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The Pittsburgh Legal Journal Opinions are published fortnightly by the Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
(412)261-6255
www.acba.org
©Allegheny County Bar Association 2010
Circulation 6,216

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Mifflin Energy Corp. v. Atlas America, LLC

Preliminary Injunction—Standard of Review—Contract Interpretation

No. GD 10-007048. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Ward, J.—October 14, 2010.

OPINION

I. SUMMARY

Plaintiff Mifflin Energy Corp. (“Mifflin”) owns oil and gas leases on approximately 3,000 acres of land in Greene County, Pennsylvania (the “Property” or the “Area of Interest”). The pivotal issue in this case is the date upon which Defendant Atlas America, LLC (“Atlas”) exercised its option to trigger a drilling obligation provision of the parties’ Joint Venture Agreement (the “JVA”).

Mifflin has not proven that it is entitled to a preliminary injunction to require Atlas to forfeit its rights to drill Marcellus Shale natural gas wells pursuant to the JVA. Mifflin has not demonstrated any irreparable harm that would result from the denial of injunctive relief. Mifflin has not demonstrated that it is likely to succeed on the merits of its case that it lawfully terminated the JVA.

II. PROCEDURAL BACKGROUND

On April 7, 2010, Mifflin filed its Complaint for Declaratory Judgment requesting that the Court enter judgment as follows: (a) declaring that the JVA was lawfully terminated by Mifflin by its January 12, 2010 written notice to Atlas; (b) preliminarily and permanently enjoining Atlas from pursuing development or drilling of wells on the Property; (c) awarding costs to plaintiff for fees and expenses incurred in bringing this action; and (d) granting such other relief as the Court deems to be appropriate. Mifflin filed its Motion for Special and/or Preliminary Injunction on April 9, 2010. On April 22, 2010, the Court entered its Order memorializing the parties’ stipulated stay regarding this action. On May 25, 2010, filed its Brief in Support of Motion for Preliminary Injunction requesting that Atlas be preliminarily enjoined from entering or performing any activities to develop or drill wells on the Area of Interest, with the exception of work related to Atlas’s operation of wells previously drilled or developed pursuant to the JVA.

On June 1, 2010 and June 2, 2010, the taking of testimony and the introduction of documentary evidence occurred during a hearing on Mifflin’s Motion for Preliminary Injunction before this Court. The preliminary injunction hearing was transcribed to create the record containing the notes of transcript of the courtroom proceedings held on June 1, 2010 and June 2, 2010.¹ At the hearing, Robert Clay, the President of Mifflin, testified on behalf of the Plaintiff. (N.T. at 18 - 134). Defendant’s hearing witnesses included: (a) Sherwood Lutz, senior project geologist for Atlas, (N.T. at 135 - 163); (b) Dawn Law, contract analyst for Atlas, (N.T. at 164 - 173); (c) Donna Hardy, director of land for Atlas, (N.T. at 174 - 277); (d) Renee Anderson, Esq., Director of Title Administration for Atlas, (N.T. at 278 - 292)²; and (e) Stefan Keplinger, project manager for Atlas. (N.T. at 293 - 341). Plaintiff also designated the deposition testimony of Michael Hartzell, Vice President of Land and Business Development for Atlas, in support of its Motion for Preliminary Injunction. (N.T. at 341).

On July 12, 2010, the parties filed a Joint Praecipe to File Exhibits Offered at the June 1 and 2, 2010 Hearing on the Motion for Preliminary Injunction. On July 13, 2010, upon consideration of the parties’ submissions, respective responses thereto, along with the entire record in this action, this Court entered its Order denying Mifflin’s Motion for Preliminary Injunction. On August 6, 2010, Mifflin filed a timely Notice of Appeal.

On August 19, 2010, as directed by this Court, Mifflin filed its Statement of Matters Complained of on Appeal. This Opinion sets forth reasonable grounds for why the matters complained of on appeal have no merit.

III. FACTUAL BACKGROUND

The Area of Interest consists of five leases in the eastern Greene County townships of Greene and Jefferson (the Yareck Lease, the Willis Lease, the Bunner Lease and the two Hartley Leases) and fourteen leases in the western Greene County townships of Washington and Whitely. (Exhibit C to Exhibit 10 (“JVA”).) Mifflin had the opportunity to participate in each well that was to be drilled by investing in and sharing in the profits. (JVA, Paragraphs 2.2; 3.1). Specifically, Paragraph 2.2.1 of the JVA set forth the Well Proposal participation notice requirements for wells to be drilled which states as follows:

2.2 Wells to be Drilled

2.2.1 Identification of Wells; Interest of Joint Ventures. Subject to Paragraph 2.3.1, ATLAS shall have the exclusive right to propose the number and location of Well(s) to be drilled pursuant to this Agreement. ATLAS shall notify MIFFLIN in writing of any Well that ATLAS intends to drill in the Area of Interest. The notice shall identify the location of the Well and shall be accompanied by (i) a title opinion as set forth in Paragraph 2.5 hereof, (ii) a plat for such Well, and (iii) an Authorization for Expenditure (“AFE”) for such Well, setting forth the estimated costs as provided in Paragraph 4.1 of this Agreement. MIFFLIN shall notify ATLAS whether it elects to participate in a Well not more than thirty (30) days following the receipt by MIFFLIN of the foregoing notice from ATLAS. The notice from MIFFLIN shall specify the percentage amount of its participation, which may not exceed ten percent (10%) of the Working Interest. The Participation Percentage elected by MIFFLIN shall be its Interest in such Well. If Mifflin does not notify ATLAS of its election in a Well within the thirty (30) day notice period described above, MIFFLIN will be deemed as electing not to participate in the drilling of such Well. The Interest of Atlas in such Well shall be the difference between 100% and the Participation Percentage elected by MIFFLIN for such Well. No Well(s) may be proposed by ATLAS prior to the payment of the acreage bonus of \$120 per acre as set forth in Paragraph 2.7 (i).

(JVA, Paragraph 2.2.1). In exchange for the exclusive right to drill Marcellus Shale natural gas wells on the Area of Interest, Atlas agreed to pay Mifflin a bonus payment of \$120 per acre, a “spud” or “site” fee of \$10,000 for each Vertical Well drilled and \$20,000 for each Horizontal Well drilled. (JVA, Paragraph 2.7).

The JVA set forth the specific schedule of Atlas’ drilling obligations in Paragraph 2.3.1:

2.3 Drilling

2.3.1 Drilling Schedule

(i) ATLAS shall drill not less than one Well in the Area of Interest during the calendar year 2008. If no Well is drilled

during 2008 MIFFLIN shall have the rights as set forth in Paragraph 2.3.2.

(ii) Within six months of the completion of drilling of a Well, as referred to in Paragraph 2.3.1(i), ATLAS must notify MIFFLIN of its intent to drill additional Well(s) in the Area of Interest. If ATLAS does not so notify MIFFLIN within such six month period, MIFFLIN shall have the rights set forth in Paragraph 2.3.2.

(iii) If ATLAS notifies MIFFLIN that it elects to drill additional Wells in the Area of Interest, it must not drill less than two (2) Vertical Wells or one (1) Horizontal Well in each twelve (12) month period following the point at which such notice has been given. If ATLAS does not drill at least two (2) Vertical Wells or one (1) Horizontal Well in the Area of Interest during each subsequent twelve (12) month period, MIFFLIN shall have the rights as set forth in Paragraph 2.3.2.

(iv) For Purposes of this Agreement, a Well shall be deemed to be drilled if the spud of the Well has occurred within the relevant period.

(JVA, Paragraph 2.3.1). According to this Drilling Schedule, Atlas had an obligation to drill at least one well in 2008 and, if Atlas chose to pursue development of the Area of Interest, additional wells in the future upon appropriate notice and within specific periods.

As an initial matter, there is no dispute that Atlas complied with Paragraph 2.3.1(i) of the JVA because Atlas “spudded” its first well, the Willis 24 Well, on the Area of Interest on December 15, 2008. (N.T. at 37). A “spud” of the well occurs upon the actual initiation of drilling, as opposed to preparation for drilling. (*Id.*) The next section of the Drilling Schedule, 2.3.1(ii), provides: “Within six months of the completion of drilling of a Well, as referred to in Paragraph 2.3.1(i), ATLAS must notify MIFFLIN of its intent to drill additional Well(s) in the Area of Interest...” The JVA defines “Completion of Drilling of a Well” as follows:

“Completion of Drilling of a Well” means the date upon which all of the following have been completed on a Well: drilling, logging, casing and cementing.

(JVA, Paragraph 1.4).

Atlas “completed the drilling” of Willis 24 on January 8, 2009. (N.T. at 39). Accordingly, as of that date, Atlas had the power to give the notice described in Paragraph 2.3.1(ii) of “its intent to drill additional Well(s) in the Area of Interest” within six months, or until July 8, 2009, to do so. As Ms. Hardy testified, the Drilling Schedule anticipated a six month period during which Atlas could evaluate data and decide whether it wanted to drill additional wells pursuant to the JVA. (N.T. at 191).

Paragraph 2.3.2 provided that, if Atlas failed to meet any of Paragraph 2.3.1’s drilling requirements, Mifflin’s sole and exclusive remedy was to terminate the Agreement as to the drilling of any future wells by Atlas. Mifflin contends that Atlas provided notice of its intent to drill additional well(s) in the Area of Interest on January 20, 2009 via Dawn Law’s well proposal letter to Robert Clay that provided the anticipated spudding date of the Willis 23 Well and an invitation to participate to Mifflin. The January 20, 2009 well proposal letter stated, in pertinent part, as follows:

The anticipated spud date of the Willis #23 well is February 19, 2009. Enclosed are copies of the survey and AFE. The title for the above-referenced track was mailed with Willis #24 on November 24, 2008.

