NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN ANTHONY VEGA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2581 EDA 2013

Appeal from the Judgment of Sentence April 30, 2013
in the Court of Common Pleas of Carbon County
Criminal Division at No.: CP-13-CR-0000395-2009

BEFORE: SHOGAN, J., JENKINS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.: **FILED MAY 15, 2014**

Appellant, John Anthony Vega, appeals from the judgment of sentence entered on April 30, 2013, following his jury conviction of two counts each of attempted rape, burglary, criminal trespass, and indecent assault; and one count of simple assault.[1] For the reasons discussed below, we affirm.

We take the underlying facts and procedural history in this matter from the trial court's opinion of November 21, 2013.

> Evidence at trial established that on two separate dates an intruder broke into June Fields' ("Ms. Fields") home during the early morning hours and sexually assaulted her. At the time of these assaults, Ms. Fields was a seventy-seven year-old widow.

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 901, 3121(a)(1), 3502(a)(1), 3503(a)(1)(i), 3126(a)(2), and 2701(a)(1), respectively.

The assaults occurred on October 21, 2007 ("2007 assault") and May 31, 2008 ("2008 assault").

On October 21, 2007, Ms. Fields was in the living room of her home in Palmerton, Carbon County, Pennsylvania watching television. At around one o'clock in the morning, she left the living room to use the bathroom. During this time, a masked intruder entered the home and followed her into the bathroom. Ms. Fields testified that the intruder was wearing all black and a mask from the movie Scream. Further, Ms. Fields testified that the intruder was around five foot seven and spoke with a slight Spanish or Puerto Rican accent. [Testimony at trial showed that this description matched Appellant].

Inside the bathroom, the intruder told Ms. Fields [ ] "he came to rape her." The intruder then approached Ms. Fields and a struggle began causing both the intruder and Ms. Fields to fall to the floor. Once on the floor, Ms. Fields continued to resist. This notwithstanding, the intruder fondled Ms. Fields' vagina. As the struggle continued, Ms. Fields told the intruder that if he raped her, she could die because she was suffering from Parkinson's disease, high blood pressure, and high cholesterol. After hearing this, the intruder ended the attack and left. Before he left, he said[,] "I'll be back."

Once the intruder left, Ms. Fields noticed that her phone wires were disconnected and that her underwear had been taken from a laundry basket and hung on various objects throughout the home. The Pennsylvania State Police were called to investigate. Unfortunately, no evidence was found that identified the intruder. [The police did find a makeshift mask made from a pair of Ms. Fields' shorts at the scene, but this was not the mask described by Ms. Fields, and testing did not yield any results].

Seven months later an intruder again entered Ms. Fields' home. This occurred during the early morning hours of May 31, 2008, while Ms. Fields was watching television. As she was going to the kitchen, she was attacked in the hallway. At trial, Ms. Fields identified her assailant as the same person from the 2007 assault. This time, however, the intruder was wearing all black and a ski mask. Ms. Fields testified that the intruder said, "I'm back. I'm here to finish what I came for before, the first time." The intruder then grabbed Ms. Fields and forced her to

the ground. While on the ground, the two wrestled. The intruder fondled Ms. Fields' vagina, and he removed her underwear.

Fortunately, Ms. Fields was not living alone when this second assault occurred. In the seven months since the first assault, Ms. Fields rented a room in her home to Jamie Rodgers ("Ms. Rodgers"). Ms. Fields' screams for help during the attack awoke Ms. Rodgers. Ms. Rodgers ran out of her room into the hallway. As she did so, the intruder ended the attack and ran out of Ms. Fields' home.

The Pennsylvania State Police were called a second time to investigate. This time, police discovered two pieces of evidence that identified the intruder as [Appellant]. First, police lifted a palm print from a windowsill on the outside of Ms. Fields' home. Police found a step stool beneath the window and determined the intruder entered the home at this location. Two experts for the Commonwealth testified that the palm print found matched [Appellant's]. While the experts could not determine the exact time [Appellant] left this print, one of the experts, Trooper [Phillip] Barletto, testified that outdoor elements easily destroy finger and palm prints, implying the print was fresh. Further, no evidence was presented to provide an innocent explanation why [Appellant's] palm print would be on the outside of Ms. Fields' windowsill when neither she nor Ms. Rodgers knew [Appellant] or gave him permission to be at the home.

