

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**Penn-America Insurance Company v.
A4 Place, Inc., Nasid Aboud, Marian E.S.
Aboud, Darnell A. Tolliver, Beatrice
Woody, individually and as Administratrix
of the Estate of Jerry McCrommon, III,
deceased, Earl C. Troxler, Lamar Ezell,
and Asa Howard**

*Declaratory Judgment Action—Assault and Battery
Exclusion for Premises Liability Policy*

1. In Declaratory Judgment action, the court granted summary judgment in favor of Penn-America, insurer of A4 Place, finding it had no duty to defend its insured and other individuals involved in an altercation that resulted in the death of an innocent bystander.

2. Defendants appealed, arguing that the same Assault and Battery exclusion was contained in the policy at issue in *QBE Insurance Corp. v. M&S Landis Corp.*, 915 A.2d 1222 (Pa.Super. 2007) wherein it was held that the exclusion did not apply to negligence claims.

3. The court found Defendants' argument to be misconceived because in that case negligence was the direct cause of decedent's death as a result of bouncers who lay on top of him restricting his ability to breathe.

4. The duty to defend an insured is triggered by the factual allegations in the complaint, not the particular cause of action that a complainant pleads, and is, thus, only triggered when the factual allegations of the complaint, taken as true, would support a recovery covered by the policy.

5. When a defense is based on an exception or exclusion in a policy, such a defense is an affirmative one, and the burden is upon the insurer to establish it.

6. The exclusion in this case clearly and unambiguously did not provide coverage, meaning indemnification or defense costs for damages alleged or claimed for bodily injury or any other damages resulting from assault and battery or physical altercations.

(Lynn E. MacBeth)

Joseph J. Bosick for Plaintiff.

Peter J. Mansmann for Earl C. Troxler.

Darnell A. Tolliver, pro se.

James A. Villanova for Beatrice Woody.

Robin S. Wertkin for A4 Place, Inc., Nasid Aboud and Marian E.S. Aboud.

John H. Woltz, Jr. for Lamar Ezell and Asa Howard.

No. GD 07-022392. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Introduction

Folino, J., February 12, 2009—After an altercation in the A4 Place tavern, the “bouncer” of A4 Place pulled out his 9-millimeter handgun and fired fifteen shots at three, fleeing individuals. While the three targeted individuals suffered bullet wounds, they survived the ordeal; an innocent bystander named Jerry McCrommon was, however, mortally wounded after two of the bullets pierced his body. The Estate of Mr. McCrommon and the three surviving victims each then filed separate complaints naming, as defendants: A4 Place, Inc., Darnell Tolliver (the shooter and the “bouncer” for A4 Place), Nasid Aboud (the manager of A4 Place) and Marian E.S. Aboud (the owner of A4 Place). Every single cause of action contained within every single one of the complaints is framed in the language of negligence.

Following service of the complaints, the underlying

defendants contacted the liability insurance carrier for A4 Place, Inc., Penn-America Insurance Company; the defendants demanded coverage under the Commercial General Liability Insurance Policy between A4 Place, Inc. and Penn-America. In particular, the underlying defendants argued that, pursuant to the CGL Policy, Penn-America was required to provide them with a defense from and, if necessary, indemnification for all of the underlying claims.

Penn-America responded to the demands with this declaratory judgment action; and, within its Complaint, Penn-America prays for a judicial declaration “that Penn-America has no duty to provide any of the insureds with a defense of or indemnity for any of [the underlying] claims.” “Action for Declaratory Judgment,” filed October 19, 2007 (hereinafter “Action for Declaratory Judgment”), at First “Wherefore” Clause.

Penn-America's declaratory judgment action was decided by this Court on summary judgment: I held that the “express and unambiguous terms of the ‘Assault and Battery Exclusion’” precluded coverage as to all of the claims made by the Plaintiffs in the four underlying complaints. Order of Court, dated October 15, 2008, Folino, J. Therefore, since Penn-America had no duty to provide its insureds “with a defense or indemnity for any of the claims asserted in the underlying Complaints,” I entered a declaratory judgment in Penn-America's favor. *Id.*

With the exception of Darnell Tolliver, all of the insureds and underlying Plaintiffs have appealed my summary judgment order. While Appellants have made other arguments, Appellants have primarily asserted that the instant “Assault and Battery Exclusion” is identical to that found in *QBE Insurance Corp. v. M&S Landis Corp.* 915 A.2d 1222 (Pa.Super. 2007). And, since the *QBE* Court held that its assault and battery exclusion “did not apply to the negligence claims,” appellants contend that the instant “Assault and Battery Exclusion” cannot do so either. “Brief of Defendants A4 Place, Inc., d/b/a A4 Place, Nasid Aboud and Marian E.S. Aboud in Opposition to Plaintiff's Motion for Summary Judgment,” filed May 28, 2008 (hereinafter “A4 Place Brief in Opposition”), at 6.¹

In the view of this Court, Appellants' argument is misconceived. At the outset, Appellants have misread the *QBE* opinion and have envisioned an analogy where none exists: according to the *QBE* Court, the “Assault and Battery Exclusion” did not apply in that case because, as the underlying complaint averred, the defendants' negligence was the direct cause of decedent's injuries. See *QBE Ins. Corp.*, 915 A.2d at 1225-26 (stating: “[i]t is not alleged that the Fat Daddy Defendants assaulted the decedent as the cause of death, but rather that, after eviction, they negligently restrained [him] or improperly restrained him causing his death”)(emphasis added). In the case at bar, however, there can be no doubt that the victims' “actual damages” were directly caused, not by negligence, but by the bullet strikes. See *Acceptance Ins. Co. v. Seybert*, 757 A.2d 380, 383 (Pa.Super. 2000). In other words, here the alleged “negligence” was, in every claimed case, merely an antecedent cause of the intentional shooting. Thus, *QBE* does not apply to the facts of this case.

Moreover, the “Assault and Battery Exclusion” at issue in *QBE* was not, as Appellants currently contend, “identical” to the provision that is found in the case at bar. Rather, because of “waiver” and because of the specific arguments *QBE* Insurance Corporation brought on appeal, the Superior Court was forced to “read out” certain “clarifying language” found within its “Assault and Battery Exclusion.” See *QBE Ins. Corp.*, 915 A.2d at 1228n.1 (stating: “*QBE* does not assert that subparts 1, 2, or 3, to part B of the exclusion” (the “clarifying language”) “have any relevance to this case”).

In the case at bar, however, there has been no waiver by Penn-America, and no failure by it to assert that the clarifying subparts to the Assault and Battery Exclusion have relevance to this case. In other words, here, Penn-America's

summary judgment motion was based upon the entire "Assault and Battery Exclusion," and this Court was able to consider the exclusion as a whole. By doing this – by viewing the Assault and Battery Exclusion in its entirety – it becomes all the more obvious that the instant Assault and Battery Exclusion encompasses every single underlying claim.

I will explain my reasoning in more detail below; ultimately I recommend affirmance: not only is *QBE* inapplicable to the case at bar, but the "express and unambiguous terms of the 'Assault and Battery Exclusion'" encompass all of the underlying claims. The facts are as follows.²

Facts

On December 29, 2005, Appellants Earl C. Troxler, Lamar E. Ezell and Asa Howard were socializing in a tavern called A4 Place. The three friends were there for about 45 minutes when the manager of A4 Place, Nasib Aboud, entered the tavern and told the three to leave. Appellants did as they were told: they left the tavern and exited into the parking lot. As they were doing this, however, Mr. Aboud went into the back of the bar and retrieved the tavern's bouncer, Darnell Tolliver; Messrs. Aboud and Tolliver then followed the Appellants into the parking lot.

In the parking lot, the two groups got into a heated, physical confrontation. During the course of this confrontation, Mr. Tolliver pulled out his 9-millimeter handgun and fired fifteen shots at the fleeing Appellants. All three were hit with bullets and injured; moreover, two of Mr. Tolliver's bullets struck an innocent bystander named Jerry McCrommon; Mr. McCrommon died as a result.

Mr. Troxler, Mr. Ezell, Mr. Howard and the Estate of Mr. McCrommon then filed separate complaints against: A4 Place, Inc., Nasib Aboud, Marian E.S. Aboud (the owner of A4 Place) and Mr. Tolliver. Each complaint asserts, exclusively, "negligence" causes of action against the various underlying defendants. Specifically, the underlying complaints make the following claims³:

A) as against Mr. Tolliver: 1) negligence for acting unreasonably (shooting the fleeing victims) when the situation called for no physical violence; 2) negligence for not being certified to carry a handgun to work and 3) negligence for firing his weapon while intoxicated;

B) as against A4 Place, Inc.: 1) negligence based upon respondeat superior (asserting that Mr. Tolliver's negligence must be imputed to Mr. Tolliver's employer) and 2) "negligent hiring, retention and/or supervision" (asserting that A4 Place was negligent because it hired and retained Mr. Tolliver);

C) as against Nasib Aboud (the manager of A4 Place): 1) negligence based upon respondeat superior (asserting that Mr. Tolliver's negligence must be imputed to Mr. Tolliver's at-work superior); 2) negligence for "failure to warn" (asserting that Mr. Aboud "knew or should have known" that Mr. Tolliver was carrying a gun and that Mr. Aboud failed to warn the victims of this fact); 3) negligence for failing to ensure that Mr. Tolliver was not armed; 4) negligence for improperly hiring, retaining and training Mr. Tolliver; 5) negligence for failing to have adequate security programs in place to deal with unruly patrons and 6) negligence for allowing Mr. Tolliver to perform his bouncer duties while intoxicated.

D) as against Marian E.S. Aboud (the owner of A4 Place): 1) negligence based upon respondeat superior (asserting that Mr. Tolliver's negligence must be imputed to Mr. Tolliver's at-work superior); 2) negli-

gence for "failure to require Mr. Tolliver to be certified to carry a handgun to work"; 3) negligence for failing to ensure that Mr. Tolliver was not armed; 4) negligence for improperly hiring, retaining and training Mr. Tolliver; 5) negligence for failing to have adequate security programs in place to deal with unruly patrons and 6) negligence for allowing Mr. Tolliver to perform his bouncer duties while intoxicated.

After being served with these claims, each of the underlying defendants contacted the liability insurance carrier for A4 Place, Inc., Penn-America Insurance Company. According to these defendants, the Commercial General Liability Insurance Policy between A4 Place, Inc. and Penn-America required Penn-America to provide them with a defense from and, if necessary, indemnification for all of the underlying claims.

Penn-America did provide the individuals with an initial defense; yet it did so under a "reservation of rights": as Penn-America informed the defendants, all of the underlying claims fell within the scope of the CGL Policy's "Assault and Battery Exclusion." Therefore, on October 19, 2007, Penn-America filed the instant "Action for Declaratory Judgment," seeking a judicial determination that it had "no duty to provide any of the insureds with a defense of or indemnity for any of [the underlying] claims." "Action for Declaratory Judgment," at First "Wherefore" Clause.

