NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RAUL MARQUEZ Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 864 MDA 21012

Appeal from the Judgment of Sentence July 30, 2009
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0005358-2008

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, J., and ALLEN, J.

JUDGMENT ORDER BY PANELLA, J. Filed: February 26, 2013

Appellant, Raul Marquez, appeals *nunc pro tunc* from the judgment of sentence entered July 30, 2009, by the Honorable John A. Boccabella, Court of Common Pleas of Berks County.[1] We affirm.

As we write exclusively for the parties, we provide only so much of the facts and procedural history as is necessary to our analysis.[2] Following a jury trial, on June 5, 2009, Marquez was convicted of murder in the first degree, murder in the third degree, aggravated assault, possessing

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[1] Although Marquez purports to appeal from the order denying his *nunc pro tunc* post-sentence motion entered April 5, 2012, his appeal properly lies from the judgment of sentence entered July 30, 2009. We have amended the caption accordingly.

[2] For a detailed recitation of the facts and procedural history of this case, we direct the reader to Judge Boccabella's memorandum opinion affirming Marquez's judgment of sentence. Trial Court Opinion, 7/26/12 at 1-7.

instruments of crime, four counts of recklessly endangering another person, and conspiracy. The convictions arose out of the shooting death of Terrell Little. On July 30, 2009, the trial court sentenced Marquez to life imprisonment. Marquez filed a direct appeal on September 4, 2009, which this Court subsequently quashed as untimely.

Marquez filed a petition pursuant to the Post Conviction Relief Act on January 3, 2011. On February 3, 2012, by agreement with the Commonwealth, the PCRA court reinstated Marquez's appellate rights *nunc pro tunc*. On January 30, 2012, Marquez filed a post-sentence motion, which the trial court denied. This *nunc pro tunc* appeal followed.

On appeal, Marquez raises the following issues for our review:

> A. Whether the [t]rial [c]ourt erred in denying [Marquez's] Post-Sentence Motion where it is contrary to justice to believe that the jury found credibility in the testimony of Migdalia Alvarez as she could not have seen the shooting, her account of the shooting was stale, and her report of the shooting to the police was the product of her desire to avoid lengthy incarceration?
>
> B. Whether the [t]rial [c]ourt erred in denying [Marquez's] Post-Sentence Motion where it is contrary to justice to believe that the jury found credibility in the testimony of Kaleena Sculco (nee Crawley) where she was a jilted ex-girlfriend of [Marquez], she admitted to filing a false report with the police, she actively thwarted police questioning for years with her lies, her report to the police was stale, and her report to the police was clearly driven by her own desire to avoid incarceration?
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> C. Whether the [t]rial [c]ourt erred in denying [Marquez's] Pretrial Motion to Sever, thereby denying [Marquez] a fair trial and prejudicing [Marquez], where the codefendants

would necessarily present clearly conflicting and antagonistic defenses at trial?

D. Whether the evidence presented was insufficient as a matter of law to convict [Marquez] of Counts 1-3, 5-11, and 13-16 of the Information filed of record: Murder – First Degree, Murder – Third Degree, Aggravated Assault, Recklessly Endangering Another Person, and Criminal Conspiracy to all of these charges, where the evidence failed to establish beyond a reasonable doubt that [Marquez] was the shooter?

Appellant's Brief at 5.

With our standards of review in mind, and after examining the briefs of the parties, the decision of the trial court, as well as the applicable law, we find that Judge Boccabella's ruling is supported by the record and free of legal error. We further find that the trial court ably and methodically addressed Marquez's issues raised on appeal. Accordingly, we affirm on the basis of Judge Boccabella's thorough and well-written memorandum opinion. ***See*** Trial Court Opinion, filed 7/26/12.

Judgment affirmed. Jurisdiction relinquished.

