EXHIBIT C

IN THE SUPERIOR COURT OF PENNSYLVANIA

Eastern District

2097 EDA 2001

COMMONWEALTH OF PENNSYLVANIA,
Appellee

Vs.

JOSEPH MICHAEL STROHL
Appellant

BRIEF OF APPELLEE

Appeal from order denying Appellant's Motion for Post-Sentence Relief entered July 27, 2001 in the Court of Common Pleas of Northampton County, Criminal Division, Docket Number 829-2000

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COUNTER-STATEMENT OF THE CASE

On or about December 26, 1986, Ella Wunderly, an elderly woman who lived alone, was brutally beaten during a burglary of her home. She was left for dead. Mrs. Wunderly slipped into a chronic and persistent vegetative state. She never recovered. As a direct result of the injuries she suffered in 1986, she died in April 1994.

The Northampton County Investigating Grand Jury of 1999 reviewed the death of Ella Wunderly. As a result of that inquiry, the existing evidence in the case was updated and substantial new evidence was uncovered. The grand jury returned a presentment against Joseph Strohl on the charge of Criminal Homicide. Criminal charges were subsequently filed.

Appellant, Joseph Strohl, was tried and convicted by jury of Second Degree Murder. He was sentenced to life in prison.

Appellant's Post-Sentence Motions were denied on July 27, 2001 by the trial judge, the Honorable Robert A. Freedberg. A notice of appeal to the Superior Court was filed.

SUMMARY OF ARGUMENT

The evidence presented at trial was sufficient to sustain the verdict of Second Degree Murder. Specifically, there was evidence that during the course of a burglary on December 26, 1986 that Appellant savagely beat the elderly victim, leaving her for dead. Overwhelming, and largely uncontradicted, expert testimony established that the injuries sustained in 1986 caused the victim's death in 1994.

Appellant's due process rights were not violated by the 5 ½ year pre-arrest delay in this case. Appellant has not demonstrated any actual prejudice. Appellant has not shown that the delay was improperly motivated.

The trial court properly, and within its discretion, admitted evidence of defendant's burglary conviction against the same house the day after the assault.

The trial court properly, and within its discretion, admitted evidence of defendant's statements before the Grand Jury.

The trial court properly, and within its discretion, admitted photographs of the condition of the victim. While a projection device was used to display the images, the court limited the size of the image, the proximity to the jury, and the time duration in which it could be displayed. The court gave a limiting instruction as to the photographs' purpose.

The trial court properly, and within its discretion, admitted expert testimony as to the causation issue.

The trial court properly, and within its discretion, excluded evidence of the details of prior convictions of a Commonwealth witness. However, the trial court did allow evidence of the convictions and the sentence as relevant to credibility and bias on the part of the witness.

The trial court properly, and based on the evidence in the case, instructed the jury on accomplice liability.

ARGUMENT

I. Sufficiency of the Evidence

In reviewing a challenge to the sufficiency of the evidence the Court must determine whether all the evidence admitted at trial and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, is sufficient to support all the elements of the offense beyond a reasonable doubt. Commonwealth v. Miller, 664 A.2d 1310 (Pa. 1995).

The Appellant asserts that certain inconsistencies in the testimony negate the proof of the December 26th burglary (hereafter "Friday burglary"). However, with regard to any inconsistencies, it is for the jury to evaluate the credibility of the witnesses. The jury may believe all, part or none of the testimony. *See*, Commonwealth v. Purcell, 589 A.2d 217, 221 (Pa.Super. 1991). Inconsistency in the testimony is, and was at trial, the subject of attack by cross-examination and argument. "A mere conflict in testimony does not render the evidence

insufficient , because it is within the province of the fact finder to determine the weight to be given to the testimony and to believe all, part, or none of the evidence." Commonwealth v. Holmes, 663 A.2d 771, 773 (Pa.Super. 1995).

