

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**Commonwealth of Pennsylvania v.
Andra Raasul Crisswalle and
William George Thompson**

Jury of One's Peers—Double Jeopardy

Herein the defendants were tried together. Accordingly, the issues of both defendants, raised pursuant to Rule of Appellate Procedure 1925 (b), are addressed in the same judicial opinion. Defendant Crisswalle raised eighteen issues and defendant Thompson five. Due to the number of issues raised, only the key issue raised by each defendant is discussed in this headnote.

1. The Commonwealth's use of its preemptory challenges to disqualify black prospective jurors, does not support an inference that the Commonwealth engaged in a systematic exclusion of blacks.
2. A defendant does not have a right to a jury composed of only members of his own race.
3. When the Commonwealth can articulate a neutral explanation for excluding a prospective juror, it has met its burden of showing that its jury choices were fair and impartial.
4. Double Jeopardy does not attach when a defendant who does not request a mistrial is retried because the court declared a mistrial. Here, the defendant was tried three times.
5. The Pennsylvania Supreme Court has stated that manifest necessity may require a retrial.

(Rhoda Shear Neft)

Michael Streily for the Commonwealth.

Norma Chase for Defendant Andra Crisswalle.

Patrick Nightingale for Defendant William Thompson.

No. CC: 200202610; 200206828. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., January 15, 2010—The appellants, Andra Crisswalle, (hereinafter referred to as “Crisswalle”), and William Thompson, (hereinafter referred to as “Thompson”), have filed separate appeals with respect to their convictions of three counts of first degree murder, one count of aggravated assault, one count of possession of a firearm without a license, six counts of recklessly endangering another person, and one count of criminal conspiracy.¹ Pre-trials were held with respect to these charges, at which time the Commonwealth certified these cases as capital cases. Jury selection began in September, 2004, and once a death-qualified jury was empanelled, their joint trial commenced.

On November 24, 2004, after nine weeks of jury selection and trial, the jury was declared a hung jury since it could not reach a verdict on any of the charges as they related to both Crisswalle and Thompson. The Commonwealth withdrew its certifications as capital cases and a second trial was held on February 22, 2005, and continued until March 23, 2005, at which time Crisswalle was convicted of all of the charges filed against him and the grade of the charge of criminal homicide with respect to each of the counts, was set at first degree murder. The jury, however, was once again deadlocked with respect to the charges filed against Thompson, and a mistrial was declared as to his cases. A presentence investigation report in Crisswalle's case was ordered and on June 20, 2005, he was sentenced to three consecutive life sentences for his convictions of first degree murder and a ten to twenty year consecutive sentence for his conviction of aggravated assault, a consecutive three and one-half to seven year sentence for his conviction of possession of a firearm without a license. Six consecutive sentences of one to two years for each of the six counts of recklessly endangering another person which he was convicted were imposed and, finally, a consecutive sentence of a period of incarceration of not less than ten nor more than twenty years for the conviction of criminal conspiracy was also imposed.

Thompson's case was rescheduled for September 6, 2005, and on September 16, 2005, the jury returned verdicts of guilty on all of the charges filed against him. A presentence report was prepared and on December 12, 2005, Thompson was given the same sentences which had previously been imposed on Crisswalle for his convictions of the same crimes. Thompson filed timely post-sentencing motions which were denied. Both Crisswalle and Thompson filed timely appeals to the Superior Court with respect to the imposition of sentences imposed upon them for their convictions.

Pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), both Crisswalle and Thompson were directed to file concise statements of matters complained of on appeal. Both Thompson and Crisswalle complied with that directive and their statements of matters complained of on appeal are reflective of the differences between those individuals. Crisswalle is a very light-skinned African-American who is approximately five foot seven inches tall and weighed approximately one hundred fifty pounds. On the other hand, Thompson was a darker-skinned African-American, approximately six foot four inches, weighing one hundred eighty pounds with a “bug-eyed” look.

Crisswalle's concise statement of matters complained of on appeal consists of twenty-nine paragraphs complaining of thirty-three claims of error. There is one claim of error during the course of jury selection, there are six claims of error regarding decisions made during the hearings on his pre-trial motions, thirteen errors with regard to errors during the course of the trial on testimonial rulings, six errors with regard to the charge given to the jury; four claims of error with regard to the denial of his request for a mistrial, and three with regard to exhibits that were ultimately given to the jury during its deliberations.

Thompson on the other hand, in his statement of matters complained of, asserts five claims of error. The first of those claims is that this Court erred in denying Thompson's request to suppress the photograph array shown to one of the witnesses, Brian Shealey (hereinafter referred to as “Shealey”). He next contends that this Court erred in denying his motion to bar retrial on the basis of double jeopardy. Thompson further maintains that this Court erred in denying a proposed point for charge on excited utterance with regard to the testimony given by Terri Coles as to the description of the two shooters involved in these homicides. Finally, Thompson maintains that not only was the evidence insufficient to support the verdicts, but the verdicts were against the weight of the evidence presented.

The plethora of errors asserted by Crisswalle demonstrate an obvious distain for the observation made by Judge Ruggerio J. Aldisert of the Third Circuit Court of Appeals in his treatise on appellate advocacy where he said:

With a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial court it is rare that a brief successfully demonstrates that the trial court committed more than one or two reversible errors.... [When I read an appellant's brief that contains ten or twelve points, a presumption arises that there is not merit to any of them. I do not say that this is an irrebuttable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness. *Aldisert, The Appellate Bar: Professional Compliments and Professional Responsibility – A View From The Jaundiced Eye Of One Appellate Judge*, 11 *Cap.U.L. Review*, 445, 458 (1982).

The parties in *Kanter v. Epstein*, 866 A.2d 394 (Pa.Super. 2004), showing a similar disdain for Judge Aldisert's observation, were engaged in a bitter contract dispute to try to determine what, if any, referral fee would be permitted as a result of a lawyer referring a personal injury action which ultimately resulted in a settlement of \$4,310,000.00. The contentiousness of the parties was clearly demonstrated when the concise statement of matters complained of on appeal revealed that there were one hundred four claims of error which the parties believed they were entitled to have reviewed. That Court reviewed the standards to be used in making a determination as to whether or not the merits of issues wished to be reviewed on appeal had been properly preserved.

Prior to undertaking an analysis of the merits of the numerous issues raised by the Defendants, we must first determine whether the Defendants have properly preserved their issues for appellate review. In *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998),^{FN6} the Pennsylvania Supreme Court specifically held that "from this date forward, in order to preserve their claims for appellate review, Appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to [Pennsylvania Rule of Appellate Procedure] 1925." *Lord*, 719 A.2d at 309. "Any issues not raised in a 1925(b) statement will be deemed waived." *Id.* This Court explained in *Riley v. Foley*, 783 A.2d 807, 813 (Pa.Super. 2001), that Rule 1925 is a crucial component of the appellate process because it allows the trial court to identify and focus on those issues the parties plan to raise on appeal. This Court has further explained that "a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent to no Concise Statement at all." *Commonwealth v. Dowling*, 778 A.2d 683, 686-87 (Pa.Super. 2001). "Even if the trial court correctly guesses the issues Appellant[s] raise [] on appeal and writes an opinion pursuant to that supposition the issue[s][are] still waived." *Commonwealth v. Heggins*, 809 A.2d 908, 911 (Pa.Super. 2002).

FN6. Since the Rules of Appellate Procedure apply to criminal and civil cases alike, the principles enunciated in criminal cases construing those rules are equally applicable in civil cases. See *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 658 n. 2 (Pa.Super. 2000).

Kanter v. Epstein, *supra* at 866 A.2d at 400.

That Court then went on to examine the alleged issues which the parties sought to appeal and determined that both the Trial and Appellate Courts had been deprived of the opportunity to do a meaningful appellate review of the alleged issues, by the manner in which the parties presented those issues:

In this case, the Defendants' voluminous Rule 1925(b) Statements did not identify the issues that the Defendants *actually intended* to raise before the Superior Court. The Defendants' Rule 1925(b) Statements identify significantly more issues than the Defendants could possibly raise on appeal due to the appellate briefing limitations requiring that the Statement of the question involved not exceed fifteen lines, and in any event, one page. See Pa.R.A.P. 2116(a). In this case, the trial court was presented with fifty or more issues that each defendant identified for appeal. This forced the trial court to guess which issue the Defendants would actually raise on appeal. This Court has previously explained that "[w]hen a court has to guess what issues an appellant is appealing, that is not enough for meaningful review." *Commonwealth v. McCree*, 857 A.2d 188, 192 (Pa.Super. 2004).

Furthermore, we note that despite the fact that the trial court authored an eighty-five page Opinion, the trial court was, through no fault of its own, unable to provide a comprehensive analysis of the issues it did address due to the posterous number of issues identified by the Defendants. This too has impeded our ability to undertake a meaningful review of the issues raised by the Defendants on appeal. Accordingly, we must conclude that the Defendants have failed to preserve any of their issues for appellate review.

Kanter v. Epstein, *supra*, 866 A.2d at 401.

In *Eiser v. Brown & Williamson Tobacco Corp.*, 595 Pa. 366, 938 A.2d 417 (2007), the Pennsylvania Supreme Court found that while the number of issues raised in a 1925(b) statement of matters complained of on appeal may have been as a result of poor appellate strategy, the number of issues asserted, in and of itself, did not constitute a per se violation of the Rules of Appellate Procedure. That Court went on to observe:

In sum, the number of issues raised in a Rule 1925 (b) statement does not, without more, provide a basis upon which to deny appellate review where an appeal otherwise complies with the mandates of appellate practice. In a rare case, like *Kanter*, where a trial court concludes there was an attempt to thwart the appellate process by including an exceptionally large number of issues in a Rule 1925(b) statement, waiver may result.

Eiser v. Brown & Williamson Tobacco Corp., *supra*, 938 A.2d at 384.

In order to review the claims of errors asserted by Crisswalle and Thompson, in accordance with the instructions provided by the Pennsylvania Supreme Court, it is necessary that a detailed review of the facts of their case be made. Prior to doing that, one observation must be made and, that is, the facts with respect to Crisswalle changed during the course of his two trials, whereas, the facts as presented against Thompson, never did.

FACTS

On January 25, 2002, Terri Coles met her two children, Taylor Coles, age 8 and Parrish Freeman, Jr., age 13, at Mr. Tommy's Restaurant, which was located in the Homewood Section of the City of Pittsburgh. She had gone there to meet her children's father, Parrish Freeman, Sr., (hereinafter referred to as "Freeman"), so that they could have dinner and then go

to a movie. They had decided that they would treat their children to dinner out and a movie to celebrate the fact that Taylor Coles had just received a straight A report card. They arrived at approximately 6:30 p.m. and after talking with Freeman, they ordered their meals.

Freeman was at a table talking to Thomas Washington, Sr., (hereinafter referred to as "Washington"), the owner of Mr. Tommy's Restaurant. Also at the table were Brian Freeman, Brian Shealey, Catrell Boyd, (hereinafter referred to as "Boyd") and Thomas Mitchell, (hereinafter referred to as "Mitchell"). Mitchell was unemployed and living on social security disability benefits as a result of the fact that he was a paraplegic, having been shot in the back a number of years earlier. Mitchell was waiting in Mr. Tommy's Restaurant for his new Cadillac Escalade to be washed at the car wash which was part of Washington's businesses and separated from the restaurant by a parking lot which served both businesses. In addition, he was waiting for Boyd to deliver keys to his Lincoln Continental which he had allowed Boyd to use earlier but now needed to give to his mother so that she might use that vehicle. Mitchell supplemented his social security disability income by monies he received from being a drug dealer in the Homewood area.

At approximately 6:45 p.m., Shealey arrived and went to the table where Freeman was sitting. His purpose in coming to the restaurant was two-fold: first he wanted to sell some pills to Freeman and, second, he wanted to discuss the upgrading of Mr. Tommy's menu with Washington since he was a part-time cook. In light of the fact that Freeman's family was with him and that Freeman had indicated that he did not want to discuss a drug transaction, Shealey confined his discussions to Washington's menu upgrade. Before walking into the restaurant, Shealey noticed several men lurking near the cut in the fence that abutted the parking lot. He noticed that one of these individuals was much taller than the others and that his eyes were unusually large. He also noted that all of these individuals were dressed in black.

In January of 1995, Boyd plead guilty to the charge of possession with intent to deliver a controlled substance and was sentenced to six and one-half to thirteen years. He was paroled in June of 2001. As a part of his restrictions on parole, he was not permitted to be involved with drugs, to consume alcohol or to possess a cellular phone. Despite these restrictions, Boyd had a cellular phone and, in fact, received a phone call shortly before Shealey entered the restaurant. Boyd wanted to keep his phone conversation private and moved from the table to a booth that was adjacent to the outside door that led into the restaurant. At some time between 6:56 p.m. and 7:00 p.m.,² two individuals all dressed in black with masks came into the restaurant, armed with semi-automatics and fired sixteen shots, fifteen of which resulted in casings being left at the scene and one live round.

Although the people in the restaurant initially maintained that they did not see anything, ultimately a basic description of the two shooters evolved, that being two individuals all dressed in black, with masks, and one of the two was substantially taller than the other. Boyd indicated that the taller of the two was at least six foot three. From discussions with witnesses, it was clear that the intended victim of this shooting was Mitchell. Mitchell was shot ten times, nine to his torso, which effectively knocked him out of his wheelchair and a tenth was placed in his head from point-blank range, when the shorter of the two shooters ran over to him and put the gun to his head and fired. However, during the course of this execution, Taylor Coles, who was getting a straw for her drink was shot three times. Her mother, Terri Coles, was shot once in the shoulder and her father, Freeman, was shot three times. Terri Coles rushed over, picked up her daughter and ran to the kitchen for protection, imploring people to help her save her child. The two shooters then ran out of the building and through the parking lot. The police were called as were the paramedics and the paramedics arrived on the scene first. The paramedics removed Taylor Coles lifeless body from her mother and it was only at that time that Terri Coles realized that she had been shot.

Taylor Coles, her mother and Freeman were all taken to Presbyterian-University Hospital and while it was clear that Taylor Coles had suffered catastrophic and fatal injuries, the surgeons at Presbyterian-University Hospital attempted to save her life but to no avail. While Terri Coles was receiving treatment for her shoulder wound, surgeons in an adjacent area of the emergency room, were working on Freeman in an attempt to save his life. Despite being given more than thirty units of blood, Freeman died several hours after the shooting.

After the victims were removed from the restaurant, the police secured the scene and began to accumulate the evidence. At that scene fifteen shell casings were found in the restaurant, and one live forty-five caliber, which was found near the entrance to the restaurant. The police detained all of the individuals who were inside the restaurant and also those who were immediately outside and began to conduct initial interviews. The individuals who were initially interviewed by the police all denied that they had seen anything although the police were able to get a generic description of the two shooters. The description that they were able to put together was that one of the individuals was very tall and had bug eyes and the other was substantially shorter and was light-skinned. Both individuals were dressed in black and wore masks. In the days following the shooting, the police conducted follow-up interviews with all of the individuals who were at the restaurant.

Shealey was re-interviewed and told the police that his original purpose of going to Mr. Tommy's was to try to sell Freeman some drugs. When Freeman did not want to discuss the purchase of drugs and after he had concluded his business with Washington, he got ready to leave the building when two shooters entered. These individuals knocked him to the ground and while he was on the ground, he noticed that the taller of the two shooters was wearing black Nike sneakers that had a black swoosh emblem. He heard what he thought to be a misfire on the gun as though it had been jammed, in addition to hearing numerous other shots. He believed that the two shooters were the individuals he saw standing in an area described as the cut adjacent to the parking lot shortly before going into the restaurant.

During that interview, he was able to identify the tall one as being Thompson. When the two shooters ran from the restaurant, he watched them leave and saw the shorter of the two turn and his mask came down and he realized that the shorter of the two individuals was Crisswalle. He knew Thompson since they had worked on repairing a car together. He subsequently identified Thompson out of a photo array and identified him by his street name, "Munch." He did not, however, identify Crisswalle since he was fearful of reprisals if he would be the only individual that would identify these two as the shooters. Shealey was fearful for his safety and was put in the Witness Protection Program during the pendency of this case. When he learned that Crisswalle had been identified by someone else, he also identified Crisswalle as the smaller of the two individuals and identified him from a photo array.

Boyd's involvement in these homicides led to an investigation by his probation officer and he was ultimately violated for his possession of a cell phone and various curfew violations. In July of 2002, Boyd was brought to the homicide headquarters and was reinterviewed by the homicide detectives. Boyd told the homicide detectives that when he was in Mr. Tommy's Restaurant, that he had received a phone call about a possible drug deal and that he moved away from the table where Mitchell

and Freeman were seated and moved to a booth that was near the entryway to the restaurant. He saw the two individuals come in and start shooting and he also saw the shorter of the two individuals run to Mitchell and then shoot him in the head at point-blank range. A forty-five caliber shell casing was found near Mitchell's head and a live forty-five caliber round was found near the doorway.

Boyd, who always carried a gun with him whenever he was selling drugs, ran out after the two shooters and watched them run through the parking lot. When he realized that he did not have a gun, he stopped his pursuit and headed back toward the restaurant. However, he saw both men running toward Frankstown Avenue toward a black, Chevrolet Impala, which he believed looked like Poundcake's car and then observed the shorter of the two stop, and heard him cursing and observed him jumping up and down and limping as he once again headed toward the car. When the shorter of the two stopped, his mask came down and he recognized that individual as being Crisswalle. After the shooters had left, Boyd had a conversation with Duane Morris (hereinafter referred to as "Morris"), who had been smoking marijuana in the parking lot and Morris had told him that he had observed a car pull up and two individuals got out of the car and went into the restaurant. Morris also told him that the shorter of the two individuals was Crisswalle. Boyd also identified Crisswalle from a photo array. Based upon this information, the District Attorney's Office wrote to the Parole Board requesting that Boyd be paroled early in light of his cooperation and help with this homicide investigation; however, that request was denied.

Morris was also interviewed by the police and he informed them that on January 25, 2000, that at approximately 6:30 p.m., he decided to smoke some marijuana and went to the dumpster area of the parking lot of Mr. Tommy's so he could do so unobserved. Morris indicated that earlier in the day that he had used one bag of heroin and he wanted to smoke the marijuana to continue his high. While smoking this marijuana, Morris observed Poundcake's car pull up to the parking lot and saw two individuals get out of the car, one of whom was much taller than the other. Both of these individuals were African-American and the taller of the two was darker-skinned than the light-skinned, shorter individual. He watched both of them run into Mr. Tommy's Restaurant with semi-automatics in their right hands and, after hearing the shooting, saw them run out of the restaurant toward the black Chevrolet Impala which he believed to be Poundcake's car, and saw that the shorter individual was Crisswalle since his mask came down. He also saw Crisswalle limping as he ran to the car. Morris did not want to be involved in the ultimate investigation and left the parking lot and went across the street to Mason's Bar where he had a beer. While in the bar he observed Poundcake's car come to a stop in front of the bar and saw Crisswalle in the front passenger seat. In August of 2002, Morris was interviewed by homicide detectives and provided them with additional information and he identified Crisswalle from a photo array.

Officer Mike Reid of the Pittsburgh Police went to Presbyterian-University Hospital to interview Terri Coles who was being treated for the gunshot wound that she had received to her shoulder. Officer Reid purportedly received information from her that the two shooters were dark-skinned African-Americans. The police did not conduct any in depth interview in light of her physical condition and the fact that she was in shock as a result of these shootings. At the time of trial Terri Coles denied that she ever told the police that the shooters were dark-skinned and, in fact, was adamant that one was medium-skinned and the other was light-skinned. She said that when she was interviewed she had realized that her eight year old daughter had died in her arms and she had just been informed that her husband, Freeman, had died.

After Shealey had identified Thompson as being the taller of the two shooters and that he was wearing black Nike sneakers with a black swoosh, the police obtained a search warrant for Thompson's residence which was located on Bennett Street, approximately one block from Mr. Tommy's Restaurant. The police recovered numerous items including a pair of black Nike sneakers with a black swoosh. They did not, however, recover any firearms. An arrest warrant was issued for Thompson and after his arrest and arraignment he was lodged in the Allegheny County Jail.

At the time of his arrest, Thompson was in possession of his cell phone and it was learned that the provider of his service was Cricket. The police obtained a search warrant for his phone records for the period of time from January 15, 2002 to January 31, 2002, the date of his arrest. In reviewing Thompson's cell phone records, one phone number kept repeatedly appearing. There seemed to be a pattern with respect to this phone number since that phone number was called every other day, and when it was called, there were repeated phone calls made to that number or from that number. The police subsequently determined that the phone number belonged to Melissa Cox, (hereinafter referred to as "Cox"), and on March 11, 2002, Detectives Patrick Moffatt and Timothy Nutter visited Cox to determine what, if any, information she had about these homicides and her involvement with Thompson.

Initially, Cox did not want to talk to the police, however, she ultimately gave a taped statement. In that statement she indicated that she worked with mentally retarded adults and that she had met Thompson at a bus stop in Downtown Pittsburgh in late 2001. She realized that Thompson was mentally challenged which was borne out by the fact that he had an IQ of 72. She and Thompson became friends and she went to a number of parties with him. She and Thompson were scheduled to go out on the night of the shooting after she had finished work. At approximately 9:05 p.m. on January 25, 2002, Cox received a phone call from Thompson in which he said that he had killed some people in Homewood and he sounded scared. She was in shock and initially did not believe him. When the phone call ended, she called Zone 1 headquarters to ask, if in fact, these homicides had been committed and the police told her that they were too busy to talk to her but, in fact, three people had been killed. She attempted to call Thompson back but was only able to reach his voice mail.

Thompson's phone records also revealed that at 7:02 p.m. on the night of the shootings, that he called his sister, who lived in East Liberty. At the time of trial his sister testified that Thompson was in her basement playing video games with her sons when these shootings occurred. Thompson's sister's residence in East Liberty was approximately five miles from the shooting in Homewood. The cell tower that handled Thompson's call to his sister was closer to Homewood than it was to East Liberty.

