA petition without a hearing and of his right to file a response to the notice. No response was filed, and on June 25, 2020, a final order of dismissal was entered. This timely appeal followed on July 23, 2020.

ISSUES

Appellant was directed to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P 1925(b), which he did and raised the issues set forth verbatim as follows:

1. Did the Trial Court err as a matter of law and abuse its discretion in denying Defendant's PCRA Petition without conducting an evidentiary hearing on the issues that were made known to the Trial Court in Defendant's PCRA and Amended PCRA?

2. Did the Trial Court err as a matter of law and discretion in denying Defendant's claim that trial counsel was ineffective for neglecting to request and preserve an alibi instruction (Pa.SSJI Crim. 3.11)?

3. Did the Trial Court err as a matter of law and discretion in denying Defendant's claim that trial counsel was ineffective for entering into numerous stipulations with the Commonwealth regarding the

content and admissibility of the five letters allegedly sent by Defendant without first obtaining Defendant's approval when said stipulations were in contrast to Defendant's defense and trial testimony of Defendant?

4. Did the Trial Court err as a matter of law and discretion in denying Defendant's claim that trial counsel was ineffective for failing to conduct a colloquy with Defendant before agreeing to the stipulation regarding the content and admissibility of the five letters allegedly sent by Defendant?

5. Did the Trial Court err as a matter of law and discretion in denying Defendant's claim that trial counsel was ineffective for conceding Defendant's guilt regarding the crime of robbery and conspiracy to commit robbery in trial counsel's closing argument when said concession was done without obtaining Defendant's consent and contrary to Defendant's defense and testimony in violation of the Sixth Amendment of the Pennsylvania and Us. Constitutions?

DISCUSSION

The Pennsylvania Superior Court's standard of review for an order denying a PCRA petition is "whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." Commonwealth v. Grayson, 212 A.3d 1047, 1051 (Pa.Super. 2019) (citation omitted).

Where, as in the instant case, the PCRA court has dismissed a petition without an evidentiary hearing, our appellate court reviews the PCRA court's decision for an abuse of discretion. See Commonwealth v. Roney, 79 A.3d 595, 604 (Pa. 2013) (stating that "[t]o obtain reversal of a PCRA court's

decision to dismiss a petition without a hearing, an appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief, or that the court otherwise abused its discretion in denying a hearing." (citation and quotation marks omitted)).

A. No Issues of Material Fact Warranting an Evidentiary Hearing.

First on appeal, Appellant claims that this Court erred as a matter of law and abused its discretion in denying his PCRA petition without conducting an evidentiary hearing on the issues set forth therein.

It is well settled that "[t]here is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." Commonwealth v. Jones, 942 A.2d 903, 906 (Pa.Super. 2008). Pursuant to Rule of Criminal Procedure 907, a PCRA court has the discretion to dismiss a PCRA petition without a hearing if the court is satisfied that there are no genuine issues concerning any material fact, that the defendant is not entitled to PCRA relief, and that no legitimate purpose would be served by further proceedings. See Pa.R.Crim.P. 907(1); Roney, 79 A.3d at 604. "[T]o obtain reversal of a PCRA court's decision to dismiss a petition without a hearing, an appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief, or that the court otherwise abused its discretion in denying a hearing." Commonwealth v. Hanible, 30 A.3d 426, 452 (Pa. 2011).

In this case, as discussed below, this Court was able to determine from the existing record that no issues of material fact existed that would have required an evidentiary hearing. Each of the issue raised in the Amended PCRA petition was able to be resolved by examining the existing record.

B. Ineffectiveness of Trial Counsel and Alibi Jury Instructions Claim.

Appellant contends that this Court erred as a matter of law in denying his claim that trial counsel was ineffectiveness in failing to request and preserve an alibi instruction. This ineffectiveness claim is without merit because the underlying claim lacks merit. The evidence of an alleged alibi introduced through the defense witnesses, including Appellant, did not place him "at the relevant time at a different place than the scene involved and so far removed therefrom as to render it impossible for him to be the guilty party." Therefore, it was not unreasonable for defense counsel to not request an alibi instruction.

To prevail on a claim alleging counsel's ineffectiveness under the PCRA, [the petitioner] must demonstrate[:] (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness, i.e. there is a reasonable probability that but for the act or omission in question[,] the outcome of the proceeding would have been different. Grayson, 212 A.3d at 1054 (quoting Commonwealth v. Wah, 42 A.3d 335, 338-39 (Pa.Super. 2012)). "A claim of ineffectiveness will be denied if

the petitioner's evidence fails to satisfy any one of these prongs." Commonwealth v. Busanet, 54 A.3d 35, 45 (Pa. 2012).

