IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-158-2019**
	:	
vs.	:	
	:	**CRIMINAL DIVISION**
BRUCE D. STUART,	:	
Defendant	:	

OPINION

This matter is before the Court on Defendant's Post-Sentence Motion filed on September 30, 2022, wherein Defendant requests a new trial due to alleged errors by the Court prior to and during the trial, as well as a Judgment of Acquittal/Arrest of Judgment or, in the alternative, Modification of Sentence. After careful consideration and for the reasons set forth below, the Court will deny Defendant's Post-Sentence Motion.

I. Procedural Background

Defendant was arrested on or about January 10, 2019, and charged with rape and related offenses. Defendant filed an Omnibus Pretrial Motion which contained a Writ of Habeas Corpus and a Motion to Suppress. Hearings were held by Senior Judge Kenneth D. Brown on May 28, 2019, and November 7, 2019. Senior Judge Brown completed his service on December 31, 2019, and the matter was reassigned to President Judge Nancy L. Butts. Briefs were filed by both the Defendant and the Commonwealth and by Opinion and Order dated June 5, 2020, Defendant's Omnibus Pretrial Motion was denied.

A jury trial was held on May 24, 2022, and May 25, 2022, after which the jury returned a verdict of guilty on Count 17, Indecent Assault, lack of consent; Count 23, Indecent Assault, person with a mental disability; and Count 29, Simple Assault. Sentencing

was scheduled for September 29, 20221, with the Lycoming County Adult Probation Department directed to conduct a Pre-Sentence Investigation Report in preparation for the sentencing. Additionally, the Defendant was directed to undergo an assessment by the Sexual Offender Assessment Board (SOAB) for determination by that Board as to whether the Defendant possesses the characteristics of a Sexually Violent Predator.

On September 29, 2022, the Defendant was sentenced to a period of incarceration of eight (8) to sixteen (16) months on Counts 17 and 23 and a period of incarceration of one (1) to six (6) months on Count 29, to run consecutive to the sentence under the merged Counts of 17 and 23. Defendant's total aggregate sentence is a period of incarceration of nine (9) to twenty-two (22) months in the Lycoming County Prison, with credit of forty-three (43) days for time served. The Court imposed the requirement that the Defendant must register as a Tier II sexual offender under SORNA for a period of twenty-five (25) years. The Sexual Offender Assessment Board determined that the Defendant did not meet the criteria to be classified as a sexually violent predator and therefore the Court found that the Defendant was not a sexually violent predator.

Defendant filed his Post-Sentence Motion on September 30, 2022, and argument was held on November 21, 2022.

II. Motion for New Trial

Defendant argues that he is entitled to a new trial based upon multiple allegations of error by the Court, each of which will be addressed individually.

1 The Defendant waived his right to be sentenced within 90 days.

a. Motion to Suppress

Defendant argues the Court erred in denying Defendant's Motion to Suppress the statement of the Defendant prior to his arrest by the Pennsylvania State Police. Preliminarily, the Court notes that judges of coordinate jurisdiction hearing the same case should not overrule one another's decisions. *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995). "This rule, known as the 'coordinate jurisdiction rule,' is a rule of sound jurisprudence based on a policy of fostering the finality of pre-trial applications in an effort to maintain judicial economy and efficiency." *Id.* The undersigned Judge presided over the Defendant's trial and sentencing, but not the Motion to Suppress. Accordingly, this Court declines to review or disturb the ruling of President Judge Butts with respect to the Motion to Suppress.

b. Motion to Preclude Expert Witness Testimony

Defendant argues that this Court erred in denying the Defendant's Motion to Preclude Expert Witness Testimony based upon the testimony of the complaining witness. Defendant's counsel raised an objection during a break on the first day of testimony during Defendant's trial, to the introduction of evidence in the form of testimony or exhibits related to a 2018 sexual assault – specifically anything regarding saliva or DNA sample due to the testimony of the victim in this matter indicating there was no sexual contact after 2017.

The law on the admissibility of expert testimony is well settled. Pa.R.E. 703 provides: [a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need

not be admissible in evidence. Under this rule, expert testimony is incompetent if it lacks an adequate basis in fact. *Commonwealth v. Gonzalez*, 109 A.3d 711, 726 (Pa. Super. 2015). The Defendant argues that, because the victim testified that his sexual behaviors towards her occurred from 2008-2017, there was not an adequate basis in fact to permit testimony from any expert witnesses or admit any exhibits regarding DNA and serology.

