

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
BIANCA AURA BUCANO,	:	
	:	
Appellant	:	No. 599 EDA 2013

Appeal from the Judgment of Sentence Entered August 3, 2012,  
In the Court of Common Pleas of Monroe County,  
Criminal Division, at No. CP-45-CR-0000778-2010.

BEFORE: SHOGAN, OTT and PLATT\*, JJ.

MEMORANDUM BY SHOGAN, J.:

**FILED MAY 20, 2014**

Appellant, Bianca Aura Bucano, appeals from the judgment of sentence entered August 3, 2012, following her conviction by a jury on April 25, 2012, of two counts of corrupt organizations, one count of dealing in proceeds of unlawful activity, ten counts of insurance fraud graded as a felony, one count of insurance fraud graded as a misdemeanor, two counts of theft by deception, three counts of attempt to commit theft by deception, two counts of forgery, and one count of conspiracy. We affirm.

The instant charges arose out of the Thirtieth Statewide Investigating Grand Jury. Following the court’s acceptance of Presentment Number 18 on March 15, 2010, the Pennsylvania Attorney General filed a criminal

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\*Retired Senior Judge assigned to the Superior Court.

complaint on March 29, 2010, charging Appellant<sup>1</sup> with a multitude of crimes related to an insurance fraud scheme allegedly masterminded by Judi Grate, in which Appellant and her daughter, Melissa M. Bucano, participated. The scheme involved submission of fraudulent claims for long-term care insurance benefits to various insurance companies.

On June 22, 2011, Appellant filed an omnibus pretrial motion that included, *inter alia*, a motion to suppress statements Appellant made to Agent Tyson of the Pennsylvania Attorney General's Office when the agent was at Appellant's home. The trial court denied the motion to suppress by order dated July 5, 2011, and filed July 7, 2011.

Appellant entered a guilty plea dated September 8, 2011, and filed September 13, 2011, which she subsequently withdrew on December 13, 2011. A jury trial for Appellant and her daughter, Melissa,<sup>2</sup> began on April 16, 2012, and concluded on April 25, 2012, with convictions on the previously identified charges.

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<sup>1</sup> Appellant and eight co-defendants were charged: Judi Grate, Melissa Bucano, who is Appellant's daughter, Christopher Bucano, who is Appellant's son, Barbara Rollins, Uhura Byrd, Patricia Lesane, Priscilla Grate Flowers, and Grace John.

<sup>2</sup> A panel of this Court affirmed the judgment of sentence of Melissa Bucano, **Commonwealth v. Bucano**, 82 A.3d 468 (Pa. Super. filed June 24, 2013) (unpublished memorandum), and our Supreme Court denied her petition for allowance of appeal. **Commonwealth v. Bucano**, 79 A.3d 1096 (Pa. 2013).

Appellant filed a post-verdict motion on May 7, 2012. At the hearing on the motion, Appellant's counsel moved to withdraw the motion. The trial court dismissed the motion on June 20, 2012, without prejudice to the Appellant's right to refile as a post-sentence motion. On June 26, 2012, Appellant filed a *pro se* petition for writ of *habeas corpus* and a petition pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541–9546, which the court forwarded to Appellant's counsel. On July 13, 2012, the court issued a notice of intent to dismiss the PCRA petition due to its prematurity. On August 2, 2012, Appellant filed a *pro se* writ of *habeas corpus*, and again, the trial court directed the clerk of courts to forward the motion to Appellant's counsel of record.

The trial court sentenced Appellant on August 2, 2012, docketed August 3, 2012, to an aggregate period of incarceration of 141 months to 282 months and imposed restitution in the amount of \$1,146,181.28.<sup>3</sup> Appellant filed post-sentence motions on August 13, 2012, followed by *pro se* motions for PCRA relief on August 20, 28, and 30, 2012. The trial court dismissed the June 26, 2012 PCRA petition on August 31, 2012, and defense counsel sought to withdraw on September 6, 2012. At an October 17, 2012 hearing on post-sentence motions, defense counsel withdrew his withdrawal

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<sup>3</sup> Because Appellant was eligible for the Recidivism Risk Reduction Incentive Program, her alternative minimum sentence was calculated to be 117 months and fifteen days. Amended Sentencing Order, 8/7/12, at unnumbered 8.

request. The trial court denied post-sentence motions on January 7, 2013, and granted an unopposed motion to reinstate Appellant's direct appeal rights *nunc pro tunc* on February 19, 2013. Appellant filed her notice of appeal on February 22, 2013. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

The trial court, in its suppression opinion, summarized the facts of these crimes as follows:

The Grand Jury conducted an investigation into allegations that Judi Grate ("Grate"), a resident of Monroe County, submitted fraudulent invoices and receipts to the Philadelphia American Life Insurance Company ("PALIC") and the Genworth Life Insurance Company ("Genworth") in order to collect insurance payments for home care services that were not provided to her. Affidavit, p.1; N/T, p. 9-10.<sup>5, 6</sup> To date, Grate has received \$729,290.08 from the insurance companies as reimbursement for money she allegedly paid to caregivers. Affidavit, p.1. The paperwork submitted to the insurance companies indicated that several individuals, including Defendant, provided home care services to Grate at some point in time between June, 2000 and January, 2010. Affidavit, p.1; N/T, p. 31, Exhibits 3-7. These individuals included: Brigid Hess, Gwendolyn Wright, Yanira Garay, Lucienne Bourjolly, Barbara Rollins, Uhura "Nicole" Byrd, "Clara Lewis", Debra Rabold, Grace John, Patricia Lesane and Priscilla Flowers a/k/a Pecilla Grate Flowers. Affidavit, p.1. Two additional individuals, Bianca Bucano ("Defendant") and Melissa Bucano, also assisted Grate by completing and signing caregiver invoices and receipts. *Id.*

<sup>5</sup> Reference to Presentment Number 18 issued by the Thirtieth Statewide Investigating Grand Jury on March 15, 2010 and attached to and incorporated by reference in the Attorney General's Affidavit of Probable Cause filed on March 29, 2010 will be cited as Affidavit, p. \_\_\_\_.

<sup>6</sup> Reference to testimony given at the Preliminary Hearing held on March 25, 2011 will be cited as N/T, p. \_\_\_\_.

During the course of the investigation, additional schemes were uncovered where Grate assisted Defendant and Melissa Bucano in the submission of claims to AIG Centennial Insurance Company ("AIG"), Metropolitan Life Insurance Company ("MetLife") and the Pennsylvania Commission on Crime and Delinquency Victim's Compensation Program ("PCCD"). *Id.* at 2. Defendant submitted copies of invoices to AIG requesting reimbursement for daily home care services she allegedly paid for and received from "J. Grate Home Health Services"<sup>7</sup> ("Health Services") between July 30, 2001 and January 4, 2004 for injuries that she allegedly suffered in a hit-and-run accident that occurred in November, 2000. Affidavit, p.2; N/T, p. 46. Defendant also submitted invoices to PCCD seeking payment for home health services allegedly provided by Health Services between May 1, 2002 and April 18, 2005, and to MetLife for services between May 17, 2004 and January 12, 2009. Affidavit, p.2. All of the invoices indicated that the home care services were provided by Kim Benn and Yanira Garay, who were alleged employees of Health Services. *Id.*

<sup>7</sup> Grate testified before the Grand Jury that she started her own home healthcare business in New Jersey in 1994 or 1995 where she then moved to Pennsylvania and continued the business. *Id.* at 65. She further testified that her home care workers were Grace John and Debra Rabold although she was unable to testify as to the number of employees, or how much her employees were paid. *Id.* at 65-66. Grate was able to testify that one of her clients was Bianca Bucano and that she paid her employees in cash. *Id.*

MetLife began investigating the services allegedly provided to Defendant and requested Grate send records pertaining to the care of Defendant. *Id.* at 3. The records were never provided. *Id.* Defendant then advised MetLife that Health Services had closed and was no longer sending caregivers to Defendant's residence. *Id.* At that time, Defendant requested permission for her son, Christopher Bucano, to be approved as caregiver. *Id.*

Defendant proceeded to submit invoices to MetLife indicating that Christopher Bucano provided 10 hours of home care services to her on a daily basis between January 13, 2009 and September 30, 2009. *Id.*

Trial Court Opinion (Suppression), 9/7/11, at 3–5.

Appellant raises the following issues for our review:

Was the verdict against the weight of the evidence in that (a) it was not shown that Appellant committed any of these acts knowingly or intentionally, especially given her bona fide medical conditions at the time the claims were made and the fact that none of the supposed RICO participants who testified at trial knew the Appellant and (b) it was not established that Appellant was a member of a corrupt organization since each witness alleged to be a member of the organization testified that they had no contact with Appellant, did not know her, and did nothing to conspire with her?

Did the trial court abuse its discretion in allowing the Commonwealth to introduce documents and testimony probative only of the crimes of Judi Grate, thus prejudicing Appellant?

Did the trial court err in failing to give the jury instruction requested by defense counsel as it relates to the failure of the Commonwealth to call an available and necessary witness; Judi Grate?

Appellant's Brief at 10.

While Appellant's first statement of the question is couched in terms of the weight of the evidence, in the argument section of her brief, Appellant appears to assert concepts of sufficiency of the evidence within her claim. Appellant's Brief at 15–28. To the extent that Appellant raises a sufficiency of the evidence claim, she challenges whether the evidence was sufficient to prove the existence of a conspiratorial agreement.

In reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, were sufficient to prove every element of the offense beyond a reasonable doubt. ***Commonwealth v. Rivera***, 983 A.2d 1211 (Pa. 2009). It is within the province of the fact-finder to determine the weight to be accorded to each witness's testimony and to believe all, part, or none of the evidence. ***Commonwealth v. Diamond***, 83 A.3d 119 (Pa. 2013). The Commonwealth may sustain its burden of proving every element of the crime by means of wholly circumstantial evidence. ***Commonwealth v. Hansley***, 24 A.3d 410 (Pa. Super. 2011). Moreover, as an appellate court, we may not re-weigh the evidence and substitute our judgment for that of the fact-finder. ***Commonwealth v. Kelly***, 78 A.3d 1136 (Pa. Super. 2013). In addition, courts have noted that "evidence of identification need not be positive and certain to sustain a conviction." ***Commonwealth v. Jones***, 954 A.2d 1194, 1197 (Pa. Super. 2008) (citations omitted).

The Crimes Code defines conspiracy as follows:

**§ 903. Criminal conspiracy**

**(a) Definition of conspiracy.**—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

- (1) agrees with such other person or persons that they or one or more of them will engage in conduct

which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

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**(e) Overt act.**—No person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

18 Pa.C.S.A. § 903(a), (e).

To sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant “(1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and, (3) an overt act was done in furtherance of the conspiracy.” **Commonwealth v. Fisher**, 80 A.3d 1186, 1190–1191 (Pa. 2013) (quoting **Commonwealth v. Rios**, 684 A.2d 1025, 1030 (Pa. 1996) (citations omitted)). “Because it is difficult to prove an explicit or formal agreement to commit an unlawful act, such an act may be proved inferentially by circumstantial evidence, *i.e.*, the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators.” **Commonwealth v. Galindes**, 786 A.2d 1004, 1010 (Pa. Super. 2001) (quoting **Commonwealth v. Spatz**, 756 A.2d 1139, 1162 (Pa. 2000)). Circumstantial evidence can include, “the relationship between the parties, the knowledge of and participation in the crime, and the

circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.” **Commonwealth v. Thomas**, 65 A.3d 939, 943 (Pa. Super. 2013) (quoting **Commonwealth v. French**, 578 A.2d 1292, 1294 (Pa. Super. 1990)).

