2012 PA Super 146

COMMONWEALTH OF PENNSYLVANIA, Appellee v. EDWARD PETTERSEN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2216 EDA 2011

Appeal from the Judgment of Sentence of July 7, 2011
In the Court of Common Pleas of Pike County
Criminal Division at No(s): CP-52-CR-0000425-2009

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J., and COLVILLE, J.*

OPINION BY BENDER, J. Filed: July 16, 2012

Appellant, Edward Pettersen, appeals from an aggregate sentence of 21 ½ - 70 years' incarceration imposed following his conviction for three counts of aggravated assault,[1] one count of burglary,[2] one count of criminal trespass,[3] three counts of simple assault,[4] and one count of reckless endangerment.[5] Appellant raises four claims of error. After careful review and for the reasons set forth below, we affirm.

The trial court summarized the facts adduced at trial as follows:

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* Retired Senior Judge assigned to the Superior Court.
[1] 18 Pa.C.S. § 2702
[2] 18 Pa.C.S. § 3502
[3] 18 Pa.C.S. § 3503
[4] 18 Pa.C.S. § 2701
[5] 18 Pa.C.S. § 2705

> On October 14, 2009 at approximately 4:20 a.m. the Pennsylvania State Police ("PSP") were contacted by the Newton Memorial Hospital in Newton, New Jersey regarding a male and female who had just arrived at the hospital. The female, later identified as Suzanne Pettersen, was bleeding profusely and appeared to have multiple stab wounds. The male who accompanied her to the hospital was later identified as Edward Pettersen ("Appellant").
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> When questioned regarding his wife's condition, the Appellant claimed that he was assaulted by an unknown person as he was going to his vehicle on a side street in the Birchwood Development in Pike County, Pennsylvania. The Appellant claimed that Suzanne Pettersen was stabbed by this unknown person while she was standing by the vehicle. The Appellant further stated that he then drove Suzanne Pettersen to the hospital in an SUV which was later discovered to be covered in blood.
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> Meanwhile, Suzanne Pettersen relayed to a nurse at the hospital that the Appellant had stabbed her multiple times and stated that he would only take her to the hospital if she did not tell anyone what happened. During this entire incident, there was an active Protection from Abuse ("PFA") Order issued on June 30, 2009 protecting Suzanne Pettersen from the Appellant.
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> It was proven at trial that the Appellant broke into the residence at 127 Walnut Street, Birchwood Lakes, Delaware Township, Pike County through a crawl space and entered the bedroom where Suzanne Pettersen was sleeping with her daughters. The Appellant proceeded to strike Suzanne in the head with a hammer and pull her out of the bedroom. The Appellant then stabbed her in excess of ten (10) times in the chest and back area. He then placed a plastic bag over her head and tried to suffocate her. Investigators later discovered that the Appellant left a black flashlight in the crawl space. A glove was also found near his car, which was parked several blocks away from the residence on a dead end road in a wooded area. Duct tape, bloody pillow cases and bed sheets were found in the residence. A plastic bag and hammer were found in the SUV.

Trial Court Opinion (T.C.O.), 10/14/09, at 1 – 2.

Appellant was tried over the course of three days by a jury and was eventually convicted on all counts. He was then sentenced on July 7, 2011. Each count of simple assault was merged as a lesser-included offense for sentencing purposes into each corresponding count of aggravated assault, and criminal trespass merged for sentencing purposes with burglary. Appellant was ultimately sentenced to consecutive terms of 7 – 20, 7 – 20, and 4 ½ - 20 years' incarceration for the three aggravated assault convictions, and a term of 3 – 10 years' incarceration for burglary consecutive to the aggravated assault sentences. Appellant was also sentenced to a concurrent term of 7 months' – 2 years' incarceration for reckless endangerment. This resulted in an aggregate sentence of 21 ½ - 70 years' incarceration.

Appellant presents the following issues for our review:

1. W[ere] the defendant's trial, conviction and sentence on various counts which had been previously dismissed and never reinstituted illegal and improper?
2. In the alternative to the above, if the multiple counts were properly before the court, should the defendant's convictions thereon have merged for the purposes of sentencing?
3. Was the defendant entitled to a reasonable continuance of the ongoing trial in order to evaluate evidence which was suddenly found to be available for review, despite previous insistence that it was not, and was the defendant prejudiced thereby?
4. Should the trial court have summarily denied counsel's motion for a pre-sentence evaluation of defendant's competency and mental state without any further proceedings thereon?

