NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DAVID LAFANTANO Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1608 EDA 2014

Appeal from the Judgment of Sentence January 31, 2013
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0002295-2012;
CP-39-CR-0002298-2012

BEFORE: GANTMAN, P.J., ALLEN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED JULY 31, 2015**

Appellant, David Lafantano, appeals *nunc pro tunc* from the judgment of sentence entered in the Lehigh County Court of Common Pleas, following his convictions for two counts each of receiving stolen property, criminal trespass, criminal mischief, and conspiracy to commit burglary, and one count each of burglary, attempted burglary, and theft by unlawful taking.[1] We affirm.

In its opinion, the trial court set forth the relevant facts of this case as follows:

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[1] 18 Pa.C.S.A. §§ 3925; 3503(a); 3304; 903 (section 3502 related); 3502; 901 (section 3502 related); 3921(a), respectively.

Appellant and his co-defendant, Javier Ramos, were involved in three burglaries which took place over the course of approximately one month in early-2012 in suburban areas of Lehigh and Northampton Counties.[1] The first incident occurred on February 16, 2012. Candy Barr Heimbach was returning home to her residence at 7066 Dusseldorf Square, Bethlehem, Pennsylvania, from a business trip at approximately 6:00 in the evening. When she arrived at her home, she discovered the back door to her house was wide open. She found things displaced throughout her house. It was still completely warm inside her house despite the open door and temperatures outside being in the twenties.

> [1] A fourth burglary out of Northampton was originally charged in the Informations against Appellant and his co-defendant, but due to a witness unavailability issue, the Commonwealth did not pursue those charges in [this] case.

Ms. Heimbach returned to her car and went to a neighbor for help. Her neighbor's wife called the State Police. After the police arrived and secured the house, Ms. Heimbach was allowed inside. She observed that the perpetrators gained entry through a window.

Police walked Ms. Heimbach through her house. She testified things were missing and indicated the house had been trashed. Jewelry and a laptop computer were taken from the guest room, as well as several laptops from the family room, a camera, an iPod, an iPhone, an electric guitar, a Wii, and an Xbox 360 belonging to Ms. Heimbach's son. The user name on the Xbox Live account associated with the Xbox 360 console was "SemperAequus." In the master bedroom, Ms. Heimbach's husband's pillowcase had been taken along with numerous jewelry items. Ms. Heimbach testified that in April of 2011, she and her husband had used a company called Class Act Landscaping for landscaping purposes.

Trooper Jason R. Trautman, who works in the Pennsylvania State Police Forensic Services Unit, testified that he went to Ms. Heimbach's residence to aid in the investigation.

Trooper Trautman collected certain items from the scene for processing.

On February 28, 2012, Veronica Ciraulo of 3503 Courtney Drive, Upper Saucon Township, Lehigh County, returned home from work in the evening to find the door to her basement was open and the light was on downstairs. A sliding glass door near her kitchen was completely open. A 32" Samsung television was missing from the family room, and Ms. Ciraulo found that several drawers and other pieces of furniture had been opened or otherwise disturbed. A back window leading into a bar area in the Ciraulos' basement was broken.

Ms. Ciraulo called the police, who arrived and did a walk-through of the house with her. In addition to the television, Ms. Ciraulo testified that her husband's iPad had been taken, along with jewelry, a Timex watch, and some cash. In her bedroom, Ms. Ciraulo found that her husband's pillowcase was removed and the pillow was thrown on the floor. Ms. Ciraulo testified that in the [f]all of 2011, she and her husband used Class Act Landscaping for some work on their property. Ms. Ciraulo further testified that neither [Appellant nor his co-defendant] had permission to be on her property on the date of the burglary.

Detective Joseph Pochran arrived on the scene of the Ciraulo burglary in order to conduct an investigation. Detective Pochran learned that a neighbor had surveillance cameras outside his home. The video depicts a black SUV driving around the neighborhood and backing into Ms. Ciraulo's driveway. A mail truck can be seen driving by the Ciraulo residence.

On March 12, 2012, Dana Wooley of 1440 Saratoga Circle in [Breinigsville], Pennsylvania, was at home alone at approximately 8:45 in the morning. She took a shower and finished just after 9:00. She went into another room of her house overlooking her driveway, which comes up from the street to a side-entrance garage. Ms. Wooley looked out the window and saw a dark SUV with shiny rims backed into her driveway. She observed a person emerging from the front passenger side of the SUV and

stepping around toward the back. The license plate was covered on the vehicle by something resembling a light cloth, either pink or peach in color. The person who got out of the vehicle was wearing a grayish-black hooded sweatshirt with a red baseball cap and red sneakers. Ms. Wooley was approximately twenty feet up while she observed this and testified she had a clear view of that person's face.

