IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-0000581-2020**
v.	:	
	:	
TAJHEA NYREE SHULER,	:	**1925(a) Opinion**
Appellant	:	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's order dated October 7, 2024 granting post-conviction relief which reinstated Tajhea Shuler (Shuler)'s post sentence rights and appeal rights nunc pro tunc. As a result of this ruling, Shuler appealed this Court's sentencing order of December 19, 2023.

Shuler was charged with Aggravated Assault (causing serious bodily injury)[1] and Aggravated Assault (with a deadly weapon),[2] Simple Assault[3] and Recklessly Endangering Another Person[4]. Shuler was convicted of stabbing a convenience store clerk in the neck and after running away, he disposed of the knife that was used and removed some of the items he was wearing. Shuler's actions were captured on surveillance video and witnesses testified as to Shuler's behavior in the store. The jury found him guilty of the charges of Aggravated Assault (causing serious bodily injury), Simple Assault and Recklessly Endangering another person, and guilty but mentally ill on the lesser Aggravated Assault (with a deadly weapon) charge. Shuler was sentenced by this court on December 19, 2023 to 60-120 months to be

[1] 18 Pa. C.S.A. §2702(a)(1).
[2] 18 Pa. C.S.A. §2702(a)(4).
[3] 18 Pa. C.S.A. §2701(a)(1).
[4] 18 Pa. C.S.A. §2705.

served in a state correctional facility on the most serious charge, Aggravated Assault- serious bodily injury caused using the deadly weapon enhancement.[5] Because the jury found Shuler guilty rather than guilty but mentally ill for that charge, the Court did not hold a hearing under 42 Pa. C.S.A. § 9727. No post sentence motion or direct appeal was filed by trial counsel.

On June 3, 2024, Shuler filed a timely Post Conviction Relief Act (PCRA) petition, alleging that he wanted counsel to challenge his conviction and sentence but counsel failed to do so. With the agreement of the Commonwealth, the Court reinstated Shuler's rights to file a post sentence motion and a direct appeal. Rather than filing a post sentence motion, Shuler filed a timely appeal to the Superior Court on November 6, 2024. This Court directed Shuler to file a concise statement of errors complained of on appeal. On December 3, 2024 Shuler filed his concise statement in which he raised the following issues:

1. The Court erred in overruling the Defense Counsel's objection to Jonathan Sebastian O'Brien, II providing a legal opinion and allowing the witness to provide a summary of the legal statute.

2. The Court erred in overruling the Defense Counsel's objection to the Commonwealth's witness Jonathan Sebastian O'Brien, II, testifying to the Defendant invoking his 5th amendment right under the United States Constitution.

3. The empaneled jury found the Defendant guilty but mentally ill of only one count and found him guilty of the lesser included and additional counts which all stemmed from the same act and were not dissimilar from each other. The verdict is inconsistent and should not stand.

4. There was insufficient evidence to support the verdict.

[5] The Court imposed guilt without further penalty on the charge of aggravated assault (bodily injury with a deadly weapon) and found that simple assault and recklessly endangering another person merged for sentencing purposes.

5. Ineffective assistance of counsel existed when the Defense Counsel did not request a mistrial when the Defendant's 5th amendment rights were used against him.

6. The Court erred in sentencing the Defendant without an inquiry on whether the defendant was severely mentally disabled and in need of treatment at the time of sentencing pursuant to Title 42 §9727.

7. The Court erred in sentencing the defendant within the deadly weapon enhancement when the jury did not specifically decide on such a question strictly within Count I. The verdict slip did not pose such question for the jury at that count.

Trial Testimony

The first witness the Commonwealth called at trial was Amanda Perillo, the clerk at the Quick-Mart on Northway Road, Williamsport, Lycoming County. Notes of Testimony, 10/22/2023 at 25. She testified that she was working on Sunday, May 17, 2020. *Id.* She described that her usual work hours were shorter due to COVID. *Id.* at 26. But on that day, Shuler came into the store twice. *Id.* The first time he came in was around 2:30 pm with his aunt and the second shortly before the 7 pm closing. *Id.* She described him as just "browsing." *Id.* When she approached him to see if he needed any help he initially did not respond to her. *Id.* She asked him again if he needed help and that was when he stabbed her in the neck. *Id.* at 28. She testified that she needed to have surgery, will have two permanent scars and nerve damage in her one arm for the rest of her life. *Id.* The Commonwealth showed surveillance video for the store to corroborate what the Shuler did that day. *Id.* at 32. The parties also stipulated that Ms. Perillo suffered serious bodily injury from the attack. *Id.* at 29.

Next the Commonwealth called Jeremy Ault who was a customer in the Quick-Mart the day Ms. Perillo was stabbed. *Id.* at 33. He testified that he felt uncomfortable around Shuler while he was with his daughter, so he kept her close. *Id.* at 34. He told the jury that he heard Ms. Perillo tell Shuler that he needed to leave because when she asked him if he needed help he didn't say anything. *Id.* Although he could not hear anything Shuler was saying he did hear Ms. Perillo yell. *Id.* He approached her thinking that Shuler shoved her but she said to him, "oh my god he stabbed me." *Id.* Ault ran out the door to see where Shuler went and called 911. *Id.* at 35.

The Commonwealth then called Stephen Bowman, a Pennsylvania constable. *Id.* at 35. Bowman testified that he also has training as a first responder and belongs to Montoursville Fire Department. *Id.* He testified that he received a call from the Loyalsock Fire Police Captain about the dispatch at the Quick-Mart and he told him that he would head over there after he changed into his constable uniform. *Id.* at 36. Once he got there he would have contacted a trooper on the scene and helped them look for evidence of the crime. *Id.* Bowman identified three exhibits offered by the Commonwealth which were aerial photographs of the immediate vicinity of the Quick-Mart. *Id.* at 37. Bowman described that he would have walked east near an apartment complex next to Fairview Road. *Id.* Once there he observed a black male come out from behind the apartment building. *Id.* at 38. At that point he would have radioed 911 for a trooper to come and one came on scene almost immediately. *Id.* Bowman described the black male as acting "boisterous, loud, wouldn't stand still and occasionally throwing his arms up in the air." *Id*. On cross examination, Bowman said he would have been around the Shuler for about 10 to 15 minutes. *Id.* at 40. Although he saw Trooper Jacobs talking with Shuler, he did not hear what they were saying.

Id. at 41. When Shuler was taken into custody although Bowman was on scene he said he was "watching the back" and did not see anything. *Id.* at 42.

Trooper Robert Jacobs was then called to testify. Jacobs has been employed by the Pennsylvania State Police for five years and has specialized training as a drug recognition expert (DRE). *Id.* at 43. Jacobs also testified that because of that specialized training, he has more frequent contact with people under the influence than the regular trooper on patrol and is more familiar with how people under the influence behave. *Id.* at 43-44. At some point on May 20, 2023 he was dispatched to the area of the Quick-Mart on Northway Road to investigate an "aggravated assault slash stabbing" that had just occurred. *Id.* at 44. When he arrived on scene he contacted a black male with dreadlocks wearing a black top and jogging pants, walking east bound on Four Mile Drive. *Id.* at 45. He began talking to the male who was saying random things which he had difficulty hearing. *Id.* He told Jacobs that he "was Jesus" and he "knows how police are." *Id.* at 46. As he spoke with Shuler he was in full uniform with his marked unit. *Id.* Because of his training and experience, Jacobs believed that because of the way Shuler was sweating profusely, his movements and what he was saying, he thought that he might be under the influence of controlled substances. *Id.* at 46-47. Jacobs stated that Shuler did not match the clothing description of the actor from the Quick-Mart which was given so he was reluctant to take him into custody. *Id.* As Shuler began "closing the gap" closer to the apartments on Four Mile Drive, he went into apartment number 5. *Id.* Once inside, a woman came to speak with Jacobs who he identified as Shuler's aunt. *Id.* at 48. Shuler stood there while Jacobs spoke with the aunt who was trying to understand why PSP was talking to him. *Id.* Jacobs then radioed fellow Trooper Birth to get a better description of the actor. *Id.* At that point Trooper Shnyder met Jacobs and after

discussing the description of the actor, they believed that Shuler was the person that they were looking for. *Id.* Jacobs further testified that Trooper Gaines came to the scene and stayed with Constable Bowman to help keep an eye on Shuler so that he did not leave the scene. *Id.* at 51. Jacobs and Shnyder then began to look for evidence of the crime in the path they believed led from the Quick-Mart to the apartments on Four Mile Drive. *Id.* Shortly after they began, Jacobs said they found the knife used lying in a path between the Quick-Mart and the apartments. *Id.*

