

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CRIMINAL DIVISION**

**COMMONWEALTH OF
PENNSYLVANIA**

vs.

NICHOLAS BOSSONS,

Defendant.

No.: C-48-CR-794-2014

**PENNSYLVANIA RULE OF APPELLATE PROCEDURE
1925(a) STATEMENT**

AND NOW, this 20th day of July, 2016, the court issues the following statement:

Following a jury trial, sentencing, and denial of post-trial motions, on May 31, 2016, Defendant Nicholas Bossons ("Bossons") filed and served upon this court a Notice of Appeal¹ to the Superior Court of Pennsylvania. On June 30, 2016, pursuant to our request under Pa.R.A.P. 1925(b), we received Bossons's Statement of Matters Complained of on Appeal. For the

¹ On December 29, 2016, Bossons filed a petition pursuant to the Post-Conviction Rights Act asserting, in part, that his trial counsel was ineffective for failing to file a Notice of Appeal to the Superior Court of Pennsylvania. See *generally* Motion for Post Conviction [sic] Collateral Relief, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Dec. 29, 2014). Following a hearing on Bossons's Post-Conviction Rights Act petition and upon the agreement of the parties, we entered an order reinstating Bossons's appellate rights and directing Bossons to file a Notice of Appeal by June 3, 2016. See Order of Court dated May 27, 2016, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. May 27, 2016).

reasons that follow, we respectfully suggest that Bossons's appeal lacks merit and should be dismissed.

BACKGROUND

I. Events Underlying Charges

On January 11, 2014, Sergeant Robert Kromer ("Sergeant Kromer") and Officer David Horvath ("Officer Horvath") responded to 808 East Morton Street, Bethlehem, Northampton County, Pennsylvania, in reference to a report that a man had been stabbed. See Transcript of Proceedings of Dec. 1, 2014 at 32-35, 44, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Feb. 19, 2015) ("N.T. Trial Dec. 1"). Upon arrival at the scene, Sergeant Kromer and Officer Horvath found the victim, Jeffrey Janos ("Janos"), lying on the front steps to his house with multiple stab wounds to his body. See *id.* at 33-35, 45. Sergeant Kromer entered Janos's house to find large amounts of blood as well as evidence that a videogame console had been recently removed from the property. See *id.* at 37. Janos was transported to St. Luke's Hospital, where he underwent numerous surgeries for stab wounds to his head, arm, and leg. See Transcript of Proceedings of Dec. 3, 2014 at 27, 79-82, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Feb. 19, 2015) ("N.T. Trial Dec. 3").

Approximately twenty-five minutes later, Officers Albert Strydesky ("Officer Strydesky") and Russell Lande ("Officer Lande") responded to

reports of a domestic disturbance at 940 East Fourth Street, Apartment 104, Bethlehem, Northampton County, Pennsylvania. See Transcript of Proceedings at 56-57, 82, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Feb. 19, 2015) (“N.T. Trial Dec. 2”). When Officers Strydesky and Lande arrived on scene, they were invited into the apartment where they observed blood on Bossons and in several areas of the apartment. See *id.* at 58, 69, 83, 85. Officers Strydesky and Lande questioned Bossons about the reported domestic disturbance and the blood until Bossons rose from his chair and attempted to flee. See *id.* at 59-62, 72, 75, 87. Officer Lande grabbed Bossons in an attempt to stop him from fleeing, but Bossons resisted, elbowing Officer Lande in the mouth, causing bruising and swelling to Officer Lande’s upper lip. See *id.* at 63, 89-91. The officers were eventually able to handcuff Bossons, and as Officer Strydesky was leading Bossons to a police car, Bossons indicated that he resisted the officers because he believed there was a warrant for his arrest due to his failure to return to Lehigh County Prison work release. See *id.* at 63-65, 90.

Upon leaving 808 East Morton Street, Officer Horvath was directed to 940 East Fourth Street to assist Officers Strydesky and Lande. See N.T. Trial Dec. 1 at 46. Officer Horvath entered 940 East Fourth Street, and observed blood on the doors, carpet and walls of the apartment, as well as on a white bag located within the apartment. See *id.* at 48-51; N.T. Trial Dec. 2 at 41. Officer Horvath opened the white bag and discovered

sneakers, a videogame console, and three cell phones. See N.T. Trial Dec. 2 at 41. Upon discovering these items, Officer Horvath began to suspect that Bossons might be involved with the incident at 808 East Morton Street, and informed Sergeant Kromer of his suspicion. See *id.* at 40-41.

