IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Prosecution.	)	
	)	
v.	)	ID No. 1006018837
	)	
ALFRED D. HUBBARD, JR.,	)	
	)	
Defendant.	)	

Date Submitted: September 21, 2011
Date Decided: September 29, 2011

FINDINGS OF FACT

Martin B. O'Connor, Esquire, and Abigail R. Layton, Esquire, Wilmington, Delaware – Attorneys for the State.

Timothy J. Weiler, Esquire, Office of the Public Defender – Attorney for the Defendant.

I. Introduction

Defendant, Alfred D. Hubbard, was indicted by the grand jury on twenty-eight counts, including rape, kidnapping, robbery, carjacking, and weapons offenses. Following a day and a half of screening potential jurors, and before exercise of peremptory strikes, Defendant announced he wished to waive his constitutional right to a trial by jury.[1] The court deferred ruling on this request until the following morning to ensure Defendant had ample time to discuss this with his counsel. The following morning Defendant reiterated his request to waive a jury trial, whereupon the court conducted an inquiry which included the colloquy suggested in *Davis v. State.*[2] The court concluded that Defendant's waiver was knowing, intelligent and voluntary. The State agreed to waive its right to a trial by jury and the court ruled that this matter would be heard as a bench trial.

Criminal Rule 23(c) provides that in a trial without a jury "on request made before the general finding, [the court shall] find the facts specially."

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[1] As discussed below, on the first day of jury selection Defendant sought to fire his attorney and reschedule the trial. Defendant, who expressly refused to waive his constitutional right to assistance of counsel, asked this court to appoint him a new attorney. The ground for this application was that Defendant's trial counsel had not adequately prepared. The resolution of that issue is discussed at some length in the text.

Defendant's counsel proposed a stipulated trial. In light of the Defendant's claim that his counsel had not adequately prepared, the court anticipated the likelihood that Defendant would file a Rule 61 motion alleging ineffective assistance of counsel if he were convicted in the bench trial. Mindful that Defendant must prove that any constitutional deficiencies in his counsel's representation would raise questions about the fairness of his conviction, the court decided that a later reviewing court, whether it be this court or the Delaware Supreme Court, should have a complete record of the evidence relating to Defendant's guilt or innocence. The court therefore declined Defendant's offer to proceed with a stipulated trial.

[2] 809 A.2d 565 (Del. 2002).

Defendant timely made such a request, and this constitutes the court's findings of fact. Before making those findings, however, the court will discuss Defendant's last minute motion for a continuance and the court's reasons for denying that motion.

II. Defendant's *pro se* motion for a continuance

Before setting forth its findings of fact the court wishes to expound upon the reasons why it denied a belated *pro se* motion for a continuance. On the morning of jury selection, Defendant sought to fire his counsel and asked that the court assign him a new attorney. Defendant claimed his attorney was ineffective and asked the court to appoint him new counsel. He asserted that a continuance would be necessary for a new attorney to have time to properly prepare for the case.

The accused have a right to counsel, but the Sixth Amendment to the United States Constitution "does not guarantee criminal defendants an absolute right to counsel *of their choice*."[3] The right to "[d]ue process is satisfied so long as the accused is afforded a fair and reasonable opportunity to obtain his chosen counsel and there is no arbitrary action prohibiting the

[3] *U.S. v. Kikumura*, 947 F.2d 72, 78 (3rd Cir. 1991) (emphasis in original) (citations omitted).

effective use of such counsel."[4] Defendant's dissatisfaction with his counsel, therefore, does not by itself require this court to appoint him new counsel.

The decision to grant a "continuance is traditionally within the discretion of the trial judge."[5] The Delaware Supreme Court has repeatedly examined the issue of a defendant seeking a continuance for new counsel on the eve of trial.

> The denial of a continuance for change of counsel on the eve of trial is not an abuse of discretion when: (1) there had been no previous complaint about counsel; (2) the defendant had a prior opportunity to obtain substitute counsel; and (3) obtaining substitute counsel was uncertain and appeared to be a dilatory tactic.[6]

Defendant had over a year from arrest to trial to obtain counsel of his choosing and he had not previously complained to the court about his Counsel. Defendant made no offer of having contacted substitute counsel and hoped the court would appoint new counsel. With the request coming as the court prepared for jury selection, it appeared to be a dilatory tactic.

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[4] *Id.* (citing *U.S. ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3rd Cir. 1969), *cert. denied*, 397 U.S. 946 (1970)).

[5] *Stevenson v. State*, 709 A.2d 619, 631 (Del. 1998) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589-90 (1964)).

[6] *Stevenson*, 709 A.2d at 631 (quoting *Riley v. State*, 496 A.2d 997, 1018 (Del. 1985)); *see Taylor v. State*, 1991 WL 57087 at *1 (Del. Supr.); *Waltman v. State*, 2003 WL 23104199 at *2 (Del. Supr.).

The court also considered other factors, including the State's position, "the efficient administration of criminal justice," and Defendant's rights.[7] The State objected to the motion. The efficient administration of criminal justice weighed heavily against a continuance. In criminal matters, delays increase the reluctance of witnesses to testify, especially in sensitive matters such as rape as is the case here.[8] The State expended considerable resources in preparing for trial and a long list of witnesses were scheduled to testify at trial.

