IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No's. CR-1253-2010**
vs.	**:**	**CR-1270-2010**
	:	**Opinion and Order re:**
WILLIAM DOWNS,	**:**	**Defendant's Post Sentence Motion**
Defendant	**:**	

OPINION AND ORDER

Before the Court is Defendant's Post Sentence Motion filed on August 31, 2012.

On January 27, 2012, following a three-day jury trial, Defendant was found guilty under Information No. 1253-2010 of Count 1, Rape By Forcible Compulsion; Count 2, Rape By Threat of Forcible Compulsion; Count 3, Involuntary Deviate Sexual Intercourse by Forcible Compulsion; Count 4, Involuntary Deviate Sexual Intercourse by Threat of Forcible Compulsion; Count 5, Indecent Assault By Forcible Compulsion; Count 6, Indecent Assault by Threat of Forcible Compulsion; Count 7, Simple Assault – Bodily Injury; Count 8, Simple Assault – By Physical Menace; Count 9, Terroristic Threats; Count 10, Criminal Attempt – Rape By Forcible Compulsion; and Count 11, Criminal Attempt – Rape by Threat of Forcible Compulsion.

Under Information No. 1270-2010, Defendant was found guilty of Count 1, Attempted Rape; Count 3, Unlawful Restraint; Count 5, False Imprisonment; Count 7, Simple Assault by Physical Menace; Count 8, Simple Assault by Physical Menace; Count 10, Aggravated Assault; Count 11, Terroristic Threats; and Count 12, Terroristic Threats.

Subsequent to the jury verdict, Defendant was assessed by the Pennsylvania

Sexual Offender's Assessment Board. Based on the assessment, the Commonwealth requested a hearing to determine whether Defendant should be designated as a sexually violent predator (SVP).

The SVP hearing and Defendant's sentencing were held on July 23, 2012. Following the SVP hearing, the Court determined that the Commonwealth proved by clear and convincing evidence that Defendant had been convicted of a sexually violent offense as set forth in 42 Pa. C.S.A. § 9795.1 and that he suffered from a mental abnormality which made him likely to engage in predatory sexually violent offenses. As a result, Defendant was designated as a sexually violent predator. At the sentencing hearing, the Court sentenced Defendant on all counts to an aggregate period of state incarceration, the minimum of which was 31 years and the maximum of which was 79 years.

Defendant's convictions arise out of criminal conduct involving three separate women. With respect to Information No. 1253-2010, Defendant was convicted of threatening, physically assaulting and sexually assaulting a woman on October 5, 2008 in the 800 block of Hepburn Street in Williamsport. With respect to Information No. 1270-2010, Defendant was convicted of physically assaulting and threatening a woman on June 27, 2010 at about 2:20 a.m. on the 400 block of Pine Street in downtown Williamsport. Further, Defendant was convicted of terrorizing, physically assaulting and attempting to sexually assault another woman on June 27, 2010 approximately 30 minutes later near the 1100 block of Market Street in Williamsport.

Defendant first argues that the Court erred in denying Defendant's Motion to Sever. The Commonwealth filed a Notice of Joinder of the separate Informations. Defendant filed a Motion to Sever, and by Opinion and Order dated October 4, 2010, that motion was denied. Subsequently, Defendant filed a Motion to Reconsider the denial, which was denied by Order of Court dated December 6, 2010.

The Honorable Joy Reynolds McCoy thoroughly and cogently addressed Defendant's Severance Motion in her Opinion and Order dated October 4, 2010. This Court adopts the reasoning and conclusion of Judge McCoy and incorporates her Opinion and Order as fully as if it was restated at length herein.

Defendant next avers that under Information 1253-2010, the verdict of guilt with respect to the Simple Assault by Physical Menace charge was "based on insufficient evidence and was against the weight of the evidence." (Defendant's Post Sentence Motion, paragraph 25). More specifically, Defendant argues that the evidence was insufficient to establish that Defendant put the victim in fear of serious bodily injury rather than bodily injury. (Defendant's Post Sentence Motion, paragraph 29).

The standard for evaluating sufficiency of evidence claims is well established.

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all of the evidence admitted at trial in a light most favorable to the verdict winner, there is sufficient evidence to enable a 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 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 finder 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. Riggs, 2012 PA Super 187 (September 6, 2012), citing Commonwealth v. Estepp, 17 A.3d 939, 943-944 (Pa. Super. 2011).