In this case, the record demonstrates that trial counsel was aware of this issue and after the Commonwealth rested its case, he informed this Court that he did not file a formal alibi notice, because he did not believe it was legally warranted. (Trial by Jury, V. 2, 3/23/17, p. 99). He did acknowledge that he would be presenting two witnesses on behalf of Appellant who he characterized as "quasi alibi witnesses." However, he did not believe their testimony would be specific enough to warrant an alibi instruction. Id.

"An alibi is a defense that places a defendant at the relevant time at a different place than the crime scene and sufficiently removed from that location such that it was impossible for him to be the perpetrator." Commonwealth v. Sileo, 32 A.3d 753, 767 (Pa. Super. 2011) (citation omitted). "Where [alibi] evidence has been introduced, a defendant is entitled to an alibi instruction to alleviate the danger that the jurors might impermissibly view a failure to prove the defense as a sign of the defendant's guilt." Commonwealth v. Bryant, 855 A.2d 726, 741 (Pa. 2004) (citation omitted). However, this instruction "is required only in cases where a defendant's explanation places him at the relevant time at a different place than the scene involved and so far removed therefrom as to render it impossible for him to be the guilty party." Commonwealth v. Collins, 702 A.2d 540, 545 (Pa. 1997) (citation omitted). Therefore, no alibi instruction is required "[w]here a defendant's own

testimony places him close enough to the scene that it would not have been impossible for him to have committed" the crime. Id. (citations omitted).

In this case, Appellant attempted to offer an alibi through his own testimony and defense witnesses, Zakiyha Henderson and Gregory Boyd, Jr..

Ms. Henderson, Appellant's younger sister, on direct examination testified in relevant part that on August 20, 2016, the relevant date, she attended a barbeque. (Trial by Jury, V. 2, 3/23/17 pp. 107-108). She arrived around 4:00 p.m. and stayed until 2 a.m. Id. at 109. Ms. Henderson testified that at some point she saw Appellant there. Id. She saw him when she first arrived around 4:15 p.m., and later on at the barbeque; however, she did not remember the time. Id. She had remembered that when she saw him the second time it was not completely dark outside. Id. at 111. She admitted that she did not know when he left the barbeque. Id.

Next, Appellant testified on his own behalf. He told this Court that he arrived at the barbeque and stayed for a few hours. Id. at 120. He went home, changed his outfit, and then went back to the barbeque with a friend around 9:00 p.m. Id. at 120-121. He left the barbeque "in the hours of almost 12:00-ish, close to that hour." Id. at 122.

Finally, defense counsel presented the testimony of Mr. Boyd, Appellant's younger brother, who testified that he also was at the barbeque. Id. at 153, 154. He arrived around 4:30 p.m. Id. at 154. Mr. Boyd testified that he saw Appellant at the barbeque and interacted with there, but did not know

when Appellant left the barbeque, and did not recall the last time in the evening he saw Appellant. Id. at 155 – 156.

The record shows that the police were called to the scene of the crime around 11:35 p.m. (Trial by Jury, V. 1, 3/22/17, p. 56). None of this defense testimony completely eliminated the possibility that Appellant could have committed the crimes. Under these circumstances where the shooting occurred around 11:30, Ms. Henderson testimony suggests that Appellant left the barbeque before it was completely dark outside, which even in the summer is well before 11:30 at night. In addition, Appellant's own testimony has him leaving the barbeque "almost 12-ish". Finally, Mr. Boyd's testimony did not eliminate the possibility that Appellant left the barbeque in time to commit the alleged crimes. Although Mr. Boyd saw Appellant at the barbeque he had no knowledge as to when Appellant left the barbeque or when he last saw him there. Under these circumstances, counsel's failure to request an alibi instruction cannot be determined to be unreasonable; the evidence of this alibi was very weak, and the evidence against Appellant at trial was overwhelming, *inter alia*, accomplice testimony and cell site analysis evidence which placed him at the scene of the robbery.

