NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA v. JOHN ANTHONY VEGA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1391 EDA 2013

Appeal from the Judgment of Sentence, December 17, 2012,
in the Court of Common Pleas of Lehigh County
Criminal Division at No. CP-39-CR-0001177-2009

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 30, 2014**

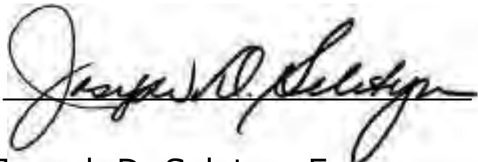
John Anthony Vega broke into an elderly woman's home and sexually assaulted her with brutal force. Following a jury trial, he was convicted of aggravated assault, attempted rape, involuntary deviate sexual intercourse, burglary, and aggravated indecent assault. Herein, he appeals from the judgment of sentence entered on December 17, 2012, in the Court of Common Pleas of Lehigh County. We affirm.

The disturbing facts of this case were thoroughly summarized by the trial court; we adopt the facts and the procedural history set forth in the court's opinion. (Trial court opinion, 7/18/13 at 2-10.) Herein, appellant

presents nine issues for our review. (See appellant's brief at 8-12).[1] We have carefully reviewed the briefs, the relevant law, the record, and the well-reasoned opinion authored by the Honorable Robert L. Steinberg. We find that Judge Steinberg's opinion correctly disposes of the issues presented, and accordingly, we affirm based on the trial court's opinion.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/30/2014

[1] Additional issues contained in appellant's 1925(b) statement have not been presented to our court in his brief, hence we deem them to have been abandoned.

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IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
:
vs. : NO. CR-1177-2009
: Superior Court No.: 1391 EDA 2013
JOHN ANTHONY VEGA :

* * * * *

Appearances:

Matthew Falk, Chief Deputy District Attorney
For the Commonwealth

Robert Long, Esquire
For the Appellant

* * * * *

OPINION

Robert L. Steinberg, Judge:

On August 10, 2012, the appellant, John Anthony Vega, was found guilty after a jury trial of Aggravated Assault,[1] Attempted Rape,[2] Involuntary Deviate Sexual Intercourse,[3] Burglary,[4] and Aggravated Indecent Assault.[5] The appellant lay in wait for Marguerite MacBurney, who was seventy-seven (77) years of age, after unlawfully entering her home. When she returned home from walking her dog, the appellant attacked and sexually assaulted her.

APPENDIX A

[1] 18 Pa.C.S. § 2702(a)(1).
[2] 18 Pa.C.S. § 901; § 3121(a)(1).
[3] 18 Pa.C.S. § 3123(a)(1).
[4] 18 Pa.C.S. § 3502(a).
[5] 18 Pa.C.S. § 3125(2).

Dr. Valliere also describes the rape "of the elderly and vulnerable victims" as "highly deviant".[81] In that regard, the attack on Mrs. MacBurney was not isolated, but represented "a pattern of sexual deviance namely Paraphilia and NOS to non-consent".[82] Furthermore, appellant's fetishism regarding the use of underwear as a staging device cannot be ignored.

The appellant's criminal history extends for over a decade with serious firearms charges, but no sexual offenses. However, in light of appellant's history of supervision violations, Dr. Valliere concluded that the appellant "is not easily manageable and that legal consequences hold no deterrent value".[83]

The appellant is someone likely to reoffend and engage in predatory behavior. His criminal behavior comes in many forms, but his sexual deviance makes it likely that he will reoffend. Dr. Valliere's diagnosis of antisocial personality disorder was coupled with "a highly likely presence of two paraphilic disorders . . .".[84] "Even without those paraphilics Mr. Vega would be likely to reoffend, but when you have a paraphilic disorder plus the personality type they combine fairly synergistically to . . . raise the risk of recidivism."[85] Moreover, his antisocial personality disorder is a lifelong condition that can only be managed. "The salient inquiry to be made by the trial court is the identification of the impetus behind the commission of the crime and the extent to which the offender is likely to reoffend." Commonwealth v. Geiter, 929 A.2d 648, 651 (Pa.Super. 2007)(emphasis in original).

The appellant contends that Dr. Valliere's opinions are flawed because her report was generated after the appellant originally entered a guilty plea on November 15, 2010. Dr. Valliere's report was issued on January 28, 2011. The appellant withdrew his guilty plea on June

[81] Sex Offender Evaluation at p. 6.
[82] Sex Offender Evaluation at p. 8; N.T.S. at p. 51.
[83] Id. at p. 7; N.T.S. at pp. 33, 51.
[84] N.T.S. at p. 21.
[85] Id. at p. 21.

20, 2011. When asked about this issue at the SVP hearing, Dr. Valliere said those facts had "nothing to do with the diagnosis . . . which is what my report hinges upon. So, whether or not he was found guilty by a jury or pled guilty, he would still meet those diagnostic criteria."[86] Her diagnosis being unaffected, this issue is meritless.

Based upon all the information provided to this Court, clear and convincing evidence was presented to this Court to find the appellant a SVP.

VII. Continuance Request of SVP Hearing

The appellant claims this Court erred in denying his continuance request at the time of sentencing in order to obtain a second expert to evaluate him prior to the SVP hearing. He requested the allocation of additional resources to find a second expert in the hopes that that expert would conclude he was not an SVP.

"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. Petterson, 49 A.3d 903 (Pa.Super. 2012) citing 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. Id. See also Commonwealth v. McKelvie, 370 A.2d 1155 (Pa. 1977). The decision of whether to appoint an expert witness is also within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. Commonwealth v. Dupre, 866 A.2d 1089, 1104 (Pa. Super. 2005) citing Commonwealth v. Bridges, 757 A.2d 859, 867 (2000), cert. denied, 535 U.S. 1102 (2002)(overruled on other grounds); see also Commonwealth v. Faulkner, 595 A.2d 28, 37 (1991), cert. denied, 503 U.S. 989 (1992); Commonwealth v. Phelan, 234 A.2d 540, 547-548

[86] N.T.S. at p. 25

(Pa. 1967)(overruled on other grounds)(no abuse of discretion or denial of due process of law where defense counsel's request for a continuance in order to retain new psychiatrists was denied because counsel was already in possession of various reports from eminent psychiatrists).

"[A]n abuse of discretion is not merely an error of judgment. Rather, discretion is abused when the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record." Commonwealth v. Flor, 998 A.2d 606 (Pa. 2010). "In reviewing the denial of a continuance, we have regard for the orderly administration of justice as well as the right of a criminal defendant to have adequate time to prepare his defense." Id.

Counsel for the appellant requested that Frank M. Dattilio, Ph.D., a well qualified expert in forensic and clinical psychology, conduct an evaluation for the SVP hearing. This Court appointed Dr. Dattilio on October 10, 2012, and authorized payment on December 3, 2012. Dr. Dattilio did not testify at the SVP hearing. At the beginning of the sentencing hearing, defense counsel, while acknowledging his request was not common, requested that funds be allocated for a second expert opinion.[87] This Court denied the request, finding that the appellant was not entitled to a second opinion based on his disapproval with Dr. Dattilio's findings. The law is clear that a defendant is not entitled to unlimited court appointed experts until he finds one that renders the opinion he desires. Commonwealth v. Fisher, 813 A.2d 761, 766 (Pa. 2002); Dupre, 866 A.2d at 1104.

This Court did not abuse its discretion in denying the appellant's motion for continuance and the appellant suffered no prejudice from the denial of this motion.

[87] N.T.S. p. 5-6.

