NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
ADAIN PUENTES,	:	
Appellant	:	No. 3218 EDA 2010

Appeal from the Judgment of Sentence entered on November 5, 2010 in the Court of Common Pleas of Philadelphia County, Criminal Division, No. CP-51-CR-0310981-2006

BEFORE: MUSMANNO, WECHT and PLATT*, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: March 11, 2013

Adain Puentes ("Puentes") appeals from the judgment of sentence imposed after he was convicted of possession with intent to deliver a controlled substance, possession of a controlled substance, possession of drug paraphernalia, and criminal conspiracy.[1] We affirm.

The pertinent facts and procedural history of this case were set forth by the trial court in its Opinion, which we adopt for the purpose of this appeal. ***See*** Trial Court Opinion, 3/21/12, at 1-7.

On appeal, Puentes raises the following issues:

> 1. Whether the trial court [erred] by denying [Puentes's] [M]otion to sever because [Puentes's] defenses were divergent at their core and [Puentes] claimed that he did not possess narcotics and there was no evidence to tie [Puentes] to the 70 grams of heroin in the house…[?]

[1] 35 Pa.C.S.A. § 780-113(a)(30), (a)(16), (a)(32); 18 Pa.C.S.A. § 903(a)(1).

*Retired Senior Judge assigned to the Superior Court.

> 2. Whether there was insufficient evidence to find [Puentes] guilty of possession with intent to deliver heroin because the 70 grams found in the house could not be attributed to [Puentes?]

Brief for Appellant at 2.

Puentes first asserts that the trial court erred by denying his Motion to sever. He contends that joinder of his trial with that of his co-defendant caused him to suffer prejudice that exceeded "the general prejudice any defendant suffers when the Commonwealth's evidence links him to a crime." ***Id.*** at 14.

"The decision on whether to grant a motion for severance rests within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion." ***Commonwealth v. Payne***, 760 A.2d 400, 404 (Pa. Super. 2000).

After reviewing the record, we conclude that the trial court did not abuse its discretion in denying Puentes's Motion for severance. The trial court has thoroughly addressed this issue, and we adopt its Opinion for the purpose of this appeal. ***See*** Trial Court Opinion, 3/21/12, at 9-16.

Puentes next contends that the evidence was insufficient to support his conviction of possession with intent to deliver heroin. Puentes asserts that the heroin that was recovered in his co-defendant's residence could not be attributed to him.

We have reviewed the record, and conclude that the evidence was sufficient to support Puentes's conviction of possession with intent to deliver.

The trial court has thoroughly addressed this issue, and we adopt the trial court's Opinion for the purpose of this appeal. ***See*** Trial Court Opinion, 3/21/12, at 16-20.

Judgment of sentence affirmed.

S77004-12

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	**CP-51-CR-0310981-2006**
	:	
vs.	:	
	:	**SUPERIOR COURT**
ADAIN PUENTES	:	**NO. 3218 EDA 2010**

OPINION

MAZZOLA, WILLIAM, J. **MARCH , 2012**

I. INTRODUCTION AND PROCEDURAL HISTORY

This is a direct appeal from a judgment of sentence entered on November 5, 2010. The defendant/appellant, Adain Puentes, was arrested on October 27, 2005, and charged with Possession with Intent to Manufacture or Deliver a Controlled Substance (PWID)[1], Intentional Possession of a Controlled Substance[2], Possession and Use of Drug Paraphernalia[3], and Criminal Conspiracy[4]. He and a co-defendant, Jose Vargas[5], who faced the same charges, were alleged to have been found to have engaged in activities and been in possession of heroin in sufficient quantity to allow an inference of an intent to deliver. The drugs were claimed to have been recovered from both this defendant's person and from Vargas's residence which they were both found to be using as their drug storage place. He was unable to meet bail, but following a series of speedy trial motions which were denied, and an appeal to this Court, at 93 EDM 2006, which reversed, he was released on nominal bail. On April 23, 2007, he filed a suppression motion which was denied at a hearing on May 25th; that is not at issue in this appeal.

[1] *35 Pa.C.S. § 780-113(a)(30).*
[2] *35 Pa.C.S. § 780-113(a)(16).*
[3] *35 Pa.C.S. § 780-113(a)(32).*
[4] *18 Pa.C.S. § 903(a)(1).*
[5] CP-51-CR-0310982-2006.

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On November 5, 2007, defendant filed a Supplemental Omnibus Pre-Trial Motion requesting a severance, in which the codefendant joined, which was denied at a hearing on December 5th. They were tried nonjury on February 2, 2009, and found guilty of all charges. At a sentencing hearing on November 5, 2010,[6] after having reviewed the Presentence and Mental Health Evaluation Reports, and hearing the defendant's brief allocution, the court imposed concurrent sentences of a minimum of seven (7) to a maximum of fourteen (14) years' incarceration for the PWID and Conspiracy, the other Possession being merged, and no further penalty imposed for the Paraphernalia, with credit for time served. No Post Verdict Motions were filed. Defendant filed a Notice of Appeal *pro se* on November 17th, and present counsel was appointed on December 1st. On December 9th, the court issued and served an Order Pursuant to *Pa.R.A.P. 1925(b)* directing the defendant to file a Concise Statement of Errors Complained of on Appeal within thirty (30) days, to which the defendant responded *pro se* on December 22nd alleging that the drugs found were not his, he was unaware of them, did not own or reside at the address where they were found, and that he wished to question the legality of the search warrant used to find them.[7] On April 15, 2011, the court granted defense counsel's request for an extension of time to file the *Statement*, in order to locate the notes of testimony; it was filed on January 30, 2012, and raises the following issues:

