NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DONTA REGUSTORS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3113 EDA 2012

Appeal from the Judgment of Sentence May 31, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0001677-2011

BEFORE: ALLEN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.: **FILED NOVEMBER 13, 2013**

Donta Regustors appeals from the judgment of sentence imposed on May 31, 2012, in the Court of Common Pleas of Philadelphia County. On April 2, 2012, a jury convicted Regustors of one count of first-degree murder, two counts of attempted murder, one count of criminal conspiracy to commit murder, two counts of first-degree aggravated assault, and one count of possessing an instrument of crime ("PIC").[1] The court imposed an aggregate sentence of life imprisonment, plus 16 to 32 years' incarceration. On appeal, Regustors raises the following arguments: (1) there was insufficient evidence to convict him of murder, attempted murder, and

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 2502(a), 901, 903, 2702(a), and 907(a), respectively.

criminal conspiracy; and (2) the court erred in failing to award a new trial on the basis of prosecutorial misconduct during closing arguments. Based upon the following, we affirm the judgment of sentence.

The trial court set forth the factual history as follows:

> At trial, the Commonwealth presented the testimony of Edward Humphrey, Charles Britten,[2] William Whitehouse, John Jones, Richard Sax, Dr. Marlon Osbourne, Philadelphia Police Officers Gerald Wolford, Kevin Port, Anthony Mooney, Travis Washington, Jeremy Elliot, Timothy Esack, Stephen Ahmie, and Donna Grebloski, Philadelphia Police Detectives Phillip Nordo, Stephen Grace, Ron Dove, Bill Urban, and Grady Petterson, and Philadelphia Police Sergeants Christopher Small and Matt Gillespie. [Regustors] presented the testimony of Ronald Coleman. Viewed in the light most favorable to the Commonwealth as the verdict winner, their testimony established the following.
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> [2] As Mr. Britten was killed between the preliminary hearing and the trial, his preliminary hearing testimony was read to the jury, pursuant to Pa.R.E. 804(b)(1).
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> On August 28, 2010, at approximately 4 a.m., Edward Humphrey and Charles Britten were hanging out at the corner of 26th Street and Silver Street. Jonathan Wilson was nearby sitting in his car. After the three men had been on the corner for about thirty minutes, [Regustors] and Kyle Pelzer rode up 26th Street on bicycles and began firing handguns at Mr. Britten and Mr. Humphrey from a short distance away. [Regustors] and Mr. Pelzer fired approximately ten shots at Mr. Britten and Mr. Humphrey. Mr. Britten and Mr. Humphrey ducked behind a car, and Mr. Britten began firing his own gun back at [Regustors] and Mr. Pelzer. [Regustors] and Mr. Pelzer continued riding down the street on their bicycles as they fired their guns at Mr. Britten and Mr. Humphrey, shooting Mr. Wilson in the process. Mr. Wilson drove away, but lost control of the car and crashed into a pole. Mr. Britten and Mr. Humphrey both fled the scene.
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> Mr. Wilson was taken by ambulance to Temple Hospital, where he was pronounced dead at 4:42 a.m. He had been shot

> once in the back with a 9-millimeter bullet. The bullet had torn his abdominal aorta, which caused him to bleed to death. Police removed 24 nine-millimeter fired cartridge casings from the scene of the shooting. Police also recovered nine .380 fired cartridge casings from the scene of the shooting, which were fired from Mr. Britten's gun.
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> Mr. Britten was questioned by homicide detectives. He identified [Regustors] and Mr. Pelzer, both of whom he knew personally, as the people who shot at himself and Mr. Humphrey, thereby killing Mr. Wilson. Mr. Humphrey was also questioned by the police. He identified [Regustors], whom he knew personally, and Mr. Pelzer, whom he did not know, from a photo array.

Trial Court Opinion, 2/8/2013, at 2-3 (record citations omitted).