The person standing outside the SUV tightened the hood on his sweatshirt around the baseball cap and walked toward the rear of the house. Upon observing this, Ms. Wooley called 911. While on the phone with 911, Ms. Wooley heard rustling and the sound of a person possibly trying to open doors from the outside. Ms. Wooley proceeded to a window looking out the front of her house and saw a second "scruffy looking" individual without much hair on his head wearing a gray colored shirt and jeans. Ms. Wooley further testified that while the men were at her house, she heard something break, which she later realized was a glass window.

While Ms. Wooley was on the phone with dispatch, she watched the black SUV leave her driveway, this time with the license plate uncovered and the cloth removed. She advised the dispatcher that it was a Pennsylvania plate. She watched the SUV drive up the road toward Ziegels Church Road. Ms. Wooley testified she could see a police car's lights as it approached the intersection and she told the dispatcher that the officer was going to run right into the SUV.

The police car Ms. Wooley saw was being driven by Pennsylvania State Trooper Patrick Dawe, who was responding to the call at Ms. Wooley's house. Trooper Dawe testified that as he drove past Saratoga Circle on Ziegels Church Road, he observed a black SUV with shiny rims in a driveway on Saratoga Circle. Trooper Dawe testified that he saw the black Ford [Expedition] SUV back out onto Saratoga Circle and make a left onto Ziegels Church Road. Because it was driving the opposite direction from him, Trooper Dawe turned his vehicle around and activated his lights and sirens to initiate a traffic stop of the vehicle. The vehicle pulled over into the

nearby Ziegels Church parking lot. The license plate number for the black SUV was HPJ 8699.

Trooper Dawe exited his vehicle and approached the SUV. Appellant was the driver, and his co-defendant, Javier Ramos, was in the front passenger seat. After backup arrived for Trooper Dawe, the officers asked Appellant and Ramos to step out of their vehicle. Trooper Dawe spoke separately to Appellant, who indicated he was Ramos' brother-in-law and they were attempting to solicit work on their own from Class Act Landscaping contacts. He indicated they had stopped at a house on Saratoga Circle. Appellant told Dawe that Ramos remained in the vehicle while he got out, approached the front door, rang the doorbell and knocked, and the two men left when there was no answer.

Trooper Dawe then spoke to Ramos. Ramos denied being related to Appellant. He told Dawe that they were trying to solicit work from their old landscaping company's clients. Ramos' account of the events at Ms. Wooley's house [was] the same as Appellant's, that Appellant approached the door, knocked and rang the doorbell, and came back to the SUV after no one answered.

While the vehicle stop was occurring, Trooper Jonathan Gerkin of the Pennsylvania State Police Criminal Investigation Unit arrived and spoke to Ms. Wooley briefly at her home. He observed the physical damage to her residence, including damage to the rear of the house. Gerkin and Ms. Wooley went outside and saw a fence was left open leading to the backyard and observed the broken window to the family room with the screen lying on her deck. The screen had been in the window the previous evening, not on the deck.

Upon being advised that the black SUV had been stopped by Trooper Dawe, Gerkin took Ms. Wooley to that location for a "show-up." Prior to taking her there, Gerkin advised Ms. Wooley that he was taking her to an area where a traffic stop was conducted. Gerkin further noted the individuals present may or may not be involved, and that it was just as important to rule out innocent people as it was to identify the perpetrators.

Trooper Gerkin slowly drove Ms. Wooley past [Appellant and his co-defendant] while the vehicle remained in the street and the suspects stood in the church parking lot approximately twenty to thirty feet away. The weather conditions were clear with a bright and sunny sky. [Appellant and his co-defendant] were not handcuffed and stood within a few feet of each other while continuing to face one direction as Trooper Gerkin and Ms. Wooley drove by. As they drove past, Ms. Wooley positively identified Appellant and Ramos as the two individuals she saw at her house. Trooper Gerkin relayed that information to Trooper Dawe and Appellant and his co-defendant were arrested.

Trooper Thomas M. Durilla of the Pennsylvania State Police was contacted to assist in searching the Ford Expedition and obtaining items as evidence from the vehicle. Within the vehicle, Trooper Durilla and another officer, Trooper Robert Devers, located green New York Jets gloves in the doors of the vehicle, a pair of red and tan gloves, two screwdrivers, and an oil-soaked pink rag. State police obtained a warrant to search and secure the items in the vehicle.