The court also considered Defendant's rights. His application is premised on his contention that his counsel has not adequately prepared for trial and he is therefore being denied his constitutional right to the assistance of counsel. In an appropriate case, the court would be willing to continue trial where it is clear that counsel has been ineffective in his or her pretrial preparation and a manifest injustice would occur if Defendant were forced to proceed to trial. To this end, the court questioned Defendant about the basis of his contention that his counsel's preparation was inadequate. Initially, Hubbard simply asserted that his counsel did not have his best interest at heart. When pressed, Defendant identified five purported deficiencies in his counsel's preparation: (1) counsel failed to move to suppress a gun, which

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[7] *Stevenson*, 709 A.2d at 631 (citing *Kikumura*, 947 F.2d at 78).
[8] *See Stevenson*, 709 A.2d at 630-31 (citing *Rendle*, 409 F.2d at 1214).

was seized from him, (2) counsel failed to pursue a psychiatric defense, (3) counsel failed to move to sever the charges involving Molly Doe[9] from those involving Lisa Brown,[10] (4) counsel did not move for a change of venue, and (5) counsel did not move to dismiss because of an alleged delay in bringing him to trial. None of these contentions support the conclusion that defense counsel's preparation in this regard was inadequate and that a miscarriage of justice would result from the denial of Defendant's *pro se* motion. Defendant's contentions about his counsel are discussed separately below.[11]

(A) The absence of a motion to suppress

Both victims testified that he threatened them with a black handgun. When Defendant was arrested, a backpack was found during an inventory search in the trunk of the car he was driving. Police did not open the backpack until after they obtained a warrant authorizing them to do so. It is unlikely, therefore, that Hubbard would have prevailed in a motion to suppress the gun. Consequently, the court concludes that the absence of such a motion is not indicative of a failure to prepare.

(B) No pursuit of a mental illness defense

[9] This is a pseudonym for the first victim.
[10] This is a pseudonym for the second victim.
[11] The discussion of Defendant's contentions does not constitute a ruling on their substantive merits. Rather it is only an assessment of the likelihood of success made in the context of whether counsel was adequately prepared for trial.

Defendant contended that he has previously been treated for psychiatric problems, including schizophrenia, and that his counsel should therefore have pursued a mental illness defense. Defendant was examined at the Delaware Psychiatric Center by a forensic psychiatrist and was found not to be suffering from any condition that would support a finding of Not Guilty By Reason of Insanity or Guilty But Mentally Ill. Defendant was also found competent to stand trial.

Of note in the psychiatric report is the finding that Defendant, according to test results, is a malingerer. The court also saw evidence of this. During his psychiatric exam, Hubbard professed not to understand the role of the judge, prosecutor, and defense attorney. He showed no such signs of this during the trial, to the contrary he was knowledgeable and informed about the judicial process and took extensive notes during testimony. The various examples cited by Hubbard of his counsel's allegedly deficient preparation given by Defendant demonstrate his familiarity with the judicial process. Indeed, he told the court that he refused to waive his constitutional right to counsel and that if the court forced him to proceed with his current counsel "you will have to do this all over again." The court finds it is likely that Hubbard was malingering when he told the examining psychiatrist he did not understand the judicial system and it is

also likely that any future psychiatric examination would yield the same result.

The evidence at trial confirmed the court's belief that a mental illness defense would not likely have succeeded. Defendant took great pains to avoid detection when committing the crimes alleged in the indictment. While Ms. Doe was withdrawing money from a drive-up ATM, Defendant crouched down in the front passenger seat so as to avoid appearing on the security camera of the machine. Before leaving Ms. Doe's car at the end of her ordeal, he wiped down the inside of the car and ordered her to do likewise. He also took an empty soda cup with him as he left Ms. Doe's car, apparently attempting to remove a potential source of his DNA. Defendant wore gloves throughout the second incident (except when fumbling with the victim's car key and when assaulting the victim) in an obvious effort to avoid leaving fingerprints or DNA in the car. These efforts to avoid detection indicate to the court that Defendant had a full understanding that what he was doing was criminal.

In light of the foregoing, the court finds that counsel's decision not to pursue a mental illness defense is not evidence of deficient pre-trial preparation.

(C) No motion to sever

Criminal Rule (8) permits the joinder of offenses if "the offenses charged are of the same or similar character."[12] Here, the offenses are remarkably similar and occurred within three days of one another. They both involved abduction of young women at gunpoint who were sitting in a car in a parking lot. In one case, the perpetrator forced the victim to withdraw cash from an ATM and in the other he attempted to do so. The locations of the last two assaults in the first incident were within a few hundred yards of where the assault in the second incident occurred and on the same piece of property. The court believes, therefore, that had defense counsel filed a motion to sever there is little likelihood he would have prevailed. Accordingly, the court finds that the absence of a motion to sever is not indicative of a failure by counsel to prepare.

(D) The absence of a motion for change of venue

Ordinarily, a criminal case is tried in the county in which the alleged conduct occurred. "Except as otherwise provided by statute or by these rules, the prosecution shall be had in the county in which the offense is alleged to have been committed."[13] The rule permits a case to be tried in another county "if the court is satisfied that there exists in the county where the prosecution is pending a reasonable probability of so great a prejudice

[12] Super. Ct. Crim. R. 8.
[13] Super. Ct. Crim. R. 18.

against the defendant that the defendant cannot obtain a fair and impartial trial in the county."[14]

In June, 2010, there was media coverage of the events giving rise to this prosecution. There is no showing that this coverage was either pervasive or inflammatory. Potential jurors were carefully examined about their exposure to this media coverage. Many did not recall the media coverage and others recalled little, if anything, about it. No potential juror recalled any media coverage of the arrest of the defendant. Potential jurors who were exposed to coverage were questioned about whether that exposure would influence their decision in this case and the court excused those few who hesitated in their response. In short, the court is convinced that defendant would have received trial before a fair and impartial jury. The court therefore does not find fault with counsel's decision not to move for a change of venue. Certainly, it is not indicative of a failure to prepare for trial.