Second, on the interior windowsill of the same window from which the police lifted the palm print, police found an unopened box of condoms. The condoms were manufactured by Associated Wholesalers, Incorporated. Police contacted Associated, who advised they distributed condoms of the type found [in] a Convenient Food Mart in Palmerton. Sales receipts from this store were obtained which showed that a box of condoms was purchased at 11:14 P.M. on the night of the 2008 assault. Next, police obtained surveillance video from the Convenient Food Mart for the time of this purchase. The video depicted a customer who strongly resembled [Appellant] and was wearing a shirt with the words "encendido" printed across the front buying condoms of the same type as those found in the victim's home. Later, police found a shirt matching that in the video in a search of [Appellant's] home.

> Based on this evidence, on March 27, 2009, the Commonwealth filed a Criminal Complaint against [Appellant] for both the 2007 and 2008 assaults. In this complaint, [Appellant] was charged for each date with one count of attempted rape by forcible compulsion, burglary, criminal trespass, and indecent assault. He was also charged with one count of simple assault related to the 2008 assault. A jury trial began on January 7, 2013 and end[ed] on January 9, 2013. At its conclusion, the jury found [Appellant] guilty of all charges.
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> Subsequently, [the trial court] ordered the Sexual Offenders Assessment Board [(SOAB)] to assess whether [Appellant] was a sexually violent predator [(SVP)] under Megan's Law. [The trial court] also ordered a pre-sentence investigation report. On April 30, 2013, [the trial court] conducted a sexual assessment hearing and sentenced [Appellant].
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> At the sexual assessment hearing, Dr. Mary Muscari of the [SOAB] opined to a reasonable degree of professional certainty that [Appellant] met the criteria to be classified as a [SVP]. At the conclusion of this assessment hearing, [the trial court] found [Appellant] to be a [SVP] under Megan's law.
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> Following the sexual assessment hearing, [Appellant] was immediately sentenced to an aggregate sentence of thirteen to thirty-one years' incarceration in a state correctional facility. [Appellant] was then thirty years old. The sentence was made consecutive to sentences [Appellant] was then serving in Northampton and Lehigh counties for similar offenses. At the time of sentencing, [Appellant] was also serving a forty-six-month sentence in a federal penitentiary.
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> On May 10, 2013, [Appellant] filed a timely post-sentence motion which was denied by order dated September 3, 2013. Following this denial, [Appellant] filed the instant appeal from the [j]udgment of sentence on September 9, 2013.[2] . . .

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[2] Appellant filed a timely concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). The trial court subsequently issued an opinion. ***See*** Pa.R.A.P. 1925(a).

(Trial Court Opinion, 11/21/13, at 2-7) (record citations and footnotes omitted).

On appeal, Appellant raises the following questions for our review:[3]

> 1. Is the verdict is [sic] against the weight of the evidence?
>
> (a) A palm print standing alone without evidence as to the approximate time when it has been placed cannot support a verdict.
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> (b) There is no evidence to identify [A]ppellant as the perpetrator in either the October 21, 2007, incident or the May 31, 2008, incident.
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> (c) There is no evidence [A]ppellant was ever at the scene of the crime.
>
> 2. Did the court err in making [A]ppellant's sentences for the October 21, 2007, and May 31, 2008, incidents consecutive to each other and consecutive to all other of [A]ppellant's sentences constituting cruel and unusual punishment?
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> 3. Is the verdict contrary to law in count number seven because there is no evidence to support the charge of indecent assault by forcible compulsion on October 21, 2007?
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> 4. Was the evidence presented at [the] hearing on the evaluation for the [SOAB] to determine if appellant is a [SVP] flawed in being unable to support the oral testimony by any documentation in the record?

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[3] While this Court understands the duty to be a zealous advocate, we note that the Pennsylvania Supreme Court has long stated that the raising of a multiplicity of issues on appeal raises the presumption that none have merit. ***See Commonwealth v. Small***, 980 A.2d 549, 564-65 (Pa. 2009).