Regustors and Pelzer were arrested and charged with multiple offenses relating to the incident. A joint jury trial was held from March 26, 2012 to April 2, 2012. On that day, the jury convicted Regustors of one count of first-degree murder (victim Wilson), two counts of attempted murder (victims Britten and Humphrey), one count of criminal conspiracy to commit murder, two counts of first-degree aggravated assault (victims Britten and Humphrey), and one count of PIC.[2]

A sentencing hearing was held on May 31, 2012. The court imposed the mandatory sentence of life imprisonment for the first-degree murder conviction, a consecutive sentence of eight to 16 years' incarceration for the

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[2] Regustors was acquitted of several other charges that originated from a different set for events that allegedly took place two weeks before the charges at issue here. Pelzer was acquitted of all charges. Trial Court Opinion, 2/8/2013, at 1 n.1.

attempted murder of Britten, a consecutive sentence of eight to 16 years' incarceration for the attempted murder of Humphrey, and a concurrent sentence of eight to 16 years' imprisonment for the conspiracy charge.[3] Regustors filed a post-sentence motion, which was denied on October 2, 2012. This appeal followed.[4]

In Regustors' first argument, he claims there was insufficient evidence to convict him of murder, attempted murder, and conspiracy to commit murder because the evidence did not demonstrate that he acted with malice or that he engaged in a conspiracy. Regustors' Brief at 19. With respect to the murder and attempted murder crimes, he states that "no evidence was presented of a formulated plan nor any actions taken prior to the shootings." ***Id.*** at 23. Rather, he contends the evidence established he "was on a bike when gun play occurred. For whatever reason, [he] engaged in the firefight. However, no evidence was presented that [he] was doing anything more than acting in the proverbial 'spur of the moment.'" ***Id.*** at 23-24. With regard to the conspiracy conviction, he claims the Commonwealth did not

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[3] The court did not impose a further penalty with respect to the PIC offense and his aggravated assault convictions merged for sentencing purposes.

[4] On November 2, 2012, the trial court ordered Regustors to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Following several extensions, Regustors filed a concise statement on January 8, 2013. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on February 8, 2013.

present evidence of any plan that occurred prior to the shootings or any agreement between Regustors and Pelzer. ***Id.*** at 24-25.

Our standard of review regarding a sufficiency claim is well-settled:

> A claim challenging the sufficiency of the evidence presents a question of law. ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751 (Pa. 2000). We must determine "whether the evidence is sufficient to prove every element of the crime beyond a reasonable doubt." ***Commonwealth v. Hughes***, 521 Pa. 423, 555 A.2d 1264, 1267 (Pa. 1989). We "must view evidence in the light most favorable to the Commonwealth as the verdict winner, and accept as true all evidence and all reasonable inferences therefrom upon which, if believed, the fact finder properly could have based its verdict." ***Id.***
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> Our Supreme Court has instructed:
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> > [T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.
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> ***Commonwealth v. Ratsamy***, 594 Pa. 176, 934 A.2d 1233, 1236 n.2 (Pa. 2007).

Commonwealth v. Thomas, 65 A.3d 939, 943 (Pa. Super. 2013).

Following our review of the record, we conclude that Regustors' argument that the evidence only establishes mere "gun play" is wholly meritless. Moreover, since the discussion of the Honorable Glenn B. Bronson

thoroughly addresses and properly disposes of this claim, we adopt that discussion as dispositive:[5]

> 1. Conspiracy to Murder Charles Britten and Edward Humphrey
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> To sustain a conviction for conspiracy, the Commonwealth was required to prove:
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> > (1) that the defendant intended to commit or aid in the commission of a criminal act; (2) that the defendant entered into an agreement with another, i. e., the co-conspirator, to engage in a crime; and (3) that the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime.
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> *Commonwealth v. Little*, 879 A.2d 293, 298 (Pa. Super. 2005), *appeal denied*, 890 A.2d 1057 (Pa. 2005); *see* 18 Pa.C.S. § 903(a). Because in most conspiracy cases there is no direct evidence of either the defendant's criminal intent or of the conspiratorial agreement, "the defendant's intent as well as the agreement is almost always proven through circumstantial evidence, such as by 'the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators.'" *Commonwealth v. Murphy*, 844 A.2d 1228, 1238 (Pa. 2004) (quoting *Commonwealth v. Spotz*, 716 A.2d 580, 592 (Pa. 1998)).
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> Here the evidence clearly established that [Regustors] and another person acted in concert to shoot and kill Mr. Britten and Mr. Humphrey on the day in question. Both Mr. Britten and Mr. Humphrey told the police that they saw [Regustors] and Mr. Pelzer ride up together on bicycles and fire multiple gunshots directly at them.[4] This was ample evidence from which a reasonable juror could conclude that [Regustors] conspired to kill Mr. Britten and Mr. Humphrey.
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> > [4] The jury apparently concluded that the second shooter was someone other than Mr. Pelzer, since Mr. Pelzer was acquitted of all charges. The identity

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[5] We note the trial court addressed the conspiracy conviction first.

