NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. GEORGE SIPLE, IV, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 275 EDA 2013

Appeal from the Judgment of Sentence entered November 30, 2012,
in the Court of Common Pleas of Delaware County,
Criminal Division, at No(s): CP-23-CR-0000846-2012

BEFORE: ALLEN, MUNDY, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.: **FILED JUNE 19, 2014**

George Siple, IV ("Appellant") appeals from the judgment of sentence imposed after a jury convicted him of attempted murder, aggravated assault, criminal conspiracy, and robbery.[1]

The trial court summarized the pertinent facts as follows:

> On May 18, 2011, at 724 Mountain Road in Aston Township, Pennsylvania, Kevin Sweeney (hereinafter "Kevin") was visiting his son Derrick Sweeney (hereinafter "Derrick"), who had been spending time with his friend Kieren Martin (hereinafter "Kieren"). Kieren left[,] leaving Kevin and Derrick together in the house. At some point, they heard a scuffling noise outside. When Kevin and Derrick went outside to investigate, they were attacked, and Derrick was robbed of

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[1] 18 Pa.C.S.A. §§ 901(a), 2502, 2702, 903, and 3701.

*Former Justice specially assigned to the Superior Court.

> money by two individuals. Both Derrick and Kevin suffered stab wounds to their heads and bodies.

Trial Court Opinion, 7/31/13, at 1.

In conducting their investigation, Aston Township Police Detectives Nardone and Berkeyheiser spoke with Kieren Martin, who told police that shortly before the attack, he received a telephone call from Paul Gill[2], and drove to Mr. Gill's residence on Upland Avenue to pick him up. N.T., 9/20/12, at 55-58. However, when Mr. Martin arrived at Mr. Gill's residence, Mr. Gill was not home. *Id*. at 55-60. Mr. Martin waited on the porch for about an hour, and observed an unknown individual run up to and enter Mr. Gill's house, dressed only in underwear. *Id*. at 60. Shortly thereafter, Mr. Gill returned to the residence, walking with a limp and wearing wet clothing. *Id*. at 60-64.

The detectives also spoke with Jesse Wilson, who informed them that Appellant told him that he had committed a robbery, after which he shed his bloody clothes, and returned to the house on Upland Avenue wearing only boxer shorts. *Id*. at 109-111. Additionally, on the night of the attack, Appellant's cousin, Michael Siple, and Michael Siple's girlfriend at the time, Kim Mirra, were asleep in a car outside the residence on Upland Avenue when they were woken by Appellant. N.T., 9/19/12, at 213-214; N.T., 9/20/12, at 21, 23. Michael Siple then left with Appellant, and when Michael

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[2] Paul Gill was tried as a co-defendant with Appellant.

Siple returned, he told Ms. Mirra that Appellant had blood on his clothes, and that he had to help Appellant dispose of his pants. N.T., 9/20/12, at 24. Detective Nardone subsequently prepared a photographic lineup from which Kevin Sweeney identified Paul Gill as one of his assailants. N.T., 9/25/12, at 46-50.

Appellant and his co-defendant Paul Gill were arrested and charged with the aforementioned crimes. A jury trial commenced on September 18, 2012, and on September 28, 2012, the jury rendered its verdicts. Following a sentencing hearing on November 30, 2012, the trial court sentenced Appellant to an aggregate term of imprisonment of thirty to sixty years of imprisonment, followed by ten years of probation. Appellant filed a post-sentence motion on December 10, 2012, which the trial court denied on January 11, 2013. Appellant filed a notice of appeal. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review:

1. Did the trial court err in allowing testimony regarding [Appellant's] location derived from cell phone records without presenting a witness capable and competent to testify regarding the significance and meaning of those records?

2. Viewed cumulatively, upon considering many of the trial court's evidentiary and other decisions during [Appellant's] trial, did the trial court err such that [Appellant] was deprived of his right, both under the state and federal Constitutions, to a fair trial consistent with due process?

3. Did the trial court err in allowing the prosecutor to argue that an adverse inference should be drawn against [Appellant]

> occasioned by his cousin's (Michael Siple's) refusal to testify as a witness called by the Commonwealth?

Appellant's Brief at 3.