VIII. Discretionary Aspects of Sentencing

The appellant was sentenced to not less than thirty (30) years nor more than sixty-four (64) years for the unlawful entry into Mrs. MacBurney's home and the attack which brutalized her. A review of appellant's sentence discloses that the sentences imposed for the multiple charges fell within either the aggravated range,[88] standard range,[89] or mitigated range[90] of the Sentencing Guidelines. The sentence for the charge of Involuntary Deviate Sexual Intercourse was a deviation from the Sentencing Guidelines.

The appellant contends that it was error to impose aggravated range sentences for the charges of Attempted Rape and Burglary, and to deviate from the guidelines for the charge of Involuntary Deviate Sexual Intercourse. The sole contention is that there were "no adequate reasons stated on the record" for those sentences. The appellant does not contest the sentences imposed for the charges of Aggravated Assault and Aggravated Indecent Assault.

"It is well settled that, with regard to the discretionary aspects of sentencing, there is no automatic right to appeal." Commonwealth v. Edwards, 2013 WL 2605568, *6 (Pa.Super. June 12, 2013); Commonwealth v. Griffin, 65 A.3d 932 (Pa.Super. 2013); Commonwealth v. Ladamus, 896 A.2d 592, 595 (Pa.Super. 2006); Commonwealth v. Shugars, 895 A.2d 1270, 1274 (Pa.Super. 2006); Commonwealth v. McNabb, 819 A.2d 54, 55 (Pa.Super. 2003). The appellant must demonstrate that a substantial question exists concerning the sentence. Commonwealth v. Lee, 876 A.2d 408, 411 (Pa.Super. 2005).

"The determination of what constitutes a substantial question must be evaluated on a case-by-case basis." Griffin, 65 A.3d at 935; Commonwealth v. Moury, 992 A.2d 162, 170 (Pa.Super. 2010); Commonwealth v. Perry, 883 A.2d 599, 602 (Pa.Super. 2005); Commonwealth

[88] The appellant's sentence for Burglary and Attempted Rape was within the aggravated range of the guidelines.
[89] The sentence for Aggravated Assault was within the standard range of the guidelines.
[90] The sentence for Aggravated Indecent Assault was within the mitigated range of the guidelines.

v. Anderson, 830 A.2d 1013, 1018 (Pa.Super. 2003). As stated in Moury "[a] substantial question exists 'only when the appellant advances a colorable argument that the sentencing judge's action were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.'" Id. See also Commonwealth v. Austin, 66 A.3d 798, 808 (Pa.Super. 2013). Bald assertions of sentencing errors do not constitute a substantial question. Moury, 992 A.2d at 170. "It is important to note that this court is not persuaded by bald assertions or the invocation of special words in a concise statement of reasons; [t]o the contrary, a concise statement must articulate the way in which the court's conduct violated the sentencing code or process." Commonwealth v. Cannon, 954 A.2d 1222, 1229 (Pa.Super. 2008).

The failure to set forth adequate reasons for the sentence imposed has been held to raise a substantial question. Commonwealth v. Macias, 968 A.2d 773, 776 (Pa.Super. 2009). However, it would appear that the gist of appellant's argument is a variation of that assertion. In other words, the appellant concedes adequate reasons were stated for some charges, but not other charges. The appellant does not allege that the guidelines were incorrectly calculated or that the sentence imposed exceeded the statutory maximum. In that regard, the appellant faced a potential sentence of forty-five (45) to ninety (90) years imprisonment. Instead, the appellant has decided to dissect the overall sentence, and look at its individual components. Commonwealth v. Robinson, 931 A.2d 15, 27 (Pa.Super. 2007)(Sentences are reviewed as a whole to determine if Court stated adequate reasons for sentencing.). The appellant's sentencing argument fails to establish that this Court's actions were "contrary to the fundamental norms which underlie the sentencing process". Griffin, 65 A.3d at 935. No substantial question has been established.

If the merits of the appellant's sentencing claims are considered, then the sentencing court's decision-making is scrutinized under an abuse of discretion standard.

Commonwealth v. Walls, 926 A.2d 957, 961 (Pa. 2007); Commonwealth v. Hoch, 936 A.2d 515, 519 (Pa.Super. 2007). In determining whether there has been an abuse of discretion in the imposition of a sentence, "the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference." Commonwealth v. Perry, 883 A.2d 599, 603 (Pa.Super. 2005); see also Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa.Super. 2003). The following explanation has been used as the starting point for determining if the sentencing court properly exercised its discretion:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Fullin, 892 A.2d 843, 847 (Pa.Super. 2006) citing Commonwealth v. Rodda, 723 A.2d 212, 214 (Pa.Super. 1999)(en banc).

A review of the sentencing proceedings reflects this Court's awareness and consideration of the Sentencing Guidelines. However, the guidelines themselves are advisory and nonbinding, and many reasons existed for structuring the appellant's sentence. Nonetheless, the sentencing court must consider the guidelines in formulating a sentence. Walls, 926 A.2d at 964. The purpose of the guidelines was explained in Walls as follows:

> Consultation of the guidelines will assist in avoiding excessive sentences and further the goal of the guidelines, viz., increased uniformity, certainty, and fairness in sentencing. Guidelines serve the laudatory role of aiding and enhancing the judicial exercise of judgment regarding case-specific sentencing. Guidelines may help frame the exercise of judgment by the court in imposing a sentence.

> Therefore, based upon the above, we reaffirm that the guidelines have no binding effect, create no presumption in sentencing, and do not predominate over other sentencing factors – they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence.

Walls, 926 A.2d at 964-965.

This Court also considered the presentence report. See Commonwealth v. Rhoades, 8 A.3d 912, 919 (Pa.Super. 2010) quoting Commonwealth v. Moury, 992 A.2d at 171 (Pa.Super. 2010)(holding that where the sentencing court had the benefit of a presentence investigation report it is assumed that the sentencing court was aware of relevant information regarding the defendant's character and weighed those factors along with mitigating statutory factors. See also Commonwealth v. Devers, 546 A.2d 12, 18 (Pa. 1988); Commonwealth v. Pollard, 832 A.2d 517, 526 (Pa.Super. 2003). The presentence report reinforced the severity of the crime and its impact on the victim, Mrs. MacBurney. See Victim Impact Statement.[91] Mrs. MacBurney, a feisty senior citizen, was attacked within her home in a most vicious manner. Her injuries were severe and life-threatening.

This Court also had the benefit of the testimony of Dr. Veronique Valliere, a clinical and forensic psychologist. Dr. Valliere found that the appellant met the diagnostic criteria for antisocial personality disorder.[92] A diagnosis of this type is "foundational, chronic and pervasive".[93] It is a diagnosis marked by "aggressiveness, assaultiveness, failure to take responsibility, lack of adherence to social mores or laws, reckless disregard for the rights of others and failure to respond to negative consequences".[94] It is a personality disorder that can be

[91] The Victim Impact Statement is attached to the Presentence Investigation Report.
[92] N.T.S. at p. 17.
[93] Id. at p. 30.
[94] Id. at p. 17.

managed, but not cured.[95] It was the opinion of Dr. Valliere, which was explained during the earlier SVP analysis, that the appellant's conduct represents "sexual deviance".[96] Finally, Dr. Valliere rendered the opinion that the appellant was a sexually violent predator.[97]

Support for Dr. Valliere's opinions are found in appellant's criminal history, his violations of conditions of supervision, and his criminal versatility. The most significant offenses are the offenses committed in Northampton and Carbon Counties. Both of those offenses point to the appellant's sexual deviance. The appellant pled guilty to Burglary in Northampton County on April 1, 2011. This offense was not included in the calculation of the sentencing guidelines, but involved circumstances relevant to the appellant's sentencing. The victim in that case was a sixty-seven (67) year old female, who arrived to discover someone had entered her home. The intruder had taken items of clothing, including a pair of underwear from the victim's laundry bin, and left them on the couch by the television. The intruder, who like the within case did not steal anything, watched Pay Per View pornography on the victim's television before departing her home. The appellant was subsequently implicated with the assistance of the discovery of DNA from a Gatorade bottle.[98]