Thompson was lodged in Pod 7D of the Allegheny County Jail on the night of his arrest. Also on that pod was Octavio Rodriquez, (hereinafter referred to as "Rodriquez"), who was Freeman's cousin. Earlier in the day of January 31, 2002, Rodriquez had received a phone call from his mother in which she told him that Freeman and Taylor Coles had been murdered and that Thompson had been charged with their murders. Thompson was placed in the bubble on Pod 7D, which is a restricted protective area. When Rodriquez found out that Thompson was on his pod, he went to the bubble and asked him why he had murdered the little girl. Thompson denied that he killed Taylor Coles and said that he shot one time and his gun jammed. Thompson also told Rodriquez that Mitchell owed Andre Marshall some money for drugs and that was the motivation for the shooting. Andre Marshall, however, was a state prisoner at the time of these shootings. Rodriquez called Homicide Detective Dennis Logan and gave him a statement as to the information that he had obtained from Thompson.

Although the police suspected that Crisswalle was the other shooter involved in these homicides, their initial investigation did not provide sufficient information to them to issue an arrest warrant. As the investigation continued to develop during the summer of 2002, the police received statements from Boyd, Shealey and Morris which indicated that Crisswalle was, in fact, the other shooter. Each of these individuals identified Crisswalle from a photo array. Once they had that information, an arrest warrant was issued for Crisswalle for these homicides. In late September of 2002, after the arrest warrant was issued for Crisswalle and the police attempts to locate him had proven unsuccessful, photographs of Crisswalle were released to the media indicating that he was wanted in connection with these three homicides. When Crisswalle saw his picture on television, he decided to leave the Pittsburgh area and he, Daniel Dandres, (hereinafter referred to as "Dandres"), Kayla Bureau, (hereinafter referred to as "Bureau"), Dandres girlfriend, and Adrian Walkow, (hereinafter referred to as "Walkow"), a fourteen year old female, went to King of Prussia, Pennsylvania.

On September 28, 2002, the Upper Marion Township Police Department received a complaint about two suspicious individuals who appeared to be attempting to pass counterfeit one hundred dollar bills at the King of Prussia Shopping Mall. Detective Alan Elverson of the Upper Marion Police Department, who had received fraud and counterfeiting training from the FBI and Secret Service, was sent to the Mall to determine if, in fact, these individuals were attempting to pass counterfeit hundred dollar bills. After meeting with the security personnel who then pointed out these individuals, Detective Elverson saw Crisswalle sitting in the food court giving money to his companions so that they could go out and make purchases and when they returned, these individuals would give Crisswalle the change. Crisswalle also made some purchases, including a new set of clothes and left his old clothes in the changing room. Detective Elverson asked to see some of the bills that had been taken in by the various merchants and upon an initial, superficial examination, they appeared to be suspect.

Detective Elverson approached Crisswalle and asked him for some identification and Crisswalle told him that he had no identification on him but his name was Ryan Warham, (hereinafter referred to as "Warham"), and that he lived in New Jersey. Detective Elverson was able to obtain the identities of Dandres and Bureau, however, the fourteen year old female was uncooperative and reluctant to produce any identification. When she finally opened her purse to get her identification, Detective Elverson saw what he presumed to be marijuana in her purse. When Dandres was asked if he had any more of the money that was suspected to be counterfeit, he produced over one thousand dollars from his pocket and at the same time, a bag of marijuana fell out of his pocket. Bureau also had several bags of cocaine in her purse. Bureau was separated from the other individuals and Detective Elverson asked her who Warham really was and she told him that his name was Dre and that he was from Pittsburgh.

Detective Elverson obtained a search warrant for the van that belonged to these individuals and in the course of the search of that van, they discovered more drugs and six cellular phones, one of which belonged to Walkow. Detective Elverson also found out that Walkow's parents had called the Penn Hills Police and told them that Walkow was a runaway. Crisswalle, Bureau, Danders and Walkow were all taken to the Upper Marion Township Police headquarters and Crisswalle was fingerprinted and his prints were sent to the FBI for identification. The FBI confirmed Crisswalle's identity and a search of the NCIC revealed that there was an active warrant for his arrest for three homicides. Crisswalle was placed under arrest and homicide detectives from the City of Pittsburgh were notified that Crisswalle had been arrested and detained.

Detectives Moffat and Nutter drove to the Upper Marion Township Police Department and after Crisswalle had been arraigned on the criminal homicide charges, they put him in their vehicle so that they could return him to Pittsburgh. Shortly after they left Upper Marion Township, Crisswalle spontaneously told Detectives Nutter and Moffat that the police had turned up the heat on him and he had to get out of town. While they were in the car, Detective Nutter asked Crisswalle if he had any injuries to make a determination if they had to take him to a hospital before having him incarcerated in the Allegheny County Jail. Crisswalle advised them that he had an injured leg.

At the first trial, Crisswalle called his sister, Shay Payne, (hereinafter referred to as "Payne"), as a witness to establish that he would have been physically unable to have been the shooter that was involved in these homicides. Payne testified that she had recalled that Crisswalle had fractured his ankle sometime before Christmas of 2001 and the reason that she remembered that was that Crisswalle had purchased presents for her children and, because he was on crutches, she had to get the presents from his car and take them to her house. She also recalled that Crisswalle was in a cast for a number of months, including January of 2002.

After a mistrial was declared when the jury could not reach verdicts on the charges filed against Crisswalle and Thompson, Crisswalle's private counsel, James Wymard, indicated to this Court that he was going to seek to withdraw as counsel because he was unsure as to whether or not Crisswalle could afford to pay him for a second trial. In light of the time constraints imposed by Rule 600(d)(1)³ requiring that Crisswalle and Thompson be retried within one hundred twenty days of the date of the declaring of a mistrial, this Court advised him that he had one week in which to make the determination as to whether or not he would seek to withdraw. Mr. Wymard subsequently informed this Court that the Crisswalle family found the money necessary to pay him and he would continue to represent Crisswalle. Accordingly, Crisswalle's and Thompson's cases were rescheduled for trial on February 22, 2005.

On December 3, 2004, the Attorney General's Office was conducting an independent investigation into drug trafficking within Allegheny County. Agents of the Attorney General's Office, working in conjunction with the Monroeville Police Department, arrested Russell Clifford, (hereinafter referred to as "Clifford"), as he was in possession of four ounces of cocaine. In light of Clifford's extensive criminal history, he agreed to be a confidential informant for the Attorney General's Office and identified Crisswalle as an individual from whom he used to purchase drugs. After Crisswalle's incarceration, when he could no longer deal with Crisswalle directly, he dealt with the individuals that Crisswalle had sent to him. Clifford advised the Attorney General's Office that following Crisswalle's incarceration, he generally made the arrangements for drug purchases by virtue of phone calls from Shaheeda Walker, (hereinafter referred to as "Walker"). After talking with her, Walker would then call Crisswalle in the jail and place the order and get a price for the drugs. Walker would then call Clifford back to make the arrangements to meet so that they could make the transfer of the drugs for cash. On several occasions, Clifford advised the Attorney General's Office that there were three-way conversations between he, Walker and Crisswalle.

During the last week of December, 2004, Clifford spoke with Walker and ordered a kilo of cocaine. Several phone calls ensued during which one of the calls, Clifford spoke directly with Crisswalle, and a price of twenty-seven thousand five hundred dollars was established for the kilo of cocaine. On January 1, 2005, Clifford met with Walker in a motel in Monroeville and exchanged the kilo of cocaine for the twenty-seven thousand five hundred dollars. On January 28, 2005, Clifford again spoke with Crisswalle, dur-

ing a three-way phone conversation which included Walker, and ordered two kilos of cocaine and one kilo of heroin. On January 30, 2005, Clifford arranged to meet Walker at a motel in Monroeville and once he determined that she was in possession of the cocaine and heroin, he signaled to the undercover police officers that she had possession of the drugs and Walker was then taken into custody. It was determined that Walker had two kilos of cocaine and five thousand one hundred ninety-four bags of heroin. Walker agreed to talk to the agents from the Attorney General's Office, and told them that she was doing these drug transactions at Crisswalle's behest and that she had delivered cocaine and heroin to Clifford based upon Crisswalle's instructions. Walker agreed to assist the police and also agreed to testify in Crisswalle's next trial.

Clifford, in addition to negotiating the drug transactions with Crisswalle, also agreed to wear a wire and went into the Allegheny County Jail to meet with Crisswalle. Clifford was instructed not to bring up Crisswalle's pending homicide charges but if Crisswalle brought up the topic, that he was to listen to anything that Crisswalle said about it. During the course of one of Clifford's visits, Crisswalle boasted about how he had duped the police with respect to the fracture of his right leg. Crisswalle told Clifford that he had a friend who was a student at Penn State that looked like him and that he used his identification to seek medical treatment.

This information was passed on to the homicide unit of the Pittsburgh Police and Detectives Moffat and Nutter, followed up and made a determination that the individual whom Clifford had referred to by only his street name of "Barney," was a student at Penn State by the name of Brian Martin (hereinafter referred to as "Martin"). Moffat and Nutter went to Penn State and interviewed Martin. During the course of the interview, Martin had told them that he had never had surgery on his leg, however, he had received a notice from a collection agency that he owed five thousand dollars for the surgery and that money was owed to the Mt. Nittany Medical Center. Nutter obtained a search warrant and obtained Martin's medical records from Mt. Nittany Medical Center which listed Martin as the patient and listed his height at five foot seven inches; Martin, however is five foot ten inches. Although Martin's name was signed on the authorization form, it was not his signature. Crisswalle's phone number was listed as a contact number and Crisswalle's mother was listed as a contact person. The medical records also revealed that the patient, "Martin," had tattoos on both arms when, in fact, Martin only had a tattoo on one arm, whereas, Crisswalle had tattoos on both arms. The medical records also showed that a steel plate was placed in "Martin's" right leg and that that steel plate was secured with seven screws. In addition to receiving the medical records, Nutter also obtained the x-rays that were taken in connection with the surgery. Upon his return to Pittsburgh, Nutter obtained a search warrant to have Crisswalle removed from the jail so that his right leg could be x-rayed. Those x-rays were then compared with the x-rays taken following the surgery and the x-rays were identical.

Crisswalle and Thompson's second case commenced on February 22, 2005. The Commonwealth presented all of the witnesses that it had presented at the first trial, in addition to the testimony of Walker, Martin, and the added testimony of Nutter. Martin testified that he had never been treated at the Mt. Nittany Medical Center nor did he ever have an injury to his right leg. Nutter also indicated that Crisswalle had obtained a photo identification from Martin so that he could pose as Martin to have this medical treatment done at the Mt. Nittany Medical Center. The surgery that was done on Crisswalle was done on February 11, 2002, approximately three weeks after the murders.

Walker was called to testify and she said that she had met Crisswalle sometime in 1992 and began dating him. In 1994 she was shot in the back and as a result of that injury, was confined to a wheelchair. Despite her disability, she graduated from high school and then enrolled in Edinborough University to obtain her college degree. After she was shot, she and Crisswalle dated sporadically. In 2001 she learned that Latisha Eubanks (hereinafter referred to as "Eubanks"), who was fifteen years old, had given birth to one of Crisswalle's children. Crisswalle introduced her to Eubanks and Eubanks eventually became the driver for Walker when she was delivering drugs for Crisswalle. In February of 2002, Walker received a phone call from Crisswalle saying that someone had injured his leg and that he would like to borrow one of Walker's leg splints. Walker gave Eubanks one of her leg splints on February 17, 2002 and shortly thereafter, Crisswalle began to visit Walker at her apartment so that he could use her shower which was equipped with a chair.

Sometime during the Spring of 2002, Crisswalle came to her apartment and was visibly upset. She asked him why he was upset and he told her that people in the "Hood" were saying that he shot the little girl. He told Walker that he did not kill the little girl but, rather, he was the one that killed Mitchell. He had to kill Mitchell because Mitchell had put a contract out on him and he wanted to get Mitchell before Mitchell could get him. A couple of months later, Crisswalle called Walker and told her that he was leaving Pittsburgh because the police had put too much heat on him and he was afraid that he was going to be arrested for these homicides.

Once Crisswalle was arrested and brought back to Pittsburgh and lodged in the Allegheny County Jail, he contacted Walker and arranged for a meeting between her, Walkow, and Walkow's mother. He wanted Walker to be present at the meetings that he had with the Walkows because the guards in the jail would allow Crisswalle to meet with visitors in a room without bars or phones and he could have a contact visit since Walker was in a wheelchair. During the Fall of 2004, Crisswalle asked Walker to be his courier for his drug sales and she agreed to do so. In January of 2005, this drug activity increased and she picked up and dropped off drugs that Crisswalle was selling. She continued to act as his courier until she was taken into custody by the Attorney General's Office as a result of her dealings with Clifford.

Walker was interviewed by Nutter and initially gave him no information, however, during a second interview, she disclosed all of the information that she knew about Crisswalle, including his admission that he had killed Mitchell. She also told Nutter that Crisswalle wanted her, if she was ever called to testify, to state that he was using her shower from January through March when she remembered that he did not begin to use the shower until after he had the surgery and it was not until sometime in mid-February. During the intervening time between the first trial and the second trial, she told Nutter that Crisswalle was looking for a doctor or nurse to testify as to his injuries and how he had sustained these injuries prior to Christmas of 2001. On March 21, 2005, the jury returned verdicts convicting Crisswalle of all of the charges filed against him, specifying that the charges of criminal homicide were all first degree murders. The jury again was unable to reach verdicts with respect to Thompson.

A mistrial was declared as a result of the jury's inability to reach verdicts with respect to the charges against Thompson and his case again was rescheduled for trial. His trial counsel for the first two trials asked to withdraw, which motion was granted, and Thompson's current appellate counsel was appointed as trial counsel. The trial commenced on September 6, 2005 and on September 16, 2005, Thompson was found guilty of three counts of first degree murder, one count of aggravated assault, five counts of recklessly endangering another person, one count of possession of a firearm without a license, and one count of criminal con-

spiracy. Thompson filed timely post-sentencing motions, which motions ultimately were denied and the instant appeal ensued.

CRISSWALLE

Although Crisswalle was convicted following the second trial, his claims of error begin with decisions on his pre-trial motions and continue through the jury instructions that were given to the jury that convicted him of all of these charges. Initially, Crisswalle maintains that this Court erred in failing to grant his motion to sever his cases from Thompson's cases. Pennsylvania Rule of Criminal Procedure 505⁴ permits the joinder of defendants when it is alleged that they participated in the commission of the same crimes. Similarly, Pennsylvania Rule of Criminal Procedure 582 sets forth the standards for the joinder of defendants for the purpose of trial. That Rule provides:

Rule 582. Joinder—Trial of Separate Indictments or Informations

(A) Standards

(1) Offenses charged in separate indictments or informations may be tried together if:

(a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or

(b) the offenses charged are based on the same act or transaction.

(2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

(B) Procedure

(1) Notice that offenses or defendants charged in separate indictments or informations will be tried together shall be in writing and filed with the clerk of courts. A copy of the notice shall be served on the defendant at or before arraignment.

(2) When notice has not been given under paragraph (B)(1), any party may move to consolidate for trial separate indictments or informations, which motion must ordinarily be included in the omnibus pre-trial motion.

A defendant may request severance if he is able to establish that he would be prejudiced by a joint trial. That request would be made pursuant to Pennsylvania Rule of Criminal Procedure 583, which provides as follows:

Rule 583. Severance of Offenses or Defendants

The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

The standard for reviewing a Trial Court's denial of a request for severance is circumspect. In *Commonwealth v. O'Kicki*, 408 Pa.Super. 518, 597 A.2d 152, 157 (1991), the Superior Court made the following observation:

Again, we are circumscribed in our review of the trial court's decision to a manifest abuse of discretion standard. *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981). As stated by the late Chief Justice Eagen, "As a general proposition it is well established that the grant or denial of severance is a matter of discretion with the trial judge whose conclusion will be reversed only for manifest abuse of discretion or prejudice and clear injustice to the defendant." *Commonwealth v. Peterson*, 453 Pa. 187, 193, 307 A.2d 264, 267 (1973).

The most common example of prejudice would be the presentation of antagonistic defenses by co-defendants. In order to be antagonistic, the defenses must not be conflicting but, rather, must require a jury to disbelieve one defendant's potential defense in order to believe a co-defendant's defense. It is incumbent upon a defendant who requests severance to not only plead that he has been prejudiced but, also, to demonstrate what that prejudice is.

In *Commonwealth v. Brown*, 592 Pa. 378, 925 A.2d 147, 161-162 (2007), the Pennsylvania Supreme Court set forth the standard to use in reviewing a claim that the Trial Court erred in failing to grant a request for severance.

Severance questions fall within the discretion of the trial judge and an order denying severance will not be overturned on appeal absent an abuse of discretion. *Commonwealth v. Rivera*, 565 Pa. 289, 773 A.2d 131, 137 (2001); *Commonwealth v. King*, 554 Pa. 331, 721 A.2d 763, 771 (1998), *cert. denied*, 528 U.S. 1119, 120 S.Ct. 942, 145 L.Ed.2d 819 (2000).^{FNS} When conspiracy is charged, a joint trial generally is advisable. *King*, 721 A.2d at 771; *Commonwealth v. Chester*, 526 Pa. 578, 587 A.2d 1367, 1372 (1991), *cert. denied*, 502 U.S. 959, 112 S.Ct. 422, 116 L.Ed.2d 442 (1991). In ruling upon a severance request, the trial court should consider the likelihood of antagonistic defenses. *Chester*, 587 A.2d at 1373; *Rivera*, 773 A.2d at 137. A claim of mere hostility between defendants, or that one defendant may try to exonerate himself at the expense of the other, however, is an insufficient basis upon which to grant a motion to sever. *Chester*, 587 A.2d at 1373. Indeed, this Court has noted that "the fact that defendants have conflicting versions of what took place, or the extents to which they participated in it, is a reason for rather than against a joint trial because the truth may be more easily determined if all are tried together." *King*, 721 A.2d at 771 (quoting *Chester*, 587 A.2d at 1373). Instead, severance should be granted only where the defenses are so antagonistic that they are irreconcilable- *i.e.*, the jury essentially would be forced to disbelieve the testimony on behalf of one defendant in order to believe the defense of his co-defendant. *Commonwealth v. Williams*, 554 Pa. 1, 720 A.2d 679, 685 (1998), *cert. denied*, 526 U.S. 1161, 119 S.Ct. 2052, 144 L.Ed.2d 219 (1999); *Commonwealth v. Lambert*, 529 Pa. 320, 603 A.2d 568, 573 (1992); *Chester*, 587 A.2d at 1373. Thus, a defendant claiming error on appeal has the burden of demonstrating that he suffered actual, not speculative, prejudice because of the ruling permitting a joint trial. *Rivera*, 773 A.2d at 137.

Crisswalle failed to meet his burden since he was unable to demonstrate that he and Thompson had antagonistic defenses or that he was in any way prejudiced by the testimony that would have been presented at a joint trial. Both Thompson and Crisswalle maintained that they were not present at the scene of the crimes and, accordingly, they did not commit these crimes. There was nothing antagonistic about either defense presented by either Crisswalle or Thompson and, accordingly, Crisswalle was unable to demonstrate what prejudice, if any, he suffered as a result of his cases being tried with Thompson's cases. Having failed to demon-

strate what prejudice he suffered, Crisswalle was unable to show an abuse of discretion in this Court's denial of his motion for severance. As noted in *Commonwealth v. Hacker*, 959 A.2d 380, 392 (Pa.Super. 2008):

An abuse of discretion is not a mere error in judgment but, rather, involves bias, prejudice, partiality, ill will, manifest unreasonableness, or a misapplication of law.

Crisswalle's next claim is that this Court erred when it refused to grant his motion for a line-up. The granting or the denying of a request for a line-up is within the sound discretion of the Trial Judge and such a decision cannot be disturbed absent an abuse of discretion on the part of the Trial Court. *Commonwealth v. Rush*, 522 Pa. 379, 568 A.2d 285 (1989). Similarly, in *Commonwealth v. Sexton*, 485 Pa. 17, 400 A.2d 1289 (1979), the Court acknowledged a timely request for a line-up cannot be arbitrarily and capriciously denied. That Court recognized the problems that were inherent with in-court identifications and outlined those circumstances when a line-up should be granted.

We have long recognized the peculiar problems raised in identification testimony. See e.g., *Commonwealth v. Mouzon*, 456 Pa. 230, 318 A.2d 703 (1974); *Commonwealth v. Kloiber*, 378 Pa. 412, 106 A.2d 820 (1954); *Commonwealth v. House*, 223 Pa. 487, 72 A. 804 (1909); *Commonwealth v. Sharpe*, 138 Pa.Super. 156, 10 A.2d 120 (1939). See generally *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967), wherein it was stated, "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." Moreover, a recognition of the need to provide the jury with cautionary instructions to assist in their assessment of the credibility of identification testimony is likewise not novel. *Commonwealth v. Kloiber*, *supra*. In our instant decision, we are merely utilizing this same procedure to make the jury aware that the appellant sought and was denied an opportunity for an identification procedure in a more objective setting than the one from which the identification introduced at trial emanated.

It is important to note the limitations of our holding today. First, we have declined to accept a per se rule that all in-court confrontations are inadmissible. Second, we have also declined to accept a per se rule that a pre-trial, pre-hearing line-up is mandatory in all cases. We are merely saying that where as here the issue of identification is legitimately at issue, a timely request for a pre-trial or pre-hearing identification procedure should be granted.

In short, the complained of injury is the denial to the accused of the possibility of evidence which could have been used to challenge the credibility of the subsequent in-court identifications. To exclude either or both of the in-court identifications, as suggested by the majority of the Superior Court, would be unduly harsh and out of proportion to the injury sustained. The doctrine of exclusion, wherein evidence which is otherwise relevant and competent is not admitted, is premised upon the impropriety of governmental action in obtaining that evidence. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Here, there was no governmental impropriety in securing this identification testimony, thus, there is no justification for the application of an exclusionary rule. We are satisfied that the remedy we have suggested adequately redresses the harm that was occasioned by the improper ruling.

In his motion requesting a line-up, Crisswalle suggested that he was entitled to one since the Commonwealth advised him that Brian Shealey would be a Commonwealth witness who would identify Crisswalle as one of the two shooters, despite the fact that he had previously testified at a Coroner's Inquest that he could not identify the second shooter. Additionally, Crisswalle maintained that the line-up would aid the truth process since he would not be subjected to a suggested identification at trial. The problem with this contention is that Crisswalle's request for a line-up was not timely made but, rather, was made almost two years following his arrest. In the intervening time, Shealey had testified at the Coroner's Inquest held with respect to William Thompson. After the Commonwealth had secured other witnesses to identify Crisswalle as the shooter and once Crisswalle was formerly charged with these crimes, Shealey came forward to the police and identified Crisswalle as the second shooter and also picked him out of a photo array. A line-up would not have changed any of this, nor would it have changed the manner in which the cross-examination of Shealey was handled.