Please indicate whether or not Mifflin intends to participate in the well with up to a 10 percent (10%) working interest.

(Exhibit 33). The Willis 23 Well proposal dated January 20, 2009 requests that Mifflin elect, within thirty days, to either “Not to participate” or “To participate with ____% working interest” as required by Paragraph 2.2.1 of the JVA. (*Id.*)

During the hearing, Mr. Clay acknowledged that the proposal for the Willis 23 Well was, for all material purposes, identical to the proposal for the Willis 24 Well, which he admitted could only be construed as a participation notice under Paragraph 2.2.1. (N.T. at 114 - 116; Exhibit 11). Mr. Clay acknowledged that Paragraph 2.2.1 of the JVA does not place any limitations on the number of wells or the timing of the wells that Atlas could propose other than two. The first limitation was that Atlas could not propose any wells until it made an up-front payment to Mifflin of the acreage bonus of \$120 per acre as set forth in Paragraph 2.7(i); and, in fact, Mr. Clay acknowledged that Atlas did make that per-acreage payment in excess of \$360,000 pursuant to that provision. (N.T. at 110 - 111). The second limitation was that Atlas’s right to propose wells was subject to fitting the Drilling Schedule of Paragraph 2.3.1. (*Id.*).

Dawn Law, who drafted the Willis 23 Well proposal (Exhibit 33), and its companion, the Willis 24 Well proposal (Exhibit 11), testified about the preparation of these documents. Dawn Law testified that she used the form well proposal that was designed to comply with the Well Proposal provision only, and that she did not intend to implicate the Drilling Schedule provision when she sent the well proposals. (N.T. at 172 - 173). Donna Hardy, Ms. Law’s supervisor who instructed Ms. Law to prepare the well proposals, gave consistent testimony. They both testified that, to prepare the well proposals, they sat down together and went through the provisions of Paragraph 2.2.1, making sure that the proposal tracked each of the requirements of that paragraph. (N.T. at 170 - 172, 252 - 253). They both testified that they did not intend for the well proposals to trigger the Drilling Schedule paragraph; and neither of them referred to Paragraph 2.3.1 when preparing the well proposals. (N.T. at 172, 252 - 253).

When it came time to prepare the Willis 23 Well proposal, Ms. Hardy instructed Ms. Law to prepare a proposal equivalent to the Willis 24 Well proposal. (N.T. at 172 - 173, 253). Ms. Law simply took the Willis 24 Well proposal and modified it to apply to the Willis 23 Well. (N.T. at 172). Once again, neither of them referred to the Drilling Schedule paragraph, as neither intended to trigger its provisions. (N.T. at 172 - 173, 254 - 255). When Ms. Law transmitted the Willis 23 Well proposal to Mifflin, she described it as a “proposal for the Willis 23 well” – a reference to paragraph 2.2.1. (Exhibit 76; N.T. at 117). Mr. Clay’s correspondence demonstrates that he, too, understood that the January 20, 2009 document was a well proposal. (Exhibit 76; N.T. at 118).

The documentation following the Willis 23 Well proposal also supports Atlas’s position and is inconsistent with Mifflin’s. Shortly after the JVA was executed, Ms. Hardy prepared the Notice of New Land Contract, which describes Atlas’s obligations as “Drill one well to objective depth (below base of elk) before 12/31/08; then after completion of first well six months to plan; then two vertical or 1 horizontal well each 12 month period.” (Exhibit 9). Then, on April 14, 2009, she prepared a spreadsheet for Atlas’s operational team, which listed the drilling obligation date as August 20, 2010. (Exhibit 14). Ms. Hardy arrived at this August date by assuming that Atlas would give the Drilling Schedule notice in August 2009, which was six months after the completion of the Willis 24 well in February 2009. (N.T. at 258 - 259). Ms. Hardy then added the twelve-month period from Paragraph 2.3.1(iii), bringing the date to August 2010 for completion of the additional drilling. (N.T. at 259).

As of April 14, 2009, Ms. Hardy understood that Atlas had not yet sent the Drilling Schedule notice. (N.T. at 258 - 259). She communicated that understanding to Mifflin the next day, April 15, 2009, when she instructed Ms. Law to send an e-mail to Mr. Clay setting forth her understanding. (Exhibit 37). Accordingly, as of April 15, 2009, Mifflin understood that Atlas had not yet intended to trigger the Drilling Schedule provision in paragraph 2.3.1(ii).

To the extent that Mr. Clay was uncertain about Atlas's position on the obligation date following the exchange on April 15, 2009, that uncertainty should have resolved when he received the June 3, 2009 notice letter from Ms. Hardy. (Exhibit 38). That letter specifically asked Mifflin to "Please accept this letter as our formal notice that it is Atlas's intent to continue drilling additional wells in the area of interest. This notice is intended to satisfy Paragraph 2.3.1(ii) of our agreement." (Exhibit 38).

Once Ms. Hardy received Mr. Clay's response, saying that he understood the date to be January 2010, she did not immediately advise Mr. Clay that Atlas disagreed with his position. (N.T. at 211, 263). Instead, she set out to determine whether Atlas could meet Mr. Clay's interpretation of the deadline. (N.T. at 259 - 260). When the Manager of Atlas's Geology Department, Sherwood Lutz, advised her that a January goal should not be a problem, Ms. Hardy decided that, in the interest of preserving what had appeared to her to be a good working relationship with Mr. Clay, she would establish January as Atlas's internal target date so as to avoid an unnecessary conflict. (N.T. at 261 - 263).

Accordingly, Ms. Hardy revised Atlas's internal target date on the operational spreadsheet to January 20, 2010. (N.T. at 260). She did not, however, tell the operational team that the target date she was creating was a false deadline, because she wanted to avoid the confusion of having multiple deadlines circulating, and because she knew that the team would be less motivated to meet the January target date if they understood that it was not the true deadline. (N.T. at 262). As Ms. Hardy expected, that internal target date was picked up and repeated on many internal documents throughout the project. (N.T. at 262). In fact, Mr. Keplinger testified that the source of the date he used in the operational spreadsheets was Ms. Hardy's summary. (N.T. at 304). Thus, the internal Atlas documents listing January 20, 2010 as the deadline do not indicate that Atlas had abandoned its legal rights under the JVA.³

The June 3, 2009 letter was followed by another response from Mr. Clay and then a phone call between Mr. Clay and Ms. Hardy. (Exhibit 17; N.T. at 265). During the phone call, Ms. Hardy advised Mr. Clay that Atlas still aimed to perform by January 2010. (N.T. at 223). The evidence at the hearing established that Atlas would have been able to perform by the January 20, 2010 false deadline, thereby avoiding this dispute altogether as originally planned, had it not encountered various difficulties related to the Yareck parcel, including locating and communicating with Mr. Conrad Gall, an uncooperative surface owner. (N.T. at 65 - 66, 158 - 159, 308 - 309, 329). As Atlas project manager Mr. Keplinger testified, there were other difficulties related to the Yareck tract such as obtaining access, Department of Environmental Protection ("DEP") permits and a concern of locating the gas well too close to a major source of water for the surface owner's livestock. (N.T. at 314 - 315, 328 - 330).

Atlas has spent considerable resources toward the development of the Area of Interest, including developing, engineering and permitting work related to the Yareck tract. (N.T. at 309 - 310, 327 - 331). At the time of the preliminary injunction hearing, Atlas had obtained all of the permits needed to drill two horizontal wells on the Yareck tract and was ready to begin developing these additional wells. (N.T. at 334).

The evidence at the hearing established that Atlas was prepared to meet the June 3, 2010 drilling obligation date. (N.T. at 334). Thus, this dispute is limited to the 4 ½ month period between January 20, 2010 and June 3, 2010. Mr. Clay testified that the only harm Mifflin would suffer by virtue of this delay is the interest for that 4½ month period on the \$20,000 drilling fee and the interest on the royalties from the new well. (N.T. at 131 -132).

IV. DISCUSSION

A. Standard of Review

Our Supreme Court of Pennsylvania has set forth the standard of review of an appeal from the grant or denial of a preliminary injunction as follows:

As an initial matter, we restate here that, in general, appellate courts review a trial court order refusing or granting a preliminary injunction for an abuse of discretion. *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 602 A.2d 1277, 1286-87 (1992); *Bloomington's By Mail, Ltd. v. Dep't of Revenue*, 513 Pa. 149, 518 A.2d 1203, 1204 (1986). We have explained that this standard of review is to be applied within the realm of preliminary injunctions as follows:

[W]e recognize that on an appeal from the grant or denial of a preliminary injunction, we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below. Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the [trial court].

(citation omitted). This Court set out the reasons for this highly deferential standard of review almost a hundred years ago:

It is somewhat embarrassing to an appellate court to discuss the reasons for or against a preliminary decree, because generally in such an issue we are not in full possession of the case either as to the law or testimony-hence our almost invariable rule is to simply affirm the decree, or if we reverse it to give only a brief outline of our reasons, reserving further discussion until appeal, should there be one, from final judgment or decree in law or equity.

Hicks v. Am. Natural Gas Co., 207 Pa. 570, 57 A. 55, 55-56 (1904)....

In ruling on a preliminary injunction request, a trial court has "apparently reasonable grounds" for its denial of relief where it properly finds that any one of the following "essential prerequisites" for a preliminary injunction is not satisfied. See *Maritrans GP*, 602 A.2d at 1282-83 (requirements for preliminary injunction are "essential prerequisites"); *County of Allegheny v. Commonwealth*, 518 Pa. 556, 544 A.2d 1305, 1307 (1988) ("For a preliminary injunction to issue, every one of the [] prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others.").

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc. 573 Pa. 637, 645-647, 828 A.2d 995, 1000 - 1001 (2003).