The appellant had also been arrested but was not as yet convicted of the Carbon County case involving Mrs. Fields at the time of this sentencing hearing. Those charges involved the burglary and sexual assault of an elderly victim and the use of the victim's underwear. Commonwealth v. P.L.S., 894 A.2d 120, 131 (Pa.Super. 2006); Commonwealth v. Fries, 523 A.2d 1134, 1136 (Pa.Super. 1987)("It is not improper for a court to consider a defendant's prior arrests which did not result in conviction, as long as the court recognizes the

[95] Id. at pp. 17-18, 30.
[96] Id. at p. 20.
[97] Id. at pp. 22-23.
[98] See Motion in Limine hearing, April 6, 2010.

defendant has not been convicted of the charges."). Here, this Court stated that it would not consider the Carbon County case as a conviction.[99]

Additionally, the prior record score of the guidelines inadequately reflected appellant's criminal background. Neither the Carbon County offenses nor the federal firearms charges were counted in the prior record score.[100] "The court may consider at sentencing prior convictions . . . not counted in the calculation of the Prior Record Score in addition to other factors deemed appropriate by the court." 204 Pa.Code § 303.5(d).

Furthermore, a sentence that exceeds the Sentencing Guidelines or is in the aggravated range of the guidelines does not make the sentence unreasonable. A sentence outside the guidelines is permitted, and as stated in P.L.S., quoting Commonwealth v. Cunningham, 805 A.2d 566, 575 (Pa.Super. 2002):

> [I]n exercising its discretion, the sentencing court may deviate from the guidelines, if necessary, to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offenses as it relates to the impact on the life of the victim and the community, so long as he also states of record the factual basis and specific reasons which compelled him to deviate from the guideline range. The sentencing guidelines are merely advisory and the sentencing court may sentence a defendant outside of the guidelines so long as it places its reasons for the deviation of the record.

P.L.S., 894 A.2d at 129-130.

With respect to an aggravated range sentence, "[a] trial court judge has wide discretion in sentencing and can, on the appropriate record and for the appropriate reasons, consider any legal factor in imposing a sentence in the aggravated range." Commonwealth v.

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[99] N.T.S. at p. 75.

[100] The appellant was convicted in federal court on January 10, 2012 of Felon in Possession of a Firearm. He was convicted in state court of similar offenses in 2002.

Shugars, 895 A.2d 1270, 125 (Pa.Super. 2006) quoting Commonwealth v. Stewart, 867 A.2d 589, 593 (Pa.Super. 2005).

Here, this Court considered the Sentencing Guidelines and recognized that certain sentences were in the aggravated range of the guidelines and the Involuntary Deviate Sexual Intercourse was a deviation from the guidelines.[101] A departure was warranted for the Involuntary Deviate Sexual Intercourse. It reflects the appellant's sexual deviance and the brutalization of Mrs. MacBurney, all of which was explained at appellant's sentencing.[102]

The severity of appellant's sentence reflects the need to protect the public from an individual who in all likelihood cannot be rehabilitated. His attack of elderly women and staging the crime scenes suggests pathology which will not be easily managed. The gravity of these offenses and its impact on Mrs. MacBurney was significant. Likewise, its impact on the community, while not measured, can easily be gauged as causing significant concern. In a nutshell, this Court concluded that these crimes are "as serious and as atrocious that can be committed against an elderly person in our community."[103]

This Court in imposing sentence did not abuse its discretion, and adhered to the requirements of 42 Pa.C.S. § 9721:

> [T]he court shall follow the general principle that the sentence imposed should call for confinement 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. § 9721(b); Commonwealth v. Downing, 990 A.2d 788, 794 (Pa.Super. 2010).

For all the foregoing reasons, the judgment of sentence should be affirmed.

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[101] N.T.S. at p. 88.
[102] Id. at pp. 81-90.
[103] Id. at p. 85

crime." Zingarelli, 839 A.2d at 1069 quoting Commonwealth v. Gilliam, 417 A.2d 1203, 1205 (Pa.Super. 1980). Although it is true that penetration with a penis is necessary to establish sexual intercourse for Rape,[55] if the appellant did not use his penis, this does not preclude a conviction for Attempted Rape.

In Commonwealth v. Vanderlin, 580 A.2d 820, 827 (Pa.Super. 1990)(collecting cases)[56] a conviction for Attempted Rape was sustained where the defendant removed the victim's clothes, kissed her and fondled her body, inserted his finger into her vagina, threatened to rape or kill her, told her he wanted oral sex, and touched her mouth with his penis.

Here, the appellant was forestalled by Mrs. MacBurney's grit. In her words, "I'm strong . . . when somebody is wiggling . . . it's very hard to do something to them.[57] Her resistance may have caused the appellant to alter his method of assault, but did preclude his conviction for Attempted Rape. The appellant professed his desire to rape Mrs. MacBurney, and while engaged in his assault, he expressed his sexual satisfaction.[58] The circumstances surrounding the assault on Mrs. Fields also confirm the appellant's intention to commit rape. The intent to commit rape may be inferred from appellant's actions in light of all attendant

[55] Commonwealth v. Wall, 953 A.2d 581 (Pa.Super. 2008).
[56] See also Commonwealth v. Owens, 462 A.2d 255 (Pa.Super. 1983)(conviction for attempted rape upheld where defendant hit a seven year old child, forced her into a garage, removed her clothes and unzipped his pants before a neighbor interceded by entering the garage); Commonwealth v. Simpson, 462 A.2d 821 (Pa.Super. 1983)(defendant's actions in applying pressure to victim's throat and in loosening and starting to take off his pants constituted a substantial step towards the commission of rape; conviction for attempted rape sustained); Commonwealth v. Russell, 460 A.2d 316 (Pa.Super. 1983)(evidence was sufficient to sustain conviction for attempted rape where defendant cut the victim's tee shirt, bra, jeans and panties, and fondled her breasts and placed his finger in her vagina); Commonwealth v. Martin, 452 A.2d 1066 (Pa.Super. 1982)(substantial step in effectuating an intended rape occurred where defendant grabbed victim, threatened her, and expressed intent to have sex with her); Commonwealth v. Keeler, 448 A.2d 1064 (Pa.Super. 1982)(defendant pushed victim to the ground and told her he was going to rape her; victim scratched defendant; this Court held that presence of scratch marks on defendant's neck was sufficient to sustain attempted rape conviction); Commonwealth v. Moody, 441 A.2d 371 (Pa.Super. 1982)(attempted rape conviction upheld where defendant forced a twelve year old girl into his basement, fondled her genitalia and began to unzip his pants before she escaped); Commonwealth v. King, 434 A.2d 1294 (Pa.Super. 1981)(attempted rape conviction upheld where defendant exposed himself to victim, indicated that he wanted to have sex with her, approached her and forcibly laid down on top of her); Commonwealth v. Bullock, 393 A.2d 921 (Pa.Super. 1978)(evidence was sufficient to sustain charge of attempted rape where defendant pulled at victim's blouse, pulled down her bra and tried to remove her pants). Vanderlin, 580 A.2d at 827-828.
[57] N.T.T., August 7, 2012, at p. 84.
[58] Id. at p. 73.

circumstances. Chance, 458 A.2d at 1374. See Commonwealth v. Pasley, 743 A.2d 521, 524 (Pa.Super. 1999)(Appellant took substantial steps toward sexually assaulting the victim and the only reason Appellant did not succeed was because the victim was strong enough to forestall Appellant's criminal objective.). The attendant circumstances here provide sufficient evidence to support the charge of Attempted Rape.

