Appendix A

Third Circuit Court of Appeal's Order denying Certificate of Appealability

June 1, 2023

ALD-149

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 23-1210

TODD FERRY,
Appellant

v.

SUPERINTENDENT LAUREL HIGHLANDS SCI; ET AL.

(W.D. Pa. No. 3:21-cv-00214)

Present: HARDIMAN, RESTREPO, and BIBAS, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)in the above-captioned case.

Respectfully,

Clerk

ORDER

Ferry's request for a certificate of appealability ("COA") is denied. After careful review of the record, the parties' filings, and the decision addressing Ferry's habeas petition, we conclude that jurists of reason would not dispute the conclusion that his claims lack merit, are inexcusably procedurally defaulted, or are not cognizable on federal habeas review, for substantially the reasons provided by the Magistrate Judge's decision. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). His COA application addresses one of the claims he raised in his habeas petition, as well as a new claim. The first claim lacks merit because his counsel could not have been ineffective for failing to pursue an argument that was not supported by the record, as Ferry did not unequivocally evoke the right to counsel or the right to remain silent before the end of his police interviews. See Strickland v. Washington, 466 U.S. 668, 688, 694 (1984); see also Berghuis v. Thompkins, 560 U.S. 370, 381 (2010). The second claim Ferry raises was not included in his habeas petition and cannot be raised for the first time on appeal, but in any event, Ferry has not explained why being shown the letter to the victim during his police interviews was coercive.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: June 27, 2023
PDB/cc: Todd Ferry
All Counsel of Record

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Appendix B

District Court's Opinion
Denying Habeas Corpus Petitionof

TODD FERRY, Petitioner v. MELISSA HAINSWORTH, SUPERINTENDENT, S.C.I. LAUREL HIGHLANDS, Respondent
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
2023 U.S. Dist. LEXIS 9615
Case No. 3:21-cv-214-KAP
January 17, 2023, Decided
January 17, 2023, Filed

Editorial Information: Subsequent History

Appeal filed, 02/02/2023

Counsel **{2023 U.S. Dist. LEXIS 1}**TODD FERRY, Petitioner, Pro se, Somerset, PA.

For SUPERINTENDENT MS. HAINESWORTH, Respondent: Lesley Childers-Potts, LEAD ATTORNEY, Office of the District Attorney of Bedford County, Bedford, PA.

For DISTRICT ATTORNEY OF BEDFORD COUNTY, Respondent: Lesley Childers-Potts, LEAD ATTORNEY, Office of the District Attorney of Bedford County, District Attorney, Bedford, PA.

Judges: Keith A. Pesto, United States Magistrate Judge.

Opinion

Opinion by: Keith A. Pesto

Opinion

Memorandum Order

Todd Ferry filed a habeas corpus petition challenging his conviction and the 10-20 year sentence imposed in November 2016 by Judge Travis Livengood of the Bedford County Court of Common Pleas, after a jury convicted Ferry of attempted kidnapping, false imprisonment of a minor, luring a child into a motor vehicle, and simple assault. Because Ferry has no meritorious claims, the petition is denied and no certificate of appealability is issued. The respondent's motion to dismiss, ECF no. 10, is granted and denied as provided in this memorandum.

The claims

The petition sets out its claims on an AO 241 form petition at ¶12(a). Because of the limited space on the form, it is sometimes difficult to follow whether Ferry is setting forth a claim, the facts in**{2023 U.S. Dist. LEXIS 2}** support, or the reason why it was not exhausted, but I reproduce the claims in the form they appear in the petition. The "SEE #" notations refer to exhibits in the 115-page appendix to the petition.

> GROUND ONE: Whether Trial Counsel Appellate Attorney and Court Appointed Counsel rendered ineffective for not challenging trial Judge and Superior Court Judge's in their erred decision of Trial counsel's Pre-Trial Motion, in which, both Trial Judge and Superior Court Judge's decision was based on hear-say and neglect in accordance to the law, in which, both Trial Judge

and Superior Court Judge's failed to read or review the police interview's of coercion and involuntaryness along with Defendant's invocations of Right of Silence and Right to Counsel? (See 6B)

(1) Trial counsel's Pre-Trial motion was denied by the Trial Judge without review of the police interview's. Trial Counsel was therefore ineffective for not appealing the decision.

(2) Appellate Attorney filed motion on direct Appeal to Superior court that the Trial court erred in denying Defendant 's motion to suppress the statement and the buccal swab that was given to the Pennsylvania state Police. Superior Court then erred in their**{2023 U.S. Dist. LEXIS 3}** decision ruling that the motion was based on no Miranda Rights being read. Appellate Attorney then erred and was ineffective for-not addressing issue to Supreme C.

(3) Court Appointed Counsel was ineffective for not addressing same issue. (SEE 6B)

GROUND TWO Whether, Appellate attorney, Terry Despoy, and Court Appointed Counsel, Christian Kerstetter, rendered ineffective for their failure to properly challenge Trial Court, Superior Court and Supreme Court's erred decision in permitting testimony about non-criminal acts by the Defendant and/or did not have probative value that outweighted their potential for unfair prejudice to the Defendant, that in which was brought on by the prosecution 9 days prior to Trial assuming in their 404(b) motion that the current case of attempted kidnapping was similar to a 24 year old NOT QUILTY case?

The prosecution used a 24 year old NOT QUILTY case against the Defendant in order to allow testimony of non-criminal acts that had nothing to do with the four (4) charges that the Defendant was on trial for. Six (6) commonwealth witnesses testified at the trial proceeding that was held on March 17, 2016, committing perjury and adding hear/say testimony that**{2023 U.S. Dist. LEXIS 4}** through objections by the defense attorney was over-ruled by the trial Judge. Three (3) of the witnesses did not know the Defendant. Two (2) of the other witnesses were sisters to the Defendant's neighbor. The last witness was a co-worker that was threatened with contempt by the lead detective if he didn't testify to a false statement that was in Defendant 's discovery. (SEE 8A)

GROUND THREE: Whether Appellate attorney, Terry Despoy, and Court Appointed Counsel, Christian Kerstetter, rendered Ineffective for their failure to add motions on Trial Judge's reversible error for not allowing trial defense attorney time to review police interrogation transcripts upon two (2) requests at the Pre-Trial hearing? During the conclusion of the Pre-Trial Hearing, that was held on October 2015, the District Attorney turned over the police interrogation tapes to the defense. At that time, Trial Attorney, Thomas Dickey, requested on two (2) occaisions to the Trial Judge, Travis Livengood, for time to review the tapes in case there was any issues that would show coercion and involuntariness. Trial Judge denied the requests. (SEE 9B)

Appellate attorney, Terry Despoy, made small argument on Direct appeal**{2023 U.S. Dist. LEXIS 5}** to the Superior Court. Superior Court waived the issue because Appellate attorney failed to include the issue in petitioner's Concise Errors. Issue was never taken to the Supreme Court. Court Appointed Counsel failed to put in any motions. Counsel also withdrew prior to PCRA Hearing. (SEE 10A)

GROUND FOUR (4) Whether, Trial Counsel, Appellate Counsel, and Court Appointed Counsel rendered Ineffective for their failure to address lack of probable cause for interrogating the Defendant on 02/27/2015 after lead detective Dana Martini, had just received a DNA lab report dated 02/26/2015 that ruled out the Defendant of any involvement of the evidence from the crime scene, and that all three (3) counsels were ineffective for their failure to address the wrong dates and collusion on the Rights Waiver and the police interrogation transcript, that in fact is not a

harmless error due to the paramount weight and power that the two (2) forms carried in the Defendants false arrest?

defendant was questioned at the bedford county police barracks one day after the lead detective, dana martini had received dna results from an alleged garbage pull that was negitive to the defendant and did not match any**{2023 U.S. Dist. LEXIS 6}** evidence from the crime scene. Defendant was questioned and interrogated at the police barracks on 02/27/2015. rights waiver is dated 02/26/15. police interrogation transcript is dated 02/22/2015. (SEE 11A)

defendant was unawhere of the evidence or lack of evidence that was in the dna lab report. defendant was never told that the dna was not tied to him prior to the police interrogation. i.a.o.c . ineffective assistance of counsel gives the petitioner reasons or reasoning that the grounds mentioned above have not been exhausted.

GROUND FIVE (5) Whether, the Superior Court used bad judgement and prejudice against the petitioner for denying him a second (2nd) and third (3rd) request for extention of tine for re-argument during the middle of the covid-19 out-break, when in fact, the same Superior Court granted the petitioner's first (1st) request?

The Superior Court granted petitioner's first (1st) request for enlargement of time for re-argument on March 12, 2021. This took place three weeks after the Court' s final decision on petitioner's PCRA. Petitioner was then denied on all futher requests during the height of the Covid-19 outbreak, at a time in which access to the institutional Law**{2023 U.S. Dist. LEXIS 7}** Libuary was impossible due to lock-down in all Pennsylvania State Prisons. (SEE 12A)

The law

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, April 24, 1996,. 28 U.S.C.§ 2244 allows a federal court to issue a writ of habeas corpus to a person challenging a state court criminal conviction and sentence if the petitioner establishes that he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.§ 2254(a); *see* Howell v. Superintendent Rockview SCI, 939 F.3d 260, 264 (3d Cir.2019).

AEDPA does not permit a federal court to review state trial or appellate proceedings *de novo*. As a preliminary matter, 28 U.S.C. § 2254(b)(1) and (2) require petitioners challenging state sentences to first exhaust their state court remedies or show that none exists. Exhaustion requires presentation of the same factual and federal legal basis for the habeas claim to the state court in the manner prescribed by its procedural rules. Duncan v. Henry, 513 U.S. 364, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (*per curiam*); Robinson v. Superintendent, SCI Somerset, 722 Fed.Appx. 309, 312 (3d Cir.2018). When a claim is not properly presented under state law and has been declared barred under an adequate state legal rule, it is procedurally defaulted and cannot be considered unless the petitioner shows cause for which the state is responsible and prejudice, or that the failure to consider the claim would result in a fundamental miscarriage of justice. Gray v. Netherland, 518 U.S. 152, 161-62, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996); Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

When the state court adjudicates a petitioner's claims**{2023 U.S. Dist. LEXIS 8}** on the merits, 28 U.S.C.§ 2254(d) requires a petitioner to show that the ruling:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.The relevant ruling is that of the last state

court to decide a petitioner's federal claim on the merits in a reasoned opinion. Wilson v. Sellers, 200 L. Ed. 2d 530, 138 S. Ct. 1188, 1192 (2018). In this case, that requires this court to determine whether Judge Bowes' decisions are not unreasonable.

A legal principle is "clearly established" "as determined by the Supreme Court" within the meaning of this provision when it is embodied in a holding of the Court in a case presenting a closely similar issue. Thaler v. Haynes, 559 U.S. 43, 47, 130 S. Ct. 1171, 175 L. Ed. 2d 1003 (2010); Carey v. Musladin, 549 U.S. 70, 74, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); *see also* Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). An "unreasonable application" of federal law requires the court to ask whether the state court unreasonably applied Supreme Court precedent, not whether it was "merely wrong." White v. Woodall, 572 U.S. 415, 419, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014). An unreasonable application of law can be found only when the arguments or theories that supported or could have supported the state court's decision are so inconsistent**{2023 U.S. Dist. LEXIS 9}** with a prior holding of the Court that every fairminded jurist would agree that the state court ruling is wrong. *See* Harrington v. Richter, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

An unreasonable determination of the facts is one where the petitioner proves by clear and convincing evidence, 28 U.S.C.§ 2254(e)(1), that the conclusion drawn from the evidence by the state court is so improbable that it "blinks reality." *See* Miller-El v. Dretke, 545 U.S. 231, 266, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). Where reasonable minds might disagree, a federal habeas court cannot reject the state court's determination. *See* Rice v. Collins, 546 U.S. 333, 341-42, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006).