> 5. Was the victim's testimony concerning the alleged incidents so conflicting and contradictory it cannot support a verdict?
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> 6. Did the court err in sustaining the Commonwealth's objection as to what the alleged victim told Trooper Silliman on his initial contact with her at the scene upon which he based, in part, his arrest of [A]ppellant?
>
> 7. Did the court err in allowing Jamie Rodgers to testify over objections as to whether she thought the alleged victim believed the incident was staged?
>
> 8. Did the court err over objection in allowing Trooper Silliman to testify on cross examination as a rebuttal witness as to his police report concerning what was said by the victim in order to bolster her testimony[?]

(Appellant's Brief, at 22-23).

In his first and fifth claims, Appellant challenges the weight of the evidence.[4] (***See*** Appellant's Brief, at 30-33, 37-38). Specifically, Appellant claims that the evidence of the palm print standing alone cannot support the verdict in the absence of proof of its time of placement. (***See id.*** at 30-32). He also argues that there was no evidence to show that Appellant was at the scene of the crime or was the perpetrator of the offense. (***See id.*** at 32-33).[5] Lastly, he avers that the testimony of the victim was unreliable. (***See id.*** at 37-38).

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[4] Appellant properly preserved his weight of the evidence claims in a post-trial motion. (***See*** Post-Sentence Motion, 5/10/13, at unnumbered page 1).

[5] In the body of his brief, Appellant conflates the issues of presence at the scene of the crime and identity, which he raised separately in his statement
(Footnote Continued Next Page)

Our scope and standard of review of a weight of the evidence claim is as follows:

> The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses.
>
> As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. A verdict is said to be contrary to the evidence such that it shocks one's sense of justice when the figure of Justice totters on her pedestal, or when the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience.
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> Furthermore, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Boyd, 73 A.3d 1269, 1274-75 (Pa. Super. 2013) (*en banc*) (citation and internal quotation marks omitted). "Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings." ***Commonwealth v. Diggs***, 949 A.2d 873, 879-80 (Pa. 2008), *cert. denied*, 556 U.S. 1106 (2009) (citation omitted).

(Footnote Continued) ———————————

of the questions involved. (***See*** Appellant's Brief, at 22; 32-33). We note that this is in violation of Pennsylvania Rule of Appellate Procedure 2119(a).

In its Rule 1925(a) opinion, the trial court explained in detail why it rejected Appellant's weight of the evidence claims. (***See*** Trial Ct. Op., at 8-16, 31-34). We have thoroughly reviewed both the trial court's opinion and the record in this matter and find that the trial court did not commit a palpable abuse of discretion in rejecting Appellant's weight of the evidence claims. Therefore, Appellant's first and fifth issues fail.

In his second claim, Appellant challenges both the legality and the discretionary aspects of his sentence. (***See*** Appellant's Brief, at 33-34). Appellant first claims that his sentence violated the Eighth Amendment of the United States Constitution's ban on cruel and unusual punishment. (***See id.*** at 33). A claim that a particular sentence violates the Eighth Amendment is a challenge to the legality of sentence rather than the discretionary aspects of sentence. ***See Commonwealth v. Yasipour***, 957 A.2d 734, 740 n.3 (Pa. Super. 2008), *appeal denied*, 980 A.2d 111 (Pa. 2009) (citations omitted).

Appellant's "argument" on this issue consists of a single sentence stating that sentences must be proportionate to the crime and citing to a United States Supreme Court decision, ***Solem v. Helm***, 463 U.S. 277 (1983). (***See*** Appellant's Brief, at 34). Appellant fails to discuss why his sentence is so out of proportion to the crime as to constitute an illegal sentence. (***See id.***). Appellant also does not explain how the facts in ***Solem***, wherein the defendant was sentenced, under a recidivist statute, for

life without possibility of parole after passing a bad check, ***see Solem***, ***supra*** at 280-82, has any applicability to the instant matter. (***See*** Appellant's Brief, at 34). It is Appellant's responsibility to develop arguments in his brief; where he has not done so we will find the claim waived. ***See Commonwealth v. Gibbs***, 981 A.2d 274, 284 (Pa. Super. 2009), *appeal denied*, 3 A.3d 670 (Pa. 2010) (holding that legality of sentence claim was waived where appellant did not develop argument in brief). Thus, we find that Appellant waived his legality of sentence claim.

