IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	
	:	
v.	**:**	**No. 201-2005**
	:	**CRIMINAL DIVISION**
CARLOS R. CASTRO, JR.,	**:**	
Defendant	**:**	**APPEAL**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

The Defendant raises three distinct issues on appeal. First, he contends that this Court lacked clear and convincing evidence to find that he is a sexually violent predator. Next, he contends that the jury's verdict of not guilty on one count of rape but guilty of one count each of sexual assault, criminal attempt - involuntary deviate sexual intercourse, and indecent assault was inconsistent and contrary to the evidence. Lastly, he contends that this Court's sentence of twenty (20) years consecutive probation on count two, criminal attempt – involuntary deviate sexual intercourse, was unduly harsh and inappropriate considering the facts of the case. For the following reasons, this court finds that the issues raised in the Defendant's appeal are without merit.

I. Background

A. *Factual History*

The facts of this case arise from the events that transpired in the early morning hours of January 10, 2005. On that date, the Defendant and the victim found themselves, along with several other acquaintances, spending the night at the Park Avenue home of a mutual friend. On this particular evening, the victim retired to the couch in the living

room; two other people slept on the floor along side the couch were she slept. The Defendant shared a first floor bedroom with his girlfriend and another couple.

Sometime around five o'clock in the morning on January 10, 2005, the victim was awakened by the Defendant on top of her. At the June 23-24, 2006 trial in this matter, the victim testified that after inquiring of the Defendant what he was doing, he said, "please Nikki, I'm horny." N.T. 06/23/05, p.15. According to the victim, the Defendant then proceeded, without her consent, to move her onto her side, slide behind her, grab her breast, and pull her pants down. The victim testified that she told the Defendant "no" several times; however, after successfully preventing him from penetrating her anally by maneuvering her body, he penetrated her vaginally.

After forcefully penetrating the victim several times, the Defendant jumped off the couch after a noise or movement in the home startled him. The victim then pulled her pants up, retrieved a telephone, and went into the laundry room to call her boyfriend; the Defendant, she testified, was in the kitchen at this time. Shortly after she entered the laundry room, the Defendant entered and accosted the victim inquiring as to whether or not she intended to keep the incident between the two of them; the victim assured the Defendant she would keep the incident between them. Soon after this encounter, the Defendant retreated from the laundry room and the victim was able to speak with her boyfriend who immediately picked her up in a nearby parking lot. After briefly discussing what transpired that evening with her boyfriend, he took her to the hospital where a rape exam was performed and the victim made a formal complaint to the police department. On January 14, 2005, the Williamsport Police Department arrested the Defendant on allegations of rape, sexual assault, indecent assault, and attempted

involuntary deviate sexual intercourse. The Defendant contends that the intimate contact that occurred on January 10, 2005 was the second of two such consensual encounters between the parties.

B. ***Procedural History***

On June 24, 2005, after a two day trial in this matter, the jury found the Defendant not guilty on Count 1, rape, and guilty on Counts 2-4, criminal attempt - involuntary deviate sexual intercourse (hereinafter "IDSI"), sexual assault, and indecent assault. On July 7, 2005, the Defendant filed a Motion for Judgment of Acquittal, which, pursuant to Pa.R.Crim.P. No. 702(B)(3)(a), was denied by operation of law. On October 19, 2005, the Commonwealth filed a Praecipe for a Megan's Law Hearing; said hearing was conducted on May 5, 2006. At the hearing, the Court determined that the Defendant was a sexually violent predator and informed him of his responsibilities associated with being so designated. On that same date, this Court sentenced the Defendant, as to Count 3, sexual assault, a felony in the second degree – to a period of incarceration in a state correctional institution (hereinafter "SCI") for an indeterminate period of time, the minimum of which shall be sixty (60)[1] months and the maximum of which shall be ten (10) years; as to Count 2, criminal attempt - IDSI, a felony in the first degree – to the supervision of the Pennsylvania Board of Probation and parole for a period of twenty (20) years running entirely consecutive to the sentence imposed under Count 3; and as to Count 4, indecent assault, a misdemeanor of the second degree – to a period of incarceration in a SCI for an indeterminate period of time, the minimum of which shall be