> 1. Whether the trial judge erred by denying the defendant's objection to the hearsay testimony of Philadelphia Police Officer Brian Reynolds who related that co-defendant Vargas yelled "no la casa, no la casa" to a woman who identified herself as Joanne Santiago. This information was used to obtain a search warrant for 3229 Hartville Street where 70 grams of heroin were found. (N.T. Trial, 12/5/07, pp. 12-17)
>
> 2. Whether the trial judge [erred] by denying the defendant's motion to sever because the appellant's [and the codefendant's] defenses were divergent at their core and the defendant claimed that he did not possess narcotics and there was no

[6] The sentencing had to be delayed a number of times due to the defendant's failure to appear and to attend the Mental Health Evaluation, but he eventually did both; Vargas was not present or sentenced at this hearing.
[7] This document was apparently sent only to the trial judge and was not filed with the court.

evidence to tie the defendant to the 70 grams of heroin in the house. The co-defendant's defense was that he was there to purchase drugs from the [*sic*] Mr. Puentes (N.T. Trial, 12/5/07, pp. 4-8)

3. Whether there was insufficient evidence to find the defendant guilty of possession with intent to deliver heroin because the 70 grams found in the house could not be attributed to the defendant. (N.T. Trial, 12/5/07, pp. 12-18)

Concise Statement of Matters Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b).

II. FACTUAL HISTORY

The defendants did not speak English and a Spanish interpreter was utilized. After the defendants were colloquied to ascertain their knowing waiver of a jury trial, the evidence in the order presented at trial can be summarized as follows. It was first stipulated that the amount of narcotics that were found in the building, as opposed to those that were found outside, were sufficient to establish possession with intent to deliver. *N.T., Trial (Waiver), February 2, 2009, p. 11.* The Commonwealth then called Officer Reynolds who testified that on October 27, 2005, he was on duty with the Narcotics Field Unit and at about eight o'clock (8:00) p.m. he arrived at the 3200 block of Hartville Street; the police had received information that an Hispanic male would be delivering a quantity of heroin to that address. *Id., 12-3.* Shortly upon his arrival, he observed the defendants exit a residence at 3229 Hartville and walk to the corner at Allegheny Avenue; there, Vargas produced a white bag from his jacket pocket and handed it to Puentes who placed it by a fence. *Id., 13-4.* Approximately five minutes later, Reynolds had a confidential informant (CI) approach the defendants and engage them in a conversation, after which Puentes went to the fence, retrieved the bag, brought it back to the CI and showed him its contents; the CI then displayed a prearranged signal upon which Reynolds and his backup converged on the defendants. *Id., 13-5.* Upon seeing them approach, Puentes threw the bag into the air and started running; Vargas did not try to leave and was apprehended immediately. The spilled contents of the bag was about seven (7) grams of heroin which was retrieved from the ground. *Id., 15.*

Reynolds was then approached by a woman who identified herself as Joanne Santiago, who apparently was indicating something about the residence from which the defendants had exited, at which time Vargas started yelling "no la casa" to her repeatedly; Puentes was apprehended up the street and other items were recovered from his person. *Id., 15-6.* A search warrant was obtained and executed and, from a back room behind a garage on the premises, were recovered a Paluzzo electronic scale and approximately seventy (70) grams of heroin. *Id., 16-7.* It was then pointed out that, when the CI first approached the defendants, all three were engaged in the conversation, but after Puentes had returned with the bag and showed the informant the contents, only those two appeared to continue to engage in a discussion. *Id., 18.*

The Officer then testified that his incident report contained the defendants' names and dates of birth, with Vargas' address being the residence in question but Puentes' being 3221 D Street; he stated that he obtained that information from them, but then mentioned that "We had Vargas' wife interpret." *Id., 20.* Both defendant's objected, Vargas' attorney stating that these alleged statements were not disclosed in discovery, of which the court took note and held in abeyance pending further development. *Id., 20-1.* The officer then disclosed that it was Santiago who translated the defendants' self identifications; he apparently only presumed her to be Vargas' wife, and she was not present at trial. The officer was not asked, nor did he volunteer, how he came to make that assumption, nor was Santiago's identity or any other connection with the incident, the residence, or the defendants ever established. Naturally the court sustained the objections. *Id., 21-22.* It would not have mattered anyway because the defendants were obviously otherwise identified.

On cross examination by Puentes' attorney, it was disclosed that the CI was not provided with any money or instructions to actually purchase any drugs; the plan was solely to commence an appearance of a buy without consummating it and that the arrests would occur as soon as the

informant saw the drugs and signaled. *Id., 22-3.* It was then established that the officer was too far away to hear the first conversation between both defendants and the CI, that while Puentes was showing the CI the contents of the bag and conversing with him the second time, Vargas had moved away and appeared to be acting as a "lookout", that no transaction was actually completed, and that the officer did not speak or understand Spanish and was told by other officers that "no la casa" meant "no house". *Id., 24-6.* It was then shown that the notes of testimony from a preliminary hearing described Reynolds as saying that Vargas yelled "no mi casa" rather than "no la casa", but he maintained that Vargas had said the latter. *Id., 26-7.* The house was then secured and Reynolds saw the items in the house before the warrant was obtained but he did not seize them until after. *Id., 27-8.* Defendant's counsel then asked to be allowed to renew the suppression motion based on this information, claiming that it was his understanding that the previous one, which was presented by prior counsel, was only based on the four corners of the warrant, as opposed to a warrantless search, to which the court responded that its notes on the motion hearing indicated the contrary and denied the request. *Id.* Since defense counsel did not raise any of this in his *1925(b) Statement*, neither the search, the warrant, nor the refusal to suppress are at issue here. It was then noted that the defendant did not have any money on him when he was arrested. *Id., 29.*