COMMONWEALTH OF PENNSYLVANIA	**: IN THE COURT OF COMMON PLEAS**
	: OF BERKS COUNTY,
	: PENNSYLVANIA
	: CRIMINAL DIVISION
	:
vs.	**: No. 5358-08**
	:
RAUL MARQUEZ	**: BOCCABELLA, JUDGE**

Alissa R. Hobart, Esquire,
Assistant District Attorney for the Commonwealth

Lara Glenn Hoffert, Esquire,
Attorney for the Defendant

Memorandum Opinion, John A. Boccabella, J. July 26, 2012

On December 2, 2008, a Criminal Complaint was filed against the Defendant, Raul Marquez (hereinafter, "Defendant") for an incident that occurred on August 18, 2006 whereby Terrell Little (hereinafter, "Victim") was murdered in the city of Reading, Berks County, Pennsylvania. A sixteen (16) count Criminal Information was subsequently filed against Defendant for the following: Murder of the First Degree[1], Murder of the Third Degree[2], Aggravated Assault[3], Possessing Instruments of Crime[4], four (4) counts of Recklessly Endangering Another Person[5], and a corresponding count of Conspiracy[6] to each of the above offenses. On December 5, 2008, Nicholas Stroumbakis, Esquire, entered his appearance on behalf of Defendant. On January 21, 2009, the Commonwealth filed a Notice of Consolidation whereby Defendant was notified of the Commonwealth's intent to try Defendant's case with that of a co-defendant, Jermaine Beverly.

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[1] 18 Pa.C.S.A. § 2502(a).
[2] 18 Pa.C.S.A. § 2502(c).
[3] 18 Pa.C.S.A. § 2702(a)(1).
[4] 18 Pa.C.S.A. § 907(a).
[5] 18 Pa.C.S.A. § 2705.
[6] 18 Pa.C.S.A. § 903(a)(1)(2).

On June 5, 2009, at the conclusion of a jury trial, Defendant was found guilty of all sixteen (16) counts. On July 30, 2009, Defendant was sentenced to the Bureau of Corrections for the remainder of his natural life without the possibility of parole. On September 4, 2009, Defendant filed a Notice of Appeal with the Superior Court of Pennsylvania. On September 14, 2009, Defendant was directed to file a Concise Statement of Matters Complained of on Appeal (hereinafter, "Concise Statement") within twenty-one (21) days. On November 2, 2009, Defendant filed a Concise Statement. On April 26, 2010, the Superior Court of Pennsylvania quashed Defendant's appeal as untimely.

On January 1, 2011, Defendant filed a *pro se* Motion for Post Conviction Collateral Relief. On January 18, 2011, this Court appointed Lara Hoffert, Esquire, to represent Defendant in all proceedings regarding the disposition of Defendant's Post Conviction Relief Act ("PCRA") petition. The Court further directed Attorney Hoffert to file a well pled petition detailing Defendant's eligibility for relief or a "no-merit" letter requesting to withdraw from representation pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) and *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988). After this Court granted Attorney Hoffert several extensions of time to file an amended PCRA petition or "no-merit" letter, Defendant filed an Amended Petition for Relief under the Post Conviction Relief Act on November 11, 2011.

On February 3, 2012, this Court ordered[7] that Defendant's post-sentence rights, including direct appeal rights and post-sentence motion rights are reinstated, *nunc pro tunc*. On February 29, 2012, Defendant filed a Motion for Post-Sentence Relief. On April 5, 2012, this Court denied Defendant's Motion for Post Sentence Relief. On May 3, 2012, Defendant filed a Notice of Appeal with the Superior Court of Pennsylvania. On May 8, 2012, this Court ordered that

[7] This Court's February 3, 2012 order was a result of an agreement reached between Defendant and the Commonwealth, which was placed on the record on January 20, 2012.

Defendant file a Concise Statement in accordance with Pa.R.A.P. 1925(b). On May 29, 2012, in compliance with said order, Defendant filed a Concise Statement raising the following issues:

A. Whether the Trial Court erred in denying [Defendant's] Post-Sentence Motion where it is contrary to justice to believe that the jury found credibility in the testimony of Migdalia Alvarez as she could not have seen the shooting, her account of the shooting was stale, and her report of the shooting to the police was the product of her desire to avoid lengthy incarceration;

B. Whether the Trial Court erred in denying [Defendant's] Post-Sentence Motion where is it (sic) contrary to justice to believe that the jury found credibility in the testimony of Kaleena Sculco (nee Crawley) where she was a jilted ex-girlfriend of [Defendant], she admitted to filing a false report with the police, she actively thwarted police questioning for years with her lies, her report to the police was clearly driven by her own desire to avoid incarceration;

C. Whether the Trial Court erred in denying [Defendant's] Pretrial Motion to Sever, thereby denying [Defendant] a fair trial and prejudicing [Defendant], where the codefendants would necessarily present clearly conflicting and antagonistic defenses at trial; and

D. Whether the evidence presented was insufficient as a matter of law to convict [Defendant] of Counts 1-3, 5-11, and 13-16 of the Information filed of record: Murder – First Degree, Murder – Third Degree, Aggravated Assault, Recklessly Endangering Another Person, and Criminal Conspiracy to all of these charges, where the evidence failed to establish beyond a reasonable doubt that [Defendant] was the shooter.