Appellant's Brief, at 4.

Appellant was initially charged with three aggravated assault counts, three simple assault counts, burglary, criminal trespass, and reckless endangerment by criminal complaint filed on October 14, 2009. The three separate aggravated assault counts (and corresponding lesser-included simple assault counts) were based upon the following actions: 1) striking the victim in the head with a hammer; 2) stabbing the victim in the chest and back; and 3) placing a bag over the victim's head in an attempt to suffocate her.

After Appellant's preliminary hearing, the magistrate only held over one count each of aggravated and simple assault. In doing so, the magistrate relied upon the argument of Appellant's counsel at the preliminary hearing. Preliminary Hearing, 10/27/09, at 59. Appellant's counsel had argued to the magistrate that the entire sequence of events that occurred during Appellant's attack on the victim should be treated as one incident. ***Id***. at 54 – 56. Accordingly, it was argued, Appellant should have been only charged with one count of aggravated assault, not three. ***Id***. at 54. Satisfied with this argument, and despite the Commonwealth's argument to the contrary, the magistrate dismissed two aggravated assault counts and two simple assault counts.

The Commonwealth filed another criminal information on November 16, 2009, again charging Appellant with three separate aggravated assault counts and three lesser-included simple assault counts. Appellant waived a

preliminary hearing that was scheduled for November 19, 2009. Over a year later, on December 22, 2010, Appellant filed a "Motion for Corrected Criminal Information" with the trial court, asking the court to amend the criminal information to only reflect the charges bound over by the magistrate.

The trial court denied Appellant's motion, and Appellant's first issue contends that the trial court abused its discretion in doing so.[6] Appellant contends that Pa.R.Crim.P. 544 provides the only means by which the Commonwealth can reinstitute criminal charges that are dismissed by a magistrate and, thus, the Commonwealth's failure to conform to Pa.R.Crim.P. 544 meant that the additional two aggravated assault counts and two simple assault counts were not properly before the jury.

Pa.R.Crim.P. 544 provides as follows:

> **Rule 544. Reinstituting Charges Following Withdrawal or Dismissal**
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> (A) When charges are dismissed or withdrawn at, or prior to a preliminary hearing, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the refiling of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.
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> (B) Following the refiling of a complaint pursuant to paragraph (A), if the attorney for the Commonwealth determines that the preliminary hearing should be conducted by a different issuing authority, the attorney shall file a Rule 132 motion with the clerk of courts requesting that the president judge, or a judge

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[6] Appellant preserved this issue by raising it again prior to jury instructions, and also before and after sentencing occurred.

> designated by the president judge, assign a different issuing authority to conduct the preliminary hearing. The motion shall set forth the reasons for requesting a different issuing authority.

Pa. R. Crim. P 544.

It is undisputed that the Commonwealth failed to follow the procedure set forth in Rule 544. However, the trial court concluded that Appellant was not entitled to any form of relief in this instance because he was on notice of his alleged criminal conduct and, therefore, he was not unduly prejudiced when the Commonwealth reinstituted the additional aggravated and simple assault charges in the criminal information. T.C.O., 5/14/11, at 5 – 8. The trial court indicated that the criminal information, separately charging three counts of aggravated and simple assault, merely reflected a legal determination of how to formulate the charges rather than any addition or alteration to the factual basis of alleged criminal conduct. ***Id***. at 5.

In reaching its decision, the trial court relied in part on Pa.R.Crim.P 564, which allows for the liberal amendment of criminal informations, provided that the amendment does not result in a deprivation of a defendant's right to notice of the alleged criminal conduct. ***Id***. at 5 – 6; ***see Commonwealth v. Davalos***, 779 A.2d 1190, 1194 (Pa. Super. 2001). Since the new criminal information did not allege any new *facts*, the trial court concluded that "the Appellant was fully apprised of all the allegations against him" and thus amendment of the charges was not prohibited. T.C.O., 5/14/11, at 6. The trial court stated that it determined that Pa.R.Crim.P 544 did not apply in this case because the magistrate's

dismissal of charges was based upon a legal issue, rather than a factual issue. ***Id***. at 7. The trial court also determined Appellant was not prejudiced because Appellant failed to call attention to the information containing the three separate aggravated and simple assault charges until over a year after the new information was filed.