Trooper Gerkin subsequently communicated with Trooper Seiple and Detective Pochran, the lead investigators of the Heimbach and Ciraulo burglaries, respectively. Two and a half years prior, Ms. Wooley had used Class Act Landscaping, similar to the victims of the Heimbach and Ciraulo burglaries. Thomas Duffy, the owner of Class Act Landscaping, testified that Appellant and his co-defendant worked for Class Act [Landscaping] up through the [f]all of 2011. Ramos had worked off and on for approximately two or three years, and Appellant worked for approximately four years.

After Appellant and Ramos were arrested, Ramos had frequent contact in the form of prison visits and telephone calls with his girlfriend, Allison Wanamaker. Prisoners are notified their telephone communications are recorded. While Ramos was in prison, his recorded conversations with Ms. Wanamaker included references to an Xbox and a TV, along with an indication that the Xbox was in Ms. Wanamaker's home courtesy of "the electronics fairy."

Based on information obtained from these communications, Trooper Gerkin proceeded to the Wanamaker residence.

On April 13, 2012, Trooper Gerkin made contact with Fay Wanamaker of 311 East 21st Street, Northampton, Penn[s]ylvania. Fay is Allison Wanamaker's mother; the two women live together in Fay Wanamaker's home. Fay Wanamaker testified that on April 13, 2012, police arrived and advised her they were looking for stolen items that they had reason to believe were in her home. Mrs. Wanamaker gave consent for the officers to search her home.

Trooper Gerkin and Trooper Durilla searched Mrs. Wanamaker's residence. In the attic, the officers located a 32" Samsung television and a clear bin with a red lid. Inside the bin was an Xbox 360 and several shoe boxes with the name "Javier" on them. Mrs. Wanamaker testified that she did not recognize these items, had not placed them in her home, and had not given anyone permission to store them in her home, though people frequently kept things in her home. Mrs. Wanamaker did not recognize Appellant or his co-defendant. The television was identified as the one stolen from the Ciraulo residence.

Trooper Gerkin took the Xbox 360 he seized from the Wanamaker residence for analysis. The Xbox Live screen name associated with that Xbox 360 was "SemperAequus," the same name associated with Ms. Heimbach's son's stolen Xbox 360 from the Heimbach burglary.

A search warrant was obtained and executed on April 13, 2012 in order to obtain and search two cell phones police located in the Ford Expedition SUV, which was still in impound. The phones were sent to Detective Pochran, who is also in charge of the Lehigh County Computer Crimes Task Force. Using technology called a Cellebrite UFED, which is capable of extracting data from, *inter alia*, cell phones, Detective Pochran was able to obtain information including text messages from phones subject to forensic analysis. A text message sent on February 28, 2012, the same date as the Ciraulo burglary, at 9:29:24 indicated "mailman just went by."

> Gerald Tate, a cellular radio frequency engineer for AT&T, testified as an expert at trial in this matter. While no cellular activity was recorded for February 16, 2012, the date of the Heimbach burglary, cell phone activity placed Appellant and his co-defendant's telephones in the area of the Ciraulo residence on February 28, 2012 at 9:26 a.m., approximately one mile away from a nearby cell tower. An audio recording from a prison visit between Ramos and Allison Wanamaker included reference by Ramos that the phones in the SUV belonged to him and Appellant.

(Trial Court Opinion, filed July 29, 2014, at 1-10) (some internal footnotes omitted).

Procedurally, the Commonwealth filed two criminal informations against Appellant and two criminal informations against his co-defendant. At docket number CP-39-CR-0002296-2012 ("docket 2296") and docket number CP-39-CR-0002298-2012 ("docket 2298"), the Commonwealth charged co-defendant and Appellant, respectively, with burglary and other offenses in connection with the Heimbach and Ciraulo burglaries. At docket number CP-39-CR-0002292-2012 ("docket 2292") and docket number CP-39-CR-0002295-2012 ("docket 2295"), the Commonwealth charged co-defendant and Appellant, respectively, with burglary and other crimes in connection with the incident at Ms. Wooley's home.

On August 28, 2012, Appellant filed an omnibus pre-trial motion to sever the charges related to the Heimbach and Ciraulo burglaries. Appellant also asked the court to hold separate trials for each of the three burglaries for which Appellant was charged. The court held a pre-trial hearing on

Appellant's motion on September 5, 2012.[2] On September 19, 2012, the court denied Appellant's pre-trial motion to sever, and granted the Commonwealth's request for joinder of Appellant's charges at trial, as well as Appellant's cases with co-defendant's cases.