These are deliberately demanding standards. Habeas corpus is a guard against extreme malfunctions in the state criminal justice system, not second bite at the apple or a substitute for ordinary error correction through appeal. A petitioner must show "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, *supra*, 562 U.S. at 102-03. As the Court of Appeals has put it, "AEDPA gives state courts the benefit of th[e] doubt." Brown v. Wenerowicz, 663 F.3d 619, 634 (3d Cir. 2011)(reversing the grant of habeas corpus on a Strickland v Washington claim where attorney error that resulted in the exclusion of an alibi witness was conceded, but the**{2023 U.S. Dist. LEXIS 10}** district court gave insufficient deference to the state courts' conclusion that the lack of that alibi witness testimony did not prejudice the defendant.)

Under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a petitioner claiming a violation of the Sixth Amendment's guarantee of the assistance of counsel must show that counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. Strickland v. Washington presumes that counsel was effective, and explains why:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel's was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;**{2023 U.S. Dist. LEXIS 11}** that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any

given case. Even the best criminal defense attorneys would not defend a particular client in the same way.466 U.S. at 689 (internal citations and quotations omitted). *See* Lewis v. Mazurkiewicz, 915 F.2d 106, 115 (3d Cir. 1990) ("[W]hether or not some other strategy would have ultimately proved more successful, counsel's advice was reasonable and must therefore be sustained.") It is "only the rare claim of ineffective assistance of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." United States v. Kauffman, 109 F.3d 186, 190 (3d Cir.1997) (*quoting* United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

Strickland v. Washington also requires a petitioner to show prejudice, that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. In making that determination the habeas court must consider the strength of the evidence. Buehl v. Vaughn, 166 F.3d 163, 172 (3d Cir.1999). Taking Strickland and AEDPA together, a federal court's review of a state court rejection of an ineffectiveness claim must be doubly deferential. Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009).

The record

The petition assumes that the reader is familiar with the voluminous**{2023 U.S. Dist. LEXIS 12}** record in this matter, and Ferry's writing style is also difficult. After having read the record, including the trial transcript and the PCRA transcript, I think the best place to start with the factual background necessary to understand this matter is the direct appeal opinion by Judge Bowes of the Pennsylvania Superior Court, Commonwealth v. Ferry, No. 1897 WDA 2016, 193 A.3d 1062, 2018 WL 2750238 (Pa. Super. June 8, 2018), *petition for allowance of appeal denied*, 650 Pa. 126, 199 A.3d 342 (Pa. December 19, 2018):

> On November 14, 2014, seventeen-year-old J.Z., a member of the Mennonite community, bicycled home from her job at a produce farm, accompanied by her friend, Ruthann. She and Ruthann parted ways when J.Z. reached the lane that led to her family's farm. After retrieving the mail, as she did every day, J.Z. travelled up the lane until a man grabbed her, knocking her off her bike. It was dark, and she was unable to see his face. N.T. Trial, 3/17/16, at 91. He repeatedly said "get in the car, you're coming with me." *Id.* at 78. The man held her by the shoulders and dragged her towards his truck, attempting to put something over her head and to open the door of the truck. *Id.* at 79, 94. J.Z. eventually pulled away from him and ran to the house, reporting the incident to her parents. *Id.* at 80. J.Z.'s dress and vest were torn**{2023 U.S. Dist. LEXIS 13}** in the struggle, and she sustained bruises to her shoulders and knees. *Id.* at 87-89, 135-37. J.Z.'s father went out to the lane and found her bicycle, the mail scattered on the ground, and a pair of black sweatpants with a knot tied in them. *Id.* at 152-55. Lab tests later revealed the presence of dark dog hairs on the pants. *Id.* at 270.
>
> The next day, J.Z.'s mother found an envelope in the mailbox. She called the State Police, who arrived and opened it in her presence. The unsigned letter read as follows.
>
> I'm sorry about the wrestling match I had with you. I never meant no harm. I wanted you to talk to me. How does one non-Mennonite talk to a beautiful lady Mennonite? I fell in love with you and I seen you one year ago, and now ... you'll never talk to me. I can't come to your house and ask your momma to date [her] daughter. I can't come to your place of work and ask you out. There is no way to approach you and now I have failed my only way. I hope you can understand. I still want to meet you and you don't need to fear me. I will never do that again. I promise. Sorry. Please forgive me. *Id.* at 133.
>
> In investigating the incident, Trooper Dana Martini of the Pennsylvania State Police

interviewed{2023 U.S. Dist. LEXIS 14} people in the area, particularly other Mennonite girls who traveled by bicycle, and Appellant's name came up several times. *Id.* at 262-64. Trooper Martini began surveilling Appellant, and observed that he drove a truck which matched the description of the one involved in the incident with J.Z., that he had a large, dark-colored dog, and that he visited several Mennonites on his day off. *Id.* at 268. Based upon these observations, Trooper Martini decided to interview Appellant.

Appellant, a man in his mid-fifties, initially denied involvement in the incident, and claimed not to have any knowledge of the lane on which the attack occurred. Trooper Martini asked him to provide a buccal swab for DNA testing, and Appellant complied. *Id.* at 276. Appellant agreed to be interviewed by Corporal Edward Mahalko, and continued to deny his involvement for approximately the first hour of the second interview. After Corporal Mahalko confronted Appellant with the apology letter left in J.Z.'s mailbox, Appellant "changed his story." *Id.* at 306. Appellant then

admitted to being at the location and doing the things that the victim described. He stated he was there. He just wanted to talk to her. He thought she was another girl.{2023 U.S. Dist. LEXIS 15} He admitted that he grabbed her wrist. He admitted that he pulled on her wrist. He [stated] that he used the sweatpants that he left at the scene-he knew that they fell.... He said that he used them to conceal his identity so she didn't recognize him. And he said that he had written a note and took it back to her house.... *Id.* at 281.

Other Mennonite girls and young women were also the object of Appellant's attentions. Joel Amick, Appellant's coworker, told Trooper Martini that Appellant knew the names of all of the Mennonite girls, thought they were pretty, and specifically was interested in "Ruthie" and "the one that rode bikes with Ruthie." *Id.* at 238-39. Appellant indicated that he knew where Ruthie and her friend worked. *Id.* at 239. Mr. Amick advised Appellant to be careful about the girls under eighteen, and Appellant responded with a laugh. *Id.* at 239-40.

Ruthann indicated that Appellant "was overly friendly" with her, bringing lunch to her and her coworkers at the market where she and J.Z. worked, inviting her to a Christmas party, and, on another occasion, inviting her to have pizza. *Id.* at 215-18, 221. Ruthann's sister, N.Z., when she was fourteen years old, did work for Appellant,{2023 U.S. Dist. LEXIS 16} including cleaning and husking corn. *Id.* at 207-08. While driving N.Z. and her sister to his house, Appellant indicated that he wanted to take her to his cabin in the mountains so she could clean it. *Id.* at 209. Another time, Appellant called N.Z. at home at night and asked her to meet him at the school "to talk with him." *Id.* at 210.

Upon testimony reflecting these facts, a jury convicted Appellant of the crimes indicated above. On November 4, 2017, the trial court sentenced Appellant to ten to twenty years imprisonment on the attempted kidnapping count, and concluded that the other convictions merged for sentencing purposes.2018 Pa. Super. Unpub. LEXIS 2006, 2018 WL 2750238, at *1-2. Ferry was represented in the pretrial period and at trial by Thomas Dickey, Esquire. Terry Despoy, Esquire, subsequently appeared as counsel and handled sentencing and the direct appeal. On direct appeal, Despoy presented five claims to the Superior Court:

I. Was the evidence insufficient, as a matter of law, to prove all of the required elements of the offenses of which [Appellant] was convicted?

II. Did the trial court err and/or abuse its discretion in permitting testimony of Commonwealth witnesses about non-criminal actions and statements by [Appellant] that{2023 U.S. Dist. LEXIS 17} were irrelevant, had the effect of impugning the character of [Appellant], and/or did not have

probative value that outweighed their potential for unfair prejudice to [Appellant]?

III. Did the trial court err and/or abuse its discretion in denying [Appellant's] pre-trial motion to suppress the statements and buccal swab he gave to the Pennsylvania State Police and in permitting the admission at trial of [Appellant's] DNA evidence obtained from the buccal swab?

IV. Did the trial court err and/or abuse its discretion in sentencing [Appellant] to the maximum permissible prison sentence under all of the facts and circumstances of this case?

V. Did the trial court err, as a matter of law, in sentencing [Appellant] outside the sentencing guidelines without issuing a contemporaneous written statement setting forth the reasons for deviating from the guidelines?Commonwealth v. Ferry, *supra*, 193 A.3d 1062, 2018 WL 2750238, at *2-3. On the first claim, the Superior Court panel rejected the sufficiency of the evidence challenge as to all four counts of conviction, in the process mildly scolding the trial court and prosecution for addressing only the attempted kidnaping count, because on direct appeal the rule is that a sufficiency of the evidence claim must be reviewed**{2023 U.S. Dist. LEXIS 18}** regardless of its impact on the length of sentence.

In collateral proceedings the rule is different due to the concurrent sentence doctrine. Because habeas corpus is concerned with detention *simpliciter*, review of claims that do not affect petitioner's custody can provide no basis for a writ. I address only the sufficiency claim relevant to the attempted kidnaping, which was exhausted by Despoy's presentation of essentially the same facts and legal argument to the Superior Court. Despoy argued that although Ferry's actions were inappropriate, there was no evidence of two necessary elements of the state law definition of kidnaping, namely that Ferry intended to remove J.Z. a substantial distance, and that Ferry intended to injure or terrorize the victim or another. The appellate panel found that Ferry tried to force J.Z. into his vehicle, thus evidencing both an intent to remove and to terrorize her.

Sufficiency of evidence claims are governed by the standard in Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979): "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." In habeas,**{2023 U.S. Dist. LEXIS 19}** AEDPA commands this court to decide only whether the state court's Jackson v. Virginia assessment was not unreasonably wrong. The trial transcript supports Judge Bowes recitation of the facts. A jury that believed J.Z.'s testimony had an ample basis to find an intent to remove and an intent to terrorize under any standard of review. For purposes of habeas review it is enough to say that the Superior Court's rejection of the petitioner's sufficiency of the evidence claim as to the attempted kidnaping charge is a not unreasonable reading of the record.

Despoy's second claim was a challenge under Pennsylvania's version of F.R.E. 404(b) to virtually all the testimony of all the witnesses other than J.Z. because they were "about actions or statements allegedly made by [Ferry] that were either irrelevant, had the effect of impugning his character, or did not have probative value that outweighed their potential for unfair prejudice." Petitioner's direct appeal brief at 23.