As Penn-America's declaratory judgment action did not hinge upon any contested facts⁴, Penn-America filed a motion for summary judgment shortly after the close of pleadings. As argued within this summary judgment motion, the "Assault and Battery Exclusion" contained within the Commercial General Liability Insurance Contract applied to exclude all of the underlying claims from coverage. Following responsive briefs and argument, this Court granted Penn-America's summary judgment motion. I found that the "express and unambiguous terms of the 'Assault and Battery Exclusion'" encompassed all of the underlying claims in this case. Order of Court, dated October 15, 2008, Folino, J. And, since Penn-America had no duty to provide its insureds "with a defense or indemnity for any of the claims asserted in the underlying Complaints," I entered a declaratory judgment in Penn-America's favor. *Id.* This appeal follows.

Analysis

I. Introduction

I.A. The Superior Court's Standard of Review

When considering any motion for summary judgment:

summary judgment is appropriate only where the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds cannot differ can a trial court...enter summary judgment.

Mountain Vill. v. Bd. of Supervisors, 874 A.2d 1, 5-6 (Pa. 2005) (internal citations omitted).

The interpretation of an insurance policy is, however, generally "a matter of law which may properly be resolved by a court pursuant to a motion for summary judgment." *Fisher v. Harleysville Ins. Co.*, 621 A.2d 158, 159 (Pa.Super. 1993). Indeed, the current appeal is concerned solely with the "legal interpretation" of an insurance policy. In following, the Superior Court must employ a *de novo* standard of review and, while this Court's analysis might be useful as a guide, the appellate court "need not defer" to my legal conclusions. *Donegal*

Mut. Ins. Co. v. Baumhammers, 938 A.2d 286, 290 (Pa. 2007).

II. Reasoning

As Pennsylvania courts have repeatedly stated, an “insurer’s duty to defend is a distinct obligation, different from and broader than its duty to indemnify.” *Old Guard Ins. Co. v. Sherman*, 866 A.2d 412, 416 (Pa.Super. 2004). This does not mean that the “duty to defend” is unlimited; without a doubt, the “insurer’s duty to defend the insured is dependent upon the coverage afforded by the insured’s policy.” *O’Brien Energy Sys., Inc. v. Am. Employers’ Ins. Co.*, 629 A.2d 957, 960 (Pa.Super. 1993). Rather, the relative breadth of the defense duty extends only so far as to require the insurer to “defend in any suit in which there exists *actual* or *potential* coverage.” *Hartford Mut. Ins. Co. v. Moorhead*, 578 A.2d 492, 494 (Pa.Super. 1990)(emphasis in original).

To determine whether coverage exists, the court must follow a two-step process. As our Supreme Court has explained, a “court’s first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy’s coverage.” *Gen. Accident Ins. Co. of Am. v. Allen*, 692 A.2d 1089, 1095 (Pa. 1997). “After determining the scope of coverage,” the court must then “examine the complaint in the underlying action to ascertain if it triggers coverage.” *Id.* Importantly, however, in comparing the underlying complaint to the policy, it must be remembered that “the particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. Instead it is necessary to look at the *factual allegations* contained in the complaint.” *Mutual Benefit Ins. Co. v. Haver*, 725 A.2d 743, 745 (Pa. 1999)(emphasis added). The duty to defend is, thus, only triggered when the factual allegations of the complaint, taken as true, “would support a recovery covered by the policy.” *Allen*, 692 A.2d at 1095.

II.A. The “scope of the policy’s coverage”

As against the Appellants, Penn-America moved for summary judgment based solely upon the “Assault and Battery Exclusion.” Therefore, this Court must assume that the facts, as alleged in the underlying complaints, fall within the CGL Policy’s general insuring clause; in other words, this Court must assume that the alleged facts constitute an “occurrence” under the applicable policy.⁵ Hence, this Court’s only issue of concern is whether the “Assault and Battery Exclusion,” contained within the CGL Policy, applies to “exclude” Appellants’ desired coverage.

Since Penn-America has relied upon an exclusion to deny coverage, it is Penn-America who bears “the burden of establishing the applicability of [the] exclusion.” *Klischer v. Nationwide Life Ins. Co.*, 442 A.2d 175, 177 (Pa.Super. 1980)(also stating: “When a defense is based on an exception or exclusion in a policy, our Supreme Court has held that such a defense is an affirmative one, and the burden is upon the [insurer] to establish it”). And, as with any exclusionary clause, the instant “Assault and Battery Exclusion” must be “strictly construed” against the insurer and in favor of the insured. *First Pa. Bank, N.A. v. Nat’l Union Fire Ins. Co. of Pgh., Pa.*, 580 A.2d 799, 802 (Pa.Super. 1990). Yet, even with this “strict construction,” a court may not “torture the [policy] language” to create ambiguities where none exist. *Ryan Homes, Inc. v. Home Indem. Co.*, 647 A.2d 939, 941 (Pa.Super. 1994). Rather, if the words of an exclusionary clause are “clear and unambiguous,” those words “must be given their plain and ordinary meaning.” *Id.* After all, a court’s “purpose in interpreting insurance contracts is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy.” *Baumhammers*, 938 A.2d at 290 (quoting 401 *Fourth St., Inc. v. Investors Ins. Group*, 879 A.2d 166, 171 (Pa. 2005)).

II.A.1. The “Assault and Battery Exclusion”

The “Assault and Battery Exclusion” in the case at bar reads:

In consideration of the premium charged it is hereby understood and agreed that this policy will not provide coverage, meaning indemnification or defense costs for damages alleged or claimed for:

“Bodily Injury,” “Property Damage,” “Personal and Advertising Injury,” Medical Payments or any other damages resulting from assault and battery or physical altercations that occur in, on, near or away from the insured’s premises;

1) Whether or not caused by, at the instigation of, or with the direct or indirect involvement of the insured, the insured’s employees, patrons or other persons in, on, near or away from the insured’s premises, or

2) Whether or not caused by or arising out of the insured’s failure to properly supervise or keep the insured’s premises in a safe condition, or

3) Whether or not caused by or arising out of any insured’s act or omission in connection with the prevention or suppression of the assault and battery or physical altercation, including, but not limited to, negligent hiring, training and/or supervision.

4) Whether or not caused by or arising out of negligent, reckless, or wanton conduct by the insured, the insured’s employees, patrons or other persons.

“Assault and Battery Exclusion,” endorsement modifying, in part, insurance provided under the “Commercial Lines Common Policy, Commercial General Liability Coverage Part,” Policy Number PAC6476937, between Penn-America Insurance Company and A4 Place, Inc., effective from June 17, 2005 until June 17, 2006 (hereinafter “Assault and Battery Exclusion”).

II.B. Ascertain whether the underlying complaints “trigger coverage”: comparing the “Assault and Battery Exclusion” to the underlying complaints

II.B.1. Applying the underlying facts to the “Assault and Battery Exclusion”

According to the plain terms of the “Assault and Battery Exclusion,” the CGL Policy does “not provide coverage, meaning indemnification or defense costs for damages alleged or claimed for...‘Bodily Injury’...or any other damages resulting from assault and battery or physical altercations...” See “Assault and Battery Exclusion.” In the case at bar, *the facts*, as alleged within each of the underlying complaints, state that Mr. Tolliver fired fifteen gunshots at the fleeing victims, with at least one bullet striking each victim.^{6,7,8,9} Additionally, the “damages” each victim seeks are for those “bodily injuries” *directly and immediately attributable* to the bullet strikes; indeed, every single underlying complaint lists one of the injuries as a “gunshot wound,” lists other injuries that can only be due to that “gunshot wound” and then avers “[a]s a result of these injuries, Plaintiff...has incurred the following damages.” Therefore, every single claim of every single complaint seeks “damages resulting from” the bullet strikes.^{10, 11, 12, 13} Because of this, all of the claims fall within the plain terms of the “Assault and Battery Exclusion.” This is a conclusion supported by (one might even argue, compelled by) our Superior Court’s opinion in *Acceptance Insurance Co. v. Seybert*, 757 A.2d 380 (Pa.Super. 2000).

In *Seybert*, a group of drunken individuals “violently attacked” the victim in a parking lot. Afterwards, the victim sued one of the bars in which his assailants became intoxicated

ed; according to the victim's complaint, the bar negligently "contributed to" the attack by furnishing alcohol to the individuals while they were visibly intoxicated. The bar then contacted its liability insurance carrier, seeking defense and indemnification from the claims. Yet, relying upon the assault and battery exclusion contained within the liability insurance policy, the insurance company denied coverage. *Id.* at 381.

Before the Pennsylvania Superior Court, the insurer again argued that the assault and battery exclusion precluded coverage. *Id.* The bar countered by arguing that, since it was being sued for "negligence" (and not for some type of intentional tort), the assault and battery exclusion was inapplicable. *Id.* at 383. Our Superior Court looked to the facts alleged in the underlying complaint and agreed with the insurance company; it held that the underlying claims were encompassed by the assault and battery exclusion. *Id.*

At issue in *Seybert* was the following assault and battery exclusion:

It is agreed that the insurance does not apply to Bodily Injury, including death, and/or Property Damage arising out of assault and/or battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person.

Id. at 382.

And, in applying the "assault and battery exclusion" to the facts of the underlying complaint, the *Seybert* Court was careful to focus its attention upon the *direct cause* of the victim's injuries. *Id.* at 383. Specifically, in *Seybert*, although the victim *claimed* that the bar's "negligence" caused his injuries, the Superior Court looked to the *facts* of the underlying complaint and was able to see that the negligence did not "directly cause" the victim any harm. Indeed, by looking to the victim's "actual injuries," the Superior Court was able to see that these were injuries "undeniably...caused by" the intentional assault and battery. *Id.* Any claimed "negligence" merely "contributed to" this assault and battery and was, therefore, a secondary cause of the victim's "actual injuries." *Id.* Thus, since the assault and battery was the direct cause of the victim's injuries, the exclusion applied to the entirety of the underlying complaint. In the words of the Superior Court:

the Complaint contain[ed] no allegations that [the victim's] actual injuries were caused in any way other than by assault and battery by the five men.... There is no suggestion that [the victim's] injuries were an accident...or were negligently caused directly by [the bar's] employees...[the assault and battery exclusion's] clear, unambiguous language excludes precisely the type of conduct complained of in the underlying tort action.

Id.

So too in the case at bar; if we are to focus upon the "direct cause" of the victims' actual damages and injuries, there can be but one conclusion: in this case, all of the damages incurred by the victims were from the "bodily injuries" they received when a bullet, intentionally fired from Mr. Tolliver's weapon, struck their body.