B. Preliminary Injunction Essential Prerequisites

As the Supreme Court of Pennsylvania reiterated in *Warehime v. Warehime*, 580 Pa. 201, 860 A.2d 41 (2004) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, supra, at 828 A.2d at 1001), there are six "essential prerequisites"

that a party must establish prior to obtaining preliminary injunctive relief:

The party must show: 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; 5) that the injunction it seeks is reasonably suited to abate the offending activity; and, 6) that a preliminary injunction will not adversely affect the public interest.

Id., 860 A.2d at 46-47. (citation omitted).

The burden of proof is on the party who requested the preliminary injunctive relief. *Id.* As a result, a difficult burden of proof is placed on the party appealing the denial of preliminary injunctive relief. Here, this Court has evaluated each of the preliminary injunction prerequisites. We find that Mifflin has not met its burden of proving each and every element necessary to establish entitlement to preliminary injunctive relief. (See, Order of Court entered on July 13, 2010).

1. Immediate and Irreparable Harm Not Adequately Compensated by Damages

Mifflin has not met its burden of proving immediate and irreparable harm absent the remedy of entry of preliminary injunctive relief. It appears that no remedy is appropriate in this matter because the June 3, 2010 deadline had not expired when the Court entered its April 21, 2010 Order memorializing the parties' stipulated stay. Even assuming that Mifflin had offered clear evidence that January 20, 2010 was the obligation date, rather than June 3, 2010, the remedy here would be to make Mifflin whole for the short delay, limited to the 4 ½ month period between January 20, 2010 and June 3, 2010. The amount of such damages could be estimated by stipulation of the parties, or by proposed calculations submitted to the Court. Alternatively, and perhaps most accurately, the precise amount could be determined after Atlas drills the next well and the actual royalties are known.

2. Balance of the Harms

Under these facts, it is reasonable to conclude that a balance of the hardships tips in favor of denying preliminary injunctive relief.

3. Status Quo

Mifflin does not face immediate and irreparable harm in the absence of an injunction to preserve the status quo until the final hearing on the merits of this case can be heard and decided. The denial of the preliminary injunction does not alter the status quo. The status quo is this: Atlas is able to drill Marcellus Shale natural gas wells pursuant to the JVA, able plan to move forward with the development of the remainder of the Area of Interest acreage and able to generate royalties from the gas in the Marcellus Shale in those properties. Mifflin is the party who attempted to change the status quo by contributing disarray and uncertainty to Atlas's drilling plans in unlawfully terminating the JVA and then asking the Court to declare that they had a legal right to do so.

The reasoning of our Supreme Court in *Hicks v. American Natural Gas Co.* 207 Pa. 570, 57 A. 55, (1904), reversing the chancellor's award of a preliminary injunction that restrained defendant from in any way entering upon land subject to an oil and gas lease, is applicable here:

[T]he preliminary injunction does not maintain the status quo. The defendant has sunk one costly well, has cased it, and has piped the gas therefrom to its mains; is now supplying its patrons, the public; was about to sink another well under its contract with the [common grantors]; has all its costly machinery ready for operation at the proper point. Its entire business is suddenly stopped by the strong arm of the chancellor. By delaying injunction until final hearing, plaintiff practically would have lost nothing. Defendant substantially loses everything it hoped to gain by its contract, and all it has gained by its large expenditure at that location. Its customers cannot wait a year or more for the event of a lawsuit; it must at once seek another field to obtain its product, involving, perhaps, the duplication of its structure and machinery. The plaintiff thus accomplishes at once, and for the time being, all he could have got by final decree. It is extremely doubtful if that decree were in defendant's favor if it could ever be put in the same situation as before the injunction. Therefore the preliminary injunction was improvident.

Id., 57 A. at 57.

4. Likelihood of Success on the Merits

For the reasons set forth, Mifflin is not likely to prevail on the merits at the permanent injunction phase of this proceeding. There is no dispute that the Drilling Schedule required Atlas to drill two vertical wells or one horizontal well in the Area of Interest within twelve months of providing notice under Paragraph 2.3.1(ii) of its intent to drill additional well(s) in the Area of Interest. However, the parties fundamentally disagree as to the factual issue of when Atlas provided notice under Paragraph 2.3.1(ii). Mifflin believes that it is justified in construing these two identical notices differently based on its contention that Atlas could not drill the Willis 23 Well until it triggered the Drilling Schedule notice under Paragraph 2.3.1. However, Mifflin's argument is not based on actual language in the JVA, but is instead based on language that Mifflin asks the Court to read into the JVA. The record reveals that it would not have made sense for Atlas to trigger the Drilling Schedule provision in January 2009. Atlas would have gained nothing by triggering the Drilling Schedule provision in January because that would have unnecessarily and substantially accelerated its drilling obligation date without receiving any benefit. We find that the actual requisite notice did not occur until Donna Hardy sent the notice letter on June 3, 2009 to Robert Clay which specifically invoked the Drilling Schedule notice provision under Paragraph 2.3.1(ii) of the JVA by stating: "This notice is intended to satisfy Paragraph 2.3.1(ii) of our agreement." Thus, in marked contrast to the Willis 23 Well proposal, the language on the face of the June 3, 2009 letter left no doubt that it was intended to satisfy the Drilling Schedule notice requirement in Paragraph 2.3.1(ii) of the JVA. Although nothing in the JVA prevented a single notice from operating as both the 2.3.1(ii) notice of intent to drill additional wells and the invitation to participate contemplated in Section 2.2.1, the evidence supports Atlas's position that the January 20, 2009 participation notice was not meant to be Atlas's 2.3.1(ii) notice of intent to drill additional wells. There is no provision in the JVA that prohibited Atlas from drilling wells on Mifflin acreage prior to providing the Drilling Schedule notice set forth in Paragraph 2.3.1(ii).

The interpretation of a contract is a matter of law for the Court to decide. *Quinn v. Bupp*, 955 A.2d 1014, 1017 (Pa. Super. 2008). A reasonable interpretation of the JVA favors Atlas's position that Section 2.3.1 contains only minimum drilling requirements. It does not establish any maximum drilling limits. To add the drilling limitations that Mifflin advocates into Section 2.3.1 would be to improperly alter the JVA. In other words, Mifflin bases its argument on a limitation in the JVA that does not actually exist. Mifflin is not entitled to overcome the absence of a limitation in Section 2.3.1 by asking the Court to rewrite into Section 2.3.1 limitations that the parties did not themselves include. See, *Steuart v. McChesney*, 498 Pa. 45, 444 A.2d 659, 662 (1982) ("It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly.").

5. Reasonably Suited to Abate the Offending Activity

The relief sought was not reasonably suited to abate the allegedly offending activity. To the contrary, the relief sought was extreme.

6. Public Interest

There is no reason to believe that a denial of the preliminary injunction in this case adversely affects the public interest.

V. CONCLUSION

For the reasons set forth above, the Court properly denied Mifflin's Motion for Preliminary Injunction.

BY THE COURT:

/s/Ward, J.

Dated: October 14, 2010

¹ A court reporter transcribed the notes of transcript of the preliminary injunction hearing, hereinafter cited to as "N.T. at ___".

² Mifflin complains on appeal that this Court erred by admitting testimony of Renee Anderson that it argues involved her opinion of title issues. However, this Court does not rely on and need not rely on any objected to testimony of Ms. Anderson in reaching its decision to deny Mifflin's Motion for Preliminary Injunction.

³ Mifflin's attempted to use Atlas's privilege log to infer the substance of privileged legal advice that Atlas's in-house counsel gave to Atlas employees. (Exhibit 72; N.T. at 228 - 242). This was clearly an appropriate situation to invoke the attorney work product privilege, because the only motivating purpose underlying the creation of Atlas's privilege log was its preparation for this litigation. Accordingly, this Court appropriately granted Atlas's request that its privilege log be excluded, and that all testimony pertaining to it be stricken from the record. (See, Order of Court entered on July 13, 2010).

Harriet Winter, a minor by Fiona Winter, her parent and natural guardian and Fiona Winter, as parent and natural guardian of Harriet Winter, a minor v. City of Pittsburgh, Forest City Enterprises, Inc. and Commonwealth of PA Department of Conservation and Natural Resources

*Statement of Matters Complained Of—Pa.R.A.P. 1925(b)—Slip and Fall—Known and Obvious Danger—
Deferral of Summary Judgment While Discovery is Open*

No. GD 07-27552. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Friedman, J.—October 27, 2010.

OPINION

Plaintiffs have appealed from two of this Court's Orders which granted the Motions for Summary Judgment of all three Defendants and which dismissed Plaintiffs' Complaint as to all of them.

Oral argument on the Motions for Summary Judgment was heard by the undersigned on June 15, 2010. We orally granted summary judgment in favor of the Commonwealth of Pennsylvania and we memorialized that in a written Order dated June 21, 2010. We took the Motions of Defendants City of Pittsburgh and Forest City Enterprises, Inc. under advisement. On July 20, 2010, we filed a Memorandum and Order granting both of those Defendants' Motions. On August 18, 2010, Plaintiffs filed their Notice of Appeal.

Before we reach the merits of the appeal, we must first note that there is a question as to whether Plaintiffs' Statement of Matters Complained Of In Accordance With Pa. R.A.P. 1925 has been properly filed of record.

On August 31, 2010, we entered an Order directing Plaintiffs to file a "Statement of Matters Complained of on Appeal and serve it on the undersigned and the parties pursuant to Pa. R.A.P. 1925(b)(1), no later than 21 days from the date of this Order. Any issue not properly included in a timely filed and served Statement shall be deemed waived."

