NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
CHARLES A. MANERI,	:	No. 1237 MDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, January 18 2012,
in the Court of Common Pleas of Lebanon County
Criminal Division at No. CP-38-CR-0001769-2010

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., AND OLSON, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED: MAY 13, 2013**

Charles A. Maneri appeals the judgment of sentence entered January 26, 2012. We affirm.

The facts, as stated by the trial court, are as follows.

> Prior to July 13, 2010, [appellant] and the victim, twenty-one-year-old Linette Colon, had been involved in a romantic relationship for approximately nine months, but had recently stopped seeing each other. On that date, Colon was at home at 816 Mifflin Street in the City of Lebanon with her young son and a friend, German Rivera. Although [appellant] had visited Colon's home on prior occasions, she had told him that he was not welcome to visit at that time. Throughout the day of July 12, 2010, [appellant] repeatedly called and texted Colon's phone and Colon repeatedly told him that she did not want him to come over. Colon eventually turned off her phone as she was tired of [appellant's] calls.

At 12:45 a.m. on July 13, 2010, Colon and Rivera were sitting on her couch watching a movie. Colon's son was asleep in the bedroom. At that time, [appellant] started to bang on the door. Colon and Rivera remained quiet as Colon thought that it might be [appellant] at the door.

[Appellant] kicked the door down and came in, holding something in his left hand, and directing Rivera to "[g]et the fuck out or I am going to slice and dice you." Rivera ran out of the apartment and called for the police, informing the dispatcher of the situation and voicing his concern for Colon's safety as she was still in the apartment with [appellant]. Colon testified that once Rivera left, [appellant] grabbed her, started to hit her and pull her hair. He ripped off Colon's bra and top and told her he was going to humiliate her by dragging her down the street naked because she was in the apartment with Rivera. She sustained cuts on both arms. She also sustained bruises. She did not know what [appellant] used to cause the lacerations as she did not actually see [appellant] with a knife or know whether he had one. Colon explained that during the attack, [appellant] was going back and forth between the living room and the kitchen.

Officer Margut and Officer Betancourt of the City Police Department were dispatched to Colon's apartment due to Rivera's call about a person with a knife. They confronted [appellant] outside the apartment building when they arrived. At that point, the officers were unaware of what had transpired, and asked [appellant] whether he had been threatened by someone with a knife. [Appellant] explained that he had an argument with his girlfriend and that nothing else occurred. Officer Betancourt patted him down to check for weapons.

Officer Margut went upstairs to Colon's apartment and found her partially undressed and bloody with two lacerations on her arms which she was covering with a rag. Colon advised Officer

> Margut that [appellant] had inflicted her injuries. Officer Margut immediately directed Officer Betancourt to take appellant into custody via his radio. [Appellant] overheard the conversation, became nervous and ran from Officer Betancourt. As he ran through the streets, he was pursued by Officer Betancourt, who told him that he was under arrest and commanded him to stop. [Appellant] ultimately made it to a van and drove away.
>
> Officer Margut located a wet knife in a strainer in the kitchen which appeared to have been washed off recently. There was also water in the sink. Colon testified that she had done the dishes earlier that evening and that the knife was not there when she did the dishes. Within two weeks, [appellant] was apprehended.
>
> At trial, Colon testified that she did not know what [appellant] had used to cause her lacerations. Rivera testified that he had seen that [appellant] had something in his hand when he entered the apartment, that he thought the object was a knife but that he did not know that for certain. Rivera also testified about [appellant's] threats to cut him up. The Commonwealth also provided the testimony of Mary Stark, a physician's assistant at Good Samaritan Hospital who had treated Colon's injuries. Stark testified that the lacerations on Colon's arms were clean and linear and consistent with injuries being inflicted with a bladed or sharp instrument, but that she could not specifically identify the weapon which had been used in the attack.[1]
>
> After [appellant] was arrested on these charges, he was incarcerated and remained incarcerated during the time of trial. Colon testified that during the period between his arrest and trial, she and [appellant] remained in contact and their

[1] The lacerations on Colon's right forearm required seven stitches. The other lacerations were described as superficial but "deep enough to see and leave a mark." (Notes of testimony, 7/15/11 at 6.) Colon also had red marks on her chest. (***Id.***)

> phone conversations were recorded by prison authorities. During trial, some of the recorded communications between the two were referenced by both the Commonwealth and [the defense].

Trial court opinion, 6/6/12 at 3-7.

On July 19, 2010, appellant was charged with aggravated assault, 18 Pa.C.S.A. § 2701(a)(4), recklessly endangering another person ("REAP"), 18 Pa.C.S.A. §2705, burglary, 18 Pa.C.S.A. § 3502(A), criminal trespass, 18 Pa.C.S.A. § 2503(A)(1)(ii), escape, 18 Pa.C.S.A. § 5121(A), and possession of an instrument of crime 18 Pa.C.S.A. § 907. He was also charged with various summary offenses. Represented by Elizabeth Judd, Esq., appellant proceeded to a jury trial on July 15, 2011. Subsequently, appellant was convicted of the aforementioned crimes with the exception of possession of an instrument of crime. On January 18, 2012, appellant was sentenced to 7 to 23 years' incarceration. Appellant filed a post-sentence motion on January 30, 2012. The motion was denied June 6, 2012. A timely notice of appeal was filed July 3, 2012.[2]

> A. Was the evidence adduced at Appellant's trial sufficient to find Appellant guilty of Aggravated Assault with a Deadly Weapon, Recklessly Endangering Another Person and Burglary?