Factual Summary

On August 18, 2006, Terrell Little ("Victim") was shot and killed in the 100 block of South Ninth Street in the City of Reading, Berks County, Pennsylvania. On June 5, 2009, at the conclusion of a five (5) day jury trial, Defendant was found guilty of all charges, including Murder of the First Degree, Murder of the Third Degree, Aggravated Assault, Possessing Instruments of Crime, Recklessly Endangering Another Person, and one corresponding count of Conspiracy for each of the above offenses.

At trial, several witnesses testified on behalf of the Commonwealth. Jacqueline Harris ("Harris") testified that she was a friend of Victim and that she, her cousin (Tamiya Wilkinson)

and her younger brother (Dwight Basnight) were walking with Victim on the night he was shot and killed. *N.T.*, 6/1/09, p. 210. Harris further testified that as they were walking she heard gunshots, so she turned around and observed two men shooting Victim. *N.T.*, 6/1/09, p. 218. Harris described one of the shooters as a light-skinned Hispanic with long braided hair and a white t-shirt on. *N.T.*, 6/1/09, p. 220. Tamiya Wilkinson ("Wilkinson") also testified that one of the shooters was a light-skinned Hispanic male with long braids and was wearing a white t-shirt. *N.T.*, 6/1/09, pp. 269-70.

Officer Justin Uczynski of the City of Reading Police Department testified that after responding to the 100 block of South Ninth Street on the night in question, he responded to Saint Joseph's Medical Center ("St. Joe's") and Reading Hospital respectively to photograph injuries of two shooting victims. *N.T.*, 6/2/09, pp. 358-61. First, Officer Uczynski went to the emergency room of St. Joe's where he photographed Dwight Basnight who had sustained a graze wound on the right side of his abdomen. *N.T.*, 6/2/09, p. 360. Officer Uczynski then went to Reading Hospital where he photographed Miguel Hernandez who had sustained a gunshot wound to the area of his left hip. *N.T.*, 6/2/09, p. 360.

Also at trial, Migdalia Alvarez ("Alvarez") testified that she was in the Gomez bar, seated in front of the window that faces Ninth Street and Franklin Street, at approximately 9:00 p.m. on August 18, 2006 when she observed two men run across the street and begin shooting Victim. *N.T.*, 6/3/09, p. 446. Alvarez testified that she knew of the two shooters because she had purchased drugs from them many times. *N.T.*, 6/3/09, pp. 450-51. Alvarez further testified that Defendant was one of the two shooters and that he had long hair with braids on August 18, 2006. *N.T.*, 6/3/09, p. 457.[8]

[8] At trial, Alvarez stated that although she witnessed the murder, she did not begin cooperating in the investigation until June of 2008, when she was informed that she was the subject of a drug investigation. *N.T.*, 6/3/09, pp. 569-70.

The Commonwealth also presented the testimony of Detective Ivan Martinez, a criminal investigator for the City of Reading Police Department. Detective Martinez testified that when he arrived at the scene of the crime at approximately 9:14 p.m. on the evening in question, he briefly observed Alvarez standing near the Gomez bar. *N.T.*, 6/4/09, p. 865. After speaking to the responding officers on scene, Martinez began interviewing civilians in the area. *N.T.*, 6/4/09, p. 863. In doing so, Martinez spoke with Farris, Wilkinson, and Alvarez amongst others. However, Martinez was unsuccessful in getting a positive identification of the shooter(s) of Terrell Little. *N.T.*, 6/4/09, p. 867.

Another witness for the Commonwealth was Frederick Prutzman ("Prutzman"), a building construction inspector for the Reading Housing Authority. *N.T.*, 6/1/09, p. 252. Prutzman testified that as the person in charge of overseeing the surveillance video at Eisenhower Apartments, located at 835 Franklin Street in Reading, Pennsylvania, police contacted him on the evening of August 18, 2006 to view the surveillance video. *N.T.*, 6/1/09, p. 254. Prutzman further testified that in viewing the surveillance video recorded at approximately 9:02 p.m. on August 18, 2006, he witnessed two individuals run down the street near the intersection of Ninth and Franklin Streets. *N.T.*, 6/1/09, p. 256.