> of [Regustors'] co-conspirator is irrelevant to any of [Regustors'] convictions at issue in this appeal.

It is true that at trial, Mr. Humphrey claimed that he lied to homicide detectives in the portions of his statement in which he inculpated [Regustors] and Mr. Pelzer in the shooting. However, Mr. Humphrey's signed statement was admitted as evidence at trial through the testimony of Detective Phillip Nordo. Similarly, Mr. Britten, in his testimony at the preliminary hearing, claimed that he lied when he inculpated [Regustors] and Mr. Pelzer. His signed statement to detectives was likewise elicited though the testimony of Detective Nordo. These statements were admissible for their truth as prior inconsistent statements that were signed and adopted by the declarants.

Moreover, it is well-established that where a witness at trial recants a statements he made to police, the fact-finder is "free to evaluate both the [witness's] statement to police as well as his testimony at trial recanting that statement, and [is] free to believe all, part, or none of the evidence." *Commonwealth v. Hanible*, 836 A.2d 36, 40 (Pa. 2003) (citing *Commonwealth v. Pitts*, 404 A.2d 1305, 1306 (Pa. 1979)). Such recantations are "notoriously unreliable," *Commonwealth v. Johnson*, 966 A.2d 523, 541 (Pa. 2009) (quoting *Commonwealth v. D'Amato*, 856 A.2d 806, 825 (Pa. 2004)), and "the mere fact that [an eyewitness] recanted a statement he had previously made to the police certainly does not render the evidence insufficient to support [the] conviction." *Hanbile*, 836 A.2d at 40. In addition, a conviction may rest entirely on prior inconsistent statements of witnesses who testify at trial, and such statements "must … be considered by a reviewing court in the same manner as any other type of validly admitted evidence when determining if sufficient evidence exists to sustain a criminal conviction." *Commonwealth v. Brown*, 52 A.3d 1139, 171 (Pa. 2012).

Accordingly, the evidence was sufficient to support the jury's conclusion that [Regustors] conspired with another person to murder Mr. Britten and Mr. Humphrey.

2. First-Degree Murder Of Jonathan Wilson

The evidence is sufficient to establish first-degree murder "where the Commonwealth proves that (1) a human being was unlawfully killed; (2) the person accused is responsible for the

killing; and (3) the accused acted with specific intent to kill." *Commonwealth v. Bedford*, 50 A.3d 707, 711 (Pa. Super. 2012), *appeal denied*, 57 A.3d 65 (Pa. 2012) (quoting [18] Pa.C.S. § 2502(a)).

To be guilty of first-degree murder, a defendant who is [a] member of a conspiracy to commit murder need not commit the act that results in the death of the [victim] since all members of a conspiracy are "liable for the actions of the others if those actions were in furtherance of the common criminal design." *Commonwealth v. King*, 990 A.2d 1172, 1178 (Pa. Super. 2010). As to the requisite specific intent to kill, under the doctrine of transferred intent, where a defendant acts with the specific intent to kill someone, but actually kills a different person, the element of specific intent is still established. *Commonwealth v. Jones*, 912 A.2d 268, 279 (Pa. Super. 2006) (citing 18 Pa.C.S. § 303(b)(1)).

As described above, the evidence plainly established that [Regustors] and another person conspired to kill Mr. Britten and Mr. Humphrey, that [Regustors] and his coconspirator fired multiple shots at Mr. Britten and Mr. Humphrey in an effort to kill them, and in so doing, either [Regustors] or his coconspirator shot and killed Mr. Wilson. This was compelling evidence from which the jury properly found that [Regustors] was guilty of first-degree murder for the death of Mr. Wilson.

3. Attempted Murder of Charles Britten and Edward Humphrey

"A conviction for attempted murder requires the Commonwealth to prove beyond a reasonable doubt that the defendant had the specific intent to kill and took a substantial step towards that goal." *Commonwealth v. Blakeney*, 946 A.2d 645, 652 (Pa. 2008); *see* 18 Pa.C.S. §§ 901, 2502. A specific intent to kill may be inferred from circumstantial evidence. *Commonwealth v. Hobson*, 604 A.2d 717, 719-20 (Pa. Super. 1992). The firing of a bullet in the general area in which vital organs are located can, in and of itself, be sufficient to prove specific intent to kill beyond a reasonable doubt. *Commonwealth v. Manley*, 985 A.2d 256, 272 (Pa. Super. 2009) (quoting *Commonwealth v. Padgett*, 348 A.2d 87, 88 (Pa. 1975)).