Appellant also challenges the discretionary aspects of sentence. (***See*** Appellant's Brief, at 28, 34). Preliminarily, "[i]ssues challenging the discretionary aspects of sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived." ***Commonwealth v. McAfee***, 849 A.2d 270, 275 (Pa. Super. 2004), *appeal denied*, 860 A.2d 122 (Pa. 2004) (citation and internal quotation marks omitted). Appellant did not raise any objections to the sentence at sentencing and, while he filed a post-sentence motion, he only raised his legality of sentence claim, not any discretionary aspects of

sentence claim. (***See*** Post-Sentence Motion, 5/10/13, at unnumbered page 1). Thus, we find his second claim waived.[6]

Appellant's third claim challenges the sufficiency of the evidence to support his indecent assault conviction for the 2007 incident. (***See*** Appellant's Brief, at 34-35). Our standard of review for sufficiency of the evidence claims is well settled:

> We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every

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[6] Moreover, Appellant did not include any discretionary aspects of sentence claim in his Rule 1925(b) statement. (***See*** Concise Statement, 10/03/13, at unnumbered page 1). Pennsylvania Rule of Appellate Procedure 1925 provides that issues that are not included in the Rule 1925(b) statement or raised in accordance with Rule 1925(b)(4) are waived. ***See*** Pa.R.A.P. 1925(b)(4)(vii); ***see also Commonwealth v. Lord***, 719 A.2d 306, 308 (Pa. 1998), *superseded by rule on other grounds as stated in* ***Commonwealth v. Burton***, 973 A.2d 428, 430 (Pa. Super. 2009). Further, an appellant cannot raise new legal theories for the first time on appeal. ***See*** Pa.R.A.P. 302(a); ***Commonwealth v. Truong***, 36 A.3d 592, 598 (Pa. Super. 2012) (*en banc*), *appeal denied*, 57 A.3d 70 (Pa. 2012). Lastly, in his Rule 2119(f) statement, Appellant argues that the trial court failed to offer specific reasons for the sentence and failed to consider his rehabilitative needs. (***See*** Appellant's Brief, at 28). However, Appellant does not discuss those claims in his three-sentence discretionary aspects of sentence argument. ***See*** Appellant's Brief, at 34). Thus, he has waived them. ***Cf. Commonwealth v. Jones***, 815 A.2d 598, 604 n.3 (Pa. 2002) (holding that claims raised in Statement of Questions Involved but not pursued in body of brief are waived). Further, the claim actually raised in the argument section of the brief, that the trial court incorrectly considered Appellant's prior record score at the time of sentencing rather than at the time of the alleged incidents, is devoid of both citations to the record and relevant legal support. Therefore, we will not consider it.

> element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.
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> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Tarrach, 42 A.3d 342, 345 (Pa. Super. 2012) (citations omitted).

The evidence is sufficient to sustain a conviction for indecent assault by threat of forcible compulsion if the Commonwealth proves: (1) indecent contact with the victim; (2) for the purpose of arousing sexual desire in the person or the victim; and (3) by forcible compulsion. ***See*** 18 Pa. C.S.A. § 3126(a)(2). Indecent contact is "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." ***Commonwealth v. Berkowitz***, 641 A.2d 1161, 1166 (Pa. 1994) (citation omitted).

In this case, viewing the evidence in the light most favorable to the Commonwealth, ***see Tarrach***, ***supra*** at 345, Ms. Fields testified that Appellant told her he was there to rape her and, while struggling with her, Appellant "fond[led]" her, putting his hands all over her body, and reached into her pants and touched her vagina. (***See*** N.T. Trial, 1/08/13, at 102;

see id. at 101-03). This testimony was sufficient to sustain a conviction for indecent assault by forcible compulsion. ***See Commonwealth v. Eckrote***, 12 A.3d 385, 387 (Pa. Super. 2010) (holding evidence sufficient to sustain conviction for rape by forcible compulsion where defendant used force on the unwilling victim); ***Commonwealth v. Smith***, 863 A.2d 1172, 1177 (Pa. Super. 2004) (holding touching of breast and vagina sufficient to establish indecent contact for purpose of arousing or gratifying sexual desire). Thus, Appellant's third claim is meritless.

