IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH OF PENNSYLVANIA | : NO. CR – 258 - 2006 |
| | : |
| vs. | : |
| | : |
| BRENDA JO GUNDLACH, | : |
| Defendant | : |

OPINION IN SUPPORT OF ORDER OF SEPTEMBER 6, 2006,
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court's Order of September 6, 2006, which sentenced her on one count of criminal mischief to pay a fine of $1,000.00 and undergo County probation supervision for a period of two years, following a bench trial which resulted in a guilty verdict on that count. In her Concise Statement of Matters Complained of on Appeal, Defendant raises a single issue: whether the Court erred in refusing to allow Defendant and another witness to testify regarding statements allegedly made in their presence by one Troy Smith.

At trial, Defendant sought to testify regarding statements allegedly made by Mr. Smith, who, according to Defendant and another witness, was also present at the bar where the crime ("keying" of the victim's show jeep) occurred. Defense counsel indicated the statements made by Mr. Smith would show that he, rather than Defendant, had committed the crime. The Court sustained the Commonwealth's hearsay objection, however, on the basis that although the statements would be statements against penal interest, and thus possibly admissible under that exception to the hearsay rule, there was no indicia of their reliability. Defendant then presented the testimony of one Matthew Rook, who was also present at the bar at the time of the crime. Mr. Rook testified that he spoke with Troy Smith and that Mr. Smith made certain statements to him regarding the crime. Again, the Court sustained the Commonwealth's objection on the same grounds. Mr. Rook was permitted to testify to Mr. Smith's alleged statement, however, that "he was going out and key Todd's vehicle." It should be noted that Troy Smith was not in attendance at the trial.

The relevant Rule of Evidence is Rule 804, which provides, in pertinent part, as follows:

> **Rule 804. Hearsay exceptions; declarant unavailable**
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> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
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> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
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> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
> ….
>
> (b) Hearsay Exceptions. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> ….
>
> (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Pa.R.E. Rule 804. Moreover, in dealing with the issue of statements against penal interest, the appellate courts have never automatically admitted such hearsay statements, but have always

required other evidence demonstrating their trustworthiness. See Commonwealth v. Cristina, 391 A.2d 1307 (Pa. 1978).

Initially, the court notes that inasmuch as none of the five situations under which a witness could be declared "unavailable" was present in the instant case,[1] Mr. Smith was not "unavailable". Furthermore, there were absolutely no corroborating circumstances to indicate the trustworthiness of the statements. No one testified that Troy Smith was seen near the jeep at any time, nor was there any testimony establishing any possible motive Mr. Smith might have had for committing the crime.[2] Indeed, the circumstance seen by the Court to most significantly indicate the *un*trustworthiness of the alleged statements, was the fact that no one had previously mentioned Mr. Smith's alleged statements to either the district attorney or the police, in spite of Defendant having provided Mr. Smith's name to the police as a possible alibi witness. It seems to the Court that had Mr. Smith actually committed the crime, Defendant would have immediately relayed his confession to either the district attorney or the police. Therefore, without the necessary indicia of reliability, the alleged statements were excluded as inadmissible hearsay.

Accordingly, the Court believes Defendant's appeal to be without merit, and respectfully suggests the Order of September 6, 2006, should be affirmed.

Dated: January 5, 2007

Respectfully Submitted,

Dudley N. Anderson, Judge

cc: DA
Andrew Smalley, Esq.
Gary L. Weber, Esq.

1 As previously stated, Troy Smith was not present, and Defendant had not attempted to obtain his presence, by means of process or otherwise.

2 Such testimony *was* presented with respect to Defendant, however.