As discussed above, both Mr. Britten and Mr. Humphrey told the police that they saw [Regustors] and another man fire

> multiple gunshots in their direction. That was plainly sufficient evidence to support [Regustors'] convictions for attempted murder.

Trial Court Opinion, 2/8/2013, at 5-8 (record citations omitted).

The trial court's findings are supported by the record and our review of this matter finds no error in the trial court's determination. The Commonwealth presented clear and convincing evidence that Regustors acted with the necessary intent when he shot at the three individuals and that he engaged in a conspiracy with another individual. Therefore, based upon a totality of circumstances and information available to the trial court, we conclude there was sufficient evidence to convict him of murder, attempted murder, and conspiracy to commit murder. Accordingly, Regustors' first argument fails.

In Regustors' second argument, he contends the court erred in failing to award a new trial on the basis of prosecutorial misconduct during the closing arguments, in which he claims the prosecution's comments amounted to "witness vouching" and were meant to inflame the passions of the jury, which resulted in a due process violation. Regustors' Brief at 26. Specifically, he states the prosecutor "referenced an unrelated murder of a teenager in Florida[.]" ***Id.*** at 29. Regustors contends the commentary served two improper purposes: (1) "the commentary inflamed the passions of the jury, in linking [Regustors] with a murderer in Florida who had been found guilty [sic];" and (2) "the prosecution's comment served as witness

vouching for Humphrey, Britten, and Jones" where the comments "made it clear that statements given to the police could be believed, regardless of trial testimony disavowing said statements." ***Id.*** at 30-31.

We begin with our standard of review:

> It is well-settled that the review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will ... discretion is abused. A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict.

Commonwealth v. Chamberlain, 30 A.3d 381, 422 (Pa. 2011) (citations omitted).

> The legal principles relevant to a claim of prosecutorial misconduct are well established.
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> > Comments by a prosecutor constitute reversible error only where their unavoidable effect is to prejudice the jury, forming in [the jurors'] minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict.
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> ***Commonwealth v. Hutchinson***, 611 Pa. 280, 25 A.3d 277, 307 (Pa. 2011) (citation omitted).
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> While it is improper for a prosecutor to offer any personal opinion as to the guilt of the defendant or the credibility of the witnesses, it is entirely proper for the prosecutor to summarize the evidence presented, to offer reasonable deductions and inferences from the evidence, and to argue that the evidence establishes the defendant's guilt. ***Id.*** at 306-07; ***Chamberlain***, ***supra*** at 408. In addition, the prosecutor must be allowed to

> respond to defense counsel's arguments, and any challenged statement must be viewed not in isolation, but in the context in which it was offered. ***Hutchinson***, ***supra*** at 307. "[The] prosecutor must be free to present his or her arguments with logical force and vigor," and comments representing mere oratorical flair are not objectionable. ***Id.*** at 306-07 (citation omitted).

Commonwealth v. Thomas, 54 A.3d 332, 337-338 (Pa. 2012).

We must review the portion of the prosecution's closing argument at issue in context. The prosecution was discussing prior statements made by Humphrey, Britten, and Jones to police that inculpated Regustors and Pelzer in the shooting and the witnesses' testimony at trial, claiming either they lied to the police or they never told police certain information that inculpated Regustors and Pelzer. The remarks read as follows:

> [The Commonwealth]: [A prior statement] has to be on paper, it has to be verbatim, word-for-word, witness has to have the opportunity to review it, and then sign it.
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> Those are heavy requirements and they have to be met to even get us in the room to even get us to the prior inconsistent portion of Judge Bronson's charge. So that is the first, that is the how.
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> Let's go to the why. Why do we have a law that says you can use someone's prior statement as the truth of the matter? That is what happened at 26th and Silver. It doesn't matter what somebody said in court. If they want to back up from the statement, they want to say they didn't say the statement, if they want to say they lied, if they want to say the detectives made it up, but the statement is the truth. Why?
>
> I was riding the train last night going home and I was reading an article about this young man, this teenager who was killed in Florida.
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> [Defense counsel]: Objection, Your Honor.

THE COURT: I'm assuming an anecdote. What is the basis of your objection, beyond the evidence.

[Defense counsel]: Mapped yes.

THE COURT: Okay. I'm assuming -- I will listen and see if he is telling an anecdote. We will see what he says.

[The Commonwealth]: Thank you, Judge. Thank you.