In addition, the testimony of Kaleena Sculco ("Sculco"), a former girlfriend of Defendant, was offered at trial. Sculco testified that she purchased a 9 millimeter Astra firearm for Defendant on July 21, 2006. *N.T.*, 6/4/09, p. 790. She testified that the firearm went into Defendant's possession that same day when she returned home from purchasing it. *N.T.*, 6/4/09, p. 790. Sculco further testified that just one day after Marquez was arrested on an unrelated

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However, although nearly two years had elapsed from the date of the shooting until the time Alvarez became cooperative in the investigation, Alvarez testified that there was no doubt in her mind who the shooters were and that when shown a photo array it only took her a matter of seconds to identify Defendant in June of 2008. *N.T.*, 6/3/09, p. 626.

matter[9] in late August of 2006, she went to the police to report the firearm stolen.[10] *N.T.*, 6/4/09, p. 792.

Sculco also testified that Defendant confessed to her that he shot Victim. In particular, she testified that Defendant told her "[t]hat he got his gun, ran down the block, and shot a boy. Two people were with the boy." *N.T.*, 6/4/09, p. 797. When asked how she knew the Defendant did not act alone, she stated that when referring to the incident, Defendant would say "we". *N.T.*, 6/4/09, p. 797. Furthermore, Sculco testified that Defendant indicated that his reason for shooting Victim was because they had "beef" over disputed drug territory. *N.T.*, 6/4/09, p. 800.

At trial, Sculco admitted that she was initially uncooperative and untruthful with investigators. When asked why she was initially dishonest with police, Sculco testified that "I was protecting myself and my child. Because I knew once I said anything, I was gonna get the death threats in the mail." *N.T.*, 6/4/09, p. 835. When asked what prompted her to cooperate with police, she stated that she felt protected by police.[11] *N.T.*, 6/4/09, p. 839.

The Commonwealth also offered the testimony of Corporal Kurt Tempinski, a firearms and toolmark examiner for the Pennsylvania State Police. *N.T.*, 6/3/09, p. 697. Corporal Tempinski testified that as a part of his job duties he determines whether specific bullets were discharged from a specific firearm. *N.T.*, 6/3/09, p. 697. Corporal Tempinski testified that based on the microscopic analysis he conducted on the eighteen (18) 9 millimeter bullet casings offered into evidence by the Commonwealth, all 18 of the 9 millimeter casings were discharged from

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[9] When Defendant was arrested on August 22, 2006, the police recovered the loaded 9 millimeter firearm. *N.T.*, 6/4/09, p. 759.

[10] However, at trial, Sculco conceded that the firearm was not in fact stolen, but that she had given the firearm to Defendant.

[11] Sculco also testified that once she became cooperative with the investigation, she received threatening letters and phone calls. In particular, she testified that she was familiar with Defendant's handwriting and that she recognized the handwriting in the threatening letters to be that of Defendant. *N.T.*, 6/4/09, p. 808.

said firearm, which was the same firearm that was recovered when the Defendant was arrested on the unrelated matter on August 22, 2006. *N.T.*, 6/3/09, p. 697.

Discussion

Under Pennsylvania law, testimony that conflicts with the incontrovertible physical facts and contrary to human experience and the laws of nature must be rejected. *Commonwealth v. Santana*, 333 A.2d 876 (Pa. 1975). "We have recognized that 'where evidence offered to support a verdict of guilt is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, a jury may not be permitted to return such a finding.' *Commonwealth v. Farquharson*, 354 A.2d 545, 550 (Pa. 1976) (citation omitted). We have, however, carefully limited this latter principle to instances 'where the party having the burden of proof presents testimony to support that burden which is either so unreliable or contradictory as to make any verdict based thereon obviously the result of conjecture and not reason.' *Farquharson*, *supra*, at 550." *Commonwealth v. Holmes*, 406 A.2d 510 (Pa. 1979). The *Farquharson* standard applies only 'in such cases where the patent unreliability of the testimony is such as to render a verdict of guilt based thereupon as no more than pure conjecture.' (Emphasis supplied.)" *Commonwealth v. Hudson*, 414 A.2d 1381 (Pa. 1980). Issues of credibility, solely within the province of the trier of fact, will not be reviewed on appeal. *Commonwealth v. Pettus*, 424 A.2d 1332, 1334 (Pa. 1980) citing *Commonwealth v. Holmes*, 406 A.2d 510 (Pa. 1979). *See also Commonwealth v. Abu-Jamal*, 720 A.2d 79, 99 (Pa. 1998).