B. Aggravated Indecent Assault

The appellant makes the rather bizarre argument that while Mrs. MacBurney was being sexually assaulted with a "very hard object", that penetration did not include "a part of the [appellant's] body". The elements of Aggravated Indecent Assault, in pertinent part, require the following:

> (a) **Offenses defined - ...** [A] person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if...
> (1) the person does so without the complainant's consent.

18 Pa.C.S. § 3125.

Viewing the evidence in the light most favorable to the Commonwealth, it is evident that the depth of penetration, coupled with the force required to cause the injuries[59] to the rectum and anal sphincter muscle, provides sufficient evidence that Mrs. MacBurney was also penetrated by appellant's fingers and/or hand. One (1) of appellant's hands held the instrument which caused her anal injuries. The suggestion that the hard object penetrated her, but not a part of appellant's body which held the object is fallacious.

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[59] N.T.T., August 7, 2012, at p. 128.

Additionally, Mrs. MacBurney's vagina suffered "little lacerations and abrasion marks that were reddened; bruise that you could tell that there was some kind of trauma".[60] It is thus reasonable to infer that those injuries, which were consistent with penetration, were caused by a part of appellant's body.

II. Weight of the Evidence

The appellant contends that the verdict was against the weight of the evidence for the charges of Attempted Rape and Aggravated Indecent Assault. This is a distinct legal concept from a sufficiency claim, and is addressed to the discretion of the trial court. Commonwealth v. Chine, 40 A.3d 1239, 1241 (Pa.Super. 2012).

"A challenge to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner." Commonwealth v. Harvard, 64 A.3d 690, 700 (Pa.Super. 2013) quoting Commonwealth v. Fisher, 47 A.3d 155, 158 (Pa.Super. 2012). This challenge contends, however, that even though sufficient evidence exists, "the trial judge should find the verdict so shocking to one's sense of justice and contrary to the evidence as to make the award of a new trial imperative." Commonwealth v. Robinson, 834 A.2d 1160, 1167 (Pa.Super. 2003); Commonwealth v. Sullivan, 820 A.2d 795, 806 (Pa.Super. 2003)("[T]he evidence must be 'so tenuous, vague and uncertain that the verdict shocks the conscience of the court.'").

A review of the appellant's weight of the evidence contentions appears to be nothing more than a reiteration of the sufficiency arguments. These nebulous arguments regarding the mechanics of the appellant's attack offer nothing to warrant a new trial on the charges of Attempted Rape and Aggravated Indecent Assault.

[60] N.T.T., August 7, 2012, at p. 115.

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III. Other Crimes – Pa.R.E. 404(b) –
Mrs. Fields' Sexual Assault

On March 3, 2010, the Commonwealth filed a Motion in Limine pursuant to Pa.R.E. 404(b) seeking to introduce in the within case evidence of the attack on Mrs. Fields, as well as evidence from a burglary in Northampton County. It was alleged that such evidence was admissible to prove "a common scheme, plan or design embracing [the] commission of two or more crimes so related to each other that proof of one tends to prove the others . . . or . . . to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other." Commonwealth v. Morris, 425 A.2d 715, 720 (Pa. 1981).

A hearing on that motion was held on April 6, 2010. During that hearing, the testimony of Trooper Raymond Judge, who was involved in the investigations in both Carbon and Northampton Counties, was presented. An affidavit outlining the facts supporting the Commonwealth's request, as well as an aerial map, were introduced into evidence. On April 8, 2010, this Court entered an Order permitting the introduction of the evidence of the attacks on Mrs. Fields, but prohibiting evidence of the Northampton County offenses.

The rules of evidence permit evidence of an accused's other crimes, not to show an accused's bad character, but for some other legitimate purpose. See Pa.R.E. 404(b)(2). Commonwealth v. Jordan, 65 A.3d 318, 325 (Pa. 2013); Commonwealth v. Selenski, 18 A.3d 1229 (Pa.Super. 2011); Commonwealth v. Weakley, 972 A.2d 1182 (Pa.Super. 2009). Such evidence is admissible to prove the "identity" of the person charged with the commission of the crime on trial. Pa.R.E. 404(b)(2); Weakley, 972 A.2d at 1189.

"Identity as to the charged crime may be proven with evidence of another crime where the separate crimes share a method so distinctive and circumstances so nearly identical as to constitute the virtual signature of the defendant. Required, therefore, is such a high correlation in the details of the crimes that proof that a person committed one of them makes it very unlikely that anyone else committed the others." Id. (internal citations and quotations omitted). See also Morris, 425 A.2d at 720-721.

The comparison of "methods and circumstances" requires a court to "look for similarities in a number of factors, including: (1) the manner in which the crimes were committed; (2) weapons used; (3) ostensible purpose of the crime; (4) location; and (5) type of victims. Remoteness in time between the crimes is also factored, although its probative value has been held inversely proportional to the degree of similarity between crimes." Weakley, 972 A.2d at 1189. See also Commonwealth v. Robinson, 864 A.2d 460, 481 (Pa. 2004) quoting Commonwealth v. Rush, 646 A.2d 557, 561 (Pa. 1994))(Evidence of brutal attacks and rapes of women within same locale during eleven month time frame permitted consolidation of cases, especially in light of "real relationship" in the way the victims were killed). In Rush, the court determined that evidence of a similar knife attack upon a second woman was admissible where there were sufficient similarities to warrant a conclusion that one individual committed both crimes. In particular, the court focused on the following similarities: the intruder gained non-forcible entry, ostensibly by ringing the door bell, into both residences; the victims were neighbors and were recently introduced to defendant; the victims were attacked while in their bedrooms; the victims and the defendant lived in the same apartment building; the victims had their underclothing or night clothes pulled from them; the victims were physically restrained and attacked with knives obtained from their own apartments; and the assailant repeatedly stabbed both victims. See also Commonwealth v. Elliot, 700 A.2d 1243 (Pa. 1997)(reversed on other

grounds)(Evidence that defendant raped other victims of similar race and gender was admissible to prove common scheme, plan, or design); Commonwealth v. Miller, 664 A.2d 1310, 1318 (Pa. 1995)(reversed on other grounds)(Evidence that defendant lured other victims of similar race, weight, and gender into his car, took them to remote areas to force sex upon them, beat them in a similar manner, and killed or attempted to kill them, was admissible to prove common scheme, plan or design); Commonwealth v. Hughes, 555 A.2d 1264, 1282-1283 (Pa. 1989)(Testimony of a subsequent rape was properly admitted at trial for a preceding rape and murder where victims were young, both rapes occurred within a tight geographic region during the daytime, the method of attack was similar, and the victims were the same ethnicity and gender).

Given this caselaw, it is clear that the attack on Mrs. Fields contained "uniquely similar attributes" and not common elements found in most burglaries and sexual assaults. Both Mrs. Fields and Mrs. MacBurney were senior citizens. Mrs. Fields was born on June 7, 1930, and Mrs. MacBurney was born on July 1, 1931. Both were sexually assaulted in their homes which shared geographical proximity.[61] They were both widows who resided by themselves, although after the first attack, Mrs. Fields secured a housemate. The purpose of the crimes was sexual assault. Nothing was taken in either crime. Mrs. Fields was attacked on two (2) occasions, the last of which occurred less than six (6) months prior to the attack on Mrs. MacBurney. The ostensible purpose of the second attack on Mrs. Fields was the appellant's expressed desire to finish what he had started.

The appellant shielded his appearance during each attack. Gloves and either a mask or face covering prevented Mrs. Fields and Mrs. MacBurney from identifying the appellant. The appellant, by using gloves, also gave thought to not leaving physical evidence.