On cross examination, Jacobs said that he had been talking with Shuler for less than 5 minutes before he went into his aunt's apartment. *Id.* at 53. Jacobs believed that when Shuler was taken into custody outside of his aunt's apartment, he had been on scene for about 45 minutes. *Id.* at 55. Reports indicated that Jacobs came on scene at 7:30 pm and Shuler was taken into custody at about 8:11 pm. *Id.* at 56. He described Shuler's behavior when he tried to speak with him as being "confrontational" and that he did not want to speak with Jacobs as evidenced by Shuler walking away from the trooper toward the apartment building when Jacobs was trying to talk with Shuler. *Id.* at 57. Jacobs watched the surveillance video in preparation for the trial and agreed that in the Quick-Mart Shuler was wearing an olive jacket and two pairs of pants: black pants under jeans. *Id.* at 58.

Next to testify was retired Trooper Douglas Hoffman. At the time of the incident he was employed by the PSP in their Forensic Services Unit. *Id.* at 60. He was asked to come down to the scene to take photographs and gather evidence. *Id.* Hoffman noted that the temperature that evening was 62 degrees. *Id.* at 61. Once on scene he was directed to the steak knife lying on the ground in the driveway next to the flower shop. *Id.* He also took pictures of the path between the Quick-Mart and where Shuler was taken into custody. *Id.* at

65. Hoffman also assisted with a search warrant of Shuler's residence to search for the clothing that Shuler would have worn earlier in the day, especially if it had blood on it. *Id.* at 66. The sneakers were found on carpet just inside the front door. *Id.* at 67. The jeans were found on a pile in front of the washer /dryer and a black mask was found tucked into the washing machine. *Id* at 68, 70. The olive jacket was never found. *Id.* at 69. Hofmann did test the jeans for the presence of any blood and sent one sample out for testing. *Id.* On cross, Hoffman testified that the only thing he moved to photograph was the black mask. *Id.* The knife, shoes, and jeans were photographed exactly where they were found. *Id.* at 72.

The next witness for the Commonwealth was Trooper Garrett Shnyder. He testified that he worked on May 20, 2020 and was dispatched to the incident at the Quick-Mart. *Id.* at 73. Once there he received a general description of the suspect and spoke to the witness, Ault, who described the direction that the suspect left the store. *Id.* at 74. Shnyder walked in that direction toward Four Mile Drive. *Id.* at 75. Once there, he spoke with Trooper Jacobs and identified Shuler as generally matching the description of the suspect. *Id.* Shnyder went back to the Quick-Mart to review the surveillance video and confirmed that the individual with Jacobs was the suspect. *Id.* As he walked back to the apartment complex to tell the troopers there Shuler was not free to leave, Shnyder found a knife with what he thought was blood on it. *Id.* at 76. Shnyder testified that Trooper Keeler prepared a warrant and he was part of the warrant team that searched the residence and found the mask, jeans and sneakers. *Id.* Shnyder confirmed that they never were able to find the olive jacket. *Id.* On cross, Shnyder confirmed that the sneakers were found by the front door, jeans in a pile of the residence and the knife near the entrance to an apartment complex close to the Quick-Mart on the route back to Shuler's apartment. *Id.* at 84.

The Commonwealth also offered a number of stipulations in its case in chief. If called to testify, Corporal Christian Rankey from the PSP would testify that he has been a trooper for ten years, and he was currently the evidence custodian at PSP Montoursville. *Id.* at 78. He would testify on June 9, 2022 he delivered the knife, the blue jeans, and a DNA sample from Amanda Perillo to the Wyoming Regional Laboratory with no break in the chain of custody. *Id.* Next, Corporal Rebecca Parker, if called to testify, would testify that she collected a DNA sample from Amanda Perillo and secured the sample in evidence pending further testing. *Id.* Another stipulation was that if called to testify, serologist Kelsey Gober, would testify that she's been employed by the Wyoming Lab for six years, has a master's degree in forensic science, has testified as an expert on multiple occasions. *Id.* at 79. She would testify that she tested the knife recovered by Trooper Shnyder and a pair of jeans. *Id.* Gober would testify that a presumptive chemical test indicated the presence of blood on the blade of the knife, but confirmatory testing was negative. *Id.* She would also testify that she swabbed the handle and blade of the knife to prepare it for DNA testing. *Id.* Additionally, Gober would testify that she took a cutting from the left pocket of the jeans and prepared it for DNA analysis. *Id.* She also prepared DNA sample from Amanda Perillo for DNA analysis. *Id.* And all DNA samples we sent forward to the forensic DNA division for testing. *Id.* She would also authenticate the serology report entered as Commonwealth's exhibit # 27. *Id.*

Another stipulation was that if called to testify, Timothy Gavel of PSP Greensburg, would testify that he is a DNA expert and has been so employed for 18 years, and has testified as an expert previously. *Id.* at 80. He would testify that he received the evidence items: the swabs from the knife, and the cutting from the jeans, and the DNA sample from Amanda Perillo. *Id.* Gavel would testify that he analyzed the evidence items for the presence

of human DNA. *Id.* Gavel would also testify that Amanda Perillo' s DNA was found on the handle of the knife and on the stained area of the blade. *Id.* He would also testify that Amanda Perillo's DNA was present in the stain taken from the cutting of the left pocket of the jeans. *Id.* He would also testify that he prepared a report identified as Commonwealth's # 28. *Id.* at 81. The Commonwealth then rested its case in chief. *Id.*

On Defense, Shuler called one witness, Dr. Scott Scotilla, PhD. *Id.* at 87. He testified that he has a clinical private practice where he sees clients and a forensic practice where he does evaluations for court systems, attorneys and judges. *Id.* at 88. He is licensed as a clinical psychologist in both New York and Pennsylvania as well as a licensed addictions counselor. *Id.* He also sees individuals with co-occurring disorders. *Id.* at 92. The Commonwealth had no objection to his qualifications as an expert in clinical psychology. *Id.* at 93.