In his first issue, Appellant argues that the trial court erred by allowing Detective Nardone to testify about Appellant's location based on his telephone records and the location of cellular phone towers, because Detective Nardone was not "competent to testify regarding the significance and meaning of those records." Appellant's Brief at 14.[3] We disagree.

"Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." ***Commonwealth v. Drumheller***, 808 A.2d 893, 904 (2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003) (quoting ***Commonwealth v. Stallworth***, 363, 781 A.2d 110, 117 (Pa. 2001)). The Pennsylvania Rules of Evidence, which govern the admission of expert testimony, provide:

Rule 702. Testimony by experts

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[3] At trial, counsel for co-defendant Paul Gill raised the specific objection that Detective Nardone had presented expert testimony without being qualified to do so, thereby preserving this claim for appeal. *See* N.T., 9/26/12, at 19-22; ***Commonwealth v. Myers***, 403 A.2d 85 (Pa. 1979) (where co-defendants preserved objection by specifically objecting at trial, although the appellant did not specifically object at trial, since the trial court had the opportunity to rule on the precise issue and appellant did not raise any issues that were not presented by his co-defendants before the trial court, appellant was entitled to raise the claim on appeal).

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
>
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
>
> (c) the expert's methodology is generally accepted in the relevant field.

Pennsylvania Rule of Evidence 701, which governs opinion testimony by lay witnesses, provides:

> **Rule 701. Opinion testimony by lay witnesses**
>
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Here, the trial court explained its decision to admit the testimony of Detective Nardone as follows:

> [T]he Commonwealth had laid a foundation that Nardone has worked with cellphone records twenty to thirty times as well as provided factual knowledge on why one tower would be used as opposed to another when a call is made. ... Therefore, since

> Nardone was testifying within the scope of his personal knowledge and specialized experience as demonstrated by the foundation laid by the Commonwealth, the trial court did not abuse its discretion nor committed an error of law by overruling [Appellant's] objections.

Trial Court Opinion, 7/31/13, at 4-5.

We agree with the trial court that Detective Nardone did not provide impermissible expert testimony. Detective Nardone explained at trial that he obtained Appellant's phone records from Metro PCS wireless service provider, pursuant to a search warrant, and that the records included a list of cell phone tower locations. N.T., 9/25/12, at 140-143. In addition, pursuant to a separate search warrant, Detective Nardone was able to retrieve "the content", i.e., detailed activity associated with Appellant's phone. *Id.* at 140-143.

Detective Nardone explained that "a cell phone is provider-specific, so ... you can have two towers right next to each other, one would be a Sprint tower, one would be a Verizon tower, and they can act off those towers. Now [the user's cell phone] would connect to the closest tower of your provider to where you are at that time." N.T., 9/26/12, at 23. Detective Nardone testified, based on the subpoenaed phone records, about the telephone calls placed to and from Appellant's phone between May 18, 2011 and May 23, 2011, and the location of the nearest cell phone tower at the time each of the calls was placed. *Id*. at 23-30.

We conclude that the trial court did not abuse its discretion by allowing Detective Nardone to testify about the location of the cell phone towers

relative to the telephone calls placed to and from Appellant's cell phone, without qualifying him as an expert. Detective Nardone did not provide expert opinion testimony as to Appellant's location based on the cell phone records. Moreover, the detective's testimony, in which he simply correlated phone calls with the nearest tower based on the information provided in Appellant's phone records, did not constitute "scientific, technical or other specialized knowledge beyond that possessed by a layperson", and Detective Nardone was not required to be qualified as an expert prior to presenting such testimony.[4]

Appellant next argues that the cumulative effect of several of the trial court's evidentiary rulings in the Commonwealth's favor caused Appellant to be deprived of his right to a fair trial. We will first address individually each of the instances in which Appellant argues that the trial court's evidentiary rulings constituted an abuse of discretion, and then address whether the

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[4] ***See, e.g., United States v. Baker***, 496 F. App'x 201, 204 (3d Cir. 2012) *cert. denied*, 133 S. Ct. 992, 184 L. Ed. 2d 770 (U.S. 2013) (witness's discussion of the operation of cell phone towers did not require any "scientific, technical, or other specialized knowledge" pursuant to Fed.R.Evid. 702 where the testimony consisted entirely of reading and interpreting defendant's cell phone records, including records detailing the locations of cell phone towers used to carry out his phone calls; "Any cell phone user of average intelligence would be able to understand that the strength of one's cell phone reception depends largely on one's proximity to a cell phone tower"; even if this were not common knowledge, the witness had sufficient training and experience to testify about the operation of cell phone towers where he had been employed by cell phone service provider for over ten years and had sufficient personal knowledge of how cell phone towers operate to testify reliably on this subject).

rulings collectively resulted in such prejudice as to deprive Appellant of a fair trial.