In the pretrial proceedings Dickey vigorously tried to limit almost all background evidence so that the jury would hear only the irreducible minimum of the encounter between Ferry and J.Z. by arguing the marginal relevance and great chance of prejudice**{2023 U.S. Dist. LEXIS 20}** in the testimony by other witnesses about Ferry's interest in and attempts to contact other Mennonite girls. On direct appeal, Despoy continued in this theme. Judge Livengood and Judge Bowes rejected the claim for the obvious reason that the challenged testimony was relevant and necessary for the jury to make an informed conclusion about Ferry's intent.

I think both of Ferry's attorneys, Dickey before Judge Livengood and Despoy before the Superior Court, were capable and zealous in this attempt to keep damaging evidence out of the trial. I also think the state courts' rulings were correct. But whatever my opinions, this court cannot review this claim because it was not presented to the state court as a federal constitutional challenge. *See* Petitioner's direct appeal brief at 12, 22-31. Inquiry into the correctness of state law evidentiary rulings is not part of a federal court's habeas review of a state conviction because "federal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)(citation omitted).

To forestall a futile argument by petitioner that not citing federal law was ineffective assistance of counsel, I note that there was no federal claim to raise and counsel cannot**{2023 U.S. Dist. LEXIS 21}** be ineffective for failing to raise meritless claims. Some evidentiary rulings implicate federal constitutional concerns (examples are allowing redacted statements or hearsay statements that implicate the right to confrontation of witnesses) but garden variety Rule 403/Rule 404(b) rulings such as the ones in this case do not, because the types of rulings that present independent federal claims are very narrowly defined. *See* Dowling v. United States, 493 U.S. 342, 352-53, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). In Dowling the petitioner was convicted of bank robbery after the jury heard testimony about an allegedly similar home invasion for which Dowling had been tried and acquitted. The Supreme Court rejected the argument that appellate review of Rule 404(b) rulings needed to be supplemented by additional Due Process Clause analysis because the Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Id.*, 493 U.S. at 352-53.

Despoy's third claim was a combination of two claims that Ferry presents in different form in the habeas petition. During the investigation that led to the charges against Ferry, two Pennsylvania State Police officers, Trooper Martini and Corporal Mihalko, interviewed Ferry over the course of several hours. Both gave Ferry Miranda warnings and obtained waivers,**{2023 U.S. Dist. LEXIS 22}** although neither told Ferry he was under arrest nor considered Ferry to be in custody. During her interview, Trooper Martini asked Ferry if he would give a writing exemplar and a DNA sample: Ferry agreed to both and a DNA sample was taken by a buccal swab. Martini did not give Ferry any additional explanation of the Fourth Amendment law governing handwriting exemplars or DNA samples or DNA searches.

In the pretrial stage, Dickey attempted to suppress Ferry's statement on the grounds Ferry was in custody, asserting that there had been a Miranda violation. Because the troopers testified to giving Miranda warnings, Dickey focused on the relatively long period of time that Ferry had remained at the interview, implicitly asserting that Ferry's statements were involuntary. Dickey also made what could be called a vague "fruit of the poisonous tree" claim that sought to have the physical evidence to be suppressed. After a pretrial hearing, Judge Livengood found that Ferry had not been in custody, but that in any case he had validly waived his Miranda rights.

Neither the writing exemplar nor the buccal swab ever became relevant to the prosecution of this matter because Ferry admitted to writing the "I'm sorry"**{2023 U.S. Dist. LEXIS 23}** letter and that he was present at the scene. With the attempt to suppress the statement not having succeeded, the defense strategy was to concede at trial that Ferry was present at the scene but that his awkward - but not criminal - conduct resulted from Ferry mistaking J.Z. for her older sister, the woman he wanted to meet. This was a defense consistent with the statement, and it left the suppression issue for the appeal if necessary. On appeal, Despoy accordingly did raise the Miranda claim, arguing that the excessive length of the interrogation was inherently coercive, and also more or less sliding in a claim without any independent Fourth Amendment basis that the physical evidence should have been suppressed. Petitioner's direct appeal brief at 32-37.

The Superior Court rejected the argument that the statement should be suppressed, stating:

> Appellant offers no argument that there was any deficiency in either the *Miranda* warnings or Appellant's waiver of his rights. Accordingly, we, like the trial court, are "confused at [Appellant's] pursuit of this issue on appeal." Id. at 3. We discern no merit in Appellant's contention that a *Miranda* violation warrants suppression of his statements or the DNA**{2023 U.S. Dist. LEXIS 24}** evidence.2018 Pa. Super. Unpub. LEXIS 2006, 2018 WL 2750238 at *8. (Pa. Super. Ct. June 8, 2018).

Despoy made an additional argument in his brief that the prosecution did not give the defense the transcripts of Ferry's interviews with Martini and Mahalko until the pretrial hearing, and that "the lower court's failure to afford [Dickey] an opportunity to ... supplement his pretrial motion prior to the court's ruling on the motion was reversible error." Petitioner's direct appeal brief at 37. The Superior Court dispatched this argument in a footnote, holding it waived because it did not appear as a separate claim in the "Issues Presented" portion of the brief. 2018 Pa. Super. Unpub. LEXIS 2006, 2018 WL 2750238 at *8.

Despoy's last two claims were sentencing claims based on Pennsylvania law, and therefore not reviewable here. No Eighth Amendment claim has ever been raised. Since the Supreme Court has never overturned a kidnaping or attempted kidnaping sentence as excessive, or a 10-20 year sentence for anything as excessive, if an Eighth Amendment claim had been made and rejected there would be no basis for finding it to be contrary to or an unreasonable application of federal law as determined by the Supreme Court.

After the Superior Court denied relief, Despoy filed a petition for allowance of appeal that the Pennsylvania Supreme Court rejected without explanation.**{2023 U.S. Dist. LEXIS 25}**

Ferry then filed a timely *pro se* petition and motion for appointment of counsel under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa.C.S.§ 9541 *et seq.* Judge Livengood appointed as counsel Christian Kerstetter, Esquire. The *pro se* petition presented five claims of what Ferry asserted was ineffective assistance of counsel, and one claim of what Ferry asserted was prosecutorial misconduct. The ineffectiveness claims can be summarized as: (A) Dickey failed to call eleven named "available witnesses or character witnesses." PCRA petition at 6-8. Other than grouping the witnesses by type (*e.g.*, "private investigator," "co-worker," etc.) Ferry did not describe what testimony they would have given; (B) Dickey could have done a better job of cross examination. Ferry gave no specifics and asked for an evidentiary hearing to "set forth a factual record as to such omissions of counsel[.]" PCRA petition at 8-9; (C) Dickey should have asked for what is sometimes referred to as the "Massachusetts rule" instruction, *see* Commonwealth v. Cunningham, 471 Pa. 577, 370 A.2d 1172, 1188 (Pa.1977)(in dissent), that Ferry characterized as "putting the jury on notice that if the jury felt that the petitioner's confession was involuntary that the jury could not consider such confession as guilt." PCRA petition at 9; (D) Despoy failed to preserve**{2023 U.S. Dist. LEXIS 26}** a sentencing issue. PCRA petition at 9-10; and (E) Despoy included fewer issues in the petition for allowance of appeal to the Pennsylvania Supreme Court than were presented to the Superior Court. PCRA petition at 10-11. The prosecutorial misconduct claim, (F), was that the prosecutor failed to correct the victim when according to Ferry she testified falsely. The claim of false testimony was based on what Ferry argued was the inconsistency of her statements with those of other witnesses. PCRA petition at 11-12.

After review of the record, Kerstetter moved to withdraw under *Turner/ Finley* because he saw no nonfrivolous issues. Judge Livengood conducted an evidentiary hearing on the motion to withdraw and on Ferry's *pro se* petition on February 20, 2020. Ferry had an opportunity to explain and flesh out his

pro se petition, following which Judge Livengood denied the PCRA petition for reasons he expressed on the record at the hearing. Ferry pursued a *pro se* appeal to the Superior Court, presenting two umbrella issues that the Superior Court noted as:

> I. [Whether t]he PCRA court committed error by finding Appellant's claim that the evidence at trial constituted a *Brady* violation lacked legal**{2023 U.S. Dist. LEXIS 27}** merit?
>
> II. Whether the PCRA court committed legal error by failing to find that the Appellant's Fifth Amendment constitutional claim pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), was controlling as to compel the Appellant's conviction and judgment of sentence illegal and unconstitutional under both the state and federal constitution?
>
> Appellant's brief at 13, 17.Commonwealth v. Ferry, 2021 WL 653233 (Pa. Super. February 19, 2021, *reargument dismissed*, 249 A.3d 1164, 2021 WL 653233 (Pa. Super. February 19, 2021, reargument dismissed April 23, 2021). The first issue, in a rambling and confusing four pages, presents two arguments: that because Dickey did not receive the interviews of Ferry until the pretrial hearing, they were "suppressed from the defense by the Trial Judge," and that Judge Livengood denied Dickey's requests for a chance to review "Exculpatory Material Evidence." Petitioner's PCRA appellate brief at 13, 13-16. Ferry's second issue did not address the question whether he was in custody during the interview with Trooper Martini, but claimed that he did in fact invoke his right to silence and his right to counsel by statements at five places throughout the interview. Petitioner's PCRA appellate brief at 17-23. The specific exchanges are at pages 34-35 of the interview transcript:
>
> Q [Martini]. ... I need to look into to determine if indeed somebody was trying to hurt her or not.
>
> A [Ferry]. Well, if she was**{2023 U.S. Dist. LEXIS 28}** hurt, then someone was trying to hurt her. That's all I got to say. So I don't know.

And at page 79 of the transcript of the interview:

> Q. I was hoping you could give me the rest of the story.
>
> A. I can't. So if I'm guilty, take me to jail. That's all I got to say. Because I don't want to be here all afternoon. And if you want me to go home and you want me to come back next week or something, maybe I can think about it and come back in a week.

And at page 89:

> A. I never meant to scare anybody. That's all I got to say. I never meant to scare anybody.
>
> Q. So what happened? Why did you wait for her that night" Why'd you wait for her" If you don't know her, why did you wait for her? Can you answer that?
>
> A. No, I can't answer that. I can only say that there's somebody out there that don't like me. That's all I got to say. And at page 94-95:
>
> A. I want to know if I'm going to jail or if you're going to let me go.
>
> Q. What does that have anything to do with me asking you what your plans were that night?
>
> A. Because if it goes any farther, I'd probably be willing to speak with an attorney.
>
> Q. Would you like to speak with an attorney? Is that what you're saying?
>
> A. All I'm saying is ---. I'm asking a simple**{2023 U.S. Dist. LEXIS 29}** question. Am I going to go home, or are you going to have me arrested?

Q. I can't answer that right now, but you have a right to speak to an attorney.

A. I know.

Q. That is your right.

A. I know. And I don't want to be here ten hours.

Q. And I don't want to be here ten hours, either.

A. If you have all this evidence against me, you might as well bring it out, show me what you got. I know one person that talked bad about me. I know for sure.