So this young man in Florida, he is killed by someone in the town watch or something, and there is something -- this has really nothing to do with that case whatsoever. But there was a line in the article, there was a line in that article and it ma[de] me almost fall off my seat. It says justice might be blind, but she is not dumb. Justice might be blind, but she is not dumb.

Why do we have this law? Why do we have this law that says the prior inconsistent statement can come in as the truth? Because, ladies and gentlemen, for people to act like these guys, to try to make a mockery of our criminal justice system, of everybody in this room to try to make a mockery of our criminal justice system, the law is not going to allow it. The law is not going to allow somebody to come in and say, I didn't say that. The law is not going to allow somebody to say the cops made it up and then it is just a wash, it is just an acquittal and we never look back.

The law is smarter than that. Because what these guys tried to do is to try to take that code they often talk about, no snitching. They tried to take this code and bring that code into this courtroom and tried to make that hold water. They have tried to bring the streets into this courtroom.

No, not in the Commonwealth of Pennsylvania. Not in the Commonwealth of Pennsylvania. We are taking the law to the streets. The law is that if a person gives a statement on prior occasion and taken in such a fashion that it is admissible in court, then you can use that as truth as to what happened.

N.T., 3/30/2012, at 166-168.

In denying the motion for a mistrial, the court stated:

> You could have said [the quote from the article] without referencing the Florida case. But just as I suspect you didn't talk about the facts of the case. You didn't even say that the case in Florida that you were talking about was the case that the two defense lawyers have said. And you just pointed out something in the newspaper that really was only tangentially related to the case, so I'm not sure I get all the uproar about it.
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> If you want me to give a curative instruction to the jury on Monday to say that this case in Florida had nothing whatsoever to do with this case and I don't want anybody to be inflamed by that or in any way to be influenced by that, that the prosecutor is merely making reference to a quote he read in the newspaper that really could have been about any case, justice is blind but not dumb. That is the whole thing. It was rhetorical.

Id. at 211-212. Defense counsel declined the offer of a curative instruction. ***Id.***

It is clear the portion of the prosecutor's closing argument at issue was an attempt to explain the law regarding prior inconsistent statements. We conclude the prosecutor was not "witness vouching," where he correctly stated that certain prior inconsistent statements made by witnesses can be admissible for their truth.[6] Likewise, he was attempting to explain a

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[6] This Court has previously stated:

> Our courts long have permitted non-party witnesses to be cross-examined on prior statements they have made when those statements contradict their in-court testimony. Such statements, known as prior inconsistent statements, are admissible for impeachment purposes. Further, a prior inconsistent statement may be offered not only to impeach a witness, but also as substantive evidence if it meets additional requirements of reliability. The test is a two-part inquiry: 1) whether the statement is given under reliable circumstances;

(Footnote Continued Next Page)

community view regarding witnesses who testify at criminal trials and why they may make inconsistent statements. Moreover, we note the remark regarding the Florida case was an attempt by the prosecutor to introduce a quotation from an article concerning the other case about legal principles in general and did not amount to an insinuation of guilt with respect to Regustors. Therefore, we conclude the prosecutor's remarks during closing arguments did not so prejudice the jury so that they could not weigh the evidence objectively and the court did not abuse its discretion in denying Regustors' motion for a mistrial. ***See Hutchinson***, 25 A.3d at 307. Accordingly, Regustors' second argument fails and we affirm the judgment of sentence.

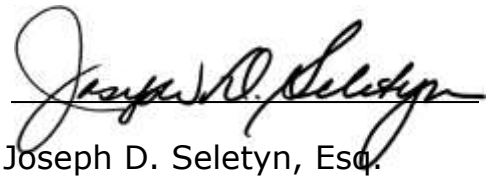
Judgment of sentence affirmed.

(Footnote Continued) ———————————

> and 2) whether the declarant is available for cross-examination. With respect to the first prong, that the statement is given under reliable circumstances, our supreme court has deemed reliable only certain statements: among them is a statement that is 'reduced to a writing and signed and adopted by the witness.' With respect to the second prong, cross-examination, the inconsistent statement itself must be the subject of the cross-examination in order to satisfy the test.

Commonwealth v. Carmody, 799 A.2d 143, 148 (Pa. Super. 2002) (citations omitted). Here, the witnesses' statements to police met the exception to the hearsay rule because (1) the statements were given under reliable circumstances where they were in writing, signed, and adopted by the witnesses; and (2) the witnesses were subject to cross-examination concerning the pre-trial police statement either at the preliminary hearing (with respect to Britten) or at trial.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/13/2013