Prior to placing Bossons in the police vehicle, Officer Lande searched Bossons and found a folding knife in Bossons's front pocket. See *id.* at 92, 142. Officer Lande took Bossons into custody and transported him to the Bethlehem Police Department. See *id.* at 95. While in route to the Bethlehem Police Department, in response to Officer Lande's questioning about Bossons's earlier behavior, Bossons told Officer Lande that "I'm a piece of shit and I'm wanted and I'm on work release." *Id.* at 96.

Once Bossons was transported to the Bethlehem Police Department, he was interviewed by Detective Moses Miller ("Detective Miller"), who suspected, based on information from Sergeant Kromer, that Bossons was involved with the attack on Janos. See N.T. Trial Dec. 3 at 165-66. Bossons initially denied having contact with Janos, but eventually admitted that he met Janos the night of January 11, 2014 at Good Times Bar, walked with Janos to Janos's home, and then stabbed Janos multiple times. See *id.* at 168-71, 182, 238. Bossons also admitted attacking Officer Lande in order to avoid being sent back to prison due to an active warrant for not returning to the Lehigh County Prison work release facility. See *id.* at 210. The videogame console and cell phones that Officer Horvath discovered in

Bossons's apartment were eventually identified as Janos's property. *See id.* at 34-37. Janos's injuries placed him at a substantial risk for death and required multiple surgeries to repair. *See id.* at 27-28, 85-90.

On January 13, 2014, Bossons was charged with Attempted Criminal Homicide,² Aggravated Assault – causing or attempting to cause serious bodily injury,³ Aggravated Assault – causing or attempting to cause bodily injury with a deadly weapon,⁴ two counts of Aggravated Assault – causing or attempting to cause bodily injury to a police officer,⁵ Robbery – serious bodily injury,⁶ Possession of an Instrument of Crime⁷, Recklessly Endangering Another Person,⁸ and Resisting Arrest.⁹ *See Police Criminal Complaint, Commonwealth v. Bossons*, No. c-48-CR-794-2014 (C.P. Northampton Co. Jan. 13, 2014).

II. **Pre-Trial Proceedings**

A. *Guilty Plea*

On May 15, 2014, Bossons was formally arraigned on the charges stemming from the January 11, 2014 incident. *See Acknowledgement of Arraignment, Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. May 19, 2014). On July 2, 2014, following a pre-trial

² 18 Pa.C.S.A. §§901(a), 2501(a).

³ 18 Pa.C.S.A. §2702(a)(1).

⁴ 18 Pa.C.S.A. § 2702(a)(4).

⁵ 18 Pa.C.S.A. § 2702(a)(3).

⁶ 18 Pa.C.S.A. § 3701(a)(1)(i).

⁷ 18 Pa.C.S.A. § 907(a).

⁸ 18 Pa.C.S.A. § 2705.

⁹ 18 Pa.C.S.A. §5104.

conference, Bossons accepted a plea offered by the Commonwealth and pleaded guilty to one count of robbery,¹⁰ and two counts of aggravated assault.¹¹ See Sentencing Sheet, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Jul. 2, 2014) (“July Sentencing Sheet”); Transcript of Proceedings of July 2, 2014, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Jul. 23, 2014) (“N.T. July 2014”). During the oral guilty plea colloquy, Bossons expressed his satisfaction with trial counsel’s efforts in relation to Bossons’s case. See N.T. July 2014 at 7-8. Sentencing was deferred until September 26, 2014. See Order of Court, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Sept. 3, 2014). Counsel for the Commonwealth and Bossons submitted sentencing memoranda, each setting forth that party’s position on sentencing. See Commonwealth’s Sentencing Memorandum, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Sept. 10, 2014); Current Defense Counsel’s Abridged Sentencing Memorandum, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Sept. 15, 2014).

B. *Withdrawal of Guilty Plea*

On September 26, 2014, Bossons appeared in court and stated that he wanted to withdraw his guilty plea rather than proceed to sentencing. See *generally* Transcript of Proceedings of September 26, 2014, *Commonwealth*

¹⁰ 18 Pa.C.S.A. § 3701(a)(1)(i).

¹¹ 18 Pa.C.S.A. §§ 2702(a)(1), (a)(2).

v. Bossons, No. C-48-CR-794-2014 (C.P. Northampton Co. May 6, 2016) (“N.T. Sept. 2014”). Counsel for the Commonwealth did not oppose this motion. See N.T. Sept. 2014 at 8. On September 26, 2014, we entered an order permitting Bossons to withdraw his guilty plea and to proceed to a jury trial scheduled for December of 2014. See *id*; Order of Court, *Commonwealth v. Bossons*, No. C-48-Cr-794-2014 (C.P. Northampton Co. Sept. 26, 2014).