Crisswalle's trial counsel spent a considerable amount of time cross-examining Shealey⁵ on the fact that he had previously stated under oath that he did not know the identity of the second shooter and that he had never seen Crisswalle prior to the evening of January 25, 2002. Shealey also explained that he did not want to become the sole individual who identified both of the shooters since, in the neighborhood that he lived, he would not be considered a witness but, rather, a snitch. What is more interesting, however, is the fact that Crisswalle has suggested that it was an error for this Court to deny a request for a line-up prior to his first trial which resulted in a hung jury. Somehow that denial prejudiced Crisswalle and ultimately resulted in his conviction following the second trial. This contention conveniently ignores the eyewitness identification made of Crisswalle by witnesses other than Shealey, Crisswalle's admission to Walker that he had killed Mitchell and the information obtained between the first and second trial, which substantiated that Crisswalle had a fracture of his right ankle and that it occurred in the early part of 2002 and not before Christmas of 2001, as Crisswalle's sister testified to during both of his trials. It is clear that nothing would have been gained by a line-up since Shealey had previously identified Crisswalle in the first trial and Crisswalle's counsel had an ample opportunity to attack his credibility as a result of Shealey's prior inconsistent statements with respect to the identification of the second shooter.

Crisswalle's next contention of error is that this Court erred when it denied his motion in limine with respect to the testimony of Shealey.

A motion in *limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered. Such a ruling is similar to that upon a motion to suppress evidence.... We apply an evidentiary abuse of discretion standard to the denial of a motion in limine.

Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and we will not reverse the court's decision on such a question absent a clear abuse of discretion.

Commonwealth v. Zugay, 745 A.2d 639, 644-645 (Pa.Super. 2000) (citations omitted).

In determining whether evidence should be admitted, the trial court must weigh the relevance and probative value of the evidence against the prejudicial effect of that evidence. *Commonwealth v. Barnes*, 871 A.2d 812, 818 (Pa.Super.

2005). Evidence is relevant if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact. *Id.* Although a court may find that evidence is relevant, the court may nevertheless conclude that such evidence is inadmissible because of its prejudicial effect. *Id.*

Commonwealth v. Maloney, 876 A.2d 1002, 1006 (Pa.Super. 2005);

In his motion, Crisswalle requested that this Court preclude Shealey from testifying as to other people's opinions as to Crisswalle's guilt, limit Shealey's testimony to the criminal activity that he may have witnessed Crisswalle perpetrate and, finally to prevent Shealey from testifying as to Crisswalle's reputation in the community. To suggest that Shealey was a reluctant and uncooperative witness would be an understatement. Shealey initially denied that he witnessed anything despite the fact that he was knocked down by the two shooters as they entered Mr. Tommy's Restaurant, that he observed both shooters prior to their entry into the restaurant, observed the shootings and then observed the two men running away from the restaurant and observed their faces when their masks came off. Shealey also described his reluctance to come forward to be the chief prosecution witness since he knew that he would be viewed as a snitch in the community in which he resided and feared for his life. That fear resulted in Shealey and his family being placed in the Witness Protection Program and being relocated. This Court had to threaten Shealey with a contempt sentence in order to attempt to have him answer the questions that were being asked of him.

Shealey was contentious throughout his testimony, more so during the time that he was being cross-examined by both Crisswalle's and Thompson's counsel. The concerns that Crisswalle sought to address never arose since Shealey's testimony implicated Crisswalle as being one of the two shooters and Shealey was vigorously cross-examined on this point. While Shealey did offer opinions as to how people view him and the danger of living in his community, he did not explore the areas which Crisswalle sought to limit and, accordingly, there could have been no error in denying his motion in limine.

Crisswalle next maintains that this Court erred when it did not suppress the statement that Crisswalle made to Detectives Nutter and Moffatt when he was being returned from Upper Marion Township, following his arrest on the outstanding homicide warrants that had been filed against him. In *Commonwealth v. Spieler*, 887 A.2d 1271, 1274-1275 (Pa.Super. 2005), the Superior Court set for the standard for reviewing the denial of a motion to suppress as follows:

We review a trial court's denial of a suppression motion under the following standard:

Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Since the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Minnich, 874 A.2d 1234, 1236 (Pa.Super. 2005) (quoting *Commonwealth v. Blair*, 860 A.2d 567, 571 (Pa.Super. 2004)).

Crisswalle maintains that his statement should have been suppressed since he was never given his Miranda warnings and his original arrest by the Upper Marion Township Police was illegal since they did not have probable cause to arrest him. The statement that Crisswalle wished to have suppressed was that he told Detectives Moffatt and Nutter that he had to get out of Pittsburgh since they turned up the heat on him by releasing his photograph to the media and indicated that he was a suspect in the homicides that occurred in Mr. Tommy's Restaurant. This statement was made spontaneously and not in response to any questions asked by either Detectives Moffatt or Nutter. Crisswalle was just explaining why he was in King of Prussia and at no time had either Detective asked him any question. Since this was not part of a custodial interrogation, there was no need for Crisswalle to be given any Miranda warnings since the sole purpose that Detectives Moffatt and Nutter had gone to Upper Marion Township was to bring Crisswalle back to Pittsburgh so that he could face these homicide charges.

Crisswalle has also suggested that since there was no probable cause for this arrest and detention by the Upper Marion Township Police, that he should not have been seized. Before one can address this claim of error, the nature of the interaction between Crisswalle and the police must be examined and analyzed. In *Commonwealth v. Smith*, 575 Pa. 203, 836 A.2d 5, 10 (2003), the Pennsylvania Supreme Court described the three types of interaction between citizens and the police and set forth the basis for each of these interactions:

A primary purpose of both the Fourth Amendment and Article I, Section 8 "is to protect citizens from unreasonable searches and seizures." *In the Interest of D.M.*, 566 Pa. 445, 781 A.2d 1161, 1163 (2001). Not every encounter between citizens and the police is so intrusive as to amount to a "seizure" triggering constitutional concerns. See *Commonwealth v. Boswell*, 554 Pa. 275, 721 A.2d 336, 340 (1998) (opinion in support of affirmance) (citing *Terri v. Ohio*, 392 U.S. 1, 20 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). This Court has noted that there are three basic categories of interactions between citizens and the police. The first category, a mere encounter or request for information, does not need to be supported by any level of suspicion, and does not carry any official compulsion to stop or respond. The second category, an investigative detention, derives from *Terri v. Ohio* and its progeny: such a detention is lawful if supported by reasonable suspicion because, although it subjects a suspect to a stop and a period of detention, it does not involve such coercive conditions as to constitute the functional equivalent of an arrest. The final category, the arrest or custodial detention, must be supported by probable cause. See *Ellis*, 662 A.2d at 1047-48; see also *In the Interest of D.M.*, 781 A.2d at 1164. This Court has acknowledged this approach to police/citizen encounters under both the Fourth Amendment and Article I, Section 8. See *Commonwealth v. Polo*, 563 Pa. 218, 759 A.2d 372, 375 (2000) (construing Article I, Section 8); *Ellis*, 662 A.2d at 1047 ("Fourth Amendment jurisprudence has led to the development of three categories of interactions between citizens and police."). *Accord In the Interest of D.M.*

The problem with this contention is that the Upper Marion Township Police were called by the security personnel of the King of Prussia Mall on the basis that they believed that counterfeit money was being passed at the various stores in the mall by Crisswalle and his companions, Walkow, Dandres and Bureau. Detective Elverson of the Upper Marion Township Police had extensive experience with counterfeiting since he had worked with the FBI and Secret Service sometime prior to and during his employ-

ment with the Upper Marion Township Police. When he first observed the pattern of what was taking place in the mall and several of the bills that had been passed through various merchants and the bills that he received from Crisswalle and his companions, he believed that they might have been counterfeit. When he asked Crisswalle what his name was, Crisswalle told him he was Ryan Warham from New Jersey. When Detective Elverson spoke to Bureau, she informed him that Crisswalle's name was not Ryan but, rather, Dra from Pittsburgh. Detective Elverson was finally able to have Walkow cooperate with him and obtained her identification and learned that she was a fourteen year old and subsequently classified as a runaway by the Penn Hills Police Department. While she was retrieving her identification from her purse, Elverson looked in and saw what he believed to be marijuana in that purse. A search warrant was obtained for the vehicle rented by Daniels and used by Crisswalle and his companions and other drugs were found in that vehicle.

Crisswalle was taken by Detective Elverson to the Upper Marion Township Police Department so that he could continue with his investigation and the first thing that he attempted to do was to determine Crisswalle's true identity. After Crisswalle was fingerprinted, his fingerprints were submitted to the FBI which determined that he was, in fact Crisswalle, and that there was a warrant out for his arrest for three homicides. Given the entire facts and circumstances known to Detective Elverson at the time that he detained Crisswalle, whether it be classified either as investigative detention or custodial detention, it is clear that he had a reasonable basis for subsequently arresting and detaining him and, accordingly, any information that was received by Detectives Nutter and Moffatt was not pursuant to that investigation but, rather, pursuant to the warrant for his arrest for the charges for criminal homicide.

Crisswalle next suggests that this Court erred in failing to suppress evidence of statements made by him to Clifford during their conversations in the Allegheny County Jail. Crisswalle also maintained that this Court further compounded that error by permitting the Commonwealth to ask him numerous questions concerning the statements made to Clifford and the nature of his relationship with Clifford. Clifford was arrested by agents of the Attorney General's Office on December 3, 2002, eight days after Crisswalle's first trial had ended in a hung jury. Clifford was in possession of four ounces of cocaine and, knowing that he was facing a significant sentence in light of this arrest, he agreed to become a confidential informant for the Attorney General's Office.

During his initial interview with agents from the Attorney General's Office, Clifford, identified Crisswalle as being one of his suppliers and he agreed to make further purchases from Crisswalle, this, in spite of the fact that Crisswalle was in jail since he had been doing this since the time of Crisswalle's arrest. The manner in which he would arrange the purchase of drugs was to talk with Crisswalle on the phone sometimes that would be simply a two-way conversation or a three-way conversation involving Walker. Crisswalle would tell Walker what the price was and the quantity of the drugs and where to meet Clifford for the exchange.⁶ Two controlled buys were made and all of this information was recorded by virtue of Clifford's agreement to have his conversations with Crisswalle recorded. They were also recorded unintentionally. Despite the fact that there is a sign in the jail indicating that all telephone calls to and from inmates in the Allegheny County Jail are recorded, Crisswalle somehow believed that if he entered into a three-way call, that the Allegheny County Jail recording system would not be able to capture the second leg of that phone call. After the second drug transaction, Walker was taken into custody by the Attorney General's Office and after initially denying that she had any information about Crisswalle, she eventually provided the District Attorney's Office with an inculpatory statement that Crisswalle had made and agreed to be a witness during the second trial.

This Court, in allowing the statements made to Clifford to be placed into evidence, thereby permitting the District Attorney to examine Crisswalle on those statements, did so for several reasons. The first of which was to show the reason why Walker agreed to testify against Crisswalle. Crisswalle had used Walker to be his courier in transporting the drugs to Clifford and bring the money to him. The drug deal for which Walker was taken into custody had a value of approximately sixty-seven thousand dollars. This was also important to demonstrate that Crisswalle had a source of revenue other than the ten dollars per hour that he received as a landscaper. Throughout the course of Crisswalle's testimony, he indicated that he had no money and yet when he was arrested in Upper Marion Township, he had more than one thousand dollars in cash on him.

The second reason for the admission of the Crisswalle-Clifford relationship was to allow the jury to assess the credibility of April Dixon, Crisswalle's aunt, who testified that on January 25, 2002, that she was about to start work at her second job, which was a manager of a nightclub known as Phase Three in the Homewood area of the City of Pittsburgh. As she was setting up the front and back bars, she realized that she did not have sufficient change in the registers to fill up both bars and she made some phone calls to see if she could borrow some money. She was initially unsuccessful and she then called Crisswalle and he informed her that he could lend her some money to furnish the back bar. In providing alibi testimony for Crisswalle, she indicated that she drove to 105 East Linster Drive in Penn Hills and honked her horn so that Crisswalle would come out of that residence. She observed Crisswalle come out with a crutch under his arm and he gave her one hundred seventy dollars to fund the back bar at Phase Three. She stated that she received the money from Crisswalle at approximately 7:05 p.m. She also testified that Crisswalle had helped her out doing the same thing on another occasion. The testimony concerning Crisswalle's drug trafficking activities with Clifford was permitted to establish Crisswalle's real source of income and to assess the credibility of several of the witnesses for both the Commonwealth and the defense who had come forward to testify.

Crisswalle's next contention of error is that he was denied a jury of his peers since the Commonwealth used its preemptory challenges to exclude African-Americans from the jury.⁷ The United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 85-87, 106 S.Ct. 1712, L.E.2d (1986), declared that a person would be denied his equal protection of the law if the systematic exclusion of prospective jurors by race was permitted.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.* at 305.^{FNS} "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. *Akins v. Texas*, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945).^{FN6} But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Ex parte Virginia*, 10 Otto 339, 100 U.S. 339, 345, 25 L.Ed. 676 345 (1880). The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder, supra*, 100 U.S., at 305,^{FN7} or on the false assumption that members of his race as a group are not qualified to serve as jurors, see *Norris v. Alabama*, 294 U.S. 587, 599, 55 S.Ct. 579, 584, 79 L.Ed. 1074 (1935); *Neal v. Delaware*, 13 Otto 370, 397, 103 U.S. 370, 397, 26 L.Ed. 567 (1881).

FN5. See *Hernandez v. Texas*, *supra*, 347 U.S., at 482, 74 S.Ct., at 672-73; *Cassell v. Texas*, 339 U.S. 282, 286-287, 70 S.Ct. 629, 631-32, 94 L.Ed. 839 (1950) (plurality opinion); *Akins v. Texas*, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945); *Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Neal v. Delaware*, *supra*, 103 U.S., at 394.

FN6. Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), we have never held that the Sixth Amendment requires that “petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population,” *Id.* at 538, 95 S.Ct., at 702. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court’s holding that a jury of six persons is not unconstitutional. *Williams v. Florida*, 399 U.S. 78, 102-103, 90 S.Ct. 1893, 1906-1907, 26 L.Ed.2d 446 (1970).

FN7. See *Hernandez v. Texas*, *supra*, 347 U.S., at 482, 74 S.Ct., at 672-673; *Cassell v. Texas*, *supra*, 339 U.S., at 287, 70 S.Ct., at 632; *Akins v. Texas*, *supra*, 325 U.S., at 403, 65 S.Ct., at 1279; *Neal v. Delaware*, *supra*, 103 U.S., at 394.

Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure. “The very idea of a jury is a body...composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” *Strauder*, *supra*, 100 U.S., at 308; see *Carter v. Jury Comm’n of Greene County*, 396 U.S. 320, 330, 90 S.Ct. 518, 524, 24 L.Ed.2d 549 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).^{FN8} Those on the venire must be “indifferently chosen,”^{FN9} to secure the defendant’s right under the Fourteenth Amendment to “protection of life and liberty against race or color prejudice.” *Strauder*, *supra*, 100 U.S., at 309.

FN8. See *Taylor v. Louisiana*, *supra*, 419 U.S., at 530, 95 S.Ct., at 697-698; *Williams v. Florida*, *supra*, 399 U.S., at 100, 90 S.Ct., at 1905-1906. See also Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L.Rev. 1 (1966).

In *Duncan v. Louisiana*, decided after *Swain*, the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action by the Due Process Clause of the Fourteenth Amendment. 391 U.S., at 147-158, 88 S.Ct., at 1446-52. The Court emphasized that a defendant’s right to be tried by a jury of his peers is designed “to prevent oppression by the Government.” *Id.* at 155, 156-157, 88 S.Ct., at 1450-52. For a jury to perform its intended function as a check on official power, it must be a body drawn from the community. *Id.* at 156, 88 S.Ct., at 1451; *Glasser v. United States*, 315 U.S. 60, 86-88, 62 S.Ct. 457, 473, 86 L.Ed. 680 (1942). By compromising the representative quality of the jury, discriminatory selection procedures make “juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.” *Akins v. Texas*, *supra*, 325 U.S., at 408, 65 S.Ct., at 1281 (Murphy, J., dissenting).

FN9. 4 W. Blackstone, *Commentaries* 350 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana*, 391 U.S., at 152, 88 S.Ct., at 1449).

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 223-224, 66 S.Ct. 984, 987-88, 90 L.Ed. 1181 (1946). A person’s race simply “is unrelated to his fitness as a juror.” *Id.* at 227, 66 S.Ct., at 989 (Frankfurter, J., dissenting). As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U.S., at 308; see *Carter v. Jury Comm’n of Greene County*, *supra*, 396 U.S., at 329-330, 90 S.Ct., at 523-524; *Neal v. Delaware*, *supra*, 103 U.S., at 386.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. See *Ballard v. United States*, 329 U.S. 187, 195, 67 S.Ct. 261, 265, 91 L.Ed. 181 (1946); *McCray v. New York*, 461 U.S. 961, 968, 103 S.Ct. 2438, 2443, 77 L.Ed.2d 1322 (1983)

As a result of this determination the United States Supreme Court devised the formula for now what is commonly referred to as a *Batson* challenge:

The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. See *Castaneda v. Partida*, *supra*, 430 U.S., at 494-495, 97 S.Ct., at 1280; *Washington v. Davis*, 426 U.S., at 241-242, 96 S.Ct., at 2048-2049; *Alexander v. Louisiana*, *supra*, 405 U.S., at 629-631, 92 S.Ct., at 1224-1226. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial....

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause. See *McCray v. Abrams*, 750 F.2d, at 1132; *Booker v. Jabe*, 775 F.2d 762, 773 (CA6 1985), cert. pending, No. 85-1028. But the prosecutor may not rebut the defendant’s prima facie case of discrimination by stating merely that he challenged jurors of the defendant’s race on the assumption-or his intuitive judgment-that they would be partial to the defendant because of their shared race. Cf. *Norris v. Alabama*, 294 U.S., at 598-599, 55 S.Ct., at 583-84; see *Thompson v. United States*, 469 U.S. 1024, 1026, 105 S.Ct. 443, 445, 83 L.Ed.2d 369 (1984) (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, *supra*, at

1716, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." *Alexander v. Louisiana*, 405 U.S., at 632, 92 S.Ct., at 1226. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." *Norris v. Alabama*, supra, 294 U.S. at 598, 55 S.Ct., at 583-84. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.^{FN20} The trial court then will have the duty to determine if the defendant has established purposeful discrimination.

During the selection of the jury, several African-Americans were excused by the Commonwealth and in response to an objection made by Crisswalle, the Commonwealth was required to disclose the reason that it removed that individual. For each prospective juror that was removed, a logical, reasonable and legitimate explanation was given as to why the Commonwealth exercised its preemptory challenge and, accordingly, the jury that was selected was a fair and impartial jury, since the explanations offered by the District Attorney met the requirements of *Batson*.

Crisswalle next maintains that this Court erred in permitting testimony concerning the drugs and paraphernalia that were found in the vehicle used by Crisswalle, Bureau, Walkow and Dandres to transport them from Pittsburgh to King of Prussia.

"The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law." *B.K. v. J.K.*, 823 A.2d 987, 991-92 (Pa.Super. 2003). "Thus our standard of review is very narrow.... To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." *Hawkey v. Peirsel*, 869 A.2d 983, 989 (Pa.Super. 2005) (citing *Turney Media Fuel, Inc., v. Toll Bros.*, 725 A.2d 836, 839 (Pa.Super. 1999)).

McManamon v. Washko, 906 A.2d 1259, 1268-1269 (Pa.Super. 2006),

The drugs that were found in that vehicle, along with the six cellular phones, formed the basis for filing charges against all of the individuals and provided the basis for holding Crisswalle pending his proper identification. Since each individual had access to this vehicle, each one of them could have been in constructive possession of that vehicle and the drugs.

Crisswalle next maintains that this Court erred in permitting Walker to testify about her drug activity with Crisswalle and further compounded that error by allowing the Commonwealth to ask her on redirect examination of Walkow's involvement with Crisswalle's drug trafficking activity. Walker testified that she has known Crisswalle since 1992 when she first began to date him and become intimate with him. In 1994 she was shot in the back⁸ and confined to a wheelchair. Following her paralysis, Crisswalle did not see much of her. Walker continued with her education and graduated from Edinboro University. In the meantime, Crisswalle was becoming intimate with several other females, including Eubanks with whom he had a child.

In the Fall of 2004, Crisswalle asked Walker to deliver drugs for him which she agreed to do because she still loved Crisswalle. Her job was to take the drugs to the purchaser and after receiving the money, give that money to another person that Crisswalle directed should receive those funds. In January of 2005, Crisswalle's drug activity increased, and it ultimately led to her detention by the Attorney General's Office for the delivery of two kilos of cocaine and fifty-two hundred bags of heroin to Clifford. When she was informed of the fact that she faced the possibility of at least ten years in prison, she agreed to be a cooperating witness in not only the drug investigation but, also, in the homicide investigation as it pertained to Crisswalle.

The testimony about Walker's involvement with Crisswalle's drug activity was given to the jury so that it could assess Walker's credibility since in addition to this testimony, she provided testimony with respect to Crisswalle's admission to her that he had killed Mitchell and not the little girl in Mr. Tommy's Restaurant and, that he did not like the fact that he was being accused of killing the little girl. This information was given to the jury for the purpose of assessing Walker's credibility so that they could make a determination as to what weight, if any, they could place upon her testimony.

The area of inquiry to which Crisswalle now objects is that during the redirect examination of Walker she was asked by the District Attorney what, if any, role Walkow had in Crisswalle's drug trafficking and she informed the jury that Walkow was the individual to whom she gave the money that she had received from the sale of the drugs. During the course of Walker's direct testimony, Walkow's name came up and, in fact, Walker explained how she was being used by Crisswalle. Since she was confined to a wheelchair, she was given a bigger room to meet Crisswalle and she would meet Crisswalle with Walkow and her mother. Walkow's involvement with Crisswalle was noted on his visitor's list since Walkow and her mother paid the most visits to Crisswalle in the jail. The testimony concerning delivery of the money to Walkow was nothing more than expansion on Walkow's involvement with Crisswalle and in no way prejudiced Crisswalle since his drug trafficking had already been presented to the jury.