Appellants might argue that their underlying complaints have "claimed" that the negligent acts, which led to the shooting, were what "caused" their injuries and damages. Yet, as this Court has earlier explained, when one looks to the facts alleged in the underlying complaints, one sees that every single complaint lists the injury as a "gunshot wound," lists other injuries that can only be due to that "gunshot wound" and then avers "[a]s a result of these injuries, Plaintiff...has

incurred the following damages." *See infra* at *10-12. There are no allegations that the victims' damages or injuries were "negligently caused *directly* by" the underlying defendants. *See Seybert*, 757 A.2d at 383 (emphasis added). Rather, since all of the alleged "negligence" occurred *prior* to Mr. Tolliver's intentional acts, one can only conclude that *the shooting* was the "direct cause of" the damages and injuries. Stated another way, the facts of the underlying complaints simply aver that the negligence "contributed to" the intentional shooting; unfortunately for Appellants, *Seybert* has already dealt with such allegations and has held that the allegations do indeed fall within the scope of the assault and battery exclusion.

Appellants might also argue that, since their underlying complaints frame Mr. Tolliver's actions in the language of negligence, "intent" cannot be presumed. Such an argument would be mistaken: as our Supreme Court has instructed, "the particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. Instead it is necessary to look at the factual allegations in the complaint." *Haver*, 725 A.2d at 745. Thus, as our Superior Court held in *Baumhammers*:

In this case, the complaints contain averments that Baumhammers' actions were unintentional. However, as stated above, we do not look at legal conclusions to determine coverage but must look at the specific factual allegations. The only averments contained in the underlying complaints are that each individual plaintiff was shot by Baumhammers. There are no specific facts set forth in those complaints supporting the allegation that any of the shootings was unintentional. In the absence of facts contradicting what human experience teaches are volitional acts, the shootings indicate that Baumhammers sought to cause the harm that he inflicted and, therefore, acted intentionally. An actor is presumed to intend the natural and probable consequences of his actions, and serious bodily injury or death is the "natural and probable result" of pointing a loaded gun at a person and firing that weapon.

Donegal Mut. Ins. Co. v. Baumhammers, 893 A.2d 797, 822-23 (Pa.Super. 2006) (*en banc*), *rev'd on other grounds* by *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007) (internal citations omitted) (internal quotations omitted).

In the case at bar, it cannot be doubted that Mr. Tolliver "intended" to cause the injuries: every single complaint avers that Mr. Tolliver fired fifteen gunshots "in the direction of" the fleeing victims; and, although Mr. McCrommon was but an innocent bystander, the "intent" Mr. Tolliver had to injure his targets is, by law, deemed transferred to Mr. McCrommon. *Germantown Ins. Co. v. Martin*, 595 A.2d 1172, 1175 (Pa.Super. 1991); *Nationwide Mut. Ins. Co. v. Hassinger*, 473 A.2d 171, 175 (Pa.Super. 1984); Restatement (Second) of Torts §16(2).

Thus, the "Assault and Battery Exclusion" encompasses all of the underlying claims: each claim seeks damages for "bodily injury" that "resulted from" an intentional assault and battery.

II.B.2. Appellants' arguments in opposition

In support of their view that the subject CGL policy does provide coverage for the claims made against defendants in the underlying tort claims, Appellants rely upon two Superior Court cases: *QBE Insurance Corp. v. M&S Landis Corp.*, 915 A.2d 1222 (Pa.Super. 2007) and *Board of Public Education of the School District of Pittsburgh v. National Union Fire Insurance Co. of Pittsburgh*, 709 A.2d 910 (Pa.Super. 1998) (*en banc*). First, Appellants assert that the two cases are "clear precedent" for this Court and, therefore, "compel" coverage of their negligence claims. Second, Appellants declare that both *QBE* and *National*

Union require that, “so long as the underlying allegations explicitly frame the cause of action as one sounding in negligence, as opposed to some intentional tort like assault and battery, no such exclusion pertaining to such a tort would be applicable.” “Troxler Brief in Opposition,” at 9. Both arguments are incorrect.

II.B.2.a. *QBE*’s facts, “assault and battery exclusion” and reasoning distinguish it from the case at bar

The *QBE* case revolved around the death of David A. Potter, Jr. According to the underlying complaint, Mr. Potter was a patron of Fat Daddy’s Nightclub when he was evicted by various “bouncers.” Unfortunately, Mr. Potter died when, after eviction, the bouncers “laid on top of him restricting his ability to breath[e].” *QBE Ins. Corp.*, 915 A.2d at 1224. Mr. Potter’s Estate then sued the nightclub for wrongful death.¹⁴ The complaint, which sounded exclusively in “negligence,” alleged that “after eviction, [the bouncers] negligently restrained Potter or improperly restrained him causing his death.” *Id.* at 1225-26 (internal brackets omitted).

After receiving notice of the claims made against it, the nightclub contacted its commercial general liability insurer, *QBE Insurance Corporation*, seeking “defense and indemnification” from the Estate’s claims. As is relevant to the case at bar, *QBE* denied coverage on the basis that the alleged conduct fell within the policy’s “Assault and Battery Exclusion”; *QBE* then filed a declaratory judgment action, asking that a court hold in its favor. *Id.* at 1224.

The Pennsylvania Superior Court disagreed with *QBE* and held that *QBE* must provide its claimants with a defense. In beginning its analysis, the Superior Court quoted from the “Assault and Battery Exclusion”; the exclusion read:

A. This insurance does not apply to actions and proceedings to recover damages for “bodily injury,” “property damage” or “personal and advertising injury” arising from the following and the Company is under no duty to defend or to indemnify an insured in any action or proceeding alleging such damages: 1. Assault and Battery or any act or omission in connection with the prevention or suppression of such acts;

B. This exclusion applies regardless of the degree of culpability or intent and without regard to:

1. Whether the acts are alleged to be by or at the instruction or at the direction of the insured, his officers, employees, agents or servants; or by any other person lawfully or otherwise on, at or near the premises owned or occupied by the insured; or by any other person;
2. The alleged failure of the insured or his officers, employees, agents or servants in the hiring, supervision, retention or control of any person, whether or not an officer, employee, agent or servant of the insured;
3. The alleged failure of the insured or his officers, employees, agents or servants to attempt to prevent, bar or halt any such conduct.

QBE Ins. Corp., 915 A.2d at 1228 (emphasis omitted).

Yet, even though the *QBE* Court quoted “Section B” of the above “Assault and Battery Exclusion,” it could not consider the applicability of that language. This was because, as our Superior Court stated, “*QBE* does not assert that subparts 1, 2, or 3, to part B of the exclusion have any relevance to this case.”¹⁵ *Id.* at 1228n.1. This waiver made it so that the *QBE* Court could interpret *only* “Section A(1)” of the exclusion; therefore, the *QBE* Court could ask *only* whether the underlying complaints sought “damages for ‘bodily injury’ arising

from an assault and battery.” *Id.* at 1229.

As in *Seybert*, when it came time to apply the assault and battery exclusion to the facts of the underlying complaint, the *QBE* Court focused upon the *direct cause* of the victim’s injuries. In *QBE*, however, the Superior Court found that, under the facts averred, the victim’s death was a direct result of the claimed negligent acts. Specifically, the *QBE* Court held: “it is not alleged that the Fat Daddy Defendants assaulted the decedent as the cause of death, but rather that, after eviction, *they negligently restrained [him] or improperly restrained him causing his death.*” See *QBE Ins. Corp.*, 915 A.2d at 1225-26 (emphasis added). Framed in that manner, the *QBE* Court could not say that the underlying plaintiff was seeking damages for “bodily injury...arising from [an]... Assault and Battery.” Rather, in *QBE*, the decedent’s “bodily injury” could have “resulted from” an unintentional “accident”: as alleged, the death occurred *directly* because of the defendants’ negligence – not defendants’ intentional conduct. See also, *QBE Ins. Corp.*, 915 A.2d at 1229 (stating: “there is a litany of allegations of Appellants’ negligence...leading *directly* to [decedent’s] death”)(emphasis added).

The facts of *QBE* are, therefore, very much distinguishable from those in the case at bar. Here, one can simply not argue that the claimed negligence acts “directly caused” the victims’ damages; in this case, the damages most certainly occurred “as a result of” the intentionally fired gunshots. See *infra* at footnotes 6-13. Hence, *QBE* does not (as Appellants currently contend) “compel” coverage; rather, the facts of *QBE* cause the case to be inapposite to that currently before this Court.

Moreover, Appellants are also incorrect to argue that the *QBE* “Assault and Battery Exclusion” is “identical” to that found here. As was explained above, in *QBE*, the Superior Court was not able to consider its “Assault and Battery Exclusion” as a whole. Instead, principles of “waiver” forced the *QBE* Court to disregard certain “clarifying language” found within its “Assault and Battery Exclusion.” See *QBE Ins. Corp.*, 915 A.2d at 1228n.1 (stating: “*QBE* does not assert that subparts 1, 2, or 3, to part B of the exclusion” (the “clarifying language”) “have any relevance to this case”). This left the *QBE* Court with an assault and battery exclusion that, in practical effect, read: “This insurance does not apply to actions and proceedings to recover damages for ‘bodily injury’...arising from...Assault and Battery or any act or omission in connection with the prevention or suppression of such acts.” *Id.* at 1228-29.

Here, however, Penn-America based its summary judgment motion upon the entire “Assault and Battery Exclusion”; thus, Penn-America’s motion was based, in part, upon the “clarifying language” that was numbered and prefaced by the words “[w]hether or not caused by...” Although this Court is of the opinion that the plain meaning of the “general language” contained within the “Assault and Battery Exclusion” is itself sufficient to establish that there is no coverage for the underlying claims at issue here, the “clarifying language” is, nonetheless, important: it makes explicit the fact that the Assault and Battery Exclusion applies as well to the claimed prior acts of negligence.

II.B.2.b. The “assault and battery exclusion” found in *National Union* is fundamentally different than the one at issue here

National Union also provides no support for Appellants’ position. Indeed, in *National Union*, the Superior Court was interpreting an “Assault and Battery Exclusion” that was completely and utterly unlike that found in the case at bar.

In the *National Union* case, the president of the school district’s “parent-teacher organization” molested a young child; the child then sued the board of education for negligence. *National Union*, 709 A.2d at 911 & 913. This negligence, the underlying complaint asserted, included such acts

as: negligent hiring, negligent training and failing to perform an adequate background check. *Id.* at 913. In other words, all of the alleged “negligence” “contributed to” the molestation.

Importantly, however, the assault and battery exclusion at issue read simply:

This policy does not apply:

b) to any *claims* arising out of...(3) assault or battery...

c) to any *claim* arising out of bodily injury to...any person...