An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. **Commonwealth v. Ramtahal**, 33 A.3d 602 (Pa. 2011). “An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence.” **Id.** at 609. A trial judge cannot grant a new trial due to a mere conflict in testimony or because he would have arrived at a different conclusion on the same facts. **Commonwealth v. Edwards**, 903 A.2d 1139 (Pa. 2006). Instead, a new trial should be granted “only in truly extraordinary circumstances . . . .” **Id.** at 1149.

The trial court will award a new trial only when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice. **Commonwealth v. Diggs**, 949 A.2d 873 (Pa. 2008). “In determining whether this standard has been met, appellate review is limited to whether the trial judge’s discretion was properly exercised, and relief will be granted only where the facts and inferences of record disclose a palpable abuse of discretion.” **Id.** at 879. Thus, “the trial court’s denial of a motion for a new

trial based on a weight of the evidence claim is the least assailable of its rulings.” **Rivera**, 983 A.2d at 1225.

The trial court has aptly analyzed Appellant’s claims both within a sufficiency-of-the-evidence framework and as a challenge to the weight of the evidence. We rely on the trial court’s complete and detailed explanation, and adopt it as our own, in concluding that Appellant’s first issue lacks merit. Trial Court Opinion, 4/15/13, at 9–34.

Next, Appellant contends that the trial court abused its discretion “by permitting the Commonwealth to introduce documents and testimony probative only of the crimes of Judi Grate, thus prejudicing Appellant.” Appellant’s Brief at 10. This is the exact issue asserted by Melissa Bucano, Appellant’s co-defendant at trial, and Appellant’s presentation of her claim is comparable. We, therefore, rely on our disposition of the issue in that case, as follows:

The only evidence Bucano specifically identified as objectionable is “pictures and videos of Grate pretending to be hurt and then later walking normally....” Bucano has failed to specifically identify any alleged documents or testimony or provide citations to the record where such documents and testimony were admitted.

The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that a trial court abused its discretion. In determining whether evidence should be admitted, the trial court must weigh the relevance and probative value of the evidence against the prejudicial impact of that evidence. Evidence is

relevant if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact. Although a court may find evidence is relevant, the court may nevertheless conclude that such evidence is inadmissible on account of its prejudicial impact.

***Commonwealth v. Alderman***, 811 A.2d 592, 595 (Pa. Super. 2002).

Rule 403 provides as follows:

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Comment: . . .

“Unfair prejudice” means a tendency to suggest decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.

Pa.R.E. 403. Rule 404, relating to character evidence, provides in pertinent part as follows:

**(b) Crimes, Wrongs or Other Acts.**

**(1) Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

**(2) Permitted Uses.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case, this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

...

Comment: . . .

Pa.R.E. 404(b)(2) ... contains a non-exhaustive list of purposes, other than proving character, for which a person's other crimes, wrongs or acts may be admissible.

Pa.R.E. 404(b).

"Our law is unequivocal that the responsibility rests upon the appellant to ensure that the record certified on appeal is complete in the sense that it contains all of the materials necessary for the reviewing court to perform its duty." **Commonwealth v. Bongiorno**, 905 A.2d 998, 1000 (Pa. Super. 2006). Further, an appellant must set forth, in the Argument section of her appellate brief, a reference to the place in the record "where the matter referred to appears." Pa.R.A.P. 2119(c); **Commonwealth v. Beshore**, 916 A.2d 1128, 1140 (Pa. Super. 2007) (holding that the failure to properly develop an argument in an appellate brief, including proper citation to the record, results in waiver; this Court will not "scour the record to find evidence to support an argument").

With regard to the alleged pictures of Grate, Bucano has failed to identify where they may be found in the extensive certified record. Moreover, our review of the certified record has not disclosed such pictures. As to the videos of Grate, our review of the certified record discloses no video evidence. Thus, we cannot conduct a review of this evidence. **See** Pa.R.A.P. 2119(c); **Bongiorno**, 905 A.2d at 1000.

As to the alleged documents and testimony, Bucano has failed to specifically identify or refer to them, thus precluding us from conducting a proper review. Pa.R.A.P. 2119(c).<sup>[4]</sup>

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<sup>4</sup> In the case *sub judice*, Appellant, in her brief, has also failed to specifically identify any alleged documents or testimony or provide citations to the record where such documents and testimony were admitted. In addition, our review fails to disclose any such pictures or video evidence in the record certified to us on appeal.

Although Bucano has failed to identify specific evidence, we discern from a general review of the record that the evidence concerning Grate was not offered to prove either Grate's or Bucano's character. Thus, we do not find Rule 404 applicable. Rather, the evidence concerning Grate was offered to demonstrate the insurance fraud scheme in which Grate was engaged. The Commonwealth then presented evidence to show that both Bucano and [Appellant] participated in the scheme of fraudulent reimbursement by signing the names of real or "fake" caregivers to the insurance claim forms. Accordingly, the evidence concerning Grate was relevant and necessary to establish the Commonwealth's case . . . . Further, the probative value of the evidence outweighed its prejudicial impact. Therefore, we conclude that the trial court did not abuse its discretion in admitting evidence concerning Grate. Further, we agree with the trial court's Opinion in regard to this issue. **See** Trial Court Opinion, 10/17/12, at 14-21.<sup>5</sup>

**Bucano**, slip op. at 9–12 (some citations to the brief omitted). We, likewise, additionally rely on the trial court's explanation for rejection of this claim. Trial Court Opinion, 4/15/13, at 34–39.

Appellant's final claim asserts that the trial court erred in failing to give a missing witness instruction to the jury regarding the Commonwealth's failure to call Judi Grate as a necessary and available witness, as requested by Appellant. Appellant's argument in her brief is nearly identical to that presented by her daughter Melissa, and we cite with approval our explanation of the issue in that appeal, as follows:

Bucano next contends that the trial court erred by failing to give the jury an instruction, as Bucano requested, concerning the Commonwealth's failure to call Grate as a necessary and available witness. Bucano cites **Commonwealth v. Evans**, 664

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<sup>5</sup> The trial court's disposition of this issue herein is identical to its analysis in Melissa Bucano's appeal.

A.2d 570 (Pa. Super. 1995), in support of her argument. **Evans** provides in pertinent part as follows:

Our Supreme Court has articulated . . . the “missing witness” adverse inference rule as follows:

When a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person’s testimony would not merely be cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference that it would have been unfavorable.

However, this Court has summarized the circumstances that preclude issuance of the instruction as follows:

1. The witness is so hostile or prejudiced against the party expected to call him that there is a small possibility of obtaining unbiased truth;
2. The testimony of such a witness is comparatively unimportant, cumulative, or inferior to that already presented;
3. The uncalled witness is equally available to both parties;
4. There is a satisfactory explanation as to why the party failed to call such a witness;
5. The witness is not available or not within the control of the party against whom the negative inference is desired; and,
6. The testimony of the uncalled witness is not within the scope of the natural interest of the party failing to produce him.

In order for the “missing witness” adverse inference rule to be invoked against the Commonwealth, the witness must be available only to the Commonwealth and no other exceptions must

apply. In order to determine whether a witness was “available” to a party, the trial court must ascertain whether the witness was “peculiarly within the knowledge and reach” of one party.

**Evans**, 664 A.2d at 573-74 (citations omitted).

The relevant inquiry for this Court when reviewing a trial court’s failure to give a jury instruction is whether such charge was warranted by the evidence in the case. If the instruction proffered is inapplicable and improper, the court should not charge on it.

**Commonwealth v. Boyle**, 733 A.2d 633, 639 (Pa. Super. 1999) (citations omitted).

A party is required to make a specific objection to a jury charge or an omission from the charge before the jury retires to deliberate. Pa.R.Crim.P. 647. The failure to make such specific objection will constitute waiver of the issue on appeal. **Commonwealth v. Baker**, 963 A.2d 495, 506 (Pa. Super. 2008). Here, Bucano has failed to cite to the record indicating whether she made a specific objection to the trial court’s denial of the requested charge.<sup>6</sup>

However, even if Bucano made such objection, the trial court did not err in denying the requested instruction. The trial court determined that the instruction was not proper because Grate was an available witness to both parties. N.T., 4/25/12, at 19. This ruling was in accordance with the applicable law; therefore, the trial court properly denied the instruction. **See** Trial Court Opinion, 10/17/12, at 21-24.

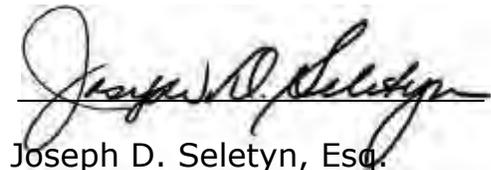
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<sup>6</sup> Appellant herein, as well, has failed to cite to the record indicating whether she made a specific objection to the trial court’s denial of the requested charge.

**Bucano**, slip op. at 12-14 (some citations to the brief omitted). We, likewise, additionally rely on the trial court's explanation for rejection of this claim. Trial Court Opinion, 4/15/13, at 44-47.<sup>7</sup>

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 5/20/2014

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<sup>7</sup> The parties are directed to attach a copy of the trial court opinion filed April 15, 2013, in the event of further proceedings in this matter.



Attempt – Theft by Deception, eight (8) counts of Forgery, and one (1) count of Insurance Fraud (misdemeanor of the first degree), for a total of (31) counts.<sup>1</sup>

On January 24, 2011, Defendant Bianca Bucano, through counsel, filed a Writ of Habeas Corpus/Remand for Preliminary Hearing. By Amended Order dated February 11, 2011, Defendant's case was remanded back to the District Court before the Honorable Debby York. After a preliminary hearing was held in the above-captioned case, all charges were bound over for Court.

On June 22, 2011, Defendant filed an Omnibus Pre-Trial Motion. Defendant first made a Motion to Suppress statements made while Agent Tyson of the Pennsylvania Attorney General's Office was at Defendant's home. Defendant believed she was subject to custodial interrogation without being advised of her Miranda rights. Count Two of Defendant's motion called for a Motion to Dismiss/Habeas Corpus. Defendant alleged that the Commonwealth failed to establish the essential elements of the crimes charged. Count Three of Defendant's Motion asked the Court to compel the Commonwealth to comply with Defendant's previous discovery requests. Defendant's fourth and final count sought to have her criminal case severed from the cases of her co-defendants.

By Order dated July 5, 2011, and filed July 7, 2011, this Honorable Court denied Defendant's Motion to Suppress. Additionally, Defendant's Motion to Compel Discovery was dismissed as moot after Defendant advised the Court that she had received the requested discovery from the Commonwealth. The remaining omnibus issues were taken under advisement. By Opinion and Order dated September 7, 2011,

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<sup>1</sup> The co-defendants in this case include: Judi Louise Grate, Melissa Bucano, Christopher Bucano, Barbara Rollins, Uhura Nicole Byrd, Patricia Lesane, Pecilla Grate Flowers and Grace John. They were charged with the same or similar offenses as Defendant.

this Honorable Court denied Defendant's Motion to Sever and Motion for Habeas Corpus Relief.

On August 1, 2011, Defendant's counsel filed a Motion in Limine, which sought to exclude (1) evidence of any other wrong doing on the part of Defendant for possible charges unrelated to the case *sub judice* and (2) evidence of alleged co-conspirators. On August 2, 2011, the Attorney General filed Motions in Limine, which included the following: (1) Motion to Preclude Reference to Absence of Criminal Record; (2) Motion to Preclude Reference to Grading of Offenses; (3) Motion to Preclude Reference to Possible Range of Sentence; (4) Motion to Preclude Reference to Sentence Received by Judi Grate; (5) Motion to Preclude Reference to Co-Defendant's Plea Agreements Unless and Until they Testify at Trial and (6) Motion to Preclude Counsel from Expression of Personal Opinion on Defendant's Innocence. By Order of this Honorable Court dated August 3, 2011, a hearing on the Motions was scheduled for August 29, 2011.