Scotilla testified that he examined Shuler about five weeks after the incident occurred. *Id.* at 94. After the examination, he found that he was legally insane at the time of the commission of the offense and prepared a report, entered into evidence as Defense exhibit #2. *Id.* He testified that he not only met with Shuler, but he reviewed records from Divine Providence Hospital and UPMC Williamsport along with a subsequent hospitalization at LifeCare in Pittsburgh. *Id.* at 97. He also performed tests of Shuler. *Id.* Scotilla stated that Shuler did pass the mini mental exam which is a memory screening device. *Id.* He performed a quick depression and anxiety measure, to identify if Shuler is suffering from anxiety or depression. *Id.* Scotilla also performed a Miller Forensic Assessment of Symptoms[6] test which he also passed. *Id.* He opined that there was consistency in discussing his symptoms and felt that he was suffering from psychosis with delusions and hallucinations that "had

[6] Although not explained by Scotilla, the Miller Forensic Assessment of Symptoms Test (M-FAST) is a 25-question interview that helps identify if someone is faking a psychiatric illness.

been going on for as recently as seven weeks prior to his hospitalization after the event". *Id.* at 99. Scotilla testified that then the question for him was his psychosis substance induced. *Id.* at 100. He testified that although Shuler said he had been using marijuana, during another involuntary hospitalization his urine was clean for marijuana metabolites. *Id.* Scotilla stated that in reviewing the medical records from his hospital stay in Pittsburgh, Shuler said that he stabbed a lady but that "the Devil made him do it." *Id.* at 103. Scotilla also identified that Shuler was diagnosed on two separate occasions with Bipolar disorder with psychotic features. *Id.* at 104. He also explained to the jury that psychosis has two different components hallucinations and delusions and if the psychosis is being caused by controlled substances, that when the substances are stopped the symptoms "would most likely "remit". *Id.* His conclusion was that since he could not have used bath salts or marijuana in between inpatient treatment stays, the psychosis was not substance induced. *Id.* at 106. Scotilla' s ultimate conclusion with a reasonable degree of psychological certainty was that Shuler was not criminally responsible because the actions were significantly affected by his mental health diagnosis. *Id.* at 107.

On cross examination, Scotilla testified that he was not provided with a copy of the 93-page (PSP) police report. *Id.* at 109 He acknowledged that it would contain information about how Shuler would have been behaving the day of the incident. *Id.* He also testified that he did not review the video footage of the incident as well. *Id.* at 110. Scotilla also acknowledged that he would have liked to have seen records of treatment prior to the offense when doing an evaluation like this but did not have the opportunity to review them. *Id.* He also was not provided with medical records from the Lycoming County Prison. *Id.* at 111. Scotilla also appeared to base much of his opinion on Shuler's behavior based upon his self-

report when he met for the evaluation. *Id.* at 112. The Commonwealth also asked if Scotilla had discussed Shuler's behavior with his aunt. *Id.* Shuler had only lived with her for about a week and she did not report any violence but she did notice an increase in agitation and irritability but that was not noted in his report. *Id.* The Commonwealth then quoted a portion of Scotilla' s report. *Id.* at 113. In it, Scotilla states

> Patient himself is a poor historian. Patient states in the last -- past three months, especially in the past seven weeks, he is experiencing racing thoughts, agitation, poor sleep, and irritability. Patient states his symptoms worsened after he started using bath salts with cannabis together. Patient states he is hearing voices. The voices are telling him to do certain things. Patient states he stabbed a woman with a knife in the neck last Sunday. Patient reports he does not recall. Patient notes the voices are talking to each other or sometimes talking to him. Patient was incarcerated. His family bailed him out from present.

Id. The Commonwealth asked Scotilla if using bath salts and marijuana could cause some serious symptoms of psychosis to which he agreed and that it could "exacerbate symptoms of bipolar with psychotic features". *Id.* at 114-115. Scotilla also agreed that withdrawal could also have symptoms of psychosis. *Id.* at 115. Scotilla also acknowledged that Shuler never admitted to him that he had used bath salts or that he stabbed the woman "because the Devil made him do it." 117-119. Scotilla acknowledged that in the two-hour interview Shuler said that he had no memory of the crime itself. *Id.* at 120. When asked about when he evaluates someone for legal insanity he "could" document the statements about their mindset at the time of the incident. *Id.* at 121.

On redirect trial counsel clarified that no one diagnosed Shuler with a substance induced psychosis. *Id.* at 123. His opinion was that no one ever followed up on the idea that his bath salts or marijuana usage contributed to his psychosis. *Id.*

On rebuttal, the Commonwealth called two witnesses. Dr. John O'Brien was called as the Commonwealth's psychiatric expert. O'Brien is licensed in Pennsylvania both as a lawyer and physician. *Id.* at 124. He practices clinical psychiatry where he sees and treats patients, and forensic psychiatry where he looks at individuals and cases for attorneys who refer them to him and express opinions about the individuals and their legal situations, as well as working directly for the criminal courts in Philadelphia where he does between 300-400 clinical evaluations of criminal defendants by court order. *Id.* at 124-125. He is board certified in forensic psychiatry and psychiatry. *Id.* at 125. O'Brien stated that he has testified as an expert on legal insanity since 1996 over 500 times. *Id.* at 126. He also testified that he works for both the Commonwealth and defense. *Id.* at 127. Through his work he has also gained a knowledge or understanding "about drugs of abuse and their effect on the human mind and body" and believes that now up to one-half of the patients he sees have concurrent drug abuse problems. *Id.* at 127. O'Brien testified that in preparation for his report, he reviewed the records regarding the incident from the PSP as well as Lycoming County Prison for the short time that Shuler was incarcerated. *Id.* at 130. He also reviewed records from UPMC Williamsport which included a number of different clinical contacts, one of which was an emergency room evaluation followed by a psychiatric hospitalization followed by a later emergency room visit. *Id.* at 131. He also reviewed records from LifeCare Behavioral Health Hospital located in Pittsburgh, as well as Scotilla's report. *Id.* O'Brien reviewed all of these records because he found many times he does an evaluation after a period of time has elapsed after the crime occurred and valuable information can be obtained when the police were involved very quickly. *Id.* at 132. Information such as

> "observations by police, communication with the defendant, and various different other aspects of the situation which are potentially

> very relevant to expressing an opinion about what was going on at the time, and what the person's mindset was at the time, and whether or not they meet the legal criteria or such a thing as an insanity defense."

Id. He ultimately interviewed Shuler at the Lancaster County District Attorney's office because he was living in Lancaster at the time. *Id.* Although Scotilla interviewed Shuler with a family member present, O'Brien does not do that. *Id.* He finds that family members sometime insert information into an evaluation which may or may not be helpful and their presence is disruptive to obtaining facts from the defendant. *Id.* at 133. If he needs information from family or others, he will do a collateral interview. *Id.* at 134.

The Commonwealth asked O'Brien about the interview Scotilla had with Shuler noted in his report. *Id.* at 134. Scotilla testified that Shuler said that he didn't remember what happened that day. *Id.* O'Brien testified that while that situation sometimes does occur, it is important to ask subjects about the offense because "it gets them to focus on the time period when the offense took place." *Id.* at 135. When O'Brien asked about the offense, Shuler told him that he

> was at home playing video games and then he retrieved a knife from the kitchen and walked over to the store where a lady told him he couldn't be there, and he stated, quote, that's when I stabbed her in the neck and I left. So there was really nothing about his report to me about what took place that was at all at odds with what the victim reported. In fact, the report of the victim was that she asked him to leave and he stabbed her, so it's pretty much exactly the same. He also did report this to a family member right after its occurrence. So, you know, it's a situation where it was clear to me that he did have recall, so it wasn't a memory problem. It's just that he was selectively reporting. He didn't remember in a context where not remembering might help him. And so that's what he -- that's how he responded to my questioning about the offense."

Id. at 135. O'Brien discussed the importance of drug use and that Scotilla did not have a full appreciation of the impact of bath salts on Shuler as stated in his report. *Id.* at 136. O'Brien

testified that he believed that understanding Shuler's use of drugs was important to identify what was going on at the time to help answer the legal question. *Id.* O'Brien stated that the legal question for insanity is if the individual has a mental health diagnosis, "whether as a result of that illness they were not able to have an appreciation of the nature and quality of their acts…. And they were also unable to -- to basically realize or understand -- comprehend that what they were doing was wrong under generally accepted societal standards." *Id.* at 137-138. O'Brien testified that to find an individual was insane at the time of the commission of the offense, it is not enough to "have symptoms and it affected my behavior." *Id.* at 138.