(E) No speedy trial motion

Defendants have a right to a speedy trial.[15] Defendant was arrested on June 22, 2010, and the grand jury indicted him on August 16, 2010. The trial commenced on September 12, 2011—less than 13 months from the

[14] Super. Ct. Crim. R. 21.
[15] *See* U.S. Const. Amend. VI.

indictment. The trial was originally scheduled by Commissioner Michael P. Reynolds for February 15, 2011. Thereafter, the case was specially assigned to this judge. Defense Counsel filed a motion asking the court to order a psychiatric evaluation of Defendant. The court ordered the evaluation and the psychiatric report was filed on February 23, 2011. The court rescheduled the trial for May 9, 2011. The State requested and the court granted a continuance that was granted because the Chief Investigative Officer was on medical leave until July 5, 2011. The court continued the trial until August 2, 2011, and later rescheduled the trial to September 12, 2011, based on the availability of the Chief Investigative Officer.

The Delaware Supreme Court has employed the *Barker*[16] test in considering speedy trial issues. "[C]ourts should assess four factors in determining whether a particular defendant has been deprived of the right to a speedy trial: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant."[17]

An assessment of these factors leads to the conclusion Defendant was not deprived of his right to a speedy trial. The trial began approximately thirteen months after the grand jury indicted Defendant. Delay is more

[16] *See Barker v. Wingo*, 407 U.S. 514 (1972) (noting the Court ruled that under the circumstances there was not a speedy trial violation when Defendant awaited trial for more than five years).
[17] *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) (citing *Barker*, 407 U.S. at 530).

tolerable for a serious, complex case such as the case here.[18] The trial was rescheduled three times. The first was after Defense counsel requested a psychiatric evaluation and the report was not ready in time for the February 2011 trial date. Upon receiving the report, Defense counsel needed adequate time to evaluate the report and decide the best way for the Defendant to move forward. The trial date was subsequently moved due to the Chief Investigative Officer's medical leave and scheduling conflict. The delays were not requested to give the State an advantage; rather they were occasioned by valid and neutral reasons.[19]

Defendant did not raise a speedy trial objection until the morning of trial when he attempted to fire his attorney, which weights against Defendant in this analysis.[20] Defendant did not appear to be prejudiced by the delays in this case. The first delay was for his benefit. The most serious concern is the impairment of a defense most likely because "defense witnesses are unable to recall accurately events of the distant past."[21] Defendant chose not to testify and did not present any witnesses. There was no indication during the trial that there were witnesses to the events, who did not testify. More importantly, perhaps, there was no indication at trial the witnesses were

[18] *See Barker*, 407 U.S. at 531.
[19] *See Barker*, 407 U.S. at 531 (noting that the Chief Investigative Officer's medical leave in this case is similar to the missing witness scenario described by the Court because the CIO was on medical leave).
[20] *See Barker*, 407 U.S. at 532 ("We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial).
[21] *Id.*

unable to give accurate testimony because of the time intervening between these crimes and the date of trial. In short the court finds no discernable prejudice to Defendant as a result of the time which elapsed between his arrest and trial.

In considering the *Barker* factors, the court believes that had defense counsel filed a speedy trial motion there is little likelihood he would have prevailed. Accordingly, the court finds that the absence of a speedy trial motion is not indicative of a failure by counsel to prepare.

III. Findings of Fact

The court notes at the outset that it finds the testimony of the victims to be straightforward and without embellishment. Their composure during their terrifying ordeals is nothing short of extraordinary, and that composure allowed them at trial to relate in substantial detail the facts surrounding these events. Having observed the demeanor of the victims during their testimony the court fully credits what they had to say. In addition, the State presented substantial evidence corroborating the victims' accounts. The court also notes that the Delaware State Police conducted a thorough investigation, and, as a result, developed overwhelming evidence against Hubbard. At trial, the State called 22 witnesses and introduced 184 exhibits. This

evidence leads the court to find that all of the following facts have been proven beyond a reasonable doubt.

(A) Molly Doe Is Attacked

Molly Doe is a single mother and part time student who worked full time at Abbey Medical Center, which is near the Christiana Hospital. June 2, 2010 was a hot, sunny day, and sometime between 11 and 11:30 a.m. Ms. Doe drove across the street to the First State Surgery Center, where there were shaded parking places, to eat her lunch and study for her night classes. Ms. Doe had her windows down, the air conditioning running, and doors locked, when sometime around 11:40am, she decided to take a cat nap before returning to work. She set the alarm on her cell phone, so as to not oversleep. No sooner had she dozed off when she was awakened, not by her cell phone, but by a stranger with a hand gun climbing into her car. That stranger was Alfred Hubbard.

Hubbard thrust the muzzle of his hand gun into Ms. Doe's side and told her "Do what I tell you to do—drive."[22] As Ms. Doe began to drive, Defendant ripped a small container of mace off of Ms. Doe's keychain and rifled through her purse, locating her driver's license. He also observed a photograph of Ms. Doe's son on her cell phone. Armed with this

[22] Unless otherwise specified, the gun remained between Defendant's legs or on the floor of the front passenger seat and within the Defendant's reach throughout the ordeal.

information, Hubbard threatened Ms. Doe, saying "I know where you work, I know where you live." This was not his only threat that day. Later, for example, he told Ms. Doe that if she reported this matter to the police he would have "a big black motherfucker go to your house and kill you and your son." In an understandable effort to appease Defendant and save her own life as well as that of her son, Ms. Doe followed his instructions.

Defendant proceeded to force Ms. Doe to drive on a meandering route through Delaware, Maryland and Pennsylvania before returning to Delaware. Hubbard's route took them to Newark and onto Elkton Road. After crossing into Maryland, Hubbard told Ms. Doe to make a right hand turn onto Fletchwood Road and then another right onto Appleton Road. They were now heading north toward Pennsylvania. After entering into Pennsylvania near Kemblesville, Hubbard's route took them generally north until they reached West Grove, at which time Hubbard directed Ms. Doe to head east toward Route 41, which they intersected just north of Avondale. From there, Hubbard directed Ms. Doe to drive south on Route 41. Throughout this trip, Ms. Doe was attempting to make conversation with Defendant, often about family, in an attempt to appease him and perhaps secure her release unharmed.