On September 8, 2011, Defendant entered into a guilty plea Agreement and pled guilty to the following charges: Amended Count 4, Conspiracy to Commit Theft, a felony of the third degree; Amended Count 8, Insurance Fraud, a felony of the third degree; Amended Count 17, Conspiracy to Commit Theft by Deception, a felony of the third degree; Amended Count 18, Conspiracy to Commit Theft by Deception, a felony of the third degree; Amended Count 19, Conspiracy to

Commit Theft by Deception, a felony of the third degree; and Amended Count 20, Conspiracy to Commit Theft by Deception, a felony of the third degree.<sup>2</sup>

On September 13, 2011, the Commonwealth filed an Amended Criminal Information with the following (31) charges: two (2) counts of Corrupt Organizations, one (1) count of Dealing in Proceeds of Unlawful Activities, one (1) count of Criminal Conspiracy, eleven (11) counts of Insurance Fraud, a felony of the third degree, four (4) counts of Criminal Conspiracy to Commit Theft by Deception, two (2) Counts of Criminal Attempt-Theft by Deception, Eight (8) counts of Forgery, and one (1) count of Insurance Fraud, a misdemeanor of the first degree. As a result of Defendant's guilty plea, the Commonwealth's Motions in Limine were dismissed.

On November 10, 2011, despite being represented by Counsel, Defendant Bianca Bucano filed a *pro se* Motion to Withdraw her Guilty Plea.<sup>3</sup> Also on this date, Defendant's Counsel filed a Motion to Withdraw the Guilty Plea on Defendant's behalf. By order of the Court, the Monroe County Clerk of Court was directed to forward Defendant's *pro se* motion to her Counsel of record. On December 14, 2011, Defendant's Motion to Withdraw her guilty plea was granted. It was further ordered that Defendant's bail be set at \$100,000.00 straight.

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<sup>2</sup> While Defendant did plead guilty to the above-cited charges on September 8, 2011, the related paperwork, such as the guilty plea form and written guilty plea agreement, were not filed with the Clerk of Court until September 13, 2011.

<sup>3</sup> Throughout the duration of Defendant's case, up to and including the date of this Order, Defendant has been represented by at least four (4) different attorneys. First, Attorney Brandon Reish was relieved of his duties after seeking to withdraw as counsel. Next, Attorney Ernest Preate, who entered his appearance on January 10, 2010, sought leave to withdraw as counsel in May of 2011. Despite an Order appointing Attorney David Skutnik as conflict counsel, Defendant retained Attorney Jeffrey Velander, who Praeciped for Entry of Appearance on June 2, 2011. After disagreements between Attorney Velander and Defendant, Attorney Velander filed a Petition to Withdraw his Appearance on behalf of Defendant. Finally, on December 20, 2011, after Attorney Velander was granted leave to withdraw as Defendant's counsel, Attorney William Watkins was appointed as conflict counsel and has served as counsel of record to date.

Trial in Defendant's case began with the selection of a jury on April 4, 2012. Testimony began on April 16, 2012 and continued on April 18<sup>th</sup>, 19<sup>th</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, and 25<sup>th</sup>. On April 23, 2012, the Commonwealth made an oral motion to Dismiss Count 27 of the Criminal Information (Forgery, a misdemeanor of the first degree), to which Defense Counsel did not object. By Order of the same date, this Court dismissed Count 27 of the Criminal Information. A verdict was reached on April 25, 2012. The jury convicted Defendant of the following crimes: one (1) count of Corrupt Organizations, one (1) count of Corrupt Organizations – Conspiracy to Violate the Corrupt Organizations Statute, one (1) count of Dealing in Proceeds of Unlawful Activities, one (1) count of Criminal Conspiracy for Dealing in Proceeds of Unlawful Activities, Insurance Fraud, Theft by Deception and/or Forgery, ten (10) counts of Insurance Fraud, two (2) counts of Theft by Deception, three (3) counts of Criminal Attempt – Theft by Deception, two (2) counts of Forgery, and one (1) count of Insurance Fraud.

On May 7, 2012, Defendant filed Post-Verdict Motions and then filed a Motion for Bail Modification on June 5, 2012. At the hearing on both motions, Defendant's counsel made an oral motion in open Court to withdraw Defendant's Post Verdict Motions. By Order dated June 20, 2012, Defendant's Post Verdict Motions were dismissed without prejudice to the right of Defendant to re-file as a Post Sentence Motion and/or a Motion for Extraordinary Relief at the time of sentencing. Also by Order dated June 20, 2012, Defendant's Motion for Bail Modification was denied.

On or about June 26, 2012, Defendant filed a *pro se* Petition for Habeas Corpus Relief and a Post Conviction Relief Act ("PCRA") Petition. By Order dated July 2,

2012, the Court issued an Order directing the Clerk of Courts to forward Defendant's *pro se* Petition to counsel of record, William Watkins. On July 13, 2012, the Court issued a Notice of Intent to Dismiss Defendant's Post-Conviction Relief Act Petition and Order due to the premature nature of Defendant's petition. On August 2, 2012, Defendant filed a *pro se* Writ of Habeas Corpus, and again, this Court directed the Clerk of Courts to forward the motion to Defendant's counsel of record.

On August 7, 2012, Defendant was sentenced to an aggregate term of incarceration of not less than (141) month nor more than (282) months to be served in a State Correctional Institution. Additionally, Defendant was ordered to: (1) pay restitution to the Pennsylvania Commission on Crime and Delinquency Victim's Compensation Program in the amount of \$35,000.00, (2) pay restitution to Philadelphia American Life Insurance Company in the amount of \$418,496.28, (3) pay restitution to Genworth Life Insurance Company in the amount of \$371,083.00, (4) pay restitution to MetLife in the amount of \$321,602.00, (5) pay the costs of the criminal proceedings, (6) have a DNA sample and fingerprints taken pursuant to Act 185 of 2004 and pay the \$250.00 fee associated with this requirement, and (7) reimburse the Commonwealth of Pennsylvania the sum of \$2,551.83 for actual witness fees incurred in bringing this matter to trial. Defendant was deemed eligible for the Recidivism Risk Reduction Incentive (RRRI) Program, with an alternative minimum sentence calculated to be 117 months, 15 days. Defendant was given a time credit commencing December 13, 2011.<sup>4</sup>

On August 13, 2012, Defendant, through counsel, filed Post-Sentence Motions, in which she argued the following: (1) there was insufficient evidence to establish that

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<sup>4</sup> See *Sentencing Order dated August 7, 2012*.

Defendant committed crimes against PALIC and Genworth, (2) there was no evidence or insufficient evidence that Defendant was part of a corrupt organization, (3) the verdicts were against the weight of the evidence, (4) the Court improperly admitted evidence as it related to the crimes of persons other than Defendant, namely crimes committed by co-Defendant Judi Grate, (5) the Attorney for the Commonwealth made improper remarks during his closing argument, (6) the Trial Court erred in denying Defendant's Omnibus Pre-trial Motion, (7) it was an error for the undersigned to not recuse herself and (8) the Trial Court failed to give jury instructions requested by defense counsel regarding the failure of the Commonwealth to call co-Defendant Judi Grate as a witness at Defendant's trial.

On August 20, 2012, August 28, 2012 and August 30, 2012, Defendant, acting *pro se*, filed separate Motions for Post Conviction Collateral Relief. On August 31, 2012, this Court denied Defendant's June 26, 2012 PCRA Petition because Defendant failed to file a response within thirty (30) days of our July 13, 2012 Notice of Intent to Dismiss Defendant's Pro-Se PCRA Petition.

On September 6, 2012, Defendant's Counsel, Attorney William Watkins, filed a Motion to Withdraw as Counsel. On September 10, 2012, this Court filed two Orders: (1) a rule returnable for answer and hearing regarding Attorney Watkins Motion to Withdraw as Counsel and (2) an Order directing the Clerk of Courts to send Attorney Watkins a copy of Defendant's PCRA Petition pursuant to Pa.R.Crim.P.Rule 576(a)(4).

On October 17, 2012, a hearing was held on Defendant's Post-Trial Motions and Attorney Watkins' Motion to Withdraw as Counsel. At this time, Defendant and Attorney Watkins advised the Court that they wished to withdraw Attorney Watkins'

Motion to Withdraw as Counsel and to have Attorney Watkins remain as counsel. By Order dated January 7, 2013, the Court denied Defendant's Post-Trial Motions and Defendant was advised that she had thirty (30) days to appeal the Order. On February 14, 2013, Defense Counsel filed an Unopposed Petition for Allowance of Appeal *Nunc Pro Tunc* and for Restoration of Appellate Rights, with said Petition being granted by Order dated February 19, 2013.

Defendant filed a Notice of Appeal on February 22, 2013, appealing to the Superior Court from the January 7, 2013 Order denying Defendant's Post-Sentence Motions. On February 25, 2013, Defendant was directed to file her Concise Statement of Errors Complained of an Appeal within twenty-one (21) days of the date of the Order. On March 18, 2013, Defendant filed her Concise Statement of Matters Complained of on Appeal. We now submit this Opinion in accordance with Pa.R.A.P. 1925(a).

In her 1925 (b) statement, Defendant argues that: (1) there was insufficient evidence to establish that Defendant committed any crimes against Philadelphia Life Insurance Company (PALIC) and General Electric Financial Assurance (Genworth); (2) there was no evidence or insufficient evidence that Defendant was a part of the "corrupt organization"; (3) the verdict in this case is against the weight of the evidence; (4) the Court improperly admitted evidence as it relates to the crimes of persons other than Defendant and erred in failing to sustain the numerous and continuous objections as they relate to the relevance of documents and testimony probative only of the crimes of Judi Grate; (5) the Attorney for the Commonwealth, in its closing, made statements that were conclusive on the issue of the Corrupt Organization that were not

in any way supported by the evidence; (6) the Trial Court erred in denying Defendant's Omnibus Pre-trial Motion; (7) this Court erred in refusing the request for recusal; (8) the Court erred in failing to give the jury instruction requested by defense counsel as it relates to the failure of the Commonwealth to call Judi Grate as a witness and (9) the Court erred in failing to grant the pretrial Motion to Sever. For the reasons that follow, we find that all nine (9) of Defendant's arguments lack merit.

**Weight of the Evidence**

Defendant's first, second and third issues on appeal allege that the guilty verdict was against the weight of the evidence. We will consolidate these issues for the sake of thoroughness and efficiency. Defendant first alleges that there was insufficient evidence to establish that she committed any crimes against PALIC or Genworth. Further, Defendant contends that there was no evidence that she submitted documents to either of these companies or conspired with others in the commission of these crimes. Second, Defendant alleges that there was no evidence or insufficient evidence that Defendant was identified as a part of the "corrupt organization" because every member of the corrupt organization testified that they did not know Defendant. Third and finally, Defendant argues generally that the verdicts were against the weight of the evidence. We disagree.

Pursuant to Pa.R.Crim.P. Rule 607:

(A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:

- (1) orally, on the record, at any time before sentencing;
- (2) by written motion at any time before sentencing; or
- (3) in a post-sentence motion.