[2] We note that appellant failed to serve the trial court with a copy of the notice of appeal, as required by Rule of Appellate Procedure, Rule 906(a)(2), 42 Pa.C.S.A. However, Rule 902 provides that the "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but it is subject to such action as the appellate court deems appropriate." Pa.R.A.P., Rule 902. Appellant's failure of service does not affect our disposition of this case. ***See id.***

> B. Did the trial court err in failing to appoint new counsel for Appellant, as a conflict of interest existed between Appellant and trial counsel?
>
> C. Did the trial court err in sentencing Appellant without consideration of Appellant's rehabilitative needs and background?
>
> D. Did the trial court err and commit an abuse of discretion in allowing Mary Stark, who was not properly qualified as an expert witness, to testify regarding the cause of Ms. Colon's injuries?

Appellant's brief at 7.

Appellant first claims that the evidence was insufficient to support his convictions. (***Id.*** at 13.)

> In determining sufficiency of the evidence, the Court must review the evidence admitted at trial, along with any reasonable inferences that may be drawn from that evidence, in the light most favorable to the verdict winner. ***Commonwealth v. Kimbrough***, 872 A.2d 1244, 1248 (Pa.Super. 2005), ***appeal denied***, 585 Pa. 687, 887 A.2d 1240 (2005). A conviction will be upheld if after review we find that the jury could have found every element of the crime beyond a reasonable doubt. ***Commonwealth v. Bullick***, 830 A.2d 998, 1000 (Pa.Super. 2003). The court may not weigh the evidence or substitute its judgment for that of the fact-finder. ***Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa.Super. 2001), ***appeal denied***, 569 Pa. 716, 806 A.2d 858 (2002). "Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances." ***Commonwealth v. Sheppard***, 837 A.2d 555, 557 (Pa.Super. 2003).

Commonwealth v. Judd, 897 A.2d 1224, 1233-1234 (Pa.Super. 2006), ***appeal denied***, 590 Pa. 675, 912 A.2d 1291 (2006).

In support of his claim regarding the sufficiency of evidence, appellant first contends the Commonwealth did not establish his guilt of aggravated assault with a deadly weapon as it did not demonstrate he had a deadly weapon or that he attempted to cause, or intentionally or knowingly caused bodily injury to Colon. No relief is due.

The statute for aggravated assault sets forth that:

> (a) A person is guilty of aggravated assault if he:
>
> . . .
>
> (4) Attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

18 Pa.C.S.A. § 2702(a)(4). As referred to in this section, "serious bodily injury" is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. § 2301. Section 2301 further provides a definition for "deadly weapon":

> Any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used is calculated or likely to produce death or serious bodily injury.

18 Pa.C.S.A. § 2301.

Viewing the evidence in the light most favorable to the Commonwealth, we find the evidence sufficient to support appellant's conviction. Colon testified that appellant attacked her and inflicted cuts on her arms. While she was not able to state what appellant used to cut her with, the wounds she suffered were consistent with being caused by a sharp bladed object. The police discovered a recently washed knife in the kitchen where appellant had been during the attack. Colon testified that the knife had not been there earlier when she had washed the dishes. Additionally, Rivera testified that he noticed appellant had something in his hand when he entered the apartment and he had threatened to "slice and dice" Rivera if he did not leave the apartment. The jury could fairly infer that appellant did in fact use a knife.

Additionally, in a footnote, appellant suggests that the jury could not convict him of aggravated assault and acquit him of the possession of an instrument of crime charge. Long standing precedent in this Commonwealth provides that consistency is not required in criminal verdict. ***See*, e.g., *Commonwealth v. Parrotto***, 150 A.2d 396, 397-398 (Pa.Super. 1959). ***See also United States v. Powell***, 469 U.S. 57 (1984). It has long been the rule that "[a]n acquittal cannot be interpreted as a specific finding in relation to some of the evidence. . . . [T]he court looks upon this acquittal as no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity." ***Parrotto***, 150

A.2d at 399, ***cited with approval in Commonwealth v. Cassidy***, 620 A.2d 9, 12-13 (Pa.Super. 1993), ***allocatur denied***, 536 Pa. 619, 637 A.2d 279 (1993).

Next, appellant asserts the evidence was insufficient to find appellant guilty of REAP. That crime is defined as:

> A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

18 Pa.C.S.A. § 2705.

Appellant argues that the victim did not know how she sustained the injures or see the weapon and her injuries were not serious. Such proof is entirely unnecessary. ***See***, ***e.g.***, ***Commonwealth v. Lawton***, 414 A.2d 658, 662 (Pa.Super. 1979) (holding that the pertinent issue is whether a defendant's reckless conduct may have placed another person in danger of serious injury; "the mere fact that the victim only sustained minor injuries and did not sustain 'serious bodily injury' does not ***ipso facto*** establish that appellant's actions did not place others in danger of such injury").

Our review of the evidence leads us to conclude that sufficient evidence existed to convict appellant of REAP. Here, a review of the record reveals that appellant broke into Colon's apartment and threatened to "slice and dice" Rivera. Appellant began hitting Colon and pulling her hair; he ripped off her top and bra. She sustained cuts to both arms and bruises. When the police arrived she was found bleeding from two lacerations on her

arms. A knife was found in the kitchen that had recently been washed off. The physician's assistant testified that the lacerations on Colon's arm were consistent with injuries inflicted with a blade or sharp instrument. The laceration on her right forearm required seven stiches. That Colon was not more seriously injured is indeed fortunate but does not mean the evidence was "so weak or inconclusive that no probability of fact could be drawn from the combined circumstances." ***Sheppard***, ***supra*** at 557. Accordingly, appellant's sufficiency claim concerning his conviction of REAP warrants no relief.

Appellant also challenges the sufficiency of the evidence to convict him of burglary because he claims that the Commonwealth failed to prove that appellant entered the premises with the intent to commit a crime. He also suggests that there was no evidence that he was not privileged to enter the apartment. (Appellant's brief at 20.) We disagree.