The trial court also found support for its conclusion in ***Commonwealth v. Picchianti***, 600 A.2d 597 (Pa. Super. 1991). In ***Picchianti***, a single count of reckless endangerment was split into three counts just prior to the trial, reflecting the allegation that the appellant had placed three separate victims in danger by his conduct. The original criminal information listed three separate victims, but only set forth a single count of reckless endangerment. The trial court permitted the amendment over defense objections. After the appellant was convicted on two of the reckless endangerment counts, he appealed, contending the trial court had erred in permitting the amendment.

The ***Picchianti*** court determined that the appellant was not entitled to relief because he had not been prejudiced by the amendment of the information on the day of trial. It was held that:

> we find no prejudice to appellant where the amended information reflects the identical crimes, and the elements thereof arose out of the identical scenario and involve the identical victims. Amendment in this case did not broaden or change the reckless endangerment charge against appellant. In so finding, we discern a clear distinction between this case and the holding in ***Commonwealth v. DeSumma***, 522 Pa. 36, 559 A.2d 521 (1989), wherein the Supreme Court refused to allow amendment of a criminal complaint at trial to include victims

> who were not named in the original complaint. In ***DeSumma***, amendment to include previously unnamed victims violated Rule 229's prohibition charging additional or different offenses, vitiating possible defenses which might have been raised. Here, appellant had ample notice of the identity of his alleged victims, although they were contained in a single information. Appellant also claims he was prejudiced by the failure of the Commonwealth to provide a written amendment to him. Given the foregoing facts, we find no need to provide appellant with a new information which merely separates one count into three, and, therefore, no prejudice to appellant.

Id. at 599.

Appellant contends that ***Picchianti*** is inapposite because it specifically deals with amendments made pursuant to Rule 564 (numbered Rule 229 at the time ***Picchianti*** was decided). Because the Commonwealth simply refiled a criminal information, rather than amending the charges that had been reduced by the magistrate, Appellant contends that ***Picchianti*** does not apply to the case *sub judice*. However, Appellant does not cite any authority other than ***Commonwealth v. Carbo***, 822 A.2d 60 (Pa. Super. 2003) (*en banc*), to support his argument that he is entitled to relief due to the Commonwealth's failure to follow the explicit terms of Rule 544. We agree that ***Picchaianti*** is not directly on point in the instant case, and we agree that ***Carbo*** presents a more analogous example to the procedural posture, of this case; however, our reading of ***Carbo*** suggests that Appellant is not entitled to relief.

In ***Carbo***, the defendant (and appellee on appeal), Carbo, was Chairman of the Plymouth Township Council. He was charged with "theft by extortion, receiving stolen property, threats and other improper influence in

official and political matters, official oppression, and criminal attempt at theft by extortion." ***Id***. at 61 (footnote omitted). During the preliminary hearing, one of the witnesses set to testify against Carbo "renounced his previous statements to police and indicated that [a]ppellee never made an improper request for increased compensation." ***Id***. at 62. As a result, the magistrate "determined that the Commonwealth had failed to establish a prima facie case on the charges of theft by extortion, receiving stolen property and attempted theft by extortion. Nonetheless, [the magistrate] held the improper influence and official oppression charges for court." ***Id***.

Carbo subsequently filed a petition for writ of *habeas corpus* with the Court of Common Pleas. ***Id***. The trial court granted the petition and dismissed the remaining charges. Two months later, however, the Commonwealth filed a criminal information identical to the original one. ***Id***. Carbo again filed a petition for writ of *habeas corpus* seeking dismissal of all the charges. ***Id***. The trial court in ***Carbo*** then dismissed all the charges in the new criminal information because the Commonwealth had not presented new evidence to substantiate the charges previously dismissed. ***Id***.

An *en banc* panel of this court overruled the trial court's dismissal of the charges. ***Id***. The panel determined that there was no "new evidence" requirement for the refiling of charges dismissed at a preliminary hearing. ***Id***. The panel stated that "[w]hen charges are dismissed after a preliminary hearing, the Commonwealth may refile the charges and attempt to establish a prima facie case with the same evidence presented at the first hearing or

with additional evidence." ***Id***. Furthermore, with respect to the charges subsequently dismissed through the first petition for writ of *habeas corpus*, the panel held that "that the refiling of charges is a viable alternative to filing an appeal from the grant of a *habeas corpus* petition." ***Id***. at 69.