Crisswalle's next contention of error is that this Court permitted Boyd and David Eynon, (hereinafter referred to as "Eynon"), to testify on the hearsay statements made by Morris, which identified Crisswalle as one of the shooters. Pennsylvania Rule of Evidence 801 defines hearsay as follows:

Rule 801. Definitions

The following definitions apply under this article:

- (a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) **Declarant.** A "declarant" is a person who makes a statement.
- (c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Boyd and Eynon both testified that Morris told them that he saw two men get out of a black car and go into the restaurant. He

also indicated that he knew one of those individuals and he knew that individual to be “Dra.” The problem with this current contention is that Morris testified at the time of trial and indicated that one of the individuals that went into the restaurant was “Little Dra” and identified him in the Courtroom as the individual he saw on the night of the shooting. Trial Transcript, Volume IV, page 23, lines 1-17.

A. I don’t know how that – how that came off.

Q. When the little guy’s mask came down, did you recognize him?

A. Yes.

Q. Who did you see?

A. Little Dra.

Q. Could you identify him by the color shirt and tie he was wearing?

A. White shirt, blue tie.

MR. TRANQUILLI: Could the record reflect the witness identified Andra Crisswalle as the shorter gunman?

THE COURT: There are two guys with white shirts and blue ties.

THE WITNESS: The one without the vest, sweater.

One of the exceptions to the hearsay rule is identification testimony as set forth in Pennsylvania Rules of Evidence 803.1:

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement:

(1) Inconsistent statement of witness. A statement by a declarant that is inconsistent with the declarant’s testimony, and (a) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement.

Comment: Subsection (a) is similar to F.R.E. 801(d)(1)(A), except that the Pennsylvania rule classifies those kinds of inconsistent statements that are described therein as exceptions to the hearsay rule, not exceptions to the definition of hearsay. Subsections (b) and (c) are an expansion of the exception that is described in the federal rule.

Pa.R.E. 803.1(1) is consistent with prior Pennsylvania case law. See *Commonwealth v. Brady*, 507 A.2d 66 (Pa. 1986) (seminal case that overruled close to two centuries of decisional law in Pennsylvania and held that the recorded statement of a witness to a murder, inconsistent with her testimony at trial, was properly admitted as substantive evidence, excepted to the hearsay rule); *Commonwealth v. Lively*, 610 A.2d 7 (Pa. 1992). To qualify as a “verbatim contemporaneous recording of an oral statement,” the “recording” must be an electronic, audiotaped, or videotaped recording. See *Commonwealth v. Wilson*, 707 A.2d 1114 (Pa. 1998). Inconsistent statements of a witness that do not qualify as exceptions to the hearsay rule may still be introduced to impeach the credibility of the witness. See Pa.R.E. 613.

(2) Statement of identification. A statement by a witness of identification of a person or thing, made after perceiving the person or thing, provided that the witness testifies to the making of the prior identification.

In *Commonwealth v. Wilson*, 580 Pa. 439, 861 A.2d 919, 929-930 (2004), the Pennsylvania Supreme Court explained the rationale for the admission of this identification testimony as follows:

The Confrontation Clause of the Sixth Amendment “provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987) (plurality opinion). These protections are not violated, where, as here, a testifying witness’s out-of-court statement is admitted and the witness is subject to full and effective cross-examination. See *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970).

With regard to the state evidentiary law dynamic of Appellant’s claim, in general, an out-of-court statement of a witness that is consistent with his trial testimony constitutes inadmissible hearsay. See *Commonwealth v. Hutchinson*, 521 Pa. 482, 486-87, 556 A.2d 370, 372 (1989). Where, however, the prior consistent statement is one of identification, it is admissible as an exception to the hearsay rule as substantive evidence, regardless of impeachment, provided that the declarant is present and subject to cross-examination. See *Commonwealth v. Ballard*, 501 Pa. 230, 233, 460 A.2d 1091, 1092 (1983); *Commonwealth v. Saunders*, 386 Pa. 149, 155, 125 A.2d 442, 445 (1956); accord Pa.R.E. 803.1(2).^{FN10} Such statements also may be admitted to rehabilitate a witness whose credibility has been challenged by an express or implied charge of fabrication, bias, improper influence or motive, or faulty memory, and where the prior statement was made before the charge existed. See *Commonwealth v. Counterman*, 553 Pa. 370, 405, 719 A.2d 284, 301 (1998); accord Pa.R.E. 613(c). When relevant for this purpose, the statement is admissible on rebuttal for rehabilitation, but not as substantive evidence. See *Commonwealth v. Vento*, 410 Pa. 350, 353-54, 189 A.2d 161, 163 (1963). This general order-of-proof prescription is consistent with the rehabilitative purpose for the admission. See generally DAVID F. BINDER, HEARSAY HANDBOOK § 2:12 at 2-80 (4th ed.2001). Although such statements should therefore be introduced as rebuttal evidence, where the defense is centered upon attacking a witness’s credibility consistent with a basis that would permit introduction of a prior consistent statement to rehabilitate, the trial court is afforded discretion to allow anticipatory admission of the prior statement. See *Commonwealth v. Smith*, 518 Pa. 15, 39-40, 540 A.2d 246, 258 (1988).

FN10. The rationale for this exception is that the “earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness’ mind.” DAVID F. BINDER, BINDER ON PENNSYLVANIA EVIDENCE

§803.1(2) (3rd ed.2003) (quoting *People v. Gould*, 54 Cal.2d 621, 7 Cal.Rptr. 273, 354 P.2d 865, 867 (1960)).

The other reason for the admission of this testimony was more mundane. This Court was advised by the District Attorney of the availability of his witnesses and it was clear that Morris would not be physically available to testify prior to the testimony of both Boyd and Eynon.

Crisswalle's next two contentions of error concerns the admission into evidence of certain photographic evidence. Initially Crisswalle maintains that this Court erred when it permitted the introduction of the autopsy photographs of Taylor Coles to be displayed and ultimately given to the jury during its deliberations. The standard for reviewing the admission of autopsy photographs is set forth in *Commonwealth v. Pruitt*, 597 Pa. 307, 951 A.2d 307, 327-328 (2008) wherein the Supreme Court acknowledged that it was an abuse of discretion standard that one must consider the claim that photographic evidence was improperly admitted.

We review a challenge to the trial court's admission of photographs under the standard of abuse of discretion. *Commonwealth v. Solano*, 588 Pa. 716, 906 A.2d 1180, 1191 (2006), *cert. denied*, — U.S. —, 127 S.Ct. 2247, 167 L.Ed.2d 1096 (2007). When considering the admissibility of photographs of a homicide victim, which by their very nature can be unpleasant, disturbing, and even brutal, the trial court must engage in a two-step analysis:

First a [trial] court must determine whether the photograph is inflammatory. If not, it may be admitted if it has relevance and can assist the jury's understanding of the facts. If the photograph is inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Commonwealth v. Tharp, 574 Pa. 202, 830 A.2d 519, 531 (2003) (citation omitted).

As we have repeatedly recognized, photographic images of a homicide victim are often relevant to the intent element of the crime of first-degree murder. *Solano*, *supra* at 1191; *Tharp*, *supra* at 531. Indeed, in some cases, the condition of the victim's body may be the only evidence of the defendant's intent. *Commonwealth v. McCutchen*, 499 Pa. 597, 454 A.2d 547, 550 (1982). In *McCutchen*, we affirmed a trial court's admission of photographs of a murder victim that illustrated the brutality of the beating and sexual assault he sustained, in order to allow an inference of the defendant's intent to kill. We stated that the depiction of the victim's deep and gaping injuries "was essential as evidence of intent beyond mere infliction of bodily injury." *Id.* at 549. As made clear in *McCutchen*, we will not sanction a sanitizing of the evidence that deprives the Commonwealth of the opportunity to prove intent to kill beyond a reasonable doubt. *See Id.*; *Tharp*, *supra* at 531.

[25] [26] The fact that a medical examiner or other comparable expert witness has conveyed to the jury, in appropriate clinical language, the nature of the victim's injuries and the cause of death does not render photographic evidence merely duplicative. *See McCutchen*, *supra* at 550. The meaning of words, particularly the clinical words employed by a pathologist, can be properly and usefully illustrated and explained to a lay jury via photographic images. In determining the intent of the defendant in a criminal homicide case, the fact-finder "must be aided to every extent possible." *Id.* at 549.

Although the possibility of inflaming the passions of the jury is not to be lightly dismissed, a trial judge can minimize this danger with an appropriate instruction, warning the jury members not to be swayed emotionally by the disturbing images, but to view them only for their evidentiary value. *Solano*, *supra* at 1192; *McCutchen*, *supra* at 548 n. 4.

It is interesting to note that Crisswalle does not complain about the introduction of the other autopsy photographs involving Mitchell and Freeman but, rather, confines his claim to Taylor Coles on the basis that the pictures of this eight year old were given to the jury solely to inflame them against Crisswalle. The problem with this contention, however, is that these photographs were given to the jury so that they could understand how she died, being caught in the execution of Mitchell. It was unquestioned throughout the entire trial that two individuals who came into Mr. Tommy's Restaurant came in for one purpose and, that is, to execute Mitchell. These autopsy photographs taken of him at the scene clearly demonstrate that intention since Mitchell was shot ten times, nine times in the torso and once, at point-blank range, in the head. In carrying out this execution, Crisswalle and Thompson killed two innocent and unintended victims, Taylor Coles and her father, Freeman.

The photographs of Taylor Coles were black and white and did not show any blood but, rather, showed the entry wounds and the surgical incision that had been made in an attempt to save her life by the emergency room physicians at Presbyterian-University Hospital. Prior to admitting introduction of those photographs, the Court cautioned the jury that they were going to see what could be best described as unsettling photographs and they were not to allow bias, prejudice, sympathy or emotion to prevent them from dispassionately viewing these photographs for their evidentiary value only. Again, during this Court's final instructions, the jury was reminded that the photographs were given to them for a very limited purpose and that was to help them understand the wounds that she sustained and the mechanics of death. Unlike Mitchell's photographs which revealed brain matter at the wound to his head, the autopsy photographs of Taylor Coles only showed the gunshot wound that she sustained and the surgical incision as a result of the attempts to save her life. Since the jury was properly instructed as to the use of these particular photographs and cautioned against allowing these photographs to prejudice them against the defendant, these photographs were properly admitted.

Crisswalle also maintained that this Court improperly admitted two videotapes that were taken of the crime scene, one by mobile crime and the other by a local television station. Crisswalle has suggested that these tapes were insufficiently authenticated and that the tapes did not accurately portray the lighting conditions as they existed on the evening of the shooting. In *Commonwealth v. Impellizzeri*, 443 Pa.Super. 296, 661 A.2d 422, 428 (1995), the Superior Court reviewed the standard for considering whether or not the videotape had been properly authenticated so as to permit its introduction into evidence:

With respect to the admission of evidence, the trial court has broad discretion and will not be reversed absent an abuse of that discretion. *Commonwealth v. Stark*, 363 Pa.Super. 356, 526 A.2d 383, 391 (1987), *appeal denied*, 517 Pa. 622, 538 A.2d 876 (1988). The trial court should not admit evidence that has no relevance to a case. Relevant evidence is that which tends to establish facts in issue or in some degree advances the inquiry and is therefore probative.

However, even relevant evidence may be excluded where the trial judge, in his or her discretion, finds that admission may confuse, mislead or prejudice the jury. *Id.* The probative value of a piece of evidence cannot be outweighed by its prejudicial impact.

In addition to the standard requirement of relevance, videotaped evidence requires additional scrutiny by the trial court prior to admission. First, like a photograph, a videotape must be authenticated. See *Commonwealth v. Wiltrout*, 311 Pa.Super. 115, 457 A.2d 520, 523 (1983). It is not necessary that the maker of the videotape testify to the tape's accuracy; any witness familiar with the subject matter can testify that the tape was an accurate and fair depiction of the events sought to be shown. *Id.*; *Commonwealth v. Hindi*, 429 Pa.Super. 169, 631 A.2d 1341, 1346 (1993). Second, because a videotape by its nature has the potential to make a stronger impact than oral testimony, the trial judge should view the tape *in camera* prior to showing it to the jury. *Hindi, supra*, at 175-77, 631 A.2d at 1345. This is particularly true where the opposing party claims that the tape is overly prejudicial.

Crisswalle's claim of error was premised upon the notion that these videotapes were inadequately authenticated so as to prevent them from being played for the jury. In *Commonwealth v. Long*, 425 Pa.Super. 170, 624 A.2d 200, 207 (1993), the Superior Court dealt with the issue of authentication and by whom such authentication might be made:

Long argues that the admission of the videotape violates the standard articulated by our supreme court in *Semet v. Andorra Nurseries*, 421 Pa. 484, 488-489, 219 A.2d 357, 360 (1966). In that case, the court stated:

The admission of photographs is a matter largely within the discretion of the trial judge. A photograph must be verified either by the testimony of the person who took it or by another person with sufficient knowledge to state that it fairly and accurately represents the object or place reproduced as it existed at the time of the accident, or if there is a difference or change, the difference or change is specifically pointed out and is readily capable of being clearly understood and appreciated by the jury.

Contrary to Crisswalle's assertion, the videotape taken by the night felony squad was authenticated by the individuals on that squad. Their testimony indicated that they took the videotape so that they could capture the scene that existed in light of the multiple victims and the numerous pieces of physical evidences that were found at or near the scene. The tape taken by the night felony squad showed not only the inside of the restaurant but, also, the outside and adjacent parking lot. With respect to the tape generated by one of the local television stations, it also showed the exterior of the restaurant and the parking lot and the number of the people that were milling about that area. Representatives from the night felony squad used this tape to point out certain pieces of information and the tape was almost self-authenticating since it was almost a mirror image of the videotape that was taken by night felony squad.

These tapes were introduced into evidence for the benefit of the jurors so that they could understand the crime scene and where the various individuals were at the time of the shooting. This is particularly important in light of the fact that three individuals other than the intended victim were shot, and two of these individuals died. By being able to show the entire restaurant from different angles, the jury had a better understanding of the layout of that restaurant and, also, the locations where people were and their ability to see what they said they saw. Crisswalle maintained during the trial that these videotapes did not accurately reflect the light conditions as they existed on the night of the shooting. This was amply addressed during the cross-examination of various witnesses and rebutted by the Commonwealth by its use of other photographs and exhibits. It is clear that these tapes were properly admitted since they provided relevant evidence with regard to material facts of this particular case that turned on the identification of the two shooters. *Commonwealth v. Weaver*, 768 A.2d 331 (Pa.Super. 2001).

Crisswalle next maintains that this Court erred when it permitted Shealey to testify to hearsay statements made by Washington. At the time that Shealey testified, Washington was deceased. The statements that this Court believes that Crisswalle finds objectionable on the basis of hearsay is when he said that Mr. Tommy asked Shealey where he was and then pointed to Shealey and said that he could identify the shooters. Trial Transcript, Volume III, page 135.⁹ As correctly noted by the District Attorney, these statements by Washington were excited utterances made by Washington at the time that the police began their investigation of these homicides.

Crisswalle next maintains that this Court erred when it permitted Deputy Sheriffs Judy Palazzo and Theodore Hughes to testify that they fired their weapons with their non-dominant hand. The sole reason for the introduction of this testimony was that an issue was raised during the examination of numerous witnesses as to whether or not a person who was left-handed would use their right hand to fire a weapon. Both of these Deputy Sheriffs are highly skilled and trained officers with the Allegheny County Sheriff's Department and they explained the reasons why they fired their weapons with their non-dominant hand. This information was given to the jury to aid it in assessing the testimony as to which hand the shooters held their guns and their ability to fire a weapon with their non-dominant hand.

Crisswalle also maintains that this Court erred when it allowed the Commonwealth to play the tapes of prior statements made by Boyd, Cox and Shealey. A Trial Court's decision to allow tapes to be played or a transcript of these tapes to go out with the jury is in the discretion of the Trial Judge and will not be reversed absent an abuse of discretion. *Commonwealth v. Williams*, 959 A.2d 1272 (Pa.Super. 2008). The sole purpose of playing these tapes was to demonstrate that these witnesses made statements prior to testifying that were consistent with their testimony at the time of trial. These tapes were permitted to be played to the jury after Crisswalle and Thompson attempted to impeach the credibility of these witnesses. The cross-examination of Boyd, Cox and Shealey consisted of one hundred sixty-seven pages. During these examinations their credibility was repeatedly challenged. Pennsylvania Rule of Evidence, Rule 613(c), permits the introduction of prior consistent statements when the witness' trial testimony has been put at issue. That Rule provides:

(c) Evidence of prior consistent statement of witness. Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:

- (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
- (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement

supports the witness' denial or explanation.

Crisswalle next maintains that this Court erred when it permitted the District Attorney to cross-examine Officer Matthew Reid on matters that went beyond the scope of his direct testimony. In particular, Crisswalle claims that it was error to allow Officer Reid to be examined as to the inaccuracies of his report with respect to Terri Coles' injuries and the lighting conditions at the time of the shooting. The problem with this contention initially is that the District Attorney never asked Officer Reid any questions about the lighting conditions at Mr. Tommy's Restaurant at the time of the shooting. His sole inquiry of Officer Reid was what statements Terri Coles made to him in the emergency room of Presbyterian-University Hospital.

Officer Reid was one of the first officers who arrived at Mr. Tommy's Restaurant and his duties were to secure the scene and prevent people from entering into that restaurant. He had been there for approximately one-half hour when he was sent by his Sergeant to Presbyterian-University Hospital to interview a witness, Terri Coles. When he went to the emergency room, he saw Terri Coles being treated for her injuries and described the scene as chaotic. Terri Coles spoke to him while physicians and nurses were working on her. He testified that she told him that she was facing the door when the two shooters came in and described both of them as dark-skinned African-Americans, one being approximately five five and the other being approximately five eight. He also testified that she stated that the shorter individual had a gun in his left hand.¹⁰

During his cross-examination, Officer Reid was asked whether or not he attempted to determine what she meant when she said dark-skinned. This is the only testimony that in any way could possibly be related to the lighting. Officer Reid indicated that he did not attempt to determine whether one of the two shooters had lighter skin than the other. Officer Reid also testified that he spoke with Terri Coles' treating physician and was informed that she had been shot twice in the lower torso. When Terri Coles testified she indicated that she had been shot once in the shoulder. This information was permitted to show the possible inaccuracies in Officer Reid's report since he had acknowledged that he had, on occasion, been inaccurate in making reports. It was not only appropriate but necessary to learn of the circumstances of Officer Reid's interview with Terri Coles since they may have impacted his ability to interview his witness and comprehend the information she was giving him.

The next several claims of error made by Crisswalle deal with this Court's instructions to the jury. In *Commonwealth v. Einhorn*, 911 A.2d 960, 975 (Pa.Super. 2006), the Court set forth the standard for review with respect to jury instructions as follows:

Our standard of review with respect to jury instructions is well settled. When reviewing a challenge to part of a jury instruction, we must review the jury charge as a whole to determine if it is fair and complete. See *Commonwealth v. Hawkins*, 549 Pa. 352, 390, 701 A.2d 492, 511 (1997). A trial court has wide discretion in phrasing its jury instructions, and "can choose its own words as long as the law is clearly, adequately, and accurately presented to the jury for its consideration." *Id.* at 391, 701 A.2d at 511. The trial court commits an abuse of discretion only when there is an inaccurate statement of the law. See *Id.*

Initially, Crisswalle maintains that this Court in failing to give a paid informant instruction with respect to the testimony of Walker. There was no testimony that the Commonwealth had paid Walker for her testimony or offered her anything for her testimony. The jury was instructed on three occasions that although Walker had not been charged formally by the Attorney General's Office with respect to the drug transactions in which she engaged with Clifford on Crisswalle's behalf, that she might reasonably expect favorable treatment from the Attorney General's Office in light of her cooperation and testimony in this case. As explained to the jury, any charges that might be filed against Walker, would be filed by the Attorney General's Office and not the District Attorney's Office. It was also noted that the District Attorney's Office would advise any Court of her cooperation and assistance in this case. The jury was amply instructed as to how it should view her testimony and how it could view whatever treatment she might expect with respect to these drug charges and how that could affect her testimony.

Crisswalle next maintains that this Court erred in failing to instruct on *crimin falsi*. When reviewing the charge in its entirety, this Court on three separate occasions instructed the jury as to prior criminal activity engaged in by the various witnesses and how that might affect their testimony. The issue of *crimin falsi* with regard to a witness' testimony was fully developed in this Court's charge and the credibility of each and every witness was reviewed, assessed and assailed by Crisswalle and the District Attorney in their closings. By reviewing the charge in its entirety, it is clear that this issue has no merit.

Crisswalle next contends that the Court erred in not giving a missing witness instruction with respect to Clifford. That instruction is as follows:

"[W]hen a potential witness is available to *only one of the parties* to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference it would have been unfavorable. See *McCormick, Law of Evidence*, 534 (1954). See also *Bentivoglio v. Ralston*, 447 Pa. 24, 288 A.2d 745 (1972), and *Commonwealth v. Wright*, 444 Pa. 536, 282 A.2d 323 (1971)."

Commonwealth v. Moore, 453 Pa. 302, 305, 309 A.2d 569, 570 (1973)." (Emphasis added)

Commonwealth v. Manigault, 501 Pa. 506, 462 A.2d 239, 241 (1983).

The problem with this particular contention is that Clifford had no information with respect to the homicides that occurred in Mr. Tommy's Restaurant. His involvement with Crisswalle resulted solely from their drug transactions which apparently had started years prior to Crisswalle's arrest for these homicides. In order for the missing witness instruction to be applicable, an individual must have knowledge of the crime that is the subject of the trial and must be available exclusively to one party. This Court conducted a suppression hearing with respect to the taped conversations between Crisswalle and Clifford and Clifford testified during that particular suppression hearing. If Crisswalle believed that Clifford's testimony was important to this case, he could have either played the tapes of the conversation that Crisswalle had with Clifford or had Clifford's testimony read into the record. Crisswalle could have also subpoenaed Clifford to present his testimony. When reviewing the record, it is clear that Clifford was available to either side and his information could have been presented in person, could have been presented by virtue of taped conversations between Clifford and Crisswalle and could have been presented by the testimony given by Clifford during the suppression hearing. Since Clifford was not unavailable to Crisswalle, there was no reason to give that instruction.

Crisswalle next maintains that this Court erred in failing to instruct the jury that the letters written by the District Attorney's Office to the Pennsylvania State Parole Board on behalf of Boyd could be considered in examining Boyd's testimony. The problem

with this contention is the fact that this Court did, in fact, instruct the jury on using those letters to assess Boyd's testimony. Trial Transcript Volume VII, page 527, lines 10-21.