Ms. Doe's car re-entered Delaware on Route 41 and eventually Hubbard directed her to Limestone Road where they headed south. When they reached the Kirkwood Highway, Defendant told Ms. Doe to turn right and head toward Newark.[23]

At this juncture, Defendant began looking for a parking lot, ostensibly because he wanted to use his cell phone. He instructed Ms. Doe to make a U-turn on Kirkwood Highway near St. Mark's high school and pull of into the parking lot of the New Castle County library. There were two emergency medical technicians and perhaps an ambulance in that parking lot. Hubbard apparently became nervous and quickly instructed Ms. Doe to drive out of the lot.

Next, they went to the Christiana Mall, where Defendant directed Ms. Doe to a parking lot near Macy's department store. Defendant used this occasion to call his then girlfriend, Bonnie Santana, and asked her to switch her car with his truck. During the call, Hubbard mistakenly told his girlfriend his truck was at the Abbey Medical Center. Still seeking to appease Defendant, Ms. Doe quietly reminded him during the phone call that his truck was at First State Surgery Center. Ms. Santana did as she was told

[23] The State Police conducted what is referred to as a "mobile interview." In this case Ms. Doe accompanied officers in a state police car and told the officers where she made turns at Hubbard's direction. The State Police later recreated this trip using a marked car and videoed the trip from a helicopter. The video was shown at trial.

and drove her Mercedes to the parking lot at First State Surgery Center, left it there with the keys, and drove Hubbard's truck home.

While parked at the Christiana Mall Defendant became uneasy because of a male in a nearby white van, so he directed Ms. Doe to move to a more remote area of the parking lot. About this time Defendant instructed Ms. Doe to kiss him and Ms. Doe did as she was told. Not satisfied Hubbard told his victim to "kiss me like you mean it." He began to feel Ms. Doe's breast over her clothing. She pushed him away, but Hubbard instructed, "don't tell me no." Hubbard then told Ms. Doe to recline the driver's seat. When she complied, Hubbard pulled up Ms. Doe's shirt, removed her bra, and pulled her pants down. Defendant kissed Ms. Doe around the breasts and stomach and then digitally penetrated her vagina, all against her will. After this assault, Defendant told Ms. Doe to get dressed. As she was doing so, she began to put her bra back on. Hubbard told her not to do so and tossed it into the back seat.

Defendant next instructed Ms. Doe to drive out of the parking lot informing her that she could "either stop at the bank or make love to me." Hoping this would bring an end to her ordeal, Ms. Doe told him they would go to the bank, after which she drove went to the WSFS in University Plaza. Using a drive-up ATM, Ms. Doe withdrew $500 from a fund she had set

aside for her son's education and handed the cash to Defendant. WSFS records confirm the withdrawal, and the ATM security camera video shows the arm of someone trying to crouch down in Ms. Doe's passenger seat while the withdrawal was being made.

Ms. Doe's ordeal was far from over. After obtaining the money, Defendant instructed her to drive to the Delmarva Power & Light complex ("DP&L") off of South Wakefield Drive and had her park near a basketball court. He again instructed Ms. Doe to recline her seat. This time Hubbard performed cunnilingus on Ms. Doe against her will. Defendant then pulled down his pants and instructed Ms. Doe to "get him going." Ms. Doe understood what this meant and, against her will, performed fellatio on him. She stopped, but was forced to continue. Hubbard finally permitted her to stop, saying he could not get an erection because he had to urinate. Defendant tucked the gun into his pants and forced Ms. Doe to accompany him as he walked to nearby words and relieved himself. A security camera at the Delmarva facility recorded a car similar to Ms. Doe's drive into the facility and park near the basketball court. The video also shows a couple later exiting the car and walking toward the woods and returning to the car shortly afterwards.

Following this Defendant had Ms. Doe drive out of DP&L and continue to a parking lot adjacent to the Marriott's Residence Inn off of Chapman Road. Hubbard again threatened her there, telling her that if she ever told anyone what had happened, she, her son, or her family would be killed.

Defendant next instructed Ms. Doe to drive them to a Wendy's in University Plaza, where he told her to buy them drinks at the drive thru. After a brief drive to the nearby Christiana Town Center, Defendant directed Ms. Doe to take them back to DP&L. There he told her to park in a secluded area near a baseball field. Defendant told Ms. Doe that they were going to take a walk and she should pretend she was his girlfriend by holding his hand. Defendant took the keys and again tucked the gun into his pants. Another security camera at the Delmarva facility captured images of Ms. Doe's car[24] parking and two people exiting and walking toward the baseball field.

The pair then walked around the outside of the fenced ball field and then down an incline, which put them out of sight of the parking lot. There Hubbard forcibly had sexual intercourse with Ms. Doe. Defendant, who was

[24] At first it is not apparent in the video that it is Ms. Doe's car. This security camera is mounted in a fixed position and therefore was focused on Doe's car throughout the entire incident. The video shows two returning to the car. As the car left the parking lot it drove within feet of the security camera, leaving no doubt that it was Ms. Doe's car.

not wearing a condom, ejaculated inside her—an event which ultimately led to his capture. The pair walked back to the car, with Ms. Doe again being forced to hold Defendant's hand. As they were returning to the car, Hubbard told her "I made it quick and easy for you."

Defendant directed Ms. Doe drive back to Abbey Medical Center and then over to the First State Surgery Center. After Ms. Doe parked, Defendant began to wipe down the interior of Ms. Doe's car and ordered Ms. Doe to help him. He then put Ms. Doe's cell phone in her trunk, and told her to bend over in the car and not move for ten minutes. Taking his Wendy's cup with him, Defendant left. It was roughly 5:15 p.m.—five and a half hours after Ms. Doe was first abducted.