O'Brien explained the numerous actions Shuler took to show that he had an awareness of the nature and quality of his actions and that what he did was wrong. *Id.* at 138. Shuler fled the scene, changed his clothes and discarded the knife. *Id.* at 139. O'Brien explained that the clerk told him to leave the store and he told his aunt what had happened which matched the version given by Perillo and prior to Shuler going out "and giving the police a hard time". *Id.* Finally, O'Brien testified that the fact that Shuler was having mental health symptoms was not dispositive of his opinion on insanity. *Id.* at 141. The only connection with the symptoms is if that having that illness or those symptoms shows that the individual cannot appreciate the nature, quality and wrongfulness of the acts. *Id.* His role is to "look at the behavior at the time of the offense to determine whether or not the person was not able to appreciate the nature, quality, and wrongfulness [of the acts.] *Id.* He also testified that the absence of positive drug screens is not dispositive of drug use; it just means that when the person was tested, a negative test result was obtained. *Id.* at 145. O'Brien noted that when asked about bath salts use Shuler denied ever using them even though they are in his

records and when asked he did not respond to O'Brien. *Id.* at 143. O'Brien also testified that medical marijuana, the type that Shuler acknowledged that he was using is often stronger and associated with psychotic episodes. *Id.* O'Brien noted that Shuler did say that when he used marijuana and bath salts together it made his symptoms worse. *Id.* at 145. Although he and Scotilla have a difference of opinion on the diagnosis, O'Brien felt that it didn't matter. *Id.* His focus was on the question at hand, which was Shuler legally insane at the time the offense occurred and he opined that Shuler demonstrated he was able to understand the nature, quality, and wrongfulness of his actions, and therefore, under the law, is not an individual who is legally insane. *Id.* at 146.

On cross, O'Brien agreed that he interviewed Shuler on June 7, 2022 about two years after the incident. *Id.* at 148. He also affirmed that he believed that Shuler was aware of the nature and wrongfulness of his acts by his getting rid of the knife, changing clothes and fleeing. *Id.* at 149. He thought that the interview he held with Shuler was approximately 1 ½ hours long. *Id.* He also reaffirmed his opinion that Shuler's use of bath salts contributed to his behavior in this situation. *Id.* He supported his belief by saying that Shuler had reported no history of mental health problems, illness, treatment, before the incident, and since that time, he has been evaluated and treated and been given a psychiatric diagnosis. *Id.* O'Brien also opined that mental health evaluations often fail to rule out the influence of controlled substances. *Id.*

When challenged by trial counsel about the diagnosis he would make of Shuler, O'Brien explained that before he would diagnose Shuler he would take him off any medications to see exactly what would happen. *Id.* at 152. He felt that the nature of his symptoms and the onset despite no prior history is consistent with the use of drugs causing

symptoms. *Id.* at 154. Even though Shuler did not talk about his bath salt use in the mental health reports, O'Brien described Schuler's self-reported behavior of twitching as being consistent with bath salt use. *Id.* Trial counsel asked if there was any other notation in reports of Shuler's bath salt use, of which he could not find. *Id.* O'Brien also clarified that bath salts show up on urine screens as amphetamines. *Id.* at 156. He then reaffirmed that Shuler's rapid or sudden onset of symptoms is consistent with bath salts and marijuana use. *Id.* at 157.

In the interview, O'Brien asked Shuler about his past medical history and his past psychiatric history. *Id.* He testified that he reviewed the records and agreed that after both of his hospitalizations he was released with medications Zyprexa and Lithium. *Id.* at 158. However, when O'Brien interviewed Shuler, while Shuler told him that he had been attending outpatient counseling he could not identify where and O'Brien was not certain that he was still attending. *Id.* at 159. While O'Brien testified that Shuler said that the medication he was taking made him "feel calmer, stable, and relaxed, and, quote, keeps me out of the way, dot, dot, dot, feeling like I won't do nothing wrong" he did not tell O'Brien exactly what medication he was taking. *Id.* O'Brien concluded that prior to his commitment after the incident he was variably or limitedly compliant with his medication. *Id.* at 160.

O'Brien then read from the 302 petition filed that Shuler was talking about cell phone radiation affecting his thoughts and that "on 5/17 he stabbed a lady at a local convenience store and reported that, the devil made him do it." *Id.* at 162. He added that the paperwork said 'constantly talked about the devil and obsessed about God' *Id.* at 163. While the statements which were allegedly made by Shuler were contained in the most recent 302 petition, O'Brien was not sure who prepared the petition. *Id.* This petition was part of the

paperwork used to involuntarily commit Shuler weeks after the stabbing which resulted in him being sent to LifeCare. *Id*. at 164.

Trial counsel pointed out on cross that O'Brien noted that one of the factors that he relied upon to support his opinion that Shuler was not insane at the time of the offense was that this was a first and single act of aggression on Shuler's part. *Id.* at 164. Trial counsel also tried to connect Shuler's behavior to having a psychotic break while not being properly medicated. *Id.* at 165. O'Brien acknowledged that it was an interesting question, but he noted that the majority of psychiatrically ill persons are not aggressive. *Id.* He explained that major cities have large numbers of psychiatrically ill individuals living on the street, so typically psychiatric illness does not cause aggressive behavior but that drugs do. *Id.* O'Brien clarified his opinion by explaining that Shuler himself describes an aggravation of symptoms concurrently with the use of marijuana and bath salts. *Id.* Therefore, O'Brien concluded that the reason that Shuler was no longer exhibiting aggressive behavior was not because he was properly medicated, but because he is no longer using drugs. *Id.* at 166. O'Brien also added that the other consideration or "general thinking" about substance use and psychosis is that it can last for up to 30 days; you do not have to be using drugs continuously for the symptoms to persist, and then after a period of time without drug use, the symptoms begin to resolve on their own. *Id.* at 166. Trial counsel challenged O'Brien as to why Shuler might be taking medication without symptoms. *Id.* at 166. O'Brien opined that "there might be some incentives underlying his ongoing use of medications." *Id.* at 167. Lithium is an element and a mood stabilizer, often prescribed for bipolar disorder, and Zyprexa can cause sedation and weight gain. *Id.*

On redirect, O'Brien was asked if Shuler was "bipolar and stabbed someone" would it have changed his opinion that Shuler was not insane at the time of the stabbing to which he said it did not. *Id.* at 168. O'Brien testified that in his opinion Shuler was able to appreciate the nature, quality, and wrongfulness of his acts which negates the insanity determination. *Id.* He clarifies by explaining the mental health diagnosis does not automatically determine whether or not the person is legally insane, just the threshold requirement, but that Shuler needs to meet the legal definition of insanity. *Id.* at 169. The Commonwealth clarified one other detail supporting O'Brien's opinion that Shuler was not legally insane. Since the focus for the determination of insanity is on the ability of a person to appreciate the nature, quality, wrongfulness of their acts, O'Brien again notes that Shuler walks in to his apartment and tells his aunt that he did it, then he tells her that the clerk told him to leave the convenience store, which is consistent with her statement to the police about what happened. *Id.* at 170. O'Brien then explains that Shuler, by his response, is cognitively aware of his circumstances and of the nature and quality of his act. *Id.* O'Brien explains that Shuler was able to report to his aunt that it happened and then outside his residence is not cooperative talking to the police, and then later requests to speak with an attorney instead of answering questions, he was in fact, aware of his circumstances. *Id.* at 171.

The other witness on rebuttal for the Commonwealth was Trooper Jameson Keeler. He testified that he was the trooper who typed up the charges against Shuler. *Id.* at 171. Keeler testified that when he met with Shuler at the barracks, he offered him the opportunity to be interviewed, so he read Shuler his *Miranda* warnings explaining his right to have a lawyer and Shuler asked for one. *Id.* at 172. Trial counsel again objected to the reference to *Miranda* and the Court gave another instruction to the jury about Shuler acknowledging that

he committed the acts from that evening but that the question was whether he was legally insane at the time of the offense and for that purpose alone. *Id.* at 173.