At trial, the Commonwealth presented testimony at trial from Dr. Mihalakis. This scientific evidence tended to prove that the assault on the victim occurred Friday evening. (N.T. at 208). The ransacked condition of the home, in combination with the other evidence, allowed the jury to conclude that the assault was part of a burglary. William Notti testified that he saw Appellant with a purse and money after Strohl had returned to the car from the area of the victim's house. (N.T. at 606). Later that night, Notti observed that something was thrown from his car as he drove to Emmaus from North Catasauqua. (N.T. at 608). Joseph Cecala testified that he first saw the victim's purse on Saturday morning. (N.T. at 580, 590). On the basis of the above evidence, the jury was able to reasonably conclude that the victim's purse was already stolen prior to the December 27th burglary (hereafter "Saturday burglary").

In addition, Robert Shull testified that he observed an opened window in the Wunderly home when he arrived at the home for the Saturday burglary. (N.T. at 525). Shull testified that she was already beaten when he and Strohl committed the Saturday burglary. (N.T. at 529). In response to Shull's question as to how Strohl knew she was dead if he had not previously been in the house, the Appellant stated that he had seen her "laying there". (N.T. at 542). Shull testified that he and Strohl entered directly through the front door. (N.T. at 528) This suggests Strohl's knowledge of the condition of the victim prior to the Saturday burglary. The jury could also reasonable conclude from the testimony that Notti and Shull were describing two separate entries into the Wunderly house.

The trial record, as outlined above and taken as a whole, contains ample proof that there was a Friday burglary, that during the Friday burglary the victim was severely beaten, and that the Appellant was the perpetrator of the Friday burglary and the assault.

The Appellant next argues that the evidence in this case was insufficient as to causation.

The severe injuries that Appellant inflicted on the victim were the cause of her death, and the trial record contains overwhelming proof of this element of the offense. To be a cause of the victim's death, the Appellant's conduct must be a direct and substantial factor in bringing about death. The Appellant's conduct does not need to be the sole or the immediate cause of death. Commonwealth v. Rementer, 598 A.2d 1300, 1305 (Pa.Super. 1991).

Here, Appellant initiated a chain of causation in 1986 that led to the victim's death in 1994. Appellant's savage beating of Ella Wunderly was a direct and substantial factor in bring about her death.

There is clear testimony as to this chain of causation from Dr. Fillinger. (N.T. at 366). Even Dr. Hoyer, the defense expert, concedes that the head injuries were a cause of death. (N.T. at 895, 904).

The head injuries suffered by the victim were documented by Dr. Mihalakis in 1986. These were the same injuries observed by Dr. Fillinger and Dr. Rorke in 1994. The alleged lack of medical records for the victim goes to the weight of the opinion. The Appellant had the opportunity to attack the opinion through cross-examination and in argument to the jury.

II. Pre-Arrest Delay

There is no statute of limitation for homicide prosecutions. 42 Pa.C.S.A §5551. However, the due process clause of the United States Constitution[1] can under certain limited circumstances require dismissal where there is oppressive prosecutorial delay. *See*, Commonwealth v. Scher, 732 A.2d 1278, 1281 (Pa.Super. 1999), *citing*, United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) *and* United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). The

[1] To the extent the Defendant's challenge includes both the 5th and 14th Amendments to the United States Constitution as well as Article I, Section 9 of the Pennsylvania Constitution, this Memorandum of Law treats them as identical issues. The Pennsylvania Constitution's "due process" clause provides no greater

limited circumstances requiring dismissal are not present in the instant case.

The threshold question is whether the Appellant is actually prejudiced by the pre-arrest delay. The showing of prejudice "cannot be speculative in nature, it must be actual and concrete". Scher, *supra* at 1286. For example, in Commonwealth v. Sneed, 526 A.2d 749, 752 (Pa. 1987), the defendant was required to show how deceased witnesses would have exculpated him.

> **"When a defendant argues undue delay in the filing of charges, proof of prejudice is a prerequisite to consideration of whether there has been a denial of due process."**

Id. at 752.