Now, you also heard that Mr. Boyd had letters written to the parole board in hope of getting his early release from incarceration. They were written by Mr. Borkowski in the District Attorney's Office. You can consider that fact in determining what affect it would have on Mr. Boyd's credibility and what weight you would place on it. You will consider the nature of the substance of those letters. You will also consider what effect that those letters had with respect to the request that was made in those letters.

Crisswalle next maintains that this Court erred in overemphasizing the Marion Township drug dealing accusations and did not highlight Crisswalle's denials in being involved in drug activity. In reviewing the charge with respect to that information, it is clear that this Court did not overemphasize any drug dealing activity but, rather, told the jury that it could consider this activity in assessing Crisswalle's credibility. Trial Transcript, Volume VII, pp. 465-466, lines 9-25, 1-23.¹¹

Crisswalle has also maintained that this Court erred in not granting a mistrial when the District Attorney suggested that Crisswalle's witnesses were being paid and that Walker would not last long in jail because of the female inmates that Crisswalle knew. The standard for reviewing the denial of a motion for a mistrial is set forth in *Commonwealth v. Padilla*, 923 A.2d 1189, 1192 (Pa.Super. 2009):

Appellant's first issue challenges the trial court's order denying a mistrial following the testimony of Officer Bealer. "The denial of a motion for a mistrial is assessed on appellate review according to an abuse of discretion standard." *Commonwealth v. Sanchez*, 589 Pa. 43, 907 A.2d 477, 491 (2006). It is primarily within the trial court's discretion to determine whether defendant was prejudiced by the challenged conduct. On appeal, therefore, this Court determines whether the trial court abused that discretion. *Commonwealth v. Savage*, 529 Pa. 108, 602 A.2d 309, 311 (1992) (citation omitted). "An abuse of discretion is not merely an error of judgment; rather, discretion is abused when the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record." *Commonwealth v. Kriner*, 915 A.2d 653, 2007 WL 5749 (Pa.Super. 2007) (internal quotations and citations omitted).

The problems with these contentions are obvious since there was no need to grant a mistrial because there was sufficient evidence on the record that Tommy Washington, Jr. had received money from Crisswalle. Walker testified as to Crisswalle's desire to get money to Thomas Washington, Jr. Whether this money was for his dialysis payments or to be a paid informant, was for the jury to consider when assessing her credibility. With regard to the claim that Crisswalle knew female inmates in the Allegheny County Jail and that they would pose a danger to Walker, there was no need for a mistrial since this Court instructed the jury that there was no evidence that Crisswalle knew any females in the Allegheny County Jail. Trial Transcript Volume VII, pp. 451-452, lines 14-25, 1. Walker's physical condition of being confined to a wheelchair indicated that she would have a difficult time in prison and a jury could consider her testimony in light of her physical condition. Crisswalle has also suggested that a mistrial should have been granted when he was referred to as a "big-time heroin dealer." This was a fair comment by the District Attorney in light of the drug transactions that had taken place between Crisswalle and Clifford as explained by Walker.

Crisswalle has also suggested that a mistrial should have been granted since the District Attorney through questions asked of Crisswalle, attempted to infer that Crisswalle in some way had been involved in the shooting of Thomas Mitchell that resulted in him being a paraplegic. Crisswalle denied that he was responsible and similarly denied that he had any relationship with Shawn Connelly. Shawn Connelly was suspected of being the individual who shot Mitchell, however he was one of two shooters, the second person never having been identified. Crisswalle, in response to these questions, denied he was the second shooter, denied he had any relationship with Shawn Connelly and denied that he had ever received any material from Shawn Connelly. During Walker's testimony she indicated that Crisswalle told her that he had killed Mitchell because Mitchell had a hit out on him. The questions that were being asked of Crisswalle during cross-examination attempted to establish a possible motive for Mitchell putting a hit out on Crisswalle and Mitchell's belief that Crisswalle was responsible for the first shooting. Crisswalle denied knowing Connelly and being involved in Mitchell's first shooting. Accordingly, there was no need for a mistrial with respect to these questions.

Crisswalle also claims that this Court erred when it permitted a photograph of Crisswalle showing the tattoos on his arms being given to the jury during its deliberations, in replaying the taped statements of Boyd, Shealey, Morris, Cox, Rodriquez and Walkow; and in allowing the written statement of Walker to go out with the jury during its deliberations. The problem with these contentions is that all of these items were admitted as exhibits and the jury was entitled to consider each and every one of those exhibits. Pennsylvania Rule of Criminal Procedure 646 identifies the items a jury may review during its deliberations:

Rule 646. Material Permitted in Possession of the Jury

<Rule effective until Feb. 1, 2010. See also, rule effective Feb. 1, 2010.>

(A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (B).

(B) During deliberations, the jury shall not be permitted to have:

- (1) a transcript of any trial testimony;
- (2) a copy of any written or otherwise recorded confession by the defendant;
- (3) a copy of the information;
- (4) written jury instructions.

(C) The jurors shall be permitted to have their notes for use during deliberations.

With respect to the picture of Crisswalle with his tattoos, it was permitted to assess the testimony of Martin that he only had one arm tattoo when the individual who received medical treatment at State College, had several tattoos. The written and taped

statements of the other witnesses that were admitted into evidence and previously played to the jury were given to the jury to allow it to review those pieces of evidence as it was entitled to review any piece of evidence that had been admitted.

Finally, Crisswalle has suggested that this Court over-emphasized in its charge, the doctrine of transferred intent.¹² When reviewing the record in this case, it is clear that two individuals went into Mr. Tommy's Restaurant for the sole purpose of executing Mitchell. During the course of that execution two other individuals were killed. The jury was instructed on the issues of co-conspirator liability and accomplice liability that would make these individuals responsible for the actions of their fellow co-conspirator. The doctrine of transferred intent was another way of explaining how they could be responsible for the deaths of individuals who were not the object of the conspiracy. This Court sought to insure that the jury understood the theories upon which the specific intent to kill somebody could be transferred from the intended victim to the unintended. The rationale for the transferred intent charge was explained in *Commonwealth v. Jackson*, 955 A.2d 441, 449 (Pa.Super. 2008):

The Commonwealth argues that even if the evidence is insufficient to establish that Appellant had the specific intent to seriously injure these persons, the intent element is satisfied under the doctrine of transferred intent.^{FN4} The Commonwealth argues that under the doctrine, Appellant's admitted intent to shoot and cause Wesley serious bodily harm, satisfies the intent element for Appellant's aggravated assault convictions of these persons. Appellant counters that the doctrine of transferred intent does not apply in this case because these persons were not actually injured. It is Appellant's position that the doctrine is not meant to apply and has not been applied to a charge of aggravated assault, when criminal liability is premised on the attempt to cause serious bodily injury to another. See, e.g., *State v. Brady*, 393 Md. 502, 903 A.2d 870 (2006), cited in *Commonwealth v. Bullock*, 590 Pa. 480, 913 A.2d 207, 219 n. 11 (2006), (concluding that the transferred intent doctrine does not apply to crimes of attempt because the defendant has committed a complete crime against the intended victim). Appellant further argues that 18 Pa.C.S.A. § 303(b), enacted to reflect existing law, reveals that the doctrine is to be used only where a defendant shoots a gun at a person, intending to cause serious bodily injury, but hits another, or where the defendant shoots the intended victim, but the bullet does not cause serious harm.

FN4. The doctrine of transferred intent was codified in 18 Pa.C.S.A. § 303. *Commonwealth v. Devine*, 750 A.2d 899, 904 (Pa.Super. 2000), appeal denied, 564 Pa. 703, 764 A.2d 1065 (2000). The statute provides in relevant part:

§ 303. Causal relationship between conduct and result

(b) Divergence between result designed or contemplated and actual result.—When intentionally or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the intent or the contemplation of the actor unless:

- (1) the actual result differs from that designed or contemplated as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or
- (2) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a bearing on the actor's liability or on the gravity of his offense.

18 Pa.C.S.A. § 303(b).

In reviewing the charge as a whole, it is clear that this Court did not over-emphasize the doctrine of transferred intent so as to result in prejudice to Crisswalle.

THOMPSON

Unlike Crisswalle, Thompson, in his concise statement of matters complained of on appeal, identifies only five issues. Initially, Thompson maintains that this Court erred in denying his pre-trial motion to suppress a pre-trial identification of him made by Shealey as being unduly suggestive. Thompson also maintains that this Court erred in denying his motion to bar re-prosecution on the basis that it violated the double jeopardy provisions of the United States Constitution and the Pennsylvania Constitution. Thompson also maintains that this Court erred when it denied his proposed instruction on the excited utterance statements made by Terri Coles to investigating police officers while she was being treated at Presbyterian-University Hospital. Thompson also maintains that the evidence was insufficient to prove that Thompson committed the offenses for which he was convicted and, finally, that the verdicts were against the weight of the evidence so as to shock one's sense of justice.

In the pre-trial motion filed by Thompson, he requested the suppression of Shealey's photo array identification, alleging that it was unduly suggestive, without any further specificity. In a pre-trial interview when a witness is given photographs of a possible suspect, in an effort to provide identification testimony, there are inherent dangers that might compromise a defendant's ability to receive a fair trial. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1968). If the identification process of the accused is so unnecessarily suggestive and conducive to mistaken identification, then a defendant is denied his right to a fair trial and due process of law. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 1199 (1967). It is axiomatic that a photo identification of an individual is unduly suggestive when under the totality of the circumstances the identification procedure creates a substantial risk of misidentification. *Commonwealth v. DeJesus*, 580 Pa. 303, 860 A.2d 102 (2004).

In *Commonwealth v. Crork*, 966 A.2d 585, 589-590 (Pa.Super. 2009), the Superior Court reviewed and rejected the claim that the photo array used in the pre-trial identification process was unduly suggestive causing a substantial likelihood of misidentification and stated as follows:

Crork next asserts that the trial court erred in refusing to suppress the clerk's photo array identification of him because the array contained only one other man with light colored eyes, and was thus unduly suggestive. We disagree. "A photographic identification is unduly suggestive when the procedure creates a substantial likelihood of misidentification." *Commonwealth v. Fisher*, 564 Pa. 505, 522, 769 A.2d 1116, 1126 (2001) (citing *Commonwealth v. Johnson*, 542 Pa. 384, 396-97, 668 A.2d 97, 103 (1995)). If a suspect's photograph does not stand out from the others, and the people depicted all exhibit similar facial characteristics the photographs used are not unduly suggestive. *Id.* Here, the trial court reviewed the array, which included pictures selected by a computerized system based upon similarity to Crork's appearance, and found nothing unduly suggestive. Rule 1925(a) opinion at 4. The trial court noted that all

the men depicted had similar characteristics. *Id.* Our own review of the photo array confirms the trial court's observations. Despite his assertions to the contrary, nothing about Crork's photo, including the tone of his eyes, causes it to stand out from the other photos. Thus we find no abuse of discretion in the trial court's assessment that the array was not unduly suggestive, and its corresponding decision to admit the evidence. In addition, in light of our conclusion that the array was not unduly suggestive, we find no merit to Crork's claim that such suggestiveness tainted the later, in-court, identification.

A pre-trial hearing was held on Thompson's motion to suppress the photo array shown to Shealey and it was established at that hearing that Shealey was shown at least four and possibly five photo arrays, each array containing six photographs. Shealey, who identified both defendants at the time of trial, did not originally provide the police with that information but did tell the police, however, that he recognized Thompson and referred to his street name of "Munch." He also advised the police that he had worked on a car with Thompson and that he knew him from the neighborhood. He described Thompson as being tall and having "bug-eyes." The police, armed with the information of Thompson's street name put together a series of photographs. Shealey did not identify anyone in the first series of photo arrays, however, when presented with the photo array containing Thompson's picture, he positively identified Thompson as one of the two shooters. In addition to having Detective Nutter testify as to how he prepared the photo arrays and Shealey's identification of Thompson, Shealey also testified. Shealey stated that he knew Thompson from the neighborhood, had worked on a car with him and knew him by the name of "Munch." He also testified that he did not identify any other individual as a result of the photo arrays that were shown to him.

This Court had the opportunity to listen to the testimony, observe the witnesses and, also, to see the various photo arrays that were shown. It was clear that the photo array that contained Thompson's picture was not unduly suggestive nor was the procedure employed by the police in presenting Shealey with that photo array in any way designed to have Shealey identify Thompson as one of the two shooters. There was no basis to suppress this photo array and, accordingly, Shealey's identification of Thompson, pursuant to the photo array and his in-court identification of Thompson, were properly permitted.

Thompson maintains that this Court erred when it denied his motion to bar a subsequent prosecution on the basis of his double jeopardy rights as contained in the Fifth Amendment of the United States Constitution and the Article I, Section 10 of the Pennsylvania Constitution. The Pennsylvania Crimes Code codifies an individual's double jeopardy rights in 18 Pa.C.S.A. §109.¹³ In his statement of matters complained of on appeal, Thompson does not indicate how his double jeopardy rights have been implicated other than to say that he should not have been tried for a third time following two hung juries.

In *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the United States Supreme Court determined that the Fifth Amendment guarantee against double jeopardy is enforceable against states through the Fourteenth Amendment. That guarantee consists of three separate constitutional protections, the first of which it protects against is a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after conviction and, third, it protects against multiple punishments for the same offense. In *Commonwealth v. Zoller*, 507 Pa. 344, 490 A.2d 394, 396 (1985), the Supreme noted:

Double jeopardy has three separate and distinct objectives: protection of integrity of final judgment; prohibition against multiple prosecutions even where no final determination of guilt has been made; and proscription against multiple punishment for same offense.

Since Thompson does not maintain that his mistrials resulted from prosecutorial misconduct which would bar subsequent prosecution,¹⁴ his claim that re prosecution is barred by the double jeopardy provisions of the Pennsylvania and United States Constitutions can only be that he should not be subject to multiple prosecutions despite the fact that his prior prosecutions ended as a result of hung juries.

In *Commonwealth v. Jones*, 274 Pa.Super. 162, 418 A.2d 346, 352 (1980), the Superior Court recognized that declaration of a mistrial on the basis of manifest necessity does not bar subsequent prosecution.

Finally, appellant argues that retrial would be improper since the trial court lacked manifest necessity to declare a mistrial.[FN5] The trial judge, of course, retains inherent power to discharge the jury before a verdict whenever, in his opinion, taking all circumstances into consideration, there is manifest necessity for the act, or the ends of justice would otherwise be defeated. *U.S. v. Wilson*, 420 U.S. 332, 95 S.Ct. 1802, 44 L.Ed.2d 186 (1975); *Illinois v. Sommerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 245 (1973); *Commonwealth v. Stewart*, 456 Pa. 447, 317 A.2d 616 (1974); Pa.R.Crim.P. 1118(b). The classic example of manifest necessity is where the jury is unable to agree upon a verdict. *Commonwealth v. Shaffer*, 447 Pa. 91, 288 A.2d 727 (1972); *Commonwealth v. Coleman*, 235 Pa.Super. 379, 341 A.2d 528 (1975). So long as manifest necessity justified the termination of the initial proceeding, the Constitution raises no barrier to retrial.

In *Commonwealth v. Ograd*, 576 Pa. 412, 839 A.2d 294, 317 (2000), the Pennsylvania Supreme Court was presented with the contention similar to the one that Thompson now advances and that Court stated:

Appellant alleges that he was retried in violation of the Double Jeopardy provisions of the United States and Pennsylvania Constitutions. He argues that when a defendant does not request a mistrial but one is declared, a second prosecution violates the Double Jeopardy clauses unless declaring a mistrial was manifestly necessary. *Commonwealth v. Diehl*, 532 Pa. 214, 615 A.2d 690 (1992). Appellant quotes *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), which sets forth the commonly cited reasons for the prohibition against twice putting a defendant in jeopardy as follows:

[T]he State, with all of its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-188, 78 S.Ct. 221. Appellant then argues that the circumstances of the deadlocked jury in the first trial of this case did not rise to the level required for a finding that there was manifest necessity for the granting of a mistrial.

The Commonwealth responds by arguing that the double jeopardy claim of Appellant has already been fully and fairly adjudicated and resolved against him. The Commonwealth correctly points out that Appellant took his double jeopardy claim through the state court system, even seeking review by the United States Supreme Court, and then filed a habeas petition with the U.S. District Court, which considered the claim but eventually denied him relief.

The Commonwealth makes two arguments. First, it contends that Appellant has already litigated his double jeopardy claim, that denial of relief is the law of the case, and that, accordingly, Appellant is not entitled to relitigate his claims. Second, the Commonwealth maintains that a hung jury is a classic situation in which there is manifest necessity to grant a mistrial and that; in any event, Appellant should not be heard to object to the mistrial because it was his attorney who originally requested it. We address these claims *seriatim*.

With regard to the first argument of the Commonwealth that we need not reach the merits of the claim because the claim was previously fully and fairly adjudicated, we cannot agree. As the denial of review does not constitute a ruling on the merits, *see Commonwealth v. Davis*, 546 Pa. 158, 159, 683 A.2d 873 (1996) (*per curiam*); *Commonwealth v. Tarver*, 493 Pa. 320, 331, 426 A.2d 569, 575 (1981), the question is raised whether the Superior Court's denial of relief on interlocutory appeal binds this Court, under the law of the case doctrine, upon review of the trial court's final order imposing judgment of sentence.

This appears to be an issue of first impression in Pennsylvania. Other jurisdictions, however, have determined that a ruling on interlocutory appeal by a state's intermediate appellate court does not preclude the state's highest court from merits review of the same issue once the order becomes final. *See, e.g., Raven v. Board of Comm'rs of Wayne County*, 399 Mich. 585, 250 N.W.2d 477, 478 n. 1 (1977). Such a conclusion comports with sound logic, as an intermediate court of appeals should not possess authority to bind a court of last resort within the same proceeding, particularly where the latter court's plenary review of the trial court's final order represents the first instance in which it undertakes consideration of any aspect of the trial-level proceedings. *See Commonwealth v. Starr*, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995) (indicating that, under the law of the case doctrine, "a court involved in the later phases of a litigated matter should not reopen questions decided by another judge *of that same court or by a higher court* in the earlier phases of the matter" (emphasis added)).

However, upon review of Appellant's double jeopardy claim, we do not find that his rights have been violated. Indeed, in this case, declaring a mistrial was manifestly necessary. The jury repeatedly and expressly told Judge Stout that it was unable to reach a unanimous verdict. A jury must be unanimous in its determination of whether a defendant is guilty or innocent. PA. CONST. art. I, § 6. We agree with the decisions of Judge Stout, the Superior Court, and the U.S. District Court that declaring a mistrial was manifestly necessary. We also agree that Appellant should not be heard to object to the mistrial where, as here, his attorney requested it the day before. For these reasons, the retrial did not violate the Double Jeopardy Clauses of the United States or Pennsylvania Constitutions.

Thompson's two prior prosecutions both resulted in hung juries. Each jury was polled and each member of the jury said that they were hopelessly deadlocked and they were of the firm and unanimous belief that they could never reach a unanimous verdict with respect to the charges that had been filed against Thompson. As a result of those declarations, this Court determined that a mistrial was proper since manifest necessity existed. Thompson's third trial was then scheduled at which time he was found guilty of all of the charges filed against him. It should be noted that there were no changes in the witnesses or testimony that was presented against Thompson in either his first, second or third trial, unlike the additional witnesses that were put forward at the second trial in which Crisswalle was convicted. The mistrials were declared as a result of a manifest necessity.

Thompson's next contention of error is that this Court erred when it refused to give his point for charge on the reliability of an excited utterance¹⁵ as it pertained to Terri Coles' identification of the shooters as it was relayed to Detective Rush and Officer Reid. The particular instruction that Thompson requested is as follows:

You have heard testimony in this trial that Terri Coles made certain statements to City of Pittsburgh Police officers sometime after the incident here in question. Said statements may qualify as what is referred to in the law as an "excited utterance." A statement made to another individual and offered as proof of the matter asserted is inadmissible hearsay. Traditionally, out of court statements which a party seeks to introduce as substantive proof of the matter asserted have been deemed unreliable because they are not generally subject to cross-examination. *Commonwealth v. Joraskie*, 519 A.2d 1010 (Pa.Super. 1987). However, certain statements made to other individuals may be admissible as an excited utterance. An excited utterance is an exception to the hearsay rule. If a statement is deemed to be an excited utterance, both the United States Supreme Court and the Superior Court of Pennsylvania have stated that if a statement qualifies as an excited utterance, the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. In order for Terri Coles' statement to either Officer Reid, Detective Rush, or both, you must be satisfied that the statement is 1) a spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, 2) which that person had just participated in or closely witnessed, and 3) made in reference to some phase of that occurrence which he perceived, and 4) this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of it having emanated in whole or in part from his reflective faculties.

It was unquestioned that Terri Coles gave identification information to Officer Reid and Detective Rush at a time when she experienced the shooting deaths of her daughter and husband, that was not spontaneous. The statements that she made to Detective Rush and Officer Reid were made in response to their questions with regard to what, if any, information she had as to the identity of the shooters. Further compounding this problem was the fact that Terri Coles denied that she had given such statements to either one of these police officers and that denial was underscored by Officer Reid's testimony that he had placed in his report, after talking to Terri Coles' treating physician, that she had been shot twice in the abdomen when Terri Coles testified that she was shot once in the shoulder.

The instruction that Thompson wished to be given to the jury was designed to establish the reliability and credibility of a statement that was in dispute. For a statement to be considered an excited utterance, it must be made spontaneously. *Croyle v. Smith*, 918 A.2d 142 (Pa.Super. 2007). This Court believed that the standard instruction on the issue of credibility and the *Kloiber*¹⁶ instruction that were given properly addressed the issue as to how the jury should view the testimony concerning the identification of the two shooters. Since the statement was not spontaneous and it was disputed by the individual who purportedly made the statement, this Court felt that it was better for the jury to examine the statement in the context of its credibility and reliability. Accordingly, it instructed the jury on the issue of credibility and the possible outside forces that might affect somebody's ability to make a proper identification. Despite refusing to give Thompson's instruction, this Court permitted his counsel, during his closing, to make the argument with respect to the purported reliability of the eyewitness identification information given to Detective Rush and Officer Reid by Terri Coles. In reviewing the charge in its entirety, it is clear that a jury was properly instructed with respect to the statements that were given to it regarding the identification of the shooter.