We received copies of Plaintiff's Amended Notice of Appeal and "Statement Of Matters Complained Of In Accordance With Pa. R.A.P. 1925." The two documents were accompanied by a cover letter dated September 15, 2010, addressed to the Chief Clerk's Office of the Commonwealth Court of Pennsylvania, at what appears to be its correct current address, with the undersigned and other counsel on the case cc'd. The cover letter indicates that the Statement is in response to the trial court's August 31, 2010 Order, and requests that the Clerk of the Commonwealth Court file the originals. However, Plaintiffs' Statement of Matters does not seem to be noted on the Commonwealth Court's docket as viewed on its website, so it is unclear whether the Statement was docketed or not.

In addition, Plaintiffs' Statement of Matters is not shown on the trial court's docket. Pa. R.A.P. 1925(b) provides in pertinent part:

(b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court. - If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

(1) *Filing and service.* – Appellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail as provided in Pa. R.A.P. 121(a) and shall be complete on mailing if appellant obtains a United States Postal Service Form 3817, Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified, in compliance with the requirements set forth in Pa. R.A.P. 1112(c). Service on parties shall be concurrent with filing and shall be by any means of service specified under Pa. R.A.P. 121(c).

The undersigned did receive a properly served copy of Plaintiffs' Statement, so we will leave it to the Commonwealth Court to determine whether there is any problem posed by the non-docketing of the Statement in either the trial court or the Commonwealth Court.

We now turn to the substantive issues in the case. This is a personal injury case in which Plaintiff Harriet Winter, a minor who was 16 years old at the time of the incident, alleges that she slipped and fell on the Station Square River Front Trail located in the City of Pittsburgh. Plaintiff was a resident of Chesterfield, Missouri, and had come to Pittsburgh with her family to visit friends. On the date of the incident, Plaintiff and her family parked in a parking lot adjacent to Station Square to ride the inclines up to Mount Washington. The group used the Monongahela Incline to travel up the slope. After sightseeing, the group walked to the top of the Duquesne Incline and used it to travel down the slope. They then crossed Carson Street and walked to a walkway known as the River Front Trail.

As they walked on the River Front Trail, they observed that there was snow and ice on the trail. Plaintiff's mother, co-Plaintiff Fiona Winter, cautioned the children to be careful because it was slippery. Plaintiff-minor was aware that she was walking on a snow and ice covered walkway. The group continued on the trail toward the parking lot where their vehicle was parked. Plaintiff slipped on the ice fell, injuring her left wrist.

In their Statement of Matters, Plaintiffs assert that the following rulings were erroneous:

- (a) The ruling that Defendants did not owe Plaintiffs a duty as a matter of law pursuant to *Carrender v. Fitterrer*, 503 Pa. 178, 469 A.2d 120 (1983);
- (b) The ruling that issues of material fact do not exist as to whether the danger was open and obvious "by Plaintiffs' own admission";
- (c) The ruling that, as a matter of law, reasonable minds could not differ regarding Defendants' having no legal duty under the circumstances to eliminate, prevent or otherwise warn Plaintiffs of the hazard;
- (d) The ruling granting Defendants' summary judgment despite Pa. R.C.P. 1035.2(1) when discovery was still open and active and Defendant Forest City had been delinquent and deficient in answering Plaintiffs' written discovery concerning the tent adjacent to the area where Minor Plaintiff fell;
- (e) The finding that "both the injured minor and her parent observed ice on the path yet chose to continue despite the recognized hazard"; and
- (f) All other subsidiary issues related to those mentioned above that led the Honorable Judith L. A. Friedman to grant the underlying motions for Summary Judgment on the basis of Defendants lack of a legal duty argument.

The above Statements boil down to one issue, whether or not there were disputed material facts involving the Defendants' duty to the minor Plaintiff that would require the case to be submitted to a jury. The *material* facts on this issue were not disputed, so we properly granted summary judgment in favor of the Defendants.

We note that the issue of whether or not "discovery was still open and active" is of no legal significance here, given Plaintiffs' own version of what they saw (snow and ice, slippery conditions) and what they did (proceed anyway). Forest City's inadequate responses to any discovery questions would be irrelevant to Plaintiffs' admitted awareness of the hazard they willingly attempted to navigate.

The appeal is without merit and should be denied.

BY THE COURT:
/s/Friedman, J.

Dated: October 27, 2010

Commonwealth of Pennsylvania v. Elizabeth Shaver

DUI—Actual Control of Auto—Credibility of Witness

No. CC 200817589. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, J.—October 15, 2010.

OPINION

The appellant, Elizabeth Shaver, (hereinafter referred to as "Shaver"), was convicted of two counts of driving under the influence of alcohol following a non-jury trial on May 18, 2009. A presentence report was ordered and on July 30, 2009, Shaver was sentenced to six months probation, seven days of which were to be served through the intermediate punishment program, fined \$1,000.00, was to attend safe driving school and was also to have an alcohol evaluation performed by the probation office. Shaver did not file post-sentence motions but elected to proceed with a direct appeal and was ordered to file a concise statement of matters complained of on appeal. In that statement Shaver maintains that the evidence was insufficient to establish that she was in actual physical control of the movement of a motor vehicle; that this Court incorrectly applied facts in her case in making a determination that she was in actual control of the vehicle; that this Court misstated the testimony of one of the defense witnesses; and, that this Court erred as a matter of law when it assumed facts that were not in the record. In order to understand these claims of error, it is necessary that a brief review of the facts of Shaver's case be made.

On September 29, 2008, at approximately 3:00 a.m., Officer Rob Scheidlmeir, of the Pittsburgh Police Department was on routine patrol along Greentree Road when he came upon a white SUV that was running, had its lights on and appeared to be abutting a utility pole, with the front half of the vehicle on the sidewalk adjacent to Greentree Road and the back half of the vehicle on Greentree Road. Officer Scheidlmeir pulled up next to the driver's side of the vehicle and shined his light into the vehicle and observed a female with her head against the steering wheel who was facing to the right. Officer Scheidlmeir then backed up his vehicle and repositioned it directly behind the white SUV and turned on his emergency lights and radioed his dispatcher that he had come upon this vehicle. While he was passing on this information to his dispatcher, he noticed a white male walking down the right-hand side of Greentree Road. Officer Scheidlmeir also noticed that the right, front passenger door was open.

Officer Scheidlmeir attempted to arouse the driver who seemed to be confused. After several attempts she acknowledged his presence and put down the driver's window. Officer Scheidlmeir asked her what happened and if she was injured. Shaver then began to cry and said that her boyfriend had just choked her and she pulled down the bowtie that was around her neck and he observed red necks on her neck. During this conversation she also advised Officer Scheidlmeir that she was driving in an effort to get her boyfriend back in the car and that they had been in Tramp's earlier in the evening where she had been drinking.

During his conversations with Shaver, he noticed that she had a strong odor of alcohol, that her eyes were glassy and bloodshot, and that her speech was slurred. As a result of the information that he received from Shaver, that her boyfriend had attempted to choke her, Officer Scheidlmeir radioed his Lieutenant and asked him to arrest the white male who was walking down Greentree Road on the charge of domestic violence. When Shaver was told that her boyfriend was being arrested for assaulting her, she became extremely irritable, started to swear at him and was totally uncooperative.

Officer Scheidlmeir had Shaver get out of the vehicle and in light of the topography of the area, decided that field sobriety tests could not be safely done at this site. Officer Scheidlmeir also removed Lisa Bruce, the mother of Shaver's boyfriend, Douglas Bruce, from the back seat. When asked if she knew anything about the domestic violence allegation being made by Shaver, she responded that as they were driving up Greentree Road her son reached across and choked her. Douglas Bruce was arrested on the charge of domestic violence and Shaver was taken to Zone 6 headquarters so that an intoxilizer could be administered. The results of that test showed that she had a blood alcohol content of .174.

At the time of trial both Douglas Bruce and Lisa Bruce testified on Shaver's behalf. Douglas Bruce testified that he took his mother and Shaver to Tramp's on October 28, 2008, to attend a Halloween party at that bar. He went to this party so that he could socialize with friends; however, he spent a good part of the evening acting as a bartender. When it was time to leave, Shaver got argumentative because she did not want to leave the party. He further testified that he put Shaver in the front seat and put his mother in the back seat. As they were proceeding up Greentree Road an argument ensued and continued to escalate to the point that Douglas Bruce decided that he had to park the car and take a walk to cool off. He stated that he parked the car in front of a telephone pole, turned the ignition off and then got out of the car and began walking up the right hand side of Greentree Road. At one point during his walk, he turned, looked back and Shaver was yelling at him out of the driver's door window and he continued to walk away from the car. When Bruce was arrested by the police for domestic violence, he was handcuffed and placed in the back of a squad car, which returned to the area where his vehicle was parked and he believed that it was in the same position that he left it.

Lisa Bruce, Douglas Bruce's mother, also testified. Lisa Bruce testified that on October 28, 2008, she went to Tramp's to see her son work with his friends. She stated that they had a very pleasant evening and that Shaver had been drinking and became argumentative when it was time to leave. This argument escalated once Shaver was placed in the front passenger seat. Shaver became more abusive toward Douglas Bruce and the argument got to a point where Douglas Bruce parked the car against the utility pole and left so that he could cool off. When Douglas Bruce left Shaver got hysterical and was crying. She then jumped the console in the car so that she could move from the front passenger seat to the driver's seat, at which point in time she put down the power window and continued to yell at Douglas Bruce.

When Officer Scheidlmeir arrived and was trying to determine what had happened, she told him that Douglas Bruce and Shaver had a fight. She does not recall how many hands Douglas Bruce put upon Shaver and in fact does not believe that she said that Douglas Bruce choked her but, rather, that they got into a fight. While she maintained that the passenger door was never opened, she did acknowledge that the lights were on.

Shaver's first claim of error is that the evidence was insufficient to support the verdict that was rendered in this case. In this regard Shaver maintains that the Commonwealth did not prove beyond a reasonable doubt the elements of the offense charged since she produced two witnesses who testified that she never drove the vehicle and that the only person who did drive that vehicle was Douglas Bruce. In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), the Pennsylvania Supreme Court set forth the standard for review when a claim is raised by an appellant that the evidence was insufficient to support the verdicts.