After waiting approximately ten minutes, a hysterical Ms. Doe began driving and eventually made her way to her sister's house. Her sister convinced her to go to Christiana Hospital, where she received medical attention from a nurse specially trained in treating victims of sexual assault. The sexual assault nursing examiner ("SANE") asked Ms. Doe what happened and took prodigious notes as Ms. Doe described her ordeal. The nurse's notes of that description, given within hours of the event, contain no material differences from Ms. Doe's testimony at trial. The SANE nurse assisted Ms. Doe in combing her hair in an effort to find any evidence which

might have been left behind by her assailant, collected her clothing, performed a physical examination, photographed recent abrasions on Ms. Doe's right arm, and gave medications to Ms. Doe. As part of the physical examination the SANE nurse, with Ms. Doe's permission, performed a speculum examination of the victim's vagina because there had been penetration by the assailant's penis. During that examination, the SANE nurse observed what appeared to be seminal fluid in Ms. Doe's vaginal vault. She swabbed that material for later analysis. Other swabs were taken for analysis.

Ms. Doe met with a Delaware State Trooper while still at the hospital. She described her attacker as wearing Oakley sunglass, a faded navy blue t-shit, a baseball cap, faded black sweat pants with a bleach stain, and white Nike sneakers with a Nike Swoosh outlined in baby blue. Clothing matching that description would later be found in Hubbard's home.

The State also obtained records of cell towers in the area in which the assaults took place. These records show whether a call was placed or received by a particular cell phone while it was in the vicinity of a particular tower. The records were matched to Hubbard's cell phone and the results show that Hubbard's cell phone was in the vicinity of the various assaults on June 2 about the time the assaults were committed.

(B) Lisa Brown Is Attacked

On Saturday morning, June 5, 2010, Lisa Brown thought she would earn some overtime at her employer Sallie Mae, which is located near Newark. After parking in the Sallie Mae lot, she sat in her car and applied makeup while her car doors were locked and the engine was running. Out of the corner of her eye, Ms. Brown saw someone run past the back of her car. She fleetingly thought it might be a co-worker playing a joke on her, but the next thing she knew, an unknown male was at her window pointing a hand gun at her.[25] It was Hubbard.

Hubbard was wearing gloves this time, apparently in an effort to avoid leaving prints or DNA evidence. As he did with Ms. Doe, Hubbard instructed Ms. Brown to do what he said or he would kill her. He told Ms. Brown to slide over to the passenger seat, whereupon he got into the driver's seat. Next, Hubbard had Ms. Brown put her hands on the dash. He then bound her wrists together using a black plastic zip-tie. Defendant told Ms. Brown that he was taking her to an ATM where she was to withdraw money for him. When Ms. Brown told him that she did not have any money, Hubbard became frustrated and informed Ms. Brown that they would then have to look for someone else to rob.

[25] Unless otherwise specified, the gun remained in Defendant's hand or near his seat and within the Defendant's reach throughout the ordeal.

Defendant drove both of them out of the Sallie Mae parking lot. After driving for several minutes he drove to the Comcast complex off of Chapman Road, where he proceeded to look for someone to rob. No one was in the parking lot, so they next proceeded to the nearby DP&L complex where Hubbard had raped Ms. Doe just three days earlier.

Defendant parked the car near a tennis courts in the complex, only yards from the basket ball court where he first raped Ms. Doe. He began going through Ms. Brown's purse and removed her cell phone and identification. He noticed that Ms. Brown had a child from the photo in her phone. Defendant asked Ms. Brown several questions about her name and address as he looked at her license and told her "I know where you live" and "if you tell anyone I'm going to come after you and your child." Finally, he threatened that even if he went to jail, he would have someone find her and kill her.

While still holding the gun, Defendant sexually assaulted Ms. Brown. He first felt her breasts over her clothes. Against Ms. Brown's will, he then pulled her shirt down, took out her left breast, and placed his mouth on it. Ms. Brown told him to stop; Hubbard responded "shut up." Next, he put his hands down Ms. Brown's pants and digitally penetrated her vagina against her will.

After the assault, Defendant drove out of the complex. He talked with Ms. Brown about her family and told her that her car needed a new front left ball joint. Coincidently, Ms. Brown had recently been told the same thing by a mechanic. They proceeded to the University Plaza parking lot and eventually parked near an Acme where Hubbard casually lit up a cigarette. He continued asking for Ms. Brown's help in finding someone to rob and drove her to the nearby Christiana Town Center. Hubbard saw a law office in that shopping center and commented it might be a good spot to rob someone because lawyers have lots of money. Defendant never found a suitable target.

About an hour after the abduction began, Defendant took Ms. Brown back to the Sallie Mae parking lot. Using her keys, he cut off the zip tie from Ms. Brown's wrists and took the zip tie with him. He instructed Ms. Brown to follow his instructions or he would come back and shoot her. He directed her put her head down for ten minutes just as he had told Ms. Doe. Ms. Brown was reluctant to put her head down for fear Defendant would kill her in an execution-style shooting, but she did so. As Hubbard left the car, he told Ms. Brown, "I'm sorry."

After approximately ten minutes, a hysterical Ms. Brown ran into the Sallie Mae building and went straight to a security guard. At first Ms.

Brown seemed incoherent, but the security guard quickly discerned something was seriously wrong and called the police.

Ms. Brown was transported to Christiana Hospital for medical attention. Another SANE nurse performed the same routine as was undertaken when Ms. Doe was examined and treated. Once again, as part of that routine the nurse took careful notes as Ms. Brown described what she had just undergone. And as in the case of Ms. Doe, there is no material difference between those notes and Ms. Brown's trial testimony. The SANE nurse photographed red marks on Ms. Brown's wrists consistent with injuries suffered as a result of being bound by a zip-tie, and swabbed Ms. Brown's left breast in an effort to locate any DNA left by the assailant.