Thompson's final claims of error were couched in the alternative since he claims that the evidence was insufficient to support the verdicts and that the verdicts were against the weight of the evidence. There are different standards for reviewing these claims, as well as different standards by which these claims have to be raised. A claim that the evidence is insufficient to support the verdicts can be raised at any time pursuant to Pennsylvania Rule of Criminal Procedure 606; whereas, a claim that the verdict was against the weight of the evidence must be raised in post-sentencing motions pursuant to Pennsylvania Rule of Criminal Procedure 607 or that claim is waived on appeal. Thompson filed timely post-sentencing motions and raised the claim that the verdict was against the weight of the evidence in accordance with Pennsylvania Rule of Criminal Procedure 607, thus preserving that claim for appeal.

The standard in reviewing these claims have been set forth in *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), as follows:

Appellant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to *how* the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.

In order to address this claim we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*

A claim challenging the sufficiency of the evidence is a question of law. 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. *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). 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. Santana*, 460 Pa. 482, 333 A.2d 876 (1975). When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991).

A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa.Super. 120, 485 A.2d 459 (1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11, 102 S.Ct. 2211.^{FN3} An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson, supra*. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Id.*

FN3. In *Tibbs*, the United States Supreme Court found the following explanation of the critical distinction between a weight and sufficiency review noteworthy:

When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different.... The [trial] court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

Tibbs 457 U.S. at 38 n. 11, 102 S.Ct. 2211 quoting *United States v. Lincoln*, 630 F.2d 1313 (Cir. 8th 1980).

In viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, it is clear that the evidence was more than sufficient to establish that Thompson was one of the two shooters who killed three people in Mr. Tommy's Restaurant. Thompson was positively identified by Shealey as the taller of the two shooters with bug-eyes who was wearing black Nike sneakers with a black swoosh. A pair of the those sneakers were found in Thompson's home pursuant to a search warrant for that residence. Shealey gave Thompson's street name of Munch to the police and said that he knew him from the area because he had worked on a car with him. When the police put together a photo array based upon the information that they had received from

Shealey, including Thompson's street name of Munch, Shealey was able to identify him in a photo array and was able to provide in-court identification testimony of Thompson. In addition, Shealey and Boyd also identified Thompson from photo arrays and provided in-court identification testimony. The Commonwealth also presented the testimony of Rodriguez who was on Pod 7D when Thompson was arrested and lodged in the Allegheny County Jail. Rodriguez testified as to his conversation with Thompson and Thompson's response to him when Rodriguez asked him why he had killed the little girl. Rodriguez related Thompson's denial that he killed the little girl but, rather, he had shot once and his gun jammed.

Thompson's own words provided further support for the identification testimony and his confession to Rodriguez. Little more than an hour and a half after the shooting, Thompson called Cox and told her that he had done something bad. When she inquired as to what he had done, he told her that he had killed three people. This is particularly significant in light of the Commonwealth's ability to fix the time of the shooting. As previously noted the shooting occurred sometime between 6:56 p.m. and 7:00 p.m. This made Thompson's alibi testimony ludicrous since Thompson's sister maintained that he was in the basement of her home playing video games with her children at the time these shootings occurred and, yet, Thompson made a phone call to his sister at 7:02 p.m. There is no logical or rational explanation as to why he would need to phone his sister from the basement of her home. In reviewing all of the evidence presented in this case, it is abundantly clear that the evidence was more than sufficient to support the verdicts that were rendered.

In *Commonwealth v. Kim*, 888 A.2d 847, 851 (Pa.Super. 2005), the Court set forth the obligation of a reviewing Court when faced with the claim the verdicts were against the weight of the evidence as follows:

With regard to our standard of review, we note that the weight of the evidence is "exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." *Commonwealth v. Champney*, 574 Pa. 435, 832 A.2d 403, 408 (2003). An appellate court "cannot substitute its judgment for that of the finder of fact...thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice." *Id.* Moreover, "where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence, ... rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim." *Id.*

Using the standard to be employed with respect to a claim that the verdicts were against the weight of the evidence, there is no doubt that the verdicts were fair, just and appropriate and the verdicts do not shock one's sense of justice.

Cashman, J.

Dated: January 15, 2010

¹ Two separate criminal complaints were filed against Crisswalle and Thompson. The first criminal complaint charged them generally with three counts of criminal homicide and the second complaint charging them with the remaining crimes.

² The Commonwealth was able to virtually pinpoint the time that the shooters entered the restaurant since Mr. Tommy's Restaurant had a Pennsylvania lottery machine. That lottery machine would freeze, thereby preventing the cashier from taking any more bets at 6:56 p.m. The woman who was operating the lottery machine was waiting for the lottery numbers to be drawn at 7:00 p.m. so she could write them down, and they had not been drawn when the two shooters entered the restaurant.

³ Rule 600(d)(1) provides:

(D)(1) When a trial court has granted a new trial and no appeal has been perfected, the new trial shall commence within 120 days after the date of the order granting a new trial, if the defendant is incarcerated on that case. If the defendant has been released on bail, trial shall commence within 365 days of the trial court's order.

⁴ (A) When more than one person is alleged to have participated in the commission of an offense, the issuing authority shall accept a complaint for each person charged. Each complaint shall contain the names of all persons alleged to have participated in the commission of the offense and shall contain a reference to the docket number of the complaints issued for the other alleged participants. Such complaints may be consolidated for hearing or such further action as may be required, and where complaints are consolidated, additional costs shall not be taxed as a result of the acceptance of separate complaints.

⁵ Shealey's cross-examination by Crisswalle's counsel consisted of forty-eight pages. Trial Transcript Volume III, pp. 150-198.

⁶ On March 21, 2005, Crisswalle was charged by the Attorney General's Office at CC No. 200509685 with two counts of delivery of a controlled substance, two counts of possession with intent to deliver, two counts of possession of a controlled substance and one count of criminal conspiracy. On April 18, 2007, Crisswalle plead guilty to all of these charges and received two seven to fourteen year sentences, which were to run concurrent with each other and concurrent with the sentences received from this Court.

⁷ Although the transcripts of these three trials amount to 5,487 pages, Crisswalle never ordered or filed the transcripts generated during the jury selection process. This Court has addressed this alleged issue on the basis of its recollection and trial notes.

⁸ Although Crisswalle shot her, this information was never disclosed to the jury.

⁹ Trial Transcript Volume III, page 135.

A Right. Before that, Mr. Tommy did things. He was smoking in the restaurant. He was asking a couple of people and said where was you, where was you. He pointed to me and said you could identify them. It was the strangest thing.

¹⁰ Crisswalle is right-handed. This is one of the reasons that the testimony of Deputy Sheriffs Judy Palazzo and Theodore Hughes was permitted.

¹¹ You have also heard evidence attempting to prove that the defendant, Andra Crisswalle, engaged in improper conduct for which he is not on trial. By that, I'm speaking of testimony to the affect that the defendant violated a period of probation that he was on by using drugs. In other words, he gave a hot urine, tested positive for the use of drugs, and that he used Brian Martin's identity

to receive medical treatment. This evidence is before you for a limited purpose and that is for the purpose of showing the defendant's state of mind. This evidence may not be considered by you in any other form or fashion. It may not be used by you to show that the defendant is a bad character or criminal tendency for which you might be inclined to infer guilt. It is only before you to reflect on the defendant's state of mind at the time that he acted in the manner in which he acted.

Now, you also heard testimony attempting to prove that defendant, Andra Crisswalle, engaged in improper conduct, once again, for which he is not on trial in this courtroom. That is evidence that he was involved in drug dealing with Shaheeda Walker and that he was caught in Upper Marion Township with individuals who possessed drugs. This evidence, once again, is before you for a limited purpose and that's, number one, to show the close relationship that he had with Shaheeda Walker. Number two, to show the circumstances of his arrest. And, number three, to also allow you to assess the credibility of Mr. Crisswalle and Ms. Walker as it reflects on their testimony involving this question of the alleged drug dealing between the two of them. You would consider this testimony with respect to these instances for that reason and that reason only.

¹² The doctrine of transferred intent is codified in 18 Pa.C.S.A. §303 which provides:

Causal relationship between conduct and result

(a) General rule.—Conduct is the cause of a result when:

- (1) it is an antecedent but for which the result in question would not have occurred; and
- (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by this title or by the law defining the offense.

(b) Divergence between result designed or contemplated and actual result.—When intentionally or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the intent or the contemplation of the actor unless:

- (1) the actual result differs from that designed or contemplated as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or
- (2) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a bearing on the actor's liability or on the gravity of his offense.

(c) Divergence between probable and actual result.—When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

- (1) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
- (2) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a bearing on the liability of the actor or on the gravity of his offense.

(d) Absolute liability.—When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the conduct of the actor.

¹³ 18 Pa.C.S.A. §109 provides as follows:

§ 109. When prosecution barred by former prosecution for the same offense

When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances:

- (1) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside.
- (2) The former prosecution was terminated, after the indictment had been found, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.
- (3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty accepted by the court. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant.
- (4) The former prosecution was improperly terminated after the first witness was sworn but before a verdict, or after a plea of guilty was accepted by the court.

¹⁴ See *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992).

¹⁵ Pennsylvania Rule of Evidence 803 defines the excited utterance exception to that rule as follows:

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

¹⁶ *Commonwealth v. Kloiber*, 378 Pa. 412, 106 A.2d 820 (1954).

**Commonwealth of Pennsylvania v.
William Scott**

Sufficiency of the Evidence

Possession of a firearm can be established through the doctrine of constructive possession, a legal fiction, by the Commonwealth proving that the defendant had both the power to control the firearm and the intent to exercise such control. A gun was recovered from under the driver's seat of defendant's car and a bullet was found in defendant's jacket pocket with the correct caliber for the weapon.

(Rhoda Shear Neft)

Michael Streily for the Commonwealth.

Brandon P. Ging for Defendant.

No. CC: 200803494. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Rangos, J., March 26, 2010—On March 20, 2009, a jury of his peers found Defendant, William Scott, guilty of one count of Firearms not to be Carried without a License¹ and one count of Resisting Arrest or other Law Enforcement.² Defendant was sentenced on June 4, 2009 to a term of probation of two years. On July 2, 2009, Defendant filed a timely Notice of Appeal and on December 18, 2009, Defendant filed a Statement of Errors Complained of on Appeal.

MATTERS COMPLAINED OF ON APPEAL

Defendant raises five issues on appeal. First, Defendant asserts that this Court erred in failing to grant a Motion to Suppress. (Concise Statement of Matters Complained of on Appeal, p. 3) Second, Defendant asserts the evidence was insufficient regarding the length of the barrel of the gun. (*Id.* at 3-4) Next, Defendant asserts that the evidence was insufficient regarding possession of the gun. (*Id.* at 4) Defendant also alleges the Commonwealth failed to prove that the arrest was lawful. (*Ibid.*) Defendant lastly asserts the Commonwealth failed to prove that Defendant created a substantial risk of bodily injury to the police or others, or resisted in such a manner that substantial force was required to overcome his resistance. (*Ibid.*)

HISTORY OF THE CASE

The facts of the case are as follows. In the early morning hours of December 10, 2007, Officer Morgan Jenkins of the City of Pittsburgh police department observed Defendant driving in Homewood, an area on the east side of Pittsburgh. (Tr. 81) Officer Jenkins testified that the area in question was notorious for its high crime rate, particularly crimes involving guns and violence. (*Ibid.*) He observed that Defendant's car appeared to be speeding. (Tr. 82) The Officer followed Defendant and observed Defendant turn right without signaling. (*Ibid.*) Officer Jenkins activated his lights and siren to initiate a traffic stop. (*Ibid.*)

As soon as the car stopped, the driver exited the vehicle. (Tr. 82-3) The Officer ordered Defendant to get back into the car, but instead the Defendant walked down the street, away from the vehicle and the Officer. (Tr. 83-4) As Defendant was walking away, he looked back over his shoulder several times and then removed his jacket and dropped it on the ground. (Tr. 84) The Officer stated that he had to draw his Taser and point it at Defendant in order to compel Defendant to stop, as numerous verbal directives were ignored. (*Ibid.*)

After Officer Jenkins drew his Taser, Defendant stopped and complied with directives to return to the car. (Tr. 86) Officer Jenkins instructed Defendant to sit down along a fence next to the two other vehicle occupants who his partner had removed from the vehicle while Officer Jenkins was pursuing Defendant. (*Ibid.*) Officer Jenkins then retrieved the abandoned jacket and recovered the .32 caliber bullet from the pocket. (Tr. 87)

After Officer Jenkins recovered the bullet, his partner, Officer Matson, returned to the driver's side of the vehicle from which Defendant had exited and performed a "wingspan" search. (Tr. 116) Officer Matson recovered a loaded revolver from underneath the driver's seat. (Tr. 117) The bullets and spent casing recovered from the revolver matched the bullet recovered from Defendant's discarded jacket. (Tr. 118) Defendant refused to provide identification or a license for the firearm. (Tr. 92, 118-119)

Officer Jenkins then attempted to place Defendant under arrest. (Tr. 89) He placed a handcuff on Defendant's right wrist and ordered Defendant to place his left hand behind his back. (*Ibid.*) At this point Defendant stated an expletive, identified himself as an "O.G." (known local gang), became combative and pulled his handcuffed arm closer in to his body. (Tr. 90, 119) The Officer shoved Defendant towards the vehicle, but was unable to arrest Defendant without assistance from additional officers. (*Ibid.*)

DISCUSSION

The standard of review in determining whether the trial court appropriately denied the suppression motion is whether the record supports the factual findings and whether the legal conclusions drawn from these facts are correct. *Commonwealth v. Stevenson*, 894 A.2d 759, 769 (Pa.Super. 2006). Police and the public interact on three recognized levels. The first is the "mere encounter" which need not be supported by any level of suspicion, but which carries no official compulsion to stop or respond. The second is an "investigative detention," which must be supported by reasonable suspicion; it subjects an individual to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of arrest. Finally, an arrest or "custodial detention" must be supported by probable cause. *Id.* at 770.

Defendant challenges the legality of the initial detention. "In order to demonstrate reasonable suspicion that justifies investigation of a situation, the police must be able to point to specific and articulable facts and reasonable inferences drawn from those facts in the light of the officer's experience." *Commonwealth v. Cook*, 735 A.2d 673 (Pa. 1999) The Officer testified that he saw Defendant's vehicle driving past him at what he observed to be a high rate of speed. He then observed Defendant make a right turn without signaling. Given these facts, it was reasonable for the Officer to suspect that Defendant was violating one or more provisions of the vehicle code, including but not limited to speeding, improper signaling and careless or reckless driving. As long as officers have reasonable basis to believe that a traffic violation has occurred, they may stop a vehicle. *Whren v. United States*, 517 U.S. 806, 810 (1996). The potential danger of causing a traffic accident is sufficient to initiate a stop. *Commonwealth v. Perry*, 982 A.2d 1009, 1011 (Pa.Super. 2009). Furthermore, the Fourth Amendment does not prevent police from stopping motorists when they witness a traffic violation, however minor. *Commonwealth v. Chase*, 960 A.2d 108, citing *United States v. Booker*, 496 F.3d 717, 721-22 (D.C. Cir. 2007). The initial traffic stop was valid.

Defendant next argues that, when he exited his vehicle after the traffic stop and walked away from the police, the officers had no reason to believe Defendant was engaging in criminal behavior. On the contrary, what began as a routine traffic stop evolved as Defendant's conduct raised suspicion. After stopping his vehicle, Defendant immediately stepped out of his car and began to walk away from the vehicle. Defendant repeatedly ignored Officer Jenkins' instructions to stop, while glancing over his shoulder several times at the Officer. He intentionally dropped his coat (from which a live .32 caliber round was later recovered). This Court finds an inference of criminal behavior is reasonable, given the totality of the circumstances, as seen through the experienced and trained eye of the Officer.

This Court finds the facts in *U.S. v. Bonner*, 363 F.3d 213 (2004), similar to the facts in the case *sub judice*. Bonner was a passenger in a car stopped by police for a minor traffic violation. *U.S. v. Bonner*, 363 F.3d 213, 218 (2004). He fled from the traffic stop before the officers could announce the purpose of the stop. (*Ibid.*) He continued to flee despite verbal instructions to stop, until he was ultimately tackled by one of the officers. (*Ibid.*) Drugs were recovered from Bonner following the stop. (*Ibid.*) The Court in *Bonner* held that “[f]light from a non-consensual, legitimate traffic stop (in which the officers are authorized to exert superintendence and control over the occupants of the car) gives rise to reasonable suspicion.” (*Ibid.*)

Similarly, in *Commonwealth v. Sojourner*, Sojourner was pulled over for a minor traffic violation. *Commonwealth v. Sojourner*, 408 A.2d 1100, 1101 (Pa.Super. 1978) He began to walk and then run away from the officers before eventually being apprehended. (*Ibid.*) As Defendant ran, he threw objects to the ground which were later identified as heroin. (*Ibid.*) The Court in *Sojourner* held that the officers were justified in chasing Defendant. (*Id.* at 1102) The Officer could reasonably assume that Defendant had some nefarious reason for walking away. (*Ibid.*) Defendant's flight permitted the officers to reasonably believe that something more than a routine traffic stop had occurred. (*Ibid.*)

Defendant next challenges the recovery of the discarded jacket. Once Defendant was apprehended, a search of his abandoned jacket revealed a live thirty-two caliber bullet. Defendant may not claim forced abandonment as it was “[D]efendant's fear of detection, as opposed to any threat or show of force, that induced him to flee the scene. [D]efendant's sensitivity to the risk of police detection does not establish that his abandonment was forced.” *Commonwealth v. Byrd*, 2009 WL 5126650 (Pa.Super.). Once Defendant voluntarily abandoned his jacket, he relinquished any expectation of privacy in its contents. (*Ibid.*)

Once police discovered the bullet, they could reasonably suspect that a corresponding gun may be nearby. Exigent circumstances that arise during the course of an encounter may require prompt action such as occurred here, where a threat to officer safety exists. *Commonwealth v. White*, 669 A.2d 896, 901 (Pa. 1995). For the officers' safety and protection, they are permitted to conduct a “wingspan” search of the driver's compartment, including under the driver's seat where the gun in this case was discovered. *See Commonwealth v. Timko*, 417 A.2d 620, 627 (1980); *United States v. Chadwick*, 433 U.S. 1 (1977).

The facts in this case are closely analogous to those in *Commonwealth v. Murray*, 936 A.2d 76 (Pa.Super. 2007). In *Murray*, the police pulled over a vehicle in a high crime area after it made a turn without signaling. As the officer approached the vehicle, he observed furtive movements raising concern for officer safety. The officer removed the defendant from the vehicle and performed a patdown for weapons. No weapons were found on the defendant. A subsequent search of the immediate area inside the vehicle where the defendant had been sitting revealed a loaded handgun. *Id.* at 77. Under these circumstances, the Court upheld the limited search of the vehicle for officer safety. *Id.* at 79. Given the totality of the circumstances in the above-captioned case, the limited search of the car was justified.

Turning to Defendant's next claim, that the evidence was insufficient to support the conviction, the test for reviewing a sufficiency of the evidence claim is well settled:

[W]hether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt.... This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.

Commonwealth v. Hardcastle, 546 A.2d 1101, 1105 (Pa. 1988) (citations omitted)

Specifically, Defendant contends that the Commonwealth failed to provide evidence regarding the barrel length of the firearm, which is required element of 18 Pa.C.S. § 6106. Reviewing the evidence in the light most favorable to the Commonwealth as the verdict winner, the sufficiency of the Commonwealth's case is established through the admission of counsel. The element of barrel length is established by a report from the crime lab. Defendant, through counsel, failed to object to the admission of the crime lab report. (Tr. 156) Once Defendant fails to object to the evidence against him in a case, he may not subsequently challenge the admission of that evidence. Defendant's claim based on insufficiency is not only without merit, it is waived.

The next error complained of by Defendant is that this Court abused its discretion and/or erred as a matter of law in convicting Defendant of Carrying a Firearm without a License, when the Commonwealth failed to meet its burden of proof that Defendant possessed, used or controlled the firearm. This Court found Defendant guilty under the doctrine of constructive possession. “Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement.” *Commonwealth v. Davis*, 280 A.2d 119, 121 (Pa. 1971).

Constructive possession is found where the individual does not have actual possession over the illegal item but has conscious dominion over it. *Commonwealth v. Carroll*, 507 A.2d 819 (Pa. 1986). In order to prove “conscious dominion,” the Commonwealth must present evidence to show that the defendant had *both* the power to control the firearm and the intent to exercise such control. *Commonwealth v. Gladden*, 665 A.2d 1201, 1206 (Pa.Super. 1995). These elements can be inferred from the totality of the circumstances. *Commonwealth v. Gilchrist*, 386 A.2d 603 (Pa.Super. 1978). “Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not.” *Commonwealth v. Parker*, 847 A.2d 745 (Pa.Super. 2004). Constructive possession may be proved by circumstantial evidence. *Commonwealth v. Carter*, 450 A.2d 142, 144 (Pa.Super. 1982). Individually, the circumstances may not be decisive; but, in combination, they may justify an inference that the accused had both the power to control and the intent to exercise that control, which is required to prove constructive possession. *Id.*

During a traffic stop, Defendant exited the driver's seat of the vehicle and was walking away from the police, despite verbal commands to stop. Flight can be considered as circumstantial evidence of a guilty conscience. *Commonwealth v. Sojourner*, 408 A.2d 1100, 1102 (Pa.Super. 1978) During his flight, Defendant discarded the jacket he was wearing. A bullet was recovered from the pocket of the jacket Defendant discarded. A gun loaded with two additional rounds and a spent shell casing, all matching the bullet recovered from the discarded jacket, was subsequently recovered from underneath the driver's seat. Under the totality of

the circumstances, it was reasonable for this Court to conclude that Defendant had the power and intent to exercise control over the weapon.

Lastly Defendant asserts the Commonwealth failed to prove that Defendant created a substantial risk of bodily injury to the police or others, or resisted in such a manner that substantial force was required to overcome his resistance. Defendant raises a sufficiency argument similar to that raised regarding the barrel length. Similarly, the argument lacks merit. Defendant exited his vehicle and defied numerous verbal prompts by the Officer to stop. Only after the Officer unholstered his Taser did Defendant comply. However, after a gun was recovered, Defendant refused to produce identification or a license for the firearm. When Defendant was being handcuffed, he became combative and pulled his handcuffed arm in and away from the Officer. He shouted an expletive, used gang slang, and would not permit himself to be handcuffed. The Officer testified that he was unable to arrest Defendant on his own, and required additional officers to assist him in effectuating an arrest. The totality of circumstances in this case support the conviction on the charge of resisting arrest.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

¹ 18 Pa.C.S. § 3334(b)

² 18 Pa.C.S. § 5104. This Court also found Defendant guilty of the summary offense of improper signaling.