In his fourth claim, Appellant states in his Rule 1925(b) statement, his statement of the questions involved, and his heading to the argument section that the evidence was insufficient to support the sentencing court's finding that he was a SVP because no documentation in the record supported the oral testimony. (***See*** Concise Statement, 10/03/13, at unnumbered page 1, ¶ 4; ***see also*** Appellant's Brief, at 22-23; 35). However, Appellant abandons this issue in the body of his argument. (***See*** Appellant's Brief, at 35-37). Therefore, he has waived it.[7] ***See Jones***, ***supra*** at 604 n.3.

In the body of his brief, Appellant instead makes three different arguments. Appellant claims that because the SOAB is predisposed to find

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[7] In any event, the claim is without merit. The trial court admitted Dr. Mary Muscari's report into evidence. (***See*** N.T. Sentencing, 4/30/13, at 48). In the report, Dr. Muscari gave a detailed explanation of the documents she relied upon in reaching her conclusion. (***See*** Sexually Violent Predator Assessment, 3/27/13, at 1-2).

that convicted sexual offenders are SVPs, the investigation was biased. (***See*** Appellant's Brief, at 35-36). Appellant also argues that the determination violated his rights under the United States Supreme Court's decision in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). (***See id.*** at 36). Lastly, Appellant generally argues that the evidence was insufficient to support the determination that he was a SVP because the expert testimony lacked "clarity, definition, and clinically established opinions" in support of the findings. (***Id.***).

Appellant did not raise the issue of the SOAB's inherent bias in his Rule 1925(b) statement. (***See*** Concise Statement, 10/03/13, at unnumbered page 1). Thus, he waived it. ***See*** Pa.R.A.P. 1925(b)(4)(vii); ***see also Lord***, ***supra*** at 308. Again, we note that Appellant cannot raise new legal theories on appeal. ***See*** Pa.R.A.P. 302(a); ***Truong***, ***supra*** at 598.

Appellant also did not raise his claim that the SOAB procedure violates his rights under the United States Supreme Court's decision in ***Apprendi***, ***supra***, in his Rule 1925(b) statement. (***See*** Concise Statement, 10/03/13, at unnumbered page 1). It appears that Appellant did raise this issue at some point below, because, despite its absence from the 1925(b) statement, the trial court addressed the merits of the issue anyway. (***See*** Trial Ct. Op., at 31). However, even if the trial court addressed the merits of a claim not properly raised by Appellant in a 1925(b) statement, this Court cannot consider it. ***See Greater Erie Indus. Dev. Corp. v. Presque Isle Downs,***

Inc., --- A.3d ---, 2014 WL 930822 at *3 (finding issues waived that were raised in untimely 1925(b) statement, even though trial court considered them).

Appellant also claims that the evidence was insufficient to sustain the finding that he was a SVP. (***See*** Appellant's Brief, at 35-36). Because he reasonably suggests this issue in his Rule 1925(b) statement, we will address it. ***See*** Pa.R.A.P. 1925(b)(4). Pennsylvania law defines a SVP as:

> An individual . . . convicted of an offense specified in:
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> * * *
>
> > (2) section 9799.14(c)(1), (1.1), (1.2), (2), (3), (4), (5) or (6) or an attempt, conspiracy or solicitation to commit an offense under section 9799.14(c)(1), (1.1), (1.2), (2), (3), (4), (5) or (6); or
> >
> > (3) section 9799.14(d)(1), (2), (3), (4), (5), (6), (7), (8) or (9) or an attempt, conspiracy or solicitation to commit an offense under section 9799.14(d)(1), (2), (3), (4), (5), (6), (7), (8) or (9)
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> who, on or after the effective date of this subchapter, is determined to be a sexually violent predator under section 9799.24 (relating to assessments) due to a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses. . . .