> Under the Crimes Code of Pennsylvania, a person is guilty of burglary if he enters a building or occupied structure with the intent to commit a crime therein, unless the premises are at the time open to the public or the person who enters is licensed or privileged to do so. 18 Pa.C.S.A. § 3502(a). In order to prevail at trial, the Commonwealth must prove beyond a reasonable doubt the following three elements: (1) entry of a building or occupied structure by the defendant; (2) with the contemporaneous intent on the part of the defendant of committing a crime therein; (3) at a time when the premises are not opened to the public and the defendant was not then licensed or privileged to enter.

Commonwealth v. Gonzales, 443 A.2d 301, 304 (Pa.Super. 1982) (citations omitted).

At trial, the evidence showed that appellant entered the apartment without the permission of Colon as he forced his way inside. Colon and Rivera testified that when they heard appellant banging and kicking the door neither one opened the door for appellant or invited him inside the apartment. In fact, the day before, Colon repeatedly instructed appellant to stay away. Thus, we now focus on whether sufficient evidence was adduced at trial to prove beyond a reasonable doubt that appellant intended to commit a crime at the time appellant entered the apartment.

The Commonwealth may prove its case by circumstantial evidence, and the specific intent to commit a crime necessary to establish the second element of burglary may thus be found in the defendant's words or conduct, or from the attendant circumstances together with all reasonable inferences therefrom. ***Commonwealth v. Madison***, 397 A.2d 818 (Pa.Super. 1979); ***Commonwealth v. Nutter***, 389 A.2d 626 (Pa.Super. 1978). The trial court instructed the jury on the crime appellant intended to commit, namely aggravated assault. It can certainly be inferred that appellant broke down the door and entered the apartment with the intent to physically assault Colon. Accordingly, the evidence was sufficient to support appellant's conviction of burglary.

The second issue presented argues that the trial court erred in failing

to appoint new counsel for appellant as he states a conflict of interest existed between appellant and his trial counsel. A brief review of the facts relevant to this issue is required.

Appellant orally requested that the court terminate Attorney Judd's court-appointed representation and requested new counsel. Appellant explained that during the course of Attorney Judd's representation, he became a witness in a lawsuit filed by Allen Kelly ("Kelly") against Attorney Judd. (Notes of testimony, 7/11/11 at 2-3.) Kelly was a prior client of Attorney Judd's who, according to appellant, subpoenaed appellant as a hostile witness in the trial against Attorney Judd. Appellant also claimed that Attorney Judd was unprepared to proceed to trial and that she failed to file various pre-trial motions he requested. (***Id.*** at 2.) After questioning Attorney Judd, the trial court denied appellant's request and gave appellant the option of proceeding to trial ***pro se*** or with Attorney Judd.

We find no error with the trial court's holding. After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the trial court, it is our determination that there is no merit to this question. The trial court's opinion, filed on June 6, 2012, comprehensively discusses and properly disposes of this issue. We will adopt it as our own and affirm on that basis. (***See*** trial court opinion, 6/6/12 at 16-21.)

Next, appellant presents a challenge to the discretionary aspects of sentencing.

> A challenge to the discretionary aspects of sentencing is not automatically reviewable as a matter of right. ***Commonwealth v. Hunter***, 768 A.2d 1136 (Pa.Super.2001), ***appeal denied***, 568 Pa. 695, 796 A.2d 979 (2001). When challenging the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); ***Commonwealth v. Tuladziecki***, 513 Pa. 508, 522 A.2d 17 (1987); 42 Pa.C.S.A. § 9781(b); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal 'furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases.'" ***Commonwealth v. Williams***, 386 Pa.Super. 322, 562 A.2d 1385, 1387 (1989) (***en banc***) (emphasis in original).

Commonwealth v. McNear, 852 A.2d 401, 407-408 (Pa.Super. 2004).

> To demonstrate that a substantial question exists, "a party must articulate reasons why a particular sentence raises doubts that the trial court did not properly consider [the] general guidelines provided by the legislature." [***Mouzon***, 571 Pa. at 426, 812 A.2d at 622], quoting, ***Commonwealth v. Koehler***, 558 Pa. 334, 737 A.2d 225, 244 (1999). In ***Mouzon***, our Supreme Court held that allegations of an excessive sentence raise a substantial question where the defendant alleges that the sentence "violates the requirements and goals of the Code and of the application of the guidelines . . . ." ***Id.*** at 627. A bald allegation of excessiveness will not suffice. ***Id.***

Commonwealth v. Fiascki, 886 A.2d 261, 263 (Pa.Super. 2005), ***appeal denied***, 587 Pa. 684, 897 A.2d 451 (2006).

Instantly, appellant has not complied with Rule 2119(f) by including in his brief the requisite statement of reasons relied upon for allowance of appeal with respect to the discretionary aspects of his sentence. However, the Commonwealth has not objected. Accordingly, we may proceed to determine whether a substantial question exists. ***See Commonwealth v. Kiesel***, 854 A.2d 530, 533 (Pa.Super. 2004) (when the appellant has not included a Rule 2119(f) statement and the appellee has not objected, this court may ignore the omission and determine if there is a substantial question that the sentence imposed was not appropriate).

Appellant essentially contends that the trial court's sentence did not give appropriate consideration to his request to be sentenced to Teen Challenge, a rehabilitative program. (Appellant's brief at 24-25.) There is ample precedent to support a determination that appellant's allegation fails to raise a substantial question that his sentence is not appropriate under the Sentencing Code. A claim that the sentencing court failed to consider or accord proper weight to a specific sentencing factor does not raise a substantial question. ***See Commonwealth v. Cannon***, 954 A.2d 1222, 1228–29 (Pa.Super. 2008), ***appeal denied***, 600 Pa. 743, 964 A.2d 893 (2009) (claim that the trial court failed to consider the defendant's rehabilitative needs, age, and educational background did not present a

substantial question); ***Commonwealth v. Coolbaugh***, 770 A.2d 788, 793 (Pa.Super. 2001); ***Commonwealth v. Bershad***, 693 A.2d 1303, 1309 (Pa.Super. 1997) (a claim that a trial court failed to appropriately consider an appellant's rehabilitative needs does not present a substantial question); ***Commonwealth v. Lawson***, 650 A.2d 876, 881 (Pa.Super. 1994) (claim of error for failing to consider rehabilitative needs does not present substantial question). Thus, we will not review appellant's claim.