[1] The Court's initial Sentencing Order sentenced the Defendant, on Count 3, to ninety (90) months to ten (10) years; however, the Court Amended this Order on May 15, 2006 to reflect the proper minimum sentence of sixty (60) months to ten (10) years as to Count 3.

twelve (12) months and the maximum of which shall be twenty-four (24) months running entirely concurrent to the sentence imposed under Count 3. On May 10, 2006, the Defendant filed his Notice of Appeal and, pursuant to this Court's May 12, 2006 Order, he filed his Concise Statement of Matters Complained of on Appeal on May 26, 2006.

II. Discussion

A. *The Commonwealth presented sufficiently clear and convincing evidence for the Court to find the Defendant is a sexually violent predator*

On June 24, 2005, a jury convicted the Defendant of three predicate offenses thereby triggering the provisions of Megan's Law. Accordingly, the Court ordered a Megan's Law assessment and conducted a hearing on the matter. At the hearing, the Commonwealth's evidence clearly convinced the Court that the Defendant is a sexually violent predator and is therefore subject to the civil penalties under Megan's Law associated with this classification. The Defendant contends that the Commonwealth did not present the requisite clear and convincing evidence necessary for him to be declared a sexually violent predator. For the following reasons, the Court finds the Defendant's contention without merit.

42 Pa.C.S.A. § 9791, *et seq.* (hereinafter "Megan's Law") defines a sexually violent predator (hereinafter "SVP") as "[a] person who has been convicted of a sexually violent offense, as set forth in § 9795.1, and who is determined to be a sexually violent predator, under § 9795.4, due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 Pa.C.S. § 9792. Megan's Law defines a "mental abnormality" as 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." 42 Pa.C.S. § 9792. That same section defines a "predatory act" as "an act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained, or promoted, in whole or in part, in order to facilitate or support victimization." 42 Pa.C.S. § 9792.

A Defendant's SVP status can only be determined after a court ordered assessment and hearing. At this hearing, the Court must find that the Commonwealth has proven, by clear and convincing evidence, that the Defendant meets the aforementioned criteria of a SVP in order for the Court to declare him/her as such. 42 Pa.C.S. § 9795.4(e)(3).

The most persuasive evidence regarding a defendant's SVP status is the results of the court ordered SVP assessment. A predator assessor assigned by the Pennsylvania Sexual Offenders Assessment Board conducts this assessment. Section 9795.4(b) of Megan's Law directs that, during his/her assessment, the predator assessor should consider, *inter alia*:

> the facts of the current offense, including, whether the offense involved multiple victims, whether the defendant exceeded the means necessary to achieve the offense, the nature of the sexual contact with the victim, relationship of the defendant to the victim, age of the victim, whether the offense included a display of unusual cruelty by the defendant during the commission of the crime, and the mental capacity of the victim; the defendant's prior offense history, including, the defendant's prior criminal record, whether the defendant completed any prior sentences, and whether the defendant participated in available programs for sexual offenders; the defendant's characteristics, including, age of the defendant, use of illegal drugs by the defendant, any mental illness, mental disability, or mental abnormality, and behavioral characteristics that contribute to the defendant's conduct; and the factors that are supported in a sexual offender assessment filed as criteria reasonably related to the risk of re-offense.

42 Pa.C.S. § 9795.4(b).

Instantly, at the May 5, 2006 Megan's Law hearing, the Commonwealth presented testimony from C. Townsend Velkoff, M.S., licensed psychologist and board member of the Pennsylvania Sex Offenders Assessment Board. Mr. Velkoff conducted the Court ordered SVP assessment of the Defendant. At the hearing, Mr. Velkoff testified, in large part, from his September 2005 report on the Defendant. Mr. Velkoff's report was based on his review of police records and without the benefit of interviewing the Defendant. Mr. Velkoff specifically testified that, although the Defendant lacked a prior sexual criminal history, he has, for a young adult, an extensive and persistent criminal history. Mr. Velkoff further testified that the Defendant meets the diagnostic criteria for antisocial personality disorder. Antisocial personality disorder, Mr. Velkoff explained, is defined as a failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest. Mr. Velkoff also testified that the Defendant meets the final criterion for being declared a SVP: propensity to engage in predatory sexual offenses in the future.