The Court erred in overruling the Defense Counsel's objection to Jonathan Sebastian O'Brien, II offering a legal opinion and commenting on the Shuler's Fifth Amendment right against self-incrimination

During the trial, the Commonwealth called Jonathan Sebastian O'Brien (O'Brien) on rebuttal to testify as to his evaluation of Shuler. O'Brien is trained as both a lawyer and physician and was admitted at trial as an expert in forensic psychiatry. Shuler argues that the Court erred in overruling trial counsel's objection to O'Brien testifying about the legal statute regarding insanity and invoking his right against self-incrimination.

O'Brien testified that he is board certified in psychiatry. Notes of Testimony, 10/2/2023 at 126. He also works for the Philadelphia Courts and performs clinical evaluations of criminal defendants by court order. *Id.* at 125. He testified that he reviewed a number of documents in preparation for his testimony: medical records, mental health records, police reports, and the psychological evaluation prepared by Scott Scotilla, PhD, the Defense expert, and the notice of insanity defense filed by trial counsel. *Id.* at 131. O'Brien testified that Shuler gave the same description of the events that occurred the day of the assault as the victim gave in her police interview. *Id.* at 135. During his testimony, in response to the Assistant District Attorney asking about the importance of the reports he reviewed, O'Brien took issue with Dr. Scotilla's definition of insanity as a "situation where actions are affected by psychiatric illness." *Id.* at 137. O'Brien then offered that "insanity is specifically defined as," and trial counsel objected to O'Brien giving his "legal opinion." *Id.* In response to trial counsel's objection, the Commonwealth responded that O'Brien was able

to give an opinion on the ultimate issue. *Id.* The Court responded that it believed that O'Brien was giving a definition of insanity; then it notified the jury that the Court is the finder of the law, and that they are bound by [the Court's] instructions. *Id.* What followed next was O'Brien explaining to the jury what his process was for the determination of insanity.

> DR. O'BRIEN: And I'm not reading the statute, so my -- my summary of it is-- is my summary. Basically, you're looking to see if the person, number one, has a psychiatric illness and whether as a result of that illness they were not able to have an appreciation of the nature and quality of their acts. Number one. In other words, what they were doing.
>
> And they were also unable to -- to basically realize or understand -- comprehend that what they were doing was wrong under generally accepted societal standards. So wrong against the law, however you want to look at it.
>
> So there are two things they have to -- you have to assess for diagnosis, but you also have to assess to see whether or not the individual appears to meet the legal diagnosis -- not diagnosis, but legal definition of insanity.
> And so there are two things. It's not just, I have symptoms and it affected my behavior. It's very specific.
>
> And in this particular case, even immediately after the offense, Mr. Shuler is documented in the investigative materials to have demonstrated behaviors that indicated that he was aware of the nature and quality and wrongfulness of his actions. He fled the scene, he got rid of the knife, he changed his clothes before he saw the police. And those are very important aspects of what the -- the investigative record revealed about the events that took place. That's documented in the investigative materials.
>
> He also told his aunt that he had done it and that she had asked him to leave the store. And this was prior to his going out and giving the police a hard time. And then ultimately when they tried to formally interview him, requesting an attorney. So he didn't tell them anything about what happened. That's also indicative of an awareness and intact awareness of law enforcement. He's not gonna talk to the cops. And -- and –
>
> MR. GOLD: Judge, I'm just gonna ask for a – I would – that they can't infer anything from someone -- from someone

-- if he's -- an attorney -- they say you can have a right to an attorney and someone says, yes, I want one, they can't infer anything negative from that.

THE COURT: Well, as -- I think we spoke – go ahead, Mr. Wade.

MR. WADE: Well, I mean, a cautionary instruction might be appropriate; however, the fact itself is relevant in this proceeding to the extent that it speaks to his cognitive awareness. In other words, he hears the warnings, the Miranda Warnings, he invokes the Miranda Warning and requests an attorney. So it goes straight to the issue of legal insanity. Ordinarily, you cannot comment on a suspect's indication of his right to an attorney.

THE COURT: With respect to guilt or innocence, that's correct.

MR. WADE: Right.

THE COURT: Okay. All right. Traditionally, when you're in a jury trial, if a Defendant is advised by the police that you have the right to remain silent and they exercise that right, that evidence can't be used against him or her.

This is a different situation where the purpose for the use isn't implicating his guilt or innocence because I believe that the Defense has acknowledged what happened. It's merely as evidence to establish his cognitive abilities at the time or shortly after the incident occurred for you -- to help you make the decision on the ultimate issue of whether or not the Commonwealth -- A, whether or not the Defense has met its burden of preponderance on establishing that he was legally insane at the time, but then also the ability for the Commonwealth to disprove that.

I think that's a very long cautionary instruction, but I think you understand the purpose for which it's being used. Was there anything more you wanted to place on the record at this time?

MR. GOLD: No, Your Honor. I just -- that's all.
THE COURT: Okay. I just want to make sure you're -- I think your record's protected, but I just wanted to make sure if you wanted to add anything else.
MR. GOLD: Yes, thank you.
THE COURT: All right. Sure. But I think ultimately then the objection's overruled.

Id. at 137-141.

A defendant has the burden of proving an insanity defense by a preponderance of the evidence. 18 Pa.C.S.A. § 315(a) ("[t]he mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense"); *see also Commonwealth v. Fortune*, 302 A.3d 780, 783–84 (Pa. Super. 2023).

The definition of legally insane means that, "at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong." 18 Pa. C.S.A. §315(b).

> [T]o plead the defense of insanity suggests that the defendant committed the act, but was not legally culpable. *Commonwealth v. Mizell,* 493 Pa. 161, 164, 425 A.2d 424, 426 (1981). An insanity defense focuses upon a defendant's capacity, at the time of the offense, to understand the nature and quality of his actions or whether he knew that his actions were wrong. *Commonwealth v. Hughes,* 581 Pa. 274, 319 n. 29, 865 A.2d 761, 788 n. 29 (2004).

Commonwealth v. Yasipour, 957 A.2d 734, 738–39 (Pa.Super. 2008).

> The rule sets forth two separate and distinct aspects of the defense in Pennsylvania: a cognitive incapacity prong and a moral incapacity provision. Where the defendant alleges that he did not know what he was doing, he is presenting a cognitive incapacity insanity defense. On the other hand, if the defendant submits that he did not understand that what he was doing was wrong, he is advancing a moral incapacity defense.

Commonwealth v. Andre, 17 A.3d 951, 958–59 (Pa.Super. 2011). Shuler's trial counsel advanced the theory and presented Dr. Scott Scotilla, PhD to testify that although he may

have committed the act[7], he did not know what he was doing and/or understand what he was doing was wrong.

The comment to Rule 702 Pa.R.E. 702 states

> "that an expert may testify in the form of an 'opinion or otherwise.'" Much of the literature assumes that experts testify only in the form of an opinion. The language "or otherwise" reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case.

Clearly here, O'Brien in his capacity as the Commonwealth's expert is educating the jury on what is involved in making the determination of insanity. Shuler's expert would also have had the opportunity to explain what he was looking for in his determination of whether Shuler was insane at the time of the commission of the offense. The Court finds O'Brien acted within the scope of his authority as an expert in providing the information to the jury.