The final issue presented is whether the trial court erred in allowing Mary Stark, a non-expert witness, to testify regarding the cause of Colon's injuries. Appellant claims that Stark should not have been permitted to testify as to the cause of the lacerations or the type of object that caused the cuts on Colon's arms. Rather, appellant suggests that this matter required expert testimony. (***See*** notes of testimony, 7/15/11 at 6.) Following this objection by the defense at trial, the Commonwealth responded and argued that this line of questioning did not require an expert opinion but rather an opinion based on Stark's observations of Colon's injuries and personal experience. (***Id.*** at 6-7.) The court held that if the Commonwealth established a proper foundation, such testimony would be appropriate. (***Id.*** at 7.) We find no error.

When reviewing a challenge to the admissibility of evidence, we will not reverse the trial court's decision absent a clear abuse of discretion. ***Commonwealth v. King***, 959 A.2d 405, 411 (Pa.Super. 2008). An

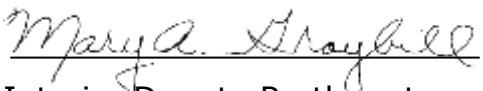
"[a]buse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." ***Id.***

Pennsylvania Rule of Evidence 701 provides that the lay opinion of a witness is admissible so long as it is: (1) rationally based on the perception of the witness; (2) helpful to give a clear understanding of the witness' testimony or the determination of a fact at issue; and (3) not based on scientific or other specialized knowledge. Pa.R.E. 701.

Stark testified as to her observations of Colon's injuries and described the characteristics of the wounds. She explained that the lacerations were clean and linear in appearance, thus they appeared to have been caused by a sharp, bladed object. (Notes of testimony, 7/15/11 at 9.) Such an observation does not requires scientific or specialized knowledge. No relief is due.

Judgment of sentence affirmed.

Judgment Entered.



Interim Deputy Prothonotary

Date: May 13, 2013

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NO. CP-38-CR-1769-2010
	:	
v.	:	
	:	
CHARLES A. MANERI	:	

APPEARANCES:

PIER N. HESS, ESQUIRE — **FOR THE COMMONWEALTH**
ASSISTANT DISTRICT ATTORNEY

GREER H. ANDERSON, ESQUIRE — **FOR CHARLES A. MANERI**

Opinion, Tylwalk, P.J., June 6, 2012

Defendant was charged with Aggravated Assault with a Deadly Weapon[1], Recklessly Endangering Another Person[2], Burglary[3], Criminal Trespass[4], Escape[5]

[1] 18 Pa.C.S.A. §2702(a)(4).
[2] 18 Pa.C.S.A. §2705.
[3] 18 Pa.C.S.A. §3502(a).
[4] 18 Pa.C.S.A. §3503(a)(1)(ii).
[5] 18 Pa.C.S.A. §5121(a).

RR2a

and Possession of an Instrument of Crime[6] as the result of an incident which occurred on July 13, 2010 at the apartment of the victim in this case, Linette Colon. After a jury trial, he was convicted of all offenses except Possession of an Instrument of Crime. (All references to "N.T." will refer to the jury trial which was held on July 15, 2011. References to other proceedings will be further identified by the date of that proceeding.) Before us are his Post-Sentence Motions challenging these convictions.

Defendant had filed an application for court-appointed counsel with the Office of the Public Defender. His application was approved and Elizabeth Judd, Esquire was appointed to represent him. At Defendant's urging, Judd obtained and reviewed various communications which occurred between Defendant and Colon during the time when Defendant was incarcerated for these charges prior to trial.

At the Call of the List on July 11, 2011, Defendant requested new court-appointed counsel, asserting that he was planning to testify on behalf of one of Judd's former clients, Allen Kelly[7], who had filed a civil suit against her. (N.T. 7/11

[6] 18 Pa.C.S.A. §907(a).

[7] Allen Kelly was convicted of drug delivery charges in Lebanon County. While serving his sentence, Mr. Kelly sued fifteen individuals involved in the Lebanon County justice system, alleging that he was the victim of a vast conspiracy of persecution.

RR3a

/11 at 2 - 3) The Judge questioned both Defendant and Judd about this situation. Judd advised the Court that this was the first time she was made aware of the situation, that she did not know what issue would be addressed by Defendant's testimony in the Kelly case, and that she was prepared and ready to proceed with Defendant's trial. (N.T. 7/11/11 at 3, 5 - 6) Due to the Court's satisfaction with Judd's position and with the Court's policy of a defendant being permitted only one court-appointed counsel, the request was denied and Defendant was given the choice to proceed either with or without Judd's representation. Defendant elected to continue with Judd's representation. After the jury trial was held on July 15, 2011, Defendant was convicted of the offenses listed above.

On January 18, 2012, Defendant requested the Court to allow him to enter the Teen Challenge program for rehabilitation. We denied this request and Defendant was sentenced to seven to twenty-three years. These Post-Sentence Motions were filed on January 30, 2012. Defendant challenges the sufficiency of the evidence to sustain his convictions, seeks a new trial and requests the Court to modify his sentence.