The right to refile is not limitless. As the ***Carbo*** court stated, the Commonwealth must refile charges "prior to the expiration of the statute of limitations[,]" and "[t]he Commonwealth may not reinstitute the charges in an effort to harass the defendant or where the refiling would prejudice the defendant." ***Id***. at 64. In this case, there is no issue with the statute of limitations, and there is no allegation nor evidence of an attempt to harass Appellant with the refiling of charges. Thus, ***Carbo*** would suggest that the only limitation in this instance, despite the Commonwealth's failure to conform to the strict terms of Rule 544, would be whether Appellant was prejudiced by the refiling of charges. In this respect, ***Picchianti*** is informative, as the issue of prejudice is substantially similar whether the Commonwealth refiles charges or amends charges that were previously dismissed by a magistrate.

While we do not endorse the Commonwealth's failure to follow the procedures set forth in Rule 544, Appellant fails to cite any authority to suggest he is entitled to a remedy in this instance absent a showing that failure to conform to Rule 544 constituted undue prejudice. As the general provisions of the Rules of Criminal Procedure provide:

> A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant.

Pa.R.Crim.P. 109.

Synthesizing the above authorities, we conclude that the Commonwealth's failure to conform to Rule 544, when refiling charges previously dismissed by a magistrate, does not automatically entitle a defendant to relief. A defendant will be entitled to relief, however, where he challenges the refiling of previously dismissed charges before the conclusion of the trial *and* when: 1) the refiling of charges occurs after the expiration of the statute of limitations; or 2) when the refiling of charges constitutes an effort to harass the defendant; or 3) where the refiling of charges is prejudicial to the rights of the defendant. ***Carbo***, 822 A.2d at 64; Pa. R. Crim. P. 109.

In the circumstances of this case, we conclude that Appellant was not prejudiced by the refiling of the criminal information. Appellant was on notice, even after the dismissal of certain charges by the magistrate, that he was accused of 1) striking the victim in the head with a hammer; 2) stabbing the victim in the chest and back; and 3) placing a bag over the victim's head in an attempt to suffocate her. Thus, Appellant was on notice of all of the acts alleged to have been committed regardless of whether those acts were formulated as one or multiple assaults. We cannot conceive

of a theory, nor has Appellant offered one for our consideration, that would demonstrate how his preparation for trial was hindered by the fact that he was facing three distinct aggravated assault charges (and corresponding simple assault charges) rather than one. The new information did not expand the number of victims, nor did it allege additional or distinct acts from those charges that survived dismissal from the magistrate. ***See generally Picchianti***, 600 A.2d at 599. As Appellant was not prejudiced by the Commonwealth's failure to strictly conform to Rule 544, we conclude his first claim does not entitle him to relief.

Appellant's second claim asserts that his three aggravated assault convictions should merge for sentencing purposes. Appellant asserts that the three assaults "collectively occurred during a single criminal act." Appellant's Brief, at 14. We disagree. While the three assaults all occurred during the same criminal episode, Appellant engaged in three distinct acts that each constitutes an aggravated assault.

Initially, we note that merger is a nonwaivable challenge to the legality of the sentence. ***Commonwealth v. Robinson***, 931 A.2d 15, 24 (Pa. Super. 2007). The issue is a pure question of law, allowing for plenary review. ***Id***.

The merger statute states that:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the

> court may sentence the defendant only on the higher graded offense.

42 Pa.C.S. § 9765. Thus, the issue in the instant case is whether Appellant's attack on the victim constituted a single criminal act or multiple criminal acts. If the assault is properly conceived of as a single criminal act, the sentences for aggravated assault in this case should merge, being that the second condition for merger, that "all of the statutory elements of one offense are included in the statutory elements of the other offense[,]" is met whether the elements of the different offenses considered are identical. ***Id***. "Our Courts have long held that where a defendant commits multiple distinct criminal acts, concepts of merger do not apply." ***Robinson***, 931 A.2d at 24.