Id. at 912 (emphasis added).

The use of the word “claim” was important to the *National Union* Court. Indeed, the Superior Court defined the victim’s “claims” as “the omissions and negligence” of the school district; or, the very same “omissions and negligence” that “contributed to” the “assault and battery.” See *National Union*, 709 A.2d at 916. With the term “claim” defined in this manner, the Superior Court then reasoned that “the omissions and negligence” (the “claim”) could not be said to have “arisen out of” the assault and battery; quite the opposite, since the “omissions and negligence” occurred prior to and contributed to the assault and battery, it was the assault and battery that “arose out of” the claims. *Id.* at 916. Thus, the Superior Court held, the plain terms of the assault and battery exclusion did not apply to the negligence claims: they were not “claims arising out of...assault and battery.” *Id.* at 912.

The “Assault and Battery Exclusion” in the case at bar is vastly different than the one interpreted in *National Union*. Here, the exclusion expressly provides: the policy does “not provide coverage...for damages alleged or claimed for... ‘Bodily Injury’...or any other damages resulting from assault and battery or physical altercations.” See “Assault and Battery Exclusion” (emphasis added). The focus of this language is, therefore, upon the “damages” and “actual injuries” suffered by the victim, not upon the specific “claim” that the victim should happen to bring. And, although the underlying complaints “claim” negligence, each of the “actual damages” “resulted,” not from the “negligence,” but rather from the assault and battery. Thus, *National Union* is of no help to the current Appellants.

Additionally, in *National Union*, the Superior Court held that the lack of (what this Court has termed) “clarifying language” was important to its holding. See *National Union*, 709 A.2d at 914 (distinguishing its case from *Britamco Underwriters, Inc. v. Grzeskiewicz*, 639 A.2d 1208 (Pa.Super. 1994) by stating: “[i]n *Grzeskiewicz*,] the specific language of the exclusion [the “clarifying language”] covered the very conduct at issue.... Here, unlike *Grzeskiewicz*, the [current] complaint includes allegations grounded in negligence and the policy does not expressly exclude coverage for claims of negligence. Therefore, the *Grzeskiewicz* decision does not control our result”) & *National Union*, 709 A.2d at 914 (distinguishing its case from *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649 (Pa.Super. 1994) by stating: “The exclusions in the present case are less expansive, and less explicit, than the exclusions in *Grzeskiewicz* and *Weiner*. Notably, the policy contains no express exclusions for negligent supervision, control, or hiring, or for civil rights violations.... We will not supply exclusionary terms neither bargained for nor agreed by the parties.”).

Yet, as was stated above, the “Assault and Battery Exclusion” in the case at bar *does contain* the “clarifying language” that was missing in *National Union*. Moreover, the “clarifying language” at issue here explicitly covers each and every one of the alleged underlying negligent acts.

II.B.2.c. *QBE* and *National Union* do not (and cannot) support Appellants’ position that, “so long as the under-

lying allegations explicitly frame the cause of action as one sounding in negligence, as opposed to some intentional tort like assault and battery, no such exclusion pertaining to such a tort would be applicable”

According to Appellants, both *QBE* and *National Union* stand for the proposition: “so long as the underlying allegations explicitly frame the cause of action as one sounding in negligence, as opposed to some intentional tort like assault and battery, no such exclusion pertaining to such a tort would be applicable.” “Troxler Brief in Opposition,” at 9.¹⁶ This argument is, however, fundamentally at odds with the precedent set by the two cases, our Superior Court’s prior precedent and, indeed, our Supreme Court’s precedent.

First, Appellants’ argument fails when confronted with the language and reasoning of both *QBE* and *National Union*. In *QBE*, the Superior Court never held that the mere “framing” of a cause of action will act to defeat an assault and battery exclusion. Instead, the *QBE* Court (like the *Seybert* Court) directed its analysis to the “direct cause” of the claimed injuries: if the “actual injuries” were directly caused by the negligent act, the assault and battery exclusion would not bar the claim; on the other hand, if the “actual injuries” were directly caused by an intentional attack, with the claimed negligence merely “contributing to” that attack, the assault and battery exclusion would apply.

National Union also does not support Appellants’ argument. It is true that, in *National Union*, the underlying complaints did allege “negligence” and the Superior Court did hold that the negligence “claims” fell outside the scope of the assault and battery exclusion. Yet, it was the unique *language* of the interpreted exclusion that mandated the *National Union* holding.

As was quoted above, the *National Union* “Assault and Battery Exclusion” read: the “policy does not apply...to any *claims* arising out of...assault or battery.” *National Union*, 709 A.2d at 912 (emphasis added). This is exclusionary language that focuses attention upon the “claims” raised within the underlying complaint. Because of this, the *National Union* Court held that the exclusion did not encompass the specific negligence “claims” at issue: those claims did not fall within the exclusionary language since they did not “arise out of” the assault and battery; instead, the assault and battery “arose out of” the “claims.” *Id.* at 916. Thus, the facts unique to *National Union* required coverage for the prior negligent acts. *National Union* simply does not stand for the broad proposition that, “so long as the underlying allegations explicitly frame the cause of action as one sounding in negligence, as opposed to some intentional tort like assault and battery, no such exclusion pertaining to such a tort would be applicable.” “Troxler Brief in Opposition,” at 9.

Second, Appellants’ above argument cannot succeed because it ignores our Superior Court’s prior precedent; certainly, the *Seybert* Court was confronted with “underlying allegations [that] explicitly frame[d] the cause of action...in negligence.” The *Seybert* Court, however, found that those allegations fell within the scope of the assault and battery exclusion. *Seybert*, 757 A.2d at 383.

And, finally, Appellants’ argument is contrary to our Supreme Court’s precedent. In fact, our Supreme Court has instructed its lower courts that, for coverage questions, courts are *not* to look to the “cause of action” pleaded; “[i]nstead it is necessary to look at the factual allegations contained in the complaint.” *Haver*, 725 A.2d at 745. To be sure, if it were otherwise and courts “allow[ed] the manner in which the complainant frames the request for redress to control,” courts would be “encourag[ing] litigation through the use of artful pleadings designed to avoid exclusions in liability insurance policies.” *Id.* Appellants’ current argument, which asks this Court to look only to the “cause of action” pleaded, advocates the very position our Supreme Court instructs against.

Conclusion

In the case at bar, Appellants have brought negligence claims against the underlying defendants, attempting to “artfully plead” around the applicable Assault and Battery Exclusion. Yet, Appellants are simply unable to evade the unfortunate reality that, in this case, all of their actual damages were *directly caused* by Mr. Tolliver’s intentionally fired gunshots: the victims have not claimed that any of their damages were directly caused by a negligent act; rather, the negligence merely “contributed to” Mr. Tolliver’s shooting. Further, one cannot classify the fifteen-fired gunshots “in the direction of” the victims as an “accident.” And, since all of the damages “result[ed] from assault and battery or physical altercation[,],” all of the claims are encompassed within the clearly worded “Assault and Battery Exclusion.”

The rest of the issues raised within Appellants’ “Rule 1925(b) Statement of Matters Complained of on Appeal” are discussed in the following footnotes.^{17,18} I have therefore analyzed all of Appellants’ issues; none have merit. This Court recommends that the Superior Court uphold the contested Order and affirm the final judgment entered in this case.

DATE FILED: February 12, 2009

¹ See also, “Defendants Lamar Ezell’s and Asa Howard’s Reply to Plaintiff’s Motion for Summary Judgment,” filed May 29, 2008 (hereinafter “Ezell and Howard Brief in Opposition”), at 9; “Defendant Earl Troxler’s Brief in Opposition to Plaintiff’s Motion for Summary Judgment,” filed May 29, 2008 (hereinafter “Troxler Brief in Opposition”), at 9; “Defendant, Beatrice Woody, individually and as Administratrix of the Estate of Jerry McCrommon, III, deceased, Reply to Plaintiff’s Motion for Summary Judgment,” filed May 29, 2008 (hereinafter “Woody Brief in Opposition”), at 2.

² The four underlying complaints agree upon every single essential underlying fact. Because of this, I have chosen to omit citation in this area: not only would citation have been unwieldy, but it would also have taken away from a proper understanding of the facts.

³ This Court has tried to list every single claim raised within the various complaints; the following list is a compilation of these claims. It should be noted that not every complaint raises each listed claim. This portion of the opinion is indented for ease of reading and recognition.

⁴ Certainly, when determining an insurer’s “duty to defend,” a court cannot look at any “outside” facts; rather, the insurer’s “duty to defend” “is to be determined *solely* by the allegations of the complaint in the action.” *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 896 (Pa. 2006)(emphasis in original).

⁵ Obviously, this Court expresses no opinion on the potential merits of any unargued position. However, I do note that, in Pennsylvania, “the test of whether injury is a result of an accident is to be determined from the viewpoint of the insured and not from the viewpoint of the one that committed the act causing the injury.” *Mohn v. Am. Cas. Co. of Reading*, 326 A.2d 346, 348 (Pa. 1974). Therefore, our Superior Court has held: the “negligence [of the insured] leading to intentional acts [by a third-party or another insured] may nevertheless be considered an ‘accident,’ and thus an ‘occurrence’ where so defined.” *Donegal Mut. Ins. Co. v. Baumhammers*, 893 A.2d 797, 810 (Pa.Super. 2006)(*en banc*), *rev’d on other grounds by Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007), see also *QBE Ins. Corp.*, 915 A.2d at 1226.

⁶ “Complaint in Civil Action,” filed on behalf of Plaintiff Lamar E. Ezell, filed August 13, 2007, at docket number

GD07-012493 (hereinafter “Ezell Complaint”), at ¶20 (firing at Plaintiff: “Defendant, Darnell Tolliver, reached for his 9mm hand gun and fired 15 rounds into the direction of Plaintiff and his two companions...striking all three of them.”) & ¶22 (fleeing: “Defendant, Nasib Aboud, did not object to Defendant Tolliver firing at Plaintiff, Earl C. Troxler and Asa J[.] Howard as they were fleeing the parking lot.”).

⁷ “Complaint in Civil Action,” filed on behalf of Plaintiff Asa Howard, filed August 13, 2007, at docket number GD07-012495 (hereinafter “Howard Complaint”), at ¶20 (firing at Plaintiff: “Defendant, Darnell Tolliver, reached for his 9mm hand gun and fired 15 rounds into the direction of Plaintiff and his two companions...striking all three of them.”) & ¶22 (fleeing: “Defendant, Nasib Aboud, did not object to Defendant Tolliver firing at Plaintiff, Earl C. Troxler and Lamar Ezell as they were fleeing the parking lot.”).