I. Factual Background

Prior to July 13, 2010, Defendant and the victim, twenty-one-year-old Linette Colon, had been involved in a romantic relationship for approximately

RR4a

nine months, but had recently stopped seeing each other. (N.T. 47, 67, 80) On that date, Colon was at home at 816 Mifflin Street in the City of Lebanon with her young son and a friend, German Rivera. (N.T. 47 - 48) Although Defendant had visited Colon's home on prior occasions, she had told him that he was not welcome to visit at that time. (N.T. 48 – 49, 68) Throughout the day of July 12, 2010, Defendant repeatedly called and texted Colon's phone and Colon repeatedly told him that she did not want him to come over. (N.T. 49 - 51) Colon eventually turned off her phone as she was tired of Defendant's calls. (N.T. 73)

At 12:45 a.m. on July 13, 2010, Colon and Rivera were sitting on her couch watching a movie. (N.T. 48 - 51) Colon's son was asleep in the bedroom. (N.T. 48) At that time, Defendant started to bang on the door. (N.T. 51) Colon and Rivera remained quiet as Colon thought that it might be Defendant at the door. (N.T. 51)

Defendant kicked the door down and came in, holding something in his left hand, and directing Rivera to "[g]et the fuck out or I am going to slice and dice you." (N.T. 16) Rivera ran out of the apartment and called for the police, informing the dispatcher of the situation and voicing his concern for Colon's safety as she was still in the apartment with Defendant. (N.T. 17)

Colon testified that once Rivera left, Defendant grabbed her, started to hit her and pull her hair. (N.T. 52) He ripped off Colon's bra and top and told her he was going to humiliate her by dragging her down to the street naked because she was in the apartment with Rivera. (52, 61 - 62) She sustained cuts on both arms. (N.T. 52) She also sustained bruises. (N.T. 6) She did not know what Defendant used to cause the lacerations as she did not actually see Defendant with a knife or know whether he had one. (N.T. 52 – 53, 74) Colon explained that during the attack, Defendant was going back and forth between the living room and the kitchen. (N.T. 75)

Officer Margut and Officer Betancourt of the City Police Department were dispatched to Colon's apartment due to Rivera's call about a person with a knife. (N.T. 26, 91) They confronted Defendant outside the apartment building when they arrived. (N.T. 27, 91) At that point, the officers were unaware of what had transpired, and asked Defendant whether he had been threatened by someone with a knife. (N.T. 28) Defendant explained that he had an argument with his girlfriend and that nothing else had occurred. (N.T. 28) Officer Betancourt patted him down to check for weapons. (N.T. 29)

Officer Margut went upstairs to Colon's apartment and found her partially undressed and bloody with two lacerations on her arms which she was covering

RR6a

with a rag. (N.T. 29, 92 - 93) Colon advised Officer Margut that Defendant had inflicted her injuries. (N.T. 93) Officer Margut immediately directed Officer Betancourt to take Defendant into custody via his radio. (N.T. 30, 94) Defendant overheard the conversation, became nervous and ran from Officer Betancourt. (N.T. 30 - 31) As he ran through the streets, he was pursued by Officer Betancourt, who told that he was under arrest and commanded him to stop. (N.T. 31) Defendant ultimately made it to a van and drove away. (N.T. 32)

Officer Margut located a wet knife in a strainer in the kitchen which appeared to have been washed off recently. (N.T. 99) There was also water in the sink. (N.T. 99) Colon testified that she had done the dishes earlier that evening and that the knife was not there when she did the dishes. (N.T. 54) Within two weeks, Defendant was apprehended. (N.T. 105)

At trial, Colon testified that she did not know what Defendant had used to cause her lacerations. (N.T. 53) Rivera testified that he had seen that Defendant had something in his hand when he entered the apartment, that he thought the object was a knife but that he did not know that for certain. (N.T. 16) Rivera also testified about Defendant's threats to cut him up. (N.T. 16) The Commonwealth also presented the testimony of Mary Stark, a physician's assistant at Good Samaritan Hospital who had treated Colon's injuries. Stark testified that the

RR7a

lacerations on Colon's arms were clean and linear and consistent with injuries being inflicted with a bladed or sharp instrument, but that she could not specifically identify the weapon which had been used in the attack. (N.T. 9 - 10)

After Defendant was arrested on these charges, he was incarcerated and remained incarcerated during the time of trial. Colon testified that during the period between his arrest and trial, she and Defendant remained in contact and their phone conversations were recorded by the prison authorities. During trial, some of the recorded communications between the two were referenced by both the Commonwealth and Judd. (N.T. Excerpts of Proceedings, 7/15/11 at 13; N.T. 55 – 56).

II. Discussion

A. Sufficiency of the Evidence

A claim challenging the sufficiency of the evidence is a question of law. ***Commonwealth v. Smith,*** 853 A.2d 1020 (Pa. Super. 2004). The evidence adduced at trial must be viewed in the light most favorable to the verdict winner to determine whether there is sufficient evidence to enable the fact- finder to find every element of the crime beyond a reasonable doubt. ***Commonwealth v. Walker,*** 874 A.2d 667, 677 (Pa. Super. 2005). Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and

RR8a

inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. ***Id.*** The Commonwealth is entitled to all reasonable inferences arising from the evidence and all facts which the Commonwealth's evidence tends to prove are treated as admitted. ***Commonwealth v. Hunter,*** 768 A.2d 1136 (Pa. Super. 2001). Only where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, is the evidence deemed insufficient as a matter of law. ***Commonwealth v. Santana,*** 333 A.2d 876 (Pa. 1975). The task of the appellate court in reviewing the sufficiency claim is to determine whether, accepting as true all the evidence and all reasonable inferences therefrom, upon which, if believed, the jury could properly have based its verdict, it is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime or crimes of which he has been convicted. ***Commonwealth v. Williams***, 316 A.2d 888 (Pa. 1974).

1. Aggravated Assault

Defendant was charged with Aggravated Assault with a Deadly Weapon. However, he contends that his conviction on this charge cannot be sustained as the jury acquitted him of the offense of Possession of an Instrument of Crime, indicating that it did not find that he had a deadly weapon. He further argues that

RR9a

the only evidence that Defendant had a knife was Rivera's testimony and that Rivera testified that he did not know what was in Defendant's hand.