While at the hospital, Ms. Brown met with police. She described her attacker was wearing a tan backwards baseball cap, t-shirt, khaki shorts, white socks, and white Nike sneakers with a blue Nike swoosh. Clothing matching that description was later found in Hubbard's home.

(C) The Investigation and Hubbard's Apprehension

Shortly after the first attack, the State Police met with Ms. Doe to construct a composite sketch of her attacker using a sophisticated computer program. Ms. Doe was satisfied with the results, except that she thought the

eyes should be placed a little closer together.[26] Likewise, Ms. Brown—who was not shown the sketch prepared by Ms. Doe—met with the State Police to prepare a composite sketch and she too thought the eyes on the sketch should be placed closer together. The composite sketches prepared by Ms. Doe and Ms. Brown are remarkably similar. They also closely depict Defendant. Indeed when they appeared in the news media Defendant told his then girlfriend that they "look a lot like me."

The swabs taken by the SANE nurses proved to be productive and ultimately led to Hubbard's arrest. The swabs were separately stored in sealed boxes, which were kept in a limited access locked room at the hospital. The boxes were taken by the State Police to the Delaware Medical examiner's offices where they were handled according to strict protocols. Melissa Newell, an experienced analyst employed by the Medical Examiner's office, was able to extract DNA from the swabs. She found the presence of semen in the samples from Ms. Doe's vagina and created a DNA profile for the then unknown male. Ms. Newell conducted similar tests for the samples from Ms. Brown and found DNA on the swab taken from her left breast. Ms. Newell created a profile of that DNA and compared it to DNA profiles of the samples collected from Ms. Doe. They were a match.

[26] Despite its sophistication the computer program was incapable of moving the suspect's eyes closer together on the composite.

The Medical Examiner's office is a member of the Combined DNA Index System, "CODIS" for short. CODIS, which is managed by the F.B.I, is a national data base of DNA profiles of known subjects. Robyn Quinn, who is the supervisor of the CODIS system in the office of the Delaware Medical Examiner, uploaded the profiles of the unknown male into CODIS and learned that the system had a match with a known subject. The match was on file in Virginia. As required by protocol, the authorities in Virginia reanalyzed their matching sample and then released the identity the subject to the Delaware authorities—Alfred Hubbard.

The State Police now had a known suspect. Ms. Doe and Ms. Brown were separately shown photo arrays consisting of photographs of six males with similar appearances; one of whom was Defendant. Both quickly, and without equivocation, identified the photograph of Defendant as their assailant.

The State Police promptly obtained an arrest warrant for Defendant and began surveillance of his home. Around six a.m. on June 22, 2010, Defendant and his then girlfriend were observed exiting their house and getting into the girlfriend's Mercedes Benz. Before doing so, Hubbard placed a black and red backpack into the trunk of the Mercedes. Defendant drove out of his development and another unmarked police car followed

him. Defendant was shortly pulled over by a trooper in a marked state police car and was arrested. Prior to towing the Mercedes, the police conducted an inventory search and the black and red backpack was found—it was not opened.

The State Police obtained a search warrant authorizing them to search the backpack as well as Defendant's truck and home. Upon executing the warrant to search the backpack police found a loaded 9 mm. Sig Saur semi automatic hand gun, which the Delaware State Police later confirmed to be in functioning order. Bonnie Santana, Hubbard's (then) girlfriend, testified at trial that Hubbard told her to purchase a handgun for him. She first went to Miller's Gun Shop on Route 13 where the clerk alertly refused to sell her a handgun because he thought it was a straw purchase, which in fact it was. Ms. Santana went to another gun shop where she managed to purchase the Sig Saur. Ms. Santana testified at trial that she was afraid of guns, had never handled one before and did not want to purchase it. Asked at trial why she did so, she responded "I was told to."

Police officers also searched Defendant's home. They recovered, among other items, a pair of black Oakley sunglasses, white Nike sneakers with a blue swoosh, black sweatpants with a white stain, a blue Nautica t-shirt, and khaki shorts. These matched the clothes described by Ms. Doe

and Ms. Brown. They also found a gun case made for a 9 mm Sig Saur and a cloth pouch containing two loaded clips for a Sig Saur. Police found a package of black plastic zip-ties in Hubbard's home and several loose black plastic zip-ties in his truck. Ms. Brown testified that the ties resembled the one that her attacker used to bind her wrists.

Detective Scott Kleckner of the Delaware State Police swabbed Defendant's mouth to obtain DNA. Ms. Newell of the Medical Examiner's office received the swab, created a profile, and compared it to the profiles of the DNA found on Ms. Doe and Ms. Brown. Ms. Newell concluded that the unknown male DNA in the samples from Ms. Doe and Ms. Brown were a match to the sample from Defendant. She concluded that in the Caucasian population there is a 1 in 11 sextillion chance that another unrelated individual would match the DNA samples. The court finds that the DNA analysis was performed by an expert in the field and that the evidence almost certainly identifies Defendant as the man responsible for these acts.

III. Conclusions

(A) Rape in the First Degree

Rape in the first degree is defined in relevant part as the commission of rape in the second degree where the defendant appears to display what

appears to be a deadly weapon.[27] Rape in the second degree is defined as intentional sexual intercourse with another without the victim's consent.[28] The term "sexual intercourse" is defined as including "[a]ny act of cunnilingus or fellatio regardless of whether penetration occur[ed]."[29] And any "physical union of the genitalia . . . of one person with the . . . genitalia of another person. It occurs upon any penetration, however slight."[30]

The State proved beyond a reasonable doubt that Defendant engaged in sexual intercourse against Molly Doe without her consent on three different occasions. The first occurred at the basketball court at the DP & L facility when Defendant performed cunnilingus on Ms. Doe. The second occurred at the same location when he forced her to perform fellatio on him at the same site. The third occurrence took place when Defendant forced Ms. Doe to submit to vaginal intercourse near the baseball field at the same facility. On each occasion, Defendant had with him, and displayed a handgun. He offered no evidence of a legally recognized affirmative defense. He will therefore be adjudged **GUILTY** of the crimes alleged in Counts I, III, and V of the indictment.