⁸ “Plaintiff’s Amended Complaint,” filed on behalf of Plaintiff Earl C. Troxler, filed October 2, 2007, at docket number GD06-014508 (hereinafter “Troxler Complaint”), at ¶13 (firing at Plaintiff: “Defendant Tolliver reached for his 9-[millimeter] handgun and fired 15 rounds in the direction of Plaintiff and his two companions”) & ¶15 (fleeing: “...Defendant Nasid Aboud did not object to Defendant Tolliver firing at Plaintiff and his two companions as they were fleeing the parking lot.”).

⁹ Jerry McCrommon was an “innocent bystander” and was shot twice by Mr. Tolliver; that is an “assault and battery or physical altercation[.]” See “Complaint in Civil Action,” filed on behalf of Plaintiff Beatrice Woody, individually and as Administratrix of the Estate of Jerry McCrommon, III, deceased, filed May 9, 2007, at docket number GD06-014508 (hereinafter “Woody Complaint”), at ¶13 (“innocent bystander”: “...At all relevant times, Plaintiffs decedent was an innocent bystander and not with non-party Earl C. Troxler, non-party, Asa Howard, and/or non-party Lamar E. Ezell.”) & ¶19a (shot twice: “Decedent suffered...[t]wo gun shot wounds to the chest”).

¹⁰ According to the “Ezell Complaint”:

32. ...Plaintiff did suffer the following injuries:

- A. A gun shot wound[] to the right side;
- B. Injuries and damages to his internal organs;
- C. Scarring and disfigurement from the bullet wound;
- D. Various surgeries as a result of the shooting;
- E. Post-traumatic syndrome, headaches, nightmares, psychosis, shock anxiety, stress and sleeplessness;
- F. Internal injuries
- I. Other severe and serious injuries as set forth in Plaintiff’s medical records.

33. As a result of these injuries, Plaintiff Lamar Ezell, has incurred the following damages:

¹¹ According to the “Howard Complaint”:

32. ...Plaintiff did suffer the following injuries:

- A. Gun shot wounds to his chin, right side, buttocks and testicles;
- B. Injuries and damages to his internal organs;
- C. Scarring and disfigurement from the bullet wound;

D. Various surgeries as a result of the shooting;

E. Post-traumatic syndrome, headaches, nightmares, psychosis, shock anxiety, stress and sleeplessness;

F. Internal injuries

I. Other severe and serious injuries as set forth in Plaintiff's medical records.

33. As a result of these injuries, Plaintiff Asa Howard, has incurred the following damages:

¹² According to the "Troxler Complaint":

21. ...Plaintiff did suffer the following injuries:

- a. Two gun shot wounds to the right upper chest;
- b. Lung damage;
- c. Liver damage;
- d. Broken ribs;
- e. Disfigurement from the bullet holes; and
- f. Various surgeries as a result of the shooting.

22. As a result of these injuries, Plaintiff Earl C. Troxler, has incurred the following damages:

¹³ According to the "Woody Complaint":

19. ...Decedent suffered the following:

- a. Two gun shot wounds to the chest;
- b. Decedent was the victim of a period of pain and suffering;
- c. Decedent died;
- d. The Administratrix...has suffered financial loss, has incurred general expenses and bills;
- e. Decedent experienced extreme pain and suffering and there were unnecessary expenditures for medical bills;
- f. Plaintiff has lost the right to future maintenance and support;
- g. Plaintiff and Decedent's alleged minor child have lost the ability to maintain or sustain a family relationship; and
- h. Plaintiff and Decedent's alleged minor child have lost such other values and have sustained other damages as are properly allowable by Pennsylvania law, including but not limited to wages and future wages.

¹⁴ Mr. Potter's Estate also sued the employees and owners of Fat Daddy's Nightclub; for simplicity, however, this Court will refer to the underlying defendants as either the "nightclub" or the "defendants."

¹⁵ And, indeed, a review of QBE's appellate brief shows this to be true. See "Brief of Appellee QBE Insurance Corporation," filed April 18, 2006, in *QBE Insurance Corp. v. M&S Landis Corp.*, 915 A.2d 1222, available at 2006 WL 3957495, at *2 (declaring "[i]n relevant part the assault and battery exclusion provides" and then omitting subsections B(1) through (3)).

¹⁶ See also, "A4 Brief in Opposition," at 6 (arguing an assault and battery exclusion does "not apply to...negligence claims"); "Ezell and Howard Brief in Opposition," at 9 (arguing that *QBE* and *National Union* mandate coverage for negligence claims); "Woody Brief in Opposition," at 4 (arguing that all prior acts of

negligence fall outside of an assault and battery exclusion).

¹⁷ Appellants have also argued that the "assault and battery exclusion" is ambiguous. According to the various "briefs in opposition to summary judgment," this "ambiguity" arises out of one of Penn-America's arguments; specifically, Penn-America argued that its "Assault and Battery Exclusion" was broader than the exclusion at issue in *QBE* "because the Penn-America policy contains the phrase 'resulting from' rather than 'arising from.'" "Troxler Brief in Opposition," at 7. In arguing against Penn-America's position, Appellants claimed that the two phrases were either synonymous or, "[a]t worst, it can be argued that the 'result from' vs. 'arise from' distinction...is ambiguous." "Ezell and Howard Brief in Opposition," at 13. Yet, as can be seen from this Court's analysis, my decision was not based upon any "result from"/"arise from" dichotomy. Rather, this Court held in Penn-America's favor because the facts, as alleged in the underlying complaints, averred that the victims' actual damages were "directly caused by" the intentional shooting. See *Seybert*, 757 A.2d at 383. Therefore, Appellants' "ambiguity" argument is misplaced.

¹⁸ Within Appellants' Rule 1925(b) Statement, Appellants also assert that the "assault and battery exclusion" is "violative of public policy." That argument was never raised before this Court; the argument is therefore waived. *Devine v. Hutt*, 863 A.2d 1160, 1169 (Pa.Super. 2004)(holding: "arguments not raised initially before the trial court in opposition to summary judgment cannot be raised for the first time on appeal.").

Commonwealth of Pennsylvania v. Eric Turner

Search Warrant—Plain View Doctrine

1. Defendant was convicted of Aggravated Assault and Recklessly Endangering Another Person and sentenced to imprisonment of not less than 60 months nor less than 120 months.

2. Seizure of a shotgun shell in plain view was legal because the officer was in a lawful vantage point when he observed the shotgun shell sitting on the passenger seat after having just left the scene of a shooting where witnesses said that the defendant had fired several shots from a shotgun and then fled the area in a black sedan similar in appearance to the one in which the shell was observed.

3. A warrant to search the vehicle was sufficiently specific in describing the object of the search as anything that would connect the vehicle to the defendant because the vehicle was not registered to the defendant.

(Lynn E. MacBeth)

Ilan Zur for the Commonwealth.

Stephen H. Begler for Defendant.

No. CC200717717. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division.

OPINION OF THE COURT

Manning, J., December 19, 2008—The Defendant, Eric Turner, was charged with two counts each of Criminal Attempt (Homicide),¹ Aggravated Assault² and Recklessly Endangering Another Person (REAP).³ A Motion to Suppress was filed by the defendant and, after a hearing, denied by the Court. The defendant waived his right to a jury trial and, following trial, was adjudged guilty at both Aggravated Assault counts and both REAP counts. He was adjudged not guilty at both Criminal Attempt counts. The defendant was sentenced on

August 13, 2008 to not less than 60 months nor more than 120 months at one Aggravated Assault count and no further penalty at the remaining counts. The defendant filed a timely Notice of Appeal. In a Concise Statement of Matters Complained of on Appeal, he claimed that the Court erred in denying the Motion to Suppress the evidence seized from a vehicle. He also claimed that verdict was against the weight of the evidence.

The evidence established that on October 12, 2007 Clairton Police Officer Christopher Adams was dispatched to Building 17 on Marion Circle to investigate a report of shots fired. Upon arriving, he was met by Laticia Ogeltree who told him that a black male known to her as Eric Turner had fired several rounds from a shotgun in her direction. An unknown female then directed the officer's attention to a dumpster where he found a live 12-gauge shotgun shell. He also examined the door of Ogeltree's apartment and noticed a dent below the door knob that was about the size of a rifle slug from a shotgun. Other witnesses told the police that the defendant left the scene after the shooting in a black sedan and was seen in the area of Third and Wadell Streets in Clairton. Officer Adams proceeded to that area and observed a black sedan that matched the witnesses' description parked on the street. No one was near the vehicle. The officer walked over to the vehicle and, looking through a window, observed a shotgun shell in plain view on the front passenger seat. The door was not locked and the officer opened the door and retrieved the shell. He did not search the vehicle at that time. Later, however, a search warrant was obtained and the vehicle searched.

The defendant sought to suppress the shotgun shell taken by the officer before the warrant and the evidence seized pursuant to the warrant. He claimed that the seizure of the shell was improper and that the warrant was defective because it too broadly described the evidence to be seized and the affidavit of probable cause did not sufficiently establish the reliability of the witnesses who provided the information contained in the affidavit.

The seizure of the shell from the vehicle was lawful. The plain view doctrine permits the warrantless seizure of evidence in plain view when: (1) an "officer views [the] object from a lawful vantage point"; and (2) it is "immediately apparent" to him that the object is incriminating. *Commonwealth v. Petroll*, 738 A.2d 993, 999 (1999). Our Supreme Court has expressly recognized that incriminating objects "plainly viewable [in the] interior of a vehicle" are in "plain view" and, therefore, subject to seizure without a warrant. *Commonwealth v. Colon*, 777 A.2d 1097, 1103 (Pa.Super. 2001) (citing *Commonwealth v. Milyak*, 493 A.2d 1346, 1348 (1985)). This doctrine rests on the principle that an individual cannot have a "reasonable expectation of privacy in an object that is in plain view." *Petroll*, 738 A.2d at 999.

The evidence established, without dispute, that Officer Adams was in a lawful vantage point when he observed the shotgun shell sitting on the passenger seat. He was standing on a public street looking into the car when he observed the shell. Moreover, the incriminating nature of the shell was immediately apparent. The officer had just left the scene of a shooting where the witnesses said that the defendant had fired several shots from a shotgun and then fled the area in a black sedan similar in appearance to the one in which the shell was observed. Officer Adams certainly had probable cause to believe that the shotgun shell he saw in the vehicle was evidence related to the shooting and he lawfully seized it.