Appellant and his co-defendant proceeded to a jury trial on December 10, 2012. On December 12, 2012, the jury returned a verdict. At docket 2298 (related to the Heimbach and Ciraulo burglaries), the jury convicted Appellant of two counts of receiving stolen property, and one count each of burglary, criminal trespass, theft by unlawful taking, criminal mischief, and conspiracy to commit burglary. At docket 2295 (related to the Wooley burglary), the jury convicted Appellant of attempted burglary, criminal trespass, criminal mischief, and conspiracy to commit burglary.

On January 31, 2013, the court sentenced Appellant to an aggregate term of eighteen (18) to forty-two (42) years' imprisonment. Appellant timely filed post-sentence motions on February 7, 2013, challenging the discretionary aspects of sentencing and the weight of the evidence. The

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[2] Appellant's severance motion was technically premature in its request to conduct separate trials for each of the charged burglaries, as the Commonwealth had not yet filed a motion for joinder. Nevertheless, the court heard argument regarding the anticipated joinder issues and allowed the Commonwealth to file a written motion for joinder by the following day. On September 6, 2012, the Commonwealth filed a formal Motion to Join for Trial Defendants, Informations and Offenses Pursuant to Pa.R.Crim.P. 582. Appellant opposed the Commonwealth's motion based on, *inter alia*, timeliness grounds. On appeal, Appellant does not contest the timeliness of the Commonwealth's motion for joinder.

court denied Appellant's motion in part on February 11, 2013 (as to Appellant's sentencing claim). Following argument on Appellant's weight of the evidence claim on March 19, 2013, the court denied Appellant's request for a new trial on March 22, 2013. Appellant did not file a direct appeal.

On November 13, 2013, Appellant filed a *pro se* petition under the Post Conviction Relief Act ("PCRA"),[3] requesting reinstatement of his direct appeal rights *nunc pro tunc*. On May 1, 2014, by agreement of the parties, the court granted Appellant *nunc pro tunc* relief. Appellant timely filed a *nunc pro tunc* notice of appeal on May 22, 2014. On June 10, 2014, the court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), which Appellant timely filed on June 30, 2014.

Appellant raises the following issues for our review:

> DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SEVER?
>
> DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO PRECLUDE THE COMMONWEALTH FROM INTRODUCING PRISON PHONE CALL CONVERSATIONS AS THEY CONSTITUTED IMPERMISSIBLE HEARSAY?

(Appellant's Brief at 4).

In his first issue, Appellant argues the court's joinder of his charges for trial prejudiced his case because the Commonwealth introduced evidence

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[3] 42 Pa.C.S.A. §§ 9541-9546.

from each burglary incident at trial that would have been inadmissible if the court had conducted separate trials. Appellant claims the only unique factor present in all three cases is the connection to Class Act Landscaping, which is insufficient by itself to demonstrate a common plan or scheme. Appellant complains that the rear window point of entry and the presence of a black SUV at some of the burglaries are too commonplace to constitute unique connections among the cases to warrant joinder. Appellant also insists the length of time between the burglaries demonstrates they are not part of the same transaction, which rebuts the Commonwealth's "complete story rationale." Appellant concludes the court's joinder of the three burglary cases for trial was improper, and this Court should reverse and remand for three separate trials.[4] We disagree.

Our standard of review of the denial of a motion to sever is as follows: "Joinder and severance of separate indictments for trial is a discretionary function of the trial court; consequently, the trial court's decision is subject to review for abuse of that discretion." ***Commonwealth v. Brookins***, 10 A.3d 1251, 1255 (Pa.Super. 2010), *appeal denied*, 610 Pa. 625, 22 A.3d 1033 (2011).

> The traditional justification for permissible joinder of offenses or consolidation of indictments appears to be the judicial economy which results from a single trial. The

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[4] Appellant does not argue that the court improperly joined his cases with his co-defendant's cases for trial.

> argument against joinder or consolidation is that where a defendant is tried at one trial for several offenses, several kinds of prejudice may occur: (1) The defendant may be confounded in presenting defenses, as where his defense to one charge is inconsistent with his defenses to the others; (2) the jury may use the evidence of one of the offenses to infer a criminal disposition and on the basis of that inference, convict the defendant of the other offenses; and (3) the jury may cumulate the evidence of the various offenses to find guilt when, if the evidence of each offense had been considered separately, it would not so find.