And at page 105:

A. I'm giving you the best I can give you, What you got out of me is what you got. That's all I can give.

Q. You have nothing more to add?

A. No.The Superior Court, in another opinion by Judge Bowes, denied both claims. Addressing the Miranda claim first, the court observed:

Appellant maintains that, during his interview with Trooper Martini, he unambiguously and unequivocally invoked his constitutional rights to counsel and to remain silent, requiring the suppression of the statements he made thereafter, as well as DNA evidence that was subsequently collected, since Trooper Martini proceeded with the interview rather than immediately ceasing questioning. *See* Appellant's brief at 17-23.

Appellant does not couch his claim in terms of the effectiveness**{2023 U.S. Dist. LEXIS 30}** of trial or direct appeal counsel; rather, he contends that the PCRA court should have held that the violations entitle Appellant to a new trial at which the evidence will be precluded. *Id.* at 24. Since Appellant could have raised his claim before his judgment of sentence became final, it is waived and not an eligible basis for PCRA relief. *See* 42 Pa.C.S.§ 9543(a)(3). Hence, Appellant's *Miranda* claim merits no relief.Commonwealth v. Ferry.3d 1164 (Pa. Super. February 19, 2021), *reargument dismissed* (Apr. 23, 2021). Judge Bowes is correct about the presentation of the Miranda claim: Ferry presents an argument that under Commonwealth v. Lukach, 649 Pa. 26, 38, 195 A.3d 176, 183 (2018), his statements at the interview were an invocation of his right to silence, but at no point does he claim that Dickey, Despoy, or Kerstetter were ineffective for failing to raise or preserve this issue. *See* PCRA appellate brief at 17-23. This is not surprising: since Lukach was decided after the direct appeal, and the Supreme Court expressly observed in Lukach that it was deciding a matter of first impression that had "no requisite precedent," 195 A.3d at 185, Kerstetter could not have made a reasonable claim that either trial or appellate counsel was ineffective for failing to predict Lukach.

Turning to what Ferry labeled as a Brady claim, the Superior Court found that Ferry's argument rested**{2023 U.S. Dist. LEXIS 31}** on an incorrect factual basis:

The evidence that he complains was withheld are his statements supposedly invoking his rights to counsel and to remain silent, which he claims that the Commonwealth improperly suppressed by failing to turn over the recordings of his interview with Trooper Martini. *See* Appellant's brief at 14-16. Appellant further asserts that the trial court suppressed this evidence at the conclusion of the hearing on his pre-trial motions, yet he also acknowledges that the recordings were provided to his trial counsel at that hearing. *Id.* at 13. Moreover, he recognizes that his direct appeal counsel "obviously reviewed [the] entire police interviews." *Id.* at 15. Nonetheless, Appellant

maintains that the trial court, as well as the prosecution, his trial counsel, and his appellate counsel, all committed *Brady* violations by wrongfully keeping from him the evidence that he had invoked his *Miranda* rights during the interview. *Id.* at 15-16.

We disagree. "A defendant claiming a *Brady* violation must plead and prove: the prosecution suppressed the evidence, either willfully or inadvertently; the evidence is favorable to the defense; and the evidence is material." *Commonwealth v. Lynch*, 2020 PA Super 262, 242 A.3d 339, 350 (Pa.Super.2020) (cleaned up, emphasis**{2023 U.S. Dist. LEXIS 32}** added). Appellant cannot satisfy the first prong, as the record reflects that the prosecution provided the recordings to Appellant's trial counsel at the hearing on his pretrial motions. *See* N.T. Omnibus Pretrial Motion Hearing, 10/2/15, at 117. Trial counsel acknowledged having belatedly received the recordings, requested time to determine whether they provided additional bases to support his suppression motion, and informed the trial court that he would file an additional brief if necessary. *Id.* at 118. Counsel did file a subsequent motion on other pretrial matters, and thus had the opportunity to utilize the recordings of Appellant's interviews to seek suppression but did not avail himself of that opportunity.Commonwealth v. Ferry, 249 A.3d 1164, 2021 WL 653233.

The Superior Court then pointed out that what Ferry was really arguing was that trial and appellate counsel were ineffective for failing to make a better argument in support of Ferry's suppression claim, and that this claim was also foreclosed:

To the extent that Appellant complains that trial and appellate counsel should have used the statements in question to support his suppression argument, his claim sounds in ineffective assistance of counsel, not *Brady*. To prevail on**{2023 U.S. Dist. LEXIS 33}** such a claim, Appellant was required to separately plead and prove not only that the claim of error had arguable merit, but also that counsel had no reasonable basis for the omission and that Appellant was prejudiced. *See, e.g., Commonwealth v. Bond*, 572 Pa. 588, 819 A.2d 33, 40 (Pa. 2002) (explaining that PCRA petitioner must purse a distinct ineffectiveness claims to circumvent the waiver of the underlying claim of trial court error that could have been previously litigated). However, Appellant did not raise an ineffectiveness claim in the PCRA court, and thus may not argue it for the first time on appeal. *See, e.g., Commonwealth v. Santiago*, 579 Pa. 46, 855 A.2d 682, 691 (Pa. 2004) ("[A] claim not raised in a PCRA petition cannot be raised for the first time on appeal."). Therefore, Appellant's second issue merits no relief.

Commonwealth v. Ferry, 249 A.3d 1164, 2021 WL 653233.

Claims this court can review

Ferry filed his timely federal habeas petition, presenting the claims set forth above. Ground One presents the suppression claim that was exhausted on direct appeal by Despoy's presentation of it to the Superior Court, plus the new suppression claim that Ferry invoked his right to silence during the interview with Trooper Martini. Ferry hopes to have the new claim considered by appending the assertion that all previous counsel were ineffective for failing**{2023 U.S. Dist. LEXIS 34}** to raise it. Ground Three presents the related claim that the pretrial procedure that should have been followed was that Judge Livengood should have given Dickey time to review the recording of the PSP interviews before the suppression hearing, rather than giving Dickey leave to file a follow-up brief if his review disclosed anything new. Ferry implicitly asserts that Dickey was ineffective in not raising the claim that Ferry invoked his right to silence either his way or Judge Livengood's way. Ferry expressly asserts that Despoy "made small argument" on this point in the direct appeal and was therefore ineffective in failing to raise or preserve a claim that Judge Livengood erred.

As I have already noted above, the rejection on direct appeal of the Miranda claim that Despoy raised

was not unreasonable. Ferry cannot present his new claim: to properly present the claim that he invoked his right to silence requires him to allege that the failure to present it properly in the trial court and preserve it on appeal was due to the ineffectiveness of counsel. But the ineffectiveness claim itself has to be presented properly. The initial place to do this was in the PCRA petition. Ferry presented the**{2023 U.S. Dist. LEXIS 35}** six claims noted above in the PCRA petition, but presented neither a claim that he invoked his right to silence nor a claim of ineffectiveness related to that claim. Ferry did discuss the substance of his Miranda claim based on Lukach in the state courts in the hearing before Judge Livengood on Kerstetter's motion to withdraw. If his remarks at that juncture could be considered a sufficient presentation of a claim of trial and direct appeal counsels' ineffectiveness (and they cannot be), Ferry subsequently defaulted any such claim, as Judge Bowes pointed out, by failing to present that ineffectiveness claim in the PCRA appeal. Since Ferry had no right to constitutionally effective assistance of counsel at that stage of the proceedings, Ferry's failure to properly present his claim constitutes an unexcused procedural default of it.

Even if I were to ignore AEDPA, overlook all the defaults, and consider the ineffectiveness claim *de novo*, the most that can be said is that Dickey and Despoy failed to anticipate a subsequent opinion by the Pennsylvania Supreme Court that might have prompted a different ruling if Judge Livengood's finding that Ferry's interrogation was not a custodial interrogation could**{2023 U.S. Dist. LEXIS 36}** also be overturned. Since a failure to anticipate coupled with reliance on a counterfactual history is not ineffectiveness, neither Dickey nor Despoy was ineffective and Kerstetter had no obligation to raise a meritless claim that they were.

Ground two presents a non-issue. Before trial the prosecution gave notice that it might seek to use evidence of a past sexual assault of a minor. Decades earlier Ferry had been prosecuted for and acquitted of sexual assault of a minor. At the omnibus pretrial hearing, the prosecution conceded that it could not present the evidence in its case in chief but argued that depending on what Ferry testified to the evidence might be available as impeachment material. The matter did not come up again: Ferry did not testify at trial and the evidence of a prior assault was not used. No claim has ever been presented to the state courts at any juncture that any ruling relevant to this claim was improper.

Ground Four rests on errors of law and fact: the troopers were not required to have probable cause before seeking to interview Ferry, DNA evidence did not "rule him out" as a suspect at any point, and the typographical errors in police reports that Ferry points**{2023 U.S. Dist. LEXIS 37}** out are immaterial. But this court could not grant a writ based on these claims because they were never presented to the state courts.

Finally, Ground Five is not based on any federal law. This court does not have the power to grant habeas corpus on the ground that a state court's denial of a second continuance to brief a request for reargument was wrong.

The petition is denied without a certificate of appealability. The Clerk shall mark this matter closed.

DATE: January 17, 2023

/s/ Keith A. Pesto

Keith A. Pesto,

United States Magistrate Judge

Appendix C

State Court's Last Decision

COMMONWEALTH OF PENNSYLVANIA v. TODD RICHARD FERRY, Appellant
SUPERIOR COURT OF PENNSYLVANIA
2021 Pa. Super. Unpub. LEXIS 463; 249 A.3d 1164
No. 402 WDA 2020
February 19, 2021, Decided
February 19, 2021, Filed

Notice:

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37PUBLISHED IN TABLE FORMAT IN THE ATLANTIC REPORTER.

Editorial Information: Prior History

Appeal from the PCRA Order Entered February 26, 2020. In the Court of Common Pleas of Bedford County Criminal Division at No(s): CP-05-CR-0000177-2015.Commonwealth v. Ferry, 193 A.3d 1062, 2018 Pa. Super. Unpub. LEXIS 2006, 2018 WL 2750238 (June 8, 2018)
Judges: BEFORE: BOWES, J., McCAFFERY, J., and COLINS, J.*. MEMORANDUM BY BOWES, J. Judge McCaffery joins the memorandum. Judge Colins concurs in the result.

Opinion

Opinion by: BOWES

Opinion

MEMORANDUM BY BOWES, J.:

Todd Richard Ferry appeals from the order that denied his petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We affirm.

Appellant's underlying convictions relate to his attempt to kidnap J.Z., a member of the local Mennonite community who was a minor at the time. Appellant was arrested after giving interviews to Trooper Dana Martini and, on the same day after a ninety-minute wait at the police station, Corporal Edward Mahalko. In his omnibus pretrial motion, among other things Appellant sought to suppress his statements during the interviews, contending that he had been subjected to a custodial interrogation without receiving warnings pursuant to ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). On direct appeal, this Court affirmed the trial court's refusal to suppress Appellant's statements, as the record reflected that Appellant had been advised of his ***Miranda*** rights prior to both interviews. ***See Commonwealth v. Ferry***, 193 A.3d 1062, 2018 Pa. Super. Unpub. LEXIS 2006 (Pa. Super. 2018) (unpublished memorandum at 18-19). Appellant also argued on appeal that the trial court erred in not giving his trial counsel sufficient time to review the transcripts of his interviews with Trooper Martini and Corporal Mahalko, but we determined that Appellant had waived the claim by not including it in his Pa.R.A.P. 1925(b) statement. ***See*** (unpublished memorandum 2018 Pa. Super. Unpub. LEXIS 2006 at *22 n.7). Our Supreme Court denied Appellant's petition for allowance of appeal. ***See Commonwealth v. Ferry***, 650 Pa. 126, 199 A.3d 342 (Pa. 2018).