Comment on post arrest silence

Testimonial reference to a defendant's post-arrest silence is constitutionally off-limits; even a single reference. *Commonwealth v. Rivera,* 296 A.3d 1141, 1157 (Pa. 2023). "An impermissible reference to an accused's **post-arrest** silence constitutes reversible error unless shown to be harmless.... Because of its nature, an impermissible reference to the accused's **post-arrest** silence is innately prejudicial." *Commonwealth v. Costa,* 560 Pa. 95, 742 A.2d 1076, 1077 (1999) (citation omitted). To violate this rule, the testimony must clearly refer to **post-arrest** silence. *Commonwealth v. Mitchell,* 576 Pa. 258, 839 A.2d 202, 213 (2003). If such reference clearly did not contribute to the verdict, however, the error may be deemed harmless. *See id.,* at 214. Harmless error occurs where: "(1) the error did not

[7] In his opening statement, trial counsel acknowledged that Shuler stabbed Ms. Perillo in the neck. Notes of Testimony, 10/22/2023 at 20.

prejudice the defendant or the prejudice was *de minimus*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence, which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted whether evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict." *Commonwealth v. Hairston*, 624 Pa. 143, 84 A.3d 657, 671-72 (2014). The mere revelation of silence does not establish innate prejudice. *Commonwealth v. DiNicola*, 581 Pa. 550, 563, 866 A.2d 329, 337 (2005); s*ee also Commonwealth v. Whitney,* 550 Pa. 618, 708 A.2d 471, 478 (1998) ("Even an explicit reference to silence is not reversible error where it occurs in a context not likely to suggest to the jury that silence is the equivalent of a tacit admission of guilt").

O'Brien's statement about "not talking to the cops" did not make a specific reference to the Shuler exercising his rights under *Miranda*. The Commonwealth was not introducing Shuler's post-arrest silence to argue that he committed the crime, as such an argument would be improper and an infringement of his constitutional rights. In addition, as part of Shuler's defense he was not disputing he committed the offense but rather asserting that he did not have the required mental state to be held accountable for the crime. Instead, the Commonwealth's witness presented this evidence to address Shuler's mental state, which he himself had placed at issue by raising an insanity defense. Shuler's choice to "not talk to the cops" reflects rational decision-making and legal awareness, both of which are inconsistent with the claim that he was unable to appreciate the nature or wrongfulness of his actions at the time of the offense. A defendant's extemporaneous statements made after being given and invoking his *Miranda* rights, may be introduced by the Commonwealth as evidence to

rebut an insanity defense as long as their introduction would not constitute an impermissible comment on [defendant's] invocation of his right to remain silent. *Commonwealth v. Hunsberger*, 523 Pa. 92, 93, 565 A.2d 152, 153 (1989). Here the Court finds that O'Brien was discussing the fact he did not speak with the police was not an improper comment on his decision not to speak after being *Mirandized,* just a description of his choice not to speak with them illustrating his ability to make decisions and awareness of his legal circumstances.

The Court also believes that the comment of the examining psychiatrist was not offered as evidence of the Shuler's guilt. Shuler's defense at trial was not one where he denied the commission of the offense. Therefore, since the admissible evidence presented at trial was not disputed and overwhelming that he caused the injury to the victim, the prejudicial impact of the information given about Shuler not talking with police was insignificant and harmless.

The empaneled jury found the Defendant guilty but mentally ill of only one count and found him guilty of the lesser included and additional counts which all stemmed from the same act so the verdict is inconsistent

Shuler argues that the jury's verdict of guilty but mentally ill on only one of the counts charged against him renders a verdict invalid on the others because it is not consistent.

It is axiomatic that consistency in criminal verdicts is not required. *Commonwealth v. Trill,* 374 Pa. Super. 549, 560, 543 A.2d 1106, 1111 (1988). In addressing an appeal involving allegedly inconsistent verdicts, the Supreme court has stated:

> [E]ven if it were assumed that the two verdicts were logically inconsistent, such inconsistency alone could not be grounds for a new trial or for reversal. "It has long been the rule in Pennsylvania and in the

> federal courts that consistency in a verdict in a criminal case in not necessary." *Commonwealth v. Gravely,* 486 Pa. 194, 205, 404 A.2d 1296, 1301 (1979) (plurality opinion) (citations omitted); *see also Commonwealth v. Maute,* 336 Pa.Super. 394, 485 A.2d 1138 (1984). Inconsistent verdicts are proper so long as the evidence is sufficient to support the convictions that the jury has returned. *Commonwealth v. Graves,* 310 Pa.Super. 184, 456 A.2d 561 (1983).

Here, there was a verdict of guilty, not a verdict of guilty but mentally ill on the more serious charge of aggravated assault and the lesser included offenses of simple assault and recklessly endangering another person. By claiming the insanity defense, Shuler was not disputing what happened that day, rather that he did not have the *mens rea* to commit the crime.

Despite the inconsistency in the verdicts, the record as set forth above, contains sufficient evidence to support the finding of Shuler's guilt. There was testimony from the victim who identified the Shuler, as well as testimony from an eyewitness, and video evidence showing Shuler assaulted the victim, which the jury believed beyond a reasonable doubt.

There was insufficient evidence to support a verdict

Although Shuler asserted a blanket statement of inadequate sufficiency of the evidence to convict him of these charges at argument on these motions, Shuler does not aver what particular inadequacies he has with the evidence presented at trial. Shuler has failed to articulate a specific charge or element of a crime that he believes was not established at trial

or elaborate where the evidence was lacking.[8] Nevertheless, this Court has reviewed the evidence submitted in the trial against Shuler and determined that the evidence sufficiently established beyond a reasonable doubt that Shuler committed the charged offenses.

The test used to determine the sufficiency of the evidence in a criminal matter is "whether the evidence, and all reasonable inferences taken from the evidence, viewed in the light most favorable to the Commonwealth, as verdict-winner, were sufficient to establish all the elements of the offense beyond a reasonable doubt." *Commonwealth v. Maloney*, 876 A.2d 1002, 1007 (Pa. Super. Ct. 2005) citing *Commonwealth v. Lawson*, 759 A.2d 1 (Pa. Super. Ct. 2000). When applying "the above test, the entire record must be evaluated, and all evidence actually received must be considered." *Commonwealth v. Lambert*, 795 A.2d 1010, 1015 (Pa. Super. Ct. 2002). Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Rivera*, 238 A.3d 482, 495 (Pa. Super. 2020). Credibility is within the province of the jury as the factfinder, which is free to believe all, part, or none of the evidence. *Commonwealth v. Ramtahal*, 33 A.3d 602, 607 (Pa. 2011); *Commonwealth v. Holt,* 270 A.3d 1230, 1233 (Pa. Super. 2022).

[8] This failure could result in this claim being considered waived. See *Commonwealth v. Hoffman*, 198 A.3d 1112, 1125 (Pa. Super. 2018) (finding sufficiency claim waived for failing to specify the element(s) upon which the evidence was lacking); *Commonwealth v. Tyack*, 128 A.3d 254, 260 (Pa. Super. 2015) (finding sufficiency claim waived because boilerplate Pa.R.A.P. 1925(b) statement failed to specify the element(s) the Commonwealth failed to prove).