On cross examination by Vargas' attorney, it was established that, while the defendants were both seen exiting the house at the same time, it was not until they were outside that Vargas was seen to hand the bag to Puentes, the attorney characterizing this as: "So he was in the house maybe a minute before he decided to hand the bag to the codefendant, but he decided to come outside where he could be in view of you to hand the bag to the codefendant; is that right?" to which the officer responded "Correct." *Id., 29-30.* The officer then agreed that Vargas was not engaged in the conversation with the CI and Puentes when the contents of the bag were being

shown and the signal was given, that while Puentes ran away upon seeing the police approach, Vargas did not, there was no money found on Vargas, and no proof of his residing at the house, such as mail, was found. *Id., 31-2.* On redirect, the officer testified that Santiago had come from the premises in question. *Id., 32-3.* At the court's request, the interpreter explained that "no la casa" means "not the house" and "no mi casa" means "not my house". *Id., 33.* It was then stipulated that another police officer would testify that he stopped Puentes and recovered a shopping bag containing new and used glassine packets, that one of the bags found at the scene contained 5.893 grams and another contained 65.57 grams of heroin, and that a police expert in narcotics sales would affirm that the quantity of drugs[8], the packaging and the scale that were found, together with all of the circumstances, would indicate possession with intent to deliver. *Id., 34-5.* The parties then rested and presented closing arguments. *Id., 36-42.* The court then found them guilty of all charges, stating in response to defense counsel's query, that they were found to have been in possession of all of the drugs found. *Id., 42-3.*

At sentencing, the Judge noted and took into consideration a letter that he had received from the defendant *pro se* explaining his failure to appear for his previous sentencing hearing; in it, he claimed to have returned to his home in the Dominican Republic to aid his terminally ill father and had voluntarily returned and turned himself in to address his legal affairs. *N.T., Sentencing, November 5, 2010, pp. 4-5.* His allocution was basically that he was a lifelong drug addict and came to the sentencing "voluntarily looking for help to treatment court." *Id., 7.* His attorney agreed that, for sentencing purposes, the conviction was a second offense, the quantity of drugs involved exceeded the amount requiring a mandatory seven (7) year sentence, and that such a sentence would still be below the mandatory minimum, thus, in effect, requesting the court to impose that minimum sentence, which the court did; the court also acceded to the

[8] It was not clarified whether that referred to all of the drugs or just those found in the house.

defendant's personal request and directed supervision by the Department of Probation and Parole Drug Unit and that the sentence be served at The State Correctional Institute at Chester because of its drug treatment program, though he was also found to be ineligible for consideration under the Recidivism Risk Reduction Incentive Act, *61 Pa.C.S. 4501-12,* due to the seven (7) year term. *Id., 6-10.* The defendant does not raise any objections to the sentencing.

III. DISCUSSION

A. Hearsay Objection

Defense counsel's account of this incident in the *1925(b) Statement* is not quite accurate, which is understandable since she was not trial counsel and the testimony is somewhat confusing. After he described recovering the bag and the spilled heroin that the defendant had thrown in the air, Officer Reynolds's testimony went as follows:

> A. . . . Recovered from the ground was approximately seven grams of heroin. As we were still on the scene . . . a woman who was later identified as -- if I may.
> MR. SAGOT [Defendant's Counsel]: Objection.
> MR. LEVIN [Codefendant's Counsel]: That's hearsay. She's not present.
> MR. SAGOT: And it's prejudicial as well, Your Honor.
> MR. LEVIN: Whatever I don't have an opportunity to cross-examine that witness.
> THE COURT: I'll let him say the name. We'll see what the next question is.
> THE WITNESS: She identified herself as Joanne Santiago, at which time, Vargas started to yell no la casa, no la casa at her.
> THE COURT: Who did it? Vargas?
> THE WITNESS: Yes. Puentes was stopped down the street by Officer Hardy and items were later turned over to me by Hardy that he recovered from Puentes. At that time, we got a search warrant for the property of 3229 Hartville Street, Your Honor, and at approximately 10:28 of '05 at 1:15 a.m., we executed search warrant 120911, and recovered from a back room that was behind the garage --
> MR. SAGOT: Objection at this point, Your Honor, unless the Officer witnessed the confiscation or made the confiscation himself. This is trial.
> MR. SCHULTZ [Prosecutor]: This is the officer who recovered these items . . .
> MR. SAGOT: That's all I ask.
> THE COURT: Fine. [The Officer then describes the scale and the heroin]

N. T., Trial (Waiver) Volume I February 02, 2009, pp. 15-17. Thus, there was no objection to the Officer's describing what Vargas said, which would have been properly overruled in any

event as it was a direct quote and was either an admission or a declaration against interest, and it was not Santiago's nor the other nontestifying police officers' interpretations that were used to translate his statements into the record, it was the court interpreter's. The above objection was directed to the Officer's recounting what was found in the house which was withdrawn once counsel was advised that the Officer himself made those observations. While it's true that the Officer did not know what Vargas's statements meant, there certainly is no prohibition against his quoting exactly what he heard a party say even though he doesn't understand the words, as long as that subsequent in court interpretation confirms it's highly probable accuracy by demonstrating that it did have congruous meaning. Moreover, the statement had nothing to do with this defendant; it only implicated Vargas. And, contrary to counsel's assertion, there is no indication that his statement was used to secure the search warrant. Reading the testimony as a whole, the actual unstated indication is that the warrant was secured solely based upon the defendants' actions as witnessed by the police. The hearsay objection that was made concerned what turned out to be Santiago's assistance in identifying the defendants, and that objection was, in fact, sustained.