Michelle Frangos v. Stephen Hersh and George Patrick Jordan IV

Default Judgment

1. A Petition to Open a Default Judgment should have a verified copy of an Answer attached to it. However, the courts have allowed Preliminary Objections rather than an Answer to be appended to the Petition to Open.

2. Where the Preliminary Objections do not state a meritorious defense to defendant's inactivity, the Petition to Open fails.

(Rhoda Shear Neft)

Frank G. Salpietro for Plaintiff.

Robert O. Lampl for Defendant.

GD 09-15684. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

McCarthy, J., March 12, 2010—This matter came before the Court as a motion styled “Petition to Open Default Judgment,” which was presented on behalf of Defendant, Stephen Hersh. That motion was denied by Order dated December 17, 2009, and from that Order Hersh has taken an appeal.

On September 10, 2009, Plaintiff Frangos filed a claim pursuant to the Mechanics’ Lien Law of 1973 49 P.S. Section 1101, *et seq.* in connection with architectural and interior renovation work Frangos had performed or supervised on property owned solely by Defendant Hersh in Pittsburgh, Pennsylvania. That claim was served upon Hersh by certified mail addressed to his residence in New York State. Because Hersh resided outside the Commonwealth of Pennsylvania, Pa.R.C.P. 403 and 404, permitted service of process to be made by any form of mail that requires a receipt signed either by the defendant or an authorized agent of the defendant. Rule 403 provides, moreover, that “[s]ervice is complete upon delivery of the mail.” A postal receipt, in any event, confirmed delivery of the claim to Stephen Hersh on September 14, 2009.¹

Thereafter, on September 29, 2009, Attorney Tomasic filed two (2) documents with the Allegheny County Department of Court Records on behalf of Hersh: an “Emergency Petition to Deposit Money to Secure Claims” and a “Praeceptum to File Complaint.”² In doing so, Tomasic entered a general appearance as counsel for Hersh.³ On that same date, the parties arrived at a consent order, which was docketed. Among other things, that order caused the action to be continued “pursuant to Rule 1651 *et seq.* and other applicable rule [sic] and the funds deposited pursuant to this order shall be applied to the payment of the amount finally determined to be due to Plaintiff.”

Within twenty (20) days of Hersh’s filing of the Praeceptum to File Complaint, Tomasic and counsel for Frangos arrived at an agreement to amend the amount of the Mechanics’ Lien claim to \$139,000.00. An Order of Court granting Frangos leave to file an amended complaint, setting forth a claim for damages in the minimum amount of \$139,880.00 was entered on October 16, 2009 by Judge Wettick. That Order also permitted the inclusion of George Patrick Jordan, IV, who had purchased the property on September 29, 2009 and resided there, as a defendant. On October 19, 2009, Frangos filed his “Complaint to Obtain Judgment on a Mechanic’s Lien” to which Tomasic had consented. Attached to that Complaint was a certificate of service, verifying that the Complaint had been served upon Tomasic via first-class mail on that same date. Tomasic had agreed to accept service for Hersh, and had confirmed in an October 17, 2009 electronic mailing to plaintiff counsel that he would also accept service for Jordan.

Subsequently, on or about November 11, 2009, Tomasic appeared at a scheduled deposition in this matter and, at that time, presented plaintiff counsel with an “Acceptance of Service” dated November 2, 2009 in which Tomasic stated that he had accepted service on behalf of Hersh and Jordan and represented that he had authority from each named defendant to accept service.⁴ Plaintiff caused the Acceptance of Service to be filed on November 12, 2009.

On November 10, 2009, plaintiff counsel mailed to Tomasic as well as to Hersh a “Ten Day Notice of Intent to Enter Default Judgment.” Receiving no response, plaintiff counsel, on November 23, 2009, filed a “Praeceptum for Entry of Default Judgment Against Defendant Stephen Hersh Pursuant to Pa.R.C.P. 237.1 and 1037(B).” Attached to the November 23 filing were proofs of separate mailing of the ten-day notice to Hersh and Tomasic.

On December 3, 2009, Tomasic, on behalf of Hersh, filed a "Petition to Open Default Judgment." That petition did not have attached to it a verified copy of an answer, but stated, at paragraph 12 of the Petition to Open that:

Hersh has a meritorious defense to the claims of Frangos and desires to assert them [sic] through a set of Preliminary Objections. Attached hereto as Exhibit C.

Although P.R.C.P. 237.3(a) provides that a petition for relief from a default judgment "shall have attached thereto a verified copy of the...answer which the petitioner seeks leave to file," preliminary objections, rather than an answer, may be appended to a petition to open. See, *Atlantic Credit and Finance, Inc. v. Giuliana*, 2003 Pa.Super. 259, 829 A.2d 340 (2003). That Superior Court opinion drew upon the analysis provided by the Commonwealth Court in *Peters Township Sanitary Authority v. American Home and Land Development Company*, 696 A.2d 899 (1997), *app den.* 550 Pa. 712, 705 A.2d 1312 (1997). The Commonwealth Court reasoned that preliminary objections are a pleading through which a party may establish a meritorious defense and, thus, preliminary objections, in lieu of an answer, may be appended to a petition to open a default judgment without invalidating that petition.

Hersh submits that, because he filed a petition to open together with preliminary objections within ten days of notice of default, and because preliminary objections may be utilized in substitution for an answer, P.R.C.P. 237.3 requires that the judgment be opened in this matter. In this connection, Hersh contends that, under P.R.C.P. 237.3(b), timely filing of a petition together with a proposed pleading mandates an order to open the default judgment. P.R.C.P. 237.3(b) states:

If a petition is filed within ten days after the entry of the judgment on the docket, the court *shall* open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

[Emphasis added]

Hersh's analysis dispenses with any requirement that a successful petition to open a default judgment set forth a reasonable explanation for the inactivity that occasioned the entry of a default. That analysis finds some support in decisional authority. See, *Estate of Considine v. Wachovia Bank*, 966 A.2d 1148, (Pa.Super. 2009), which indicates that compliance with the language of P.R.C.P. 237.3 is alone sufficient to compel a court to open a default judgment. Even if that analysis is valid under a literalist approach to 237.3 (b), however, the analysis does not assist Hersh, who, by attaching preliminary objections rather than a verified answer to his petition to open judgment, failed to achieve compliance with the plain terms of 237.3(a). The consequence of inexact compliance with 237.3 is that a petitioner must demonstrate compliance with *Schultz v. Erie Insurance Exchange*, 505 Pa. 90, 477 A.2d 471 (1984). See, Explanatory Comment to Rule 237.3. *Schultz* provides that a court will only exercise its equitable powers to open a judgment when "(1) the petition has been promptly filed; (2) a meritorious defense can be shown; and (3) the failure to appear can be excused."

Further, Hersh's attachment failed to comply with local rules of court regarding preliminary objections. Allegheny County Rule 1028*1(B) provides, in part:

No preliminary objection shall be accepted by the Motions Clerk, unless a brief is attached. Failure to attach a brief shall be cause for dismissal of the preliminary objections.

Hersh did not include a brief with the preliminary objections attached to his petition to open, and for that reason, the preliminary objections might well have been deemed a nullity upon any effort by Hersh to present them. Minimally, because a brief has by local rule been made indispensable to the resolution of preliminary objections, Hersh's preliminary objections could not be considered until such time as Hersh provided a brief. A party seeking the indulgence of equity to excuse a delay in responding to a complaint cannot expect to successfully do so through a pleading that itself fails to conform to rules of court and, by reason of that nonconformity and neglect, will cause additional delay.

Hersh's failure to attain even substantial compliance with Rule 237.3 requires that he satisfy the requirements of *Schultz*, if the default judgment is to be opened. Hersh has not satisfied those requirements and, in particular, has not provided a reasonable explanation for his failure to timely respond to Frangos' complaint. In fact, the explanation proffered by Tomasic seems not at all plausible.

Tomasic avers that plaintiff counsel requested that Tomasic accept service for both Jordan and Hersh, and that Tomasic eventually did so by providing plaintiff counsel with an acceptance of service as to both Hersh and Jordan on November 11, 2009. That acceptance was dated November 2, 2009. An examination of the record and of correspondence between counsel establishes, however, that plaintiff counsel had inquired only as to whether Tomasic would accept service for Jordan, who had been newly added to the action. Plaintiff counsel stated in an e-mail that, if Tomasic could not accept service for Jordan, then counsel would "send the sheriff out" to serve Jordan. Because Hersh had already been served with the Mechanic's Lien pursuant to the requirements of the Mechanic's Lien Law, which treats the lien as a writ of summons, there was no need to have the sheriff also serve the Complaint upon Hersh. The service of the Complaint upon Hersh was not service of original process.

Service of the Complaint upon Hersh could be accomplished by mail under Pa.R.C.P. 440, which provides, in part, that service by mail of legal papers other than original process is complete upon mailing. Under Pa.R.C.P. 440, it is presumed that an article that has been properly placed in the mail has been received in due course of mail by the addressee. Therefore, a Ten-Day Notice of Intent to Enter Default Judgment may properly be delivered to a party twenty-one (21) days after the date that a complaint has been placed in the mail; such notice is presumed to have arrived by due course of mail and the burden is upon the party against whom judgment is ultimately entered to rebut the presumption of service of the complaint or notices having been accomplished by mail in due course. See, *Cameron's Estate* 388 Pa. 25, 130 A.2d 173 (1957); *Whitmore v. Dwelling House Insurance Co.*, 148 Pa. 405, 23 A. 1131 (1892). In this matter, Frangos awaited the probable due course receipt by Tomasic of the Complaint as to Hersh and, after sufficient time has passed, thereafter mailed a Ten-Day Notice of Intent to Enter Default Judgment as to Hersh. Because Frangos mailed the November 10, 2009 notice at least twenty-one (21) days after the date of presumptive receipt by Tomasic of the Complaint that had been mailed on October 19, 2009, Frangos, though precipitate, was not premature. *Franklin Interiors, Inc., v. Browns' Lane, Inc.*, 227 Pa.Super 252, 323 A.2d 226 (1974).

On November 11, 2009, the day following the mailing of the ten-day notice, Tomasic presented to Frangos an acceptance of service that Tomasic had signed. That document purported to establish the date of service of the Complaint as to both Hersh and Jordan as November 2, 2009. It is not at all uncommon that intra-city mail is delivered within a day. It is unlikely, therefore, that the November 2, 2009 acceptance of service date corresponds to the actual date of receipt by Tomasic of the Complaint that had been placed in the mail to him on October 19, 2009. It is difficult to disagree with Frangos' assertion that the representation that the

Complaint was not received until November 2 is disingenuous.

Hersh insists, however, that Complaint was, in fact, original service of process upon him. Hersh arrives at that conclusion based upon a contention that the delivery of the Mechanics' Lien claim to Hersh on September 14, 2009 by certified mail was a legal nullity. In his proposed preliminary objections appended to the Petition to Open, Hersh asserts:

Pennsylvania Law interpreting the requirements of 49 Pa.C.S.A. 1502c has specifically addressed the issue of service via certified mail and, and deemed such service to be invalid and grounds for discharge of the Mechanics Lien. *See John A. O'Connor Co., Inc. v. Hanson*, 48 Pa. D&C 398 (C.C.P., Bucks County, 1969).

If service of the initial claim by way of certified mail was ineffective, then, Hersh reasons, a presumption pursuant to Pa.R.C.P. 440, that the Complaint that had been placed in the mail on October 19 had been received in due course was unavailable to Frangos because service of the Complaint would have been original service upon Hersh. Instead, service would have been deemed to have occurred upon the date indicated by the acceptance of service.

O'Connor provides slim support for Hersh. That opinion does not at all address the circumstance of service upon an individual residing outside the Commonwealth of Pennsylvania. The opinion, in fact, disavows consideration of any out-of-the ordinary circumstances: "Reference to Pa.R.C.P. 1009, controlling the manner in which a writ of summons or a complaint in assumpsit may be served, makes no provision for service by certified mail, *with the exception of circumstances not pertinent to this opinion.*" (*O'Connor* at 400; emphasis added). Hersh's election to cite to the Court a case that is plainly factually distinguishable from the case at hand and to also disregard Pa.R.C.P. 403 and 404, which permit original service of process to be made upon individuals who reside outside the Commonwealth of Pennsylvania by any form of mail that requires a receipt signed by the defendant or an authorized agent is disconcerting.

Hersh suggests that Pennsylvania cases hold that certified-mail delivery of a Mechanic's Lien claim is always ineffective. In fact, decisional law is, to the contrary. Where courts have considered the matter of service of a mechanics' lien claim upon an out-of-state resident by means of certified mail, such service has been deemed valid. *Cassell Building Corporation v. Rice*, 46 Pa. D. & C.3d 98, 1986 WL 22227 (C.C.P., Pike County). Hersh, therefore, has not satisfied the requirement set forth in *Schultz v. Erie Insurance Exchange* that he provide a reasonable explanation for his failure to timely respond to Frangos' complaint. Hersh's proffered explanation – that the initial service of the claim by certified mail was ineffective and that the subsequent service of the Complaint did not reach Tomasic until November 2, 2009 – is unconvincing and, as indicated, seem disingenuous.

The failure by Hersh to satisfy the requirement of providing reasonable explanation for his failure to timely respond to the complaint is, in itself, sufficient reason to deny the Petition to Open Judgment. Hersh has failed as well, however, to meet the requirement of demonstrating a meritorious defense to the Complaint. Having chosen to present its proposed defense through preliminary objections, Hersh neglected to provide a brief in support of those objections. That is no small oversight. Even if that deficiency were overlooked, however, the proposed preliminary objections remain inadequate to establish a meritorious defense. Hersh has proposed a number of preliminary objections in the nature of a demurrer. The question presented by a demurrer is whether, on the facts averred, the law provides to a certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, that doubt should be resolved in favor of overruling it. *Employers Insurance of Wausau v. Commonwealth of Pennsylvania Department of Transportation*, 581 Pa. 381, 865 A.2d 825 (2005). For the most part, Hersh's efforts at pleading a demurrer consist of little more than setting forth excerpts of pertinent statutory authority followed by a conclusion. That effort is insufficient.

Hersh's proposed preliminary objections allege, additionally, breach of contract, a breach of fiduciary duty and a setoff. Those items that are not proper subjects for such objections. The sole aspect of the proposed preliminary objections that may have been properly set forth is Hersh's contention that interest is not a proper element of a mechanics' lien claim. The assertion that interest is wholly unavailable in a mechanics' lien action is overbroad. It is only pre-judgment interest that is unavailable in a mechanics' lien action. *See, Artsmith Development Group v. Updegraff*, 2005 Pa.Super. 11, 868 A.2d 495 (2005). Post-judgment interest, however, is available in Mechanics' Lien litigation at the lawful statutory rate of six percent *per annum* and is calculated from the date judgment is entered. 42 Pa.C.S.A. §801, *Wyatt, Inc. v. Citizens Bank of Pennsylvania*, 2009 Pa.Super. 107, 976 A.2d 557 (2009). In any event, a preliminary objection as to the propriety of an *ad damnum* clause that seeks such "interest, costs and attorneys' fees [plaintiff] may be entitled to under Pennsylvania Law" does not challenge the substantive aspects of the Complaint. It is not a sufficient basis on which to set aside the default.

Hersh's Concise Statement of Matters Complained of on Appeal further asserts that this Court "erred in its refusal to consider the Petition to Strike." The appeal in this matter was taken from the Order of Court dated December 17, 2009 and docketed December 18, 2009. Hersh filed his "Petition to Strike Default Judgment" on January 12, 2010, well after the date and docketing of the Order from which the appeal is taken. Moreover, it appears that Hersh merely filed the Petition to Strike and provided this Court with a courtesy copy. Hersh did not attach a notice of presentation, did not obtain a time and date for presentation from the Motions Clerk, and apparently did not present the matter to the Motions Judge⁵; all events that are required under Local Rule 249. Hersh cannot legitimately complain that his motion was not heard when he neglected to take the steps necessary to have that motion heard.

Hersh additionally complains that the Court erred in refusing to consider his motion for reconsideration. That motion was not promptly filed, and indeed was not filed until shortly before the time for taking an appeal would have expired. The motion offered nothing new, did not afford Frangos a reasonable opportunity to respond before an appeal was taken, and would have added one more occasion of delay to this matter.

BY THE COURT:
/s/McCarthy, J.

Date: March 12, 2010

¹ Section 1502 of the Mechanic's Lien Law requires that service of a lien be made "in a manner consistent with service of a writ of summons in assumpsit." The envelope was addressed to Hersh; the receipt was signed by an individual other than Hersh.

² Pa.R.C.P. 1659 provides that if a claimant has filed a claim and does not file a complaint, the prothonotary shall, upon praecipe of an owner, enter a rule upon the claimant to file a complaint. Failure by the claimant to timely file a complaint in response to the rule may result in judgment for the defendant.

³ A general appearance is made by a party who comes into court and appears in the case in any manner except specially and for the specific purpose of challenging the jurisdiction of the court over the defendant's person. See, AMJUR Appearance §2.

⁴ In fact, Tomasic did not have authority to represent Jordan. Jordan, through separate counsel, later filed a "Petition to Strike Acceptance of Service." By Order of Court entered by Judge Robert J. Colville on November 20, 2009, the petition to strike was withdrawn without prejudice, the appearance of Tomasic on behalf of Jordan was withdrawn, an appearance of new counsel was entered, and Jordan was directed to file a responsive pleading to the complaint within 20 days. The November 20 Order of Court further provided that "This Order shall not affect any obligations of Deft. Stephen Hersh or any rights any party has against Deft. Hersh."

⁵ I did not serve as the Motions Judge in January 2010.

American National Insurance Company v. Hollind Holdings, Inc.

Rules of Civil Procedure

Failure to timely comply with a court order setting a date certain to file a Concise Statement of Matters Complained of on Appeal fails to preserve any issues for appellate review.

(Rhoda Shear Neft)

Richard C. Parks for Plaintiff.

Marvin Leibowitz for Defendant.

No. GD 09-2117. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

McCarthy, J., March 17, 2010—By Order of Court dated December 8, 2009 and docketed December 9, 2009, this Court denied the "Motion to Set Aside Sheriff's Sale" that had been filed on behalf of Hollind Holdings, LLC, by Marvin Leibowitz, Esquire. Mr. Leibowitz has not formally entered an appearance on behalf of Hollind Holdings.

An appeal has been taken by Hollind Holdings, LLC from the December 8, 2009 Order of Court. The "Notice of Appeal to Superior Court" filed in this matter states that that pleading had been filed "pro se." The notice is signed by Linda Landan.

By Order of Court dated January 11, 2010, and docketed January 12, 2010, this Court directed as follows:

[P]ursuant to Pennsylvania Rule of Appellate Procedure 1925(b), Appellant, Hollind Holdings, is directed to file of record and to serve on all other parties of record and on this Court, a concise statement of errors complained of on appeal.

Said statement shall be filed and served within twenty-one (21) days of the entry of this Order on the docket.

Any issue not properly included in a timely filed and served statement shall be deemed waived.

The January 11, 2010 Order of Court allowed Hollind Holdings, the appellant, the required number of days in which to file and serve a statement of matters complained of on appeal. Two "Motions for Extension of Time" in which to submit a statement of matters complained of on appeal were filed on behalf of Hollind Holdings, each signed by Linda Landan. Each such motion had appended to it a certificate of service confirming service to, among others, counsel of record for plaintiff/appellee American National Insurance Company. The second motion for an extension was filed on February 19, 2010, the date the Court had set forth in a January 9, 2010 Order of Court as the extended deadline for filing and service of appellant's statement.

A "Concise Statement of Matters Complained of on Appeal" was eventually filed on February 22, 2010. No service of that statement was made upon Plaintiff, American National Insurance Company. Although the statement indicates the statement had been "cc'd" to three counsel, none was counsel of record for American National Insurance Company, nor does it appear that any of them in fact represented American National Insurance Company.

By reason of the failure to comply with the Order to file *and serve* a statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), Hollind Holdings has failed to preserve any issues for appeal; all issues that might have been raised are deemed waived.

It might also be noted that a further infirmity apparent from the record is that Ms. Landan attempted to file and proceed with an appeal on behalf of Hollind Holdings, an LLC, notwithstanding that she is not licensed counsel. It is well established in this Commonwealth, and elsewhere, that non-attorneys may not represent corporations before Pennsylvania courts. See, *Smaha v. Landy*, 162 Pa.Cmwlth. 136, 638 A.2d 392, *petition for allowance of appeal denied*, 539 Pa. 660, 651 A.2d 546 (1994). Proceedings commenced by persons unauthorized to practice law are a nullity, and an appeal pursued by an individual unauthorized to practice law may be quashed by an appellate court pursuant to a tribunal's obligation to raise jurisdictional questions *sua sponte*. See, *Spirit of the Avenger Ministries v. Commonwealth of Pennsylvania*, 767 A.2d 1130 (Pa.Cmwlth. 2001); *McCain v. Curione*, 106 Pa.Cmwlth. 552, 527 A.2d 591 (1987).

The fact that Hollind Holdings is a limited liability company rather than a traditionally configured corporation does not assist in avoiding the constraint against representation by a non-attorney. Pa.R.C.P. 216 deems a limited liability company the substantial equivalent of a corporation for purposes of pleading and procedure. Hollind Holdings is an entity distinct from Ms. Landan, and Ms. Landan, who has not identified herself as an attorney, and certainly not as an attorney admitted to practice in Pennsylvania, cannot presume to act as counsel for another in court proceedings. Ms. Landan does not purport to be an owner of the real estate in question. There are no applicable exceptions that permit Ms. Landan to plead or appear on behalf of Hollind Holdings in this matter.

By reason of the failure to comply with the Order to file *and serve* a statement pursuant to Pennsylvania Rule of Appellate

Procedure 1925(b) and for the further reason that the attempt to appeal on behalf of a corporation is being pursued by an individual unauthorized to practice law, the Court offers no further consideration of the matters complained of on appeal.

BY THE COURT:
/s/McCarthy, J.

Dated: March 17, 2010

**Kosmos Cement Company v.
GMO Land Company, LLC, et al.**

Permanent Injunction

A permanent injunction is appropriate to bar the actions of defendant where an Agreement of Sale and the Deed to the property prohibit the development of the property for the purpose of producing or manufacturing cement and the defendant ignores the plain language of the documents by establishing a cement business on the property.