[61] The distances from the appellant's residence to Mrs. Fields' residence was 10.1 miles, and from Mrs. MacBurney's residence was 4.5 miles.

The appellant also attempted, during the second attack on Mrs. Fields and the attack on Mrs. MacBurney, to pull their hands behind their back. Mrs. MacBurney was able to explain that the appellant did so to handcuff her. Appellant may suggest that some subtle differences exist between the crimes; i.e. time of crime or type of face covering. However, "the other crime need not match every fact and circumstance of the charged crime before it may be used to prove identity." Weakley, 972 A.2d at 1190.

The "virtual signature", however, was appellant's use of the victims' underwear to stage the crimes. Mrs. Fields discovered that her underwear was "scattered" throughout her home. Mrs. MacBurney observed her underwear on "plants, a picture, and the floor". The use of the victims' underwear was a prelude to the sexual attacks and earmarks these crimes as the "handiwork of the accused". While Justice Flaherty in Commonwealth v. Bryant 530 A.2d 83, 96 (Pa. 1987)(Bryant I), pointed out that "senior citizens are frequently the victims of violent crimes, and this is particularly so in major urban areas . . .", the attack of elderly females in semi-rural locales is not commonplace.

The high correlation of details between the assaults made the assault on Mrs. Fields admissible in this case. "Sufficient commonality of factors between the two crimes here dispels the notion that they were merely coincidental and permits the contrary conclusion that they are so logically connected they share a perpetrator." Weakley, 972 A.2d at 1189.

The probative value of the "other crimes" evidence also outweighs "its potential for unfair prejudice". Pa.R.E. 404(b)(2). Weakley, supra, sets forth factors to consider in conducting the "probative value/prejudice balancing test", including "the similarities between the crimes, the time lapse between crimes, the need for the other crimes evidence, the efficacy of alternative proof of the charged crime, and the degree to which the evidence probably will rouse

the jury to overmastering hostility". Id. at 1191 (internal quotations omitted). Furthermore, cautionary instructions were provided to the jury.[62]

Here, as in Weakley, the evidence in the attack on Mrs. MacBurney was "largely circumstantial" and the "specific purpose of the 'other crimes' evidence [is] to give the jury insight into the significance of these circumstances." Id. Finally, the jury was already aware that they were considering crimes against Mrs. MacBurney, and so any prejudice associated with listening to the attack on Mrs. Fields was diminished.

For all the foregoing reasons, the evidence of the attack on Mrs. Fields, "other crimes" evidence, was admissible to prove identity under Pa.R.E. 404(b)(2).

IV. Prison Telephone Calls

On April 12, 2010, a hearing was held on the defendant's Motion in Limine in the nature of a "Motion to Preclude Commonwealth from Using Defendant's Recorded Telephone Calls". The appellant alleged the conversations were not relevant.[63] On April 13, 2010, an Order was entered permitting the Commonwealth to use three (3) telephone conversations. However, the Commonwealth was required to redact those conversations to eliminate references to controlled substances, drug paraphernalia, berserks (guns), bail, and the appellant's prior record.

"[R]elevant evidence, i.e. evidence that logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable[,] or supports a reasonable inference or presumption regarding a material fact, is admissible. However, relevant evidence may be excluded if its probative value is outweighed by the likelihood of unfair prejudice.

[62] N.T.T., August 9, 2012, at pp. 133-134; N.T.T., August 10, 2012, at pp. 118-119.
[63] Notes of Testimony, Motions in Limine (hereinafter N.T.M.L.), April 12, 2010, at p. 11.

Admission of evidence rests within the sound discretion of the trial court, which must balance evidentiary value against the potential dangers of unfairly prejudicing the accused, inflaming the passions of the jury, or confusing the jury." Jordan, 65 A.3d at 324-325 (internal citations and quotations omitted).

The telephone conversations led to the handcuffs that the appellant denied owning.[64] Those conversations also point out that appellant's alibi witness, Melissa Ballas, did not know where the appellant was at the time of the crime.[65] Care was taken to redact any prejudicial information. Furthermore, if appellant's claim of prejudice is based on the telephone calls originating from the prison, it was not error to permit them. Commonwealth v. Johnson, 838 A.2d 663, 680 (Pa. 2003); Commonwealth v. Bedford, 50 A.3d 707, 716 (Pa.Super. 2012)("[N]o rule in Pennsylvania [] prohibits reference to a defendant's incarceration awaiting trial or arrest for the crimes charged.").

The Concise Statement does not contest the relevance of the phone calls, but merely alleges "the potential for prejudice outweighed the probative value".[66] All Commonwealth evidence is prejudicial. These phone calls were relevant, and the probative value outweighed any unexplained prejudice. There was no abuse of discretion in their admission into evidence.

V. Testimony of Allison Leech

During the trial, Allison Leech was called as a defense witness. She testified that John Vega had a "bushy" beard at or about the time of the attack on Mrs. MacBurney.[67]

[64] N.T.M.L. at pp. 16-19.
[65] Id. at p. 18.
[66] Concise Statement Of Matters Complained Of On Appeal, ¶ 2.
[67] N.T.T., August 9, 2012, at pp. 195-196.

The appellant contends that Ms. Leech was precluded, however, from providing alibi evidence. Ms. Leech was never identified as an alibi witness.

The attack on Mrs. MacBurney took place on November 9, 2008. The appellant was arrested on December 17, 2008. On June 8, 2009, which was one (1) month after the appellant's formal arraignment, prior counsel, Carol Marciano, filed a "Notice of Possible Alibi Defense". The only witness identified was Melissa Ballas. No other alibi notice was ever filed up to and including the start of trial more than three (3) years later.

The only other reference to an alibi was made at a hearing held on July 26, 2012, twelve (12) days prior to the start of the trial. Ms. Leech's name was never mentioned, and counsel was told that a new notice of alibi would be untimely.

Ms. Ballas was permitted to testify as an alibi witness.[68] She also testified that on the date of appellant's arrest, Allison Leech was at her home.[69] She did not testify that Ms. Leech was present on the night before or the day of the attack.

Pa.R.Crim.P. 567(A) in pertinent part states the following:

> Notice by Defendant. A defendant who intends to offer the defense of alibi at trial shall file with the clerk of courts not later than the time required for filing the omnibus pretrial motion provided in Rule 579[70] a notice specifying an intention to offer an alibi defense, and shall serve a copy of the notice and a certificate of service on the attorney for the Commonwealth.

It is apparent that if trial counsel intended to file a notice of alibi, it would have been untimely. However, no notice with Allison Leech's name was ever filed, and so even the rudimentary requirements of Pa.R.Crim.P. 567 were never completed.

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[68] N.T.T., August 9, 2012, at pp. 201-232.
[69] Id. at p. 209.
[70] Pa.R.Crim.P. 579 requires omnibus pretrial motions to be filed "within thirty (30) days after arraignment, unless opportunity therefor did not exist . . . ."

The right to present evidence of alibi is not absolute, and the appellant was required to comply with the notice requirement of Pa.R.Crim.P. 567 in order to pursue an alibi defense. Commonwealth v. Poindexter, 646 A.2d 1211, 1218-1219 (Pa.Super. 1994)(Alibi witnesses have been excluded where notification had not been provided until shortly before trial); Commonwealth v. Lyons, 833 A.2d 245, 257 (Pa.Super. 2003)(Alibi witnesses properly excluded where notification only provided two days into the trial); Commonwealth v. Anthony, 546 A.2d 1122, 1124-1125 (Pa.Super. 1988)(Alibi witness properly excluded where notification was provided on day of trial).