Commonwealth v. Janda, 14 A.3d 147, 155 (Pa.Super. 2011) (quoting ***Commonwealth v. Morris***, 493 Pa. 164, 171, 425 A.2d 715, 718 (1981)). "Thus[,] in arriving at a meaningful standard to guide the trial court in its exercise of discretion, and to permit appellate courts to determine whether the trial court abused this discretion, we must weigh the possibility of prejudice and injustice caused by the consolidation against the consideration of judicial economy." ***Id.***

Pennsylvania Rule of Criminal Procedure 582 provides:

> **Rule 582. Joinder—Trial of Separate Indictments or Informations**
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> **(A) Standards**
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> (1) Offenses charged in separate indictments or informations may be tried together if:
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> (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.

Pa.R.Crim.P. 582(A). Pennsylvania Rule of Criminal Procedure 583 provides:

> **Rule 583. Severance of Offenses or Defendants**
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> 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.

Pa.R.Crim.P. 583. "Under Rule 583, the prejudice the defendant suffers due to the joinder must be greater than the general prejudice any defendant suffers when the Commonwealth's evidence links him to a crime." ***Commonwealth v. Dozzo***, 991 A.2d 898, 902 (Pa.Super. 2010), *appeal denied*, 607 Pa. 709, 5 A.3d 818 (2010).

> The prejudice of which Rule 583 speaks is, rather, that which would occur if the evidence tended to convict the appellant only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence. Additionally, the admission of relevant evidence connecting a defendant to the crimes charged is a natural consequence of a criminal trial, and it is not grounds for severance by itself.

Id. (quoting ***Commonwealth v. Lauro***, 819 A.2d 100, 107 (Pa.Super. 2003), *appeal denied*, 574 Pa. 752, 830 A.2d 975 (2003)).

> Where the defendant moves to sever offenses not based on the same act or transaction…the court must therefore determine: (1) whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation

> by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, (3) whether the defendant will be unduly prejudiced by the consolidation of offenses.

Dozzo, supra at 902 (quoting ***Commonwealth v. Collins***, 550 Pa. 46, 55, 703 A.2d 418, 422 (1997), *cert. denied*, 525 U.S. 1015, 119 S.Ct. 538, 142 L.Ed.2d 447 (1998)). Thus, a court must first determine whether evidence of each of the offenses would be admissible in a separate trial for the other. ***Dozzo, supra***. Evidence of other crimes is not admissible solely to show the defendant's bad character or propensity to commit crimes. ***Id.***

Nevertheless, evidence of other crimes is admissible to demonstrate:

> (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other.

Janda, supra at 156 (quoting ***Morris, supra*** at 175, 425 A.2d at 720). "Additionally, evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts." ***Dozzo, supra*** at 902 (quoting ***Collins, supra*** at 55, 703 A.2d at 423). The "*res gestae*" exception, also known as the "complete story" rationale, permits courts to admit evidence of other criminal acts "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." ***Commonwealth***

v. Lark, 518 Pa. 290, 303, 543 A.2d 491, 497 (1988). "Factors to be considered to establish similarity are the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed." ***Dozzo, supra*** at 902 (quoting ***Commonwealth v. Taylor***, 671 A.2d 235, 240 (Pa.Super. 1996), *appeal denied*, 546 Pa. 642, 683 A.2d 881 (1996)). Further, "[w]here a trial concerns distinct criminal offenses that are distinguishable in time, space and the characters involved, a jury is capable of separating the evidence." ***Collins, supra*** at 56, 703 A.2d at 423. ***See also Dozzo, supra*** (holding joinder of defendant's seven robbery cases for trial was proper where robberies were closely linked temporally and geographically and showed like manner in which defendant committed robberies; evidence tended to establish defendant's identity as robber; evidence from each robbery would be admissible in separate trials for other robberies because evidence established common scheme, plan or design, as well as defendant's identity; jury was able to separate evidence for each case where each docket number dealt with robbery of different individual(s), who testified about details of individual robberies; jury found defendant not guilty of all charges in one case and not guilty of three out of four charges in another case, demonstrating that jury considered each case and each charge separately and did not cumulate evidence).