C. Bossons’s Dissatisfaction with Trial Counsel

On October 17, 2014, the parties appeared in court and discussed the potential for Bossons to enter into another guilty plea agreement with the Commonwealth. See *generally* Transcript of Proceedings of Oct. 17, 2014, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Jan. 26, 2015) (“N.T. Oct. 2014”). Trial counsel recommended that Bossons accept the Commonwealth’s offer of a guilty plea with an agreed-upon sentence of a minimum period of thirteen years to a maximum period of twenty-six years in prison, which was significantly less than the prior offer Bossons had received. See N.T. Oct. 2014 at 4. Bossons indicated that he did not wish to take the plea deal offered, and for the first time, on the record, voiced his concern about his trial counsel. See N.T. Oct. 2014 at 5-8. Bossons seemed particularly concerned about the fact that his trial counsel recommended that Bossons accept the offered plea deal. See N.T. Oct. 2014 at 5-8. However, despite his voiced dissatisfaction, Bossons did

not indicate that he wished to have trial counsel replaced. *See generally* N.T. Oct. 2014.

D. *Commonwealth's Motion in Limine*

On November 18, 2014, the Commonwealth filed a motion *in limine* seeking to admit statements that Bossons made to Officer Strydesky, Officer Lande, and Detective Miller on the night of Bossons's arrest. *See generally* Commonwealth's Motion in Limine to Introduce Defendant's Statements, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Nov. 18, 2014) ("Commonwealth's Motion"). On November 25, 2014, we granted the Commonwealth's motion, and permitted the Commonwealth to introduce evidence of the following:

- 1) that while being escorted to the police car, Bossons informed Officer Albert Strydesky that he was on work release and may have a warrant for his arrest;
- 2) that while in the police car in route to the Bethlehem Police Department, Bossons told Officer Russell Lande "I know I'm a piece of shit, I'm wanted because I haven't returned to work release;" and
- 3) that while at the Bethlehem Police Department, Bossons explained to Officer Moses Miller that he wanted to escape from Officer Russell Lande because he knew that otherwise he would be returned to jail because of a warrant for not returning to the Lehigh County Prison work release facility.

Order of Court dated Nov. 25, 2014, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Nov. 25, 2014) ("Nov. 2014 Order"). In addition to allowing the Commonwealth to introduce these

statements, we also provided that the following jury instruction would be read to the jury at the time of trial:

You have heard evidence tending to prove that the defendant was guilty of an offense for which he is not on trial. I am speaking of the testimony to the effect that the defendant was released from prison on work release at the time of his arrest. This evidence is before you for a limited purpose, that is, for the purpose of tending to show the defendant's motive and intent for the alleged aggravated assault of Officer Russell Lande. This evidence must not be considered by you in any other way than for the purpose I just stated. You must not regard this evidence as showing that the defendant is a person of bad character or criminal tendencies from which you might be inclined to infer guilt.

Nov. 2014 Order at 2 (citing Pa. SSJI (Crim.), § 3.08 (2006)).

III. **Trial and Sentencing**

A. *Bossons's Jury Trial*

On December 1, 2014, Bossons appeared for a jury trial. See *generally* N.T. Dec. 1. Prior to the commencement of trial, the Commonwealth withdrew the charges of Recklessly Endangering Another Person, 18 Pa.C.S.A. § 2705, and Aggravated Assault, 18 Pa.C.S.A. § 2702(a)(2). See Criminal Information, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. May 7, 2014). Bossons pleaded not guilty to all of the remaining charges in the Criminal Information and proceeded to a jury trial. See Criminal Information. Over the course of the next three days, the Commonwealth presented the testimony of Patrick Malloy, Richard Vasquez, Sergeant Kromer, Officer Horvath, Officer Strydesky, Officer Lande, Marco Nieves, Janos, Dr. Peter Thomas, Joe

Kukosky, and Detective Miller. *See generally* N.T. Dec. 1; N.T. Dec. 2; N.T. Dec. 3; Transcript of Proceedings of Dec. 4, 2014, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Dec. 4, 2014) (“N.T. Dec. 4”). At the time of Officer Strydesky’s testimony, the court recited the limiting instruction concerning Bossons’s testimony relating to his work release status. *See* N.T. Dec. 2 at 68. Following the presentation of the Commonwealth’s case, Defendant recalled Janos. *See id.* Bossons chose not to testify himself, and presented no additional witnesses on his behalf. *See* N.T. Dec. 4. On December 4, 2014, the jury convicted Bossons of all the counts in the Information. *See* Verdict Sheet, *Commonwealth v. Bossons*, C-48-CR-794-2014 (C.P. Northampton Co. Dec. 4, 2014); N.T. Trial Dec. 4 at 121-124.