The claim that the warrant was too broad in the items that were to be searched for is also without merit. A search warrant cannot be used as a general investigatory tool to uncover evidence of a crime. *In re Casale*, 517 A.2d 1260, 1263 (1986); *Commonwealth ex rel. Ensor v. Cummings*, 207 A.2d 230, 231 (1965). Nor may a warrant be so ambiguous as to allow the executing officers to pick and choose among an

individual's possessions to find which items to seize, which would result in the general "rummaging" banned by the Fourth Amendment. See *Commonwealth v. Santner*, 454 A.2d 24 (1982) (quoting *Marron v. United States*, 275 U.S. 192, 195 (1927)). Thus, Pa.R.Crim.P. 205 specifies the necessary components of a valid search warrant. The comment to Rule 205 provides, however, that even though general or exploratory searches are not permitted, search warrants should "be read in a common sense fashion and should not be invalidated by hypertechnical interpretations. This may mean, for instance, that when an exact description of a particular item is not possible, a generic description will suffice." Pa.R.Crim.P. 205 (cmt.). Embracing this approach, we have held that "where the items to be seized are as precisely identified as the nature of the activity permits...the searching officer is only required to describe the general class of the item he is seeking." *Commonwealth v. Matthews*, 446 Pa. 65, 285 A.2d 510 (1971).

Though somewhat broadly defined, the items that this search warrant sought were as precisely identified as the nature of the offense permitted. The officers were seeking any evidence that would connect the vehicle both to the incident at Marion Circle and would connect the vehicle to the defendant. The evidence established that the vehicle was not registered to the defendant, so it was necessary for the officers to connect the defendant to the vehicle. Accordingly, in addition to such obvious items of evidence as a shotgun and ammunition for the shotgun, just about any other physical evidence that would connect the defendant to this vehicle would also have been properly sought, as would evidence tending to establish why the defendant may have shot at the victim. This Court correctly held that the description of the items sought set forth in the Affidavit and Search Warrant were sufficiently specific.

The final claim with regard to the warrant involves the defendant's assertion that the affidavit failed to establish the reliability of the persons who provided the information that was set forth in the affidavit. As the Court noted at the hearing, "...one need not establish the reliability of the information when the informant is named. It's only when the informant is a confidential, unnamed informant that requiring verification of the prior information is necessary to support any information received from a "confidential," unidentified informant." (N.T. p. 14).

As the information that was set forth in the affidavit which resulted in the issuance of the warrant was from named sources, it was not necessary for the reliability of those sources to be otherwise established. The Superior Court has held that identified citizens who report their observations of criminal activity to police are assumed to be trustworthy, in the absence of special circumstances. *Commonwealth v. Sudler*, 436 A.2d 1376 (1981); *Commonwealth v. Frazier*, 410 A.2d 826 (1979). The defendant has not argued, nor does the record establish, that there were any "special circumstances" which would have cast doubt on the inherent trustworthiness of the person identified in the affidavit. Accordingly, the suppression motion was properly denied.

The defendant also challenges the weight of the evidence. In his Concise Statement, he claims, "The finding of guilt by the Trial Court was against the weight of the evidence." The Pennsylvania Superior Court recently held:

It is well settled that when a trial court requests a statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925, that statement must indicate, with specificity, the error to be addressed on appeal.

When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review. When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on

appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues.

In other words, a Concise Statement which is too vague to allow the court to identify the issue raised on appeal is the functional equivalent of no Concise Statement at all. *Commonwealth v. Dowling*, 778 A.2d 683, 686-87 (Pa.Super. 2001) (citations and quotation marks omitted). 'Even if the trial court correctly guessed the issues Appellant brings before this Court, the vagueness of Appellant's Concise Statement renders all issues raised therein waived.' *Commonwealth v. Heggins*, 809 A.2d 908, 912 (Pa.Super. 2002) (citation omitted).

Appellant's concise statement raises a sufficiency of the evidence claim by stating that '[t]here was insufficient evidence to sustain the verdict of guilt beyond a reasonable doubt.' Appellant's Concise Statement of Matters Complained of on Appeal, 6/10/03, no. 1. We have previously held that such language is too vague to permit review. *Commonwealth v. Lemon*, 804 A.2d 34, 37 (Pa.Super. 2002) (statements that '[t]he verdict of the jury was against the evidence,' '[t]he verdict of the jury was against the weight of the evidence,' and "[t]he verdict was against the law' were too vague to permit adequate review); *Commonwealth v. Seibert*, 799 A.2d 54, 62 (Pa.Super. 2002) (statement that '[t]he verdict of the jury was against the weight of the credible evidence as to all of the charges' was too vague).

Commonwealth v. McCree, 857 A.2d 188, 192 (Pa.Super. 2004). The defendant has failed to explain with the required specificity how the verdict was against the weight of the evidence. Moreover, it is not obvious from the record on what basis the defendant could claim that the verdict was contrary to the evidence. Accordingly, the weight of the evidence claim is waived.⁴

BY THE COURT:
/s/Manning, J.

Date: December 19, 2008

¹ 18 Pa.C.S.A. §903(a).

² 18 Pa.C.S.A. §2702(a)(1).

³ 18 Pa.C.S.A. §2705.

⁴ It is important to note that this was a non-jury trial. This Court was the fact finder and is satisfied that the verdict was amply supported by the evidence.

Commonwealth of Pennsylvania v. Rodney Matthews a/k/a William Taylor

Sentencing—County Jail—Reduction of Sentence

Defendant pled guilty to burglary and escape and received sentences below the standard sentencing range guidelines. A Motion to Modify Sentence requested a reduction of the sentences to qualify Defendant to serve his sentence in the Allegheny County Jail pursuant to 42 Pa.C.S.A. §9762(2) which states that two maximum terms of two years or more but less than five years may be...committed to a county prison within the jurisdiction of the court. The court denied the request, stating that to grant the request would have been a significant departure from the suggested ranges given the current convictions.

(Lynn E. MacBeth)

Michael W. Streily for the Commonwealth.
Carrie L. Allman for Defendant.

Nos. CC200616618 and CC200800969. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Reilly, J., January 20, 2009—The defendant, Rodney Matthews, plead guilty on April 28, 2008, in the above referenced cases. He was sentenced as follows: at CC200800969 to 2 to 5 years imprisonment; at CC200616618 1 to 3 years consecutive. The defendant has appealed the sentences. On November 14, 2008, the defendant was ordered to file a concise statement of matters complained of on appeal, in accordance with Pa.R.A.P. Rule 1925(b). On December 5, 2008, a concise statement of matters complained of, in accordance with Pa.R.A.P. Rule 1925(b), was filed. The defendant asserts that the sentence imposed was manifestly excessive, unreasonable, and an abuse of discretion.

At the sentencing hearing of April 28, 2008, the defendant was sentenced for the first-degree felony (burglary) to 2 to 5 years imprisonment, which was below the standard sentencing range guidelines. The defendant was also sentenced to a consecutive term of 1 to 3 years imprisonment for the third degree felony (escape). This also was below the standard sentencing range guidelines. At the September 22, 2008 proceedings on the defendant's Motion to Modify Sentence, counsel attempted to persuade the court to change the sentence in order to have the defendant be eligible to serve his sentences at the Allegheny County Jail. The defendant's counsel referenced 42 Pa.C.S.A. §9762(2) as legal authority that states:

(2) maximum terms of two years or more but less than five years may be committed to the Bureau of Corrections for confinement or maybe committed to a county prison within the jurisdiction of the court;

The court advised defense counsel that it was not going to lessen the sentences any further. To grant the request would have been a significant departure from the suggested ranges given the defendant's current convictions. In light of all the circumstances, the sentences for these convictions were within the guidelines and appropriate. *Commonwealth v. McCloughan*, 279 Pa.Super. 599, 421 A.2d 361 (1980). The defendant asserts that because the court had stated that if there was a way to word the sentence to allow the defendant to serve his time at the County Jail, that the court would consider it. Because the sentences are consecutive, it appears that the minimum term of incarceration is three years and thus, the sentencing court is without authority to permit the sentences to be served at the county prison in accordance with 42 Pa.C.S.A. §9762(2).

BY THE COURT:
/s/Reilly, J.

Date: January 20, 2009

Commonwealth of Pennsylvania v. David J. Baird

Probation Revocation Hearing—Hearsay

1. Prior false allegations of sexual abuse were not made by victim where defense asserted that victim merely accused someone but never filed charges, and that victim accused another individual, but those charges were still pending.

2. Prior consistent statements were admitted to rehabilitate the victim's credibility, and were not excluded as fabricated

because they were made before the motive to fabricate arose.

3. Prior inconsistent statements of another witness were admitted over a hearsay objection because they were used to impeach the witness's credibility, not to prove the truth of the matter asserted.

(Lynn E. MacBeth)

Jennifer DiGiovanni for the Commonwealth.

John Elash for Defendant.

Nos. CC200709115, 200711296, 200712456. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Zottola, J., January 30, 2009—On May 5-7th, 2008, following a jury trial, the Defendant, David Baird, was found guilty on multiple charges, and was sentenced on July 30th 2008.

At CC. 200711296, the Defendant was convicted of four (4) counts of Involuntary Deviate Sexual Intercourse, two (2) counts of Indecent Assault, Sexual Assault, Statutory Sexual Assault, Unlawful Contact with a Minor, Endangering the Welfare of Children, Corruption of Minors, and Indecent Exposure. The Defendant was sentenced to a period of incarceration of not less than ten (10) nor more than twenty (20) years.

At CC. 200709115, the Defendant was convicted of three (3) counts of Involuntary Deviate Sexual Intercourse, Sexual Assault, Statutory Sexual Assault, Unlawful Contact with a Minor, Endangering the Welfare of Children, Corruption of Minors, Indecent Exposure, Indecent Assault of Person Less than 13 Years of Age, and Indecent Assault. The Defendant was sentenced to a period of incarceration of not less than ten (10) nor more than twenty (20) years to run consecutive to CC. 200711296.

At CC. 200712456, the Defendant was convicted of Corruption of Minors and Indecent Assault. The Defendant was sentenced to a period of not less than five (5) nor more than ten (10) years to run consecutive to CC. 200711296 and CC. 200709115.

The Defendant filed a timely appeal of this Court's sentence.

Pursuant to Rule Pa.R.A.P. 1925(b), the Defendant filed a Motion of Matters Complained of on Appeal on November 7th, 2008, from which the following is taken verbatim.

1) The Court erred in precluding defense counsel from inquiring into whether James Alan Brown and Laythan Foster, two of the alleged victims, had made prior false allegations of sexual abuse against other individuals not the Defendant.

2) The Court erred in permitting the Commonwealth to introduce Cory Jay Pina's and Tang Zhiyan's testimony that James Alan Brown told them the Defendant had sexually molested him. Those statements were prior consistent statements and thus impermissible hearsay.

3) The Court erred in permitting the Commonwealth to introduce the testimony of Joseph Snyder that he observed a forensic interview where Laythan Foster stated the Defendant had sexually molested him. Those statements were prior consistent statements and thus impermissible hearsay.

4) The Court erred in permitting the Commonwealth to introduce William Trogler's testimony about what Gillette Hawkins told him about the Defendant allegedly sexually molesting him. The Commonwealth should not have been permitted to impeach its own witness, Gillette Hawkins, with hearsay testimony.