> Q. Officer, if you could, what information did you have on the offender information field.
> A. The date of birth of Jose Vargas, which is 2-2-65 as well as the address being 3229 Hartville Street. Adain Puentes, date of birth being 7-15-57 and the address given, 3221 D Street. . . .
> Q. Officer, that information, where did you receive that information from?
> A. From each of the defendants. We had Vargas' wife interpret.
> MR. SAGOT: Objection.
> MR. LEVIN: Objection. Judge, I further object in that the statement, if this information was allegedly taken in a statement from the defendant. No statement made by client [*sic*] was ever passed in discovery. Any information contained in such alleged statement I ask be precluded at trial.
> THE COURT: Let's explore it or you will at cross-examination. Depending upon what develops, you can renew the objection. Go ahead.
> MR. SAGOT: Please note that I join in that, Your Honor.
> THE COURT: Okay.
> BY MR. SCHULTZ:

Q. On the offender information in this field, where did you receive that information?
A. From each of those males through Joanne Santiago who interpreted it for us.
MR. SAGOT: Objection.
THE COURT: Sustained. You can't tell us what she said.
MR. SCHULTZ: I believe what the Officer was alluding to was that this information was interpreted to him.
THE COURT: He didn't say that.
MR. SCHULTZ: That's what he was trying to.
MR. SAGOT: He's leading his own witness.
MR. LEVIN: Not only that, Judge, then it's definitely hearsay because the interpreter or this person who allegedly --
THE COURT: I sustained the objection.

Id., pp. 20-2. Thus, there is no basis whatsoever for this claim; the description of the alleged erroneous event as presented by the defendant in the *Statement* simply did not occur. The objections were not directed to the Officer quoting Vargas saying "no la casa", but to his quoting Santiago who was quoting the defendants. Therefore, since neither he nor Vargas actually objected to the Officer quoting Vargas, an objection which would have been properly overruled anyway, and the actual objection that was made, to the Officer's repeating what Santiago said, was sustained, and the quote from Vargas had no probative or any other value with regard to this defendant's guilt, and only minimal value, if any, with regard to Vargas, the defendant has nothing of which to complain in this appeal.[9]

B. Severance

At the hearing on their motions to sever, both defendants' counsel asserted, essentially, that each of them would be claiming that he was only a buyer and that the other was the seller; they declined, however, to produce any evidence of those claims and neither defendant testified at trial. This defendant's counsel claimed that his client would "potentially" testify that he was not the dealer "that day", was not found to be in possession of any drugs, and had no connection with the drugs found in the house. *N.T., Motion, December 5, 2007, pp. 7-8.* Counsel for Vargas

[9] Even if the events as described by defense counsel had occurred and were improper, *de minimis non curat lex* would certainly apply as they would have been clearly harmless.

asserted that he would claim that he was only a purchaser "that day", as no drugs, money, or packaging were found on him, and the only reason he entered the house was to purchase drugs from the defendant who was the dealer. *Id., 8.* This, of course, ignores all the evidence that clearly showed that they were working together and exhibited equal access to and control over the drugs. While it is true that only Vargas was apparently living at the house where most of the drugs were recovered, it was this defendant who took charge of them when they went outside, placed the stash by the fence, retrieved it to show to the CI in an obvious attempt to make a sale, and threw it away and started running as soon as the police appeared. The applicable *Rules* state:

> **Rule 582. Joinder--Trial of Separate Indictments or Informations**
>
> (A) Standards
>
> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
>
> (b) the offenses charged are based on the same act or transaction.
>
> (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. . . .
>
> **Rule 583. Severance of Offenses or Defendants**
>
> The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

Pa.R.Crim.P., 42 Pa.C.S. In claims of error in applying either rule, the standards are:

> The decision to grant or deny a motion for severance is committed to the sound discretion of the trial court, reversal of which is proper only in the event of an abuse of that discretion. *Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367, 1373, cert. denied, 502 U.S. 959, 116 L. Ed. 2d 442, 112 S. Ct. 422 (1991).* While joint trials are preferred in those cases in which conspiracy is charged and the evidence against one actor is the same or similar to that presented against the

other actor, the law is also clear that severance is required whenever codefendants intend to present antagonistic defenses. *Id.* However, "the mere fact that there is hostility between the defendants, or that one may try to save himself at the expense of another, is in itself not sufficient grounds to require separate trials." *Id. See also Pa.R.Crim.P. 583* (severance may be ordered if prejudice established).

In this case, Hetzel surely attempted to place the blame on Bloss throughout the joint trial. She offered witnesses in support of her theory of the case and testified in a manner consistent with her innocence and her husband's guilt. However, Bloss did not present a defense that was antagonistic to Hetzel's defense. Indeed, he offered no witnesses in defense and did not testify on his own behalf. In her brief, Hetzel repeatedly refers to Bloss's defense, despite the fact that he did not present one. There was no evidence offered against Hetzel by Bloss. Every witness that testified contrary to Hetzel's interest was a Commonwealth witness. Hetzel makes specific reference to Cara Judd, the woman who testified that Hetzel confessed the crime to her. But Judd was a Commonwealth witness; she did not appear on Bloss's behalf.

The law requires that in order to warrant severance, a co-defendant must show a "real potential for prejudice" from a joint trial; speculation that prejudice may result is not enough, nor is mere hostility between defendants. *Commonwealth v. Jones, 542 Pa. 464, 668 A.2d 491, 501 cert. denied, 519 U.S. 826, 136 L. Ed. 2d 45, 117 S. Ct. 89 (1995).* The decision to deny the severance motion in this case was not an abuse of discretion. [Footnote omitted]

Commonwealth v. Hetzel, 2003 PA Super 100, 822 A.2d 747, 763, appeal denied, 576 Pa. 711, 839 A.2d 351 (2003) and by sub nomine, Commonwealth v. Bloss, 576 Pa. 710, 839 A.2d 350 (2003). This ruling has been consistently applied in conspiracy situations, such as where both defendants claimed they did not participate in burglaries (*Commonwealth v. Hamm, 325 Pa.Super. 401, 473 A.2d 128, 132-3 (1984)*) and even where some of the charges vary. *Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820, 822 (1954), cert. denied, Kloiber v. Pennsylvania, 348 U.S. 875, 75 S. Ct. 112, 99 L. Ed. 688 (1954).*