Appellant filed a timely *pro se* PCRA petition, and counsel was appointed. Appellant also filed an

amended PCRA petition, in which he asserted the two issues he raises in this appeal, namely (1) a violation of ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), alleging that the recordings of the interviews with Trooper Martin and Corporal Mahalko were wrongfully suppressed; and (2) a claim that the transcripts of the interviews reveal that Appellant had asserted his rights to counsel and to remain silent, but his rights were ignored and the interviews continued. ***See*** Amendment to PCRA Petition, 11/9/19, at unnumbered 1-3. Appellant's PCRA counsel opined that the claims lacked merit and sought to withdraw, but his no-merit letter was not delivered to Appellant by prison authorities. However, Appellant eventually received a copy and was given the opportunity tc respond to it and make oral arguments in support of his position at a PCRA hearing on February 20, 2020.1 The PCRA court agreed with PCRA counsel's assessment of the claims, allowed him to withdraw, and denied Appellant's petition.

Appellant filed a timely notice of appeal, and both Appellant and the PCRA court complied with Pa.R.A.P. 1925.2 Appellant presents the following questions for our consideration:

> I. [Whether t]he PCRA court committed error by finding Appellant's claim that the evidence at trial constituted a ***Brady*** violation lacked legal merit?
>
> II. Whether the PCRA court committed legal error by failing to find that the Appellant's Fifth Amendment constitutional claim pursuant to ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), was controlling as to compel the Appellant's conviction and judgment of sentence illegal and unconstitutional under both the state and federal constitution?Appellant's brief at 13, 17.3

We begin with a review of the applicable legal principles.

> This Court's standard of review regarding an order denying a petition under the PCRA 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. Allison***, 2020 PA Super 168, 235 A.3d 359, 362 (Pa. Super. 2020) (internal quotation marks omitted). Further, "[i]t is an appellant's burden to persuade us that the PCRA court erred and that relief is due." ***Commonwealth v. Stansbury***, 2019 PA Super 274, 219 A.3d 157, 161 (Pa. Super. 2019) (cleaned up).

To be eligible for PCRA relief, a petitioner must plead and prove, *inter alia*, that his conviction or sentence resulted from one of the enumerated errors or defects, such as ineffective assistance of counsel or an illegal sentence, that the claim has not been previously litigated or waived, and that the failure to litigate the claim earlier could not have been a tactical decision by counsel. ***See*** 42 Pa.C.S. § 9543(a)(2)-(4). An issue is previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or . . . it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa.C.S. § 9544(a). "[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. § 9544(b).

With these principles in mind, we first address Appellant's claim that the PCRA court erred in denying him relief for a violation of his ***Miranda*** rights. Appellant maintains that, during his interview with Trooper Martini, he unambiguously and unequivocally invoked his constitutional rights to counsel and to remain silent, requiring the suppression of the statements he made thereafter, as well as DNA evidence that was subsequently collected, since Trooper Martini proceeded with the interview rather than immediately ceasing questioning. ***See*** Appellant's brief at 17-23.

Appellant does not couch his claim in terms of the effectiveness of trial or direct appeal counsel;

rather, he contends that the PCRA court should have held that the violations entitle Appellant to a new trial at which the evidence will be precluded. ***Id.*** at 24. Since Appellant could have raised his claim before his judgment of sentence became final, it is waived and not an eligible basis for PCRA relief. ***See*** 42 Pa.C.S. § 9543(a)(3). Hence, Appellant's ***Miranda*** claim merits no relief.

Appellant's contention that the PCRA court erred in rejecting his ***Brady*** claim is also unavailing. The evidence that he complains was withheld are his statements supposedly invoking his rights to counsel and to remain silent, which he claims that the Commonwealth improperly suppressed by failing to turn over the recordings of his interview with Trooper Martini. ***See*** Appellant's brief at 14-16. Appellant further asserts that the trial court suppressed this evidence at the conclusion of the hearing on his pre-trial motions, yet he also acknowledges that the recordings were provided to his trial counsel at that hearing. ***Id.*** at 13. Moreover, he recognizes that his direct appeal counsel "obviously reviewed [the] entire police interviews." ***Id.*** at 15. Nonetheless, Appellant maintains that the trial court, as well as the prosecution, his trial counsel, and his appellate counsel, all committed ***Brady*** violations by wrongfully keeping from him the evidence that he had invoked his ***Miranda*** rights during the interview. ***Id.*** at 15-16.

We disagree. "A defendant claiming a ***Brady*** violation must plead and prove: **the prosecution** suppressed the evidence, either willfully or inadvertently; the evidence is favorable to the defense; and the evidence is material." ***Commonwealth v. Lynch***, 2020 PA Super 262, 242 A.3d 339, 350 (Pa. Super. 2020) (cleaned up, emphasis added). Appellant cannot satisfy the first prong, as the record reflects that the prosecution provided the recordings to Appellant's trial counsel at the hearing on his pretrial motions.4 ***See*** N.T. Omnibus Pretrial Motion Hearing, 10/2/15, at 117. Trial counsel acknowledged having belatedly received the recordings, requested time to determine whether they provided additional bases to support his suppression motion, and informed the trial court that he would file an additional brief if necessary.5 ***Id.*** at 118. Counsel did file a subsequent motion on other pretrial matters, and thus had the opportunity to utilize the recordings of Appellant's interviews to seek suppression but did not avail himself of that opportunity.

To the extent that Appellant complains that trial and appellate counsel should have used the statements in question to support his suppression argument, his claim sounds in ineffective assistance of counsel, not ***Brady***. To prevail on such a claim, Appellant was required to separately plead and prove not only that the claim of error had arguable merit, but also that counsel had no reasonable basis for the omission and that Appellant was prejudiced. ***See***, ***e.g., Commonwealth v. Bond***, 572 Pa. 588, 819 A.2d 33, 40 (Pa. 2002) (explaining that PCRA petitioner must purse a distinct ineffectiveness claims to circumvent the waiver of the underlying claim of trial court error that could have been previously litigated). However, Appellant did not raise an ineffectiveness claim in the PCRA court, and thus may not argue it for the first time on appeal. ***See***, ***e.g., Commonwealth v. Santiago***, 579 Pa. 46, 855 A.2d 682, 691 (Pa. 2004) ("[A] claim not raised in a PCRA petition cannot be raised for the first time on appeal."). Therefore, Appellant's second issue merits no relief.

Appellant has failed to sustain his burden of establishing that the PCRA court erred and that relief is due. ***See Stansbury***, ***supra*** at 161. Accordingly, we affirm the order denying his petition.

Order affirmed.

Judge McCaffery joins the memorandum.

Judge Colins concurs in the result.

Judgment Entered.

Date: 2/19/2021

Footnotes

*

1

Counsel filed his petition to withdraw with the PCRA court, but did not attach his no-merit letter to Appellant to the filing, as he believed, and the PCRA court agreed, that it was subject to privilege. ***See*** N.T. PCRA Hearing 2/20/2020, at 11. Our case law is clear that counsel seeking to withdraw from PCRA representation must "file" the no-merit letter with the court, be it the PCRA court or the appellate court, to make a record for the court's independent assessment. ***See***, ***e.g., Commonwealth v. Rykard***, 2012 PA Super 199, 55 A.3d 1177, 1184 (Pa. Super. 2012). Since Appellant does not challenge the sufficiency of PCRA counsel's no-merit letter, counsel's failure to file it does not impact this appeal.

2

The PCRA court did not author an opinion, but pointed to the transcript from the PCRA hearing for an explanation of its reasoning.

3

Appellant's brief lacks a separate statement of questions involved as well as several other sections specified by the Rules of Appellate Procedure. While Pa.R.A.P. 2101 permits this Court to dismiss an appeal if briefing defects are substantial, we have held that dismissal is not appropriate where the omissions do not impede our review. ***See***, ***e.g., Commonwealth v. Levy***, 2013 PA Super 331, 83 A.3d 457, 461 n.2 (Pa. Super. 2013). Indeed, while Pa.R.A.P. 2116 goes so far as to state that this Court will not consider a question that is not included in a statement of questions involved, this Court has held that "such a defect may be overlooked where an appellant's brief suggests the specific issue to be reviewed and appellant's failure does not impede our ability to address the merits of the issue." ***Werner v. Werner***, 2016 PA Super 221, 149 A.3d 338, 341 (Pa. Super. 2016) (cleaned up). Although Appellant's brief does not conform with the rules, we conclude that the defects in his brief do not impede our ability to review his two appellate questions, which are readily discerned from the headings to the argument sections of Appellant's brief.

4

Aside from the fact that the trial court is not the prosecution, we note that the court did not keep the evidence from Appellant but rather declined to suppress Appellant's statements made during the interviews. ***See*** N.T. Omnibus Pretrial Motion Hearing, 10/2/15, at 117-20.

5

The trial court did not, as Appellant suggests, suppress the statements; it denied Appellant's request to suppress them, and they were admitted into evidence at trial. ***See*** N.T. Omnibus Pretrial Motion Hearing, 10/2/15, at 119.

Appendix D

Direct Appeal

Superior Court of Pennsylvania

Opinion

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
TODD RICHARD FERRY	:	
Appellant	:	No. 1897 WDA 2016

Appeal from the Judgment of Sentence November 4, 2016
In the Court of Common Pleas of Bedford County Criminal Division at
No(s): CP-05-CR-0000177-2015

BEFORE: BOWES, J., OLSON, J., and KUNSELMAN, J.

MEMORANDUM BY BOWES, J.: **FILED JUNE 08, 2018**

Todd Richard Ferry appeals from the judgment of sentence of ten to twenty years imprisonment imposed after a jury convicted him of attempted kidnapping, false imprisonment of a person under eighteen, luring a child into a motor vehicle, and simple assault. We affirm.

On November 14, 2014, seventeen-year-old J.Z., a member of the Mennonite community, bicycled home from her job at a produce farm, accompanied by her friend, Ruthann.[1] She and Ruthann parted ways when J.Z. reached the lane that led to her family's farm. After retrieving the mail, as she did every day, J.Z. travelled up the lane until a man grabbed her,

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[1] All of the young Mennonite women discussed in this case have the same last name, although they are not all related to each other. For the sake of clarity, we refer to them by their first names.

knocking her off her bike. It was dark, and she was unable to see his face. N.T. Trial, 3/17/16, at 91. He repeatedly said "get in the car, you're coming with me." *Id.* at 78. The man held her by the shoulders and dragged her towards his truck, attempting to put something over her head and to open the door of the truck. *Id.* at 79, 94. J.Z. eventually pulled away from him and ran to the house, reporting the incident to her parents. *Id.* at 80. J.Z.'s dress and vest were torn in the struggle, and she sustained bruises to her shoulders and knees. *Id.* at 87-89, 135-37. J.Z.'s father went out to the lane and found her bicycle, the mail scattered on the ground, and a pair of black sweatpants with a knot tied in them. *Id.* at 152-55. Lab tests later revealed the presence of dark dog hairs on the pants. *Id.* at 270.