Pa.R.Crim.P. 607(A)(1)-(3). When arguing that a trial court's verdict is against the weight of the evidence, "such a claim must be presented to the trial court while it exercises jurisdiction over a matter since 'appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence.'" Commonwealth v. Burkett, 830 A.2d 1034, 1037 (Pa. Super. 2003) citing Commonwealth v. Widmer, 744 A.2d 745, 753 (Pa. 2000).

In discussing the burden of proof required in criminal cases, the Pennsylvania Supreme Court has stated that:

It is beyond cavil that an accused in a criminal case is clothed with a presumption of innocence and that the burden of proof in establishing guilt rests with the Commonwealth. The quantum of proof necessary to satisfy this burden, which never shifts from the Commonwealth to the accused, is such that the fact-finder must be convinced beyond a reasonable doubt of the defendant's guilt.

Commonwealth v. Bishop, 372 A.2d 794, 796 (Pa. 1977). "Circumstantial evidence alone may be used to prove guilty beyond a reasonable doubt." Commonwealth v. Gearhart, 384 A.2d 1321, 1323 (Pa. Super. 1978). Pennsylvania Suggested Standard Criminal Jury Instruction 7.1, entitled "Presumption of Innocence – Burden of Proof – Reasonable Doubt" provides, in part, the following: "reasonable doubt is a doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his or her own affairs." Pa.SSJI (Crim) 7.01.

"An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court." Widmer, 744 A.2d at 751-752. The Widmer Court also noted that:

“Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that “notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice”

Id. at 752, citing Commonwealth v. Brown, 648 A.2d 1177, 1189 (Pa. 1994). “Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence.” Id. at 753. A verdict will only be deemed against the weight of the evidence “when the jury's verdict is so contrary to the evidence as to shock one's sense of justice.” Commonwealth v. Blakeney, 946 A.2d 645, 652 (Pa. 2008) citing Commonwealth v. Cousat, 928 A.2d 1025, 1036 (Pa. 2007). The trial judge “only possesses narrow authority to upset a jury verdict on a weight of the evidence claim” because “assessing the credibility of witnesses at trial is within the sole discretion of the fact-finder.” Blakeney, 946 A.2d at 652-653.

A review of the record reveals that the verdict was consistent with the law and that the Commonwealth met their burden of establishing that Defendant was guilty of the crimes for which she was convicted. For the sake of clarity, we will discuss why the verdict was appropriate by addressing the aggrieved insurance companies in turn.

(a) Philadelphia American Life Insurance Company (PALIC)

First, Defendant was convicted of several crimes against the Philadelphia American Life Insurance Company (“PALIC”).<sup>5</sup>

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<sup>5</sup> Defendant was convicted of the following crimes related to PALIC: One (1) Count of Insurance Fraud (Present False Claim), One (1) Count of Insurance Fraud (Prepare False Claim), One (1) Count of Criminal Attempt – Theft by Deception and One (1) Count of Forgery – Yanira Garay

Pursuant to 18 Pa.C.S.A. §4117 entitled "Insurance Fraud":

**(a) Offense defined.**--A person commits an offense if the person does any of the following:

(1)...

(2) Knowingly and with the intent to defraud any insurer or self-insured, presents or causes to be presented to any insurer or self-insured any statement forming a part of, or in support of, a claim that contains any false, incomplete or misleading information concerning any fact or thing material to the claim.

(3) Knowingly and with the intent to defraud any insurer or self-insured, assists, abets, solicits or conspires with another to prepare or make any statement that is intended to be presented to any insurer or self-insured in connection with, or in support of, a claim that contains any false, incomplete or misleading information concerning any fact or thing material to the claim, including information which documents or supports an amount claimed in excess of the actual loss sustained by the claimant.

(4)...

(5) Knowingly benefits, directly or indirectly, from the proceeds derived from a violation of this section due to the assistance, conspiracy or urging of any person.

18 Pa.C.S.A. §4117(a)(2),(3)(5).

Next, pursuant to 18 Pa.C.S.A. §901, entitled "Criminal Attempt":

**(a) Definition of attempt.**--A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step

**(b)** toward the commission of that crime.

18 Pa.C.S.A. §901(a). As Defendant was charged with Criminal Attempt – Theft by Deception, 18 Pa.C.S.A. §3922 defines "Theft by Deception" as:

**(a) Offense defined.**--A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally:

- (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise

18 Pa.C.S.A. §3922(a)(1).

Finally, Defendant was charged with the crime of Forgery. Pursuant to 18 Pa.C.S.A. §4101:

**(a) Offense defined.**--A person is guilty of **forgery** if, with intent to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:

- (1) ...

- (2) makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed; or

- (3) utters any writing which he knows to be forged in a manner specified in paragraphs (1) or (2) of this subsection.

Pa.C.S.A. §4101(a)(2), (3).

The Commonwealth's first witness was Carol Rose Heughan, a Senior Benefits Analyst with PALIC. The Commonwealth presented an application for long term care submitted to PALIC on behalf of Judi Grate. [N/T, 4/16/12, p. 42.]<sup>6</sup> Ms. Heughan testified that PALIC received invoices from December 2001 through the year 2005 listing a "Yanira Garay" as a caregiver and Certified Nurse Assistant (CNA) for Judi Grate. [Id. at 51-54.] Many of the invoices were entitled "Caregiver Assessment Report" and listed the date and times worked, the daily rate of pay, and the duties

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<sup>6</sup> Testimony from Day one (1) of trial will be cited as [N/T, 4/16/12, p. \_\_\_.]

allegedly performed by the listed CNA. *See Commonwealth's Exhibit 3.*<sup>7</sup> The duties allegedly performed by the CNA included: bathing, skin care, dressing, assistance with walking and toileting, meal preparation, etc. *See Commonwealth's Exhibit 3.* PALIC reimbursed Judi Grate based on the invoices submitted to the company. [Id. at 61.]<sup>8</sup> This meant that Judi Grate was "reimbursed" for the costs she allegedly incurred as a result of paying "caregivers" or "CNA's".

During Day Two (2) of Defendant's trial, the Commonwealth called Yanira Garay to testify. As indicated by the above-cited testimony, Ms. Garay's name was listed as a CNA on many of the invoices submitted to PALIC on behalf of Judi Grate. Ms. Garay, who was a CNA, did perform work for Judi Grate in 2001, which included preparation of food, cleaning, etc. [N/T, 4/18/12, p.165.]<sup>9</sup> After being terminated by Judi Grate in 2002, Ms. Garay did eventually work for Grate in 2007 for a couple of days. [Id. at 166-167.]<sup>10</sup> When questioned as to whether Ms. Garay ever signed home health care invoices, she testified as follows:

Q: But between 2002 and 2007, did you complete any of those receipts or invoices - -

A: No.

Q: Which are contained in that book? [referring to Commonwealth's Exhibit "3", which contains the PALIC invoices]

A: No.

Q: Did you have any signatures – did you sign any of these documents?

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<sup>7</sup> During the trial, the Commonwealth entered into evidence what was marked as Exhibit "3", which was a booklet of PALIC invoices submitted by Judi Grate.

<sup>8</sup> The Commonwealth entered into evidence what was marked as Exhibit "4", which was a spreadsheet of payments made by PALIC to Judi Grate.

<sup>9</sup> Testimony from Day two (2) of trial will be cited as [N/T, 4/18/12, p.\_\_\_\_.]

<sup>10</sup> Yanira Garay testified that she did not work for Judi Grate in the years 2003, 2004, 2005, 2006 and 2008.

A: There are some signatures, yes. But there are some that's --- actually, most of them, they're not mine.

Q: Okay. And you never authorized anybody to sign your name?

A: Never. No.

[Id. at 169-170.] A further review of the invoices revealed that Ms. Garay's name was spelled incorrectly on invoices. [Id. at 180.]

The testimony thus far revealed that PALIC received invoices on behalf of Judi Grate which indicated that Yanira Garay was her caregiver. However, Ms. Garay testified that she had not signed or completed many of those invoices.

Co-Defendant Melissa Bucano's testimony revealed that: (1) she in fact completed many of the invoices and signed these documents as "Yanira Garay", (2) she knew Judi Grate and (3) at the age of (14) or (15) began working with Grate and assisting her with the care of a woman by the name of Nancy Bradley. [N/T, 4/24/12, p.9-10.]<sup>11, 12</sup> Co-Defendant Melissa Bucano testified that she was "substituting" for caregivers, including Yanira Garay. [Id. at 11.] Co-Defendant Melissa admitted that "Since I was filling in for Yanira...I guess I checked things that I did for Nancy....the form it might have had Yanira...so she said to put who I was filling in for." [Id. at 14.] Further, while working with Ms. Bradley in the year 2003, co-Defendant Melissa estimated that she may have completed forms for Grate "ten (10) times" [Id. at 15.]<sup>13</sup>

Later in the testimony, after being asked whether she signed Yanira Garay's name, co-Defendant Melissa stated "I was filling in for them....", and later noted she

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<sup>11</sup> Defendant began working with Judi Grate in the year 2003, when she was 15.

<sup>12</sup> Testimony from Day five (5) of trial will be cited as [N/T, 4/24/12, p.\_\_\_\_.]

<sup>13</sup> Further testimony revealed that despite the fact that co-Defendant Melissa Bucano alleged she was assisting Judi Grate in the care of Nancy Bradley, co-Defendant Melissa admitted that she had no formal certified nurse training, nor was she trained in CPR. *See testimony of co-Defendant Melissa Bucano.*

didn't think it was wrong because "...Judi told me that's what, I was filling in for them, I didn't see anything wrong with it." [Id. at 56-57.] Additionally, many of the above-referenced invoices submitted to PALIC via fax had a header stating that the fax came from a "Justthewayouare". [Id. at 28.] Co-Defendant Melissa testified that "justthewayouare" was an online clothing and accessory business she ran. [Id.] Co-Defendant Melissa told the Court that the fax machine originally belonged to her and her mother, Defendant Bianca Bucano, but that "Judi's fax machine broke in her office and she asked us if she could use ours, so Judi had our fax machine." [Id.]

Special Agent Jennifer Harrison of the Pennsylvania Office of the Attorney General testified that she met with Defendant and co-Defendant Melissa Bucano in order to go through various invoices they claimed they had a part in writing. [N/T. 4/23/12,p.96.]<sup>14</sup> Special Agent Harrison went through invoice after invoice and Defendant and co-Defendant Melissa Bucano admitted that they had signed the name Yanira Garay and Claire [sic] Lewis. [Id. at 97.] Additionally, as part of her investigation, Special Agent Harrison reviewed the bank records of Defendant. [Id.] After review of the records, Special Agent Harrison discovered that a check made out to Judi Grate in the amount of \$2,680.23 from Life and Health of America, the company that was formerly PALIC, was endorsed by Judi Grate and Bianca Bucano and deposited into Defendant's account on January 8, 2003. [Id. at 97-98.]<sup>15</sup>

While Defendant argues that the verdict was against the weight of the evidence, the above-cited testimony and exhibits are more than sufficient evidence upon which the jury could determine that Defendant knowingly committed the crimes related to

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<sup>14</sup> Reference to Day Four (4) of the trial, held on April 23, 2012, will be cited as [N/T, 4/23/12, p.\_\_\_\_.]

<sup>15</sup> A copy of Defendant's bank records from Wachovia Bank was marked as Commonwealth's Exhibit 71 and admitted into evidence.