On cross-examination, Mr. Velkoff admitted that anyone who meets the diagnostic criteria for antisocial personality disorder and is convicted of a sexually violent offense, will be classified as a SVP because, in his words, "he's broken that barrier, he's gone in that direction so now it becomes part, it becomes included in what he can do." N.T. 05/05/06, p. 24. In other words, a lack of prior sexual criminal history, while relevant, is not controlling as to the issue of declaring one a SVP because when one is deemed to meet the diagnostic criteria for antisocial personality disorder and they

commit a sexually violent crime, their mental abnormality makes them more likely to re-offend in a sexual nature. Without this personality disorder, a perpetrator is not necessarily likely to re-offend because they lack the "tendency to refuse to conform to social norms with respect to lawful behaviors" shared by those who meet the diagnostic criteria for antisocial personality disorder.

Clear and convincing evidence, for Megan's Law purposes, our Supreme Court of Pennsylvania has said, is "evidence so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue." *Commonwealth v. Dengler*, 2004 PA Super 38, P21, 843 A.2d 1231, 1241 (Pa. Super. Ct. 2004) citing *Commonwealth v. Maldonado*, 576 Pa. 101, 109 838 A.2d 710, 715 (Pa. 2003). Here, the Court unhesitantly believes that, based on Mr. Velkoff's testimony, the Commonwealth established, by clear and convincing evidence, that the Defendant is a SVP. The Defendant's extensive criminal history is a clear indication of his refusal to adhere to social norms and obey the law. The only significant period of time in which the Defendant was not charged with any crimes was during a period of incarceration. The fact that the Defendant's criminal history is devoid of criminal sexual offenses is a mitigating factor against SVP classification but not controlling. With the Defendant's conviction for a sexually violent predator offense, he appears to be the kind of offender the legislature envisioned when enacting Megan's Law.

B. ***The jury's verdict in this matter was not logically inconsistent; nor was it contrary to the evidence***

On June 24, 2005, a jury acquitted the Defendant of one count of rape and convicted him of one count each of criminally attempted – involuntary deviate sexual intercourse, sexual assault, and indecent assault. The Defendant contends that this result is logically inconsistent; however, because the elements of each of the aforementioned crimes, although similar, are distinguishable from one another, the jury's verdict is not logically inconsistent. The Defendant further contends that his conviction was contrary to the evidence. For the following reasons, the Court finds the Defendant's contention without merit.

An individual commits a rape when he/she engages in *sexual intercourse* with the complainant by forcible compulsion or by the threat of forcible compulsion that would prevent resistance by a person of reasonable resolution. 18 Pa.C.S. § 3121 (emphasis added). An individual who does any act which constitutes a substantial step toward the commission of engaging in *deviate sexual intercourse* with a complainant by forcible compulsion or by the threat of forcible compulsion that would prevent resistance by a person of reasonable resolution has committed the crime of criminally attempted involuntary deviate sexual intercourse. 18 Pa.C.S. §901 and 18 Pa.C.S. § 3123 (emphasis added). Sexual intercourse, for purposes of the Crimes Code, is defined as all types of sexual intercourse, whereas the definition of deviate sexual intercourse is limited to oral and anal intercourse. 18 Pa.C.S. § 3101. An individual commits a sexual assault when he/she engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent. 18 Pa.C.S. § 3124.1. Finally, an individual commits

an indecent assault when he/she has indecent contact with the complainant or causes the complainant to have indecent contact with the person . . . for the purpose of arousing sexual desire in the person or the complainant and the person does so without the complainant's consent, by forcible compulsion, or by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution. 18 Pa.C.S. § 3126.