The next day, J.Z.'s mother found an envelope in the mailbox. She called the State Police, who arrived and opened it in her presence. The unsigned letter read as follows.

> I'm sorry about the wrestling match I had with you. I never meant no harm. I wanted you to talk to me. How does one non-Mennonite talk to a beautiful lady Mennonite? I fell in love with you and I seen you one year ago, and now . . . you'll never talk to me. I can't come to your house and ask your momma to date [her] daughter. I can't come to your place of work and ask you out. There is no way to approach you and now I have failed my only way. I hope you can understand. I still want to meet you and you don't need to fear me. I will never do that again. I promise. Sorry. Please forgive me.

Id. at 133.

In investigating the incident, Trooper Dana Martini of the Pennsylvania State Police interviewed people in the area, particularly other Mennonite girls

who traveled by bicycle, and Appellant's name came up several times. ***Id.*** at 262-64. Trooper Martini began surveilling Appellant, and observed that he drove a truck which matched the description of the one involved in the incident with J.Z., that he had a large, dark-colored dog, and that he visited several Mennonites on his day off. ***Id.*** at 268. Based upon these observations, Trooper Martini decided to interview Appellant.

Appellant, a man in his mid-fifties, initially denied involvement in the incident, and claimed not to have any knowledge of the lane on which the attack occurred. Trooper Martini asked him to provide a buccal swab for DNA testing, and Appellant complied.[2] ***Id.*** at 276. Appellant agreed to be interviewed by Corporal Edward Mahalko, and continued to deny his involvement for approximately the first hour of the second interview. After Corporal Mahalko confronted Appellant with the apology letter left in J.Z.'s mailbox, Appellant "changed his story." ***Id.*** at 306. Appellant then

> admitted to being at the location and doing the things that the victim described. He stated he was there. He just wanted to talk to her. He thought she was another girl. He admitted that he grabbed her wrist. He admitted that he pulled on her wrist. He [stated] that he used the sweatpants that he left at the scene --- he knew that they fell. . . . He said that he used them to conceal his identity so she didn't recognize him. And he said that he had written a note and took it back to her house. . . .

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[2] Lab tests revealed that the DNA Appellant provided matched DNA recovered both from the knot in the sweatpants left behind at the scene of J.Z.'s attack and from the envelope left in J.Z.'s mailbox. ***Id.*** at 278.

Id. at 281.[3]

Other Mennonite girls and young women were also the object of Appellant's attentions. Joel Amick, Appellant's coworker, told Trooper Martini that Appellant knew the names of all of the Mennonite girls, thought they were pretty, and specifically was interested in "Ruthie" and "the one that rode bikes with Ruthie." *Id.* at 238-39. Appellant indicated that he knew where Ruthie and her friend worked. *Id.* at 239. Mr. Amick advised Appellant to be careful about the girls under eighteen, and Appellant responded with a laugh. *Id.* at 239-40.

Ruthann indicated that Appellant "was overly friendly" with her, bringing lunch to her and her coworkers at the market where she and J.Z. worked, inviting her to a Christmas party, and, on another occasion, inviting her to have pizza. *Id.* at 215-18, 221. Ruthann's sister, N.Z., when she was fourteen years old, did work for Appellant, including cleaning and husking corn. *Id.* at 207-08. While driving N.Z. and her sister to his house, Appellant indicated that he wanted to take her to his cabin in the mountains so she could clean it. *Id.* at 209. Another time, Appellant called N.Z. at home at night and asked her to meet him at the school "to talk with him." *Id.* at 210.

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[3] An audio recording was made of Appellant's statements and was played for the jury at trial. However, neither the CD nor the transcript of its contents is included in the certified record. The summary quoted herein was testified to by Trooper Martini at trial.

Upon testimony reflecting these facts, a jury convicted Appellant of the crimes indicated above. On November 4, 2017, the trial court sentence Appellant to ten to twenty years imprisonment on the attempted kidnapping count, and concluded that the other convictions merged for sentencing purposes. Appellant timely filed a post-sentence motion, which the trial court promptly denied without a hearing. Appellant filed a timely notice of appeal, and both he and the trial court complied with Pa.R.A.P. 1925.

Appellant presents this Court with the following questions.

I. Was the evidence insufficient, as a matter of law, to prove all of the required elements of the offenses of which [Appellant] was convicted?

II. Did the trial court err and/or abuse its discretion in permitting testimony of Commonwealth witnesses about non-criminal actions and statements by [Appellant] that were irrelevant, had the effect of impugning the character of [Appellant], and/or did not have probative value that outweighed their potential for unfair prejudice to [Appellant]?

III. Did the trial court err and/or abuse its discretion in denying [Appellant's] pre-trial motion to suppress the statements and buccal swab he gave to the Pennsylvania State Police and in permitting the admission at trial of [Appellant's] DNA evidence obtained from the buccal swab?

IV. Did the trial court err and/or abuse its discretion in sentencing [Appellant] to the maximum permissible prison sentence under all of the facts and circumstances of this case?

V. Did the trial court err, as a matter of law, in sentencing [Appellant] outside the sentencing guidelines without issuing a contemporaneous written statement setting forth the reasons for deviating from the guidelines?

Appellant's brief at 6-7 (unnecessary capitalization omitted).

We begin with the law applicable to our review of Appellant's claim that the evidence was insufficient to sustain his convictions.[4]

> Because a determination of evidentiary sufficiency presents a question of law, our standard of review is *de novo* and our scope of review is plenary. In reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, were sufficient to prove every element of the offense beyond a reasonable doubt. [T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. It is within the province of the fact-finder to determine the weight to be accorded to each witness's testimony and to believe all, part, or none of the evidence. The Commonwealth may sustain its burden of proving every element of the crime by means of wholly circumstantial evidence. Moreover, as an appellate court, we may not re-weigh the evidence and substitute our judgment for that of the fact-finder.

Commonwealth v. Williams, 176 A.3d 298, 305-06 (Pa.Super. 2017) (citations and quotation marks omitted).

Appellant was convicted of criminal attempt–kidnapping. The attempt statute provides that "[a] person commits an attempt when, with intent to

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[4] We note with displeasure that both the trial court and the Commonwealth addressed only Appellant's sufficiency challenge regarding the attempted kidnapping conviction, declining to discuss the others because Appellant was not sentenced to additional penalties on those convictions. Trial Court Opinion, 2/10/17, at 9 n.6; Commonwealth's brief at 14-15. If Appellant's conviction is invalid, it must be vacated although it does not affect the length of his supervision. ***See, e.g., Ball v. United States***, 470 U.S. 856, 865, (1985) (holding improper conviction, "even if it results in no greater sentence, is an impermissible punishment").

commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." 18 Pa.C.S. § 901(a). "The substantial step test broadens the scope of attempt liability by concentrating on the acts the defendant has done and does not any longer focus on the acts remaining to be done before the actual commission of the crime." ***In re R.D.***, 44 A.3d 657, 678 (Pa.Super. 2012) (internal quotation marks and citation omitted). The kidnapping statute provides that

> a person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following intentions:
>
> > (1) To hold for ransom or reward, or as a shield or hostage.
> >
> > (2) To facilitate commission of any felony or flight thereafter.
> >
> > (3) To inflict bodily injury on or to terrorize the victim or another.
> >
> > (4) To interfere with the performance by public officials of any governmental or political function.

18 Pa.C.S. § 2901(a).

Appellant argues that, although the Commonwealth's evidence showed that his actions in trying to get J.Z. to talk to him were "highly inappropriate," it failed to prove that he intended to remove her a substantial distance or isolate her for a substantial period of time, let alone to injure or terrorize her. Appellant's brief at 16-17. We disagree.

The evidence and the reasonable inferences therefrom show the following. Appellant's apology letter lamented that he was unable to speak to the young Mennonite girl while she was at work or with her family. Appellant thus accosted J.Z. while she was alone, grabbing her from her bike so he could speak with her. Since Appellant could not have the conversation he wanted outside her home, he took substantial steps toward his goal of isolating her. He tried to force her into his vehicle so he could remove her to a new location more susceptible to his design. J.Z.'s reactions to Appellant's entreaties to go elsewhere and talk to him made it abundantly clear that she was and would continue to be terrorized by his "highly inappropriate" attempt to get to know her by force. Had J.Z. not succeeded in evading Appellant, he would have forcibly moved her to another location.

From this, the jury was able to conclude beyond a reasonable doubt that Appellant committed the crime of attempted kidnapping. ***See, e.g., In re T.G.***, 836 A.2d 1003, 1007 (Pa.Super. 2003) (holding elements of kidnapping and false imprisonment were proven where "[t]he six-year-old victim was removed, without the consent of her parent, from a public place outside of a playmate's house and forcibly taken into the seclusion of [the juvenile's] home [next door]. [The juvenile] closed the door to her home, would not let the victim's playmate enter the house, and would not let the victim leave.").

Appellant next contests the validity of his conviction for false imprisonment. False imprisonment is the knowing, unlawful restraint of another "so as to interfere substantially with his liberty." 18 Pa.C.S. § 2903(b). Appellant maintains that the Commonwealth did not prove that Appellant substantially interfered with J.Z.'s liberty. Appellant's brief at 19.

As detailed above, when J.Z. declined to go with him to his truck and tried to flee, Appellant forcibly restrained her and dragged her towards his truck. His conduct in preventing her from escaping and going to the safety of her home was sufficient to establish that Appellant restrained J.Z. against her will. ***See In re T.G., supra***.

Appellant also contends that the evidence was insufficient to sustain his conviction for luring a child into a motor vehicle. The relevant statute provides as follows: "[u]nless the circumstances reasonably indicate that the child is in need of assistance, a person who lures or attempts to lure a child into a motor vehicle or structure without the consent, express or implied, of the child's parent or guardian commits an offense." 18 Pa.C.S. § 2910(a).

Our Supreme Court has explained that "a 'lure' involves the making of a promise of pleasure or gain, the furnishing of a temptation or enticement, or the performance of some other affirmative act calculated to strongly induce another individual to take a particular action, usually and most often likely to result in his or her harm." ***Commonwealth v. Hart***, 28 A.3d 898, 909 (Pa. 2011). Appellant argues that the Commonwealth presented "no

evidence whatsoever" that Appellant took any actions "in the nature of attracting, attempting, or enticing" J.Z. to get in his truck. Appellant's brief at 20.

The same argument was advanced, and soundly rejected, in ***Commonwealth v. Walker***, 139 A.3d 225 (Pa.Super. 2016). In that case, the defendant contended that he was not guilty of luring his victim because he made no promises to persuade her to get into his car. Rather, he drove his car alongside the child as she was walking, grabbed her wrist, and pulled her toward his car with such force that she had to put her foot on the side of the vehicle to push away from him and escape his grip. ***Id.*** at 232. This Court observed that our Supreme Court's definition of luring in ***Hart***, ***supra***, broadly includes "some other affirmative act" designed "to strongly induce" the child to get into the motor vehicle. Accordingly, we held that the evidence that the defendant attempted to get his victim into his car by physical force was sufficient to establish an affirmative act by the defendant calculated to induce his victim to enter the car.