Instantly, the trial court explained its rationale for granting the Commonwealth's motion for joinder and denying Appellant's motion to

sever, as follows:

> In this case, the [c]ourt properly found, upon consideration of all of the evidence and the arguments of counsel, that consolidation was appropriate for all four cases for trial and for a joint trial of the defendants. The evidence showed a common plan or scheme between the two defendants wherein they would burglarize the homes of people who were present or former clients of Class Act Landscaping. Both Appellant and [his co-defendant] were former employees of that company. The common elements of the rear window point of entry or attempted entry and the black SUV observed in two of the burglaries supported the Commonwealth's theory that the defendants were engaged in a common scheme. Additionally, the recorded comments from prison telephone conversations linked both defendants to the items found at [co-defendant's] girlfriend's home during the execution of the search warrant.
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> In proving its cases against these defendants, the Commonwealth was required to present testimony and evidence relating to each burglary. In essence, the Commonwealth needed to prove each burglary in order to connect all of the burglaries to these defendants. This is the way by which the jury would receive the complete story of these events. Additionally, the evidence would not implicate either defendant as only showing a propensity on his part to commit crimes; rather, it would demonstrate that both defendants acted in concert to commit these burglaries.
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> Additionally, the interests of judicial economy were substantial in this case because the nature and complexity of the evidence meant the trial would be lengthy. If these cases were tried separately, it would result in two protracted trials with extensive witness testimony and presentation of evidence. Upon review of the evidence presented at the omnibus pretrial motions hearing, it does not appear that any of the evidence is so prejudicial against either defendant such that a jury would be unable to fairly and appropriately evaluate the evidence as it applies separately to each defendant.

> In sum, Appellant was not unduly prejudiced by joinder of his cases with [co-defendant's] cases for trial, nor was he unduly prejudiced by the joinder of his two separate informations. Accordingly, the above-captioned cases were properly joined for a single trial.

(Trial Court Opinion, filed July 29, 2014, at 19-20). We see no reason to disrupt the court's sound analysis. ***See Brookins, supra***. ***See also Collins, supra***; ***Janda, supra***; ***Dozzo, supra***. Additionally, the crimes took place close in time in February and March 2012, in nearby counties. ***See id.*** As well, the jury found Appellant not guilty of burglary at docket 2295 and not guilty of five counts charged at docket 2298, demonstrating the jury considered each case and each charge separately and did not cumulate the evidence.[5] ***Id.*** Consequently, Appellant's first issue on appeal merits no relief.

In his second issue, Appellant argues the court improperly admitted at trial certain prison phone calls between Appellant and his wife; and between co-defendant and Allison Wanamaker (co-defendant's girlfriend). Appellant asserts the court admitted a prison phone call in which Appellant's wife stated to Appellant: "I'm not giving her half of shit." Appellant contends the

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[5] Specifically, the jury convicted Appellant of only receiving stolen property in relation to the Heimbach burglary (finding Appellant not guilty of five other offenses charged in relation to that incident); all charges in relation to the Ciraulo burglary; and attempted burglary, criminal trespass, criminal mischief, and criminal conspiracy to commit burglary in relation to the Wooley incident (finding Appellant not guilty of burglary charged in relation to that incident).

Commonwealth sought to prove Appellant's wife was referring to Ms. Wanamaker in the statement relative to items recovered during one of the burglaries. Appellant contends his wife's statement could have been wholly unrelated to the burglaries and to Ms. Wanamaker, and the Commonwealth took the statement out of context.[6] Appellant insists the court's admission of this prison call to show its "effect on the listener" was improper.

Additionally, Appellant explains the court admitted prison phone calls between co-defendant and his girlfriend, Ms. Wanamaker, in which they discuss (1) Appellant and co-defendant's ownership of cell phones police recovered in the SUV; and (2) the "electronics fairy" leaving an Xbox at Ms. Wanamaker's home. Appellant claims the court erred by admitting this evidence because the Commonwealth failed to prove a conspiracy between Appellant and Ms. Wanamaker. Even if the Commonwealth could prove a conspiracy, Appellant insists the conspiracy ended once police arrested

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[6] Appellant also claims the court's admission of the prison phone call was erroneous because one portion of the call was relevant only to charges against Appellant in an alleged fourth burglary, which the Commonwealth withdrew prior to trial. Appellant does not provide any details regarding which portion of the call pertained to this fourth burglary. Nevertheless, the record suggests Appellant is referring to a portion of the prison call in which Appellant and his wife discussed a 50" television. The trial court ordered the Commonwealth to redact this portion of the conversation because it was relevant only to the burglary for which the Commonwealth withdrew the charges, and the Commonwealth complied. Thus, the jury heard no evidence concerning this fourth burglary, and we will give Appellant's claim on this basis no further attention.

Appellant. Appellant concludes these evidentiary errors unduly prejudiced him and warrant a new trial.[7] We disagree.