Here, the Appellant set forth the potential for prejudice in the assertion that medical records and documents, and unknown nursing home employees inhibit his preparation of a defense. However, Appellant failed to set forth any evidence to support the validity to an alternate theory of causation defense. There is

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protection than its federal counterpart in the area of pre-arrest delay. Commonwealth v. Snyder, 713 A.2d A.2d 596 ,602 (Pa.Super. 1998).

no showing that more medical records and/or the unknown witnesses would have exculpatory information. In the absence of such proof, all that remains is bald assertion and speculation. Indeed, the evidence of record is that the injuries that ultimately led to Mrs. Wunderly's death were not consistent with a fall, but rather of a blunt force strike. (N.T. at 362).

The Appellant also pointed to prejudice occasioned by the death of the police prosecutor on the burglary case, Dennis Snell. Once again, however, there is no record to suggest that Officer Snell would have exculpatory information. The same point applies to all of Appellant's allegations concerning lapses in witness memory generally and to assertions made about missing physical evidence.

Assuming *arguendo* that that there was a showing of actual prejudice, Appellant is still not entitled to dismissal. The Commonwealth met its burden of demonstrating that the pre-arrest delay was not unreasonable, improper, or intentionally calculated to cause the Defendant a tactical disadvantage.

About the secondary prong of the so-called Marion/Lovasco test, the Superior Court has recently written extensively. Commonwealth v. Scher, 732 A.2d 1278 (Pa.Super. 1999); Commonwealth v. Snyder, 713 A.2d 596 (Pa.Super. 1998)(hereinafter, "Snyder I"); and Commonwealth v. Snyder, 761 A.2d 584 (Pa.Super. 2000)(hereinafter, "Snyder II"); *See also*, Commonwealth v. McCormick, 772 A.2d 982 (Pa.Super. 2001).

Commonwealth v. Scher, *supra* is a panel decision which sets forth a standard wherein the Court reviews the prosecution in light of negligence and due diligence criteria. Scher has been appealed to our Supreme Court. In Snyder II, *supra,* the Superior Court *en banc* elected not to follow the due diligence and negligence standard of Scher and instead enunciated a standard of deference to the prosecutor with an examination of whether the delay was improper. Snyder II, *supra* at 590.

The Superior Court found no due process violation in Commonwealth v. Snyder, 761 A.2d 584 (Pa.Super. 2000), finding that valid reasons justified the pre-arrest delay in that case of over 11 years. The Court had previously remanded the matter so

that a record on the reasons for delay could be made. *See* Snyder I, *supra*. The Superior Court set forth a concise statement in these cases of the test to be utilized:

> **"[T]he Marion and Lovasco decisions stand for the proposition that to establish a due process violation for delay in prosecution, a defendant must show that the passing of time caused actual prejudice and that the prosecution lacked sufficient and proper reasons for postponing the prosecution.**

Snyder II, *supra* at 585, *quoting* Snyder I, 713 A.2d 596 at 601 (1998).

In Snyder, the delay was not improper where prosecutors and police officers gave consideration to its investigation until a new prosecutor eventually devoted substantial resources to reinvestigate the case including the findings of an investigating grand jury and the increased cooperation of some of the witnesses. The prosecutor, in light of the reinvigorated investigation changed his assessment of the case from sufficient to arrest to sufficient to convict.

By contrast, in Commonwealth v. Scher, 732 A.2d 1278 (Pa.Super. 1999), the defendant had been arrested for murder

approximately 20 years after the shooting death at issue. The Superior Court found that no comprehensive investigation was conducted until 18 years after the shooting. The Court further found that the Commonwealth had provided no proper reasons for the prolonged delay. Specifically, there was at one point an eight year laspe of no activity. Scher, *supra* at 1286. The Court determined that the inactivity was "grossly negligent". Id at 1287. The Superior accordingly reversed the conviction as violative of due process.