The instant case is not materially distinguishable from ***Walker***. Appellant grabbed J.Z. and dragged her towards his truck, saying "get in the car, you're coming with me." N.T. Trial, 3/17/16, at 78. She fought him off, and ultimately used a fence as leverage to escape his grasp. The Commonwealth thus showed that Appellant took affirmative acts designed to

induce J.Z. to get into his motor vehicle, which was sufficient to establish luring.

Finally, Appellant maintains that there was insufficient evidence to establish that he committed simple assault. The simple assault statute provides, in relevant part, that "a person is guilty of assault if he: . . . attempts by physical menace to put another in fear of imminent serious bodily injury[.]" 18 Pa.C.S. § 2701(a)(3). Appellant argues that the Commonwealth failed to prove that he put J.Z. in fear of serious bodily injury by his physical menace. Appellant's brief at 21.

We again disagree. J.Z. testified that Appellant ran at her in the dark, grabbed her by the shoulder, knocked her off her bike, dragged her towards his truck, attempted to cover her head, and chased after her when she broke away from his grasp, causing her to fear that he was going to injure her more than he already had. N.T. Trial, 3/17/16, at 78-80. This evidence was sufficient to establish simple assault. ***See Walker***, ***supra*** at 233–34 (holding evidence established physical menace causing fear of serious bodily injury where Walker, "a [forty-one-]year-old man, clearly attempted to subdue T.H., an [eleven-]year-old child, by grabbing her wrist and pulling her to his car. [Walker] made a very explicit, sexual comment to T.H. just prior to gripping her wrist, and held T.H. with such force that she had to put her foot against his car to gain leverage to escape his grasp. T.H. could

have fallen backward and struck her head, or injured herself in some other serious manner, due to [Walker's] physically restraining her in this way.").

Having determined that Appellant's convictions are supported by sufficient evidence, we next consider Appellant's evidentiary challenges, mindful of our standard of review.

> The admissibility of evidence is a matter addressed solely to the discretion of the trial court, and may be reversed only upon a showing that the court abused its discretion. For there to be abuse of discretion, the sentencing court must have ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Johnson, 179 A.3d 1105, 1119-20 (Pa.Super. 2018) (internal citations and quotation marks omitted).

Appellant first contends that the trial court erred in allowing the Commonwealth to present evidence pursuant to Pa.R.E. 404(b). That Rule provides as follows.

> **(b) Crimes, Wrongs or Other Acts.**
>
> *(1) Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> *(2) Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

Pa.R.E. 404(b).

Appellant argues that "the trial court erred in permitting the testimony of six Commonwealth witnesses about actions or statements allegedly made by [Appellant] that were either irrelevant, had the effect of impugning his character, or did not have probative value that outweighed their potential for unfair prejudice to [Appellant]." Appellant's brief at 23. Appellant points to certain testimony offered by J.Z.'s friend Ruthann; by Ruthann's sister, N.Z.; by David Martin, the manager of the farm market where J.Z. and Ruthann worked; by J.Z.'s sister; by Joel Amick, Appellant's coworker; and by Trooper Martini.

Specifically, Appellant complains about the following testimony.[5] Mr. Martin testified that he saw Appellant in the store on one occassion, and his

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[5] In his Rule 1925(b) statement, Appellant did not identify the allegedly-offending testimony, or even which witness or witnesses offered it. Rather, he vaguely complained the trial court allowed testimony about "non-criminal acts," permitted testimony that "had the effect of impugning the character of" Appellant, and overruled objections "to testimony that was irrelevant, prejudicial, beyond the scope of the offer of proof, beyond the scope of cross-examination, contained hearsay, and/or was unduly prejudicial to" Appellant. Concise Statement, 12/30/16, at ¶¶ 6-8. Unsurprisingly, the trial court in its Rule 1925(a) opinion chose to neither explain its reasons for every single objection Appellant made at trial nor to speculate about which specific ones Appellant intended to argue before this Court. Trial Court Opinion, 2/10/17, at 5. As a consequence, we do not have the benefit of a trial court opinion supporting the six specific claims Appellant raises on appeal, and we could hold that Appellant waived all of these issues. ***Commonwealth v. Reeves***, 907 A.2d 1, 2 (Pa.Super. 2006) ("[A] Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all.") (citation omitted). However, because we do not find our review unduly hampered, we will address the merits of the arguments.

employees told him that Appellant was the person who dropped off food once. Appellant's brief at 24. N.Z. testified that Appellant asked her, when she was fourteen, to go to his mountain cabin and to meet him at the school to talk. ***Id.*** at 25. Ruthann testified that Appellant brought lunch a few times, invited her to dinner and a Christmas party, and was overly friendly to her, making her uncomfortable. ***Id.*** at 25-26. Mr. Amick testified as an adverse witness that Appellant knew all of the Mennonite girls by name, thought they were pretty, wanted to ask one to the office Christmas party, and laughed when warned to be careful with those under eighteen. ***Id.*** at 27. J.Z.'s sister, who had previously worked at the market where Ruthann and J.Z. worked, testified that she did not know Appellant and would not have been receptive to talking to him or getting into his truck on the night he assaulted J.Z..[6] ***Id.*** at 28. Finally, Trooper Martini relayed in her testimony that people she had interviewed during her investigation mentioned Appellant as being interested in the Mennonite community, but only in the Mennonite girls. ***Id.***

Appellant makes the following argument against the admission of this testimony.

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[6] It has been Appellant's contention that on the night in question he thought J.Z. was her older sister, who is over the age of eighteen. ***See, e.g.,*** Appellant's brief at 16-17 ("[C]learly he thought [J.Z.] was her older sister[.]").

> None of this testimony involved any conduct or statements by [Appellant] that were sexual, forcible or aggressive in nature. Rather, this evidence, at most, showed only that [Appellant] knew a number of the people in the Mennonite community, that he was friendly toward them, that he found several of the young Mennonite women attractive, that he was interested in establishing a relationship with a few of them, that a couple of them had worked for him in the past, and that he brought lunch on three occasions for the workers at a farm market where several Mennonites were employed. However, it is evident that the intent of the Commonwealth in presenting this evidence, together with the women's negative reactions to [Appellant's] actions and statements, was to raise questions in the jury's minds as to [Appellant's] character and intentions and to suggest that he intended to take [J.Z.] a substantial distance from the location of the incident and/or to confine her for a substantial period of time in a place of isolation, which would have been sheer conjecture and speculation.

Appellant's brief at 28-29.

Appellant's argument proves its own lack of merit. The conduct cannot be both irrelevant and suggestive of Appellant's intent. The evidence cannot reflect wholly innocent conduct, and yet be so prejudicial as to outweigh its probative value. It appears to us that the evidence went to Appellant's intent when he grabbed J.Z. and tried to drag her to his truck, making it relevant. Thus, even if the acts at issue amount to "crimes, wrongs, or other acts" evidence subject to Rule 404(b), it was permissible under Rule 404(b)(2) to prove intent. ***See***, ***e.g.***, ***Commonwealth v. Sherwood***, 982 A.2d 483, 497 (Pa. 2009) (finding testimony about prior assaults was relevant to refute the defendant's claim that he did not intend to hurt the victim); ***Commonwealth v. Diehl***, 140 A.3d 34, 41 (Pa.Super. 2016) ("The admission of [404(b)] evidence becomes problematic only when its

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prejudicial effect creates a danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial."). The nature of the evidence was not likely to evoke a passionate response that would impede the jurors' ability to rationally decide Appellant's guilt or innocence.

In any event, were we to agree with Appellant that the evidence was erroneously admitted, we would nonetheless hold that it was harmless error. Given J.Z.'s testimony about the attack, the DNA evidence placing Appellant at the scene and as the author of the apology letter, and Appellant's corroboration of J.Z.'s account of the assault in his letter and statement to police, the evidence of guilt was overwhelming. ***See, e.g., Commonwealth v. Shull***, 148 A.3d 820, 846 (Pa.Super. 2016) (holding in appeal from robbery and assault convictions that, if trial court erred in failing to sustain objections to testimony that Shull had stolen items from two different stores on the same night he robbed the victim, "the uncontradicted evidence of guilt, namely, victim and police testimony identifying Shull as the gun-toting assailant who violently assaulted [the victim] in a robbery attempt, is so overwhelming, so that by comparison, the errors at issue are insignificant") (internal quotation marks omitted). Appellant's Rule 404(b) arguments merit no relief.

Appellant next challenges the denial of his pretrial motion to suppress his statements and the DNA test results. Specifically, Appellant contends

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that he was subjected to a custodial interrogation at the time he gave a buccal swab and his statement indicating that he had indeed grabbed J.Z. from her bike, without first being advised of his rights pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966). Appellant's brief at 32-34.

"Our law is well settled that an individual is entitled to ***Miranda*** warnings only when he is subject to a custodial interrogation." ***Commonwealth v. Witmayer***, 144 A.3d 939, 948 (Pa.Super. 2016). However, we need not examine whether, or at what point, Appellant became the subject of a custodial interrogation, because the record is clear that Appellant was in fact advised of his ***Miranda*** rights at the beginning of each interview.

Trooper Martini testified at the hearing on Appellant's suppression motion that she called Appellant to request that he come to the police station for an interview. N.T. Omnibus Pretrial Motion Hearing, 10/2/15, at 19-21. Appellant agreed, drove himself to the station, and signed the visitor's log. ***Id.*** at 21. Trooper Martini began the interview by advising Appellant of his ***Miranda*** rights, and Appellant gave both written and oral waivers of those rights. ***Id.*** at 22.

Although he did not admit to attacking J.Z. during the interview with Trooper Martini, she noted that Appellant showed "deceptive behaviors" and "made some incriminating statements." ***Id.*** at 27. She asked Appellant if he would be willing to give a DNA sample. ***Id.*** at 28. Appellant consented

without hesitation, stating that "he didn't have anything to hide," and provided the buccal swab. ***Id.*** at 28-29.

Trooper Martini also asked Appellant if he was willing to be interviewed by Corporal Mahalko, and Appellant agreed. ***Id.*** at 270. Corporal Mahalko indicated that it would take him approximately ninety minutes to get there, but Appellant indicated that he had no problem with waiting. ***Id.*** at 28.

When Corporal Mahalko arrived, he began his interview by again giving Appellant ***Miranda*** warnings, which is his practice for all interviews whether the interviewee is in custody or not. ***Id.*** at 73-74. Appellant acknowledged his rights and indicated that he was willing to talk to Corporal Mahalko. ***Id.*** at 74. After Corporal Mahalko brought up the apology letter found in J.Z.'s mailbox, Appellant initially persisted in his denials, but then admitted that he had done it, thinking that it was J.Z.'s sister. He had waited in the lane to meet J.Z.'s sister, with sweatpants covering his face so she would not see him. ***Id.*** at 78. Not realizing it was the wrong person, he went up to her when she came by on her bike and said he wanted her to come into his truck to talk to him. ***Id.*** at 76. J.Z. got scared and fell down, and Appellant grabbed her by the wrist, pulling her up and saying "come into the truck and talk to me." ***Id.*** at 76-77.