In order to find Defendant guilty of Simple Assault by Physical Menace, the Commonwealth must prove beyond a reasonable doubt that he attempted by physical menace to put another in fear of imminent serious bodily injury. 18 Pa. C.S.A. § 2701 (a) (3). Serious bodily injury is "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa. C.S.A. § 2301.

With respect to the Simple Assault by Physical Menace charge, Count 8 of the Information, the victim testified that on October 5, 2008, shortly after 2:00 a.m. while she was walking north in the 800 block of Hepburn Street in Williamsport to a friend's house, she met Defendant. While she did not know Defendant, being concerned for her safety, she asked Defendant to walk with her to her friend's house.

Defendant dragged the victim between two houses. While her memory was somewhat impaired, she remembers being between two houses on her back with her pants and underwear being off. Defendant was hitting her on the side of her face with a closed fist

and screaming at her to “shut the fuck up” and threatening her that if she did not he would “kill her.” At the time, he was holding her down by her arms.

All the while she was screaming, crying and begging Defendant to get off of her. After penetrating her vagina with his penis, he straddled her and put his penis in her mouth. During the assault, the Defendant hit the victim with a closed fist in the face “multiple times.”

Defendant’s suggestion that these facts were insufficient to establish that he attempted by physical menace to put the victim in fear of imminent serious bodily injury begs logic. Defendant dragged the victim between two houses at approximately 2:00 a.m. in the morning. He orally and vaginally raped her, punched her in the face with a closed fist multiple times, held her down forcibly against her will, straddled her with his entire body, screamed at her to shut up and threatened to kill her. Clearly, this evidence was sufficient to find the Defendant guilty of Simple Assault by Physical Menace. See, for example, Commonwealth v. Brown, 822 A.2d 83 (Pa. Super. 2003); Commonwealth v. Repko, 817 A.2d 549 (Pa. Super. 2003).

Additionally, it is clear from the record that for sentencing purposes, Count 8, Simple Assault by Physical Menace merged with Count 7, Simple Assault, Attempting to or Causing Bodily Injury. Defendant has not attacked the conviction on that count and it appears to the Court that any complaint regarding the sufficiency of evidence with respect to the merged count would be a nullity.

Defendant also argues that his convictions with respect to Counts 2, Unlawful Restraint, Count 7, Simple Assault by Physical Menace and Count 10, Aggravated Assault, Attempt to Cause Serious Bodily Injury, under Information No. 1270-2010 were based on insufficient evidence or against the weight of the evidence.

Under the facts and circumstances of this case, for Defendant to be found guilty of Unlawful Restraint, the Commonwealth had to prove that Defendant knowingly restrained another unlawfully in circumstances exposing her to a risk of serious bodily injury. 18 Pa. C.S.A. § 2902 (a) (1). Similarly, to be found guilty of Aggravated Assault, the Commonwealth had to prove beyond a reasonable doubt that Defendant attempted to cause serious bodily injury to another. 18 Pa. C.S.A. § 2702 (a) (1).

With respect to all three counts (Unlawful Restraint, Simple Assault by Physical Menace and Aggravated Assault, attempted serious bodily injury), Defendant argues that the circumstances of the attack were such that it did not expose the victim to a risk of serious bodily injury, did not put the victim in fear of imminent serious bodily injury and did not demonstrate that Defendant attempted to cause serious bodily injury.

With respect to these charges, the victim testified that at approximately 2:30 a.m. on June 27, 2010, she left a local entertainment establishment known as the Cell Block. She walked a few blocks east and then started traveling north on Market Street. She noticed that a person, eventually identified as Defendant, walking behind her. She became more suspicious as Defendant not only continued walking behind her but also followed her as she crossed the street more than once. In fact, Defendant followed the victim for several blocks.

When the victim got near her home, Defendant quickly grabbed her by her waist and arm, put his hand over her mouth and pulled her approximately 15 feet into a dark alley. He directed her to "shut the fuck up" and, if she did not, he threatened that he would "kill her." She immediately started screaming at which time he punched her at least two times in the face. He then threw her on the ground and straddled her pinning her arms by his legs. He started fondling her breasts on the outside of her clothing and then started "undoing" his pants.