To sustain the convictions for Aggravated Assault the Commonwealth must prove that the Shuler caused serious bodily injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, 18 Pa. C. S. A. § 2702(a)(1), and/or intentionally or knowingly caused bodily injury with a deadly weapon, 18 Pa. C. S. A. § 2702(a)(4). "Serious bodily injury" is bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ. 18 Pa. C.S.A. § 2301. Bodily injury is impairment of physical condition or substantial pain. *Id.* A deadly weapon is defined as any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury. *Id.*

The evidence presented by the Commonwealth at trial established that Shuler committed both aggravated assault charges. Video evidence reviewed by the Troopers and the testimony of the victim established that Shuler assaulted the victim and caused serious bodily injury to her. Trial counsel acknowledged not only that Shuler was the one who injured Ms. Perillo with a knife, but that serious bodily injury was caused. Even without the acknowledgement, the victim testified that: Shuler stabbed her in the neck with a knife, she needed to have surgery, and she will have two permanent scars and nerve damage in her one arm for the rest of her life. N.T., 10/22/23, at 28. The neck is a vital area of the body. *Commonwealth v. Robertson*, 874 A.2d 1200, 1207 (Pa. Super. 2005). A stab wound to the neck creates a substantial risk of death as the neck contains major veins and arteries connecting the brain to the heart, specifically the jugular veins and carotid arteries. Stabbing

someone in a vital organ shows not only a specific intent to injure but a specific intent to kill. *See id.* (use of a deadly weapon, a knife, to inflict injuries to vital areas of the victim's body is sufficient to prove specific intent to kill). The permanent scars constituted permanent disfigurement. The permanent nerve damage to the victim's arm established the victim suffered protracted loss or impairment of the function of any bodily member or organ. Clearly, the victim suffered serious bodily injury. It also was sufficient to establish bodily injury as it shows the victim's physical condition was impaired. When used to stab someone in a vital area, a knife is calculated or likely to produce death or serious bodily injury; therefore, the knife constitutes a deadly weapon. *See id*.

The video of the incident, the testimony of the victim and DNA evidence established that Shuler was the perpetrator. DNA showed that the victim's DNA was found in the stain from Shuler's left jean pocket as well as on the knife found along the path between the store and Shuler's apartment. Id. at 79-81.

This evidence shows that Shuler intentionally or knowingly caused serious bodily injury to the victim for aggravated assault (cause serious bodily injury) and that he intentionally or knowingly caused bodily injury with a deadly weapon. Therefore, the Commonwealth presented sufficient evidence to establish the Defendant's guilt beyond a reasonable doubt.

To convict Shuler on the charge of Simple Assault, the Commonwealth must prove beyond a reasonable doubt that he attempted to cause or intentionally, knowingly or recklessly caused bodily injury to another. *See* 18 Pa. C.S.A. § 2701(a)(1). This is a lesser included offense to the aggravated assault convictions. Since the evidence was sufficient to

establish serious bodily injury as well as bodily injury with a deadly weapon and that Shuler intentionally or knowingly caused it, the evidence was also sufficient to establish beyond a reasonable doubt that Shuler intentionally or knowingly caused bodily injury to the victim.

To sustain a conviction on the charge Recklessly Endangering Another Person, the Commonwealth must prove beyond a reasonable doubt that he recklessly engaged in conduct which placed or may have placed another person in danger of death or serious bodily injury. *See* 18 Pa. C.S. A. § 2705. The *mens rea* for recklessly endangering another person is a conscious disregard of a known risk of death or great bodily harm to another person. *Commonwealth v. Martuscelli*, 54 A.3d 940, 949 (Pa. Super. 2012); *Commonwealth. v. Klein*, 795 A.2d 424, 427-28 (Pa. Super. 2002). Shuler did not merely place the victim in danger of serious bodily injury, he actually caused serious bodily injury to her. Therefore, the evidence was sufficient to sustain the conviction for Recklessly Endangering Another Person.

To the extent that Shuler may be asserting that the Commonwealth failed to meet its burden of proof in light of his insanity defense, the Court cannot agree. It was Shuler's burden to prove insanity by a preponderance of the evidence; he failed to do so. He did not establish to the jury's satisfaction that he did not know the nature or the quality of the act he was doing or that he did not know what he was doing was wrong. There was competing testimony from psychiatric experts. The jury apparently chose to believe the testimony from the Commonwealth's expert, Dr. O'Brien, rather than the defense expert, Dr. Scotilla, which was the jury's prerogative. *See Commonwealth v. Talbert*, 129 A.3d 536, 542 (Pa. Super.

2015)("the trier of fact, while passing on the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.").[9]

Ineffective assistance of counsel existed when the Defense Counsel did not request a mistrial when the Defendant's 5th Amendment rights were used against him.

Shuler claims that trial counsel was ineffective for failing to request a mistrial after he alleges that the Commonwealth used his 5th Amendment rights against him. The Court questions whether this issue can be asserted at this stage of the proceedings for two reasons. First, it was never raised before the trial court. "Issues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a). Second, generally claims of ineffective assistance of counsel are to be deferred to Post Conviction Relief Act (PCRA) review. *See Commonwealth v. Holmes*, 79 A.3d 562, 576 (Pa. 2013). There are two limited exceptions to this rule but both require the claim to be asserted in a motion and litigated before the trial court.

> First, [our Supreme Court] held that trial courts retain discretion, in extraordinary circumstances, to entertain a discrete claim of trial counsel ineffectiveness if the claim is both apparent from the record and meritorious, such that immediate consideration best serves the interest of justice. Second [our Supreme Court] held that trial courts also have discretion to entertain prolix claims of ineffectiveness if there is a good cause shown and the unitary review thus permitted is accompanied by a knowing and express waiver by the defendant of the right to pursue a first PCRA petition.

Commonwealth v. Arrington, 86 A.3d 831, 856-57 (Pa. 2014); *Holmes*, 79 A.3d at 577.

[9] To the extent that Shuler may actually be asserting a weight of the evidence claim, the jury's verdict did not shock the conscience of the Court. Dr. O'Brien's testimony focused on how Shuler's actions and statements showed that he was aware that he had stabbed the victim and that he knew what he had done was wrong. Dr. Scotilla's testimony dealt more with the medical definition of insanity and Shuler's mental disease or defect of the mind.

The second exception is geared toward short sentence cases where PCRA review may be unavailable or cases involving strong collateral claims where advanced review will permit the evidentiary hearing on the ineffectiveness claim to occur when the events are fresh in the witnesses' minds and any retrial to occur sooner rather than later. *Holmes*, 79 A.3d at 577-579. Shuler did not assert this claim before the trial court, and he did not waive his right to a first PCRA petition.

Even if this claim can be litigated at this stage of the proceedings, the court would reject it under the facts and circumstances of this case. The only time a statement was made about Shuler not speaking to police was made by Dr. O'Brien as one of several pieces of information supporting his opinion that after assaulting Perillo, Shuler understood the nature and quality of he acts and appreciated the wrongfulness of his conduct. Keeler also testified that he would have given Shuler his *Miranda* warnings and then Shuler would have requested to speak with an attorney. He made no statement regarding Shuler not speaking to the police after his warnings were given to him.

Under the Post Conviction Relief Act (PCRA), a petitioner must prove by a preponderance of the evidence that their conviction or sentence resulted from ineffective assistance of counsel that undermined the truth-determining process, rendering the adjudication unreliable. *See* 42 Pa.C.S. § 9543(a)(2)(ii). Counsel's performance is presumed constitutionally adequate, and ineffectiveness is established only when a petitioner demonstrates both deficient performance and resulting prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). An individual may overcome the presumption that counsel was effective by pleading and proving the well-established three prong test: (1) the underlying claim has arguable merit; (2) counsel had no

reasonable basis for their action or inaction; and (3) the petitioner suffered prejudice as a result. *Commonwealth v. Drayton*, 313 A.3d 954, 960 (Pa. 2024); *see also Commonwealth v. Johnson*, 966 A.2d 523, 533 (Pa. 2009).

First the Court must determine if Shuler's claim has any arguable merit. Any claim implicating *Miranda* inherently possesses arguable merit because it touches upon fundamental constitutional protections.

Next, did trial counsel's actions lack a reasonable basis. Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. *Commonwealth v. Spotz,* 84 A.3d 294 (Pa. 2014). Where matters of strategy and tactics are concerned, "finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Commonwealth* v. *Colavita,* 606 Pa. at 21, 993 A.2d at 887 (quotation and quotation marks omitted). To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Commonwealth v. King,* 618 Pa. 405, 57 A.3d 607, 613 (2012) (quotation, quotation marks, and citation omitted). *Spotz*, 84 A.3d at 311–12.