"[Q]uestions of consolidation or severance of defendants for trial rests [sic] in the discretion of the trial court and will not be reversed in the absence of an abuse of that discretion." *Commonwealth v. Norman, 272 Pa.Super. 300, 306, 415 A.2d 898, 902 (1979).* "[T]he burden is on appellant to show that there was a substantial prejudice to him as a result of the refusal to sever." *Commonwealth v. Iacino, 265 Pa.Super. 375, 385, 401 A.2d 1355, 1360 (1979).* "[A] joint trial [is] permissible, if not advisable, when the crimes charged grew out of the same acts and much of the evidence is necessary or applicable to [all] defendants."

Commonwealth v. Jackson, 451 Pa. 462, 464, 303 A.2d 924, 925 (1973), quoting *Commonwealth v. Kloiber,* [*supra*]. The American Bar Association Minimum Standards for Criminal Justice Relating to Joinder and Severance suggest consideration of the following factors which, if present, recommend a severance: "(1) whether the number of defendants or the complexity of the evidence as to the several defendants is such that the trier of fact probably will be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant; (2) whether evidence not admissible against all the defendants probably will be considered against the defendant notwithstanding admonitory instructions; and (3) whether there are antagonistic defenses." Commentary to Standard 2.3(b). See also Pa.R.Crim.P. 1127, 1128.

Because there were in the case *sub judice* only two defendants and the evidence was neither complex, confusing nor admissible against only one defendant, we agree with the trial court that the case was one wherein the jury could "distinguish the evidence and apply the law intelligently as to the charges against each defendant." There was no abuse of discretion in consolidating for trial the charges against William and Charles Fields. Such a consolidation was in the interest of judicial economy and did not unfairly prejudice either appellant.

Commonwealth v. Fields, 317 Pa.Super. 387, 464 A.2d 375, 380-1 (1983). "The assertion of a better chance of acquittal if tried separately does not meet this burden. *Commonwealth v. Iacino,* [*supra*]; *Commonwealth v. Shriner, 232 Pa.Super. 306, 332 A.2d 501 (1974).*" *Commonwealth v. Katsafanas, 318 Pa. Super. 143, 464 A.2d 1270, 1278 (1983).*

In the instant matter appellants correctly assert that the probability of antagonistic defenses is a factor which the trial court should consider in deciding whether to grant severance. *Commonwealth v. Morales, 508 Pa. 51, 494 A.2d 367 (1985).* However, more than a bare assertion of antagonism is required. *Id.* The mere fact that there is hostility between defendants, or that one may try to save himself at the expense of another, is in itself not sufficient grounds to require separate trials. *See Commonwealth v. Bennie, 352 Pa.Super. 558, 508 A.2d 1211 (1986). See also United States v. Provenzano, 688 F.2d 194* (3d Cir.), *cert. denied, 459 U.S. 1071, 103 S.Ct. 492, 74 L.Ed.2d 634 (1982).* In fact, it has been asserted that the fact that defendants have conflicting versions of what took place, or the extents to which they participated in it, is a reason for rather than against a joint trial because the truth may be more easily determined if all are tried together. *Ware v. Commonwealth, 537 S.W.2d 174 (Ky.1976). See, generally,* 2 La Fave and Israel, Criminal Procedure § 17.2 (Third Edition).

Instant appellants' claim of antagonism falls within this latter category. Neither Chester nor Laird denied involvement in the killing of Anthony Milano. Rather each man claimed that the other had slashed Milano's throat. (N.T. 5/18/88

at p. 480.)[3] These assertions, while inconsistent, do not rise to the level of antagonism that requires severance. Defenses become antagonistic only when the jury, in order to believe the essence of testimony offered on behalf of one defendant, must necessarily disbelieve the testimony of his co-defendant. *United States v. Berkowitz, 662 F.2d 1127 (5th Cir.1981)*. In this case the jury was not faced with such a dilemma. Both men conceded their participation in the killing and disputed only their respective acts in furtherance thereof. Appellants' claim of error with respect to the denial of severance must therefore fail.

3 Although Laird does not specifically testify to this fact, his position can be inferred from the averments in his brief. *See* Brief of Appellant Laird at p. 28.

Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367, 1373 (1991), cert. denied, Laird v. Pennsylvania, 502 U.S. 849, 112 S. Ct. 152, 116 L. Ed. 2d 117 (1991) and Chester v. Pennsylvania, 502 U.S. 959, 112 S. Ct. 422, 116 L. Ed. 2d 442 (1991). The scenario in *Chester* is materially identical to that here. While here neither defendant testified, their attorneys asserted that they would each have claimed that they were simply the purchaser and the other was the dealer, thus, as with Chester and Laird, admitting participation in the crime, but simply claiming the other was the one that committed the deadly act, the possession and attempted sale.