In the case at bar, Defendant submits that it is contrary to justice to believe that the jury found credibility in the testimony of Migdalia Alvarez (hereinafter, "Alvarez") and Kaleena Sculco (hereinafter, "Sculco"). At trial, Alvarez testified that she witnessed Defendant commit the murder of Victim, while Sculco testified that Defendant confessed to her that he committed

the murder of Victim. While not the most cooperative and forthcoming witnesses, the testimony of both Alvarez and Sculco was not so unreliable and/or contradictory as to make any verdict based upon such testimony to be pure conjecture.

At trial, Alvarez testified that she was sitting near the window in the Gomez bar on the evening of August 18, 2006 when she observed two men run across the street and begin shooting Victim. *Notes of Testimony* ("*N.T.*"), June 3, 2009 ("6/3/09"), p. 446. She further testified that on the date in question she observed Victim walk by the Gomez bar with a little boy. *N.T.*, 6/3/09, p. 556. Although Alvarez testified that the window by which she sat while in the Gomez bar had its curtains closed, she testified that she opened the curtains and looked out the window while she sat there. *N.T.*, 6/3/09, pp. 549-553. Furthermore, she testified that there was nothing obstructing her view on the night in question. *N.T.*, 6/3/09, p. 577. She later testified that there was no doubt in her mind as to who killed the Victim. *N.T.*, 6/3/09, p. 476. In fact, when shown a photo array of possible suspects, it only took a matter of seconds for Alvarez to identify Defendant. *N.T.*, 6/3/09, p. 626. Alvarez stated that she recognized Defendant because she, Alvarez, had purchased drugs from him on numerous occasions. *N.T.*, 6/3/09, p. 455.

There is truth in Defendant's argument that Alvarez's participation in the investigation was remote in time to the date on which the murder occurred. Additionally, it is plausible that Alvarez's cooperation in the investigation was the product of her desire to avoid lengthy incarceration. In fact, the incident occurred on August 18, 2006, but Alvarez did not begin cooperating in the investigation until she was informed that she was the subject of a drug investigation in June of 2008. *N.T.*, 6/3/09, pp. 569-70. However, without more, such assertions are insufficient for the Court to determine that Alvarez's testimony was so unreliable and/or contradictory as to make any verdict based thereon the result of conjecture or speculation.

Despite Defendant's assertions, Alvarez's testimony that she was at the Gomez bar on the night in question was corroborated by Detective Martinez. Detective Martinez testified that when he first arrived on scene on the night in question, he briefly saw Alvarez, who was standing on the sidewalk near the Gomez bar. *N.T.*, 6/4/09, pp. 865-66. Additionally, Alvarez testified that she did not come forward to identify the defendants until two years after the incident because she feared that she would be killed if she cooperated with police. *N.T.*, 6/3/09, p. 463. Based on the foregoing, this Court will not disturb the jury's findings with regard to the credibility of Alvarez as a witness. *See Commonwealth v. Gibbs*, 981 A.2d 274 (Pa. 2009).

As to Sculco, she testified that she, Sculco, was Defendant's girlfriend in the summer of 2006. *N.T.*, 6/4/09, p. 789. Sculco also testified that she purchased a 9 millimeter Astra firearm for Defendant in July of 2006. *N.T.*, 6/4/09, p.790. The day after Defendant was arrested; Sculco filed a police report alleging that the gun had been stolen. *N.T.*, 6/4/09, p. 792. However, at trial, Sculco testified that the gun was not actually stolen, but that she had given it to Defendant when she returned home the day the purchase was made. *N.T.*, 6/4/09, p. 790.

In addition, Sculco testified that Defendant had made a confession to her about the shooting a few months after it had occurred. *N.T.*, 6/4/09, p. 842. She testified that Defendant told her "[t]hat he got his gun, ran down the block, and shot a boy." *N.T.*, 6/4/09, p. 797. She also testified that Defendant informed her that two people were accompanying Victim at the time of the shooting. *N.T.*, 6/4/09, p. 797. Sculco further testified that Defendant told her that his reason for shooting Victim was because they had "beef" over drug territory. *N.T.*, 6/4/09, p. 800.