When considering whether there is a single criminal act or multiple criminal acts, the question is not "whether there was a 'break in the chain' of criminal activity." ***Id***. (quoting ***Commonwealth v. Wesley***, 860 A.2d 585, 592 (Pa. Super. 2004)). This issue is whether "the actor commits multiple criminal acts beyond that which is necessary to establish the bare elements of the additional crime, then the actor will be guilty of multiple crimes which do not merge for sentencing purposes." ***Commonwealth v. Belsar***, 676 A.2d 632, 634 (Pa. 1996) (quoting ***Commonwealth v. Weakland***, 555 A.2d 1228, 1233 (Pa. 1989)).

We have no reservation in concluding that Appellant engaged in at least three separate, criminal acts, and that each individual act could independently fulfill the elements of aggravated assault. Although the time

between the separate acts was relatively short, the three assaults were committed with different weapons and caused distinct injuries to different parts of the victim's body. When Appellant struck the victim in the back of the head with a hammer, he committed an aggravated assault. When Appellant stabbed the victim multiple times in the chest and back, he committed at least one aggravated assault. And Appellant committed an aggravated assault when he attempted to suffocate the victim by placing a plastic bag over her head.

Appellant is not entitled to a volume discount for these crimes simply because he managed to accomplish all the acts within a relatively short period of time. ***Id***. (citing ***Commonwealth v. Anderson***, 650 A.2d 20, 22 (1994)). Consequently, we hold that Appellant was not entitled to have his three aggravated assault sentences merge.

Appellant's third claim posits that the trial court abused its discretion when it failed to grant Appellant a continuance in order to evaluate evidence, in the form of an digital audio/video file ("video"), which purportedly memorialized Appellant's initial statement to police at the hospital where he took the victim after the assaults occurred. Neither the defense nor the prosecution had been able to get the video file to play until after the trial began. On the evening of May 10, 2011, however, the prosecutor contacted defense counsel to inform him that he was able to get the video working. When the trial resumed the next day, the matter was brought to the trial court's attention.

Appellant's counsel initially indicated that he would need to review the video, that he would then need to confer with Appellant, and that he was likely going to ask that the prosecution be precluded from using it. N.T., 5/11/11, at 6. The prosecutor stated that he had no intention of introducing Appellant's statement on the video unless it became necessary to directly impeach some portion of Appellant's testimony. ***Id***. at 7.

After some discussion, defense counsel then stated that "[i]f I make a Motion to Preclude and it is precluded then at this point in time I think I'll be able to move forward." ***Id***. at 10. When the trial court indicated that it was inclined to preclude the admission of the video, defense counsel further asserted that he would need to re-question a witness, Trooper Mulvey who had testified that the recording was not working. ***Id***. The court said that if defense counsel was going to draw attention to the video, then the video should be admitted into evidence. ***Id***. at 11. Before any final decision was made, the court allowed Appellant's counsel to review the video, and told counsel to inform the court how he wanted to proceed afterwards. ***Id***. at 12 -13.

After defense counsel reviewed the video, he made the following statement to the court:

> Mr. Tonkin gave me the opportunity to see the video on his computer. So I saw and listened to the video and audio. Afterwards, I went to speak with my client. I spoke to my client, explained to my client what was going on. It would be my client's position that he does want me to ask Trooper Mulvey about it on what happened with the video and audio tape or CD. I didn't get into the whole mistrial issue or asking for a mistrial

> anyway with my client. Honestly, in looking at the video, it would seem to support what he was going to be testifying too, I guess so. I guess we just move forward, Your Honor.

Id. at 13 – 14. After this statement, defense counsel did not ask for a mistrial or a continuance.

Subsequently, defense counsel recalled Trooper Mulvey to the stand to discuss the video. Mulvey testified that he had been able to bring up the visual, but not the audio portion of the video, prior to trial. ***Id***. at 25 – 29. He stated that he contacted the Newton Police Department in New Jersey, informed them that he was having difficulty with the audio, and they confirmed that there was a problem with the audio. ***Id***. He tried to play the video file on several different computers, but made no further efforts to recover the audio portion of the file. ***Id***. This was substantially similar to the testimony that he had provided on the previous day of trial. N.T., 5/10/11, 128 – 29.

After defense counsel called Mulvey to the stand, he did not make or renew any objections regarding the issue surrounding the recording. Defense counsel did not ask for a continuance, nor did he request a mistrial. In the Brief for Appellant, Appellant contends that the trial court erred in denying a continuance in order for counsel to examine the recording.