B. Sentencing

On February 20, 2015, Bossons appeared for sentencing. *See generally* Transcript of Proceedings, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Mar. 3, 2015) (“N.T. Sentencing”). Bossons, through his attorney, indicated that he reviewed the Pre-Sentence Investigation and found it to be factually accurate. *See id.* at 14. Bossons also reviewed the guideline calculations on the Sentencing Guideline Forms and acknowledged that the calculations were correct. *See id.* at 15. The calculations indicated that Bossons had a prior record score of five. *See id.* at 10; Guideline Sentencing Form dated Feb. 20, 2016, *Commonwealth v.*

Bossons, No. C-48-CR-794-2014 (C.P. Northampton Co. 2013). Further, based upon the jury finding that Bossons used a deadly weapon in the commission of his crimes, the court found that the deadly weapon enhancement applied to Bossons's sentencing. See *id.* at 11; Verdict Sheet.

Bossons was sentenced to (1) serve a term of imprisonment for a minimum period of nineteen years to a maximum period of thirty-eight years for the charge of criminal attempt to commit murder, causing serious bodily injury with a deadly weapon used; (2) serve a term of imprisonment for a minimum period of nine years to a maximum period of eighteen years for the charge of robbery with a deadly weapon used; (3) serve a term of imprisonment for a minimum period of eight years to a maximum period of sixteen years for the charge of aggravated assault, causing serious bodily injury with a deadly weapon used; (4) serve a term of imprisonment for a minimum period of two years to a maximum period of four years for the charge of aggravated assault, causing or attempting to cause bodily injury to a police officer; (5) serve a term of imprisonment for a minimum period of one year to a maximum period of two years for the charge of possession of an instrument of a crime; and (6) serve a term of imprisonment for a minimum period of six months to a maximum period of one year for the charge of resisting lawful arrest. See *id.* at 40-41. Bossons was not sentenced on aggravated assault, causing or attempting to cause serious bodily injury with a deadly weapon used in relation to his attack on Janos, as

we found that this charge merged with attempted murder for the purposes of sentencing. *See id.* at 41.

The court ordered that the sentence of imprisonment and parole for the charge of robbery to run consecutively to the sentences of imprisonment and parole for the charges of attempted murder and aggravated assault, causing or attempting to cause bodily injury to a police officer. *See id.* Conversely, the court ordered that the sentences of imprisonment for aggravated assault, causing serious bodily injury with a deadly weapon used, possession of an instrument of crime and resisting arrest, were to run concurrently to all other sentences. *See id.* Therefore, Bossons was ordered to serve a total term of imprisonment for a minimum period of thirty years to a maximum period of sixty years. *See id.*

IV. Bossons's Post-Trial Motions and Appeal

A. Post-Trial Motions

On March 2, 2015, following the imposition of sentence, trial counsel filed a motion for reconsideration, asking that the court modify or reduce Bossons's sentence of imprisonment. *See* Motion for Reconsideration, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Mar. 2, 2015). On March 8, 2015, Bossons wrote a letter to the court, asking permission to supplement trial counsel's post-trial motion with claims of violations of the Confrontation Clause and invalidity of a police photograph array. *See* Attachment to Order of Court dated Mar. 18, 2015,

Commonwealth v. Bossons, No. C-48-CR-794-2014 (C.P. Northampton Co. Mar. 18, 2015) (“March 2015 Letter”). Through his letter, Bossons raised the issue of ineffective assistance of counsel, alleging that trial counsel was ineffective for 1) failing to file pre-trial motions to suppress prejudicial evidence; 2) failing to object to the admission of prejudicial photographs; and 3) failing to keep Bossons informed of developments and progress in the case. See March 2015 Letter at 2. On March 18, 2015, we entered an Order directing the clerk of courts to send Bossons’s letter to trial counsel because Bossons was still represented by trial counsel, and therefore could not act as co-counsel in his case. See Order of Court dated Mar. 18, 2015, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Mar. 18, 2015). On June 4, 2015, we denied Bossons’s motion for reconsideration. See Order of Court dated June 4, 2015, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. June 4, 2015).