Consistent verdicts are not required and inconsistent verdicts are allowed to stand so long as the evidence is sufficient to support the conviction. ***Commonwealth v. Miller,*** 35 A.3d 1206 (Pa. 2012). This is so as long as a conviction of an offense does not require as an element the commission of an underlying offense beyond a reasonable doubt. ***Id.*** at 1212.

To be guilty of aggravated assault under Section (a)(4), one must "attempt to cause or intentionally or knowingly cause bodily injury to another with a deadly weapon." 18 Pa.C.S.A. §2702(a)(4); ***Commonwealth v. Meekins,*** 644 A.2d 765 (Pa. Super. 1994), appeal denied 651 A.2d 535 (Pa. 1994). A "deadly weapon" is defined as "any device designed as a weapon and capable of producing death or serious bodily injury, or any device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury." 18 Pa.C.S.A. §2301. "Serious bodily injury" is defined as an injury which "creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. §2301.

RR10a

The crime of Possession of an Instrument of Crime pursuant to 18 Pa.C.S.A. §907 is not always a lesser included offense of aggravated assault committed with a deadly weapon as it is possible to commit an aggravated assault under Section (a)(4) without possessing an instrument of crime and the two do not merge for sentencing purposes. ***Commonwealth v. Meekins,*** 644 A.2d 765 (Pa. Super. 1994). "Aggravated assault under (a)(4) hinges on the possession of a weapon capable of producing death or serious bodily injury. Possession of an instrument of crime requires possession of something commonly used in the commission of a crime or specially adapted for criminal use. Although deceptively similar, the elements of the two crimes are not 'identical to and capable of being wholly subsumed' by one another... ." ***Id.*** at 767. The ***Meekins*** case also dealt with a knife. In finding that the charges of aggravated assault with a deadly weapon and possession of an instrument of crime would not merge, the court explained, by way of example, that a brick used to strike someone during an altercation may be a deadly weapon under (a)(4), but would not be an instrument of crime because it was not specifically made or specially adapted for criminal use.

Defendant contends that the jury's acquittal on the count of Possession of an Instrument of Crime precludes the conviction on the count of aggravated assault. However, this verdict was clearly not inconsistent. We agree with the

RR11a

reasoning in ***Meekins*** and find it applicable to the issue before us. The knife here could also have been a deadly weapon – capable of causing serious bodily injury – without being in instrument of crime – an item specifically made or adapted for criminal use. This verdict simply indicates the jury's determination that Defendant had a weapon, but that they could not determine for sure what exact weapon he had in his possession.

Furthermore, after viewing the evidence in the light most favorable to the Commonwealth, we find there was ample evidence to support a conviction on this charge. With regard to the injuries inflicted on Colon, Colon testified that Defendant attacked her, inflicting cuts on her arms. He ripped off her clothing, pulled her hair and hit her. With regard to the item used to inflict these injuries, Stark testified that the linear nature of Colon's cuts was indicative of being inflicted with a sharp, bladed object. Rivera testified that he noticed that Defendant had something in his hand when he entered the apartment and threatened to slice and dice him. The recently washed knife was located in the kitchen where Defendant had been during the attack and Colon testified that the knife had not been there earlier when she had done the dishes. Based on this evidence, the jury was entitled to conclude that Defendant used some type of

RR12a

weapon to injure Colon and that the weapon was capable of causing serious bodily injury.

2. Burglary

One may be convicted of burglary if he "enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." 18 Pa.C.S.A. §3502. This crime is regarded as one involving the use or threat of violence to the person. ***Commonwealth v. Rios,*** 920 A.2d 790 (Pa. 2007). The specific intent required may be established through the defendant's words, conduct, or from the circumstances together with all reasonable inferences therefrom. ***Commonwealth v. Brosko,*** 365 A.2d 867 (Pa. Super. 1976). In determining the defendant's intent at the time the residence was entered, the totality of the circumstances must be considered. ***Commonwealth v. Magnum,*** 654 A.2d 1146 (Pa. Super. 1995). The Commonwealth is not actually required to allege or prove the particular crime the defendant intended to commit after making a forcible entry into a residence. ***Commonwealth v. Alston,*** 651 A.2d 1092 (Pa. 1994).

Defendant argues that the evidence was insufficient to prove that he did not have permission to enter the apartment and that he intended to commit a crime once inside. We find that these complaints have no merit. Colon testified that she had specifically told Defendant that he was not welcome prior to his coming to her apartment during the numerous phone communications with him throughout June 12, 2010. Both she and Rivera described Defendant banging on and kicking in the door. Neither one opened the door for Defendant or invited him inside. Instead, they remained silent. Rivera testified that Defendant had something in his hand when he forced his way into the apartment. We find this evidence sufficient for the jury to conclude that Defendant forced his way into Colon's residence with the intent to commit an aggravated assault once inside.

3. Criminal Trespass

The crime of criminal trespass will be sustained if it is proven that a defendant "knowing that he is not licensed or privileged to do so, breaks into any building or occupied structure or separately secured or occupied portion thereof." 18 Pa.C.S.A. §3503(a)(1)(ii). With regard to this charge, Defendant repeats his argument that he had license or permission to enter Colon's apartment due to his having been permitted to visit there previously during his relationship with Colon.

As noted above, Colon testified that Defendant had been advised that he was not welcome at her apartment. Both she and Rivera testified that Defendant kicked in the door and entered the apartment subsequent to being advised that he was not to come over. Thus, the evidence was likewise sufficient to support the conviction on this offense.