PALIC and Yanira Garay. The jury was well within its province to find that Defendant committed insurance fraud. The jury in this case presumably found that Defendant knew she was completing insurance documents containing false information regarding home health care services and that she forged Yanira Garay's name with an intent to defraud PALIC or assist Judi Grate in defrauding PALIC. Additionally, it was well within the province of the jury to decide that Defendant knowingly signed Yanira Garay's name without her authorization. Such findings are consistent with the evidence presented during trial and will not now be disturbed.

(c) Genworth

Next, the evidence also supports the jury's conclusion that Defendant committed unlawful acts related to Genworth<sup>16</sup> William Waters, an investigator with Genworth, testified that Judi Grate applied for and received a long term care insurance policy. [N/T, 4/16/12, p. 71-72.] Grate stated on the application that she did not need the assistance of a walker, wheelchair, etc, nor did she need supervision performing various tasks such as eating, walking, etc. [Id. at 73.] Mr. Waters testified that Genworth received Invoices for Independent Care submitted on behalf of Judi Grate listing Lucienne Bourjolly as the care provider. [Id. at 80-97.]<sup>17</sup> These forms listed the days and hours worked, the hourly and daily rate of pay, and the daily tasks allegedly performed by the caregiver. See *Commonwealth's Exhibit "7"*.

When Ms. Bourjolly was questioned regarding the home health care invoices, she testified as follows:

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<sup>16</sup> Defendant was convicted of the following crimes related to Genworth: One (1) count of Insurance Fraud – Present False Claim, One (1) count of Insurance Fraud – Prepare False Claim, and One Count of Insurance Fraud – Benefit from Proceeds.

<sup>17</sup> The invoices signed by "Lucienne Bourjolly" were submitted to Genworth in the years 2003, 2004, 2005 and 2006; Genworth reimbursed Judi Grate based on the figures provided in these invoices.

Q: Now ma'am, did you ever work for Judi Grate?

A: No, I never used to work for Judi Grate. I was just a friend of her [sic].

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Q: Did you ever sign any forms indicating that you provided home health care services for Judi Grate?

A: Never.

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Q: Did you ever sign any receipts indicating that you received money...?

A: Never.

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Q: Did you ever give anybody permission to ever sign your name to any forms, invoices or cash receipts?

A: I didn't know anybody in Pennsylvania, no.

[N/T, 4/19/12, p.42-43.]<sup>18</sup>

Next, Mr. Waters stated that Genworth also received home health care invoices signed by Yanira Garay. [N/T 4/16/12, p. 86-94.]<sup>19</sup> As we previously cited, Ms. Garay's testimony revealed that she had never submitted invoices on behalf of Judi Grate. Lastly, Mr. Waters testified that Genworth received Invoices for independent health care submitted on Judi Grate's behalf, listing a "Clara Lewis" as the care provider. [Id.

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<sup>18</sup> Reference to Day Three (3) of the trial, held on April 19, 2012, will be cited as [N/T, 4/19/12, p.\_\_\_\_.]

<sup>19</sup> The invoices signed by "Yanira Garay" were submitted to Genworth in the years 2004, 2005 and 2006.

at 99-100.]<sup>20</sup> The caregiver "Clara Lewis" indicated on the invoices that she was an employee of Judi Grate. [Id. at 102.]<sup>21</sup>

On March 12, 2007, Mr. Waters conducted an interview at Judi Grate's home, and while there, met a girl who identified herself as "Clara Lewis" and gave her address as 2211 Arlene Drive [Id. at 113-114.]<sup>22</sup> "Clara Lewis" told Mr. Waters that she was Judi Grate's caregiver and that she typically worked 9 a.m. to 3 p.m., seven (7) days a week with no days off. [Id. at 115-116.] Additionally, Clara described the activities she performed for Judi Grate, such as assistance with bathing, dressing, toileting, etc. [Id. at 116.] At trial, Mr. Waters identified co-Defendant Melissa Bucano as the "Clara Lewis" he met with in 2007. [Id.] Although co-Defendant, acting as Clara Lewis, told Mr. Waters the above-cited work schedule, video surveillance conducted on the home contradicted these assertions. [Id. at 117.]

Co-Defendant Melissa Bucano testified that Judi Grate offered to train her to become a CNA when she was 16 or 17 years old<sup>23</sup>. [N/T, 4/24/12, p. 17.] Judi Grate had co-Defendant Melissa Bucano complete "practice forms", to which co-Defendant Melissa Bucano stated:

A: When I went to her office to train she had forms filled out, names, addresses, time, like everything was filled out already, and she just said, and she gave me a blank form, she said copy this and put that on the blank form.

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<sup>20</sup> During Mr. Water's testimony, the Commonwealth referred to what was marked as Commonwealth's Exhibit "7", which was a booklet containing various invoices submitted to Genworth on behalf of Judi Grate.

<sup>21</sup> The Invoices signed by "Clara Lewis" were submitted to Genworth in the years 2007, 2008 and 2009; Genworth reimbursed Judi Grate based on the figures provided in these invoices.

<sup>22</sup> Throughout the course of the trial, evidence was presented that "2211 Arlene Drive" was the address of Defendant's son and co-Defendant's brother.

<sup>23</sup> Co-Defendant later testified that she believed she was "18 or 19" when she went to Judi Grate's house to complete forms. Co-Defendant was 19 in 2007.

Q: And what names were on the bottom of those forms...

A: Clara Lewis.

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Q: Do you remember what addresses you might have used?

A: ...I know I used 2211 Arlene Drive.

Q: And what's that address?

A: My brother's address.<sup>24</sup>

[Id. at 18-21.] Co-Defendant Melissa further admitted that she used her own phone number and address on many of the Genworth invoices. [Id. at 21.] Co-Defendant also testified that she completed the part of the form that asked for a list of daily tasks performed for the insured:

Q: Did she [Judi Grate] ever have you fill out the stuff on the side where you had to say what the reasons are for it?

A; Yes.

[Id. at 24.] Defense counsel also showed co-Defendant Melissa an invoice submitted to Genworth and she admitted that the handwriting was hers and that she had completed the form. [Id. at 25.]

Co-Defendant Melissa stated that when she went to Judi Grate's house to "train", Judi appeared "fine", and she was not using a cane or walker. [Id. at 35-36.] Melissa stated that when Genworth Investigator Mr. Waters arrived at Grate's home, she identified herself as Clara Lewis at the behest of Grate. [Id. at 37.] Even though co-Defendant Melissa claimed she thought the incident was "bizarre", she still

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<sup>24</sup> The brother to which co-Defendant was referring to is Christopher Bucano, who was also a co-defendant in this case. Christopher Bucano pled guilty to various charges related to the insurance fraud and is currently serving a period of incarceration in a State Correctional Institution.

continued to "train" with Grate. [Id. at 39.] She also stated that after the meeting with Mr. Waters, she signed pre-dated invoices with the name "Clara Lewis"; the forms Defendant signed were dated for 2008 and she testified that Judi Grate had already completed the forms. Further, co-Defendant Melissa testified that "just because it has that date doesn't mean that's when I did it, Judi had me pre-fill out things when I was training with her, she already had dates and everything in there." [Id. at 64.]

Special Agent Harrison testified that Clara Lewis and Defendant Bianca Bucano were listed as members on Judi Grate's American Express Gold Card Account.

[N/T, 4/23/12, p.77-78.] Special Agent Harrison reviewed Defendant's bank records, which indicated that there were checks deposited from the various insurance companies involved in this matter. [Id. at 98.] From the year 2002 through 2009, there appeared to be seven (7) different occasions where a check was deposited and the cash back was received. [Id.] Also, several checks from Judi Grate were deposited into Defendant's bank account. [Id. at 101.]

Special Agent Harrison testified that records also revealed that Defendant made several purchases, such as a \$2,000.00 clock, a \$14,000 John Deer Tractor, etc, which based on Defendant's income, seemed like "a lot" and "extravagant". [Id. at 124-125.] Further, Defendant Bianca Bucano testified that co-Defendant Melissa Bucano had use of all of her credit cards and used them to purchase items for herself. [N/T, 4/24/12, 172-173]. Additionally, much like the evidence supporting crimes against PALIC, Defendant and co-Defendant Melissa Bucano told Special Agent Harrison that they signed Genworth invoices with the names Claire [sic] Lewis, Yanira Garay and Lucienne Bourjolly. [N/T, 4/23/12, p.96-97.]

In light of the testimony at trial, we find that ample evidence exists to support the jury's finding that Defendant committed criminal acts involving Genworth. It was reasonable for the jury to find that Defendant committed Insurance Fraud by presenting a false claim, preparing a false claim, and benefiting from a false claim. Defendant openly admitted that she signed insurance forms with the name "Yanira Garay" and "Lucienne Bourjolly". It was within the province of the jury to decide that Defendant did this knowingly with the intent to defraud Genworth. Also, evidence revealed that Defendant was listed as a member on Judi Grate's business card account. Finally, it was reasonable for the jury to believe that Defendant benefitted from the proceeds of the insurance fraud based on Special Agent Harrison's investigation into the various purchases made by the Bucanos and the insurance checks deposited into Bianca Bucano's account. As such, we find no reason to disrupt the jury's findings.

**(d) AIG**

Defendant was convicted of one (1) count of Insurance Fraud – Present False Claim, One (1) count of Insurance Fraud – Prepare False Claim and One (1) count of Criminal Attempt – Theft by Deception related to AIG. Michael Linn, a litigation specialist with AIG testified that in 2002, Defendant filed a personal injury protection claim and an uninsured motorist claim as a result of an automobile accident that occurred nearly two (2) years prior. [N/T, 4/18/12, p.18.] Defendant submitted various "Homecare Caregiver Assessment" reports to AIG listing Yanira Garay as her caregiver. [Id. at 20.]<sup>25</sup> Defendant submitted these invoices from 2001-2004, all of

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<sup>25</sup> The AIG booklet of invoices was admitted into evidence as Commonwealth's Exhibit "18."

which listed days and times worked, duties performed and caregiver and patient's names and signatures. See *Commonwealth's Exhibit 18*.

Interestingly enough, Yanira Garay testified that although her name is listed as Bianca Bucano's caregiver, she did not know who Bianca Bucano was. [N/T 4/18/12, 168.] Additionally, despite Defendant signing Yanira Garay's name on various insurance documents, Ms. Garay testified that she had never met Defendant, nor had she ever heard her name. [Id. at 174.] As we previously discussed, Defendant admitted to Special Agent Harrison that she and her daughter, co-Defendant Melissa Bucano, signed forms with the name Yanira Garay. [N/T/, 4/23/12, p.96-97.] Defendant also testified that while co-Defendant Melissa was training with Judi Grate to become a CNA, she signed forms for Grate. [N/T, 4/24/12, p. 166.] During this time period, co-Defendant Melissa also testified that she signed various caregiver reports as "Yanira Garay". [N/T, 4/24/12, 9-10, 15, 56-57.] Again, Special Agent Harrison reviewed Defendant's bank records, which indicated that there were checks deposited from the various insurance companies involved in this matter and that Defendant made rather extravagant purchases considering her financial circumstances.

We incorporate the previously cited law on Criminal Attempt, Theft by Deception and Insurance Fraud for the purposes of this analysis. It was reasonable for the jury to determine that Defendant was guilty of the crimes committed against AIG because: (1) she knowingly and with the intent to defraud AIG presented claims stating that Yanira Garay was her caregiver despite the fact that this was false: (2) Defendant assisted daughter and co-Defendant Melissa Bucano in signing forms with the name Yanira Garay knowing this act was fraudulent; (3) Defendant benefitted

from the proceeds received from AIG and (4) Defendant allowed AIG to believe that Yanira Garay provided various enumerated caregiver services on her behalf. For the above-cited reasons, we find no reason to disrupt the jury's verdict.