Appellant argues that after one of the victims, Kevin Sweeney, testified about the certainty of his identification during a photographic lineup, the trial court permitted Detective Nardone to re-emphasize how certain Mr. Sweeney was during the lineup, effectively allowing the detective to bolster Mr. Sweeney's credibility. Appellant's Brief at 23-24. Specifically, Appellant objects to the testimony of Detective Nardone that during the photographic lineup, he told Kevin Sweeney to only select a photograph if he was "100% certain" that it matched the identity of his attacker. N.T., 9/25/12, at 49. We conclude that Detective Nardone's testimony was competent, relevant testimony, corroborating the testimony of Mr. Sweeney, and was more probative than prejudicial, and therefore admissible.

"Before any evidence is admissible in a criminal proceeding, it must be competent and relevant. As far as relevancy is concerned, the admissibility of evidence is a matter left to the sound discretion of the trial court. It may only be reversed on appeal if the trial court abused its discretion." ***Commonwealth v. Owens***, 649 A.2d 129, 135 (Pa. Super. 1994); Pa.R.E. 402. The Pennsylvania Rules of Evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401

(emphasis added); ***Commonwealth v. Flamer***, 53 A.3d 82, 88, n.5. (Pa. Super. 2012).

"Evidence that bolsters, or strengthens, existing evidence ... is corroborative evidence." ***Id.*** at n.6. "Corroborative evidence may be excluded if its probative value is outweighed by its potential prejudicial effect." ***Commonwealth v. Owens***, 649 A.2d 129, 135-136 (Pa. Super. 1994) (citations omitted). "Evidence is not unfairly prejudicial simply because it is harmful to the defendant's case. The trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand. Exclusion of evidence on the grounds that it is prejudicial is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." ***Flamer***, 53 A.3d at 88, n.7.

Here, the trial court explained, "[Detective] Nardone's testimony about the events surrounding Kevin's photo identification served the purpose of explaining the procedure involved in the selection as well as gave added credibility to Kevin's identification of Gill from the lineup. While this did bolster Kevin's credibility, the testimony by [Detective] Nardone was not unfairly prejudicial and served the beneficial need of providing the jury with the facts surrounding the photo identification." Trial Court Opinion, 7/31/13, at 12. We find no abuse of discretion in the trial court's evidentiary ruling. "Improper bolstering or vouching for a government witness occurs where the

prosecutor assures the jury that the witness is credible, and such assurance is based on either the prosecutor's personal knowledge or other information not contained in the record." ***Commonwealth v. Cousar,*** 928 A.2d 1025, 1041 (Pa. 2007). Here, Detective Nardone's testimony did not amount to improper vouching or bolstering of Kevin Sweeney's testimony because it did not reflect Detective Nardone's personal knowledge of Mr. Sweeney's credibility or refer to information outside of the record tending to indicate that Mr. Sweeney was believable. ***Cousar, supra***.

Appellant additionally argues that the trial court improperly permitted hearsay testimony under the "state of mind" exception to the hearsay rule, when it allowed Derrick Sweeney's statement that on May 17, 2011, the date before the crime, "[Paul Gill] [told] me how afraid he was of ... [Appellant]." N.T., 9/19/12, at 31-32.

The state of mind hearsay exception, set forth in to Pa.R.E. 803(3), provides:

> The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this

> exception only if it relates to the execution, revocation, identification, or terms of declarant's will.

Pa.R.E. 803(3).