> We conclude that Appellant was not entitled to severance on any of the theories which he advances in this appeal. Separate trials of co-defendants should be granted only where the defenses of each are antagonistic to the point where such individual differences are irreconcilable and a joint trial would result in prejudice. This determination is left to the discretion of the court which balances the inconvenience and expense to the government of separate trials against prejudice to the defendants in a joint trial, and the burden is on the movant to show prejudice. Prejudice, moreover, should be real, not fanciful, and must be considered together with the desirability of joint trials. Mere inconsistency in defenses is insufficient to denote potential prejudice. The evidence, on the contrary, must be of such a nature and quality that while it will be introduced against one defendant, it will not be admissible against others. Where the jury will infer justifiably that the conflict alone demonstrates that both are guilty, separate trials should be provided by the court. *Commonwealth v. Jackson, 451 Pa. 462, 303 A.2d 924 (1973)*; *Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820 (1954)*, cert. denied, *348 U.S. 875, 75 S.Ct. 112, 99 L.Ed.2d 688 (1954).*
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> * * *
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> Mere fingerpointing alone -- the effort to exculpate oneself by inculpating another -- is insufficient to warrant a separate trial. This particular rule is bracketed by one of our most ancient decisions, *Commonwealth v. Place, 153 Pa. 314, 26 A.*

620 (1893) (fingerpointing actually lightens the burden on the prosecution), and our most recent, [*Commonwealth v.*] *Patterson,* [*519 Pa. 190,*] *546 A.2d* [*596*] *at 599-600.* In the absence of manifest prejudice where the movant is unable to demonstrate the existence of antagonistic or irreconcilable defenses, therefore, our law does not approve of separate trials. On the contrary, the general policy of the law is to encourage joint trials in order to avoid the expense of duplicating evidence in a separate proceeding. *Patterson, 546 A.2d at 600.*[4]

> 4 We hasten to add that the same rules governing severance of defendants where substantive crimes are charged apply with equal vigor to charges of conspiracy. In addition to *Patterson, 546 A.2d at 600*, see *Commonwealth v. Jackson, 451 Pa. 462, 303 A.2d 924 (1973)* (joint trials for conspiracy are advisable). In accord with our law is *United States v. DiPasquale, 561 F.Supp. 1338 (E.D. Pa. 1983)*, aff'd. *740 F.2d 1282 (3rd. Cir. 1984).*

Commonwealth v. Lambert, 529 Pa. 320, 603 A.2d 568, 573-4 (1992). Like the above defendants, this one merely alleges that the mere fact that he and his codefendant intended to blame the other demonstrates prejudice; this precise argument has been repeatedly found to be completely insufficient in meeting the burden to prove actual prejudice.

> With the foregoing [*Tolassi, supra,* manifest abuse standard for reversal on appeal] in mind, it is clear that the court did not abuse its discretion in denying appellant's motion to sever his trial from co-defendant's. The evidence against appellant was virtually identical to the evidence against co-defendant, and the Commonwealth's case against one defendant exactly the same as against the other. And, while appellant alleged that consolidation of trials against both defendants would unfairly prejudice him, appellant failed to inform the court as to the nature of that prejudice. Similarly, appellant does not now state with particularity the manner in which he may have been prejudiced by consolidation of trials, but instead argues abstractly that his defense was "inconsistent" and in "conflict" with co-defendants'.
>
> The probability of antagonistic defenses is *one* of the factors that a court should *consider* in deciding whether to grant severance. *See, e.g.,* [*Hamm, supra*]; ABA Standards for Criminal Justice Relating to Joinder and Discovery § 13-3.2(c) and Commentary. However, more than a bare assertion of antagonism is required. In the instant case, not only does appellant fail to indicate the manner in which his defense "conflicted" with co-defendants', the record does not support an inference that he was hindered in any way from presenting whatever defense he wished to present. Neither defendant took the stand to testify. Both defense attorneys vigorously attacked the credibility of the Commonwealth witnesses. Co-defendant Cobo's defense was that Lisa Colon named Cobo as the murderer because he had jilted her and in order to protect her brother. Appellant's defense

> was that Lisa named him because she was protecting her former lover Cobo as well as her brother. While these defenses might be seen as mildly antagonistic, in important respects they complement each other. That their defenses may have been mildly antagonistic did not, in and of itself, pose such a significant possibility of prejudice to appellant in this case so as to require the court to grant the motion to sever. Joinder was most appropriate, therefore, and the court did not abuse its discretion in denying the motion to sever.

Commonwealth v. Morales, 508 Pa. 51, 494 A.2d 367, 372-3 (1985).

At the motion hearing, the defendant cited the *Bennie* case, cited in *Chester, supra*, as requiring severance because his and the codefendant's ". . . defenses are, at their core, divergent . . ." *N.T., Motion, December 5, 2007, p. 6.* However, there, as here, the defendant failed to demonstrate actual prejudice.

> . . . Secondly, defendant claims he was prejudiced by the consolidation because one of the co-defendant's alibi witnesses implicated the defendant, acting alone, in the robbery. Consolidation is proper unless the defenses are "irreconcilable and exclusive". *U.S. v. Desimone, 660 F.2d 532 (5th Cir.1981).* The defenses must conflict at the core; mere divergence on peripheral matters or mere hostility between co-defendants does not require severance. *U.S. v. Provenzano, 688 F.2d 194 (3rd Cir.1982).* Here, only one of the co-defendant's witnesses directly implicated the defendant.[6] Neither defendant relied primarily upon establishing the other's guilt in presenting a defense; instead, they focused on challenging the strength of the Commonwealth's case. Moreover, the trial court found as a fact that the witness' adverse testimony was "neither raised nor foreseen at the time of the severance motion." Trial counsel was not ineffective for failing to file a severance motion.
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> > 6 It is difficult to understand how defendant can claim he was prejudiced by this witness. The jury convicted both appellant and his do-defendant, obviously rejecting the testimony of the witness.

Id., A.2d at 1215. All of the principles concerning this issue as set forth in the above citations were emphatically reiterated in *Commonwealth v. Housman, 604 Pa. 596, 986 A.2d 822 (2009)*: "Regardless of the reasoning behind the jury's verdict, the fact the co-defendants blamed one another is insufficient to warrant separate trials based on antagonistic defenses. . . . Indeed, if truth is the goal, having all the fingerpointing before the same fact-finder is quite efficacious." *Id., A.2d at 834.* The facts in those cases are directly comparable to those here. Moreover, the

fact that neither defendant here actually presented any evidence or did any finger pointing only demands that those principles be applied all that much more.