(e) METLIFE

Defendant was charged with the following crimes related to the Metlife Insurance

Company: Insurance Fraud – Present False Claim, Insurance Fraud – Prepare False Claim, Insurance Fraud – Benefit from Proceeds, Theft by Deception and Criminal Attempt – Theft by Deception.

Leslie Bonito was a Senior Claims Analyst with Metlife when Defendant applied for and received a long-term care policy in the year 2004. [N/T, 4/18/12, p.41.] The form asked several medical questions, most notably, whether the applicant had a history of cancer, to which Defendant answered no.<sup>26</sup> [Id. at 45.] Despite this answer, Defendant testified that she previously had thyroid cancer. [N/T, 4/24/12, 116.] Only five (5) months after applying for the policy, Defendant filed a claim in May of 2004 and continually filed claims through 2009. [N/T, 4/18/12, p.46-47.] All of Defendant's invoices were submitted with the header "J. Grate Home Healthcare Services". [Id. at 48.] The forms submitted to Metlife listed care providers as Yanira Garay and Kim Benn. See *Commonwealth's Exhibit 25*.

Subsequently, Kim Benn testified that she had never been employed by J.Grate Home Services Company and never provided care to Defendant. [N/T, 4/18/12, p.140-141.] While receipts indicated Ms. Benn was paid by Judi Grate for services provided

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<sup>26</sup> MetLife Claim forms for the years 2004-2009 were contained in a booklet collectively marked as Commonwealth's Exhibit "25".

to Defendant, Ms. Benn denied this allegation. [Id. at 141.] Further, Ms. Benn never authorized anyone to sign her name on Metlife documentation. [Id. at 141-142.]

Special Agent Harrison testified that during her investigation of Defendant, she discovered that Defendant and her family had taken a trip to Disney World in June of 2005. However, despite this fact, Defendant submitted invoices to Metlife stating that she received home health care services from Yanira Garay during this time. [N/T 4/23/12, p.82-83.] Also, Defendant submitted documents to Metlife indicating that her son, Christopher Bucano, had provided her home health services on a variety of occasions. [Id. at 83-87.] However, Special Agent Harrison discussed several instances when Christopher Bucano was not available and was not capable of providing the services listed on the home health care invoices.

More specifically, Christopher Bucano attended Magisterial District Court for a Preliminary Hearing on July 24, 2009 and again on August 14, 2009 to enter a guilty plea. [Id. at 84-85.] On September 13 and 14<sup>th</sup> of 2009 and again on August 5<sup>th</sup> and 6<sup>th</sup> of 2009, Christopher Bucano was incarcerated at the Monroe County Correctional Facility. [Id. at 83-87.] From May 28, 2009 to June 2, 2009, Christopher Bucano was admitted to Pocono Medical Center. [Id.] Significantly, Defendant submitted invoices to Metlife indicating that her son Christopher was actually providing home health services to her on the above-referenced days. It is clear that Christopher Bucano would not have been able to provide Defendant with services while he attended Court, was incarcerated or admitted to the hospital.

As we previously stated, Defendant and co-Defendant already admitted to forging caregiver reports as various individuals during the time caregiver reports were

submitted to Metlife. Caregiver reports submitted to MetLife in the year 2008 listing "Yanira Garay" and "Kim Benn" as caregivers contained headers reading "J. Grate Home Health Services". [N/T, 4/19/12, 6-8.] Further, the reports listed a patient address as "2 Harvest Hill Drive" located in Effort, Pennsylvania. [Id. at 8-9.]<sup>27</sup> Co-Defendant Melissa Bucano testified that she completed various insurance forms for Judi Grate during this time period and that many of the forms were pre-dated for the year 2008. [N/T, 4/24/12, 39, 64.]

Based on the evidence and the above-cited facts, it was reasonable for the jury to find Defendant guilty of all the charges associated with Metlife. First, it was within the discretion of the jury to find that Defendant committed various acts of insurance fraud related to Metlife. There was sufficient evidence that Defendant knowingly presented a false claim to Metlife with the intent to defraud the company when she presented or caused to be presented caregiver reports with the forged signatures of Yanira Garay and Kim Benn. Further, Defendant presented reports that contained various caregiver tasks that were allegedly performed knowing that this information was false. Co-Defendant Melissa Bucano admitted that she signed insurance documents as various caregivers, including Yanira Garay, and that she completed the substantive section of the forms alleging tasks performed when they were not. Additionally, Defendant submitted invoices to Metlife stating that her son Christopher performed services for her despite the fact that he was either in Court, in jail or at the hospital.

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<sup>27</sup> Notes of Testimony revealed that "2 Harvest Hill Drive" in Effort, Pennsylvania was Defendant's address.

It was also reasonable for the jury to find that Defendant knowingly conspired with Judi Grate with the intent to defraud MetLife when she and daughter and co-Defendant Melissa prepared caregiver reports that contained false information, namely, forged signatures. Co-Defendant Melissa testified that she "trained" with Judi Grate, and that in doing so, she forged caregiver signatures on caregiver reports because Judi Grate had told her to do so. There was sufficient evidence for the jury to find that Defendant knew the caregiver reports she signed with her daughter were false.

Further, there was sufficient evidence to show that Defendant benefitted from the proceeds derived from the insurance fraud. The Commonwealth established that Defendant received nearly \$320,000.00 as a result of caregiver reports submitted to MetLife. [N/T, 4/24/12, 174.] We previously cited the testimony of Special Agent Jennifer Harrison, who testified to the various "extravagant" purchases made by Bianca Bucano, such as a tractor, a clock, etc. Additionally, Defendant admitted that she "paid her children" from the proceeds received from MetLife. [Id. at 172-173.]

Defendant also testified to the following:

Sometimes if they [referring to her children, including co-Defendant Melissa] needed cash they took the cash out, they would have my card, they would take the cash, whatever they needed, whatever they needed. That's the way my family is, when my daughter was the caregiver she had my card, all of my kids had the card, they ordered stuff on the internet, they used the account number, that's how we are as a family.

[Id. at 175.] It was reasonable for the jury to find that Defendant benefitted from the MetLife proceeds.

Finally, it was well within the province of the jury to find Defendant guilty of Theft by Deception and Criminal Attempt-Theft by Deception as it relates to MetLife. As we stated in regards to the similar charge for AIG, there was sufficient evidence that Defendant attempted to intentionally deceive MetLife when she created the false impression that she needed home health services and that these services were being provided by Yanira Garay, Kim Benn and Christopher Bucano. For the above-cited reasons, we find no reason to disrupt the jury's verdict that Defendant was guilty of the charges associated with MetLife.

(f) Pennsylvania Commission on Crime and Delinquency (PCCD)

Defendant was convicted of one (1) count of Theft by Deception for actions committed against the Pennsylvania Commission on Crime and Delinquency (PCCD). Cynthia Minnich worked in the legal office at PCCD when Defendant filed a claim for compensation. [N/T, 4/16/12, p.140.]. Defendant submitted invoices to PCCD "in support of the request for payment for home care" [Id. at 143.] In the year 2002, Defendant submitted invoices listing Yanira Garay as her care provider. [Id. at 144.] In 2003, Defendant submitted invoices listing Yanira Garay and son Christopher Bucano as caregivers. [Id. at 147-148.] In 2004 and 2005, Defendant submitted invoices listing Yanira Garay and Kim Benn as caregivers. [Id. at 151-161.] The invoices often listed caregivers working anywhere from eight (8) hour to ten (10) hour days. [Id. at 157.] The above-referenced invoices contained the header "J.Grate Home Health Services." [Id. at 151-155.] Further, many of Defendant's invoices were faxed from "Barnyard Kids". [Id. at 158.] In total, Defendant received \$35,000.00 from PCCD, the maximum amount allowable.

While defense counsel would like us to believe that the conviction for crimes related to PCCD was against the weight of the evidence, the facts clearly support a conviction. As we have previously mentioned, Yanira Garay testified that she did not know Defendant and certainly did not work as her caregiver. Despite this fact, Defendant listed Yanira Garay as a "caregiver" who provided her services over the course of several years upwards of ten (10) hours a day. In 2004 and 2005, Defendant listed Kim Benn as a caregiver; however, Ms. Benn did not know Defendant. During direct examination, Kim Benn testified as follows:

Q: And do you know anybody by the name of Judi Grate?

A: No, I don't.

Q: Do you know anybody by the name of Bianca Bucano?

A: No.

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Q: Have you been employed by J.Grater Home Services Company?

A: No.

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Q: Have you ever provided healthcare services on behalf of Judi Grate Home Health Services to Bianca Bucano.

A: No.

Q: Have you ever been paid any money for providing home healthcare services on behalf of Judi Grate for Bianca Bucano?

A: No.

Q: Did you ever sign any healthcare receipts that you were paid by Judi Grate for Bianca Bucano?

A: No.

Q: Did you authorize anybody to sign your name?

A: No.

[N/T, 4/18/12, p. 140-141.] Additionally, while Defendant submitted invoices claiming her son, Christopher Bucano provided home healthcare services in 2002, Christopher was actually incarcerated at the Monroe County Correctional Facility when he allegedly provided these services. [N/T, 4/23/12, p.86.] Additionally, invoices that were submitted to PCCD came from a "Barnyard Kids". Special Agent Harrison testified that Defendant filed an application for a fictitious name with the Pennsylvania Department of State for the name Barnyard Kids. [Id. at 80-81.]

Based on the above-cited facts, it was reasonable for the jury to find Defendant guilty of Theft by Deception for her acts against PCCD. As we previously stated, Theft by Deception is defined as follows:

**(a) Offense defined.**--A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally:

- (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise

18 Pa.C.S.A. §3922(a)(1). It is undisputed that Defendant obtained money from PCCD as a result of the invoices submitted to PCCD. Further, Defendant did so by deception because she created the false impression that she received home healthcare services from various caregivers, when in fact, these alleged caregivers had never even met Defendant. For the above-cited reasons, we find no reason to

disrupt the jury's verdict that Defendant was guilty of Theft by Deception against PCCD.

Defendant's final argument related to the weight of the evidence is that she cannot be guilty of a "corrupt organization" when every member of the group testified that they did not know Defendant. Despite this argument, a clear reading of the "Corrupt Organization" statute, as well as relevant case law, shows that Defendant need not "know" all of her co-conspirators in order to be found guilty of the charges.

Pursuant to 18 Pa.C.S.A. § 911, entitled "Corrupt Organizations", the law states, in relevant part, the following:

**(b) Prohibited activities.--**

(3) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

(4) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (1), (2) or (3) of this subsection.

**(h) Definitions.--**As used in this section:

(1) "**Racketeering activity**" means all of the following:

(i) An act which is indictable under any of the following provisions of this title:

Chapter 39 (relating to theft and related offenses)

Section 4117 (relating to insurance fraud)

Section 5111 (relating to dealing in proceeds of unlawful activities)

(iii) A conspiracy to commit any of the offenses set forth in subparagraph (i).....

(3) “**Enterprise**” means any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce and includes legitimate as well as illegitimate entities and governmental entities.

(4) “**Pattern of racketeering activity**” refers to a course of conduct requiring two or more acts of racketeering activity one of which occurred after the effective date of this section.

18 Pa.C.S.A. § 911(b)(3), (4), and (h).

While there is no case law regarding 18 Pa.C.S.A. 911 (b)(4) and whether Defendant must know her co-conspirators, the case law on general conspiracy is instructive. The Superior Court of Pennsylvania thoroughly addressed the law on conspiracy in Commonwealth v. Ruiz, 819 A.2d 92 (Pa. Super. 2003):

To sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and, (3) an overt act was done in furtherance of the conspiracy. This overt act need not be committed by the defendant; it need only be committed by a co-conspirator.