This Court has explained:

> [W]here a statement is being introduced for the truth of the matter asserted, then it may be admissible if it is a declaration concerning "the declarant's then existing state of mind ... such as intent, plan, motive, design, mental feeling, pain, and bodily health." The statement must be "instinctive, rather than deliberate [.]" ...
>
> Traditionally, statements of the declarant's then existing state of mind are considered reliable based on their spontaneity. There are ordinarily three instances in which the state of mind exception is applicable. First, the exception may apply to prove the declarant's state of mind when that state of mind is an issue directly related to a claim or defense in the case. Second, the exception can apply to demonstrate that a declarant did a particular act that was in conformity with his or her statement after having made the statement. Finally, an out of court statement related to the person's memory or belief is admissible in the limited instance where it relates to the execution, revocation, identification or terms of the declarant's will. Pa.R.E. 803(3).

Schmalz v. Manufacturers & Traders Trust Co., 67 A.3d 800, 804 (Pa. Super. 2013) (citations and internal quotations omitted).

Here, the trial court explained that "since the hearsay statement was a then existing mental condition of the declarant, and it can be used to demonstrate that the declarant acted in accordance with his fear of [Appellant], it fits within the state of mind hearsay exception. Therefore, the trial court did not abuse their discretion or commit an error of law by overruling the defense's objection." Trial Court Opinion, 7/31/13, at 8.

We find no abuse of discretion in the trial court's determination that Paul Gill's statement, which pertained to his mental and emotional condition, fell within the "state of mind" exception to the hearsay rule. Moreover, even if the statement constituted inadmissible hearsay, any prejudice to Appellant resulting from the jury's knowledge that co-defendant Paul Gill was afraid of Appellant was *de minimis*. Given the strength of the other evidence in this case, including the testimony of Mr. Wilson that Appellant confessed that he had been involved in a robbery, after which he returned home without pants, and the testimony of Ms. Mirra and Kieren Martin that Appellant disposed of his pants on the night of the incident, any error in admitting the statement was harmless. ***See Commonwealth v. Laich***, 777 A.2d 1057, 1062–63 (Pa. 2001) (internal citations omitted) (an error is considered harmless where we are convinced beyond a reasonable doubt that there is no reasonable possibility that the error could have contributed to the verdict; error is harmless where: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial [e]ffect of the error so insignificant by comparison that the error could not have contributed to the verdict).

Appellant further assails the trial court's denial of his motion for mistrial after one of the victims, Derrick Sweeney, stated "I was a little

nervous when I found out one of the defendants was out" and that his father told him "not to be scared." N.T., 9/19/12, at 75. Appellant objected, asserting that the testimony that one of the defendants was "out" implied that Appellant had been previously incarcerated, and requested a mistrial. *Id*. However, the trial court denied the motion on the basis that the jury was not told which of the defendants had been incarcerated, and that the vague statement that "one of the defendant's was out" did not warrant a mistrial. *Id*. at 76.

> The denial of a motion for a mistrial is assessed on appellate review according to an abuse of discretion standard. The central tasks confronting the trial court upon the making of the motion were to determine whether misconduct or prejudicial error actually occurred, and if so, to assess the degree of any resulting prejudice.
>
> Additionally, when dealing with a motion for mistrial due to a reference to past criminal behavior, [t]he nature of the reference and whether the remark was intentionally elicited by the Commonwealth are considerations relevant to the determination of whether a mistrial is required.

Commonwealth v. Kerrigan, 920 A.2d 190, 199 (Pa. Super. 2007) (citations and internal quotations omitted).

We find no abuse of discretion in the trial court's determination that a mistrial was not warranted. The remark about one of the defendants being "out" did not specifically reference Appellant, was not intentionally elicited by the Commonwealth, and was made in passing. Moreover, the Commonwealth did not exploit the reference. "A singular, passing reference to prior criminal activity is usually not sufficient to show that the trial court

abused its discretion in denying the defendant's motion for a mistrial." ***Commonwealth v. Parker***, 957 A.2d 311, 319 (Pa. Super. 2008). We find no error in the trial court's evidentiary ruling.

Finally, Appellant takes issue with the trial court's denial of his motion for mistrial after Detective Nardone testified that Appellant "said ... he's an admitted heroin user." N.T, 9/25/12, at 118. Appellant argues that the trial court erred in denying his motion for mistrial, asserting that the Commonwealth made no mention of Appellant's heroin use during discovery, and that the Commonwealth had engaged in "trial by ambush tactics" in eliciting such testimony, which the trial court sanctioned. Appellant's Brief at 27.