B. Post-Conviction Relief Act Petition

On December 29, 2015, Bossons filed a motion pursuant to the Post-Conviction Relief Act (“P.C.R.A.”), alleging that his appellate rights should be reinstated and he should be granted a new trial due to ineffective assistance of counsel. See *generally* Motion for Post-Conviction Collateral Relief, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Dec. 29, 2014) (“P.C.R.A. Petition”). The court received the motion on February 19, 2016 and appointed P.C.R.A. counsel for Bossons. See Order

of Court dated Feb. 19, 2016, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Feb. 19, 2016). Through his P.C.R.A. petition, Bossons asserted that his trial counsel was ineffective for numerous reasons, including that his trial counsel did not file an appeal from the denial of Bossons's motion for reconsideration. *See generally* P.C.R.A. Petition. Following a hearing on Bossons's P.C.R.A. petition, counsel for the Commonwealth and Bossons's P.C.R.A. counsel agreed that the most appropriate course of action to dispose of Bossons's P.C.R.A. petition would be to have the court reinstate Bossons's appellate rights. *See* Order of Court dated May 27, 2016, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. May 27, 2014) ("May 2016 Order"). Based upon the agreement of the parties, we entered an Order on May 27, 2016 reinstating Bossons's appellate rights and directing Bossons to file a Notice of Appeal by June 3, 2016. *See* May 2016 Order.

C. *Appeal*

On May 31, 2016, Bossons filed a Notice of Appeal to the Pennsylvania Superior Court. *See* Notice of Appeal, *Commonwealth v. Bossons*, C-48-CR-794-2014 (C.P. Northampton Co. May 31, 2016). On appeal:

1. [Bossons] complains that the trial court erred by granting the Commonwealth's Motion in Limine to introduce statements made by him.
2. [Bossons] claims the trial court abused its discretion by not permitting him to replace counsel before trial.

3. [Bossons] claims his trial counsel was ineffective preparing for trial and representing him at trial. Specifically, [Bossons] contends that counsel failed to object to the introduction of statements or evidence that should have been excluded, he failed to move for the suppression of [Bossons's] statements before trial, and he failed to assert a clear defense strategy.

Concise Statements of Matters Complained of Pursuant to Pennsylvania Rule of Appellate Procedure No. 1925(b), *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Jun. 30, 2016) ("Statement of Matters Complained of on Appeal").

DISCUSSION

I. Motion *in Limine*

Bossons contends that we erred by granting the Commonwealth's motion *in limine* to introduce statements made by Bossons at the time of his arrest. We believe that Bossons's statements were properly introduced as evidence tending to show motive under Pennsylvania Rule of Evidence 404(b)(2). Therefore, we respectfully suggest that Bossons's appeal should be dismissed.

A. Standard of Review

A motion *in limine* is a pre-trial motion made outside the presence of a jury "requesting a ruling or order from the trial court prohibiting the opposing counsel from referring to or offering into evidence matters so highly prejudicial to the moving party that curative instructions cannot alleviate an adverse effect on the jury." *Commonwealth v. Metzger*, 634 A.2d 228, 232 (Pa. Super. 1993) (additional citations omitted). "A trial

court's decision to grant or deny a motion *in limine* 'is subject to an evidentiary abuse of discretion standard of review.'" *Parr v. Ford Motor Co.*, 109 A.3d 682, 688 (Pa. Super 2014) (quoting *Commonwealth v. Reese*, 31 A.3d 708, 715 (Pa. Super. 2011) (*en banc*)). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1046 (Pa. 2003). Further, to constitute reversible error, "an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." *McClain ex rel. Thomas v. Welker*, 761 A.2d 155, 156 (quoting *Turney Medial Fuel, Inc. v. Toll Bros., Inc.*, 725 A.2d 836, 839 (Pa. Super. 1999)).

B. *Admission of Evidence*

Under the Pennsylvania Rules of Evidence, evidence must be relevant to be admitted in a court proceeding. *See Commonwealth v. Cook*, 952 A.2d 594, 612 (Pa. 2008). "Evidence is relevant if it tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact." *Commonwealth v. Drumheller*, 808 A.2d 893, 904 (Pa. 2002) *cert. denied*, 123 S. Ct. 2284; *see also* Pa.R.E. 401. "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402.

As an exception to the general rule of admissibility, Pennsylvania Rule of Evidence 404 provides that, even if evidence is relevant, “[e]vidence 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.” Pa.R.E. 404(b)(1). However, “evidence of a crime, wrong or other act” may be admissible into evidence for another purpose, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident” but only if the probative value of the evidence outweighs its potential for unfair prejudice.” Pa.R.E. 404(b)(2).