5) Finally, the Court erred in denying the Defendant's motion for judgment of acquittal regarding Gillette Hawkins. At the time the Commonwealth had closed its case, it had not presented sufficient substantive evidence to support the Defendant's conviction on all the counts related to Mr. Hawkins.

FACTS OF THE CASE

On May 5-7th, 2008, a jury trial was held before this court, where the Defendant, David Baird, was charged with sexually assaulting three separate underage victims, James Brown, Laythan Foster, and Gillette Hawkins. The Defendant came into contact with all three victims while serving as a youth pastor for the Covenant Church of Pittsburgh. (J.T. pp. 43)¹ The Commonwealth presented the first victim, James Brown, at trial. Mr. Brown testified that he first met the Defendant when he was thirteen (13) years old and quickly established a close relationship with the Defendant through the youth church program. (J.T. pp. 43-44) Mr. Brown further testified that he would often spend the night at the Defendant's home, sometimes along with other youth group members. (J.T. pp. 45) Mr. Brown stated that one night when he was approximately fourteen (14) years old, he was awakened by the Defendant attempting to place his penis in Mr. Brown's mouth. Mr. Brown then testified that this happened on three other occasions over a six month period. (J.T. pp. 49) After each incident occurred, the Defendant would ask Mr. Brown to pray with him. (J.T. pp. 48) Mr. Brown eventually left the Defendant's youth group and lost contact with the Defendant for several years. (J.T. pp. 52)

In the spring of 2007, the Defendant called Mr. Brown, who had moved to Chicago, and informed him that Laythan Foster was accusing him of sexual abuse. (J.T. pp. 57) Mr. Brown and Mr. Foster briefly knew each other as a result of their participation in the Defendant's youth group, but had not spoken in years. (J.T. pp. 148) The Defendant asked Mr. Brown to stand as a character witness for him. (J.T. pp. 57) Mr. Brown testified that he then contacted Mr. Foster and asked him to give his name to the detectives working on the case. (J.T. pp. 59) A friend of Mr. Brown, Cory Jay Pina, testified that when Mr. Brown was sixteen (16) years old he confessed to him that the Defendant had sexually assaulted him on several occasions. (J.T. pp. 109-110) Another friend, Tang Zhiyan, also testified that in January 2007, Mr. Brown told him that he had been molested by his youth pastor as a teenager. (J.T. pp. 118)

The second victim, Laythan Foster, testified that he became involved with the Defendant's youth group when he was ten (10) years old. (J.T. pp. 129) Mr. Foster also testified that he established a close relationship with the Defendant and would often spend the night at his residence. (J.T. pp. 131) Mr. Foster stated that the first incident occurred one night at the Defendant's home while Mr. Foster was still only ten (10) years old. (J.T. pp. 138) Mr. Foster further testified that the Defendant laid on the couch with him, preformed oral sex on him, and told Mr. Foster to do the same to him. (J.T. pp. 138) Mr. Foster also testified that the Defendant would apologize after each incident and ask Mr. Foster to pray with him. (J.T. pp. 140) Mr. Foster stated that over an eleven (11) year period, oral sex occurred between twenty (20) and forty (40) times. (J.T. pp. 141) Mr. Foster further testified that when he was an early teenager the Defendant forced anal sex on him twice. (J.T. pp. 142-144) When Mr. Foster was eighteen (18) years old he told a teacher about the abuse and it was subsequently reported to the Pittsburgh Police Department. (J.T. pp. 146)

The third victim, Gillette Hawkins, testified that he met the Defendant when he was thirteen (13) years old while training at a local boxing gym. (J.T. pp. 203) When he was sixteen (16) years old, Mr. Hawkins received community service on a DUI charge and agreed to complete it under the supervision of the

Defendant. (J.T. pp. 204) Mr. Hawkins wrote a letter to the Penn Hills Police Department from prison in July of 2007, where he stated that in 2002, at age sixteen (16), he was sexually assaulted by the Defendant while attempting to serve his community service. (J.T. pp. 207) Mr. Hawkins maintained this story until the time of trial when he then testified that he made the story up because someone named "Brown" paid him \$2,500 to do so. (J.T. pp. 207-208) A check of Mr. Hawkins accounts showed that he did not receive \$2,500 and Mr. Hawkins later testified that his earlier testimony was entirely made up. (J.T. pp. 230) William Trogler, detective with the Penn Hills Police Department, interviewed Mr. Hawkins after receiving his letter. (J.T. pp. 232-233) Detective Trogler testified that Mr. Hawkins told him that the Defendant masturbated with and engaged in anal sex with Mr. Hawkins. (J.T. pp. 239) Detective Trogler stated that Mr. Hawkins further told him that after the incident, the Defendant asked Mr. Hawkins to pray for forgiveness with him. (J.T. pp. 239) Detective Trogler further testified that the fact that the Defendant asked his victims to pray after assaulting them was never reported in the media. (J.T. pp. 241)

A jury subsequently found the Defendant guilty of all counts in the case involving victim James Brown. The Defendant was also found guilty of all counts involving victim Laythan Foster. Finally, with respects to Gillette Hawkins, the Defendant was only found guilty of Corruption of a Minor and Indecent Assault.

MATTERS COMPLAINED OF ON APPEAL

First, the Defendant alleges that this court erred in precluding the defense counsel from inquiring into whether Mr. Brown and Mr. Foster had previously made false allegations of sexual abuse against other individuals. However, in the case of Mr. Brown, the defense counsel did not provide the court with any evidence that Mr. Brown had made any false accusations of sexual abuse in the past. (J.T. pp. 90-91) As it pertains to Mr. Foster, the defense counsel claimed that the victim had previously accused his father, although charges were never filed. (J.T. pp. 151-152) Defense counsel also claimed that Mr. Foster accused somebody at his school, though those charges were still pending and the issue was unresolved at the time of trial. Therefore, the defense counsel did not provide adequate evidence that any false allegations were made. Thus, this court did not err in precluding the defense counsel from inquiring into any previous false allegations of sexual abuse.

Second, the Defendant alleges that this court erred in permitting the Commonwealth to allow testimony from Cory Jay Pina and Tang Zhiyan that Mr. Brown told them the Defendant had sexually molested him. The Defendant maintains that those statements constituted prior consistent statements and are therefore impermissible hearsay. Under Pa.R.E. 613(c)(1), prior consistent statements may be admitted to rehabilitate a witness whose credibility has been attacked with a charge that the witness fabricated the trial testimony and the prior statement was made before the motive to fabricate arose. *Commonwealth v. Harris*, 578 Pa. 377, 391 (2004). The Defense counsel suggested that Mr. Brown fabricated his testimony after hearing that Mr. Foster already came forward because he was angry with the Defendant's church and wanted to "get them." (J.T. pp. 101) The prior consistent statements by Mr. Brown of the Defendant's sexual assault that both Mr. Pina and Mr. Zhiyan testified to were each made before February 2007. (J.T. pp. 112, 118). Mr. Brown was not notified about Mr. Foster's accusations until the Defendant informed him of them in the spring of 2007. (J.T. pp. 57) Therefore, the prior consistent statements were made before the motive to fabricate arose, and were introduced to rehabilitate Mr. Brown's credibility. Thus, this court did not err in

permitting the prior consistent statements to be admitted.

Third, the Defendant further alleges that this court erred in permitting the Commonwealth to introduce the testimony of Officer Snyder that he observed a forensic interview where Laythan Foster stated the Defendant had sexually molested him. The Defendant also maintains that those statements were prior consistent statements and thus impermissible hearsay. Again, the Defendant attacked Mr. Foster's credibility by suggesting that Mr. Foster terminated his relationship with the Defendant's church because he was angry that the Defendant had reprimanded him. (J.T. pp. 178-179) Since the Defendant attempted to impeach Mr. Foster, the prior consistent statements made by Mr. Foster to Mr. Snyder were admissible to rehabilitate his credibility. Therefore, this court did not err in permitting those statements to be admitted.

Fourth, the Defendant avers that this court erred in permitting the Commonwealth to introduce Officer William Trogler's testimony about what Gillette Hawkins told him about the Defendant allegedly sexually molesting him. The Defendant contends that the Commonwealth should not have been permitted to impeach its own witness with hearsay testimony. However, at trial, Mr. Hawkins testified that he was not sexually assaulted by the Defendant, in contrast to his earlier statements. Therefore, the Commonwealth used Mr. Hawkins' prior inconsistent statements to impeach their witness' credibility, not to prove the truth of the matter asserted. Thus, this court did not err in allowing the Commonwealth to impeach its own witness with Officer Trogler's testimony.

Fifth, the Defendant alleges that this court erred in denying the Defendant's motion for judgment of acquittal regarding Gillette Hawkins due to lack of sufficient evidence to support a conviction. "The test in determining if the evidence is sufficient to sustain a criminal conviction, whether accepting as true all of the evidence of the Commonwealth, and all reasonable inferences arising therefrom, upon which the jury could properly have reached its verdict, was it sufficient in law to prove beyond a reasonable doubt that the appellant was guilty of the crime of which he stands convicted." *Commonwealth v. Burton*, 301 A.2d 599, 600 (Pa.Super. 1973).

It is within the discretion of the fact finder to believe all, part, or none of the evidence. *Commonwealth v. Lyons*, 833 A.2d 245, 258 (Pa.Super. 2003). The fact finder can find proof beyond a reasonable doubt from wholly circumstantial evidence. *Lyons*, 833 A.2d at 258. It is also within the purview of the fact finder's responsibilities to determine credibility of witnesses. *Id.* at 255. The fact finder can rely on such factors to determine reliability including consistency of statements, apparent mental state of the declarant, and potential reasons for the declarant to fabricate. *Id.* The Commonwealth presented the testimony of three separate victims, James Brown, Laythan Foster, and Gillette Hawkins, all who testified that the Defendant sexually assaulted them. Furthermore, all three victims testified to a similar pattern of behavior by the Defendant, including requiring each victim to pray with him after each assault took place. Therefore, taken in the light most favorable to the Commonwealth, the evidence presented was sufficient to support the conviction.

Based on the foregoing, the Defendant's issues raised as matters complained of on appeal are deemed to be without merit.

BY THE COURT:
/s/Zottola, J.

¹ J.T. refers to the transcript of the Jury Trial dated May 5-7th, 2008.