The Court will assume that the Defendant's second issue raised on appeal (i.e. the jury's verdict was logically inconsistent and contrary to the evidence) is the same or nearly the same argument he made in his July 7, 2005 Motion for Judgment of Acquittal. In that Motion, and at the August 15, 2005 hearing on said Motion, the Defendant argued that that jury's decision to acquit him of rape evidenced their belief that the Defendant did not use force or the threat of force to compel the victim to engage in sexual intercourse with him. Furthermore, the Defendant argued, if the jury did not believe he raped the victim then it was logically inconsistent for the jury to find the Defendant guilty of criminally attempted IDSI and sexual assault because those crimes shared specific elements with the crime of rape; i.e. it was logically inconsistent for the jury to find the Defendant not guilty of forcing or threatening to force the victim to engage in sexual intercourse (rape) but find him guilty of attempting to force or threatening to force the victim to engage in deviate sexual intercourse (attempted IDSI) and guilty of engaging in sexual intercourse with a reckless disregard for the victim's consent or lack thereof (sexual assault).

The apparent similarities between the elements of rape, IDSI, and sexual assault are readily apparent to the Court; however, each of these crimes encompasses distinct and unique elements. For example, although both IDSI and rape require the same element of

force, the crime of rape requires the element of forced *sexual intercourse* whereas the crime of IDSI requires forced *deviate sexual intercourse*; therefore, one can be found guilty of IDSI and not guilty of rape and, where the facts of the case show that the defendant forcibly engaged in only vaginal intercourse, the defendant can be found guilty of rape and not guilty of IDSI. In addition, although both rape and sexual assault require the same element of sexual intercourse, the seemingly fine line distinction between "forcible compulsion" and "lack of consent" distinguishes the crimes. The Superior Court of Pennsylvania explained this distinction as follows:

> [w]e observe that the term "forcible compulsion," as used in section 3123 (pertaining to rape), directly imputes the perpetrator's conduct whereas the absence of the complainant's consent in the language of § 3124.1 (pertaining to sexual assault) requires the fact finder to consider the complainant's conduct. Although facts may be present in a case that would suggest a finding of forcible compulsion and the absence of consent, the want of consent is not necessarily included in a finding that a defendant forcibly compelled the complainant to engage in sexual intercourse.

Commonwealth v. Buffington, 2001 PA Super 309, P10, 786 A.2d 271, 274 (Pa. Super. Ct. 2001) (emphasis added).

The facts presented at the trial in this matter (i.e. that the Defendant forcibly attempted to penetrate the victim anally and did penetrate her vaginally without her consent) were directly in line with the jury's verdict; therefore, the Court respectfully disagrees with the Defendant's assertion that the jury's verdict was logically inconsistent.

The Court also disagrees with the Defendant's assertion that the jury's verdict was contrary to the evidence presented at trial. A jury's verdict will only be deemed contrary to the evidence and a new trial ordered if that verdict "shocks one's sense of justice." *Commonwealth v. Fletcher*, 580 Pa. 403, 421, 861 A.2d 898, 908 (Pa. 2004) citing

Commonwealth v. Tharp, 574 Pa. 202, 830 A.2d 519, 528 (Pa. 2003), cert. denied, __ U.S. __, 541 U.S. 1045, 158 L. Ed. 2d 736, 124 S. Ct. 2161 (2004) citing Commonwealth v. Brown, 538 Pa. 410, 648 A.2d 1177, 1189 (Pa. 1994). Additionally, a jury's verdict will only be overturned for insufficient evidence where, "viewing the evidence admitted at trial in the light most favorable to the Commonwealth and drawing all reasonable inferences in the Commonwealth's favor, there is sufficient evidence to enable the trier of fact to find every element of the [crime] charged beyond a reasonable doubt." *Commonwealth v. Jones*, 449 Pa. Super. 58, 61, 672 A.2d 1353, 1354 (Pa. Super. Ct. 1996), citing, *Commonwealth v. Carter*, 329 Pa. Super. 490, 495-96, 478 A.2d 1286, 1288 (Pa. Super. Ct. 1984); *Commonwealth v. Peduzzi*, 338 Pa. Super. 551, 555, 488 A.2d 29, 31-32 (Pa. Super. Ct. 1985).