“‘Unfair Prejudice’ means a tendency to suggest decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.” *Commonwealth v. Tyson*, 119 A.3d 353, 360 (Pa. Super. 2015) (additional citations omitted). However, the trial court is not “required to sanitize the trial to eliminate all unpleasant facts from the jury’s consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged.” *Commonwealth v. Lark*, 542 A.2d 491, 501 (Pa. 1988). “Additionally, when examining the potential for undue prejudice, a cautionary jury instruction may ameliorate the prejudicial effect of the proffered evidence Jurors are presumed to

follow the trial court's instructions." *Commonwealth v. Hairston*, 84 A.3d 657, 666 (Pa. 2014) *cert. denied*, 135 S. Ct. 164, (U.S. 2014).

C. *Commonwealth's Motion in Limine*

As discussed above, the Commonwealth filed a motion *in limine* seeking to introduce the following statements: 1) Bossons's statement to Officer Strydesky that he fought the officers because he was in Lehigh County Prison work release and may have an active arrest warrant; 2) Bossons's statement to Officer Lande, "I know I'm a piece of shit, I'm wanted because I haven't returned to work release; and 3) Bossons's statement to Detective Miller that he tried to escape from Officer Lande because he knew that otherwise he would be returned to prison due to an active arrest warrant for not returning to the Lehigh County Prison work release facility. *See generally* Commonwealth's Motion. Through its motion, the Commonwealth argued that Bossons's statements to police officers concerning his escape from Lehigh County Prison work release were admissible at trial under Pennsylvania Rule of Evidence 404(b) because they "are relevant and demonstrate [Bossons's] intent and motive in resisting arrest and assaulting Officer Lande." Commonwealth's Motion at 3. Bossons opposed this motion, and argued that these statements should be excluded because the prejudice of the statements outweighed the probative value of the statements. *See* Defendant's Brief in Opposition to Commonwealth's

Motion in Limine to Introduce Defendant's Statements, *Commonwealth v. Bossons*, No. C-48-CR-794-2014 (C.P. Northampton Co. Nov. 25, 2014).

We conclude that these statements satisfy the exception to Pennsylvania Rule of Evidence 404(b)(2). First, we find that the statements meet the relevancy test, as they make the fact that Bossons resisted arrest and intentionally assaulted Officer Lande, more probable. While the statements themselves implicated Bossons's prior record, *i.e.*, that he was in the work release program and therefore must have a prior record, the statements meet the exception because they demonstrate Bossons's intent and motive for resisting arrest and assaulting Officer Lande. Through his statements, Bossons admits that he intentionally hit Officer Lande in order to escape police custody. These statements also demonstrate his motive for hitting Officer Lande, as he hoped if he escaped police custody, he would not be returned to jail on his outstanding warrant. *See Commonwealth v. Philistin*, 53 A.3d 1, 16-17 (Pa. 2012) (stating that defendant's undocumented immigration status at the time of his arrest "was relevant to show he had a motive to shoot the officers, lest he be deported").

Additionally, the probative value of Bossons's statements concerning his potential fugitive status to police officers outweighs its potential for unfair prejudice. The information about Bossons's escape from work release "should not be shielded from the factfinder merely because it is harmful to [Bossons]; the question is whether evidence of [Bosson's escape from work

release] would be **unduly** prejudicial.” *Commonwealth v. Tyson*, 119 A.3d 353, 361 (Pa. Super. 2015). We do not find that this information is unduly prejudicial. Bossons’s prior criminal history or the underlying conviction resulting in a work release sentence was never disclosed to the jury. See *Commonwealth v. Tedford*, 567 A.2d 610 , 621 n.4 (Pa. 1989) (explaining that trial court was correct in admitting evidence of a defendant’s work release status but excluding evidence of the underlying charges and Defendant’s prior criminal history). While this evidence may have prejudiced Bossons, we did not find that this prejudicial effect would be significant. Conversely, Bossons’s statements that he tried to escape police custody due to fear that he would be arrested on a warrant for escaping from Lehigh County Prison’s work release program provides significant evidence of Bossons’s intent and motive in resisting arrest and attacking Officer Lande. This evidence is extremely probative, as without the admission of Bossons’s statements, the Commonwealth would not be able to explain Bossons’s actions in assaulting Officer Lande. Therefore, weighing the relevant facts of the case, we believe that the probative value outweighs any prejudicial effect.