We find no merit to Appellant's claim. Following Detective Nardone's reference to Appellant's heroin use, the trial court issued a cautionary instruction, stating to the jury that "there was some testimony as to heroin use by [Appellant]. Said testimony is not relevant, not material, and not to be considered by you as part of the evidence in this case." N.T., 9/25/12, at 133. Nevertheless, Appellant argues that the cautionary instruction was inadequate to cure the prejudice, and that the cumulative effect of the trial court's evidentiary rulings prejudiced Appellant and denied him his right to a fair trial.

It is noteworthy that at trial, Appellant did not object to the trial court's decision to give a cautionary instruction rather than grant a mistrial, and did not argue at trial that the instruction was inadequate. Therefore,

Appellant's claim that the cautionary instruction was inadequate is unavailing. ***Commonwealth v. Johnson***, 542 Pa. 384, 399, 668 A.2d 97, 104 (1995), *cert. denied*, 519 U.S. 827, 117 S.Ct. 90, 136 L.Ed.2d 46 (1996) (appellant cannot claim trial court error for failing to grant relief which appellant failed to pursue). Moreover, absent evidence to the contrary, a presumption exists that a jury will follow the instructions of the trial court. ***Commonwealth v. O'Hannon***, 732 A.2d 1193, 1196 (Pa. 1999). Here, the trial court directed the jury not to consider as evidence the reference to Appellant's heroin use, and absent any evidence to the contrary, we conclude that the trial court did not abuse its discretion or commit an error of law.

Although Appellant argues that the trial court's evidentiary rulings in the Commonwealth's favor had the effect of denying him his right to a fair trial, for the reasons explained above, we conclude that the trial court did not abuse its discretion, and Appellant's claim therefore fails. The trial court properly permitted Detective Nardone to testify about Kevin Sweeney's lineup identification. Likewise, the trial court's determination that Derrick Sweeney's hearsay statement fell within the "state of mind" exception constituted an appropriate evidentiary ruling. Appellant's remaining claims regarding Derrick Sweeney's statement that one of the defendants was "out," and Detective Nardone's passing reference to Appellant's heroin use (which was cured by a cautionary instruction) do not warrant relief individually, nor do they warrant relief cumulatively.

In his final issue, Appellant argues that the trial court erred in allowing the prosecutor to argue that an adverse inference should be drawn against Appellant as a result of the refusal of Appellant's cousin, Michael Siple, to testify as a witness called by and for the Commonwealth. Appellant's Brief at 29-32.

The record reflects that at trial, when the Commonwealth called Michael Siple to the stand, after Mr. Siple identified Appellant and his co-defendant, Paul Gill, the prosecutor attempted to question Mr. Siple about statements he made when interviewed by Detective Nardone at the Aston Township Police Department. N.T., 9/19/12, at 160-185. In response, Mr. Siple repeatedly stated that when he was interviewed by the police he "told them whatever they wanted to hear." *Id*. When the Commonwealth then presented Mr. Siple with a written copy of his statement to the police, Mr. Siple stated that he could not read it. *Id*. The Commonwealth then attempted to play an audiotape of Mr. Siple's statement to him, but Mr. Siple stated that he did not know to whom the voice on the audiotape belonged. *Id*. Thereafter, Mr. Siple refused to answer any more questions. *Id*. The trial court then ruled that pursuant to the confrontation clause, the Commonwealth could not question Detective Nardone about Mr. Siple's police statement because Appellant had been deprived of the opportunity to cross-examine Mr. Siple about that statement when Mr. Siple refused to testify. N.T., 9/25/12, at 4-5.

Appellant argues that despite the trial court's ruling, the prosecution, during its closing arguments, suggested that the jury impute an adverse inference to Appellant from Mr. Siple's refusal to testify, and that such a statement constituted prosecutorial misconduct and warranted a mistrial. Appellant refers to the following statement by the prosecutor:

> How about Michael Siple? He was happy to tell me, yeah, I know Paul Gill. He's my cousin. I know [Appellant]. He's my cousin. And he was happy to tell me those things. But as soon as I asked him anything of substance he clammed up. He got silent. He refused to follow [the trial court's] instructions to answer the questions. Members of the jury, Michael Siple's silence speaks volumes in this case and you can discuss, you should discuss his silence and what it says. They're cousins. If he had something that would help his cousins don't you think he would have freely offered it? All I got was attitude and non-compliance.