C. Ineffectiveness of Trial Counsel and Stipulations Claim.

Next on appeal, Appellant contends that this Court erred in denying his claim that trial counsel was ineffective for entering into numerous stipulations with the Commonwealth regarding the content and admissibility of the five letters allegedly sent by him without first obtaining his approval when

the stipulations were in contrast to his defense at trial. Appellant also claims it was an error of this Court in denying relief on his claim that trial counsel was ineffective for failing to conduct a colloquy with him before agreeing to the stipulation regarding the content and admissibility of the five letters allegedly sent by him. Both issues will be discussed together below.

In this case, trial counsel stipulated to the fact that the letters found in Appellant's girlfriend's apartment were sent by Appellant. (Trial by Jury, V. 2, 3/23/17, p. 83). The letters were introduced into evidence during the testimony of Detective Jeffrey Koch. Id. Detective Koch testified that these letters were found pursuant to a search of house belonging to Appellant's girlfriend, Shonda Gelermo. Id. at 85. He read the letters in Court. The first letter, dated September 17th, Appellant tells his girlfriend about a dream in which Appellant distances himself and disavows his involvement in the robbery and shooting. See, Exhibit "C-23"; (Trial by Jury, V. 2, 3/23/17, pp. 86 – 87). Next was a letter dated September 15th, in which he offers his girlfriend an alibi that she could testify to, that they were having dinner together the night of the robbery and shooting. See, Exhibit "C-23A"; (Trial by Jury, V. 2, 3/23/17, pp. 88 – 89). The third letter is dated October 11th. In this letter, Appellant pleads with his girlfriend to talk to his aunt about Latia, his counsin, possibly testifying against him at trial. See, Exhibit "C-24"; (Trial by Jury, V. 2, 3/23/17, pp. 90 – 91). He states that his lawyer overheard Latia and her lawyer talking about her testifying. Therein he suggest to tell his aunt what Latia should testify to, that the text messages were not from him and that she

sent those messages to him by mistake. Id. The fourth letter, marked "X-mas", asks his girlfriend to talk to Latia and to tell Latia to say that she never said anything about him to implicate him, that she did not know her rights when she gave a statement to police, and that she never texted Appellant the night of the robbery and shooting. See, Exhibit "C-25"; (Trial by Jury, V. 2, 3/23/17, pp. 91 – 92). Finally, the last letter is dated March 9th. In that letter, Appellant coaches his girlfriend how to testify and the substance of what her testimony should be should she testify at trial. See, Exhibit "C-26" (Trial by Jury, V. 2, 3/23/17, pp. 95 – 97).

In this case, Appellant cannot show he was prejudiced by counsel's stipulation because the letters could have been authenticated and admitted into evidence without the stipulation.

"The admission of evidence is committed to the sound discretion of the trial court and an appellate court may reverse only upon a showing that the trial court clearly abused its discretion." Commonwealth v. McFadden, 156 A.3d 299, 309 (Pa. Super. 2017). Pennsylvania Rule of Evidence 901 requires parties to authenticate documents with "evidence sufficient to support a finding that the matter in question is what its proponent claims." Pa.R.E. 901(a). Parties may use circumstantial evidence to authenticate documents. See Commonwealth v. Collins, 957 A.2d 237, 265 (Pa. 2008). " '[P]roof of any circumstances which will support a finding that the writing is genuine will suffice to authenticate the writing.' " Commonwealth v. Brooks,

508 A.2d 316, 319 (Pa.Super. 1986) quoting McCormick, Evidence § 222 (E. Cleary 2d Ed. 1972). The courts of this Commonwealth have demonstrated the wide variety of types of circumstantial evidence that will enable a proponent to authenticate a writing. Id.

"The ultimate determination of authenticity is for the jury. A proponent of a document need only present a *prima facie* case of some evidence of genuineness in order to put the issue of authenticity before the factfinders." Id. at 320. "The court makes the preliminary determination of whether or not a prima facie case exists to warrant its submission to the finders of fact." Id.

In this case, the letters were found in the apartment of Appellant's girlfriend. They were addressed to Ms. Gelermo, and therein Appellant discusses some of the facts of his case; names his accomplice by name, Latia, and entreats his girlfriend to talk to his aunt about Latia, his cousin. He also asks his girlfriend to talk to Latia herself about Latia's possible testimony at his trial and suggests an alibi that Ms. Gelermo could offer if she testified. One of the letters was signed "Darrell." These circumstances are sufficient, when considered in their totality, to authenticate the letters. Accordingly, this Court would have made the preliminary determination that a *prima facie* case of genuineness was made out by this circumstantial evidence, and no prejudice was suffered by Appellant with the stipulations made by trial counsel. Therefore, trial counsel cannot be deemed ineffective.