42 Pa. C.S.A. § 9799.12. The determination of a defendant's SVP status may be made only after an assessment and hearing before the trial court. ***Commonwealth v. Whanger***, 30 A.3d 1212, 1215 (Pa. Super. 2010), *appeal denied*, 42 A.3d 293 (Pa. 2011) (citation omitted). In discussing the affirmance of an SVP designation under the former 42 Pa. C.S.A. § 9792,

this Court stated that "[w]e will disturb an SVP designation only if the Commonwealth did not present clear and convincing evidence to enable the court to find each element required by the SVP statutes." ***Whanger***, ***supra*** at 1215. As with any sufficiency of the evidence claim, we view all evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth. ***See id.***

When discussing the prior version of the SVP statute, this Court has said:

> [t]he process of determining SVP status is statutorily-mandated and well-defined. The triggering event is a conviction for one or more offenses specified in 42 Pa.C.S.A. § 9795.1 [(now 42 Pa. C.S.A. § 9799.14)], which in turn prompts the trial court to order an SVP assessment by the SOAB. The Board's administrative officer then assigns the matter to one of the Board's members all of whom are "expert[s] in the field of behavior and treatment of sexual offenders." 42 Pa.C.S.A. § 9799.3 [now 42 Pa. C.S.A. § 9799.35]. At the core of the expert's assessment is a detailed list of factors, which are mandatory and are designed as "criteria by which … [the] likelihood [of reoffense] may be gauged." ***Commonwealth v. Bey***, 841 A.2d 562, 566 (Pa. Super. 2004). They include:
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> (1) Facts of the current offense, including:
>
> (i) Whether the offense involved multiple victims.
>
> (ii) Whether the individual exceeded the means necessary to achieve the offense.
>
> (iii) The nature of the sexual contact with the victim.
>
> (iv) Relationship of the individual to the victim.
>
> (v) Age of the victim.

> (vi) Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
> (vii) The mental capacity of the victim.
>
> (2) Prior offense history, including:
>
> (i) The indvidual's prior criminal record.
>
> (ii) Whether the individual completed any prior sentences.
>
> (iii) Whether the individual participated in available programs for sexual offenders.
>
> (3) Characteristics of the individual, including:
>
> (i) Age of the individual.
>
> (ii) Use of illegal drugs by the individual.
>
> (iii) Any mental illness, mental disability, or mental abnormality.
>
> (iv) Behavioral characteristics that contribute to the individual's conduct.
>
> (4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense.

42 Pa.C.S.A. § 9795.4(b) [(now 42 Pa. C.S.A. § 9799.24(b))].

The specific question for the SOAB expert, as well as any other expert who testifies at an SVP hearing, is whether the defendant satisfied the definition of a sexually violent predator set out in the statute, that is, whether he or she suffers from "a mental abnormality or personality disorder that makes [him or her] likely to engage in predatory sexually violent offenses." 42 Pa.C.S.A. § 9792 [now 42 Pa. C.S.A. § 9799.12]. At the hearing on SVP status, the expert's opinion is presented to the trial court judge, who alone determines whether the Commonwealth has proved by clear and convincing evidence that the defendant is a sexually violent predator. [***Commonwealth v.***] ***Krouse***, [799

> A.2d 835], 839 [Pa. Super. 2003 (*en banc*), *appeal denied*, 821 A.2d 586 (Pa. 2003)]. This Court has determined that the "salient inquiry" for the trial court is the "identification of the impetus behind the commission of the crime," coupled with the "extent to which the offender is likely to reoffend." ***Bey***, ***supra*** at 566.

Commonwealth v. Dixon, 907 A.2d 533, 535-36 (Pa. Super. 2006), *appeal denied*, 920 A.2d 830 (Pa. 2007).

As noted, "the triggering event [for determination of SVP status] is a conviction for one or more offenses specified in 42 Pa. C.S.A. [§ 9799.14]. . ." ***Id.*** Here, a jury found Appellant guilty of two counts each of indecent assault and attempted rape. Both are qualifying convictions under 42 Pa. C.S.A. § 9799.14. ***See*** 42 Pa. C.S.A. §§ 9799.14(c)(1.2) and (d)(2). Thus, "the triggering event" conviction has occurred. Further, Appellant had numerous prior adult and juvenile convictions, for a wide variety of offenses, including a prior sexual assault conviction. (***See*** N.T. Sentencing, 4/30/13, at 19-20).