Despite the victim testifying that the Defendant's sexual conduct occurred only until 2017, Trooper Matthew Miller testified that the victim and her father presented to the Pennsylvania State Police barracks on July 8, 2018, and after an initial conversation with them, he decided to conduct an interview immediately with the victim.

> Q: Was there – at least indicated at the time was there a suspect or a perpetrator alleged?
>
> A: Yeah. So at the time when I spoke with Rebecca she had mentioned that the reason why she was there was because of her brother-in-law, Bruce Stuart.
>
> . . .
>
> Q: Were you given a time or timeframe when the acts were alleged to have occurred?
>
> A: Yeah. So during the interview, Rebecca had mentioned that her sister, Jenny, was away for approximately nine days; and during those nine days, she had been sexually involved with Mr. Stuart, you know, against her will. But she had also mentioned that this had taken place over the course of the last ten years. So it was kind of hard to at the time pinpoint what time and date she was actually referring to at the time, but it was within the last ten years.

(Transcript of Proceedings, 5/25/22, pg. 125-126). Based on this information, Trooper Miller testified that he advised the victim to go with her father to get a SANE examination, sexual assault kit, done at the hospital in the meantime to preserve any evidence that may be on her body. (T.P., 5/25/22, pg. 126).

Additionally, Nancy Steil, who was recognized by the Court as an expert in the area of sexual assault examination, provided the following testimony:

> Q: As part of your exam, did you collect swabs from any part of her body?

A: Yes, I did.
Q: And from what parts?
A: On the chain of custody form it says that I collected a buccal swab, which is a swab on the inside of the mouth that's used to identify the patient's DNA, an oral swab which would be around her lips and inside of her mouth. Not—when you do the buccal swab it's the inside of the cheek; but this would be around the gum line. A swab of her back and shoulders, both breasts, and her right outer thigh and calf.
Q: Okay. Now, those seem pretty specified areas. Is there a particular reason you swabbed those areas as opposed to any other places?
A: Okay. Let me see. In the narrative she stated that she felt his penis against her right leg, and he hit me in the right arm and right leg with a paddle. She also stated that he had kissed her back, shoulders, and her breasts.
Q: Okay. And so is that why the swabs were taken from where they were?
A: Yes.
Q: Is that the reason why – were there any swabs taken from say the vaginal area?
A: No. She denied that there had been any vaginal contact.
Q: Okay. But at the time she did state that there had been mouth on the breast?
A: Yes.

(Transcript of Proceedings, 5/24/22, pg. 82-83).

Despite stating that the sexual behavior of the Defendant occurred only between 2008 and 2017, when asked if Bruce ever put his mouth on any part of her body the victim testified "[j]ust up on my breast. He put his place – his mouth up there. And I didn't like it. That's when my dad took me down to the hospital; and they found that DNA on me, on my breast and everywhere." (T.P. 5/24/22, pg. 40). This testimony shows that the victim made accusations of sexual behavior on the part of the Defendant in 2018. It is the job of the jury to resolve any inconsistencies in testimony. However, the victim's testimony, along with the corroborating testimony of Trooper Miller and Nancy Steil, provided a sufficient foundation to establish an adequate basis in fact to permit the testimony of the expert witness and admission of exhibits regarding DNA and serology. The Court committed no error of law and no abuse of discretion in denying Defendant's Motion to Preclude Expert Witness Testimony based upon the testimony of the complaining witness.

c. Motion to Preclude Serology Report and Related Testimony

Defendant also argues that this Court erred in denying his Motion to Preclude the Serology Report and any testimony relative thereto. Defendant argues that Gordon Calvert, supervisor of the serology section at the Pennsylvania State Police Wyoming Regional Laboratory, was not the person who performed the test nor was he the person who wrote the report, and therefore his testimony should have been precluded.

The Commonwealth introduced two lab reports signed by Kelsey Gobar, whom Mr. Calvert testified is one of the analysts at his lab. As the direct supervisor of Ms. Gobar, Mr. Calvert reviews all notes that are taken and reviews the report that is generated by the analyst before approving it to go out of the lab. (Transcript of Proceedings, 5/24/22, pg. 68). Mr. Calvert further testified that, although he did not perform the actual analysis, he has worked in the serology section for 22 years and has performed tens of thousands of analyses. (Id.). Mr. Calvert testified that Ms. Gobar was not able to testify at the trial because she was on maternity leave. (Id. at 104).

The Rules of Evidence provide certain statements are not excluded by the hearsay rule, even when the declarant is not present. Rule 803(6), known as the "business record exception," provides:

> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, ... unless the sources of information or other circumstances indicate lack of trustworthiness. The term "business" as used in this paragraph

> includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. *Id.,* 803(6).