Commonwealth of Pennsylvania v. Michael Davis

Sentencing—Sentencing Above Aggravated Range

1. Defendant was convicted of two counts each of Involuntary Deviate Sexual Intercourse, Statutory Sexual Assault, Aggravated Indecent Assault, Corruption of Minors and Indecent Assault in connection with crimes against a 14-year-old girl with whose family he held a position of trust. He was sentenced to two consecutive terms of 8 to 20 years, slightly above the aggravated range for the two counts of Involuntary Deviate Sexual Intercourse. The sentence was proper and would not be disturbed by the court because it reflected the defendant's violation of trust and callous behavior. Moreover, had the court stayed within the guideline ranges but chosen to sentence at any of the other counts, the aggregate would certainly have been more than what was actually imposed.

2. The court did not err in admitting a page from the victim's journal, even though that particular page had not been produced in discovery. There was no allegation that the omission of the page was intentional. Moreover, the defense opened the door to the journal on cross-examination by badgering the victim on the number and frequency of sexual acts.

3. The court did not find it prosecutorial misconduct for the prosecutor to mention in her closing argument that defendant was the victim's mother's drug dealer. The statements were made within the context of explaining the defendant's presence in the victim's home and, certainly, were not the reason the defendant was convicted because there was ample evidence to support the charges.

(Lynn E. MacBeth)

Shanicka Kennedy for the Commonwealth.
Scott Coffey for Defendant.

No. CC200613205. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

McDaniel, P.J., January 26, 2009—The Defendant has appealed from the judgment of sentence entered by this Court on November 14, 2007. A review of the record reveals that the Defendant has failed to raise any meritorious issues and, therefore, the judgment of sentence must be affirmed.

The Defendant was charged with Involuntary Deviate Sexual Intercourse,¹ Statutory Sexual Assault,² Aggravated Indecent Assault,³ Corruption of Minors⁴ and Indecent Assault⁵ in relation to a series of events that occurred with a 14-year-old child. Following a jury trial, he was convicted of all charges, and on November 14, 2007, he appeared before this Court and was sentenced to two (2) consecutive terms of imprisonment of eight (8) to twenty (20) years. Post-Sentence Motions were filed and denied by this Court on November 26, 2007. This appeal followed.

1. Weight of the Evidence

The Defendant initially argues that the verdict was against the weight of the evidence. However, contrary to the Defendant's assertion, the victim's testimony was credible, and the verdict was not against the weight of the evidence, and therefore this Court did not err in denying the Defendant's Post-Sentence Motion to this effect.

"A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court. An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. The fact finder is free to believe all, part or none of the evidence and to determine the credibility of the witnesses. The trial court will award a new trial only when the jury's verdict is so contrary to the evidence

as to shock one's sense of justice. In determining whether the standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the last assailable of its rulings." *Commonwealth v. Cousar*, 928 A.2d 1025, 1035-6 (Pa. 2007).

The evidence presented at trial established that the victim, Cherise Hardrick, was living with her mother in the Hill District section of Pittsburgh in the fall of 2005, when her mother brought the Defendant into their home. The Defendant, known to Cherise by his nickname, "Little," helped Cherise's mother manage her money and pay her bills, occasionally bought food for the family and loaned them spending money. By December, 2005, Cherise had become friends with the Defendant and would talk to him about school. One afternoon, after Cherise had broken up with her boyfriend, the Defendant told her he wanted to have sex with her, and in exchange he would buy her shoes. Cherise said she didn't like shoes and would prefer food from Wendy's. The Defendant took her into her mother's bedroom where they both undressed and the Defendant proceeded to lick her vagina. The sexual contact continued and escalated to include multiple occasions of oral sex and vaginal and anal intercourse. Cherise testified that she was afraid that the Defendant would hurt her if she refused to do as he wished. She attempted to tell her mother on two (2) separate occasions, but her mother would not do anything. She finally told her brother's girlfriend, who, along with Cherise's brother, contacted the police.

Given the above evidence, there is no credible argument that the verdict was against the weight of the evidence. Cherise's mother put the Defendant into a position of responsibility and trust in the household, which he then used to force Cherise, a minor, into sexual activity that she was too frightened to resist. As the guilty verdicts do not "shock the conscience," this Court was well within its discretion in denying the Defendant's request for a new trial based upon a weight of the evidence claim. This claim is meritless.

2. Sentencing Issues

Next, the Defendant argues that the sentence imposed by this Court—two (2) consecutive terms of imprisonment of eight (8) to twenty (20) years – was excessive for its length and consecutive terms, and illegal in that this Court failed to place its reasons for imposing sentence on the record. His claims are meritless.

As is by now well-established, "sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an 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, abused its judgment for reasons of partiality, prejudice bias or ill will, or arrived at a manifestly unreasonable decision." *Commonwealth v. Booze*, 952 A.2d 1263, 1278 (Pa.Super. 2008), internal citations omitted. A sentencing court may sentence outside the guidelines, so long as she demonstrates an awareness of the guideline ranges and places her reasons for the deviation on the record. *Commonwealth v. Hartle*, 8984 A.2d 800, 808 (Pa.Super. 2006). In addition, the decision to impose consecutive or concurrent sentences is also within the sentencing court's discretion and will not be disturbed absent an abuse of discretion. *Commonwealth v. Ligo*, 878 A.2d 867, 873 (Pa.Super. 2005).

At the sentencing hearing, the following occurred:

THE COURT: As to sentencing, my records indicate that Mr. Davis was found guilty of all charges. The

Court has ordered, read and considered a presentence report. I know Mr. Sweeney had it earlier. I have the guidelines indicating that Mr. Davis at the two counts of involuntary deviate sexual intercourse has an offense gravity score of 12, a prior record score of 2, which is the standard sentence of 60 to 78 and aggravated sentence of 90 months for each of the counts. The guidelines for the statutory sexual assault are 7 and 2. The aggravated indecent assaults are 10 and 2...

Okay, Mr. Davis, the thing that I find, although your prior record is not substantial, I find you seem to have a pattern or kind of denial here. For instance, you say that you have never used drugs, and about four minutes ago you just pled guilty to a possession count which was reduced. You have a number of convictions for drugs. You picked on a child of tender years. You picked on a child that was 14 years of age, and this was not a one time incident. This was a course of conduct. You violated the position of trust that you held with that child. And as you heard her testify, she is unable at this time to trust anybody. And you bribed her with shoes or a Wendy's to have sex with you. You were in jail before in your life in different periods. That didn't deter you....

(Sentencing Hearing Transcript, pp. 6, 13-14).

As reference to the above record demonstrates, this Court appropriately demonstrated its understanding of the guidelines prior to imposing sentence. Although the sentence imposed was just slightly above the aggravated range – only six (6) months more at each count – this Court did place its reasons for the deviation on the record. (As well, had this Court stayed within the guideline ranges but chosen to sentence at any of the other counts, the aggregate would certainly have been more than what was actually imposed.) Given the facts of the case, the deviation was appropriate and reflected the Defendant's violation of trust and particularly callous behavior. This Court was further within its rights to run the sentences consecutive to each other, and the Defendant has failed to demonstrate an abuse of discretion in this regard.

It is clear, then, that the sentence imposed by this Court was proper and within its discretion and, therefore, this claim must fail.

3. Admission of the Victim's Journal

Next, the Defendant argues that this Court erred in admitting one (1) page of the victim's journal into evidence. Again, this claim is meritless.

Although generally "all relevant evidence is admissible," Pa.R.Evid. 402, the "admission of evidence is a matter within the sound discretion of the trial court and will not be reversed absent a showing that the trial court clearly abused its discretion." *Commonwealth v. Cooper*, 941 A.2d 655, 667 (Pa. 2007).

During cross-examination, the victim testified to having kept a list of the dates and types of her sexual contact with the Defendant. On re-direct, Cherise read a portion of her March 1, 2006 journal/diary entry into evidence, in which she had written "Little ate my pussy on March 1 and fucked me." (Trial Transcript, p. 74). This Court admitted the page into evidence without objection, but subsequent argument revealed that that particular page had not been included with the copy of the journal produced by the Commonwealth in discovery. The defense made no allegation that the omission of the page was intentional (T.T., p. 97-99), rather it appeared to be an inadvertent copying error.

Contrary to the Defendant's argument, the admission of the page did not cause him any prejudice. Cherise had already testified that the Defendant had had oral and vaginal intercourse with her, so the reading of her journal with her

description of the acts was not new to the jury. Moreover, given Cherise's testimony regarding the Defendant's repeated sexual contact with her and ample evidence in support of the charges, there is no available argument that this journal page was the sole reason for his conviction.

Finally, it bears mentioning that the Commonwealth did not attempt to introduce the journal page until defense counsel badgered Cherise on the number and frequency of the sexual acts, causing her to mention the journal. Even though the Defendant did not have this particular page, his counsel admits to having the remainder of the journal where other acts were documented. Thus, it was not unreasonable to expect that the Commonwealth would introduce the journal to bolster Cherise's claims after that line of cross-examination – if not with this particular page, then with another page which had made it through the photocopier and into counsel's discovery packet. Defense counsel opened the door to the journal on cross-examination and the Commonwealth was more than entitled to walk through it on re-direct. This Court was within its discretion in allowing the admission of the page, and therefore, this claim must fail.

4. Prosecutorial Misconduct

Finally, the Defendant accuses the Assistant District Attorney, Shanicka Kennedy, of prosecutorial misconduct during her closing argument. However, reference to the record reveals no such misconduct and, therefore, this claim must fail.

During her closing argument, Ms. Kennedy made several allusions to the fact that the Defendant was Cherise's mother's drug dealer. The statements were made within the context of explaining the Defendant's presence in Cherise's home and the reason Cherise's mother refused to believe her when she told what the Defendant had been doing. Ms. Kennedy did not attempt to backdoor additional drug charges or suggest that the Defendant was guilty of the sexual crimes because he was a drug dealer.

"It is well-settled that statements made by the prosecutor to the jury during closing argument will not form the basis for granting a new trial 'unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict'.... Like the defense, the prosecution is accorded reasonable latitude and may employ oratorical flair in arguing its version of the case to the jury." *Commonwealth v. Williams*, 896 A.2d 523, 542 (Pa. 2006).

Clearly, Ms. Kennedy's closing argument statements were meant only to clarify the Defendant's presence in the apartment and Cherise's life and their effect did not prejudice the jury in any way. Certainly, they were not the reason the Defendant was convicted, as there was ample evidence to support the charges. While Ms. Kennedy's statements may have constituted "oratorical flair," they did not rise to the level of prejudice and, therefore, no prosecutorial misconduct can be found. This claim must also fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence must be affirmed.

BY THE COURT:
/s/McDaniel, P.J.

Dated: January 26, 2009

¹ 18 Pa.C.S.A. §3123 – 2 counts

² 18 Pa.C.S.A. §3122.1 – 2 counts

³ 18 Pa.C.S.A. §3125 – 2 counts

⁴ 18 Pa.C.S.A. §6301(a)(1) – 2 counts

⁵ 18 Pa.C.S.A. §3126 – 2 counts