When asked why she did not initially tell the truth to police, Sculco testified that "I was protecting myself and my child. Because I knew once I said anything, I was gonna get the death threats in the mail." *N.T.*, 6/4/09, p. 835. When asked what prompted her to cooperate with

police, she stated that she felt protected by police. *N.T.*, 6/4/09, p. 839. Although Sculco was not the most cooperative and forthcoming witness, her intuition regarding death threats was correct. For example, after she began cooperating with police, Sculco stated that she began receiving threatening phone calls and letters. *N.T.*, 6/4/09, p. 846. She testified that she recognized the handwriting in the letters to be that of Defendant because he had previously written her numerous letters. *N.T.*, 6/4/09, p. 808. In fact, the heading of the letter read, "A snitch anywhere is a threat to hustlers everywhere." Underneath the heading was a list of names, which included "Kaleena Crawley", Sculco's maiden name. *N.T.*, 6/4/09, p. 810. Based on the testimony presented at trial, this Court will not disturb the jury's findings with regard to the credibility of Sculco as a witness. See *Commonwealth v. Gibbs*, 981 A.2d 274 (Pa. 2009).

The next issue is whether the Trial Court erred in denying Defendant's Pretrial Motion to Sever. The Pennsylvania Rules of Criminal Procedure provide that:

> (1) Offenses charged in separate indictments or informations may be tried together if:
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> (a) the evidence of each of the witnesses 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.
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> (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act of transaction or in the same series of acts or transactions constituting an offense or offenses.

Pa.R.Crim.P. 582 (A)(1), (2).

The Pennsylvania Rules of Criminal Procedure further provide that "[t]he 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. 583. To warrant a separate trial, case law requires that real potential for prejudice must be shown. *Commonwealth v. Colon*, 846 A.2d 747 (Pa. Super. 2004). Such prejudice must

"...exceed 'the general prejudice any defendant suffers when the Commonwealth's evidence links him to a crime.'" *Commonwealth v. Brookins*, 10 A.3d 1251 (Pa. Super. 2010) quoting *Commonwealth v. Collins*, 703 A.2d 418, 422 (Pa. 1997). Mere speculation that prejudice may result is not sufficient, nor is mere hostility between defendants. *Commonwealth v. Jones*, 668 A.2d 491, 501 (Pa. 1995), cert. denied, 519 U.S. 826 (1996).

While joint trials are preferred in cases in which conspiracy is charged and the evidence against the one actor is similar to or the same as that presented against the other actor, severance is required when defendants intend to present antagonistic defenses. *Commonwealth v. Hetzel*, 822 A.2d 747 (Pa. Super. 2003). However, "severance should be granted only where the defenses are so antagonistic that they are irreconcilable." *Commonwealth v. Brown*, 846 A.2d 747 (Pa. Super. 2007). *See also Commonwealth v. Bernie*, 508 A.2d 1211 (Pa. Super. 1986). This occurs "...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. [Citation omitted]." *Commonwealth v. La*, 640 A.2d 1336 (Pa. Super. 1994). The accounts of co-defendants must be "on a collision course" *Commonwealth v. Orlowski*, 481 A.2d 952 (Pa. Super. 1984).

The ultimate issue of "whether or not separate indictments should be consolidated for trial is within the sole discretion of the trial court and such discretion will be reversed only for a manifest abuse of discretion or prejudice and clear injustice to the defendant." *Commonwealth v. Lark*, 543 A.2d 491 (Pa. 1988). An abuse of discretion occurs when a court's determination is based on bias, prejudice, partiality, ill will, manifest unreasonableness, or a misapplication of the law. *Commonwealth v. Carroll*, 936 A.2d 1148, 1152-52 (Pa. Super. 2007).

In the case at hand, Defendant contends that the Court's denial of his motion to sever was prejudicial and deprived him of a fair trial because the defenses of the codefendants were conflicting and antagonistic. Prior to trial, Defendant by and through his attorney, Nicholas Stroumbakis, Esquire, made an oral motion to sever Defendant's trial from that of his co-defendant. Attorney Stroumbakis argued:

> The basis for my motion is that if there is evidence that I believe is probative in Mr. Waltman's case that's allowed to come in, that evidence would be more highly prejudicial toward Mr. Marquez than probative and, therefore, that the issues are sufficiently different between the two that they can't be tried fairly together, that the rulings that the Court makes have to be on an individual basis for each of the defendants, and that as soon as we try and do blanket rulings, we get, you know, - - -

N.T., 6/1/09, p.158. However, Defendant made no substantive argument other than the one excerpted above. Accordingly, no prejudice sufficient to warrant severance has been demonstrated in this case.