No notification regarding Ms. Leech was ever filed. As a result, this issue was not properly preserved. Moreover, the failure to file an amended alibi notification for over three (3) years is not the type of excusable delay contemplated by Pa.R.Crim.P. 567. The defense was aware of Ms. Leech, as evidenced by her trial testimony, and that of the alibi witness, Ms. Ballas. Therefore, there was no abuse of discretion in precluding the defense from contemplating her addition as an alibi witness.

VI. Sexually Violent Predator Finding

The appellant objects to his designation as a sexually violent predator (hereinafter SVP). This objection is without merit. Based on the Sex Offender Evaluation and the testimony of Dr. Veronique Valliere, a clinical and forensic psychologist who is also a member of the Pennsylvania Sexual Offender Assessment Board,[71] "clear and convincing evidence" established that the appellant was an SVP.[72]

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[71] N.T.S. at pp. 9-10.
[72] 42 Pa.C.S. § 9795.4(e)(3) now 42 Pa.C.S. § 9799.24(e)(3).

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In Commonwealth v. Brooks, 7 A.3d 852, 860-861 (Pa.Super. 2010), it was explained that a sexually violent predator is:

> [A] person who has been convicted of a sexually violent offense as set forth in section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses. "Mental abnormality" is a "congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons."

7 A.3d at 860-861 citing Commonwealth v. Krouse, 799 A.2d 835, 838 (Pa.Super. 2002) (en banc), appeal denied, 821 A.2d 586 (Pa. 2003)(quoting 42 Pa.C.S.A. § 9792)(emphasis omitted), disapproved on other grounds; Commonwealth v. Meals, 912 A.2d 213 (Pa. 2006).

Here, the appellant's convictions for Involuntary Deviate Sexual Intercourse, Attempted Rape, and Aggravated Indecent Assault are sexually violent offenses.[73] The appellant also met the diagnostic criteria for an antisocial personality disorder.[74] It is also evident that appellant engaged in "predatory" behavior, which is "[a]n act directed at a stranger . . . in whole or in part in order to facilitate or support victimization."[75] None of those issues are raised on appeal.

Additionally, the factors set forth in § 9795.4(b) were reviewed by Dr. Valliere and considered by this Court prior to making a SVP determination. Each of the factors must be examined, but there is no "requirement that all of them or any particular number of them be present or absent in order to support an SVP designation. The factors are not a checklist with each one weighing in some necessary fashion for or against SVP designation. Rather, the

[73] 42 Pa.C.S. § 9795.1 now 42 Pa.C.S. § 9799.14.
[74] N.T.S. at p. 17; Sex Offender Evaluation at p. 7.
[75] 42 Pa.C.S. § 9792 – "Predatory".

presence or absence of one or more factors might simply suggest the presence or absence of one or more particular types of mental abnormalities." Commonwealth v. Feucht, 955 A.2d 377, 381 (Pa.Super. 2008)(internal citation omitted). Instead, "the question for the SVP court is whether the Commonwealth's evidence, including the Board's assessment, shows that the person convicted of a sexually violent offense has a mental abnormality or disorder making that person likely to engage in predatory sexually violent offenses." Id. See also Commonwealth v. Fuentes, 991 A.2d 935, 942 (Pa.Super. 2010) quoting Commonwealth v. Dixon, 907 A.2d 533, 535-536 (Pa.Super. 2006)(The list of factors are designed as criteria by which the likelihood of reoffense may be gauged).

Each of the factors were weighed, but the nature of the current offense predominates the remaining factors. The attack on Mrs. MacBurney, who was seventy-seven (77) years old, "exceeded the means necessary to achieve the offense."[76] Appellant's use of a "very hard object" which caused great harm demonstrated unusual cruelty. The "nature of the sexual contact"[77] was anal rape. It was Dr. Valliere's opinion that "his offense characteristics also show injurious behavior, which especially when you have some kind of anal injury, it could imply that cruelty or humiliation of the victim is also a component of their arousal."[78] Dr. Valliere in her report suggests an "arousal to sadism or the presence of rage in his rape behavior".[79]

Other relevant factors include the appellant's attack on a complete stranger after unlawfully entering her home. Dr. Valliere described this as a "very risky crime situation".[80]

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[76] 42 Pa.C.S. § 9795.4(b)(1)(ii), (vi).
[77] Id. at § 9795.4(b)(1)(iii).
[78] N.T.S. at p. 20.
[79] Sex Offender Evaluation at p. 8.
[80] N.T.S. at p. 20

A presentence report was ordered following the jury's verdict. Additionally, this Court had the benefit of a Sex Offender Evaluation prepared by the Sexual Offenders Assessment Board.

On December 17, 2012, a sentencing hearing was held. During that hearing, Dr. Veronique Valliere, a clinical and forensic psychologist, testified that, in her opinion, the appellant was a sexually violent predator.[6] No testimony on this issue was presented by the appellant, although this Court had previously appointed Dr. Frank M. Dattilio, a clinical and forensic psychologist, at appellant's counsel's request. At the conclusion of the hearing, the appellant, by clear and convincing evidence, was found to be a sexually violent predator.

This Court then listened to victim impact letters from family members of the victim, heard the arguments of counsel, and the appellant's "allocution".[7] The victim was present, but did not testify. Thereafter, the appellant received a total sentence of not less than thirty (30) years nor more than sixty-four (64) years in a state correctional institution.[8] The sentences were also ordered to run consecutively to a federal firearms sentence which was imposed on January 10, 2012.

Post Sentence Motions were filed on December 24, 2012. A hearing on those motions was held on March 25, 2012, and they were denied on April 22, 2013. Trial counsel was permitted to withdraw and appellate counsel was appointed on April 22, 2013. A Notice of Appeal was filed on May 15, 2013, and an Amended Notice of Appeal the same date.

[6] Notes of Testimony, Sentencing (hereinafter N.T.S.), pp. 9-42.
[7] N.T.S. at pp. 64-66.
[8] The sentences imposed were as follows: (1) Aggravated Assault: 5-10 years; (2) Burglary: 5-10 years; (3) Attempted Rape: 7-14 years; (4) Involuntary Deviate Sexual Intercourse: 10-20 years (5) Aggravated Indecent Assault: 3-10 years. The Aggravated Assault sentence was within the standard range of the guidelines. The Burglary and Attempted Rape sentences were within the aggravated range of the guidelines. The Involuntary Deviate Sexual Intercourse sentence was a deviation from the guidelines. The Aggravated Indecent Assault sentence was in the mitigated range of the guidelines. N.T.S. at pp. 85-90.

Pursuant to this Court's Pa.R.A.P. 1925(b) order, appellant's counsel filed a timely "Concise Statement Of Matters Complained Of On Appeal" on June 10, 2013. It is alleged: (1) the evidence was insufficient with respect to the charges of Attempted Rape and Aggravated Indecent Assault; (2) the verdict was against the weight of the evidence with respect to the charges of Attempted Rape and Aggravated Assault; (3) the finding that the appellant was a sexually violent predator was error; (4) the sentencing court erred in not allowing the appellant to secure a second expert to evaluate whether the appellant was a sexually violent predator; (5) the sentencing court failed to state adequate reasons for imposing the sentences for Attempted Rape (aggravated range of guidelines), Involuntary Deviate Sexual Intercourse (deviation from the guidelines), and Burglary (aggravated range of guidelines); (6) it was error to allow evidence of a sexual assault of a seventy-seven (77) year old Carbon County woman which occurred less than six (6) months prior to this attack; (7) it was error to permit the Commonwealth to use redacted telephone calls of the appellant from Lehigh County Prison; (8) it was error to preclude Allison Leech, who did testify, from offering alibi evidence.

Background

On November 9, 2008, at approximately 8:00 a.m., Marguerite MacBurney left her home at 5520 Oakwood Lane in Schnecksville, Pennsylvania to walk her dog. She did this most mornings for approximately thirty (30) minutes along a predetermined route.