The Rule "places the burden on an opposing party to show that the sources of information or other circumstances indicate that a business record is untrustworthy, and thus does not qualify for exception to the hearsay rule." *Commonwealth v. Carter*, 932 A.2d 1261, 1264 (Pa. 2007).

Here, the supervisor verified that the report was made by the analyst at or near the time the analyst conducted the analysis of evidence for bodily fluids such as blood, semen, or saliva. These lab tests are highly standardized and routine. It is the regular practice of the lab to generate such reports, and the supervisor's review and approval of the analyst's notes was required for the report to be generated. The Defendant did not put forth any evidence to establish that this type of business record is untrustworthy. Furthermore, given the amount of time that passed between the time the lab tests were conducted and the date of the trial, it is likely that, had Ms. Gobar testified, her testimony would inevitably also have been based upon the lab report at issue. Accordingly, the Court did not err when it denied Defendant's Motion to Preclude the Serology Report and any testimony relative thereto.

d. Recorded Interview of Defendant

The Defendant argues that the Court erred in permitting the Commonwealth to play the recorded interview of the Defendant to the jury. "Evidence is admissible if it is relevant—that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact—and its probative value outweighs the likelihood of unfair prejudice." *Commonwealth v. Hicks*,

156 A.3d 1114, 1125 (Pa. 2017). Admissibility of evidence is within the sound discretion of the trial court and a reviewing court will not disturb an evidentiary ruling absent an abuse of that discretion. *Id*. Here, the Commonwealth showed only select portions of the Defendant's interview with Trooper Miller and Trooper Zach Martin to ensure that the Defendant was not unduly prejudiced. The portion of the video that was shown was relevant in that the Defendant's lack of explanation for how his saliva would have ended upon the victim's breast may have tended to make a fact at issue more or less probable. Accordingly the Court did not commit an error of law in permitting the Commonwealth to play the recorded interview of the Defendant to the jury.

e. Recorded Prison Conversation

The Defendant argues that the Court erred in failing to sustain the Defendant's objection to the playing of the recording of a telephone conversation between Defendant and his wife. In support of his position, Defendant's counsel cited the case of *Hunter v. Hunter*, 83 A.2d 401 (Pa. Super. 1951), which involved an appeal regarding the entry of a divorce decree wherein the court held that wire recordings, made by plaintiff's son from an adjoining room, of conversations allegedly held in bedroom between plaintiff and defendant wife, were inadmissible in divorce suit, since as to wife communications were privileged.

In a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial. 42 Pa.C.S. 5914. "This privilege, which is waivable only by the spouse asserting the privilege, prevents a husband or wife from testifying against their spouse as to any communications which were *confidential* when made and which were

made during the marital relationship." *Commonwealth v. May*, 656 A.2d 1335, 1341 (Pa. Super. 1995). We note initially that the Defendant's wife was not called to testify against him, but rather the Commonwealth sought to play a recording of a phone conversation between them. However, unlike the couple in *Hunter*, the conversation between the Defendant and his estranged wife took place not in their bedroom, where there would be an expectation of privacy, but while the Defendant was incarcerated at the Lycoming County Prison. In *Com v. May*, the Court found that letters written from the Appellant to his wife while he was incarcerated were not confidential since the Appellant signed a form permitting prison officials to review all incoming and outgoing mail, and therefore the Appellant had no reasonable expectation of privacy. "In order for the spousal privilege to apply, it is essential that the communication be made in confidence with the intention that it not be divulged." 656 A.2d at 1342.

Each call placed by the Defendant using the prison phone system was prefaced by a recording notifying him that the calls are monitored and recorded. As a result, the Defendant had no reasonable expectation of privacy in the conversations he had with his wife, and therefore the spousal privilege did not apply in this case. Accordingly, the Court did not err in failing to sustain the Defendant's objection to the Commonwealth playing the recorded conversation between the Defendant and his wife.

f. Dr. Scotilla

The Defendant argues that the Court erred in finding Scott Scotilla, PsyD, as a qualified expert in this matter. The basis of Defendant's argument lies in the fact that Dr. Scotilla testified that he is not board certified in forensic psychology.