The Snyder Court rejected the negligent prosecution analysis. Constitutional standards are satisfied, according to Snyder II, even where the particular case has "undergone a period of informed deferral or perhaps even benign neglect". Snyder II, *supra* at 589. The Court recognized that a prosecutor has a duty and a legitimate interest in not rushing to prosecute a case. Id. at 587. Moreover, the Court recognized that it was appropriate to give deference to the decision-making responsibility of the prosecutor's office. Id. Courts should not hold prosecutors to a duty to prosecute promptly when it appears

that probable cause is present. Commonwealth v. Daniels, 390 A.2d 172, 180 (Pa. 1978).

In the case *sub judice*, the Commonwealth asserts that Snyder II -- the *en banc* Superior Court decision -- controls. Accordingly, the 5 ½ year delay between Mrs. Wunderly's death and the filing a charges should be reviewed, on the second prong of the test, based upon a standard of whether the Commonwealth's reasons for delay were improper.[2] The testimony of the District Attorney and the police prosecutors at time of hearing established that the pre-arrest delay was not a result of any improper reasons.

The Investigating Grand Jury of 1999 uncovered substantial new evidence. For example, William Notti's testimony concerning the Appellant's statement "Shut up or I'll kill you too" and "I wonder if she's alright" (N.T. at 606) are powerful evidence of Appellant's guilt. Also of extreme significance is Notti's testimony that he was with Strohl in the alley behind the

[2] Importantly, however, even employing the due diligence standard, the pre-arrest delay does not rise to the level of a due process violation. The determination of whether the pre-arrest delay was reasonable under the facts of the case is within the discretion of the trial court. Scher, *supra* at 1280.

victim's home. At that time, and at the time of the statements Notti described Strohl was in possession of a purse and money that is later connected to the victim by other witnesses. (N.T. at 606). Inconsistency in Notti's testimony was the subject of cross-examination and argument.

III. Evidence of other bad acts

Appellant's burglary of the victim's house on the following day – the Saturday burglary --- was properly admitted for the limited purpose of demonstrating knowledge. Strohl committed the burglary on Saturday because he knew the condition of the victim and home from his conduct on Friday. A limiting instruction was given to the jury. (N.T. at 1072-1073).

The use of other bad acts evidence is set forth in Pennsylvania Rule of Evidence 404(b). In this case, the other conviction was relevant to the knowledge of the Defendant. Beyond relevance, the Court is obliged to conduct a balancing test considering the need, the level of proof, the similarity and proximity of the other act, and the prejudice to the Defendant. Commonwealth v. Travaglia, 467 A.2d 288 (Pa. 1983). In this

case, the Court explicitly considered all of these in conducting its balancing test and properly admitted the evidence. The admission of other bad acts evidence is within the sound discretion of the trial court. Commonwealth v. Simmons, 662 A.2d 621, 635 (Pa. 1995).

The Commonwealth was prosecuting a difficult case. The primary witnesses against the Defendant, Shull and Notti, were subject to attack as an accomplices. In addition, William Notti was open to severe attack on the basis of his prior inconsistent statements. Robert Shull's credibility was attacked for interest and bias. Thus, the need for the other bad acts evidence was great. The level of proof was that of an admission in a guilty plea. The similarity was overwhelming in that the other burglary occurred the very next day, at the same house, with the same victim.

The Court did not abuse its discretion in admitting this evidence.

IV. The use of Appellant's Grand Jury Testimony

The Appellant's statement in the Grand Jury speaks for itself: "I believe I pled guilty to a burglary on the second day, an additional burglary." (N.T. at 711). The jury was free to give this admission as much weigh as they thought appropriate. Appellant's counsel had the opportunity at trial to attack, explain, and/or deny the statement through cross-examination or argument.

Appellant was advised of his rights prior to testifying before the Grand Jury. Appellant had a court-appointed attorney to assist him in the grand jury room. Appellant demonstrated his understanding of his 5th amendment privilege in his invocation of that right as to other questions.