Appellant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to how the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.

In order to address this claim we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*

A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975). When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v.*

Chambers, 528 Pa. 558, 599 A.2d 630 (1991).

A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa.Super. 120, 485 A.2d 459 (1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11, 102 S.Ct. 2211.^{FN3} An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson, supra*. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that “notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.” *Id.*

FN3. In *Tibbs*, the United States Supreme Court found the following explanation of the critical distinction between a weight and sufficiency review noteworthy:

When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different.... The [trial] court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

Tibbs 457 U.S. at 38 n. 11, 102 S.Ct. 2211 quoting *United States v. Lincoln*, 630 F.2d 1313 (Cir. 8th 1980).

In reviewing the evidence in the light most favorable to the Commonwealth as the verdict-winner, together with all of reasonable inferences drawn therefrom, it is clear that the Commonwealth established all of the elements of the offenses charged in this case. As this Court noted at the time that it rendered its verdicts, it rendered those verdicts based upon the credible evidence that was presented. Officer Scheidlmeir presented that credible evidence. This Court did not find Douglas Bruce or Lisa Bruce to be credible with respect to the occurrences that took place on the night of the stop.

Douglas Bruce testified that he took Shaver and his mother to Tramp’s so that they could attend a Halloween part on the 28th of October 2008, which eventually ended on the 29th of October 2008. Lisa Bruce testified that she went to see her son at work with his friends. Although Douglas Bruce and Lisa Bruce testified that there was a verbal altercation between Douglas Bruce and Shaver during the ride from Tramp’s, Douglas Bruce maintained that this argument never became physical whereas, Lisa Bruce told the investigating police officer that Douglas Bruce had choked Shaver. Shaver’s statements to the police confirmed this fact because not only did she tell the police that Douglas Bruce choked her, but she showed Officer Scheidlmeir the red marks on her neck. Lisa Bruce did not recall how many hands her son put on Shaver and did not recall if she said that her son had choked her Shaver but maintained that she used the word that they were in a fight, which she thought was inartfully used. Both Lisa Bruce and Douglas Bruce testified that they went to Tramp’s to attend a Halloween party on October 28, 2008, and that party ended in the early hours of the following morning on October 29. It is this testimony that cast extreme doubt on their credibility.

When Officer Scheidlmeir testified on direct examination, he stated that he was on routine patrol at approximately 3:00 on the morning of September 29, 2008, when he came upon a white SUV that was half on the sidewalk, half on the road, and abutting a utility pole. Prior to any questions being asked, Shaver’s counsel attempted to correct the record by suggesting that the stop did not occur on September 29 but, rather, on October 2. The problem with his statement and the testimony of Douglas Bruce and Lisa Bruce was that the record in this case clearly indicates that Officer Scheidlmeir made the stop and subsequent arrest on September 29, 2008. Officer Scheidlmeir instituted this criminal proceeding by filing a criminal complaint that stated that the incident took place on September 29, 2008 at 3:00 a.m. Officer Scheidlmeir swore to this complaint, which was filed on October 29, 2008, and the issuing authority noted that the complaint was properly completed and verified on October 29, 2008. In the affidavit of probable cause that was attached to that complaint, Officer Scheidlmeir stated that the alleged violation occurred on September 29, 2008. The transcript prepared by the issuing magistrate also indicated that the date of arrest was September 29, 2008 and the date of the issuance of the complaint was October 29, 2008.

This Court did not find Douglas Bruce and Lisa Bruce to be credible in this matter but, rather, believed the testimony presented by Officer Scheidlmeir. In that testimony Officer Scheidlmeir testified that when he came upon the scene he saw Shaver in the driver’s seat with her head on the steering wheel and that when he finally got her attention, she stated that her boyfriend had choked her and she showed Officer Scheidlmeir the red marks on her neck and then stated that she was driving the car to get her boyfriend back in the car.¹ Officer Scheidlmeir also noted that the lights were on in the car, the engine was running and that the right, front passenger door was open and that there was a white male walking await from the car on the sidewalk on the right side of Greentree Road. It is clear that the credible testimony presented in this case was presented by Officer Scheidlmeir and as a result of that testimony, it is clear that the Commonwealth established beyond a reasonable doubt the elements of the offense of driving under the influence of alcohol.

Shaver next claim of error is that this Court did not properly apply the standard necessary for making a determination that an individual was in actual control of the machinery or movement of a motor vehicle. Shaver was convicted of two counts of driving under the influence of alcohol or a controlled substance, those being Section 3802(a)(1)² and 3802(c)³, of the Pennsylvania Motor Vehicle Code.

In *Commonwealth v. Brotherson*, 888 A.2d 901, 904-905 (Pa. Super. 2005), the Court was confronted with a similar claim that there insufficient evidence to establish that the driver was in actual control of machinery or movement of the motor vehicle and rejected that claim.

A challenge to the sufficiency of the evidence is a question of law, subject to plenary review. When reviewing a sufficiency of the evidence claim, the appellate court must review all of the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth, as the verdict winner. Evidence will be deemed to support the verdict when it establishes each element of the crime charged and the commission thereof by the accused, beyond a

reasonable doubt. The Commonwealth need not preclude every possibility of innocence or establish the defendant's guilt to a mathematical certainty. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Williams, 871 A.2d 254, 259 (Pa.Super.2005) (citations and quotation marks omitted).

At the time of Appellant's offense, Section 3731 (now repealed) of Pennsylvania's Motor Vehicle Code provided in relevant part:

§ 3731. Driving under influence of alcohol or controlled substance

(a) Offense defined.—A person shall not drive, operate or be in actual physical control of the movement of a vehicle in any of the following circumstances:

* * *

(4) While the amount of alcohol by weight in the blood of:

(i) an adult is 0.10% or greater;

* * *

75 Pa.C.S.A. § 3731(a)(4)(i). "The term 'operate' requires evidence of actual physical control of either the machinery of the motor vehicle or the management of the vehicle's movement, but not evidence that the vehicle was in motion." *Commonwealth v. Johnson*, 833 A.2d 260, 263 (Pa.Super.2003). "Our precedent indicates that a combination of the following factors is required in determining whether a person had 'actual physical control' of an automobile: the motor running, the location of the vehicle, and additional evidence showing that the defendant had driven the vehicle." *Commonwealth v. Woodruff*, 447 Pa.Super. 222, 668 A.2d 1158, 1161 (1995). A determination of actual physical control of a vehicle is based upon the totality of the circumstances. *Williams, supra* at 259. "The Commonwealth can establish through wholly circumstantial evidence that a defendant was driving, operating or in actual physical control of a motor vehicle." *Johnson, supra* at 263.

Here the Commonwealth established beyond a reasonable doubt that at the time that Officer Scheidlmeir came upon the scene, Shaver was behind the wheel of Bruce's SUV with the engine on and the lights on. In addition, the passenger door was open and Douglas Bruce was seen walking on the sidewalk away from the car, which abutted the right side of Greentree Road. When Officer Scheidlmeir attempted to determine what had happened to cause this vehicle to be parked half on the sidewalk and half on the road, Shaver said that her boyfriend had choked her and showed the red marks on her throat to him. This statement was confirmed by Bruce's mother when Officer Scheidlmeir asked her what had happened. The vehicle obviously had been driven since everyone had indicated that they were going home from spending an evening at Tramp's. Finally, Shaver stated that she was driving to get her boyfriend back in the car. It was obvious to Officer Scheidlmeir that Shaver was intoxicated as evidenced by a strong odor of alcohol emanating from her, her glassy bloodshot eyes, and her slurred speech. His observation of her intoxication was confirmed by the blood alcohol test that was performed on her which indicated that she had a blood alcohol level of .174.

As previously noted, this Court did not find Douglas Bruce or Lisa Bruce to be credible and made the determination that Shaver was guilty of these two counts of driving under the influence. This Court used both direct and circumstantial evidence to establish the elements of the offenses charged and that she was in control of the machinery and movement of this motor vehicle since the engine was on, the lights were on, she was behind the wheel, and stated that she was the driver.

Shaver's next claim of error was that this Court made a material mistake of fact with respect to the testimony of Douglas Bruce that it recounted that Bruce's recollection that he had stopped and was turning around to go back to the car. In reviewing the transcript in this case it is clear that Mr. Bruce did indicate that he had stopped, he had turned, but he never went back to the car in light of the fact that Shaver was continuing to be belligerent and argumentative to him and he turned and continued on his way away from the vehicle. Even if this Court's characterization of Bruce's testimony was incorrect, it was de minimus since it had no bearing on the ultimate question that was involved in this case, as to whether or not Shaver was in actual control of the machinery or movement of the vehicle. As previously noted, there is more than sufficient direct and circumstantial evidence that the Commonwealth had established that fact beyond a reasonable doubt.

Shaver's final contention of error is predicated upon her assertion that this Court assumed facts that were not in evidence when rendering the verdicts in this case. In particular, Shaver claims that this Court introduced facts that were never presented to the Court with respect to the electrical system of Douglas Bruce's vehicle when it stated:

Obviously you have to close the door and you put the window down so you could talk to the police officer which means one of two things, either you had to start the car back up and/or the vehicle was already running because even if you turned off the car, there is still residual power to allow you to roll the window up or down. Once you open the door, you break the circuit and it doesn't matter.