On this morning, a man, who was also walking, caught her attention. He looked at her and pulled the hood to his sweatshirt over his head. During the next few moments, this man disappeared, which worried Mrs. MacBurney. She increased her pace to her home, and as she approached her home, she observed something "white" fall down in the middle bedroom.[9]

[9] Notes of Testimony, Trial (hereinafter N.T.T.), August 7, 2012, at pp. 67-68.

She entered the back of her home and made her way to the middle bedroom. She opened the door to the bedroom and saw "white things hanging around".[10] They were her underpants.[11]

She knew something was "definitely wrong" because the underwear, which were on plants, a picture, and the floor, were not scattered there by her.[12] She started to run towards the living room in an effort to get out of her home. She was unsuccessful because an assailant, covered from "head to toe", tackled her. Mrs. MacBurney believed that person had "some kind of stocking or something in front of his face".[13]

Mrs. MacBurney's assailant attempted to pull her hands behind her in an effort to put her in handcuffs. She resisted and started to scream and yell, and the attempt to handcuff was abandoned. Her assailant told her to "shut up – shut up, I'm going to f... you."[14] He then pushed her on the sofa, pulled down her pants, and ripped her underpants.[15] He then went up her vagina and rectum.[16] Mrs. MacBurney cried out "this is like raping your mother" and with that the attacker stopped and fled.[17] Mrs. MacBurney got up and saw blood on the floor. She put on her slacks, but left her underpants. She went into the bathroom, took a shower, and then called her daughter and son-in-law. A short time later, Mrs. MacBurney's family and the police arrived.

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[10] N.T.T., August 7, 2012, at p. 68.
[11] Id.
[12] Id. at p. 69.
[13] Id. at p. 70.
[14] Id. at pp. 71-72.
[15] N.T.T., August 7, 2012, at pp. 71-72.
[16] Id. at p. 73.
[17] Id.

When Mrs. MacBurney returned to where she was attacked, she noticed a brown glove on the floor and stated "that's his glove on the floor."[18] Her assailant was wearing gloves and Mrs. MacBurney surmised that he had taken off the glove when he entered her.

Mrs. MacBurney reluctantly went by ambulance to the hospital, where she learned her bowel and sphincter muscles were ripped. She remained in the hospital for a week and after her release, she wore a colostomy bag for five months.

Loretta Gogel, a sexual assault forensic nurse (SANE Nurse), examined Mrs. MacBurney at the hospital. She described the examination as "horrific" due to the injuries she observed. Surgery was performed by Linda Lapos, a colon/rectal surgeon, at Lehigh Valley Hospital. Dr. Lapos explained that Mrs. MacBurney "had a complete disruption of the anal sphincter, where the sphincter muscle had been totally torn through just about its whole thickness. And also that she had an injury with a perforation of her rectum above that."[19] Mrs. MacBurney's injuries were potentially life threatening, and required a "lot of force".[20] The injuries were consistent with forced penetration, and some type of "very hard object".[21]

Following the attack of Mrs. MacBurney, members of the Pennsylvania State Police responded to her home. It was determined that the 9-1-1 call came in at 8:40 a.m. and the first trooper responded at 8:56 a.m.

Trooper Arthur Johnson also responded to the MacBurney home and was assigned as the lead investigator. He observed women's undergarments on the floor of the spare bedroom and also hanging on a picture or poster frame. In the living room, a coffee table was tipped over with the legs facing up. One (1) of the legs had been broken off. He also observed "two gloves, one like a dark brown or black cloth type glove near the center of the living room

[18] N.T.T., August 7, 2012, at pp. 74-75, 91-92.
[19] Id. at p. 123.
[20] Id. at pp. 124, 128.
[21] Id. at pp. 128, 130.

floor. And [about two] feet away from that was a very light colored cloth glove. And in-between those two gloves . . . there was a few drops of what appeared to be blood on the carpeting."[22] The brown glove was collected into evidence and cuttings were submitted for DNA testing. The blood drops were also submitted for testing, but the white glove which belonged to Mrs. MacBurney was not submitted for analysis.

Michael Gossard, a serologist with the State Police Crime Lab in Bethlehem, took two (2) cuttings from the brown glove and packaged them for the DNA Lab in Greensburg. One (1) cutting was from the palm and the other was from the wrist of the glove.[23] During the course of the investigation, he also received DNA samples of the appellant and Mrs. MacBurney, and submitted them to the DNA Lab.[24]

Angelina Biondi, a Forensic DNA Scientist Supervisor at the Pennsylvania State Police DNA Laboratory in Greensburg, conducted the DNA profiling in this case. The DNA profile from the cuff of the glove matched the DNA profile of the appellant "obtained from the major component of the cutting from the cuff of the glove in 15 of the 16 areas tested . . . . [O]ne area did not have results due to an insufficient amount of DNA . . . . [T]he probability of randomly selecting an unrelated individual exhibiting this combination of types is approximately one in one hundred and twenty quadrillion from the Caucasian population, approximately one [in] one hundred and sixty quadrillion from the African American population and approximately one [in] one hundred and sixty quadrillion from the Hispanic population."[25] The appellant was the major profile, but minor alleles were present in the profile. Mrs. MacBurney was a potential minor contributor. Additionally, minor alleles were present at three loci which were foreign to

[22] N.T.T., August 7, 2012, at pp. 197, 205, 207-210.
[23] N.T.T., August 8, 2012, at pp. 23-25.
[24] Id. at pp. 29-30.
[25] Id. at pp. 70-71, 77, 102-104.

both the appellant and Mrs. MacBurney, but no further interpretation could be made due to an insufficient amount of DNA.[26]

The DNA profile from the palm cutting of the glove was consistent with a mixture.[27] "[The appellant] cannot be excluded as a potential contributor at 15 of the 16 loci tested, one locus was inconclusive due to an insufficient amount of DNA . . . ."[28] Mrs. MacBurney was also a potential contributor to the mixture. Minor alleles foreign to Mrs. MacBurney and the appellant were present in five (5) of the sixteen (16) areas tested.[29] "[B]ased on the results at fourteen of the sixteen areas tested, approximately one in five hundred and ninety thousand randomly selected unrelated Caucasian individuals, approximately one in three point (sic) million randomly selected unrelated African American individuals, and approximately one [in] 1.5 million unrelated Hispanic individuals would be expected to be included as potential contributors to this DNA mixture profile."[30]

The DNA profile from the cuttings from the underwear, which was located in Mrs. MacBurney's bathroom, and the blood on the floor, matched Mrs. MacBurney's profile at all areas tested. "The probability of randomly selecting an unrelated individual exhibiting this combination of DNA types is approximately one in fifty-one quintillion from the Caucasian population, approximately one [in] 1.7 sextillion from the African American population, and approximately one in one hundred and ten quintillion from the Hispanic population."[31]

[26] N.T.T., August 8, 2012, at p. 72.
[27] Id. at p. 86. "In a mixture you're going to expect more than two alleles at each locus that would indicate a mixture is present, more than one contributor."
[28] Id. at pp. 73, 77, 86.
[29] Id. at pp. 73, 108. Minor alleles are "less intensive than that major contributor, meaning that minor contributors deposited less DNA on that item than the major contributor."
[30] N.T.T., August 8, 2012, at p. 74.
[31] Id. at pp. 68-69, 84.

During the course of the investigation, the appellant was "developed" as a suspect.[32] It was learned that he resided approximately four (4) miles from Mrs. MacBurney's home, and that a green 1999 Honda was registered in his name. One (1) of the witnesses, Kimberly Lilly, who worked at a store within walking distance of Mrs. MacBurney's home, observed a dark green vehicle in the parking lot when she arrived for work at approximately 7:30 a.m. She observed a man whom she described as "Hispanic or maybe light-skinned black man" inside the vehicle.[33] When she returned from making a bank deposit at approximately 8:10 a.m., the vehicle was still in the parking lot, but she did not remember seeing an occupant.