Here, both defendants were charged with the same crimes deriving from the same set of events. Defendant did not present a defense that was antagonistic to the defense of his co-defendant. In fact, Defendant offered no witnesses in support of his defense and did not testify on his own behalf. The only evidence offered by the co-defendant was a stipulation[12] and the testimony of Sergeant John Solecki, who testified that in investigating the homicide of Victim, he interviewed a Tamiya Wilkinson, who described the shooter as a "light-skinned male wearing a T-shirt" and wearing a black do-rag on his head. *N.T.*, 6/5/09, p. 1044. With the exception of the above, every other witness whose testimony implicated Defendant was a Commonwealth witness. Based on the foregoing, Defendant cannot demonstrate that this Court abused its discretion in finding that no real potential for prejudice has been established in support of

[12] The stipulation entered into by respective counsel for the Commonwealth, Defendant, and his co-defendant was that on August 18, 2006, Officer John Gooch of the Reading Police Department located a Hispanic male by the name of Miguel Hernandez sitting on the steps at 39 South Ninth Street.

Defendant's motion for severance. *See Commonwealth v. Hetzel*, 822 A.2d 747, 763 (Pa. Super. 2003).

Lastly, Defendant raises a sufficiency of the evidence claim with respect to Counts 1-3 inclusive, 5-11 inclusive, and 13-16 inclusive, of the Criminal Information filed of record. In reviewing a challenge to the sufficiency of the evidence to support a conviction, the appellate court is required to consider the evidence admitted at trial in a light most favorable to the Commonwealth as the verdict-winner, and grant the Commonwealth all reasonable inferences that can be derived from the admitted evidence. *Commonwealth v. Salter*, 806 A.2d 610 (Pa. Super. 2004) (citing *Commonwealth v. Magliocco*, 806 A.2d 1280, 1282 (Pa. Super. 2002)) (quoting *Commonwealth v. Jackson*, 485 A.2d 1102, 1103 (Pa. 1984)). The facts and circumstances need not preclude every possibility of innocence. *Commonwealth v. Newsome*, 787 A.2d 1045, 1047 (Pa. Super. 2001) (citing *Commonwealth v. Morales*, 669 A.2d 1003 (Pa. Super. 1996)).

An appellate court will deem the evidence legally sufficient to support a conviction only if the evidence enables the trier of fact to find every element of the crime charged beyond a reasonable doubt. *Morales*, *supra*, (citing *Commonwealth v. Zimmick*, 653 A.2d 1217, 1220 (Pa. 1995)). In making such an evaluation, the appellate court may not weigh the evidence and substitute its judgment for that of the fact-finder. *Commonwealth v. Derr*, 841 A.2d 558, 560 (Pa. Super. 2004). Any questions or doubts are to be resolved by the trier of fact, unless the evidence is so weak that no probability of fact may be drawn from the circumstances as a matter of law. *Newsome, supra*, at 1048.

In the case at bar, Defendant argues that the evidence was insufficient as a matter of law to support the verdict. Defendant's contention is misplaced as it disregards the ample amount of

direct and circumstantial evidence presented by the Commonwealth. In particular, the Commonwealth presented the testimony of numerous witnesses, including two of the actual shooting victims, an eyewitness, and a former girlfriend of Defendant who testified that Defendant made a confession to her regarding the events of August 18, 2006. Equally important, the respective testimony of said witnesses was corroborated by the results of the investigation conducted by the criminal investigator assigned to the case, Detective Martinez. In addition, a video recording of the events at the time and date in question was also offered into evidence. The Commonwealth also presented evidence that the murder weapon, a 9 millimeter Astra firearm, was recovered while placing Defendant under arrest for an unrelated matter just four days after Victim was murdered.

Based on the above, there was sufficient evidence presented, for the jury, as trier of fact, to find Defendant guilty of all counts as set forth in the Criminal Information. As such, there is nothing that suggests that this Court committed a plausible abuse of discretion in determining that the verdict was not so contrary to the evidence as to shock one's sense of justice.

For all of the foregoing reasons, the Court respectfully requests that Defendant's appeal be DENIED.