Dr. Scotilla testified that he has been doing treatment and psychological assessments in Pennsylvania since 2007. (Transcript of Proceedings, 5/25/22, pg. 25). He earned an undergraduate degree from Penn State University and a Doctorate Degree in Clinical Psychology from Nova Southeastern University. (Id.). He possesses specialized training in the field of forensic psychology and testified that between January 2008 and November of 2021 he completed at least 381 forensic assessment reports which have been accepted in over 16 different counties in Pennsylvania. (T.P. 5/25/22, pg 26). He has been accepted as an expert witness 100% of the times he was offered as one, and he has testified in seven different Pennsylvania counties, including Lycoming County. (Id. at 26-27). He is a licensed as a psychologist in both New York and Pennsylvania. (Id. at 27). Dr. Scotilla testified that he is not board certified by the American Board of Professional Psychology (ABPP), but that has never prevented him from being qualified as an expert. (Id. at 28).

In order to qualify as an expert in a given field, "a witness must possess more expertise than is within the ordinary range of training, knowledge, intelligence, or experience." *Jacobs v. Chatwani*, 922 A.2d 950, 959 (Pa. Super. 2007). "The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation." *Id*. Notably, the test to be applied when qualifying a witness to testify as an expert in the field of forensic psychology does not include a requirement that the expert be board certified. Based upon Dr. Scotilla's education and experience, the Court committed no error of law or abuse of discretion in finding that he was qualified to testify as an expert witness.

g. Weight of the Evidence

The Defendant alleges that the verdict rendered by the jury is inconsistent and contrary to the weight of the evidence. "The weight of the evidence is a matter exclusively for the finder of fact, who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." *Commonwealth v. Gonzalez,* 109 A.3d 711, 723 (Pa. Super. 2015). A trial court may only grant a new trial on a weight claim "when the jury's verdict is so 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. Clay,* 64 A.3d 1049, 1055 (Pa. 2013).

A trial court should not grant a new trial because of a mere conflict in the testimony. *Id.* "Rather, to grant a new trial, the trial court must determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts, is to deny justice." *Id.,* quoting *Commonwealth v. Widmer,* 744 A.2d 745, 752 (Pa. 2000). As well, the court may not reweigh the evidence and substitute its judgment for the factfinder. *Commonwealth v. Troy,* 832 A.2d 1089, 1092 (Pa. Super. 2003). Finally, a verdict is 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." *Commonwealth v. Cruz,* 919 A.2d 279, 282 (Pa. Super. 2007).

At the trial, both the victim and the Defendant testified. Their versions of, and explanations for, the events that took place on July 8, 2018, and the days and years leading

up to that date varied drastically. However, the jury listened to all of the evidence presented, followed the instructions given by the Court, and ultimately acquitted the Defendant of a large majority of the offenses for which he was charged. Based on the evidence presented at the trial including the Defendant's own statements, the Court does not find that the jury rendering a verdict on the counts of indecent assault and simple assault shocks the judicial conscience to such an extent that the Defendant is entitled to a new trial.

III. Motion for Judgment of Acquittal/Arrest of Judgment

The Defendant argues that the Commonwealth failed to present sufficient evidence to establish the elements of simple assault. Pursuant to 18 Pa.C.S. §2701(a)(1), a person is guilty of simple assault if he attempts to cause or intentionally, knowingly, or recklessly causes bodily injury to another. To enable a jury to find the Defendant guilty of simple assault, the Commonwealth must prove beyond a reasonable doubt (1) that the Defendant caused bodily injury to the victim and (2) that the Defendant's conduct in this regard was intentional, knowing, or reckless. For purposes of this crime, bodily injury means impairment of physical condition or substantial pain.

In this case, the victim, [redacted], testified that in 2018, her father came and got her "[a]nd he saw the bruises on my arm and on my leg, and he took me right down to the police station." (Transcript of Proceedings, 5/24/22, pg. 36-37). She testified that she obtained the bruises when the Defendant "took a paddle out of the living room; and he hit me on the arm several times with it. And he pushed me down on the floor." (T.P., 5/24/22, pg. 37). The victim testified consistently that the Defendant hit her several times on the arm with a wooden paddle, and pushed her down, causing a sore on her leg. Nancy Steil, registered

nurse and sexual assault nurse examiner, testified that she took photographs of the victim, including "her right arm – well, actually, two of the right arm with a marker to indicate, sorry, where the bruises are….and also her right knee." (T.P. 5/24/22, pg. 84-85).

The Defendant testified that the victim "went and got into the kitchen utensil drawer and she grabbed a steak knife that were just sharpened that week" and he used the paddle "as a poker like just to keep her back. Cause a sharp knife could hurt me." (Transcript of Proceedings, 5/25/22, pg. 107). Defendant admitted to hitting the victim with the paddle in his police interview; however, at trial he testified "[i]t wasn't a hit as far as trying to hit like a spanking. It was more of a poke to keep her back so that I didn't get jabbed with the knife. Because the end of this paddle thing was like 14 inches, and the knife she had was like 10 inches. There wasn't much room for error for me. So I – not to try to paddle her, to just waive it at her, like, to get – to get that knocked out of her hand." (T.P. 5/25/22, pg. 108).