The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation.

The conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt.

Commonwealth v. Ruiz, 819 A.2d 92, 97 (Pa. Super. 2003) *citing* Commonwealth

v. Johnson, 719 A.2d 778, 784-785 (Pa. Super. 1998.) Further,

The general rule of law pertaining to the culpability of conspirators is that each individual member of the conspiracy is criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy. The co-conspirator rule assigns legal culpability equally to all members of the conspiracy. All co-conspirators are responsible for actions undertaken in furtherance of the conspiracy regardless of their individual knowledge of such actions and regardless of which member of the conspiracy undertook the action.

Ruiz, 819 A.2d at 98, *citing* Commonwealth v. Lambert, 795 A.2d 1010, 1016-1017

(quoting Commonwealth v. Galines, 786 A.2d 1001, 1001 (Pa. Super. 2001).

Based on the statutes and cited case law, the Commonwealth clearly proved the criminal acts of Judi Grate and Melissa Bucano. It was also reasonable for the jury to find that Defendant agreed to commit criminal acts with Judi Grate and/or Melissa Bucano. There is no requirement that Defendant herself commit all of the criminal acts. Based on the evidence presented at trial, a jury could infer that a corrupt organization existed of which Defendant was a part. The rule is very clear: defendant shall be held criminally responsible for the acts of her co-conspirators.

As we previously explained, Defendant was involved in a conspiracy with co-defendant Melissa Bucano, as well as Judi Grate. The Commonwealth presented an abundance of evidence implicating Judi Grate in this massive insurance fraud scheme. Additionally, the Defendant's own testimony was substantial enough to convince a jury that she worked with Judi Grate to defraud insurance companies. While Defendant denies any criminal intent, it was well within the discretion of the jury to find that

Defendant did intend to commit criminal acts or assist Judi Grate in the commission of these acts.

### **Failure to Sustain Objections**

Defendant's fourth argument is that the Court improperly admitted evidence as it relates to the crimes of persons other than Defendant and further erred in failing to sustain the numerous and continuing objections as they related to the evidence and testimony probative only of the crimes of Judi Grate. We disagree.

Pursuant to the Pennsylvania Rules of Evidence, "relevant evidence" means 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., Rule 401. The rules of evidence go on to state that "[a]lthough relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E., Rule 403. The official comment to Rule 403 defines "unfair prejudice" as "a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E., Rule 403 Explanatory Comment – 2012.

In the instant case, Defendant, through counsel, made several objections to evidence related to the crimes of co-defendant Judi Grate. First, Defense counsel objected to the testimony provided by representatives of the various insurance companies from which Judi Grate held long term care policies. Additionally, counsel objected to documents related to these various insurance companies, such as

receipts, invoices, etc. More specifically, Defense counsel began by objecting to the testimony elicited from Carol Rose Heughn, a Senior Benefits Analyst for the Philadelphia American Life Insurance Company (hereinafter, "PALIC"). Ms. Heughn testified that Judi Grate (hereinafter, "Grate") had applied for a long term care policy which would reimburse Grate for any monies paid to caregivers. [N/T, 4/16/12, p. 42-43.] Throughout this testimony, the Commonwealth admitted into evidence invoices allegedly signed by Grate's caregivers. Next, Counsel objected to the testimony of William Waters of Genworth Financial (hereinafter, "Genworth"). Again, Grate applied for a long term care policy, with a reimbursement structure similar to that of the PALIC policy. [Id. at 70.] Mr. Waters testified that Grate submitted several receipts to Genworth as "proof of loss", which was intended to show that Grate had paid caregivers directly, and was now seeking reimbursement for those payments. [Id. at 79-80.]

Next, Defense counsel objected to the testimony of several witnesses who claimed they knew Grate. These individuals testified that they never signed the invoices submitted to the insurance companies, despite the fact that their names were included on various invoices submitted by Grate. Defendant also objected to the testimony of Isabelle Grimm, who performed cleaning work for Grate on three (3) separate occasions. [N/T, 4/18/12, p.120-121.] Ms. Grimm stated that although Grate submitted invoices to Genworth with her name on them, she never signed the documents, nor did she authorize Grate to do so on her behalf. [Id. at 121-122.] Defense Counsel next objected to the testimony provided by Commonwealth witnesses Lucienne Bourjolly, Brigid Hess, and Barbara Rollins, all of whom were

acquainted with Grate. Ms. Bourjolly testified that she never signed any insurance forms, despite the fact that Grate submitted invoices to Genworth bearing Ms. Bourjolly's alleged signature. [N/T, 4/19/12, p. 41-48.] Similarly, Brigid Hess testified that although she had performed minimal housekeeping working for Grate, she never signed the invoices submitted to PALIC. [N/T, 4/23/12, p. 4-19.] Finally, Defense counsel objected to the testimony provided by Barbara Rollins, who stated that she signed insurance forms that were ultimately submitted to PALIC; however, she testified that it was Grate who completed the substantive sections of the form, which listed the duties performed by the policyholder's caregiver. [Id. at 22-35.]

Lastly, Defendant objected to the testimony provided by Commonwealth witnesses Kenneth Carroll and Matt Evans, who conducted surveillance on Grate on behalf of International Claims Specialist Merrill Group (hereinafter, "ICS Merrill"). Mr. Carroll observed Grate walking with the assistance of a cane and/or walker to an attorney's office; however, he later observed Grate walking without the benefit of an assistive device. [N/T, 4/18/12, p.182-188.]

When Defense counsel first noted their objections, we stated on the record our reasons for allowing all of the above-referenced testimony:

MR. WATKINS: Your Honor, for the record, I'd just like to object to the relevance of document number 1 [Judi Grate's application for a long term care policy with PALIC], it has to do with Judi Grate, she's not a defendant in this matter, I don't think it's relevant to Bianca Bucano or to Melissa - -

THE COURT: Counsel approach.  
(The following sidebar discussion was held)

THE COURT: Your objection is on relevance?

MR. WATKINS: Yes.

MR. VENTRELLA: This is a long trial, if we have to do every single Judi Grate document - -

THE COURT: Exactly, so that's my point, they are charged with corrupt organizations and Judi Grate was involved in that corrupt organization, to the extent you're going to object on that basis throughout trial, I'll note a standing objection.

MR. WATKINS: Thank you, Your Honor.

THE COURT: But it's overruled.

[N/T, 4/16/12, p. 43-44.]

We incorporate by reference the above-cited corrupt organization statutes. When it comes to judicial rulings on evidence, the Pennsylvania Supreme Court has held that "[t]he admissibility of evidence is a matter committed to the sound discretion of the trial court; an appellate court may reverse a trial court's ruling only upon a showing that the trial court abused its discretion." Commonwealth v. Hawk, 709 A.2d 373, 376 (Pa. 1998).

Defendant was charged with the crimes of "Corrupt Organizations" under subsections (b)(3) and (b)(4) as a result of her association with several co-defendants, most notably, Judi Grate and her "enterprise" J. Grate Home Health Services. Therefore, the Commonwealth had to establish Judi Grate's involvement in the criminal enterprise as part of their case-in-chief. In order to be convicted under the corrupt organizations statute, Defendant need only be associated with or conspire to participate in an enterprise engaged in a pattern of racketeering. It is clear that the testimony and exhibits regarding Judi Grate's crimes were relevant to the Defendant's criminal case.

For example, in the Commonwealth's Amended Criminal Information, Count 1: Corrupt Organizations, it is alleged that:

On or about and between June 4, 2000 and January 31, 2010, the defendant, Bianca Bucano employed by or associated with an enterprise, conducted and participated directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity; to wit, the defendant, Bianca Bucano, was associated with an enterprise consisting of a group of individuals engaged in commerce and consisting of....Judi Louise Grate....and the defendant...did conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity...

[Amended Criminal Information, 9/13/11, p.1.]<sup>28</sup> In addition, Count Two (2) of the Amended Criminal Information charges Defendant with conspiring to violate the above cited section of the Corrupt Organization statute and contains similar allegations. Evidence of Judi Grate's criminal acts make the allegations that a criminal enterprise existed, that Defendant was associated with this criminal enterprise, that Defendant conspired to participate in the conduct of the enterprise's affairs through a pattern of racketeering activities, and that Defendant participated in fraudulent acts more probable than if the jury were presented with no evidence regarding the crimes of co-defendant Grate.

Judi Grate was viewed as an integral part of the enterprise and the conspiracy to operate the enterprise's affairs, and Defendant was alleged to have worked with Grate in order to defraud various insurance companies. Defendant received information from Judi Grate which allowed her to commit the crimes for which she is charged. More specifically, Defendant received the names of alleged "caregivers", such as Yanira Garay and Lucienne Bourjolly and subsequently forged their names on false insurance documents. The Commonwealth had to present evidence of Judi

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<sup>28</sup> Reference to the Commonwealth's Amended Criminal Information, filed on September 13, 2011, will be cited as [Amended Criminal Information, 9/13/11, p.\_\_\_\_.]

Grate's crimes in order to establish the existence of the enterprise and the Defendant's participation and acts of conspiracy with respect to the enterprise. The probative nature of the testimony regarding Grate's crimes clearly outweighs any potential unfair prejudice that could have resulted because Defendant was alleged to have agreed to commit insurance fraud with Judi Grate.

Based on the above-referenced reasoning, there was no abuse of discretion. The decision to allow testimony and exhibits related to Grate's crimes was based on the nature of the charges facing Defendant. As such, we find no error in our decision to continually overrule counsel's objections related to the relevance of documents and testimony regarding Judi Grate's crimes, and we respectfully request the Superior Court affirm our decision.

#### **Improper Remarks during Closing**

Defendant's fifth argument is that the Attorney for the Commonwealth, in his closing, made statements that were conclusive on the issue of the Corrupt Organization that were not in any way supported by the evidence. We disagree.

Pursuant to Pa.R.Crim.P. Rule 604,

(B) When the evidence is concluded, each party shall be entitled to present one closing argument to the jury. Regardless of the number of defendants, and whether or not a defendant has presented a defense, the attorney for the Commonwealth shall be entitled to make one argument which shall be made last.

Pa.R.Crim.P. Rule 604(b). In order to properly object to the Commonwealth's closing arguments, the Pennsylvania Superior Court has held:

Defense counsel has the obligation of setting forth in context and with sufficient illumination the statements he deemed offensive and prejudicial so an appellate

court could make an intelligent judgment as to the nature and possible effect of the comments.

Commonwealth v. Leymeister, 428 A.2d 176, 178 (Pa. Super. 1981) *citing*

Commonwealth v. Banks, 311 A.2d 576, 580 (Pa. 1973). (internal quotations omitted).

The Leymeister Court further stated "defense counsel has the burden of not only making a timely objection during the prosecutor's closing but also of placing the challenged remarks on the record." Leymeister, 428 A.2d at 178.

In the instant case, Defense counsel failed to raise any objection to the Commonwealth's closing argument. Although the state Supreme Court has found that defense counsel need not enter an immediate objection and can reserve the objection until the conclusion of the prosecuting attorney's argument, this is not the situation in the case *sub judice*. See Commonwealth v. Kuebler, 399 A.2d 116, 118 (Pa. 1979). At no point did Defendant object, and therefore the issue is waived. However, in the interest of justice and for the purpose of judicial economy, we will address the merits of this issue.