4. Escape

A defendant is guilty of escape if he "unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period." 18 Pa.C.S.A. §5121(a). An official detention includes arrest or any other detention for law enforcement purposes. 18 Pa.C.S.A. §5121(e). The defendant need not be restricted by bars, handcuffs or locked doors. ***Commonwealth v. Stewart,*** 648 A.2d 797 (Pa. Super. 1994). Whether a seizure has occurred is to be viewed in light of all the circumstances as to whether a reasonable person would have believed he was free to leave. ***Id.***

Prior to Defendant fleeing, he was being questioned by Officer Betancourt. Once he heard Officer Margut's directive to Officer Betancourt to keep him there,

Defendant certainly knew he was not free to leave. Officer Betancourt testified that Defendant became nervous as soon as he heard the message. When he started to run, he was told to stop by Officer Betancourt. Officer Betancourt pursued Defendant and continued to tell him to stop and that he was under arrest. This evidence was sufficient to prove that any reasonable person would have known that he was under detention under these circumstances. This evidence was sufficient for the jury to conclude that Defendant's flight from that detention constituted an escape.

5. Reckless Endangerment

In order to be convicted of recklessly endangering another person, a defendant must recklessly engage in conduct which places or may place another person in danger of death or serious bodily injury. 18 Pa.C.S.A. §2705. This includes a conscious disregard of a known risk of death or great bodily harm to another person. ***Commonwealth v. Cottam,*** 616 A.2d 988 (Pa. Super. 1992), appeal denied 636 A.2d 632 (Pa. 1993). Here, the Commonwealth presented evidence regarding the bruises, cuts and lacerations suffered by Colon through the testimony of Colon, Officer Margut and Stark. These injuries were severe enough to require medical attention at the hospital. Colon testified that these

RR16a

injuries were inflicted by Defendant. There was sufficient for the jury to find that Defendant hitting Colon and using a weapon to cut her constituted conduct which evidenced a conscious disregard for risk of serious bodily injury to Colon.

B. Conflict of Interest

An attorney owes his client a duty of loyalty to avoid conflicts of interest. ***Commonwealth v. Tedford,*** 960 A.2d 1 (Pa. 2008). When a defendant asserts a conflict exists, the court must make inquiry into the alleged nature of the conflict. ***Mickens v. Taylor,*** 535 U.S. 162 (2002). The trial court must take steps to ascertain that the risk of a conflict is too remote to warrant a change in counsel. ***In re Saladin,*** 518 A.2d 1258 (Pa. Super. 1986). In examining an assertion of a conflict, the court must (1) determine that there is an actual conflict; (2) there must be a determination of whether the conflict of interest was waived; and (3) there must be a determination of whether the conflict adversely affected the defendant's representation. ***Saladin,*** *supra.* at 1261. An actual conflict is evidenced when, during the court of representation, the interests of the defendant and the interests of another client towards whom counsel bear obligations – diverge with respect to a material factual or legal issue or to a course of action. ***Tedford,*** *supra.* at 54, quoting ***Saladin,*** *supra.* at 1261.

RR17a

Conflicts typically arise in the context of an attorney's representation of several clients; however, a conflict may also exist when the personal interests of an attorney compete with the interests of the defendant. See, ***Commonwealth v. Duffy,*** 394 A.2d 965 (Pa. 1978)(attorney's desire to maintain professional reputation and avoid criminal charges against himself created personal interest in seeking acquittal of defendant due to allegations that attorney had agreed to payment out of "fruits of the crime;" such interest compromised attorney's potential pretrial counseling and assistance in plea bargain negotiations and once such conflict between interests of counsel and client was established, relief would be required without regard to showing of harm). An actual conflict of interest will be found in such a situation, however, only if the matter in which counsel is alleged to have been engaged is related to that with which the criminal defendant has been charged; where counsel's personal legal troubles are unrelated to those of the client whom he is representing, there is no *per se* rule that commands that counsel be deemed constitutionally ineffective. 26 Standard Pennsylvania Practice 2d §132.152, citing ***Commonwealth v. McCloy,*** 574 A.2d 86 (Pa. 1990).

In applying the three-pronged test, we note that Defendant did raise the existence of a possible conflict of interest between himself and Judd for which the

Court expressed concern at the call of the list on July 11, 2011 and that Defendant did not waive that conflict. The Court made a thorough and appropriate inquiry into the alleged conflict upon Defendant's request for new counsel at that time. We considered all Defendant's reasons and arguments and found that his concerns were unfounded. Judd indicated that she was unaware that Defendant planned to testify on behalf of Kelly prior to that time and that she did not even know what issue would be addressed in the Kelly case by Defendant's testimony. Moreover, the matter between Judd and Kelly was totally unrelated to the Defendant's case. In fact, Judd would have had no motive to provide anything less than zealous representation to Defendant, for to do so might bias Defendant's testimony in that unrelated litigation. As such, we find that an actual conflict did not exist between Judd and Defendant.

Even if an actual conflict had been established, Judd's representation was certainly not detrimental to Defendant. Defendant argues that Judd acted against his interests in her opening statement by referring to the recorded communications between himself and Colon which could have led the jury to realize that Defendant was incarcerated at the time of trial. In addition, he argues

that this conflict caused Judd to render advice against his best interests, i.e., not to testify on his own behalf at trial.

We have reviewed Judd's opening statement and find this complaint to have no merit. Judd does refer to the continuation of the relationship between Defendant and Colon even after this incident and does refer to communications, statements made by Colon and the fact that Colon gave money to Defendant. (Excerpts of Proceedings, 7/15/11 at 13). The references to these matters were made in order to exhibit Colon's behavior after this incident and to attack her credibility. By no means was there any reference to or insinuation of Defendant's incarceration.

Defendant also complains that during Colon's direct testimony, the Commonwealth questioned her about some of these communications. Some of these questions indicated that the communications had been recorded and some referred to Defendant's request that Colon put money into his (prison) account. (N.T. 55 – 64) We do not believe that the jury became aware of Defendant's incarceration through any of these questions and/or responses. We doubt that there is common knowledge among the community that calls made to prisoners are routinely recorded by prison officials. Furthermore, there are other reasons

RR 20a

and means by which a conversation would be recorded which have nothing to do with incarceration. The jury could just have easily assumed that Defendant had recorded the calls himself in some sort of attempt to undermine Colon. With regard to the "account" references, we must note that Defendant also requested that Colon give money to him and did not always refer to his account. Thus, there was no intimation that he was unable to control his finances himself due to his imprisonment. Furthermore, these references to his "account" could just as well have pertained to a bank account.