In this circumstance, we are constrained to agree with the Commonwealth that Appellant waived any issue he had concerning the recording. The Rules of Appellate Procedure provide that "[i]ssues not

raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302.

While defense counsel did initially ask for a continuance, he did not renew that request after he was permitted to listen to the recording. He also did not ask for a continuance following his cross-examination of Trooper Mulvey. The record reveals that, though the trial court did reveal its intention to not permit a continuance as it was not likely to permit admission of the recording into evidence, it is clear that defense counsel was allowed to make any necessary objections after he had the opportunity to listen to the recording. The court stated: "[s]o, I'll give you a chance to review it and then figure out where you want to go. But I'm not just going to continue this for a day or whatever. Go watch the tape and figure out how you want to proceed. Okay? That's where we are." ***Id***. at 13.

Appellant's contention is that this constituted a denial of his request for a continuance. We disagree. We only surmise from this statement that the trial court was not inclined to grant a continuance without defense counsel having first reviewed the video. The trial court's statement left open the possibility that counsel could have asked the court for a continuance, or other form of relief, after counsel reviewed the video. The trial court's statements were, at best, construed as a conditional denial of the continuance request, subject to further consideration once defense counsel reviewed the video. Appellant's failure to renew the request for a continuance, or seek some other form of relief after his counsel listened to

the recording, constituted an effective waiver of any claim that the trial court had failed to grant a continuance.

Still, even if we were to find that Appellant had not waived the issue, we would nonetheless conclude that the trial court did not abuse its discretion in denying a continuance. "It is well settled that the grant of a continuance rests within the sound discretion of the trial court and that the decision to deny the continuance will not be reversed unless a clear abuse of discretion is shown." ***Commonwealth v. Hughes***, 399 A.2d 694, 698 (1979). Moreover, an appellate court will not find an abuse of discretion if the denial of the continuance did not prejudice the appellant. ***See Commonwealth v. McKelvie***, 370 A.2d 1155 (Pa. 1977); ***Commonwealth v. Kishbach***, 373 A.2d 118 (Pa. Super. 1976).

Appellant has failed to demonstrate that he was prejudiced by the trial court's denial of the continuance. As Appellant even acknowledges, his claim of prejudice is purely speculative in nature:

> it is unknown what use trial counsel may have been able to make of a) the recording itself, b) the fact of its sudden availability in the midst of trial, and/or c) the potential conflict in police testimony its revelation may have caused, had a reasonable amount of time been provided to analyze it and make appropriate adjustments to trial preparation and strategy.

Appellant's Brief, at 19. Hence, Appellant fails to assert a concrete, specific argument regarding how the failure to grant a continuance prejudiced him.

Appellant has not asserted what could have been ascertained through further review beyond what was learned during the time in which defense

counsel was permitted to review the video. While we acknowledge that the video's viability as potential evidence was unanticipated at the start of the trial, the trial court nonetheless precluded its use. Thus, while the video's accessibility as evidence was sudden, Appellant cannot claim this situation is analogous to cases where late-discovered or other surprise evidence was used against a defendant. Appellant has now had a reasonable amount of time to review the short video since the time of trial, far in excess of his initial request of one day's continuance, and yet he still cannot substantiate any actual prejudice beyond the inherently speculative claim regarding "the ***potential*** conflict in police testimony its revelation ***may*** have caused." ***Id***. (emphasis added).

Thus, though we conclude that Appellant has waived his third issue, had we addressed the merits, we would have concluded the trial court did not abuse its discretion in denying a continuance because Appellant failed to establish that actual prejudice occurred when the trial court denied his request for a continuance.

Appellant's fourth claim of error is that the trial court abused its discretion by denying defense counsel's pre-sentence request to have Appellant's mental health evaluated for competence. Appellant claims that he was, at a minimum, entitled to a hearing on the issue of the propriety of such an examination. Appellant's counsel cites the "disruptive effect" of *pro se* filings by Appellant, and the "bizarre and irrational nature" of the issues raised therein, including Appellant's claim that trial counsel was scheming to

have him convicted "with the apparent ultimate aim of forcing Pettersen and/or his family to re-hire and pay him to handle an appeal." Appellant's Brief, at 20. In light of these events, Appellant's counsel filed a motion for continuance of the sentence for the purpose of evaluating Appellant's mental fitness to proceed to sentencing. The motion was denied by the trial court. The issue was again raised, unsuccessfully, in a post-sentence motion.