D. Ineffectiveness of Trial Counsel and Closing Argument Claim.

Last on appeal, Appellant asserts that this Court erred as a matter of law and discretion in denying his claim that trial counsel was ineffective for conceding his guilt regarding the crime of robbery and conspiracy to commit robbery in trial counsel's closing argument, when this concession was done without obtaining Appellant's consent and contrary to his defense and testimony in violation of the Sixth Amendment of the Pennsylvania and U.S. Constitutions. This claim was not raised in the Amended PCRA petition, and has been raised for the first time on appeal. It is therefore waived pursuant to Pa.R.A.P. 302(a).

Even if this claim is not waived, it lacks merit. Defense counsel's strategy was to have the jury acquit Appellant for the robbery and shooting. To this end trial counsel's closing argument focused on discrediting the testimony of Commonwealth witnesses, Mr. Gibbons and Ms. Lofton. He argued in part that Mr. Gibbons' account was unreliable because he could not positively identify Appellant as the person involved in the robbery or shooting. He also suggested reasons why Mr. Gibbons' testimony might not have been truthful a trial. In addition, he argued as to Ms. Lofton a possible motive to lie in her testimony, i.e., to receive favorable treatment on the charges she faced in connection with the robbery and shooting. Additionally, piece by piece, counsel offered alternate explanations for the evidence the Commonwealth presented against Appellant. Finally, in his 20 page closing, counsel offers various

versions of the facts that the jury could believe based on the evidence presented. In one version counsel stated as follows:

> So Darrell Johnson, I submit to you, you can find, if you believe he was involved in this robbery and you discard what he had to say, is sitting in the van. He's going to be the guy that drives from the scene, but there's a third person involved.
>
> ***
>
> What does that do for Darrell Johnson in terms of what you folks have to do? Unfortunately, if that's the version you accept to believe, then he gets found guilty of the robbery and criminal conspiracy to commit robbery, because he's involved in being the driver of the van. And somebody else is the one who did the shooting, which the DNA bears out, which the ballistics expert bears out with regard to how to round a chamber and his DNA is not on the slide....

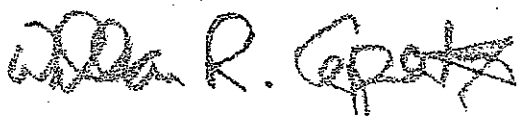
(Trial by Jury, V. 3, 3/24/17, pp. 20, 22). When read in context of the entire closing argument, trial counsel first argued to the jury that Mr. Gibbons and Ms. Lofton's testimony should not be believed; rather, that Appellant's alibi should be believed and that the jury should find that Appellant was not involved in the robbery or shooting. Faced with an overwhelming amount of evidence of guilt, trial counsel offered an alternate explanation of the evidence to the jury that while would find Appellant guilty of the robbery and conspiracy would spare him a guilty verdict as to the shooting. He was attempting to mitigate Appellant's involvement, should the jury believe some of the evidence against Appellant. This was a reasonable strategy given the amount of evidence presented at trial against Appellant, first to argue that the jury should not believe any of that evidence or in the alternative if the jury believed some of the evidence, it was reasonable for trial counsel to mitigate Appellant's

involvement. When the identified portions of the closing argument are viewed in the proper context, trial counsel's strategy becomes clear. Accordingly, even if this issue is not waived, it lacks merit because trial counsel's strategy in making his closing argument was reasonable and trial counsel cannot be deemed ineffective.

CONCLUSION

Based upon the foregoing analysis, the dismissal of Appellant's Amended PCRA petition without a hearing issued on June 25, 2020, should be affirmed.

BY THE COURT:



WILLIAM R. CARPENTER J.
COURT OF COMMON PLEAS
MONTGOMERY COUNTY
PENNSYLVANIA
38TH JUDICIAL DISTRICT

Copies sent on September 4, 2020
By Electronic Mail to:
Robert Falin, Deputy District Attorney, Chief of Appellate Division; RFalin@montcopa.org
Keith Harbison, Esquire; kharbison@consoloharbison.com
George Cardenas; GEORGE@montgomerybar.org
Paul DAnnunzio; PDAnnunzio@alm.com

Judicial Assistant

APPENDIX "C"

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent v. DARRELL JOHNSON, Petitioner	:	No. 431 MAL 2021 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 4th day of January, 2022, the Petition for Allowance of Appeal is **DENIED**.

Justice Brobson did not participate in the consideration or decision of this matter.