At this point, a Good Samaritan who has suspected something going wrong yelled to the victim asking if everything was okay. The victim immediately yelled for help at which time Defendant took off running and the Good Samaritan came to the victim's assistance.

The Court finds that this evidence is sufficient to sustain the questioned convictions. The requisite intent to cause serious bodily injury can be easily inferred from the surrounding circumstances such as following the victim for several blocks, pulling her into a dark alley, threatening to kill her, punching her in the face two times and then pinning her down. The circumstances also clearly exposed the victim to a risk of serious bodily injury and evidenced an attempt by Defendant to cause serious bodily injury. See, for example, Commonwealth v. Matthew, 589 Pa. 487, 909 A.2d 1254 (2006); Commonwealth v. Stevenson, 894 A.2d 759 (Pa. Super. 2006), appeal denied, 591 Pa. 691, 917 A.2d 846 (2007).

Alternatively, Defendant argues that all of the aforesaid convictions to which

he makes insufficiency claims are against the weight of the evidence.

"Relief on a weight of the evidence claim is reserved for extraordinary circumstances, when the jury's verdict is contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." Commonwealth v. Sanchez, 36 A.3d 24, 39 (Pa. 2011), quoting Commonwealth v. Blakeney, 596 Pa. 510, 946 A.2d 645, 653 (2008).

In light of the testimony of the victims which was clearly found by the jury to be credible, the verdict is far from contrary to the evidence and falls exceedingly short of shocking this Court's sense of justice.

Defendant next argues that the Court erred in denying his Rule 600 Motion. This claim was addressed by President Judge Nancy L. Butts in an Order of Court dated December 23, 2011. Said Order is adopted herein as fully as if restated at length herein. The Court adopts the reasoning and conclusion of President Judge Butts. Moreover, the Court notes that following the Order of Judge Butts, Defendant failed to raise any additional Rule 600 speedy trial claims.

Defendant next argues that the aggregate sentence of 31 to 79 years was "manifestly excessive." (Post Sentence Motion, paragraph 44). Defendant argues that the sentence was an abuse of discretion, not in tandem with the fundamental norms of the sentencing process and was due to the Court's "personal feeling that the Court had about offenses against women." (Post Sentence Motion, paragraph 46, 48). Nonetheless, Defendant concedes that the sentences imposed on each count were within the sentencing guidelines.

Defendant argues that the consecutive nature of the sentences constituted the manifest excessiveness. (Post Sentence Motion, paragraph 45).

Where sentences are within the standard range of the guidelines, the courts view the sentence as appropriate under the Sentencing Code. Commonwealth v. Lamonda, 2012 PA Super 180 (August 29, 2012), citing Commonwealth v. Moury, 992 A.2d 162, 171 (Pa. Super. 2010).

Defendant's claim that the sentence was manifestly excessive or unreasonable implicates the discretion of this Court in imposing a sentence. While it is certainly a discretionary function to balance the factors and circumstances bearing on a sentence, said discretion is not unfettered. Commonwealth v. Coulverson, 34 A.3d 135, 143-44 (Pa. Super. 2011). "When imposing a sentence, the sentencing court must consider the factors set out in 42 Pa. C.S. § 9721 (b), that is, the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the Defendant…[A]nd, of course, the court must consider the sentencing guidelines." Id. at 144, citing Commonwealth v. Fullin, 892 A.2d 843, 847-48 (Pa. Super. 2006).

While there appear to be no hard and fast rules in connection with an excessive or unreasonable inquiry, there are general guidelines. The concept of unreasonableness is "inherently a circumstance-dependent concept that is flexible in understanding and lacking precise definition." Coulverson, Id. at 147, citing Commonwealth v. Walls, 926 A.2d 957, 963 (Pa. 2007).

However, in addition to the § 9721 statutory factors, the Court must also

consider the factors set forth in 42 Pa. C.S.A. § 9781 which include the nature and circumstances of the offense and the history and characteristics of the defendant, the court's observations of the defendant, the pre-sentence investigation, other findings supporting the sentence and finally the guidelines. Coulverson, supra at 145; Commonwealth v. Dodge, 957 A.2d 1198, 1200 (Pa. Super. 2008); Commonwealth v. Moore, 617 A.2d 8, 12 (Pa. Super. 1992).