There is nothing in the record to show whether trial counsel had a strategic basis for not seeking a mistrial, because Shuler did not assert this issue before the trial court in a post sentence motion. Had he done so, he could have presented testimony from trial counsel so the court could determine whether the failure to request a mistrial was mere oversight or whether it was a chosen strategy to proceed with a cautionary instruction and the impaneled

jury rather than request a mistrial and go to trial before different jurors who may have been less likely to accept the defense evidence regarding Shuler's mental illness and insanity defense.

Trial counsel's strategy was to offer evidence that the Commonwealth could not overcome that Shuler was insane at the time of the commission of the offense. Shuler was admitting from the start that he did assault Perillo. When the statement was made at trial, a cautionary instruction was given so that the jury would understand the role that information would have in determining the question to be decided by them: not whether he committed the act but whether he was legally insane at the time of the commission of the act.

As to the final prong of the *Strickland/Pierce* test, Shuler has not shown that prejudice was caused by the introduction of the information. Shuler has not demonstrated how trial counsel's failure to ask for a mistrial would have changed the outcome of the proceedings. Traditionally, comments on a defendant's failure to speak with the police are used to bolster the defendant's guilt in an otherwise weak case. Here, Shuler, as part of his trial strategy, acknowledged that he committed the offense. The purpose that the Commonwealth's witness offered the information was to the mental state of Shuler at the time the offense was committed. So even if the introduction of that evidence was in error, its effect was harmless as Shuler was acknowledging that he assaulted Perillo.

Shuler cannot establish that had trial counsel requested a mistrial that the outcome of the decision of the jury would have been different. Therefore, the Court finds that trial counsel had a reasonable basis for his actions and that Shuler was not prejudiced by the failure to request a mistrial.

The Court erred in sentencing the Defendant without an inquiry on whether the defendant was severely mentally disabled and in need of treatment at the time of sentencing pursuant to Title 42 §9727.

Under 18 Pa. C.S.A. §314 a person who "timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found 'guilty but mentally ill' at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense." Once an individual is found to be guilty but mentally ill, they must be sentenced pursuant to 42 Pa. C.S.A. §9727.

> (a) Imposition of sentence.--A defendant found guilty but mentally ill or whose plea of guilty but mentally ill is accepted under the provisions of 18 Pa.C.S. § 314 (relating to guilty but mentally ill) may have any sentence imposed on him which may lawfully be imposed on any defendant convicted of the same offense. Before imposing sentence, the court shall hear testimony and make a finding on the issue of whether the defendant at the time of sentencing is severely mentally disabled and in need of treatment pursuant to the provisions of the act of July 9, 1976 (P.L. 817, No. 143),[1] known as the Mental Health Procedures Act.

Here Shuler was found guilty but mentally ill by the jury on the charge of Aggravated Assault (causing bodily injury with a deadly weapon). The jury also found Shuler guilty of the more serious charge of Aggravated Assault (causing serious bodily injury) and the lesser included offenses of simple assault and recklessly endangering another person which meant that they found that he committed the offenses and was not mentally ill at the time. Since 18 Pa. C.S.A. §314 was not applicable to these offenses, the Court was not bound by law to sentence Shuler under 42 Pa. C.S.A. §9727 for them.

The Court erred in sentencing the Appellant using the deadly weapon enhancement when the jury did not specifically decide on such a question strictly within Count I.

An allegation that the Court improperly applied the deadly weapon enhancement challenges the discretionary aspects of a sentence. See, e.g., *Commonwealth v. Rhoades*, 8 A.3d 912, 915 (Pa. Super. 2010), *appeal denied*, 25 A.3d 328 (Pa. 2011), *cert. denied*, 132 S. Ct. 1746 (U.S. 2012); *Commonwealth v. Raybuck*, 915 A.2d 125, 127 (Pa. Super. 2006); *Commonwealth v. Magnum*, 654 A.2d 1146, 1149 (Pa. Super. 1995); *Commonwealth v. Reading*, 603 A.2d 197, 199 (Pa. Super. 1992). Issues challenging the discretionary aspects of a sentence must be raised in a post sentence motion or by presenting the claim to the trial court during sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived. *Rhoades*, 8 A.3d at 915 (citations omitted). See also *Commonwealth v. Shugars*, 895 A.2d 1270, 1273-74 (Pa. Super. 2006).

When Shuler had his appeal rights restored, it included the opportunity to file post-sentence motions. Shuler did not file post-sentence motions preserving this issue. In addition, trial counsel did not object to the use of the deadly weapon enhancement at the time of sentencing. *See Transcript of Sentencing,* 12/19/2023. The Court finds that Defendant waived his challenge to the Court's use of the deadly weapon enhancement in sentencing Shuler.

In the event the appellate court believes that Shuler has not waived his objection on this issue, the Court finds that the deadly weapon enhancement provision of the sentencing guidelines provides that any dangerous weapon should be considered to be a deadly weapon for enhancement purposes. 204 Pa. Code § 303.10(a)(ii). The Sentencing Code also defines as a deadly weapon any device, implement, or instrumentality designed as a weapon or

capable of producing death or serious bodily injury where the court determines that the offender intended to use the weapon to threaten or injure another individual. *See* 204 Pa. Code § 303.10(a)(iii); s*ee also Raybuck*, 915 A.2d at 128. Guns, knives, and other clearly offensive weapons constitute the most obvious and commonly encountered forms of deadly weapons. *See Commonwealth v. Pennington,* 751 A.2d 212, 215–17 (Pa. Super. 2000), *Raybuck*, *supra*.

The guidelines provide that the Court, not the jury, must determine if the offender possessed the deadly weapon during the course of the convicted offense. 204 Pa. Code § 303.10(a); s*ee also Raybuck,* 915 A.2d at 128. If the defendant possessed a deadly weapon during the commission of the convicted crime, the Court must apply the guidelines outlined in the deadly weapon enhancement matrix. *Raybuck*, 915 A.2d at 129.

The evidence presented by the Commonwealth established that Defendant possessed a knife during his encounter with the victim for which he was found guilty of aggravated assault (cause serious bodily injury) and guilty but mentally ill on the charge of aggravated assault (bodily injury with a deadly weapon). On the latter charge, the jury found that Shuler possessed the weapon and used it but was mentally ill at the time. Since it was clear not only from the evidence but the verdict of the jury that the Shuler used a deadly weapon, the Court was required to apply the deadly weapon enhancement.

To the extent Shuler is asserting that the imposition of the deadly weapon enhancement (DWE) without a jury finding renders his sentence unlawful based on the United States Supreme Court holdings in *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), or *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the court rejects it.

> In both [*Alleyne* and *Apprendi*], the Supreme Court determined that certain sentencing factors were considered elements of the underlying crime, and thus, to comply with the dictates of the Sixth Amendment, must be submitted to the jury and proven beyond a reasonable doubt instead being determined by the sentencing judge. However, this inquiry is not relevant to our case because of the nature of the DWE.
>
> *Alleyne* and *Apprendi* dealt with factors that either increased the mandatory minimum sentence or increased the prescribed sentencing range beyond the statutory maximum, respectively. Our case does not involve either situation; instead, we are dealing with a sentencing enhancement. If the enhancement applies, the sentencing court is required to raise the standard guideline range; however, the court retains the discretion to sentence outside the guideline range. Therefore, neither of the situations addressed in *Alleyne* and *Apprendi* are implicated.

Commonwealth v. Buterbaugh, 91 A.3d 1247, 1270 n. 10 (Pa.Super.2014), *appeal denied*, 628 Pa. 627, 104 A.3d 1 (2014).

Date: January 23, 2025

By the Court,

Nancy L. Butts, President Judge

cc: DA (MWade)
Jamie Cook, Esquire
Gary Weber, Esquire
Jerri Rook

/nlb