At the trial in this matter, the most important evidence was the testimony from the victim and the Defendant. As stated previously, the only contradictory statements of these two witnesses, was in reference to the victim's consent, or lack therefore, regarding the sexual acts that occurred between these parties in January 2005. Because the physical evidence presented at trial (medical testimony and reports) supported the victim's allegation that the Defendant committed the sexual acts without her consent and the Defendant's version that the victim consented to the sexual acts, the jury's decision came down to credibility of the witness testimony; because credibility of witness testimony is the province of the finder of fact, the Court will not interfere or disturb the fact finder's decision absent a shocking or utterly illogical verdict and, in the instant matter, the Court, after explaining why the jury's verdict was not logically inconsistent, does not now find the jury's verdict to be shocking or utterly illogical.

C. ***The Court's sentence was not inappropriately harsh, nor is the discretionary aspect of the Court's sentence (i.e. consecutive vs. concurrent nature of sentences on additional counts) a matter appropriate for appellate review***

Instantly, the Court sentenced the Defendant as to Count 3, sexual assault, a felony in the second degree – incarceration in a State Correctional Institution for an indeterminate period of time, the minimum of which shall be sixty (60)[2] months and the maximum of which shall be ten (10) years; as to Count 2, criminal attempt - IDSI, a felony in the first degree – supervision of the Pennsylvania Board of Probation and parole for a period of twenty (20) years running entirely consecutive to the sentence imposed under Count 3; and as to Count 4, indecent assault, a misdemeanor of the second degree - incarceration in a State Correctional Institution for an indeterminate period of time, the minimum of which shall be twelve (12) months and the maximum of which shall be twenty-four (24) months running entirely concurrent to the sentence imposed under Count 3. Although the Court's sentences were statutorily permissible, the Defendant contends that the Court's sentence of twenty (20) years of consecutive probation is unduly harsh and inappropriate in light of the fact that all three counts the jury found the Defendant guilty of occurred out of the same incident and involved the same victim. For the following reasons, the Court finds the Defendant's contention without merit.

It is well established that, the "sentencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime." *Commonwealth v. Boyer*, 2004 PA Super 303, P10, 856 A.2d 149, 153 (Pa. Super. Ct. 2004) citing *Commonwealth v. Moore*, 420 Pa.

[2] The Court's initial Sentencing Order sentenced the Defendant, on Count 3, to ninety (90) months to ten (10) years; however, the Court Amended this Order on May 15, 2006 to reflect the proper minimum sentence of sixty (60) months to ten (10) years as to Count 3.

Super. 484, 617 A.2d 8 (Pa. Super. Ct. 1992). 42 Pa.C.S. § 9721 further refines this standard and directs that, when sentencing a defendant, the sentencing court shall consider the Pennsylvania Commission on Sentencing Guidelines, and "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."

Instantly, during the sentencing phase in this matter, the Defendant's attorney asked the Court to run the Defendant's sentences, on all three charges, concurrent because they occurred from the same incident. The Commonwealth countered that, although all three charges arose from the same incident, each charge related to a specific and distinct crime: the criminally attempted IDSI charge stemmed from the Defendant's attempt to penetrate the victim anally; the sexual assault charge arose from the Defendant vaginally penetrating the victim without her consent; and the indecent assault charge arose from, *inter alia*, the Defendant's grabbing of the victim's breast.

The Court agreed with the Commonwealth in that the Defendant should be sentenced consecutively on the most serious offenses, the criminally attempted IDSI and sexual assault charges; however, the Court, because of the nature of the crimes, the Defendant's age, and his criminal history, the Court disagreed with the Commonwealth and sentenced the Defendant to twenty (20) years probation on the criminally attempted IDSI charge and ran the Defendant's sentence on the indecent assault charge concurrent to his sentence on the sexual assault charge. Because the Court would have been within its discretion to run all of Defendant's sentences consecutive and not impose any

probationary periods in lieu of incarceration, the Court finds the Defendant's argument that his sentences are unduly harsh without merit.

III. Conclusion

As none of the Appellant's contentions appear to have merit, it is respectfully suggested that the Defendant's conviction, SVP status, and sentence be affirmed.

By the Court,

Dated: _____

_____
Nancy L. Butts, Judge

xc: DA
PD (JC)
Judges
Honorable Nancy L. Butts
Gary L. Weber, Esq.
Laura R. Burd, Law Clerk