The Metal Health Procedure Act provides, in pertinent part, that:

> Whenever a person who has been criminally charged is to be sentenced, the court may defer sentence and order him to be examined for mental illness to aid it in the determination of disposition. This action may be taken on the court's initiative or on the application of the attorney for the Commonwealth, the person charged, his counsel, or any other person acting in his interest.

50 P.S. § 7405.

The terminology used in § 7405 is not mandatory ("the court ***may*** defer"), and therefore we can safely assume that the court retains discretion regarding whether a mental health evaluation is appropriate in the given circumstances. "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." ***Commonwealth v. Cameron***, 780 A.2d 688, 692 (Pa. Super. 2001).

The trial court indicated that it denied the motions "[b]ased upon the Appellant's demeanor and ability to testify on his own behalf at trial and

based on the baseless circumstances raised by Defense Counsel in his request . . . ." T.C.O., 10/14/11, at 12. The trial court further explained its decision to deny the motion as follows:

> Instantly, it is important to note that at no point prior to or during the Appellant's trial was his competency brought into issue by Defense Counsel. Only after the Appellant was convicted was the issue raised. Based on the Court's observation of the Appellant throughout trial, in which he testified in his own behalf in a coherent, save incredible fashion, the Court did not find any basis to order a psychiatric or psychological evaluation prior to sentencing. The Appellant's *pro se* filings with the Court, in which he filed a Motion for Reconsideration because his "parents do not have the money to pay Mr. Mincer to do my appeals" and claimed that Defense Counsel did not properly defend him, did not show any indication of incompetency. ***See*** Correspondence from Appellant 7/19/11 and 7/20/11. Appellant Counsel's "concerns" about the Appellant's mental health based on his pro se submissions are unfounded. The Appellant's assertion that his counsel was trying to "throw" the trial seems to this Court to be more a dissatisfaction with his conviction than actual incompetency.
>
> Additionally, this Court notes that the Appellant testified in a competent and coherent manner at his sentencing proceeding. Even at that proceeding there was nothing to indicate to the Court that a psychiatric or psychological evaluation was needed. Accordingly, this Court's decision to deny Defense Counsel's request for a mental evaluation of the Appellant post-trial but pre-sentencing was proper and should be upheld.

Id. at 13 – 14.

Upon review of the reasoning set forth in the trial court's opinion, we find no basis to find an abuse of discretion. The trial court had ample opportunity to observe Appellant during the course of trial, and also had the opportunity to observe Appellant when he testified in his own defense. We

are also persuaded, based upon our own review of Appellant's *pro se* motions, that the content of those motions was not so bizarre and irrational as to demonstrate that the trial court's actions were manifestly unreasonable.

The motions appear to be no more than an attempt to assert ineffective assistance of trial counsel claims, albeit the accusation of ineffective assistance contains outlandish assertions of intentional misconduct. The mere presence of a conspiracy theory concerning trial counsel's motivations presented by Appellant in his *pro se* motions is not demonstrative of some manifest necessity to conduct a mental health evaluation. Furthermore, it is far too common an occurrence for a defendant to engage in *pro se* filings, while represented by counsel, to suggest that such filings are so inherently disruptive to the attorney-client relationship as to present an adverse inference regarding Appellant's mental health or competence. Accordingly, we cannot conclude that the trial court abused its discretion in denying the motion for a pre-sentence mental health evaluation, and, thus, Appellant's final claim affords him no relief.

In conclusion, we denied Appellant relief on his first claim because we found that he was not prejudiced by the Commonwealth's failure to follow Pa.R.Crim.P. 544 when it refiled charges that had been previously dismissed by the magistrate. We denied Appellant relief on his second claim because, as a matter of law, Appellant's three aggravated assault convictions did not merge for sentencing purposes, because they each stemmed from separate

and distinct criminal acts. We rejected Appellant's third claim as waived, but nonetheless concluded that had we addressed the merits of his claim, he would not be entitled to relief due to his failure to establish prejudice, as his claim of prejudice was too speculative to be legally cognizable. Finally, we rejected Appellant's fourth claim because the trial court's denial of Appellant's motion for a pre-sentence mental health evaluation was not manifestly unreasonable, and therefore not an abuse of discretion.

Judgment of sentence affirmed.