The decision to testify on one's own behalf is ultimately a decision to be made by the accused after consultation with counsel. ***Commonwealth v. Baldwin,*** 8 A.3d 901 (Pa. Super. 2010), appeal denied 32 A.3d 1259 (Pa. 2011). Defendant contends that he was prevented from testifying on his own behalf at trial based on his following Judd's advice not to do so. At that point in the trial, we conducted a full colloquy with Defendant on his decision. We specifically informed him of his right to testify. (N.T. 20, 22) We also engaged in an in-depth explanation that it was his choice alone to make and that he was not required to heed the advice of his counsel. (N.T. 17) Judd indicated that she was fully prepared to direct Defendant's testimony if he so desired. (N.T. 17) After this

lengthy discussion between the Court, defense counsel and Defendant, he indicated that he understood that the decision was his and he further indicated that he would follow Judd's advice and would not testify. (N.T. 22) Thus, Defendant's complaints are unjustified. He was never prevented from testifying and, in fact, was given every opportunity to exercise his right to do so.

There is no credence to Defendant's assertions that Judd acted against his interests at any time during her representation. Our review of the trial transcripts reveals that Judd pursued Defendant's position vigorously and brought to the Court's attention various matters demanded by Defendant prior to and during the trial. Defendant was given the choice whether to go to trial with or without Judd representing him and he made an unfettered decision to proceed with Judd as his attorney.

C. STARK'S TESTIMONY REGARDING CAUSE OF INJURIES

A lay person may testify as to facts observed by him concerning the apparent physical condition or appearance of another. ***Commonwealth v. Allison,*** 703 A.2d 16 (Pa. 1997). As a general rule, a lay witness may testify as to readily observable factual details he or she has noted regarding the apparent

RR22a

physical condition or appearance of another "the evaluation of which does not require a complex application of technical knowledge, [and so] can as easily be ascertained by the lay person as by a trained physician." ***Id.*** at 19, citing ***Commonwealth v. Green,*** 380 A.2d 798, 801 (Pa. Super. 1977). Expert testimony is required only when the jury is confronted with factual issues whose resolution requires knowledge beyond the ken of ordinary laymen. ***Commonwealth v Griffith,*** 32 A.3d 1231 (Pa. 2011).

Defendant argues that the Court permitted Mary Stark, the treating physician's assistant at Good Samaritan Hospital, to offer an impermissible expert opinion as to the type of instrument which was used to inflict the injuries sustained by Colon. He argues that this matter required expert testimony and that Stark was not qualified to offer such an expert opinion.

This issue was raised during trial upon defense counsel's objection. The Commonwealth argued that this line of questioning was not seeking an expert opinion, but rather an opinion based on Stark's observations of Colon's injuries and personal experience. We agreed that upon the establishment of a proper foundation, such testimony would be appropriate.

RR23a

Thereafter, Stark testified that she had been employed as a physician's assistant for eleven years at the Good Samaritan Hospital. (N.T. 8) During the regular course of her duties of her employment, she had obtained experience in examining and treating lacerations and wounds and in drawing conclusions as to the cause of such injuries based upon their appearance. (N.T. 8 - 9) Stark testified that she dealt with these types of injuries several times each week. (N.T. 9) She explained that a bladed object would leave a clean, linear laceration, while something like a chainsaw blade would leave a laceration which was more jagged. (N.T. 9) With regard to Colon's injuries, Stark testified that both the lacerations were clean and linear in appearance and thus appeared to have been created by a sharp, bladed object. (N.T. 9)

We believe that this testimony was appropriate in light of the subject matter and Stark's experience. It was based on the appearance of Colon's lacerations, which were readily observable by Stark. Moreover, the evaluation of these injuries did not require a complex application of technical knowledge. The type of instrument which would cause lacerations of this type could be just as easily be ascertained by a lay person as by a trained physician.

D. MODIFICATION OF SENTENCE

Sentencing is a matter vested in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. ***Commonwealth v. Johnson,*** 961 A.2d 877 (Pa. Super. 2008), appeal denied 968 A.2d 1280 (Pa. 2009). In sentencing a defendant, the Court must impose a sentence that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. 42 Pa.C.S.A. §9721(b). Defendant seeks a modification of his sentence, arguing that the Court did not give appropriate consideration to his request to be sentenced to Teen Challenge in order to address his rehabilitative needs. (N.T. 1/18/12 at 6)

Before sentencing Defendant, we considered the presentencing report, his lengthy prior criminal record,[8] a ten-page handwritten letter submitted by the Defendant (Exhibit "1") and the affidavit of probable cause from this case. We further considered Defendant's numerous attempts to manipulate the victim in

[8] Included in Defendant's record was an aggravated assault from 1991, carrying a firearm without a license from 1993, possession of a handgun and distribution of heroin in New York (3 years incarceration), other felony drug charges from the 1980's for which he was sentenced by the Dauphin County Court to 7 to 10 years and another drug charge in 1998 for which he was sentenced to 7 ½ to 20 years. (N.T. 1/18/2 at 10)

this case so that she would not testify against him. All of these factors, along with the egregious facts of this case, fully justified our exercise of discretion in determining that incarceration was an appropriate sentence for Defendant. As noted by the Commonwealth, the placement of Defendant, with his violent and manipulative nature, in a program such as Teen Challenge, where he would have access to the community, and possibly the victim in this case, would have been inappropriate. (N.T. 1/18/12 at 9 – 10) The needs of the community, the victim and Defendant were better served by the sentence imposed. Defendant will have access to rehabilitative programs in a state correctional institution and the public will be protected while Defendant is undergoing such rehabilitation.

RR26a