The trial court credited the testimony of both Trooper Martini and Corporal Mahalko. Trial Court Opinion, 2/20/17, at 2. Appellant offers no argument that there was any deficiency in either the ***Miranda*** warnings or

Appellant's waiver of his rights. Accordingly, we, like the trial court, are "confused at [Appellant's] pursuit of this issue on appeal." ***Id.*** at 3. We discern no merit in Appellant's contention that a ***Miranda*** violation warrants suppression of his statements or the DNA evidence.[7]

Having concluded that the evidence was sufficient to sustain Appellant's convictions and that none of the alleged evidentiary errors warrants the grant of a new trial, we turn to his challenge to the discretionary aspects of his sentence. The following principles apply to our review.

> An appellant is not entitled to the review of challenges to the discretionary aspects of a sentence as of right. Rather, an appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction. We determine whether the appellant has invoked our jurisdiction by considering the following four factors:
>
> > (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.[] § 9781(b).

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[7] In his brief, Appellant also asserts that the trial court committed reversible error in not giving Appellant's trial counsel sufficient opportunity to review the transcripts of his interviews with Trooper Martini and Corporal Mahalko. Appellant's brief at 37. This issue was not raised in his 1925(b) statement or addressed by the trial court, and therefore it is not properly before this Court. ***Commonwealth v. Hill***, 16 A.3d 484, 494 (Pa. 2011) ("[A]ny issues not raised in a Rule 1925(b) statement will be deemed waived[.]").

Commonwealth v. Samuel, 102 A.3d 1001, 1006-07 (Pa.Super. 2014) (some citations omitted).

Appellant filed a notice of appeal after preserving his issues by including them in a motion to modify sentence and his Pa.R.A.P. 1925(b) statement. Further, Appellant's brief contains a statement pursuant to Pa.R.A.P. 2119(f), in which he claims that the trial court's imposition of the statutory maximum sentence was excessive under the circumstances, including the fact that he had no prior record; was based upon factors not supported by the record; and lacked sufficient basis for deviating from the guidelines. Appellant's brief at 13. Appellant has raised substantial questions. ***See, e.g., Commonwealth v. Garcia-Rivera***, 983 A.2d 777, 780 (Pa.Super. 2009) ("[A] claim the trial court failed to state its reasons for deviating from the guidelines presents a substantial question for review."); ***Commonwealth v. Simpson***, 829 A.2d 334, 338 (Pa.Super. 2003) ("[A] claim that the sentence is excessive because the trial court relied on impermissible factors raises a substantial question."). Accordingly, we proceed to the merits of his arguments.

> [T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. [A]n abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest

> unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.
>
> Where the trial court deviates above the guidelines, this Court may only vacate and remand a case for resentencing if we first conclude that the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable. Although the Sentencing Code does not define the term unreasonable, our Supreme Court has made clear that rejection of a sentencing court's imposition of sentence on unreasonableness grounds [should] occur infrequently, whether the sentence is above or below the guideline ranges, especially when the unreasonableness inquiry is conducted using the proper standard of review.

Commonwealth v. Bullock, 170 A.3d 1109, 1126 (Pa.Super. 2017) (internal quotation marks and citations omitted).

Here, the trial court sentenced Appellant to the maximum penalty allowed by law for attempted kidnapping: ten to twenty years.[8] Appellant notes that, with a prior record score of zero and an offense gravity score of nine, the applicable standard range of the guidelines called for a sentence of twelve to twenty-four months imprisonment, and twenty-five to thirty-six months in the aggravated range. Appellant's brief at 39.

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[8] At the sentencing hearing, the Commonwealth recommended "a serious upward departure from the guidelines," namely an aggregate sentence of ten to twenty-seven years, claiming Appellant should be under supervision for the rest of his life. N.T. Sentence Hearing, 11/4/16, at 10-11. However, the trial court held that all of Appellant's other convictions merged with the attempted kidnapping conviction for sentencing purposes, and sentenced him only on the latter charge. ***Id.*** at 38. The Commonwealth has not appealed the trial court's ruling on merger.

Appellant maintains that the upward deviation from the guidelines was an abuse of discretion for several reasons. First, Appellant suggests that there was minimal harm caused, arguing the incident lasted only a few minutes, J.Z. suffered no significant injuries, Appellant promptly left an apology note, and Appellant had no prior criminal record. ***Id.*** at 40. Appellant also claims that the trial court failed to consider the guidelines at all, and instead rejected them outright because it thought they were too low for any kidnapping case. ***Id.*** Further, Appellant indicates that the record did not support factual assertions the trial court made in support of its sentence, such as that there was "extreme premeditation" and that Appellant continued to seek contact with J.Z. after the incident. ***Id.*** at 40-41.

Prior to imposing Appellant's sentence, the trial court considered the statements of counsel and a pre-sentence investigation report, including letters from Appellant and many members of his family. After acknowledging that Appellant has a good, supportive family, and that he has no reason to doubt that Appellant is, as they contended, a hard worker, the court offered the following discussion.

> I have seen absolutely no remorse from [Appellant]. He can sit there and say that he's sorry for today. I'm not exactly sure what he's sorry about.
>
> In his letter . . . in the very first paragraph, he's, he explains that he didn't intend to hurt, or harm her, which is one thing I guess you could say.

But his position is: He was just coming out of the lane, and it was just an accident that he happened to run into her. That, that's completely unsupported by any fact in the case.

. . . .

. . . I think he terrorized her, and I accept that as, as credible. He was forceful. He forcibly tried to get her into the car. . . . For him to tell me in his letter that this was just in some accident that he happened to come upon her, that's beyond the realm of imagination. It just is.

So for him to come in here today and say that I'm sorry. I don't know what he's apologizing for and -- because he hasn't taken acceptance of responsibility for anything that he did to this girl.

In fact, he took more responsibility for it in the, the letter he wrote to the family after he tried to take her in saying that I'm sorry for the wrestling match. To be honest with you, that's more of an apology than he's given at any other point during the proceedings.

Now, I don't take that as remorse because he did not say who it was. . . . I just see no remorse or, and I think in the bigger part for his rehabilitative needs[,] I see no appreciation for, one, how he scared the girl, how he affected the community in any way. Just, just no appreciation for those factors.

. . . .

This was not a chance encounter as [Appellant] would have me believe it. It wasn't even a situation I don't believe where he happened to see the girl and got the idea that he wanted to talk to her or take her in his car.

I believe the way the testimony came in, it is clear to me that he had planned this to great detail. The girl testified that she always rode home on the bikes with her friend. And as soon as she hit her driveway, she turned off, or peeled off from her friend, and from the end of her driveway to her house, which was I believe from the testimony a hundred yards or a couple hundred yards, it was only that stretch of area, and only during that time of day, that this girl was alone. And for him to be

sitting in the middle of that lane knowing that that's the only time this girl is alone causes me a great deal of concern in this case.

Because I [b]elieve for [Appellant] to know that he would have to observe this girl for a long period of time to know exactly when he could have gotten her alone. And as I listened to the testimony during the trial, I think that's the one factor that caused me a great deal of concern over the public safety for [Appellant].

Because there are very few cases that I have seen in this courtroom where I think the premeditation in this case was so great. Because he had to narrow down the time window of when she was alone, and narrow down an exact location of when she was alone in order to commit this crime.

The other factors are that he did forcibly injure her. There's testimony that there were marks on her, left on her. That there was a tear in her dress. I find that all as credible as well.

And add into the fact of . . . the premeditation prior to committing the crime. The testimony regarding his actions following the crime causes me great concern as well. Leaving a note for the victim's family to find that tries to -- he doesn't identify himself.

Now, ultimately it ended up identifying him. But he didn't identify himself, and he just tried to play it off as another, just some wrestling match with the girl.

The fact that he did that is, is anti-social. It's strange behavior. The fact that he followed up with visits to the girl's employment following the incident causes me great concern. Because it's evidence of the fact that not only did he do this to this girl, and plan it in a great manner, but he couldn't stay away from her.

He had to re-visit her, and continue to talk to her knowing that an investigation was going on. That's anti-social behavior.

I feel the guidelines are not indicative of the protection of the public and the gravity of the offense and his rehabilitative

> needs in this case. Quite frankly, I think the guidelines are low. Even on a normal kidnapping case, but as I see this one. . .
>
> I keep trying to see a situation where I feel comfortable in an, in sentencing anything less than the maximum in the kidnapping. And I do not see what -- I can't arrive at it. I cannot arrive at it.
>
> Given that this was a child, given the extreme premeditation that was involved in the case, given his lack of remorse, a lack of appreciation of what he did to this girl, her terror that was involved in it, and the fact that he just kept following up with contact with her just heightens the protection of the public in the case that I believe, and the gravity of the offense, and his rehabilitative needs being that incarceration is needed in this case. I just am, I cannot be left with any other result other than a maximum on the, on the kidnapping. I just cannot.

N.T. Sentencing Hearing, 11/4/16, at 30-36 (unnecessary capitalization omitted).

Contrary to Appellant's arguments, we find the trial court's reasoning supported by the record. Appellant's anonymous apology letter does not reflect acceptance of the impact of his actions. The evidence at trial, discussed at length above, fully supports the trial court's characterization of the attempted kidnapping as being meticulously planned and based upon extensive observation of these young women. Appellant's claim that he just happened to be in the driveway when J.Z. returned to her home in the dark reveals his complete lack of acceptance or remorse for his guilt. The evidence at trial also showed that Appellant continued to pursue contact with the Mennonite girls after the incident, as Ruthann testified that Appellant

continued to come to J.Z.'s workplace in the winter of 2015, which was during the Troopers' investigation. N.T. Trial, 3/17/16, at 215-16.

Moreover, from our foregoing review of the sufficiency of the evidence to sustain Appellant's convictions, it is clear that the terror and physical harm caused to J.Z. were not elements of the crime of attempted kidnapping already accounted for by the offense gravity score. Indeed, as the statute is written, a kidnapping can be accomplished without the victim even being aware that he or she has been kidnapped. The trial court's reliance on those particular factors in Appellant's perpetration of this attempted kidnapping, as well as J.Z.'s minority and Appellant's lack of remorse, therefore, justifies an upward deviation from the guidelines range. ***Accord Commonwealth v. Walls***, 926 A.2d 957, 967 (Pa. 2007) (holding trial court acted within its discretion in considering extreme youth of the granddaughter-victim and defendant's position of trust in deviating from the guidelines and imposing statutory maximum sentences for rape and involuntary deviate sexual intercourse with a victim less than thirteen years old). While the sentence is undoubtedly harsh, we cannot conclude that it constituted an abuse of the trial court's discretion.

Appellant also argues that the trial court erred in failing to give a contemporaneous statement of its reasons for deviating from the guidelines as is required by 42 Pa.C.S. § 9721(b). The on-the-record discussion detailed above satisfies that requirement. ***See Commonwealth v. Rodda***,

723 A.2d 212, 216 (Pa.Super. 1999) (*en banc*) ("[W]hen imposing sentence, a trial court has rendered a proper 'contemporaneous statement' under section 9721(b) . . . so long as the record demonstrates with clarity that the court considered the sentencing guidelines in a rational and systematic way and made a dispassionate decision to depart from them.").

None of Appellant's arguments convinces us that the trial court's imposition of the statutory maximum sentence for attempted kidnapping was "manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." ***Bullock***, ***supra*** at 1126. Hence, we find no abuse of discretion.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/8/2018