Shaver also maintains that this Court erroneously concluded that the vehicle was still moving when the incident of domestic violence occurred between Shaver and Douglas Bruce. In her first claim Shaver has suggested that this Court interjected evidence as to the operation of the electrical system in Douglas Bruce's Jeep. The statement made by this Court did nothing more than to explain the possible ways by which Shaver could have lowered the driver's window when Officer Scheidlmeir was investigating this occurrence. Officer Scheidlmeir had indicated that the lights were on and the engine was running and that the front seat passenger door was open. Douglas Bruce and Lisa Bruce indicated that although the keys were in the ignition and that the lights were on, the car was not running nor was the front seat passenger's door open. There would have been sufficient electrical power to lower the window since it was a power window as acknowledged by all parties which would permit Shaver to have lowered that window. If the vehicle was not running and a door, either the driver's door or the front seat passenger door had been opened, there would not be sufficient residual electricity within the system to allow the driver to have lowered the driver's window. The fact that she was able to lower the window and that the front seat passenger's door was open, provided support for Officer Scheidlmeir's observation that the front seat passenger's door was open and the vehicle was running.

When this Court made those statements, it was doing nothing more than using its common sense and its practical experience.

In Standard Jury Instruction 705⁴, a jury about to begin its deliberation is charged to consider all of the evidence and to use its common sense and draw upon their everyday practical experiences in consideration how the evidence would lead them to discovery of facts and how those facts, when viewed in the light of the Court's charge, would lead them to an appropriate verdict. That charge provides as follows:

Your decision in this case, as in every case you hear, is a matter of considerable importance. Remember that it is your responsibility as jurors to perform your duties and reach a verdict based on the evidence as it was presented during the trial. However, in deciding the facts, you may properly apply common sense and draw upon your own everyday, practical knowledge of life as each of you has experienced it. You should keep your deliberations free of any bias or prejudice. Both the Commonwealth and the defendant have a right to expect you to consider the evidence conscientiously and to apply the law as I have outlined it to you.

Since this Court was the fact-finder in a non-jury trial, it was doing nothing more than using its common sense and its practical experience in dealing with automobiles and how they operate when both running and not running. That being said, however, the testimony in this case was that the vehicle was in fact running. Lisa Bruce testified that she stated that Shaver put down the window in response to the police request and that the power was on. Douglas Bruce's testimony that the power was off was good only for the point in time up until he left the vehicle, as he was not there at the time that Officer Scheidlmeir interacted with Shaver.

Shaver's final contention that this Court erroneously concluded that the vehicle was in motion when Douglas Bruce choked Shaver ignores all of the testimony that was presented in this case. Both Douglas Bruce and Lisa Bruce testified that they went to Tramp's to attend a party and they enjoyed themselves at that party, Shaver to the extent that she became intoxicated and did not want to leave the party. As a result of her desire to stay at that party, an argument ensued between her and Douglas Bruce that continued once they were in the vehicle. At no time did anyone ever mention that while they were at the party Shaver was choked by Douglas Bruce but, rather, both Douglas Bruce and Lisa Bruce testified that the argument between Shaver and Douglas Bruce became more animated and heated to the point that Douglas Bruce felt that he had to leave the vehicle in order to cool down. When Officer Scheidlmeir asked Shaver what was going on, she told him that her boyfriend had choked her. When Officer Scheidlmeir interviewed Lisa Bruce, she also said that as the argument escalated in the car, that her son choked Shaver. Even her attempt to minimize this occurrence when she could not remember how many hands he had placed on her or whether or not she had used the word choke, she did acknowledge that she used the word fight. The logical and reasonable inference to be drawn from all of these pieces of testimony was that the incident of domestic violence occurred inside the vehicle while Shaver was operating it. As with all of her other claims of error, this claim is similarly without merit.

Cashman, J.

Dated: October 15, 2010

¹ A. I, at this time, asked her what was going on, if she was okay.

Q. What did she say?

A. She was like, she started crying. She stated my fucking boyfriend just choked me and she pulled down her bow tie she had around her neck and had red marks.

Q. At any point in time did she say her boyfriend was driving?

A. No.

Q. At any point in time did she say anyone other than her was driving?

A. No. She said she was driving to get her crazy ass boyfriend back in the car.

Trial Transcript, page 12, lines 8-21.

² (a) **General impairment.**—

(1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

³ (c) **Highest rate of alcohol.**—An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

⁴ See also, *Commonwealth v. Einhorn*, 911 A.2d 960 (Pa. Super 2006), where the instruction to the jury to use their common sense and practical experience was approved by the reviewing Appellate Court.

Commonwealth of Pennsylvania v. Michael Givens

2nd PCRA—After-Discovered Evidence—Time Bar

No. CC 9916433, 200005984. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. McDaniel, J.—October 25, 2010.

OPINION

The Defendant has appealed from this Court's Order of July 23, 2010, which dismissed his Amended Post Conviction Relief Petition without a hearing. A review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, this Court's Order must be affirmed.

The Defendant was charged with Criminal Homicide,¹ Criminal Conspiracy² and a Violation of the Uniform Firearms Act – Firearms Not to be Carried Without a License³ in relation to the shooting death of Rico Steele on November 6, 1999, on Path Way in the Hazelwood section of the City of Pittsburgh. The Defendant was tried before this Court with a co-Defendant, his brother, Curtis Johnson, and at the conclusion of the evidence the jury returned a verdict of guilty of first-degree murder and all other charges. On June 19, 2000, the Defendant was sentenced to a term of life imprisonment, plus additional consecutive terms of imprisonment of five (5) to ten (10) years and three and one half (3 ½) to seven (7) years. No Post-Sentence Motions were filed.

A direct appeal was taken to Superior Court and, on July 5, 2002, the judgment of sentence was affirmed. The Pennsylvania Supreme Court denied allowance of appeal on December 27, 2002.

On November 30, 2003, the Defendant filed a pro-se PCRA Petition. Scott Coffey, Esquire, was appointed to represent the Defendant, but after his review of the record, Mr. Coffey could find no meritorious issues and sought permission to withdraw pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa.Super. 1988). After giving the appropriate notice, this Court dismissed the Defendant's PCRA Petition without a hearing. The Defendant initiated a direct appeal, but the Superior Court later dismissed the appeal on March 15, 2005 for the Defendant's failure to file a brief.

On April 30, 2010, the Defendant filed a second pro-se PCRA Petition, alleging a claim of after-discovered evidence. After reviewing the record, this Court determined that the Defendant failed to satisfy the requirements of the after-discovered evidence exception to the time limitation provisions of the Post Conviction Relief Act and gave notice of its intent to dismiss the Petition. This Court considered the Defendant's Response to the Notice of Intent to Dismiss and his subsequent Amended PCRA Petition; however, neither was sufficient to supersede the time bar or necessitate an evidentiary hearing. On June 21, 2010, this Court dismissed the Defendant's second PCRA Petition without a hearing. This appeal followed.

Pursuant to 42 Pa.C.S.A. §9545(b), any and all PCRA Petitions, "including a second or subsequent petition, shall be filed within one year of the date the judgment of sentence becomes final..." 42 Pa.C.S.A. §9545(b)(1). In this case, the Defendant's judgment of sentence became final on March 27, 2003, ninety (90) days after the Pennsylvania Supreme Court's ruling, when he failed to petition for certiorari to the United States Supreme Court. Therefore, in order to be timely, any PCRA Petitions should have been filed by March 29, 2004. The instant Petition, filed on April 30, 2010, is well outside of that time limitation. However, the Defendant has averred after-discovered exception to that time limitation.

The Post Conviction Relief Act states, in relevant part:

§9545. *Jurisdiction and proceedings.*

(b) *Time for filing petition.* –

(1) *Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment became final, unless the petition alleges and the petitioner proves that:*

(ii) *the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.*

(2) *Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.*

42 Pa.C.S.A. §9545.

Our Courts have held that when raising claims of after-discovered evidence, the defendant "only has sixty days after the discovery of the information to file his PCRA and he must plead and prove that the information could not have been discovered earlier with the exercise of due diligence. Further, in order to prevail under the newly discovered evidence exception, Appellant must plead and prove that the facts upon which the claim is predicated were unknown to him and could not have been ascertained earlier by the exercise of due diligence...In addition, Appellant must show that these new facts constitute 'exculpatory evidence' that 'would have changed the outcome of the trial if it had been introduced.'" *Commonwealth v. Sattazahn*, 869 A.2d 529, 534 (Pa.Super. 2005). See also *Commonwealth v. Bonaccorso*, 625 A.2d 1197, 1199 (Pa.Super. 2003).

On appeal, the Defendant argues that this Court erred in not finding an after-discovered evidence exception in relation to an Allegheny County Homicide Department Supplemental Report dated November 17, 1999 documenting Detective McDonald's interview with the Defendant's brother (and co-Defendant), Curtis Johnson, wherein Johnson admitted to be the individual who fired the gun, as well as statements from Ernestine Thomas Murray, Derrick McDonald, Lori Chambers and his brother and co-Defendant, Curtis Johnson. A careful review of the record reveals that all of these claims are meritless.

Reference to the record reveals that Johnson was always alleged to have been the shooter and that the Commonwealth pursued a conspiracy and accomplice liability theory against Givens. The record further reveals that Detective McDonald testified regarding the November 17, 1999 interview and Johnson's confession, and the report was introduced into evidence. (See Trial Transcript, Vol. 2, pp. 369-398). Inasmuch as the report in question was known to the Defendant at the time of trial and was, in fact, introduced into evidence at trial, there is no possible argument that this statement could constitute after-discovered evidence for purposes of the time limitation provisions of the Post Conviction Relief Act.

Similarly, the statements of Ernestine Thomas Murray, Derrick McDonald and Lori Chambers are unpersuasive. Ms. Murray claims to have been sitting in front of her house for an entire 24-hour period when the shooting occurred, during which she saw the Defendant leave and not return until after the shooting. Mr. McDonald and Ms. Chambers both claim to have been drinking in a bar with the Defendant at the time of the shooting. The Defendant fails to indicate when he learned of Ms. Murray's, Mr. McDonald's and Ms. Chambers' testimony, why he could not have learned of it sooner in the exercise of due diligence or why such testimony would have been exculpatory. The Defendant himself admits that the testimony would have been the same as and cumulative with the testimony of several individuals who *did* testify at trial. Under these circumstances, the Defendant has failed to satisfy the requirements of the after-discovered evidence exception with regard to the purported testimony of Ms. Murray, Mr. McDonald and Ms. Chambers. Again, this claim must fail.