V. The use of enlarged photographs

The defense in this case attacked the element of causation. The extent of the victim's injuries, accordingly, was especially relevant in this case. Additionally malice is an issue in any homicide prosecution. The jury in this case was charged as to

Second and Third Degree Murder. "In assessing the intent of the actor in a case of criminal homicide... the fact-finder who deals with such an intangible inquiry must be aided to every extent possible." Commonwealth v. Duffy, 548 A.2d 1178, 1183 (Pa. 1988).

The photographs of the injuries were restricted in size by the Court. (N.T. at 129). They were not displayed at length to the jury. A limiting instruction was given to the jury. (N.T. at 1093).

VI. The testimony of the Commonwealth's expert witnesses

Dr. Mihalakis saw the victim's injuries in 1986. Dr. Fillinger saw the victim's injuries in 1994. The Appellant attacked the chain of causation at trial. Both Dr. Mihalakis and Dr. Fillinger were duly qualified to render expert opinions. The foundation for their opinions was set forth and subject to cross-examination.

Contrary to defense assertions, the Commonwealth's experts were not improperly bolstering one another. They

offered proper opinion based upon their observations and expertise.

Dr. Mihalakis testified that it was his opinion, to a reasonable degree of medical certainty, that Dr. Fillinger's determination was consistent with the injuries he observed in 1986. (N.T. at 210, 212). Dr. Fillinger testified that in his opinion, to a reasonable degree of medical certainty, that the injuries he noted in victim's head at autopsy in 1994 were consistent with those injuries described by Dr. Mihalakis in 1986. (N.T. at 360). As Judge Freedberg noted in his denial of Appellant's Post-Sentence Motions: "Neither of these witnesses addressed the credibility of the other or attempted to bolster the credibility of the other. Rather, each was defending his own opinion." (Trial Court Opinion of 7/27/01 at 17).

VII. Not allowing the specifics of Robert Shull's prior convictions

Robert Shull's prior convictions were admitted as relevant to his credibility. (N.T. at 549). Robert Shull's sentence was

admitted as relevant to possible bias or interest in the case. (N.T. at 549-551). The details of the offenses were properly excluded. The prior crimes of Shull did not tend to show a common scheme or plan. *See* Pa.R.E. 404(b)(2).

Defendant's contention that the details of Shull's prior burglaries demonstrated a "common scheme" is not supportable. Shull was previously convicted in connection with crimes a month earlier in a neighboring community. There is no suggestion, nor could there be, that the prior conviction was uniquely similar to the instant offense.

VIII. Jury Instruction on Accomplice Liability

The testimony of Notti was that he observed Strohl and an unnamed man go toward the victim's house and return with purse and money. (N.T. at 604-606). Strohl and the accomplice then engaged in a conversation regarding what had happened to the victim (N.T. at 606).

There are ample facts on the record to support the charge of the jury on accomplice liability. The court instructed on

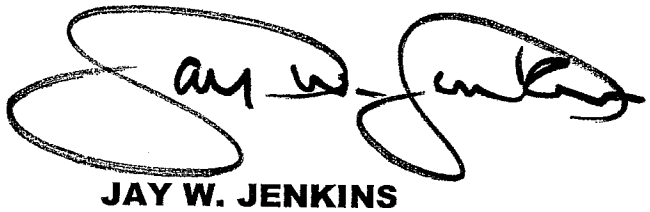
accomplice liability, allowing for the possibility that the assault was committed by a partner of the Appellant. (N.T. at 1085-1089).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny Appellant's appeal.

Respectfully submitted,

JOHN M. MORGANELLI
District Attorney of Northampton County



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PROOF OF SERVICE

I HEREBY CERTIFY THAT I AM THIS DAY SERVING THE FOREGOING BRIEF UPON THE PERSON SET FORTH BELOW, BY FIRST CLASS MAIL ADDRESSED AS BELOW, WHICH SERVICE SATISFIES THE REQUIREMENTS OF Pa. R.A. P. 121:

Robert Sletvold, Esquire
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Date: December 21, 2001

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