C. Sufficiency of the Evidence

> The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence. *Commonwealth v. Nahavandian, 2004 PA Super 136, 849 A.2d 1221, 1229-30 (Pa. Super. 2004)* (citations omitted). Furthermore, when reviewing a sufficiency claim, our Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

> *Commonwealth v. Robinson, 2003 PA Super 61, 817 A.2d 1153, 1158 (Pa. Super. 2003),* quoting *Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745 (2000).* However, "the inferences must flow from facts and circumstances proven in the record, and must be of such volume and quality as to overcome the presumption of innocence and satisfy the jury of an accused's guilt beyond a reasonable doubt." *Id.*, quoting *Commonwealth v. Scott, 409 Pa. Super. 313, 597 A.2d 1220, 1221 (Pa. Super. 1991).* "The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fail even under the limited scrutiny of appellate review." *Id.*

Commonwealth v. Matthews, 2005 PA Super 92, 870 A.2d 924, 928 (2005), appeal granted in part, 584 Pa. 436, 884 A.2d 248 (2005), affirmed, 589 Pa. 487, 909 A.2d 1254 (2006) (confirming proper test to determine intent to cause serious bodily injury). Defendant's sole claim of a lack of sufficiency was that the heroin found in the house was not proven to be

attributable to him. As set forth above, the uncontradicted facts proven at trial clearly established that the defendant was in constructive possession of the drugs, and the same facts that indicate that he was involved in the conspiracy to distribute also contribute to that finding. All of the defendants' actions indicated dual control over them.

> "When contraband is not found on the defendant's person, the Commonwealth must establish constructive possession...." *Commonwealth v. Haskins, 450 Pa. Super. 540, 677 A.2d 328, 330 (Pa. Super. 1996), appeal denied, 547 Pa. 751, 692 A.2d 563 (1997).* "Constructive possession is the ability to exercise conscious control or dominion over the illegal substance and the intent to exercise that control." *Commonwealth v. Kirkland, 2003 PA Super 279, 831 A.2d 607, 610 (Pa. Super. 2003), appeal denied, 577 Pa. 712, 847 A.2d 1280 (2004) (citing Commonwealth v. Macolino, 503 Pa. 201, 469 A.2d 132 (1983)).* "Two actors may have joint control and equal access and thus both may constructively possess the contraband." *Haskins, supra at 330.* "The intent to exercise conscious dominion can be inferred from the totality of the circumstances." *Kirkland, supra at 610.*
>
> "To establish the offense of possession of a controlled substance with intent to deliver, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance with the intent to deliver it." *Kirkland, supra at 611 (citing Commonwealth v. Conaway, 2002 PA Super 9, 791 A.2d 359 (Pa. Super. 2002); Commonwealth v. Aguado, 2000 PA Super 293, 760 A.2d 1181 (Pa. Super. 2000)).*
>
> > The trier of fact may infer that the defendant intended to deliver a controlled substance from an examination of the facts and circumstances surrounding the case. Factors to consider in determining whether the drugs were possessed with the intent to deliver include the particular method of packaging, the form of the drug, and the behavior of the defendant.
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> *Kirkland, supra at 611.* "Thus, possession with intent to deliver can be inferred from the quantity of the drugs possessed and other surrounding circumstances, such as lack of paraphernalia for consumption." *Commonwealth v. Torres, 421 Pa. Super. 233, 617 A.2d 812, 814 (Pa. Super. 1992), appeal denied, 535 Pa. 618, 629 A.2d 1379 (1993).*
>
> 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. Murphy, 2002 PA Super 84, 795 A.2d 1025 (Pa. Super. 2002), aff'd, 577 Pa. 275, 844 A.2d 1228 (2004). Circumstantial evidence may provide proof of the conspiracy. *Commonwealth v. Davalos, 2001 PA Super 197, 779 A.2d 1190 (Pa. Super. 2001), appeal denied, 567 Pa. 756, 790 A.2d 1013 (2001).* "The conduct of the parties and the circumstances surrounding such conduct may create a 'web of evidence' linking the accused to the alleged conspiracy beyond a reasonable doubt." *Commonwealth v. Morton, 355 Pa. Super. 183, 512 A.2d 1273, 1275 (Pa. Super. 1986), appeal denied, 514 Pa. 624, 522 A.2d 49 (1987).* Additionally:

> An agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, 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. Greene, 702 A.2d 547, 554 (Pa. Super. 1997).

Instantly, the police seized the drugs from the rental car, not from the persons of Appellant, Nieves, or Walker. The police found the cocaine in the cabin of the car, in plain view, shortly after the passengers had exited. Officer Wood testified that while standing with Appellant outside of the rental car, he saw Appellant constantly staring in the direction of the passenger seat that Nieves had vacated. Significantly, Officer Wood later discovered the cocaine in the same area. Further, Appellant had $ 481.00 in small denominations, which is common for someone involved in a drug distribution scheme. (N.T. Trial, 3/23/04, at 90). From the totality of these circumstances, we conclude the evidence was sufficient to establish that Appellant exercised conscious control or dominion over the cocaine, with the intent to exercise that control. *See Kirkland, supra*; *Haskins, supra.*

[The Court then summarizes the expert police testimony that the quantity of the drugs and the way they were packaged was inconsistent with personal use but very indicative of an intention to distribute. The expert also testified that the fact that no paraphernalia for use was found also indicated a lack of intended personal use and that the quantity of cash found on the defendant ($ 481.00) was common for a drug distributer, both of which further indicated the intent to sell. It concluded "Based on the applicable case law and standard of review, this testimony amply supports Appellant's conviction for possession of cocaine with intent to deliver. *See Kirkland, supra*; [*Commonwealth v.*] *Bullick* [*2003 PA Super 285, 830 A.2d 998 (2003)*], *supra; Torres, supra.*"]

Finally, regarding Appellant's conviction for conspiracy, the evidence established a close relationship between Appellant and his passengers; Appellant and Nieves both indicated Nieves was Appellant's girlfriend and Appellant and Walker both said they were cousins. All three passengers were present at the

> scene. Police discovered the cocaine in an area where any one of the passengers could have seen it and exercised control over it. The passengers also made inconsistent statements regarding the duration and purpose of their trip. Thus, the coalescence of this circumstantial evidence sufficiently established a conspiratorial agreement. *See Bullick, supra; Greene, supra.*

Commonwealth v. Barnswell Jones, 2005 PA Super 166, 874 A.2d 108, 121-3 (2005).