Finally, though we believe that the probative value of Bossons’s statements outweighed any prejudicial effect, we also believe that the cautionary jury instruction we read ameliorated any prejudicial effect of the statements. See Pa.R.E. 404(b) cmt; *Commonwealth v. Hairston*, 84 A.3d

657, 666 (Pa. 2014) *cert. denied*, 135 S. Ct. 164, (U.S. 2014). Following the admission of these statements, we read the jury the following instruction:

You have heard evidence tending to prove that the defendant was guilty of an offense for which he is not on trial. I am speaking of the testimony to the effect that the defendant was released from prison on work release at the time of his arrest. This evidence is before you for a limited purpose, that is, for the purpose of tending to show the defendant's motive and intent for the alleged aggravated assault of Officer Russell Lande. This evidence must not be considered by you in any other way than for the purpose I just stated. You must not regard this evidence as showing that the defendant is a person of bad character or criminal tendencies from which you might be inclined to infer guilt.

N.T. Dec. 2 at 68. As jurors are presumed to follow the trial court's instructions, we believe that this instruction minimized the risk that the statements inflamed the jury or caused it to convict Bossons on an improper basis. *See Hariston*, 84 A.3d at 666; *see also Commonwealth v. Sherwood*, 982 A.2d 483, 497-98 (Pa. 2009) (finding that cautionary instructions were sufficient to overcome any prejudicial effect of evidence of prior bad acts); *Commonwealth v. Williams*, 896 A.2d 523, 540 (Pa. 2006) (finding that any error in trial court's admission of prior bad acts was cured by the trial court's contemporaneous administration of a cautionary instruction, as well as its final instruction limiting the jury's consideration of the evidence of prior bad acts). Therefore, because we believe the statements were properly introduced pursuant to Pa.R.E. 404(b)(2), the probative value of the statements outweighs any prejudicial effect, and the cautionary instruction

reduced any prejudicial effects of the statement, we respectfully suggest that we did not err in admitting this evidence at Bossons's trial.

II. **Withdrawal of Counsel**

Bossons contends that we abused our discretion by preventing Bossons from replacing his counsel prior to trial. However, despite Bossons's contention, there is no evidence in the record that Bossons asked the court for replacement counsel, or for permission to terminate appointed counsel and proceed *pro se*, prior to trial. Without a clear statement from Bossons that he desired to proceed without his appointed attorney, we could not have removed his appointed attorney, or, as Bossons contends, prevented Bossons from replacing his trial counsel prior to trial. Therefore, we respectfully suggest that Bossons's allegation lacks merit and should be dismissed.

A. *Standard of Review*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. In order to ensure that all defendants receive the assistance of attorneys in criminal matters, the United States Supreme Court has held that states must provide indigent criminal defendants with appointed counsel. *See Gideon v. Wainwright*, 83 S. Ct. 792 (1963); Pa.R.Crim.P. 122(2) (stating counsel shall be appointed "in all court cases, prior to the preliminary hearing to all

defendants who are without financial resources or who are otherwise unable to employ counsel”).

However, the constitutional right to counsel of one’s choice is not absolute. Rather, the right of an accused individual to choose his or her own counsel, as well as a lawyer’s right to choose his or her clients, must be weighed against and may be reasonably restricted by the state’s interest in the swift and efficient administration of criminal justice. Thus, while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably clog the machinery of justice or hamper and delay the state’s efforts to effectively administer justice.

Commonwealth v. Lucarelli, 971 A.2d 1173, 1178-79 (Pa. 2009)

(additional citation omitted). Further, the Pennsylvania Supreme

Court has also noted:

[t]he situation is different for a defendant who is not employing counsel at his own expense, and who, at public expense, seeks court-appointed counsel. Such a defendant does not have a right to choose the particular counsel to represent him. Nor, after counsel has been appointed, can he change to other assigned counsel unless a substantial reason exists for the change.

Commonwealth v. Rucker, 761 A.2d 541, 542 n.1 (Pa. 2000) (internal citations omitted).

This “substantial reason” test is codified in Pennsylvania Rule of Criminal Procedure 122(c), which provides that “[a] motion for change of counsel by a defendant to whom counsel has been assigned shall not be granted except for substantial reasons.” Pa.R.Crim.P. 122(c)(2). “To satisfy this standard, a defendant must demonstrate that he has an irreconcilable difference with counsel that precludes counsel from representing him.”

Commonwealth v. Cook, 92 A.2d 594, 609 (Pa. 2008) (quoting *Commonwealth v. Spatz*, 756 A.2d 1139, 1150 (Pa. 2000)). “Whether a motion for change of counsel should be granted is within the sound discretion of the trial court and will not be disturbed on appeal absent abuse of discretion.” *Cook*, 92 A.2d at 609 (citing *Commonwealth v. Basemore*, 582 A.2d 861, 865 (Pa. 1990)).