Viewing the evidence in the light most favorable to the Commonwealth, as the verdict winner, the victim in the case suffered a visible injury to her arm and leg as a result of being hit with a paddle and pushed to the ground. 18 Pa.C.S.A. § 2301 defines "bodily injury" as "[i]mpairment of physical condition or substantial pain." Substantial pain may be inferred from the circumstances surrounding the physical force used. *Commonwealth v. Duck,* 171 A.3d 830, 836 (Pa. Super. 2017), quoting *Commonwealth v. Smith*, 848 A.2d 973 (Pa.Super. 2004). The strikes from the paddle were with a force strong enough to causes bruises, and therefore it can be inferred that the victim suffered substantial pain. Although the Defendant's explanation for his actions suggests he did not intentionally cause the victim's bodily injuries, his actions were at the very least reckless. Accordingly,

the Commonwealth provided sufficient evidence for the jury to find that the victim suffered actual bodily injury.

IV. Motion to Modify Sentence

The Defendant was sentenced on September 29, 2022. The Defendant's counsel advocated for a sentence of probation, which would allow him to continue working and farming. Defendant's counsel argued that the humiliation and embarrassment that the Defendant suffered as a result of crimes for which he was accused but found not guilty was in essence punishment. the Defendant was ultimately sentenced to an aggregate sentence of nine (9) to twenty-two (22) months in the Lycoming County Prison.[2] The Defendant contends that, while the individual sentences imposed are within the standard range of the guidelines, the aggregate of those sentences is a substantially excessive sentence under the facts and circumstances of this case, and that the sentence is excessive for the crimes in which he was convicted.

> 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. Hoch, 936 A.2d 515, 517-518 (Pa. Super. 2007). The proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. *Commonwealth v. Walls,* 926 A.2d 957, 961 (Pa.2007). The trial court is

2 The Defendant's Post Sentence Motion incorrectly lists the Defendant's aggregate sentence as 9 to 18 months.

afforded broad discretion in sentencing criminal defendants "because of the perception that the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." *Commonwealth v. Mouzon,* 571 Pa. 419, 812 A.2d 617, 620 (Pa.2002) (quoting *Commonwealth v. Ward,* 524 Pa. 48, 568 A.2d 1242, 1243 (1990)).

In the present case, Count 17, indecent assault without consent of other, and Count 23, indecent assault – person with mental disability, merged for sentencing purposes. The standard range for the indecent assault of a person with a mental disability pursuant to 18 Pa.C.S. §3126(a)(6), and misdemeanor of the first degree, with a prior record score of 0 is RS-9. The Court sentenced the Defendant to a period of incarceration of eight (8) to sixteen (16) months. While this sentence is at the upper end of the standard range, it is within the standard range and when imposing this sentence the Court considered the mental disability of the victim as well as the, frankly, ludicrous explanation the Defendant provided the jury for what occurred that day. The Defendant's statement revealed an awareness of the inappropriateness of his actions and a complete attempt to avoid responsibility for them. The Defendant continued to show little remorse at the time of his sentencing.

As to count 29, simple assault, a misdemeanor of the second degree pursuant to 18 Pa.C.S. §2701(a)(1), the standard range for sentencing purposes with a prior record score of 0 is RS-1. The Court sentenced the Defendant to a period of incarceration of one (1) to six (6) months, citing that the situation warranted the upper end of the standard range. The Court determined that the sentence under Count 29 was to run consecutive to the sentence under Count 23 for an aggregate sentence of nine to 22 months.

Given the circumstances of the case, the sentence imposed by the Court, which was within the standard range, was neither manifestly excessive nor an abuse of discretion.

V. Conclusion

For the reasons set forth above, the Defendant has not persuaded the Court that he is entitled to a new trial as a result of Court error, nor that his Motion for Judgment of Acquittal/Arrest of Judgment or his Motion to Modify Sentence should be granted.

ORDER

AND NOW, this **24th** day of **January**, **2023**, upon consideration of Defendant's Post Sentence Motion, and for the reasons set forth above, Defendant's Motion is **DENIED**.

By the Court,

_____
Ryan M. Tira, Judge

RMT/jel
CC: DA (M. Welickovitch, Esq.)
Robert A. Hoffa, Esq.
Gary Weber, Esq.
Jennifer E. Linn, Esquire