Our standard of review concerning challenges to the admissibility of evidence is as follows:

> Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's decision absent a clear abuse of discretion. Abuse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Commonwealth v. Young, 989 A.2d 920, 924 (Pa.Super. 2010) (internal citations omitted).

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[7] As well, Appellant argues the court failed to issue a requested cautionary instruction for the jury to consider the prison phone calls only in relation to Appellant's charges for receiving stolen property. Appellant failed to preserve this claim in his Rule 1925(b) statement, so it is waived. ***See Commonwealth v. Castillo***, 585 Pa. 395, 888 A.2d 775 (2005) (holding any issues not raised in Rule 1925(b) concise statement will be deemed waived on appeal). Further, Appellant contends admission of the prison phone calls between co-defendant and his girlfriend violated Appellant's right to confrontation, as neither party recorded on the tape was subject to cross-examination. Appellant made no argument in his motion *in limine* or at trial based on Confrontation Clause grounds. Thus, Appellant's Confrontation Clause complaint is also waived. ***See Commonwealth v. Cousar***, 593 Pa. 204, 928 A.2d 1025 (2007), *cert. denied*, 553 U.S. 1035, 128 S.Ct. 2429, 171 L.Ed.2d 235 (2008) (explaining where appellant makes specific objection at trial he cannot assert new grounds for relief on appeal); ***Commonwealth v. Strunk***, 953 A.2d 577 (Pa.Super. 2008) (explaining defendant must make timely and specific objection at earliest stage of proceedings to preserve issue for appeal). Appellant similarly did not preserve his Confrontation Clause claim in his Rule 1925(b) statement. ***See Castillo, supra***. ***See also*** Pa.R.A.P. 302(a) (stating issues not raised in trial court are waived and cannot be raised for first time on appeal).

"Hearsay" is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Pa.R.E. 801(c). Generally, hearsay testimony is inadmissible at trial. ***See*** Pa.R.E. 802. Pennsylvania Rule of Evidence 803 provides exceptions to the hearsay rule, in pertinent part, as follows:

> **Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness**
>
> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
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> * * *
>
> **(25) An Opposing Party's Statement.** The statement is offered against an opposing party and:
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> * * *
>
> (E) was made by the party's coconspirator during and in furtherance of the conspiracy.
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> The statement may be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Pa.R.E. 803(25)(E).

Under the co-conspirator exception to the hearsay rule, "the existence of a conspiracy between the declarant and the defendant must be demonstrated by a preponderance of the evidence; the statements must be shown to have been made during the course of the conspiracy; and they must have been made in furtherance of the common design."

Commonwealth v. Johnson, 576 Pa. 23, 42, 838 A.2d 663, 674 (2003), *cert. denied*, 543 U.S. 1008, 125 S.Ct. 617, 160 L.Ed.2d 471 (2004). For purposes of the co-conspirator exception, a conspiracy "may be inferentially established by showing the relation, conduct or circumstances of the parties." ***Commonwealth v. Feliciano***, 67 A.3d 19, 27 (Pa.Super. 2013), *appeal denied*, 662 Pa. 765, 81 A.3d 75 (2013). To satisfy the "in-furtherance-of" requirement of the exception, it is sufficient for the Commonwealth to establish an intent to promote the conspiratorial objective. ***Johnson, supra*** at 44, 838 A.2d at 675. ***See also Commonwealth v. Watson***, 512 A.2d 1261 (Pa.Super. 1986), *appeal denied*, 515 Pa. 579, 527 A.2d 540 (1987) (explaining that generally, conspiracy ends when its principal objective is accomplished; however, fact that "central objective" has been nominally attained does not preclude continuance of conspiracy; where there is evidence that conspirators originally agreed to take certain steps after principal objective of conspiracy was reached, or evidence from which such agreement may be reasonably inferred, conspiracy may be found to continue). Further, the exception applies even when the co-conspirator has not been charged with conspiracy. ***Commonwealth v. Dreibelbis***, 493 Pa. 466, 426 A.2d 1111 (1981). "Application of the coconspirator exception to the hearsay rule is predicated on agency principles—when the elements of the exception are established, each conspirator is considered an agent of the other, and therefore, a

statement by one represents an admission by all." ***Johnson, supra*** at 44, 838 A.2d at 675.