B. *Bossons’s Dissatisfaction with his Trial Counsel*

While a review of the record reveals that Bossons expressed dissatisfaction with his attorney, we did not find that Bossons requested his counsel be replaced until after his trial. At Bossons’s initial guilty plea, Bossons reported that he was satisfied with the services of trial counsel. See N.T. Jul. 2014 at 7-8. On September 26, 2014, Bossons appeared in court and expressed his desire to withdraw his guilty plea, but did not express any desire to replace appointed counsel. See generally N.T. Sept. 2014. On October 17, 2014, we find the first instance of record where Bossons expressed dissatisfaction with trial counsel, but although Bossons did not appear pleased with trial counsel, he did not ask the court to replace trial counsel. See N.T. Oct. 2014 at 5-8. Following trial and sentencing, on March 8, 2016, Bossons sent a letter to the court expressing his belief that his trial counsel was ineffective. See March 2015 Letter. Subsequently, on December 29, 2015, Bossons filed a P.C.R.A. Petition alleging ineffective assistance of counsel, and requesting the appointment of new counsel. See

generally P.C.R.A. Petition. On February 19, 2016, once the court received Bossons's P.C.R.A. Petition, we appointed P.C.R.A. counsel for Bossons. See Order of Court dated Feb. 19, 2016.

Pursuant to the framework devised in *Gideon*, Bossons was provided with appointed trial counsel prior to his preliminary hearing. See 83 S. Ct. 792 (1963); Pa.R.Crim.P. 122(2) (stating counsel shall be appointed "in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel"). Bossons initially reported satisfaction with his counsel, and even once his relationship with trial counsel appeared to deteriorate, he did not make a motion to replace counsel. Bossons did not inform the court that there were irreconcilable differences with trial counsel until *after* trial and sentencing, when Bossons first alleged that he believed trial counsel was ineffective. See March 2015 Letter; Rucker, 761 A.2d at 542 .1 (indigent defendant cannot change to other assigned counsel unless he provides a substantial reason for the requested change). As Bossons did not make a motion to replace counsel until after trial and sentencing, it is axiomatic that we could not have abused our discretion by failing to honor his non-existent request and replace trial counsel prior to trial. Therefore, we respectfully suggest that we did not abuse our discretion by preventing Bossons from replacing trial counsel prior to trial, and that Bossons's claim should be dismissed.

III. **Ineffective Assistance of Counsel**

“As a general rule, a petitioner should wait to raise ineffective assistance of trial counsel until collateral review.” *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002). However, the Pennsylvania Superior Court has recognized two exceptions to this general rule, both within the discretion of the trial court. First, ineffective assistance of counsel is appropriately raised on direct appeal where “a discrete claim (or claims) of trial counsel ineffectiveness is apparent from the record and meritorious to the extent that immediate consideration best serves the interests of justice.” *Commonwealth v. Holmes*, 79 A.3d 562, 563 (Pa. 2013). Second, in a case where the defendant seeks to:

litigate multiple or prolix claims of counsel ineffectiveness, including non-record-based claims, on post-verdict motions and direct appeal, [the Pennsylvania Superior Court reposes] discretion in the trial courts to entertain such claims, but only if (1) there is good cause shown, and (2) the unitary review so indulged is preceded by the defendant’s knowing and express waiver of his entitlement to seek PCRA review from his conviction and sentence, including an express recognition that the waiver subjects further collateral review to the time and serial petition restrictions of the PCRA.

Id. at 563-64.

Here, because Bossons raises allegations of ineffective assistance of counsel on direct appeal, his claims must fit into one of the two exceptions to constitute issues properly raised on appeal. Bossons alleges that his trial counsel was ineffective for: 1) failing to object to the introduction of

statements or evidence that should have been excluded; 2) failing to move for the suppression of Bossons's statements before trial; and 3) failing to assert a clear defense strategy. See Statement of Matters Complained of on Appeal at ¶ 3. We do not find that Bossons's ineffective assistance claims fall into the first exception because his claim that trial counsel failed to assert a clear defense strategy is not something that can be determined solely from the existing record. See *id.* at 563. Further, Bossons's ineffective assistance of counsel claim does not fall within the confines of the second exception as Bossons did not waive his entitlement to seek P.C.R.A. review of his conviction and sentence. See *id.* at 563-64. Therefore, because Bossons's claims do not fall within the enumerated exceptions, we respectfully suggest that Bossons's ineffective assistance of counsel claims should be quashed on direct appeal.

CONCLUSION

For the reasons set forth above, we respectfully suggest that Bossons's appeal lacks merit and should be dismissed.

BY THE COURT:

/s/ Michael J. Koury, Jr.

MICHAEL J. KOURY, JR., J.