Following the appellant's arrest, he was advised of his Miranda rights, and then interviewed by Trooper Johnson. During that interview, the appellant denied owning or possessing handcuffs.[34] A few days later, based on intercepted phone conversations from the prison, a search warrant was secured for a shed located on the property at 7661 Furnace Road.[35] Inside a green garment bag, which was found approximately five (5) or six (6) feet from the entry door, was a pair of handcuffs.[36] A search warrant was also secured for the appellant's green Honda, where a handcuff key was discovered in the glove compartment.[37]

June Fields, a seventy-seven (77) year old woman, was accosted and assaulted inside her home nearby in Carbon county under circumstances which made her testimony admissible in the attack of Mrs. MacBurney. On October 21, 2007, Mrs. Fields was residing alone in her home when a masked individual with gloves entered her bathroom "tried to pin my

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[32] The initial analysis of the glove led to a Combined DNA Index System (CODIS) "hit" of the appellant. CODIS is a computer software program that operates local, state, and national databases of DNA profiles from convicted offenders, unsolved crime scene evidence, and missing persons. A "Motion To Exclude References to CODIS" was filed by defense counsel and granted. Therefore, the jury was unaware of this information.
[33] N.T.T., August 7, 2012, at p. 134.
[34] N.T.T., August 8, 2012, at p. 145.
[35] See Commonwealth Exhibits 5 – 11.
[36] N.T.T., August 8, 2012, at pp. 154-159.
[37] Id at p. 122.

arms back and put his hands down my pants."[38] He also made lewd comments during this attack which lasted approximately fifteen (15) to twenty (20) minutes. Mrs. Fields was able to dissuade him from continuing the attack by telling him that because of her health problems she might die. She then discovered that her "underwear was scattered throughout the house . . . wherever he could hang them."[39] He also matched the description provided in the attack of Mrs. MacBurney.[40] Her attacker then returned on the morning of May 31, 2008.[41] He was wearing a mask and gloves and told her that he returned to finish what he started. The intruder took Mrs. Fields to the ground and began his sexual assault. However, on this occasion, the attack was thwarted when Mrs. Fields called for her girlfriend, who was staying with her. When the girlfriend came running, the attacker fled.

Trooper Philip Barletto, a member of the Forensic Services Unit, and an expert in fingerprint analysis, responded to the Fields' residence at approximately 3:00 a.m. on May 31, 2008. One (1) of the items he recovered was a package of condoms which was located on the "inside of the window sill".[42] He also secured a latent palm print from the window sill and later compared that latent print with the known fingerprints of the appellant.[43] It was his opinion that "[t]he developed print . . . was made by the right palm of Mr. Vega."[44]

Trooper David Hudzinski traced the box of condoms through the price tag. By conducting an internet search, he located a business called Associated Wholesale Incorporated and learned that there were three (3) locations where they distributed products in Palmerton. One (1) of those places was the Convenient Food Mart, which is approximately one mile from

[38] N.T.T., August 9, 2012, at pp. 11-12, 24-25, 29.
[39] Id. at p. 14.
[40] Mrs. MacBurney described her attacker as approximately 5'7" or 5'8" and a medium build. N.T.T., August 7, 1012, at pp. 70, 84. Mrs. Fields described him as 5'6" or 5'7" and a medium or stocky build. N.T.T., August 9, 2012, at p. 14.
[41] N.T.T., August 9, 2012, at p. 18.
[42] Id. at pp. 60-62, 70-71.
[43] Id. at pp. 85, 88-89.
[44] Id. at pp. 96-97, 109.

Mrs. Fields' residence. He secured a sales receipt for 5/30/2008 at 23:14, and a surveillance video from the relevant time from the store. The tee-shirt in the video matched a tee-shirt with the word "Encindido", which was secured from appellant's bedroom. More importantly, the appellant's girlfriend confirmed the appellant's identity in the surveillance video.[45] The Deputy District Attorney, in his closing argument, put it succinctly by arguing that the video shows the appellant "clear as day buying [the] condoms . . . ."[46]

The defense presented Officer Richard Garner, Melissa Ballas, and Allison Leech, who will be discussed infra. Officer Garner was employed by the Whitehall Police Department as a patrolman and canine handler. He responded to Mrs. MacBurney's residence with his canine "Vitas" approximately three (3) hours after the attack, and began tracking from the scent on the recovered glove. However, in the words of Officer Garner, "nobody was at the end of the trail."[47]

Ms. Ballas provided alibi testimony. She testified that she and the appellant went to bed between 3:00 a.m. and 5:00 a.m., and when she awoke at 8:00 a.m., the appellant was still in her home. The appellant, according to Ms. Ballas, left her home a little after 9:00 a.m.

During cross-examination, the Deputy District Attorney pointed out that during one (1) of the intercepted phone calls from the prison, the appellant said to Ms. Ballas "[i]t happened on the morning of the 9th" and Ms. Ballas responded, "I know where were you."[48] Trooper Raymond Judge testified in rebuttal that he interviewed Ms. Ballas on multiple occasions, and the first time he heard that the appellant came home at 3:00 a.m., and was there when she awoke, was at the trial.[49]

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[45] N.T.T., August 9, 2012, at p. 223.
[46] N.T.T., August 10, 2012, at p. 71.
[47] N.T.T., August 9, 2012, at p. 187.
[48] Id. at pp. 220-222.
[49] Id. at pp. 240, 244.

I. Sufficiency of the Evidence

A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000); Commonwealth v. Brewer, 876 A.2d 1029, 1032 (Pa.Super. 2005).

Challenges to the sufficiency of the evidence are evaluated under the following well-established standard of review:

> [W]hether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. 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. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Helsel, 53 A.3d 906, 917-918 (Pa.Super. 2012); Commonwealth v. Zingarelli, 839 A.2d 1064, 1069 (Pa.Super. 2003).

A. Attempted Rape

The appellant contends that insufficient evidence was presented to sustain the charge of Attempted Rape. During the trial, Mrs. MacBurney testified that her attacker was up her vagina and rectum.[50] The SANE Nurse, Ms. Gogel, testified that Mrs. MacBurney had "little lacerations and abrasion marks that were reddened; bruise that you could tell that there was some kind of trauma."[51] It was her opinion that the injuries to Mrs. MacBurney's vagina were consistent with penetration.[52]

The appellant contends that because the injuries to the rectum and anal sphincter were caused by a very hard object, that there is insufficient evidence of Attempted Rape. This bit of sophistry is debunked by the nature of the charge of Attempted Rape and the totality of the circumstances.

The appellant started his attack by telling Mrs. MacBurney that he was "going to f… her".[53] He forced her to her knees, pulled down her pants, and ripped her underpants. He then viciously assaulted her. His conduct constituted a substantial step toward the commission of a Rape.

A person commits Attempted Rape when, with the intent to engage in sexual intercourse by forcible compulsion, that person does any act which constitutes a substantial step towards its commission.[54] Commonwealth v. Zingarelli, 839 A.2d at 1069 (Pa.Super. 2003); Commonwealth v. Chance, 458 A.2d 1371, 1374 (Pa.Super. 1983). "The substantial step test broadens the scope of attempt liability by concentrating on the acts the defendant has done and does not any longer focus on the acts remaining to be done before the actual commission of the

[50] N.T.T., August 7, 2012, at p. 73.
[51] Id. at p. 115.
[52] Id.
[53] Id. at p. 72.
[54] 18 Pa.C.S. § 901; § 3121(a)(1).