N.T., 9/27/12, at 83.

Our standard of review for a claim of prosecutorial misconduct is limited to whether the trial court abused its discretion. ***Commonwealth v. Harris***, 884 A.2d 920, 927 (Pa. Super. 2005) (citation omitted), *appeal denied*, 928 A.2d 1289 (Pa. 2007). In considering such a claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one. ***Id.*** We observed:

> Not every unwise remark on a prosecutor's part constitutes reversible error. Indeed, the test is a relatively stringent one. Generally speaking, a prosecutor's comments do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in

> their minds fixed bias and hostility toward Appellant so that they could not [weigh] the evidence objectively and render a true verdict. Prosecutorial misconduct, however, will not be found where the comments were based on evidence or proper inferences therefrom or were only oratorical flair. In order to evaluate whether comments were improper, we must look to the context in which they were made.

Harris, 884 A.2d at 927.

"Our review of prosecutorial remarks and an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial." ***Commonwealth v. Judy***, 978 A.2d 1015, 1019–1020 (Pa. Super. 2009). "Prosecutorial misconduct is evaluated under a harmless error standard." ***Commonwealth v. Hogentogler***, 53 A.3d 866, 878 (Pa. Super. 2012).

Appellant argues that the Commonwealth impermissibly suggested that the jury infer guilt from Mr. Siple's silence. In cases where a witness's silence implicates the Constitutional privilege against self-incrimination, our Supreme Court has held:

> It is clear beyond question that no inference can be taken against the person invoking the privilege. Although it could be argued that under certain circumstances, a refusal to testify on grounds of self-incrimination might have probative value in establishing an issue in a matter to which the witness was not a party, we have recently held that it is not permissible for either defense or prosecution to attempt to capitalize on such refusal. Where it is the prosecutor who attempts to use such a device, there is a special vice: ***the inference to be drawn from the refusal to testify of the defendant's co-defendant, accomplice or associate has no probative value whatsoever in establishing the guilt of the***

> ***defendant. It is rather an effort to cause the jury to think 'guilt by association'.***

Commonwealth v. DuVal, 307 A.2d 229, 232-233 (Pa. 1973) (emphasis added).

Here, however, Michael Siple did not invoke the Fifth Amendment privilege. ***See Salinas v. Texas***, 133 S. Ct. 2174, 2178, 2181, 186 L. Ed. 2d 376 (2013) ("A witness does not expressly invoke the privilege by standing mute"; a witness who desires the protection of the privilege ... must claim it at the time he relies on it) (citations and internal quotations omitted). Appellant cites no authority to support an assertion that a witness who refuses to testify, without invoking the Fifth Amendment privilege, should be treated the same as a witness who invokes the privilege, and, absent more, we decline to extend such Constitutional protections. ***See Commonwealth v. Todaro***, 569 A.2d 333, 335 (Pa. 1990) (there is a distinct danger [that] a refusal to testify on Fifth Amendment grounds by a known co-actor will be taken improperly, as evidence of a defendant's guilt by association; however where the privilege was not made within the jury's hearing, "[i]t is difficult to see how they could draw any reasonable inference of anything," as "[i]t is the expressed, highlighted reference to the Fifth Amendment privilege that may prejudice or influence a jury, not mere silence itself" and "a mere odd or unexplained occurrence during a trial does not justify the conclusion that the jury has drawn an inference prejudicial to the defendant"). We cannot conclude that Appellant was prejudiced by the

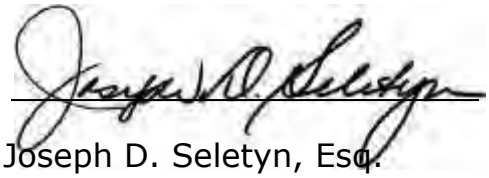
prosecution's reference to Michael Siple's silence, where Mr. Siple did not invoke his Fifth Amendment privilege. We find no abuse of discretion in the trial court's determination.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Justice Fitzgerald concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/19/2014