Defendant's aggregate sentence in this case was not the product of a perfunctory exercise by this Court. It was not the product of a limited focus on one or even two of the factors required to be considered in imposing an appropriate sentence. It was not the product of private retribution, judicial policy making or as claimed by Defendant an overwhelming need by the Court to protect women.

To the contrary, and as set forth on the record, the sentence was both individualized and thoroughly considered. The aggregate sentence was consistent with the protection of the public, the gravity of the offense as it related on the impact on the life of the victims and on the community, and the rehabilitative needs of Defendant. The Court clearly and expressly considered the nature and circumstances of the offense, the sentencing guidelines, the presentence report and Defendant's demeanor and conduct.

Furthermore, the Court considered the SVP Assessment, the written victim impact statements and the character reference letters submitted on behalf of Defendant. The Court also reviewed the Sentencing Report from the Lycoming County Prison.

The Court further considered Defendant's trial testimony which, candidly,

was quite disturbing. With respect to the one rape victim, Defendant claimed that she was a prostitute who chose to have sex with him for money in the grass and dirt between two buildings at 2:00 a.m. in the morning. Despite overwhelming physical evidence, Defendant denies hitting her or threatening her.

With respect to the remaining two victims, Defendant testified that he was drunk and intended to rob them. Again despite overwhelming physical evidence he denied hitting or threatening to kill them. He conceded that he told them to shut up.

Of significance to the Court was also the fact that Defendant's girlfriend of 10 years and the mother of his three children ages, 10, 3 and 22 months urged the Court to be lenient because Defendant's "past record" did "not show a propensity of any sex-related or violent behavior." She expressed that Defendant learned from his experience and was rehabilitated. Apparently, however, Defendant never shared with his girlfriend that he was adjudicated delinquent in 1998 for statutory sexual assault, a felony of the second degree. The facts of the statutory sexual assault involved the sexual assault of Defendant's then seven-year old sister and his sister's friend.

As well, Defendant was previously convicted of a second degree misdemeanor hindering apprehension or prosecution charge and a felony possession with intent to deliver drug charge. For both offenses, he received probationary sentences.

At sentencing, Defendant appeared to lack any understanding of the impact of his crimes, let alone any remorse.

As the Court indicated to Defendant at his sentencing, it recognized that he

had a difficult past and overcame some obstacles. This, however, could not be a reason for his crimes or an excuse. The Court explained that it recognized that the sentence would impact upon his children the rest of their lives and impact upon their mother as well. The Court noted, however, that this was a choice Defendant made.

The Court was extremely concerned about the apparent double life that Defendant was living. Ostensibly, Defendant was a working, caring father of three during the day, but a dangerous predator at night, lying in wait to victimize vulnerable individuals. As the Court referenced at sentencing, it was clear that Defendant hid behind a veil of normalcy.

The Court also referenced the fact that the victims were violated beyond comprehension. Their lives have been permanently affected. They are "casualties of a social and personal tragedy that has profoundly altered the courses of their lives. Their losses are the product of brutal, senseless acts and anathema to individual dignity in an ordered society." Coulverson, Id. at 148. The Court also noted that the sanctity and safety of the local community had been shattered. These attacks occurred in downtown Williamsport where many young, single women live, work and socialize. The Court was not willing to chance Defendant being released or being eligible for parole anytime soon, especially in light of the Defendant's prior convictions and the failure of rehabilitation.

In imposing consecutive sentences, the Court also considered the separate crimes and separate victims, all of which needed to be addressed and all of who needed to be vindicated.

The offense gravity scores with respect to the most serious charges of Rape by

Forcible Compulsion, Involuntary Deviate Sexual Intercourse by Forcible Compulsion, Attempted Rape by Forcible Compulsion and Aggravated Assault (10 through 12) are within a sentencing level of 5. According to the guidelines, level 5 provides sentence recommendations for the most violent offenders. The primary purposes of the sentencing options at this level are punishment commensurate with the seriousness of the criminal behavior and incapacitation to protect the public. 42 Pa. C.S.A. § 9721; 204 Pa. Code § 303.11 (b) (5).