"A prosecutor 'must limit his statements to the facts in evidence and legitimate inferences therefrom.'" Leymeister, 428 A.2d 176 at 177, *citing* Commonwealth v. Revty, 295 A.2d 300, 302 (Pa. 1972). The standard for reviewing a prosecutor's remarks during closing arguments is as follows:

In reviewing prosecutorial remarks to determine their prejudicial quality, comments cannot be viewed in isolation but rather, must be considered in the context in which they were made. Generally, comments by the district attorney 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 the defendant so that they could not weigh the evidence objectively and render a true verdict. The initial determination whether the prosecutor's remarks were unfairly prejudicial rests within the sound discretion

of the trial court and our [the Superior Court's] inquiry of necessity must turn to whether an abuse of discretion was committed.

Commonwealth v. Correa, 664 A.2d 607, 609 (Pa. Super. 1995) *citing*

Commonwealth v. Jubilee, 589 A.2d 1112, 1114 (Pa. 1991) (citations omitted).

"The remedy to be applied in each case is within the discretion of the trial judge."

Commonwealth v. Williams, 433 A.2d 505, 508 (Pa. Super. 1981).

Commonwealth v. Williams, 433 A.2d 505, 508 (Pa. Super. 1981).

In the instant case, Defense counsel did not specifically articulate which of the Attorney General's closing comments he believed to be unsupported by the evidence, so after a review of the record, we will take our best guess as to which remarks Defense counsel finds improper. In particular, we believe defense counsel may be objecting to the following three sections of the Commonwealth's closing argument:

In addition, ladies and gentlemen, the Commonwealth proved beyond a reasonable doubt that the defendants, Bianca Bucano and Melissa Bucano, engaged in her scheme and assisted Judi Grate, by completing and signing caregiver invoices and receipts.

[N/T, 4/25/12, p.74.]

It doesn't have to be that we're dealing with the Mafia, it doesn't have to be that these people all know one another, they are all part of a common plan and scheme in this case where they're submitting the documentation that goes to the insurance company...

[Id. at 79]

...it's not a Mafia case, it's not a case of drug dealing, what is it a case of, it's insurance fraud, and we have to talk about predicate offenses, and the predicate offenses is it's consistent, over years, almost a decade, of filing false claims, a theft by deception and insurance fraud, and that's what a corrupt organization is, it's an organization, and information, Bianca Bucano relied on the resources of Judi Grate, and Judi Grate initially started filing the false claims, but the person that perfected it was Bianca Bucano.

[Id. at 82.]

Even if Defendant had preserved this issue on appeal, it lacks any arguable merit. Based on the above-cited passages from the Commonwealth's closing arguments and reviewing the remarks in context, we do not find that the Commonwealth made inappropriate remarks that would jeopardize Defendant's right to a fair and impartial jury deliberation. The previously-cited evidence clearly indicates that Defendant associated with Judi Grate. Further, Defendant admitted during direct examination that she signed insurance forms with the names Yanira Garay and Lucienne Bourjolly. Additionally, it was reasonable, based on the evidence presented, that Defendant Bianca Bucano perfected the insurance scheme when she submitted "J. Grate" invoices with the forged signature of Yanira Garay as her caregiver. The numerous exhibits submitted by the Commonwealth indicated that the fraud occurred over an extended period of time. We see nothing prejudicial about the closing arguments, as the evidence fairly supports these remarks, and as such, it would have been inappropriate to sustain any related objections.

#### **Denial of Omnibus Pretrial Motion**

Defendant's sixth argument on appeal is that the Trial Court erred in denying her Omnibus Pre-trial Motion. This Court thoroughly addressed Defendant's Omnibus Pretrial Motion by Order dated July 5, 2011, as well as an Opinion and Order dated September 7, 2011. As such, we refer the Superior Court to those Opinions and Orders and the issues will not be further addressed in this Opinion.

#### **Request for Recusal**

Defendant's seventh argument is that this Court erred in refusing a request for recusal. We disagree.

Pursuant to 207 Pa. Code § 111 entitled "Recusal", the Code provides, in relevant part, the following:

Recusal is an official means by which a member may disqualify himself or herself from participating in a pending matter. In this regard members shall be guided by Rule 5(C) of the Rules Governing the Conduct of Members of the Court of Judicial Discipline, pertaining to disqualification.

207 Pa. Code § 111. According to the Pennsylvania Supreme Court, "recusal has been a matter of individual discretion or conscience and only the jurist being asked to recuse himself or herself may properly respond to such a request." Commonwealth v. Jones, 663 A.2d 142, 143 (Pa. 1995). "Moreover, recusal is further unwarranted where...there has been no allegation or showing of any specific prejudgment or bias against petitioner." Id. at 145. See also Commonwealth v. Darush, 459 A.2d 727, 731 (Pa. 1983). Further, "this Court...stated that the Fourteenth Amendment Due Process provision is offended where the jurist has a '*direct, personal, substantial, pecuniary interest.*'" Id. (internal citations omitted).

In the Code of Judicial Conduct, Canon 3, 42 Pa.C.S.A., entitled "Judges should perform the duties of their office impartially and diligently", it provides, in relevant part, the following:

The judicial duties of judges take precedence over all their other activities. Their judicial duties include all the duties of their office prescribed by law. In the performance of these duties, the following standards apply:

**C: Disqualification**

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

(a) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding

Code of Judicial Conduct, Canon 3, 42 Pa.C.S.A.

In the case at bar, Defendant requested the undersigned recuse herself from presiding over Defendant's criminal case. This Court subsequently denied Defendant's recusal request. A lengthy discussion was placed upon the record regarding Defendant's request for recusal during which the Court placed its reasons for denial of the motion on the record, and no further recitation will be made here. We clearly stated on the record the reasons why we could be fair and impartial in the Defendant's criminal case. Further, Defendant failed to aver that this Court showed specific prejudgment or bias against her. Based on the reasons stated on the record, in addition to the fact that this Court found that it could be fair and impartial, denial of the recusal request was proper. As such, we find no error in our decision to deny Defendant's Request for Recusal and respectfully request the Superior Court affirm our decision.

**Jury Instruction**

Defendant's eighth argument is that the Court erred in failing to give the jury instruction requested by defense counsel as it relates to the failure of the Commonwealth to call Judi Grate as a witness. We disagree.

Pursuant to the Rules of Criminal Procedure,

(A) Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge's rulings on all written requests

and which instructions shall be submitted to the jury in writing. The trial judge shall charge the jury after the arguments are completed.

Pa.R.Crim.P 647(a). As for jury instructions, “[o]nly where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.”

Commonwealth v. Jones, 668 A.2d 491, 518 (Pa.1995). Further, the Pennsylvania Superior Court has stated that “[t]he relevant inquiry for this Court when reviewing a trial court's failure to give a jury instruction is whether such charge was warranted by the evidence in the case.” Commonwealth v. Baker, 963 A.2d 495, 507 (Pa. Super. 2008) *citing Commonwealth v. Boyle*, 733 A.2d 633, 639 (Pa. Super. 1999).

“Our Supreme Court has articulated what has come to be known as the ‘missing witness’ adverse inference rule as follows”:

When a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not merely be cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference that it would have been unfavorable.

Commonwealth v. Evans, 664 A.2d 570, 573 (Pa. Super. 1995), *citing Commonwealth v. Manigault*, 462 A.2d 239, 241 (Pa. 1983) (quotations, citations and emphasis omitted). The Evans Court also described circumstances that would preclude issuing the missing witness instructions:

1. The witness is so hostile or prejudiced against the party expected to call him that there is a small possibility of obtaining unbiased truth;
2. The testimony of such a witness is comparatively unimportant, cumulative, or inferior to that already presented;
- 3. The uncalled witness is equally available to both parties;**
4. There is a satisfactory explanation as to why the party failed to call such a witness;

5. The witness is not available or not within the control of the party against whom the negative inference is desired; and,

6. The testimony of the uncalled witness is not within the scope of the natural interest of the party failing to produce him.

Evans, 664 A.2d at 573-574. See Commonwealth v. Boyd, 514 A.2d 623, 626

(Pa.1986) *appeal denied*. Also, “[i]n order for the ‘missing witness’ adverse inference rule to be invoked against the Commonwealth, the witness must be available only to the Commonwealth and no other exceptions must apply.” Id. at 574.

In the instant case, Defendant requested the Court charge the jury with Criminal Jury Instruction 3.21, entitled “Failure to Call Potential Witness.” The jury instruction reads as follows:

1. There is a question about what weight, if any, you should give to the failure of [a party] [the Commonwealth] [the defendant] to call [a person] [name of person] as a witness.

2. If [however] three factors are present, and there is no satisfactory explanation for a party’s failure to call a potential witness, the jury is allowed to draw a common-sense inference that [his] [her] testimony would have been unfavorable to that party. The three necessary factors are:

*First*, the person is available to that party only and not to the other;

*Second*, it appears the person has special information material to the issue; and

*Third*, the person’s testimony would not be merely cumulative.

3. Therefore, if you find these three factors present, and there is no satisfactory explanation for the [party’s] [Commonwealth’s] [defendant’s] failure to call [a person] [name of person] to testify, you may infer, if you choose to do so, that [his] [her] testimony would have been unfavorable to [that party] [the Commonwealth] [the defendant].

Pa.SSJL (Crim) 3.21.

Based on the facts of this case, there was no need to read Criminal Jury Instruction 3.21. We stated, on the record, the following:

THE COURT: ...defendant requests standard jury instruction 3.21 on the failure to call Judi Grate, that is denied, that party is available to all parties, not just the Commonwealth, which is the first necessary factor that must be met, she could have been called, so that will be denied.

[N/T, 4/25/12, p.19.]<sup>29</sup> At no point did Defendant allege that Judi Grate was unavailable as a defense witness. Although the Commonwealth chose not to call Judi Grate as a witness, there is no indication that anything prevented defense counsel from utilizing her as a witness on behalf of his client. Nothing on the record establishes that Judi Grate was only available as witness for the Commonwealth. Judi Grate was an available witness, but certainly did not meet the standard of "necessary". Not only was a reading of Criminal Jury Instruction 3.21 unnecessary, it would have been improper based on the availability of Judi Grate as a Defense witness. As such, we find no error in our decision to deny Defendant's request to instruct the jury on the failure of the Commonwealth to call Judi Grate as a witness and we respectfully request the Superior Court affirm our decision.

### **Motion to Sever**

Defendant's ninth and final argument is that this Court erred in failing to grant Defendant's pretrial Motion to Sever. We disagree. Defendant first raised her Motion to Sever in her Omnibus Pretrial Motion filed on June 22, 2011. In our Opinion and Order dated September 7, 2011, in discussing the Motion to Sever, we directed Defendant to our Opinion and Order dated February 9, 2011 regarding co-Defendant

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<sup>29</sup> Reference to Day (6) of trial, held on April 25, 2012, will be cited as [N/T, 4/25/12, p.\_\_\_\_.]

Grace John's similar Motion to Sever, which we incorporated therein. For the purposes of Defendant's appeal, we again cite to our February 9, 2011 opinion addressing co-Defendant Grace John's Motion to Sever. (See attached)<sup>30</sup> Based on the reasons cited within our February 9, 2011 opinion, we see no reason to disrupt our denial of Defendant's Motion to Sever, and as such, we request the Superior Court affirm same.

BY THE COURT:

  
JENNIFER HARLACHER SIBUM, J.

Dated: 4.15.13

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<sup>30</sup> Attached to this Opinion is this Court's February 9, 2011 opinion in which we addressed the Motion to Sever filed by co-Defendant Grace John, docketed at 783 CR 2010.