The definition section of the Registration of Sexual Offenders statute, 42 Pa. C.S.A. § 9799.12, defines a "sexually violent predator" as one who, upon assessment pursuant to 42 Pa. C.S.A. § 9799.24 is found to be "likely to engage in predatory sexually violent offenses," "due to a mental abnormality or personality disorder." 42 Pa. C.S.A. § 9799.12. As noted, both indecent assault and attempted rape are offenses specified in § 9799.14. "Sexually violent offense" is defined as "[a]n offense specified in section 9799.14 (relating to sexual offenses and tier system) as a Tier I, Tier

II or Tier III sexual offense." "Predatory" is defined as "an act directed at a stranger. . . ." 42 Pa. C.S.A. § 9799.12.

Dr. Muscari, who has advanced degrees in psychiatric nursing, forensic nursing, and criminology, performed Appellant's assessment. (**See** N.T. Sentencing, 4/30/13, at 4). At the SVP hearing, she testified that Appellant has a mental abnormality consisting of an antisocial personality disorder. (***See id.*** at 23). Dr. Muscari also concluded that Appellant exhibited sexually deviant behavior. (***See id.*** at 25). She averred that Appellant's behavior was predatory in that he targeted a "total stranger, solely for the purpose of sexual victimization[,]" and returned to the same victim some seven months later. (***Id.*** at 32). She concluded that, to a reasonable degree of professional certainty, Appellant met the definition of an SVP. (***See id.***).

We conclude that the trial court did not commit an error of law or abuse its discretion in finding that Dr. Muscari's testimony and report established by clear and convincing evidence that Appellant meets the statutory criteria that makes him likely to engage in predatory sexually violent offenses in the future. ***See Krouse, supra***. Therefore, we affirm the trial court's SVP designation.

In his sixth, seventh, and eighth claims, Appellant challenges various evidentiary rulings by the trial court. (***See*** Appellant's Brief, at 38-40). This Court has held that:

> [w]ith regard to evidentiary challenges, it is well established that [t]he admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record. Furthermore, if in reaching a conclusion the trial court overrides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error.

Commonwealth v. Serrano, 61 A.3d 279, 290 (Pa. Super. 2013) (citation and internal quotation marks omitted).

In his sixth claim, Appellant alleges that the trial court erred in sustaining an objection to Pennsylvania State Police Trooper Brian Silliman's proposed testimony about a prior inconsistent statement made by Ms. Fields. (***See*** Appellant's Brief, at 38-39). The record reflects that Trooper Silliman testified prior to Ms. Fields. (***See*** N.T. Trial, 1/07/13, at 25, 97). The record further reflects that defense counsel sought to elicit, as a prior inconsistent statement, testimony by Trooper Silliman that Ms. Fields told him that Appellant did not sexually assault her in 2007. (***See id.*** at 35-38). The trial court found that the statement could not be a prior inconsistent statement, because Ms. Fields had not testified yet that Appellant had sexually assaulted her in 2007. (***See id.***). The trial court noted that Appellant could recall Trooper Silliman after Ms. Fields testified. (***See id.*** at 38).

Appellant argues that under the Pennsylvania Supreme Court's decision in ***Commonwealth v. Sholcosky***, 719 A.2d 1039 (Pa. 1998), this decision was error. (***See*** Appellant's Brief, at 39). However, Appellant's reliance on ***Sholcosky*** is misplaced. In ***Sholcosky***, a defense expert testified about time of death in contradiction to statements made in his expert report, which were more favorable to the defendant. ***See Sholcosky***, ***supra*** at 1041. Neither party questioned the expert about the discrepancy and defense counsel moved the report into evidence without objection. ***See id.*** The next morning, the Commonwealth filed, and the trial court granted, a motion *in limine* preventing defense counsel from arguing in closing that the more favorable times contained in the expert report were the time of death. ***See id.*** at 1041-42. The Supreme Court held that because the Commonwealth did not challenge the admission of the expert's report as substantive evidence, the trial court erred in granting the motion *in limine*. ***See id.*** at 1045. We see nothing in ***Sholcosky*** supporting Appellant's argument that the trial court should have allowed the introduction of a hearsay statement that is not yet a prior inconsistent statement at the time it is offered. Further, even if there was error, it was harmless, as Appellant recalled Trooper Silliman and questioned him about the prior inconsistent statement after Ms. Fields testified. (***See*** N.T. Trial, 1/09/13, at 266-67). Appellant has not explained how the timing of Trooper Silliman's testimony prejudiced him. Appellant's sixth claim lacks merit.