In viewing all the evidence as a whole in the light most favorable to the verdict winner, and giving the prosecution the benefit of all reasonable inferences derived therefrom, it cannot be said that the evidence did not support the verdict beyond a reasonable doubt, nor that the verdict was so contrary to it as to shock one's sense of justice. The Commonwealth did not preclude every possibility of innocence, and it was not required to, but the lack of any contradictory evidence certainly strengthens the probative value of the inference. Nor can it be logically concluded that the evidence was so weak and inconclusive that no probability of an intent to control and deliver could be drawn therefrom. All of the facts indicated that, while the defendant was not shown to have any legal possessory interest in the premises, he certainly exhibited a right to be there, proximal and equal access, and the right to control, all of which are more than sufficient to infer constructive possession. The quantity of drugs, together with the presence of a scale and lack of any implements indicative of personal use, certainly allow a strong inference of intent to sell. The fact that there were others present with similar access allows for the inference of a conspiracy. In fact, the evidence of that conspiracy itself lends that much more weight to the inference of possession. Thus, this claim lacks any merit.

> . . . "In order to uphold a conviction for possession of narcotics with the intent to deliver, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance and did so with the intent to deliver it." *Commonwealth v. Aguado, 2000 PA Super 293, 760 A.2d 1181, 1185 (Pa. Super. 2000)* (citation omitted). *See also 35 P.S. § 780-113 (a)(30).*
>
> Burkett's sole argument in support of his sufficiency claim is that, "based on the inconsistencies of Officer Riddick's testimony, there is insufficient evidence to support the element of possession" of a controlled substance. Brief

and Reproduced Record of Appellant, at 14-15.[4] This allegation is completely undeveloped, therefore Burkett's purported sufficiency claim may be dismissed on that basis. *Pa.R.A.P. 2101, 2119.* In our view, this claim is also little more than an attempt by Burkett to recast his weight of the evidence claim, which we have already determined is waived, in terms of sufficiency of the evidence. As explained above, it was within the province of the trial court, as the trier of fact, to pass upon Officer Riddick's credibility and decide whether to believe all, part or none of his testimony. *Nicotra.* The trial court obviously credited the officer's testimony and we decline Burkett's invitation to review that determination.

> 4 Although he contends the evidence was insufficient to prove that he possessed a controlled substance, Burkett states that "there definitely is enough evidence to show an intent to distribute. . . ." Brief and Reproduced Record of Appellant, at 14. Burkett's claim borders on nonsensical since he essentially argues that he did not possess the crack cocaine that he then concedes he intended to distribute.

Moreover, the evidence admitted at Burkett's trial, including Officer Riddick's testimony, was more than sufficient to demonstrate that he illegally possessed a controlled substance. Officer Riddick observed Burkett, in a known drug-trafficking area, carrying and inspecting two plastic bags that resembled the type of packaging commonly used for illegal narcotics. Riddick then watched Burkett stash one of the bags into some shrubbery. Minutes later, Officer Ritchie searched the shrubbery and discovered a plastic bag containing 7.63 grams of crack cocaine divided into thirty-seven smaller bags. Viewing the above evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences in its favor, we find that the evidence was sufficient to prove, beyond a reasonable doubt, that Burkett illegally possessed a controlled substance.

Commonwealth v. Burkett, 2003 PA Super 293, 830 A.2d 1034, 1038 (2003). Unlike the Court in *Burkett*, this court will not consider this defendant's stipulation, that the quantity of drugs was sufficient to find an intent to deliver, a contradiction or waiver of his claim that the evidence failed to prove his possessory interest because, apparently unlike there, the context here does indicate that he clearly only stipulated for the laudable purpose of saving the court time and expense. The court does find, however, that the evidence itself was more than sufficient to prove beyond a reasonable doubt that he did have that interest.

IV. CONCLUSION

In summary, this Court has carefully reviewed the entire record and finds no harmful,

prejudicial, or reversible error. The claim that the court allowed hearsay testimony simply did not occur; neither defendant objected to the police witness repeating what the codefendant said, only to what he tried to say what Santiago said the codefendants said, and those objections were sustained. Refusing to sever the cases was not only proper, but, comparing the facts here to those in the cases cited above demonstrates that the law practically required that they be tried together; the operative factual proofs against both defendants were identical, they were charged with committing the exact same crimes at the same time and place, and there is absolutely no indication that the mere fact, or rather the implication, that they would each claim that the other was the dealer as opposed to the buyer, was no where near the type of defenses that might have led to confusion and improper attributions of evidence to the wrong defendant, particularly since there was no jury, a judge being presumed to be able to completely avoid any such pitfalls. The evidence was more than sufficient, and without any evidence to the contrary, practically conclusive, that the defendant was an equal partner in this criminal endeavor and exercised all rights to possession and control of the products of that endeavor. Therefore, the court's actions were fully justified and certainly not the product of a manifest abuse of discretion, and the judgment of sentence should be affirmed.

BY THE COURT:

WILLIAM J. MAZZOLA, J.