IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM A. BERRY,	§	
	§	No. 545, 2012
Defendant Below-Appellant	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID No. 1106011736
	§	
Plaintiff Below-Appellee	§	
	§	

Submitted: February 22, 2013
Decided: April 3, 2013

Before **HOLLAND**, **JACOBS** and **RIDGELY**, Justices.

O R D E R

On this 3rd day of April 2013, it appears to the Court that:

(1) Defendant-below/Appellant William A. Berry appeals from a Superior Court jury conviction of Aggravated Menacing, Possession of a Firearm During the Commission of a Felony ("PFDCF") and Possession of a Firearm by a Person Prohibited ("PFPP"). Berry claims the trial court erred in finding that the out-of-court statements admitted into evidence under 11 *Del. C.* § 3507 were voluntary. Berry also claims the trial court erred in admitting the out-of-court statement of Anthony Monroe Jr. ("Junior") under § 3507 as the foundational requirements were not met. We find no merit to Berry's appeal and affirm.

(2) In June of 2011, Berry and his paramour, Dina Laws, drove to the home of Anthony Monroe, Sr. ("Senior"). Berry accused Senior of taking his property and demanded it back. Senior denied the accusation and Berry drove away. Sometime later, Senior's son, Junior, noticed Berry had returned. Senior went outside to confront Berry. An argument ensued. Berry threatened to shoot Senior, and asked Laws to bring him his handgun. Laws handed Berry a black bag from which Berry pulled a handgun and pointed it at Senior. Senior struggled with Berry over the gun and the weapon discharged. No one was injured. Det. Michael Bradshaw was assigned to investigate the incident. During the investigation, he interviewed Senior and Junior and recorded statements from each about the incident.

(3) Berry was charged with two counts of Reckless Endangering First Degree, Aggravated Menacing, three counts of each PFDCF, PFPP and Possession of Ammunition by a Person Prohibited ("PAPP"). During the trial, the State called Junior and Senior to the witness stand. Junior testified that he had no memory of the events. Junior said that the police "made" him leave his girlfriend's graduation party to go to the police station and make a statement and he acknowledged that he was driven to the station by his mother and that he told the police the truth. Specifically, the record shows the following exchange:

> Prosecutor: I'm going to ask you now. On June 12, 2011, what happened while you were there that made the police want to

talk to you?

Junior: They wanted me to tell what's going on. But I honestly don't remember. That was six, seven months ago.

…

Prosecutor: And you voluntarily answered [Det. Bradshaw's] questions?

Junior: No. I was forced to. I didn't want to go out there and make a statement at all. I was forced to.

Prosecutor: Were you under arrest when you spoke to him?

Junior: It made it seem like I was going to be arrested. I had to leave my girlfriend's party. I just got there and had to leave early and make a statement. I didn't want to. My mother asked him, "Do we have to come down?" He said, "Yes, you have to come down. You can come by the cops, or your Mom can bring you voluntarily." I said, "I'll have my Mom do it."

Prosecutor: So you went voluntarily with your mother?

Junior: Right.

Prosecutor: And then you spoke voluntarily with Det. Bradshaw?

Junior: Right.

…

Prosecutor: Let me just ask you this, plain and simple. When you were questioned by the police officer and asked these questions, did you answer them voluntarily?

Junior: Yes.

Prosecutor: You did?

Junior: Yes.

(4) "Our review of a ruling on the admissibility of a Section 3507 statement is for abuse of discretion."[1] Title 11, Section 3507 states in relevant part:

> (a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.
>
> (b) The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.[2]

"The draftsmen of § 3507 expressly contemplated a circumstance where a witness voluntarily gives a prior statement but later denies the substance of the statement at trial."[3] In *Woodlin v. State*, we reiterated the foundational requirements for the admission of a § 3507 statement:

> The basic procedure for admitting a statement under section 3507 was first announced ... in *Keys v. State* [337 A.2d 18 (Del.1975)]. In [Keys], we held: "In order to offer the out-of-court statement of a witness, the Statute requires [that] the direct examination of the declarant ... [touch on] both the events perceived or heard and the out-of-court statement itself." Three weeks later, we supplemented Keys in *Hatcher v. State* [337 A.2d 30 (Del.1975)], where we addressed another foundational requirement for the admission of a witness' statement pursuant to section 3507–voluntariness.... In *Ray v. State* [587 A.2d 439 (Del.1991)], we also explained (and cited *Johnson*) in holding in order to conform to the Sixth Amendment's guarantee of an

[1] *Johnson v. State*, 878 A.2d 422, 427 (Del. 2005) (*citing Barnes v. State*, 858 A.2d 942, 944 (Del. 2004)).
[2] 11 *Del. C.* § 3507.
[3] *Collins v. State*, 56 A.3d 1012, 1018 (Del. 1012) (*citing Johnson v. State*, 338 A.2d 124, 127 (Del. 1975).

> accused's right to confront witnesses against him, the declarant must also be subject to cross-examination on the content of the statement as well as its truthfulness.[4]

(5) In his opening brief, Berry argued that Senior's prior, out-of-court statement was involuntarily made. But, in his reply brief, Berry acknowledged that his trial counsel withdrew any objection to the admissibility of Senior's prior statement. Berry now concedes he is not entitled to review of his challenge to Senior's prior statement, and we do not consider it.[5]

(6) Berry claims that Junior's prior, out-of-court statement was improperly admitted under § 3507 because it was involuntarily given and his testimony did not touch on the events perceived. Though Junior's testimony is inconsistent, he ultimately acknowledged that he voluntarily spoke to the police. When directly questioned on the issue of whether he spoke voluntarily, Junior answered "Yes." The trial judge also reviewed the videotape of Junior's statement and determined that "[i]t's clear from the tape that [Junior's] conversation with the police was voluntary." On this record, it was not an abuse of discretion for the trial judge to find Junior's statement was voluntary.

(7) Junior's testimony also touched on the events he perceived. He gave an

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[4] *Woodlin v. State*, 3 A.3d 1084, 1087 (Del. 2010) (internal citations omitted)).

[5] Appellant's Reply Br. at 4. ("[T]he State is correct that Mr. Berry is not entitled to review on this claim.") *See Williams v. State*, 34 A.3d 1096, 1098 (Del. 2011) (finding that when defense counsel fails to object or withdraws an objection in the face of a known justiciable issue, he or she intentionally relinquishes a known right and therefore waives judicial review); *Hickman v. State*, 801 A.2d 10, 2002 WL 1272154, at *1 (Del. 2002) (finding that defense counsel's tactical decision to not raise an objection waived judicial review).

out-of-court statement recalling certain events, and then when he was on the witness stand he claimed he had no memory of those same events when questioned about them. Berry argues this case is similar to *Ray v. State*, in which this Court found that the testimony of a victim of sexual assault who refused to testify as to her attack did not touch on the events perceived.[6] We disagree. In this case, Junior was a turncoat witness. As we said in *Johnson v. State*, "[T]here is nothing in the Statute or its intent which prohibits the admission of the statements on the basis of limited courtroom recall."[7]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely

Justice

[6] *Ray v. State*, 587 A.2d 439, 443-444 (Del. 1991).
[7] *Johnson v. State*, 338 A.2d at 127. *See also Collins v. State*, 56 A.3d 1012 (Del. 2012); *Turner v. State*, 5 A.3d 612 (Del. 2010); *Hall v. State*, 788 A.2d 118 (Del. 2001).