In his seventh claim, Appellant contends that the trial court erred in allowing certain rebuttal testimony of Ms. Fields' roommate, Jamie Rodgers. (***See*** Appellant's Brief, at 39). At trial, defense counsel asked Rodgers, on cross-examination, if she gave a statement to the police in 2008, in which she stated that it was her belief that the assault was staged. (***See*** N.T. Trial, 1/08/13, at 163). Rodgers replied that she did not remember.[8] (***See id.***). On rebuttal, over defense counsel's objection, the trial court permitted Rodgers to testify that she no longer believed the assault was staged. (***See id.*** at 165-67). Appellant's argument on this issues consists of two sentences explaining, without reference to the record, the facts underlying the claim and three bald sentences with a cite to ***Commonwealth v. Hickman***, 309 A.2d 564 (Pa. 1973), for the general proposition that rebuttal evidence must rebut prior evidence. (***See*** Appellant's Brief, at 39). This Court will not act as counsel and will not develop arguments on behalf of an appellant. ***See In re R.D.***, 44 A.3d 657, 674 (Pa. Super. 2012), *appeal denied*, 56 A.3d 398 (Pa. 2012). When deficiencies in a brief hinder our ability to conduct meaningful appellate review, we can dismiss the appeal

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[8] Trooper David Hudzinski confirmed that Rodgers did tell him that she believed the assault was staged. (***See*** N.T. Trial, 1/08/13, at 206-07).

entirely or find certain issues to be waived. ***See*** Pa.R.A.P. 2101; ***R.D.***, ***supra***. at 674. Accordingly, we find Appellant's seventh claim waived.[9]

In his eighth and final claim, Appellant avers that the trial court erred in allowing Trooper Silliman to testify on rebuttal as to certain prior consistent statements given by Ms. Fields. (***See*** Appellant's Brief, at 39-40). As discussed above, at trial, defense counsel recalled Trooper Silliman to testify about a prior inconsistent statement by the victim, namely that she initially claimed that Appellant had not sexually assaulted her in 2007, and that she had not told him that Appellant had stated to her that he would return. (***See*** N.T. Trial, 1/09/13, at 266-67). On cross-examination, the Commonwealth asked Trooper Silliman, over defense counsel's objections, a series of questions regarding consistencies between Ms. Fields' 2007 statement to the police and her trial testimony. (***See id.*** at 269-74). Appellant claims that this testimony was improper bolstering and hearsay. (***See*** Appellant's Brief, at 40). However, at trial, Appellant did not argue that the testimony was improper bolstering or hearsay but rather that it was

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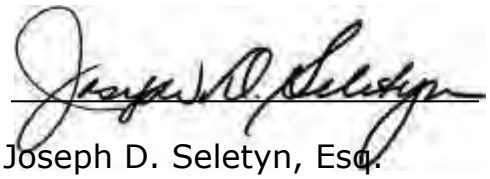
[9] Moreover, even if we were to find that the trial court erred in allowing the testimony, any such error was harmless. Appellant has not shown how a fact witness' opinion as to whether or not the incident was staged prejudiced him. The forensic evidence established his presence at the scene, his purchase of the condoms found at the scene within an hour of the assault, the proximity of the store where he purchased the condoms to Ms. Fields' residence, and his possession of a t-shirt matching that shown on the store video. (***See*** N.T. Trial, 1/07/13, at 82, 92; N.T. Trial, 1/08/13, at 107, 172, 181-83, 188, 190, 236; N.T. Trial, 1/09/13, at 251-52).

beyond the scope of counsel's direct examination. (***See*** N.T. Trial, 1/09/13, at 269). This Court has stated that, "[w]here a specific objection is interposed, other possible grounds for the objection are waived." ***Commonwealth v. Shank***, 883 A.2d 658, 672 (Pa. Super. 2005), *appeal denied*, 903 A.2d 538 (Pa. 2006) (citations omitted). Because Appellant did not object at trial on the grounds of improper bolstering or hearsay, he has waived his eighth claim on appeal. ***See id.***

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/15/2014