(B) Rape in the Second Degree

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[27] *See* 11 Del. C. § 773 (3).
[28] *See* 11 Del. C. § 772(a)(1).
[29] 11 Del. C. § 761(g)(2).
[30] 11 Del. C. § 761(g)(1).

Rape in the second degree is defined in pertinent part as sexual penetration without the victim's consent and in which the defendant displays what appears to be a deadly weapon.[31] The term "sexual penetration" is defined to include the unlawful placement of an object (including fingers) in the vagina of another person.[32]

The court finds beyond a reasonable doubt that on June 2, 2010, Hubbard placed one or more of his fingers in Molly Doe's vagina without her consent, while in the parking lot of the Christian Mall and at that time he displayed what appeared to be a deadly weapon. The court further finds beyond a reasonable doubt that on June 5, 2010, Hubbard placed one or more of his fingers in Lisa Brown's vagina without her consent while near the tennis courts of DP&L, and at the time he did so he displayed what appeared to be a deadly weapon. Defendant will therefore be adjudged **GUILTY** of the crimes alleged in Counts VII and XXII of the indictment.

(C) Robbery in the First Degree

Robbery in the first degree is defined in pertinent part as the commission of robbery in the second degree accompanied by the display of what appears to be a deadly weapon.[33] Robbery in the second degree is

[31] *See* 11 Del. C. § 772(2)(d).
[32] *See* 11 Del. C. § 761(i).
[33] *See* 11 Del. C. § 832.

defined in pertinent part as the commission of a theft in which the defendant uses or threatens the use of force in order to facilitate the theft.[34]

The court finds that the State has proven beyond a reasonable doubt that on June 2, 2010, Defendant threatened the immediate use of force on Molly Doe with a firearm and that he did so forcing her to withdraw $500 from her account at the WSFS drive-thru ATM. The court further finds that the State has proven beyond a reasonable doubt that at the time he did so Defendant displayed what appeared to be a deadly weapon. Therefore, Defendant will be adjudged **GUILTY** of the crime alleged in Count IX of the indictment.

(D) Kidnapping First Degree

Kidnapping in the First Degree is defined in 11 *Del.C* §783A as Kidnapping in the Second Degree in which the defendant "does not voluntarily release the victim alive, unharmed and in a safe place prior to trial." It is obvious that both Ms. Doe and Ms. Brown were "harmed" in the common sense of the word before they were released. The court finds that based upon the statutory language, however, the rapes which occurred are not the "harm" contemplated by section 783A. The General Assembly defined Kidnapping in the second degree in section 783 to be the unlawful

[34] *See* 11 Del. C. § 831.

restraint in order to "violate or abuse the victim sexually." If rape is the sort of harm contemplated in section 783A, then a kidnapping in which a rape occurred would necessarily always be kidnapping in the first degree. This would render the afore-quoted language of section 783 defining kidnapping in the second degree meaningless. It is a maxim of statutory construction, that courts should construe statutes *in pari materia* and must, whenever possible, avoid constructions which render portions of a statute meaningless.[35] The court concludes therefore that, despite the horrific nature of what occurred to these two victims, it is not the sort of "harm" contemplated by section 783A.[36] It follows that, because the victims were voluntarily released and they were not "harmed" as contemplated by section 783A, the State has failed to prove kidnapping in the first degree beyond a reasonable doubt with respect to both victims. Therefore, Defendant will be adjudged **NOT GUILTY** of the crime of kidnapping in the first degree as alleged in Counts XI and XX of the indictment.

(E) Kidnapping in the Second Degree

The court will consider whether Hubbard is guilty of the lesser included offense of Kidnapping in the second degree. Kidnapping in the

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[35] *See Sommers v. State*, 2010 WL 5342853, at *2 (Del. Supr.); *Allen v. State*, 970 A.2d 203, 213 (Del. 2009) (reading the criminal code *in pari material*).

[36] *C.f. Tyre v. State*, 412 A.2d 326, 329-30 (Del. 1980) (noting that the Court considered a punch in the mouth resulting in a cut lip for the victim in justifying the kidnapping in the first degree conviction as opposed to kidnapping in the second degree).

second degree is defined in part as occurring when someone intentionally retrains another person to abuse the person sexually and voluntarily releases the person prior to trial alive, unharmed, and in a safe place.[37]

The court finds beyond a reasonable doubt that Defendant intentionally restrained Molly Doe independent of the rape during the approximately five hours that Defendant forced Molly Doe to drive around Delaware, Maryland, and Pennsylvania. The court further finds beyond a reasonable doubt that Defendant restrained Molly Doe for the purpose of abusing her sexually. The court also finds beyond a reasonable doubt that Defendant intentionally and voluntarily restrained Lisa Brown independent of the rape during the approximate hour that Defendant drove Lisa Brown, while holding her captive in her car. The court further finds beyond a reasonable doubt that Defendant restrained Lisa Brown for the purpose of abusing her sexually. Defendant offered no evidence of a legally recognized affirmative defense. The court stresses that in both instances it finds beyond a reasonable doubt that the restraint was not incidental to the sexual abuse itself. Therefore, Defendant will be adjudged **GUILTY** of kidnapping in the second degree of Ms. Doe and Ms. Brown, the lesser included charge of the crime alleged in Counts XI and XX of the indictment.

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[37] *See* 11 Del. C. § 783.