Finally, the Defendant alleges an after-discovered evidence exception with regard to a written affidavit made by his brother and co-Defendant, Curtis Johnson, stating essentially that he (Johnson) was the shooter and that the Defendant (Givens) had nothing to do with the killing. Again, reference to the record is noted to establish that the Commonwealth's theory of the case was *always* that Johnson was the shooter and that Johnson did, in fact, confess to being the shooter. As noted above, Johnson's confession was admitted into evidence at trial. Thus, Johnson's affidavit cannot be considered "new" evidence sufficient to satisfy the after-dis-

covered evidence exception to the time limitation provisions of the Post Conviction Relief Act. This claim is meritless.

Inasmuch as the Defendant has failed to satisfy the requirements of the after-discovered evidence exception to the Post Conviction Relief Act, his Petition was properly classified as untimely. “Given the fact that the PCRA’s timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner.” *Commonwealth v. Mazzarone*, 856 A.2d 1208, 1210 (Pa.Super. 2004). See also *Commonwealth v. Bennett*, 842 A.2d 953, 956 (Pa.Super. 2004) and *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999). As such, this Court is bound by the time limitation provisions of the Act and, therefore, properly dismissed the Defendant’s third Post Conviction Relief Act Petition.

Accordingly, for the above reasons of fact and law, this Court’s Order of July 23, 2010 must be affirmed.

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

¹ 18 Pa.C.S.A. §2502 (CC 9916433)

² 18 Pa.C.S.A. §903 (CC 200005984)

³ 18 Pa.C.S.A. §6106 (CC 200005984)

Commonwealth of Pennsylvania v. Brandon McClendon

Attempted Murder—Prosecutorial Misconduct—Prior Attacks—Jury Instruction

No. CC 2007-14747. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Williams, J.—October 27, 2010.

OPINION

The Defendant, Brandon McClendon, has appealed this Court’s October 8, 2009, sentence of 20 to 40 years for attempted homicide, aggravated assault and carrying a firearm without a license. His sentence followed a multi-day jury trial before this Court in July, 2009.

McClendon’s *Concise Statement of Errors Complained of on Appeal* raises four discrete accusations of error. While each can be addressed within the confines of his respective argument, a brief summary will provide context.

A love triangle almost led to the death of Elijah Posey. This was not your ordinary love connection. The female temptress, Janya Jenkins was 18 years old. The defendant, Brandon McClendon (“McClendon”) was about the same age, having known Janya since he was 14 years old. Mr. Posey was 47 years old. He and Jayna had been dating for about 3 months despite him being almost 30 years older. McClendon did not like that his baby’s mother was messing around with an old guy.

On September 4, 2007, Jayna had Posey drive her to a secluded and dark street in a section of the City of Pittsburgh. Jayna left the car. Posey waited for her return. The quiet of the location was interrupted by McClendon approaching the driver’s side of Posey’s car. Multiple gunshots are fired at Posey. Several shots hit him. He plays dead. When the coast is clear, Posey musters up enough strength to drive a short distance to get help. His helper drives him to a nearby hospital. The hospital is his home for three weeks.

The broad headlines of McClendon’s claims are prosecutorial misconduct, the verdict was against the weight of the evidence, evidentiary error regarding prior attacks on victim and other uses of gun and fault with certain jury instructions. Each will be addressed in that order.

A. Prosecutorial Misconduct

McClendon identifies four instances of prosecutorial misconduct which, in his mind, demand relief. Each is identified below and each is discussed through the lens of Pennsylvania law. He seeks a new trial and, because of the intentional misconduct engaged in by the prosecutor, he feels a new trial should never occur. In other words, McClendon feels the government should be barred from trying him a second time.

The phrase “prosecutorial misconduct” is so often heard throughout Pennsylvania courts that it has lost “any particular meaning.” *Commonwealth v. Cox*, 983 A.2d 666, 685 (Pa. 2009). Its popularity, perhaps, has contributed to the legal basis for the claim often being overlooked. Recently, our Supreme Court in *Cox* elaborated upon the constitutional underpinnings of a prosecutorial misconduct assertion.

“The claim either sounds in a specific constitutional provision that the prosecutor allegedly violated or, more frequently, like most trial issues, it implicates the narrow review available under Fourteenth Amendment due process. See *Greer v. Miller*, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) (“To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant’s right to a fair trial.”) (internal quotation marks omitted); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) (“When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them.”). However, “[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty.” *Mabry v. Johnson*, 467 U.S. 504, 511, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984). The touchstone is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). If the defendant thinks the prosecutor has done something objectionable, he may object, the trial court rules, and the ruling—not the underlying conduct—is what is reviewed on appeal.”

983 A.2d at 685. With this constitutional frame now constructed, each accusation of prosecutorial misconduct can be reviewed.

(1) Prosecutor referred to defense counsel as using the ‘oldest play in the defense attorney handbook’

The above quoted language appears in the prosecutor's closing argument. TT, 548. There was no spontaneous objection by McClendon. Upon conclusion of closing argument and before the jury was charged, McClendon moved for a mistrial. TT, 612. McClendon's counsel provided a list of "the various misrepresentations made by [the] prosecution at closing argument which...unduly prejudiced my client." *Id.* The third topic was that "the prosecution referred to my genuine defense as lawyer tricks... To suggest that my tactics are somehow lawyer tricks unduly prejudiced my client suggesting that his defense is somehow ungeniue." TT, 614. Did this somewhat vague post closing criticism preserve this precise claim? The Court is not so sure. Nevertheless, the substance of the claim will be reviewed.

It is axiomatic that a prosecutor who refers to a closing argument of defense counsel as somehow involving trickery is not appropriate. Implicit within such a contention is an attack on defense counsel's integrity. While that might be appropriate for a school-yard full of third graders playing dodge ball, it has no place in modern day trial practice. That being said, the Court is not convinced that this single reference on the 5th page of an argument that dragged on for 49 more pages so inflamed the jury that they were incapable of considering the evidence in a dispassionate manner. *See, Commonwealth v. Young*, 692 A.2d 1112 (Pa. Super. 1997)(Court did not grant a new trial where prosecutor told jury that defense counsel "is playing one of his games again").

(2) Prosecutor told the jury that defense counsel concocted stories with the witnesses and 'fed lines' to the witnesses.

This assertion appears in the prosecutor's closing argument. TT, 550. The prosecutor was addressing the statement Janya Jenkins gave the police and highlighting some real world realities which could contribute to their believing certain parts of her testimony when he said, "except when Ms. Jenkins testified, she said that Elijah had gone to make a drug deal. Okay. I would argue that Mr. Sontz fed that line to her as well." TT, 550. Counsel for McClendon took immediate umbrage.

Mr. Sontz: Your Honor, I am going to object. The implication that I have somehow told witnesses what to testify to is absurd and it is completely unprovable and I completely reject it or deny it.

The Court: The Court's position would be consistent that there is an expectation of some civility in that everyone who speaks as an attorney before the Court is telling the truth. To suggest that an attorney is a liar or that he has distorted the truth, I believe is inappropriate unless there is a basis that you can establish that with.

I would instruct you not to say anything else about the character of Mr. Sontz. Are we clear?

Mr. Pietragallo: We are, Your Honor.

TT, 550-551. Before the final charge, McClendon revisited this issue.

Mr. Sontz: [T]he prosecution's statement that I told the Commonwealth witnesses to lie. I understand that Your Honor sustained my objection but the mere implication of it I find to be quite frankly offensive. The implication of it that I would counsel a Commonwealth witness to lie is utterly absurd. There is absolutely no evidence to support it and I can't imagine that the jury — that that wouldn't have planted a seed of doubt of my integrity in the mind of the jury and I believe that that unduly prejudiced my client.

TT, 614-615.

There is no question that the issue was preserved by a contemporaneous objection and the topic was revisited upon conclusion of the government's closing argument. The preservation of the issue, however, does not lead to the promised land. The Court reaches this conclusion based upon two events which took place during the trial and the law. First, the objection was sustained. *Commonwealth v. Ragan*, 645 A.2d 811,822 (Pa. 1994)("The mere sustaining of an evidentiary objection does not give rise to an incident of prosecutorial misconduct."). Second, the court admonished the prosecutor – not in private at sidebar – but in front of the same group of people he was trying to persuade. Third, McClendon's mistrial request is appropriate only where the alleged prejudicial event can reasonably be said to deprive him a fair trial. *Commonwealth v. Jones*, 668 A.2d 491,503 (Pa. 1995), *cert. denied*, 519 U.S. 826, 117 S.Ct. 89, 136 L.Ed.2d 45 (1996). This matter - where an objection was sustained and the offending lawyer was scolded - cannot reasonably be said to have deprived McClendon of a fair trial.

(3) Prosecutor testified to facts not in evidence regarding the gun used during the commission of the crime and then stated to the jury that 'I am going to use the judge's own term here. He likes to call these community guns because they get passed around from person to person and they go around the streets and they are used in different crimes'.

During his closing argument, the prosecutor made the above referenced statement. TT, 560. Before the jury was given their final instructions, McClendon objected to this argument. TT, 613. "[T]he district attorney improperly advised the jury that it was a community gun by telling them that, 'the judge in his own words called it a community gun.' I believe that this is severely prejudicial." TT, 613, 614. This claim has not been waived.