(Rhoda Shear Neft)

Richard F. Paciaroni, Jason L. Richey, and Joseph C. Safar, for Plaintiff.

Robert O. Lampl, James R. Cooney, and Elsie R. Lampl for Defendant.

No. GD 08-001288. In the Court of Common Pleas of Allegheny County, Civil Division.

MEMORANDUM

INTRODUCTION

Ward, J., March 11, 2010—This case involves the enforcement of a use restriction (“Use Restriction”) contained in the deed and land sale contract for the purchase of a subdivided parcel of real property containing a decommissioned cement plant (“GMI Parcel”) by GMI Land Company, LLC (“GMI”) from Kosmos Cement Company (“Kosmos”). The Use Restriction prevents the Defendants from developing or using the Property “...for the purpose of producing, manufacturing, unloading, transporting, selling or distributing cement, ready-mix concrete, aggregates, cementitious materials, masonry products, or any activity directly related to the concrete, cement or aggregates industries.”

Plaintiffs filed their Motion for Preliminary Injunction and Complaint on January 18, 2008 seeking, among other things, the issuance of a preliminary and permanent injunction to enforce the Use Restriction through Count I of the Complaint for Breach of Restrictive Covenant in Deed and/or Equitable Servitude and Count II of the Complaint for Breach of Restrictive Covenant in the Purchase and Sale Agreement.

The multi-day preliminary injunction hearing included extensive testimony and the admission of numerous documents and other exhibits. The parties conducted extensive discovery prior to the hearing, including the taking of fifteen depositions, as well as serving and responding to interrogatories and requests for production. On May 23, 2008, this Court granted Plaintiffs’ Motion for Preliminary Injunction by Order of Court that preliminarily enjoined Defendants from violating the Use Restriction.

On December 31, 2008, this Court entered a Case Management Order, which placed this action under Local Rule within the Commerce and Complex Litigation Center. This Court also provided the parties with an additional five and a half months to complete discovery, file expert reports and take any expert depositions. During this extended period, Defendants conducted no further discovery, adduced no additional evidence, provided no expert reports and took no expert depositions.

The subject of this Memorandum and Order of Court is the Motion for Summary Judgment filed by Plaintiffs on June 29, 2009 requesting a permanent injunction in their favor on Counts I and II of the Complaint.¹ The pleadings are closed, discovery is closed and Plaintiffs’ Motion for Summary Judgment seeking permanent injunctive relief is now properly ripe for disposition. We find that the same record that supported entry of a preliminary injunction now supports entry of permanent injunction to enforce the Use Restriction by granting summary judgment in Plaintiffs’ favor on Counts I and II of the Complaint.

FINDINGS OF FACT

I. Record and Transcript of Proceedings

1. The preliminary injunction hearing was held before the undersigned of this Court over the course of three days on April 30, 2008, May 19, 2008 and May 22, 2008, which was transcribed to create the record containing the notes of transcript of the courtroom proceedings. (“N.T. 4/30/08, N.T. 5/19/08 and N.T. 5/22/08”).

II. Plaintiffs

2. Prior to November 2007, Plaintiff Kosmos was the owner of certain real property and associated improvements located at 200-B Neville Road, Neville Township, Allegheny County, Pennsylvania (“Kosmos Property”). (Complaint ¶ 13; Amended Answer ¶ 13).

3. Plaintiff Cemex, Inc. (“Cemex”) seeks to enforce the rights of Kosmos in its capacity as the general and managing partner of Kosmos. (Complaint ¶ 5; Reply to New Matter ¶ 4).

III. Subdivision of the Kosmos Property

4. The Kosmos Property included: (i) a decommissioned cement plant with an accompanying barge dock and (ii) a distribution terminal. (Complaint ¶ 13; Amended Answer ¶ 13).

5. The Kosmos Property was divided by a subdivision plan, known as the Cemex Plan of Lots, dated in April of 2007 (“Subdivision Plan”), which was ultimately approved and duly recorded in November of 2007. (Complaint ¶ 16; Amended Answer ¶ 16).

6. Under the Subdivision Plan, the Kosmos Property was divided into two lots: Lots 1 and 2. Lot 1 contains the former cement plant and associated equipment. Lot 2 contains Kosmos's Pittsburgh terminal. (Complaint ¶ 16; Amended Answer ¶ 16).

IV. Defendants

7. In December 2005, an individual utilizing the name of "Michael Zampaglione," approached Kosmos regarding the sale of Lot 1. Michael Zampaglione took a tour of the facility claiming to be a representative to various companies in the business of manufacturing and distributing steel building supply products. (Complaint ¶ 20; Amended Answer ¶ 20; Plaintiffs' Exhibit 3; N.T. 4/30/08 at 85-87).

8. "Michael Zampaglione" was a pseudonym used by Defendant Michael P. Carlow a/k/a Michael Zampaglione ("Carlow"). (Plaintiffs' Exhibit 59, Carlow Depo. pp. 17-22; N.T. 4/30/08 at 88).

9. A series of negotiations ensued, during which Carlow and various business associates brought forth a series of inter-related companies as potential buyers. The potential buyers included the other Defendants, GMI Land Company, LLC, Griswold Manufacturing, Inc., and Neville Island Supply Company, Inc. Elizabeth Gilmore Jones ("Jones") directly or indirectly owned all of these interrelated companies. Jones considered Carlow to be her "agent" for the management and operation of her various companies. (Complaint ¶¶ 21-25; Amended Answer ¶¶ 21-25; Plaintiffs' Exhibit 58, Jones Depo. pp. 8-9, 93-94; N.T. 5/19/08 at 37-38; N.T. 5/22/08 at 181-82).

V. Real Estate Purchase and Sale Agreement

10. On June 20, 2007, Kosmos and GMI entered into a Real Estate Purchase and Sale Agreement ("Purchase and Sale Agreement") for Lot 1, the GMI Parcel. (Plaintiffs' Exhibit 1, Purchase and Sale Agreement; Complaint ¶ 25; Amended Answer ¶ 25; N.T. 4/30/08 at 102).

11. Section 22.9 of the Purchase and Sale Agreement provides:

Use Restriction. As a material inducement to Seller's Agreement to sell the Property, Buyer shall not develop, use or operate the Property or personal property sold hereunder, or permit the Property or personal property sold hereunder to be used, developed or operated, for the purpose of producing, manufacturing, unloading, transporting, selling or distributing ready-mix concrete, cement or aggregates, cementitious materials, masonry products or any activity directly related to the concrete, cement or aggregates industries. Seller shall have the right to enforce, by proceeding at law or in equity, the restrictions imposed by this provision including the right to prevent the violation of such restrictions, and the right to recover damages or other amounts due for such violation. The restrictions contained in this provision shall survive the Closing, are intended to require the compliance of Buyer's successors, heirs and assigns, and shall run with the land to the maximum extent allowed under applicable law. In order to assure notice to potential successors, heirs and assigns, this use restriction shall be set forth in the deed to the Property.

(Plaintiffs' Exhibit 1, Purchase and Sale Agreement at § 22.9; N.T. 4/30/08 at 97-99) (underlining added).

VI. Deed

12. The deed for the GMI Parcel ("Deed") contains the same Use Restriction limitations set forth in Section 22.9 of the Purchase and Sale Agreement. (Complaint ¶ 31; Amended Answer ¶ 31; Plaintiffs' Exhibit 2, Deed).

13. The Deed contains the following Use Restriction in bold print:

Use Restriction. As a material inducement to Grantor's agreement to sell the demised premises, the improvements and appurtenances thereto, the personal property, the fixtures, and the permits, credits, entitlements and other benefits granted by federal state and local government authority related to the demised premises (collectively the "Property") to Grantee, Grantee shall not develop, use or operate the Property, or permit the Property to be used, developed or operated for the purpose of producing, manufacturing, unloading, transporting, selling or distributing cement, ready-mix concrete, aggregates, cementitious materials, masonry products, or any activity directly related to the concrete, cement or aggregates industries. Grantor shall have the right to enforce, by proceedings at law or in equity, the restrictions imposed by this provision including the right to prevent the violation of such restrictions, and the right to recover damages or other amounts due for such violation. The restrictions contained in this provision shall be binding upon Grantee's heirs, successors and assigns and shall run with the land to the maximum extent allowed by law.

(Plaintiffs' Exhibit 2, Deed p. 2; N.T. 4/30/08 at 100-01) (underlining added).

VII. The Use Restriction was a Deal Breaker for Plaintiffs

14. At all relevant times during the contract negotiations and thereafter, Defendants were aware of the Use Restriction, never objected to it, and understood that it was a "deal breaker" for Plaintiffs. (Plaintiffs' Exhibit 59, Carlow Depo. pp. 95-96 and 140-41; Plaintiffs' Exhibit 58, Jones Depo. pp. 91-92, 146-47; N.T. 4/30/08 at 91-92, 100-01).

15. During negotiations, Defendants led Plaintiffs to believe that they intended to use the cement plant for steel fabrication and gave no indication of an intention to conduct cement making activities. (Plaintiffs' Exhibit 58, Jones Depo. pp. 89-90; N.T. 4/30/08 at 86-87, 97).

VIII. Intentions to Restart the Cement Plant

16. Soon after the deed transfer in November of 2007, Carlow began publicly announcing Defendants' intentions to restart the cement plant notwithstanding the Use Restriction. (Complaint ¶¶ 36-37; Amended Answer ¶¶ 36-37; Plaintiffs' Exhibit 59, Carlow Depo. pp. 224-25; N.T. 4/30/08 at 108-09).

17. To carry out the operation to restart the cement plant, Jones formed Neville Island Supply Company (“NISC”) and caused GMI to lease the cement plant to NISC. Jones hired her two brothers, Ray and Gary Gilmore to work with Carlow as the management team of NISC. All of the people hired by the NISC management team were experts in making cement as a career. (Plaintiffs’ Exhibit 57, G. Gilmore Depo. pp. 7-9, 16; Plaintiffs’ Exhibit 58, Jones Depo. pp. 163-64, N.T. 4/30/08 at 184; Plaintiffs’ Exhibit 59, Carlow Depo. pp. 73-76; Plaintiffs’ Exhibit 60, R. Gilmore Depo. pp. 7-8; N.T. 5/22/08 at 179-80).

18. Carlow had extensive prior experience operating and restarting decommissioned cement plants. Carlow was considered the “leader” of the operation. (Plaintiffs’ Exhibit 59, Carlow Depo. pp. 40-56; Plaintiffs’ Exhibit 48, Frankl Depo. p. 15; Plaintiffs’ Exhibit 57, G. Gilmore Depo. p. 16; Plaintiffs’ Exhibit 60, R. Gilmore Depo. pp. 54-55; N.T. 5/22/08 at 182-83).

19. The Defendants purchased insurance for cement manufacturing operations and specifically told one insurer that the Defendants will “update the plant” and then “use it for cement manufacturing.” (Plaintiffs’ Exhibit 36, Insurance Application; Plaintiffs’ Exhibit 37, Conn email dated July 17, 2007; Plaintiffs’ Exhibit 43, Workman’s Compensation Insurance; Plaintiffs’ Exhibit 52, Conn Depo. p. 21; N.T. 5/22/08 at 146-49).

20. Ray Gilmore, when asked why his files were full of quotes to refurbish the cement making equipment, suggested that the quotes were just informational. He had no plausible explanation, however, for why he did not have similar informational quotes in his files related to any of the alleged alternative, non-prohibited uses of the facility that Defendants were purportedly actively pursuing. (N.T. 5/22/08 at 215-16).

IX. Cease and Desist Letter and Request for Assurance

21. On December 20, 2007, Plaintiffs sent a cease and desist letter and request for assurance that Defendants stop any activities to restart the cement plant or any other violation of the Use Restriction. Since Plaintiffs did not receive a timely assurance, this lawsuit was started. (Plaintiffs’ Exhibit 44, Cease and Desist Letter and Request for Assurance; N.T. 5/22/08 at 233-35).

X. Preliminary Injunction Order

22. On May 23, 2008, this Court granted Plaintiffs a preliminary injunction upholding the enforcement of the Use Restriction which, in relevant part:

...ORDERED that Defendants and any other individual or entity acting in consort with Defendants are ENJOINED, from developing or using the parcel of land described in Exhibit A to that certain Deed from Kosmos Cement Co. to GMI Land Company, LLC, dated November 1, 2007 and recorded on December 10, 2007 in the Office of the Allegheny County Recorder of Deeds (now known as the Allegheny County Department of Real Estate), Book Volume 13461, Page 310, and/or any of the other assets conveyed as part of the November 2007 sale of said property by Plaintiffs, for the purpose of producing, manufacturing, unloading, transporting, selling or distributing cement, ready-mix concrete, aggregates, cementitious materials, masonry products, or any activity directly related to the concrete, cement or aggregates industries.

(Preliminary Injunction Order, 5/23/08) (underlining added).

DISCUSSION

I. Standard for Summary Judgment

The applicable standard that governs the entering of summary judgment is set forth in the Pennsylvania Rules of Civil Procedure. The Court shall enter summary judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery, Pa.R.C.P. 1035.2(1) or if, after the completion of discovery relevant to the motion, an adverse party who will bear the burden of proof at trial failed to produce evidence of facts essential to the cause of action or defense. Pa.R.C.P. 1035.2(2).

Ordinarily, summary judgment should only be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Chepkevich v. Hidden Valley Resort, L.P.*, 911 A.2d 946, 950 (Pa.Super. 2006) (citing *Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63, 71 (Pa.Super. 2005)). A “material fact,” for summary judgment purposes, is a fact that directly affects the outcome of the case. *Bartlett v. Bradford Publishing, Inc.*, 885 A.2d 562 (Pa.Super. 2005). A trial court may grant summary judgment based upon determinations made in connection with a preliminary injunction proceeding where the non-moving party could not succeed as a matter of law, so that introduction of further factual evidence would serve no purpose. *Mars Emergency Medical Services v. Township of Adams*, 704 A.2d 1143 (Pa.Cmwlt. Ct. 1998).

II. There are No Material Facts in Dispute regarding Breach of the Use Restriction

In this case, there are no material facts in dispute regarding breach of the Use Restriction in Counts I and II of the Complaint. Introduction of further factual evidence would serve no purpose. All material facts at issue have been admitted and/or established. There is no dispute concerning the existence of, or language in, the Deed or the Real Estate Purchase and Sale Agreement. There is no dispute that both contain the same Use Restriction. Further, Defendants admit to: (i) knowing that the Use Restriction was a “deal breaker” for Plaintiffs and (ii) accepting the Use Restriction, as written, without objection of any kind.

Here, the undisputed facts indicate that Defendants intended to actively pursue their stated desire to restart the cement plant. Defendants offered no plausible explanation for the undisputed facts that show that they were actively working toward restarting the cement plant. Rather, Defendants claimed that an injunction should not issue because their ability to manufacture cement was not imminent. The Use Restriction clearly restricts the use, operation or development of the GMI parcel relating to the concrete, cement, and aggregates industries. The Use Restriction provides Plaintiffs the right to enforce these restrictions, by proceeding in equity, to prevent any violation of such restrictions. Defendants’ actions are in clear violation of the provisions imposed by the Use Restriction covenant in both the Deed and the Purchase and Sale Agreement.

III. The Use Restriction is Valid and Enforceable

Generally, use restrictions are valid and enforceable restrictive covenants. *Gey v. Beck*, 568 A.2d 672, 675 (Pa.Super. 1990). In *Holland v. Brown*, 304 Pa. 545, 156 A. 168 (1931), the Supreme Court of Pennsylvania sustained an injunction where the defendants had agreed not to go into the dairy business or any other business of a competitive nature within a radius of ten miles of East Pittsburgh, Pennsylvania. Our Supreme Court held that an agreement of this character, being limited in space, though unlimited in time, is prima facie valid. *Id.* at 168. Real covenants in restraint of trade are enforceable if reasonable. *Harris Calorific Company v. Marra*, 345 Pa. 464, 29 A.2d 64 (1942). The burden is on him who sets up unreasonableness as the basis of illegality as a defense in a suit to enforce a contract “to show how and why it is unlawful.” *Holland v. Brown*, 156 A. at 169.

Here, Defendants have not met their burden of establishing that the Use Restriction is unreasonable. The Use Restriction only applies to the GMI Parcel and is prima facie valid. Defendants are free to open a cement plant on any location except the GMI parcel. The Use Restriction is reasonable, and therefore enforceable, because it is extremely limited in space and only restricts the parcel’s use, operation or development relating to the concrete, cement, and aggregates industries.

IV. Permanent Injunctive Relief is Appropriate

Restrictive covenants may be enforced by the granting of injunctive relief. *Perrige v. Horning*, 654 A.2d 1183, 1187 (Pa.Super. 1995) (covenants of “recent vintage” certainly may be enforced by the granting of injunctive relief). Where a use restriction is still of substantial value to a dominant lot, equity should restrain its willful violation because to restrict the plaintiff to damages is not an adequate remedy. *Gey v. Beck*, 568 A.2d at 677.

In *Peters v. Davis*, 426 Pa. 231, 231 A.2d 748 (1967), the Supreme Court of Pennsylvania unanimously reversed the decision of the chancellor who had refused to grant an injunction ordering the removal of a dwelling intentionally constructed in violation of certain use restrictions contained in the deed to the property. Our Supreme Court stated the applicable principles of law as follows:

“Where a building restriction is still of substantial value to a dominant lot equity should restrain its wilful violation. [citing an authority] To restrict the plaintiff to damages is not an adequate remedy... Where a contract right has been invaded there is generally no question of the amount of damages but simply of the right. Clearly it would be ‘only by conjecture and not by any accurate standard’ that a jury could measure the damages caused to the plaintiff. [citing an authority].” Judge (later Chief Justice) Kephart in *Dodson v. Brown*, 70 Pa.Super. 359 (1918) aptly said: “The aggrieved property owner’s right is absolute. However hard his acts might be regarded, he asks the court for the enforcement of a legal right of a positive character with respect to land which it is conceded was wrongfully taken from him. He is entitled to a decree. The rule in such cases is founded on sound reason. If damages may be substituted for the land, it will amount to an open invitation to those so inclined to follow a similar course and thus secure valuable property rights. The amount of land involved does not change the situation.” ...If a property owner deliberately and intentionally violates a valid express restriction running with the land or intentionally “takes a chance,” the appropriate remedy is a mandatory injunction to eradicate the violation.

Id. at 238, 231 A.2d at 752.

“[W]hen reviewing the grant or denial of a final or permanent injunction, an appellate court’s review is limited to determining whether the trial court committed an error of law.” *Buffalo Township v. Jones*, 571 Pa. 637, 644, 813 A.2d 659, 663-664 (2002). “[I]n order to establish a claim for a permanent injunction, the party must establish his or her clear right to relief.” *Id.* As our Supreme Court has summarized, a permanent injunction is appropriately awarded “to prevent a legal wrong for which there is no adequate redress at law.” *Id.* at 644, 813 A.2d at 663 (quoting *Soja v. Factoryville Sportsmen’s Club*, 361 Pa.Super. 473, 522 A.2d 1129, 1131 (1987)). When the words of a contract are clear and unambiguous, a court is to determine what the parties intended by looking at the express language of the agreement. *Giant Food Stores, LLC v. THF Silver Spring Development, L.P.*, 959 A.2d 438, 448 (affirming order of trial court, sitting as a court in equity, granting summary judgment that enjoined appellant from violating a supermarket use restriction in an agreement). Where defendants actions are in clear violation of the provisions imposed by the covenant, injunctive relief is particularly appropriate. *Vernon Tp. Volunteer Fire Dept.*, 855 A.2d 873 (Pa. 2004); *Loeb v. Watkins*, 240 A.2d 513 (Pa. 1968).

Based on the undisputed factual record, and the legal arguments presented, Plaintiffs are entitled to summary judgment as a matter of law and the issuance of a permanent injunction to enjoin Defendants from violating the Use Restriction. Essentially, the same record that supported entry of a preliminary injunction now supports entry of permanent injunction. Accordingly, we find that granting summary judgment in Plaintiffs’ favor on Count I for Breach of Restrictive Covenant in Deed and/or Equitable Servitude and Count II for Breach of Restrictive Covenant in the Purchase and Sale Agreement is appropriate. An appropriate permanent injunction order follows.

CONCLUSIONS OF LAW

1. Plaintiffs are entitled to judgment as a matter of law as to Counts I and II of the Complaint.
2. There is no genuine issue of material fact in dispute regarding breach of the Use Restriction.
3. The Use Restriction is valid and enforceable.
4. Permanent injunctive relief is appropriate to enjoin Defendants from violating the Use Restriction.

BY THE COURT:
/s/Ward, J.

Dated: March 11, 2010

ORDER OF COURT

AND NOW, this 11th day of March, 2010, upon consideration of Plaintiffs’ Motion for Summary Judgment, and all supporting and supplemental materials, and any response in opposition thereto, and following argument thereon, it is hereby ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment is GRANTED in Plaintiffs’ favor on Count I of the Complaint for Breach of Restrictive Covenant in Deed and/or Equitable Servitude and Count II of the Complaint for Breach of Restrictive

Covenant in the Purchase and Sale Agreement as follows:

Defendants and any other individual or entity acting in consort with Defendants are PERMANENTLY ENJOINED from developing or using the parcel of land described in Exhibit A to that certain Deed from Kosmos Cement Co. to GMI Land Company, LLC, dated November 1, 2007 and recorded on December 10, 2007 in the Office of the Allegheny County Recorder of Deeds (now known as the Allegheny County Department of Real Estate), Book Volume 13461, Page 310, and/or any of the other assets conveyed as part of the November 2007 sale of said property by Plaintiffs, for the purpose of producing, manufacturing, unloading, transporting, selling or distributing cement, ready-mix concrete, aggregates, cementitious materials, masonry products, or any activity directly related to the concrete, cement or aggregates industries.

A status conference shall occur before the undersigned on May 5, 2010 at 9:30 am in Courtroom 820 of the City-County Building.

BY THE COURT:
/s/Ward, J.

¹ The Complaint also contains Count III for Declaratory Judgment, Count IV (In the Alternative) for Equitable Rescission and Restitution, and Count V for Trespass to Land. On July 31, 2009, Defendants filed their Amended Answer, New Matter and Counterclaim. On August 20, 2009, Plaintiffs filed their Answer (sic) to Counterclaim. These issues remain subject to adjudication.