(F) Unlawful Sexual Contact First Degree

Unlawful sexual contact in the first degree is defined in pertinent part as committing unlawful sexual contact in the second degree or unlawful sexual contact in the third degree in which the defendant displays what appears to be a deadly weapon.[38] Unlawful contact in the third degree occurs when on person has sexual contact with another person without that person's consent.[39] Sexual contact is "[a]ny intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person."[40]

The court finds beyond a reasonable doubt that Defendant intentionally had sexual contact with Molly Doe when he touched her breasts without her consent, while parked in the Christiana Mall parking lot. The court also finds beyond a reasonable doubt that Defendant intentionally had sexual contact with Lisa Brown when he touched her breasts without her consent, while parked in the DP&L complex near the tennis courts. The court further finds beyond a reasonable doubt that Defendant displayed a firearm during the commission of the unlawful sexual contacts against Molly Doe and Lisa Brown. Defendant offered no evidence of a legally recognized affirmative defense. Therefore, Defendant will be adjudged **GUILTY** of

[38] *See* 11 Del. C. § 769.
[39] *See* 11 Del. C. § 767.
[40] 11 Del. C. § 761(f)(1) (2011).

unlawful sexual contact in the first degree as alleged in Counts XIII and XXVI of the indictment.

(G) Terroristic Threatening

Terroristic Threatening is defined in pertinent part as a person threatening to commit a "crime likely to result in death or in serious injury to" another person.[41]

The court finds beyond a reasonable doubt that Defendant intentionally threatened to kill Molly Doe, while they were in the Marriott's Residence Inn off of Chapman Road. The court further finds beyond a reasonable doubt that Defendant intentionally threatened to kill Lisa Brown, when he forced his way into her car in the Sallie Mae parking lot. Defendant offered no evidence of a legally recognized affirmative defense. Therefore, Defendant will be adjudged **GUILTY** of terroristic threatening as alleged in Counts XV and XXVIII.

(H) Carjacking in the First Degree

Carjacking in the first degree is defined in pertinent part as knowingly and unlawfully taking possession or control of a vehicle from another person without the person's permission.[42] Additionally, while trying to take

[41] 11 Del. C. § 621(a)(1).
[42] *See* 11 Del. C. § 836(a).

possession of the vehicle or while in possession of the vehicle, the defendant must display what appears to a deadly weapon.[43]

The court finds beyond a reasonable doubt that Defendant knowingly and unlawfully took possession and control of Lisa Brown's Blue Chevrolet Blazer without her permission, when she was sitting the driver's seat and parked in the Sallie Mae parking lot. The court further finds beyond a reasonable doubt that Defendant displayed a deadly weapon both at the time he took possession of the vehicle and while he was control of the vehicle. Defendant offered no evidence of a legally recognized affirmative defense. Therefore, Defendant will be adjudged **GUILTY** of carjacking in the first degree as alleged in Count XVI of the indictment.

(I) Aggravated Menacing

Aggravated Menacing is defined as intentionally placing "another person in fear of imminent physical fear of imminent physical injury" while displaying what appears to be a deadly weapon.[44]

The court finds beyond a reasonable doubt that Defendant intentionally placed Lisa Brown in fear of imminent physical injury when he threatened to kill her if she did not comply with his demands as he entered her car in the Sallie Mae parking lot. The court further finds beyond a

[43] *See* 11 Del. C. § 836(a)(4).
[44] 11 Del. C. § 602(b).

reasonable doubt that Defendant displayed a firearm to Lisa Brown. Defendant offered no evidence of a legally recognized affirmative defense. Therefore, Defendant will be adjudged **GUILTY** of possession of aggravated menacing as alleged in Count XVIII of the indictment.

(J) Attempted Robbery in the First Degree

A person attempts to commit a crime when he intentionally takes "a substantial step in a course of conduct planned to culminate in the commission of the crime by the person."[45] Robbery in the first degree is defined in pertinent part as the commission of robbery in the second degree accompanied by the display of what appears to be a deadly weapon.[46] Robbery in the second degree is defined in pertinent part as the commission of a theft in which the defendant uses or threatens the use of force in order to facilitate the theft.[47]

The court finds beyond a reasonable doubt that Defendant intentionally attempted to commit a theft by telling Lisa Brown to go the ATM, withdraw money, and deliver it to him. The court further finds beyond a reasonable doubt that Defendant displayed a firearm in the commission of the attempted robbery and threatened immediate use of force on Lisa Brown during the encounter. The attempted robbery took place

[45] 11 Del. C. § 531(2).
[46] *See* 11 Del. C. § 832.
[47] *See* 11 Del. C. § 831.

shortly after Defendant forced his way into Lisa Brown's car and was unsuccessful because of Lisa Brown protestations that she did not have any money to withdraw. Defendant offered no evidence of a legally recognized affirmative defense. Therefore, Defendant will be adjudged **GUILTY** of attempted robbery in the first degree as alleged in Count XXIV of the indictment.

(L) Possession of a Firearm During the Commission of a Felony

Possession of a firearm during commission of a felony is defined as occurring when a person possesses a firearm during the commission of a felony.[48] The court finds beyond a reasonable doubt that Defendant possessed a firearm throughout these events the firearm was within Hubbard's proximity and control. The court thus finds beyond a reasonable doubt that he possessed that firearm during the commission of each of the above adjudicated felonies namely: rape in the first degree, rape in the second degree, robbery in the first degree, kidnapping in the second degree, unlawful sexual contact in the first degree, carjacking first degree, aggravated menacing, and attempted robbery in the first degree. Defendant offered no evidence of a legally recognized affirmative defense. Therefore, Defendant will be adjudged **GUILTY** of possession of a firearm during the

[48] *See* 11 Del. C. § 1447A.

commission of a felony as alleged in Counts II, IV, VI, VIII, X, XII, XIV, XVII, XIX, XXI, XXIII, and XXV.

The court will enter a separate verdict form consistent herewith.

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John A. Parkins, Jr.
Judge of the Superior Court

Dated: September 29, 2011