Importantly, "[t]he hearsay concern is not present where statements of an out-of-court declarant are not being offered for the truth of the content of those statements." ***Commonwealth v. Smith***, 523 Pa. 577, 593, 568 A.2d 600, 608 (1989). Thus, a witness may testify to statements made by another when the purpose of the testimony is to evidence the effect which the statement had upon the listener, and not to prove the truth of the matter asserted. ***Commonwealth v. Wright***, 455 Pa. 480, 485, 317 A.2d 271, 273 (1974). ***See also Commonwealth v. Blough***, 535 A.2d 134 (Pa.Super. 1987) (explaining out-of-court statements may be offered for non-hearsay purpose to show effect on listener and state of mind produced, including motive).

Instantly, Appellant filed a motion *in limine* on December 5, 2012, seeking to exclude from evidence, *inter alia*, the prison phone calls between Appellant and his wife, and between co-defendant and Ms. Wanamaker, based on alleged hearsay grounds. Prior to opening arguments on the first day of trial, the court denied Appellant's motion with respect to the challenged prison phone calls.[8] The court decided the portions of the conversations uttered by Appellant or his co-defendant were admissible as

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[8] The court granted in part other requests in Appellant's motion *in limine*.

party admissions; and Appellant's wife and Ms. Wanamaker's statements were admissible under the co-conspirator exception to the hearsay rule, provided the Commonwealth could establish by a preponderance of the evidence that a conspiracy occurred between the parties. During the Commonwealth's case-in-chief, and just before the Commonwealth was to play the recordings of the prison phone calls, Appellant and his co-defendant again objected to admission of the tapes on hearsay grounds. The court reaffirmed its initial determination that Ms. Wanamaker's recorded statements were admissible under the co-conspirator exception but concluded the Commonwealth had failed to prove a conspiracy between Appellant and his wife. Nevertheless, the court ruled that the conversation between Appellant and his wife was still admissible because the Commonwealth did not offer Appellant's wife's statement to prove the truth of the matter asserted, but to show only the "effect on the listener;" in other words, Appellant's knowledge about disposition of stolen goods.[9]

We agree with the trial court's admission of the challenged prison phone calls. With respect to Appellant and his wife's conversation, in which Appellant's wife stated: "I'm not giving her half of shit[,]" the trial court properly determined the statement was not hearsay because the

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[9] In its Rule 1925(a) opinion, the trial court states it admitted the conversation between Appellant and his wife under the co-conspirator exception; this statement is inconsistent with the court's findings at trial.

Commonwealth did not offer the statement to prove the truth of the matter asserted. ***See*** Pa.R.E. 801(c). In other words, the Commonwealth did not seek to prove that Appellant's wife would not give "her" (presumably, co-defendant's girlfriend) half of certain items stolen in the burglary. Rather, the court admitted the statement for a non-hearsay purpose, *i.e.*, to show its effect on Appellant as to his knowledge regarding the stolen goods. The statement was relevant to the Commonwealth's theory that Appellant and his wife were discussing division of items acquired from the burglaries between Appellant and his wife, and co-defendant and Ms. Wanamaker. ***See*** Pa.R.E. 401 (stating evidence is relevant if it has any tendency to make fact more or less probable than it would be without evidence and fact is of consequence in determining action). Thus, the court properly admitted the prison phone call between Appellant and his wife as non-hearsay, to show the effect on the listener. ***See Smith, supra***; ***Wright, supra***; ***Blough, supra***.

Regarding the prison phone calls between co-defendant and Ms. Wanamaker, the trial court explained that the crimes took place around February 2012. In April 2012, police searched Fay Wanamaker's home (where co-defendant's girlfriend also resides) and recovered property stolen from the Heimbach and Ciraulo residences, as well as several shoe boxes with co-defendant's name on them. Fay Wanamaker testified she did not bring the items into her home and she did not give anyone else access to

bring the items into her home, suggesting Ms. Wanamaker was the only other person who could have stored the stolen items in Fay Wanamaker's home. The trial court determined the preponderance of the evidence demonstrated a conspiracy between Appellant, co-defendant, and Ms. Wanamaker to, *inter alia*, relocate or transport the known stolen property. (***See*** Trial Court Opinion at 22.) ***See also*** Pa.R.E. 803(25)(E); ***Johnson, supra***; ***Feliciano, supra***. Contrary to Appellant's contention that any conspiracy ended once police arrested him and the burglaries were completed, the evidence showed that the objective of the burglaries (including where to store the stolen items) continued thereafter. ***See Watson, supra***. Additionally, the Commonwealth's decision not to charge Ms. Wanamaker with crimes related to the burglaries is immaterial to the court's application of the co-conspirator exception. ***See Dreibelbis, supra***. Therefore, we see no reason to disrupt the court's decision to admit the prison phone calls. ***See Young, supra***. Accordingly, we affirm.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015