As the Court expressed to Defendant at sentencing, it was a "bad day." The Defendant forfeited his right to remain a free citizen and to parent his children outside of a prison cell. Defendant's loved ones and most notably his children would suffer tremendously as a result of Defendant's criminal behaviors. Defendants' choices to drink heavily and to act out in a monstrous fashion, however, compelled that he be incarcerated for decades, not just years. The safety of the community and the impact of the victims primarily warranted such. See, for example, Commonwealth v. Prisk, 13 A.3d 526 (Pa. Super. 2011); Commonwealth v. Riggs, Id. Defendant's own disturbing trial testimony showed his character as a violent criminal from whom the public in general and women in particular needed protection, justifying the lengthy sentence imposed by the Court. Defendant admitted preying on women who were alone outside at night, but claimed he intended to rob them, not rape them.

Defendant's final post sentence argument submits that it was error for the Court to find that the Defendant was a sexually violent predator because the Commonwealth "failed to prove by clear and convincing evidence that he had a mental abnormality." (Post

Sentence Motion, paragraph 51).

Defendant's argument is multifaceted. Defendant claims that the Commonwealth's witness was a psychologist, not a medical doctor; that he relied on police reports, not "independent information;" that he did not read any reports on Defendant's behavior while in a juvenile facility; and that the Commonwealth's expert speculated on the Defendant's alleged mental abnormalities and likelihood of future predatory behavior. (Defendant's Sentence Motion, paragraph 52, 53, 54, and 55).

At the hearing in this matter, C. Townsend Velkoff, a licensed psychologist who has been a member of the Sexual Offenders Assessment Board since 1996, testified that he conducted an assessment, prepared a written report and concluded to a reasonable degree of professional certainty that Defendant met the statutory criteria for classification of a sexually violent predator (SVP). Mr. Velkoff described the records that he had reviewed, noted that Defendant did not participate in the interview process, referenced identifying and historical information regarding Defendant, discussed and applied the statutory criteria relevant to assessing SVP status, and concluded that Defendant met the criteria to be classified as a SVP under the Act.

Specifically, Mr. Velkoff testified that Defendant had a mental abnormality, paraphelia n.o.s., which made him likely to engage in predatory sexually violent offenses.

Defendant's argument that the Commonwealth did not meet its burden because Mr. Velkoff was not qualified being "merely" a licensed psychologist and not a medical doctor fails. Megan's law specifically lists psychologists as individuals who can

serve on the Board and thus conduct SVP assessments and testify on the question of SVP classification. 42 Pa. C.S. § 9799.3. Moreover, case law is clear that a licensed psychologist may offer expert opinion concerning a mental abnormality. Commonwealth v. Conklin, 897 A.2d 1168, 1177-78 (Pa. 2006); Commonwealth v. Dengler, 890 A.2d 372, 383 (Pa. 2005).

Defendant's further argument that Mr. Velkoff based his decision on information contained in police reports, failed to read juvenile facility reports and thus speculated on his conclusions also fails.

Initially, the Court notes that Defendant has not provided one reference to the controlling statute or case law in support of his argument. Secondly, and determinatively, it is clear that the statute "does not require proof of a standard diagnosis that is commonly found and/or accepted in a mental health diagnostic paradigm." Dengler, Id. at 383.

"The question of SVP status is…a statutory question, not a question of 'pure science' and, at least in the absence of a challenge due to the propriety of the substance of the statute, the question of evidentiary relevance is framed by the very provisions of the statute itself, not some external source." Id. at 383. Mr. Velkoff complied with the statute, addressed the statutory factors and provided his opinion within the required degree of certainty. See Commonwealth v. Whanger, 30 A.3d 1212 (Pa. Super. 2011).

ORDER

AND NOW, this ___ day of September 2012, the Court DENIES Defendant's Post Sentence Motion.

Defendant is notified that he has a right to appeal from this order to the

Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Prothonotary at the Lycoming County courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and content as set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.App.P. 903. If the Notice of Appeal is not filed in the Prothonotary's office within the thirty (30) day time period, the defendant may lose forever his right to raise these issues.

Defendant is notified that he has the right to assistance of counsel in the preparation of the appeal.

If Defendant is indigent, he has the right to appeal in forma pauperis and to elect to proceed with court-appointed counsel. The Court notes that, pursuant to Rule 122 (B)(2) of the Rules of Criminal Procedure, Jeana Longo Esquire's appointment as Defendant's court-appointed counsel would continue throughout any direct appeal.

Defendant also has a right to qualified bail under Rule 521(B) of the Rules of Criminal Procedure.

Defendant should discuss these rights with his court-appointed counsel.

By The Court,

_____

Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
Jeana Longo, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)