When viewed in isolation this claim may appear to have some legs. Context, however, extinguishes the flicker of hope. The phrase "community gun" was not used by this Court during the course of this trial when the jury was present. The Court recalls the phrase being used during one of the proceedings held before the actual trial. These facts coupled with two other events convince this Court that the prosecutor's use of the phrase did not contribute to an unfair trial. The jury was instructed that the arguments of counsel are not evidence but that it may be guided by them. TT, 624-625. *Commonwealth v. Miner*, 753 A.2d 225,232 (Pa. 2000)("The law presumes that the jury follows the court's instructions.").

In the context of this case, and recognizing the reality of trial work that both lawyers want the jury to subconsciously believe everything they say, it is difficult for this Court to believe that a prosecutor, who uses extraneous material that was not presented to the jury, enhances his credibility in front of the decision making body. Jurors are not stupid. Counsel arguing about something this court never said serves only to blunt the build-up of credibility points this young prosecutor was trying to amass. This prosecutor's misguided attempt at making him more worthy of belief than defense counsel had the opposite effect. Simply put, it did not have the significant effect of denying McClendon a fair trial.

(4) Prosecutor interjected his personal tale into the closing argument by stating that he had been involved in a love triangle.

The complained of language consumes 20 lines of transcript or about 4/5ths of a page in a closing argument that goes on for

54 pages. TT, 563-564; 544-598.¹ McClendon leveled no immediate objection. TT, 564. After a jury charge conference and before the jury returned to hear closing arguments defense counsel asked for a mistrial. TT, 612. McClendon advanced several grounds. None of the justifications for a mistrial included the prosecutor's unenlightening tale of his own college escapades. TT, 612-616.² This claim is waived. *Commonwealth v. Powell*, 956 A.2d 406 (Pa. 2008) ("The absence of a contemporaneous objection below constitutes a waiver of appellant's current claim respecting the prosecutor's closing argument. Pa.R.A.P. 302(a); see also, *Commonwealth v. Butts*, 434 A.2d 1216,129 (Pa. 1981)(failure to object during or after summation constitutes waiver of prosecutorial misconduct claim.)").³

B. Against the Weight

McClendon claims the verdict was contrary to the weight of the evidence and shocks the conscience. Before the Court can even address the reasons advanced by McClendon as to why the verdict was so shocking, the rules of procedure need to be consulted.

Pa.R.Crim.P. 607 provides as follows:

(A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:

- (1) orally, on the record, at any time before sentencing;
- (2) by written motion at any time before sentencing; or
- (3) in a post-sentence motion.

Pa.R.Crim.P. 607 (A). On October 8, 2009, McClendon filed a post-sentence motion. His only assertion of error was that the verdict was against the weight of the evidence. Post-Sentence Motion, paragraph 4(a) (Oct. 8, 2009). On March 4, 2010, through a three page opinion and separate order, this Court denied McClendon's post-sentence motion. The Court concluded that the claim was waived. The waiver conclusion was predicated upon the lack of reasons *why* the verdict was against the weight of the evidence. Trial Court Opinion, pg. 2 (March 4, 2010).⁴ The Court stands by its previous ruling.⁵

C. Prior Attacks on Victim & Prior Uses of Gun

McClendon asserts this court erred when it "denied [d]efense [c]ounsel the opportunity to present additional evidence regarding prior attacks on the victim Mr. Posey and the prior uses of the gun in violent acts in neighboring areas and communities." Concise Statement, pg. 6. Because of their close connection to each other, the Court will address the issue collectively.

The Court made a basic evidentiary decision that the gun used in other shootings was not relevant as was prior attacks on the victim. Motions Hearing Transcript ("MHT", pg. 5 (July 9, 2009). McClendon asserts "the other shootings with the same weapon show that other individuals had access to this weapon and could have been the people responsible for shooting Mr. Posey." Concise Statement, pg. 7. Persuasive to the Court was the lack of scientific evidence linking the gun used here to the other incidents. MHT, pg. 8, 10 ("There is no ballistic evidence."); MHT, pg. 17 (Court: Is the [re] any hard evidence that it was the same gun? Prosecutor: None, your Honor."; Court: Do we have any fingerprints...? Prosecutor: No, your Honor.").

Similarly, the proffered evidence of prior attacks on the victim does not clear the relevance hurdle and was properly excluded under Pa.R.E. 402. The Court recognizes the fundamental principle that "[a]n accused has a fundamental right to present evidence so long as the evidence is relevant and not excluded by an established evidentiary rule." *Commonwealth v. Ward*, 605 A.2d 796,797 (Pa. 1992). The Court also acknowledges the definition of relevant evidence is rather broad and did not require McClendon to score a touchdown but just to advance the ball. Binder, *Pennsylvania Evidence 4th Ed.*, Section 4.01, pg. 91. However, just articulating these legal principles does not make something admissible. And that is where McClendon's argument fails. The collection of facts he set forth just did not convince this Court of their relevance.

D. Jury Instruction

McClendon's fourth and final accusation of error concerns the closing instructions given to the jury. McClendon claims this Court erred when it denied his request for a specific reasonable doubt instruction and a particular charge regarding identification evidence. This Court's failure to give these coveted instructions, according to McClendon, prejudiced him.

The initial area of inquiry when addressing a jury instruction error is whether the issue has been properly preserved. Rule 647 of our Rules of Criminal Procedure guides the analysis. Subsection (A) of Rule 647 says:

(A) Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge's rulings on all written requests and which instructions shall be submitted to the jury in writing. The trial judge shall charge the jury after the arguments are completed.

Pa.R.Crim.P. 647(A). The docket entries reveal that neither party submitted any written requests for instructions. Despite not being obligated to hold a charge conference when no written instructions are submitted, the Court gathered both counsel to resolve some matters where a consensus was lacking. TT, 599-611. Two of the matters discussed were the reasonable doubt and identification instruction sought by McClendon. TT, 599-602; 604-607. Subsection (A) of Rule 647 is not an impediment to issue preservation.

Subsection (B) of Rule 647 is another story. This rule provides:

(B) No portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.

Pa.R.Crim.P. 647(B). At the conclusion of the charge conference, McClendon's counsel leveled a global objection.

Mr. Sontz: I want to put one last thing on the record. **The Appellate Court has required that I object after you read the instructions in order to preserve any challenges that I would have to the instructions.** I personally think that this is a ridiculous rule because I have clearly made my opinions known right here, but I would just like to put on the record that I am objecting to the instructions for the purposes of preserving it so that I do not have to object in front of the jury to the instructions. The Superior Court believes that I have to have the opportunity to maybe change your mind, but I am confident that you are not going to change your mind regarding your rulings.

The Court: With respect to the instructions?

Mr. Sontz: Yes.

The Court: Astute observation.

TT, 610-611 (emphasis added).

The question becomes was this critique of precedent good enough to preserve McClendon's claims of jury instruction error? This Court says no.

In *Commonwealth v. Pressley*, 887 A.2d 220,221 (Pa. 2005),⁶ our state Supreme Court addressed "the proper procedure to preserve an issue respecting proposed jury instructions under the Rules of Criminal Procedure." The court held "that under Criminal Procedural Rules 603 and 647(B), the mere submission and subsequent denial of proposed points for charge that are inconsistent with or omitted from the instructions actually given will not suffice to preserve an issue, absent a specific objection or exception to the charge or the trial court's ruling respecting the points." *Id.*, 225.

In the five years since *Pressley* was decided, our Supreme Court has referenced that decision on five occasions. *Commonwealth v. Garcia*, 888 A.2d 633 (Pa. 2005) affirmed that *Pressley* would apply to trials after November 29, 2005 as did the per curiam opinion in *Commonwealth v. Toby*, 963 A.2d 902 (Pa. 2008). In *Commonwealth v. Dickson*, 918 A.2d 95 (Pa. 2007), Justice Castille uses *Pressley* to support his dissent. His thoughts have some contributing influence to this Court's conclusion.

"As I recently noted in *Commonwealth v. Pressley*, 887 A.2d 220,227 n.1 (Pa. 2005)(Castille, J., concurring in the result), "I respectfully disagree with [any] suggestion that a repeated objection risks 'alienating' the trial judge. It should not alienate a trial judge that a lawyer seeks to protect his client's interest; and I trust in the professionalism of our trial judges to recognize what is an exercise of prudent caution and not to react adversely thereto." In this case, the failure was not one of non-repetition; rather, appellant simply never forwarded the relevant objection. A proper objection could easily and candidly have been phrased thus: "Your Honor, I concede (as is my duty) that the law at the Superior Court level (which binds you), is settled, is against me, and affords you no discretion but to impose the statutory mandatory minimum sentence. Respectfully, however, I wish to register an objection to the application of the mandatory minimum against my client, who was but an unarmed coconspirator, so as to preserve that issue in the hope that, upon further review, I can convince our Supreme Court to rule upon the issue, which it has not expressly done to date."

918 A.2d at 111.

In *Commonwealth v. Steele*, 961 A.2d 786,807 (Pa. 2008), *Pressley* was used to support the conclusion that an instruction claim was waived for failure to object at trial. Similarly, in *Commonwealth v. Laird*, 988 A.2d 618 (Pa. 2010), appellant's lack of objection before the jury retired to deliberate was fatal. *Laird* also highlights an event which repeated itself at McClendon's trial.

"Indeed, as in *Pressley*, the court inquired of counsel whether he wanted any additional instructions or corrections, and he responded, "No, your honor." N.T. Feb. 13, 2007, at 177. Accordingly, this claim is waived."

Laird, 988 A.2d at 646.

Our Superior Court's experience with *Pressley* is greater in volume. Ten decisions have referenced *Pressley*.⁷ Three will be discussed here. In *Commonwealth v. Baker*, 963 A.2d 495,505 (Pa. Super. 2008), the trial court was accused of not instructing the jury on "prior inconsistent statements" of a witness despite being requested to do so. When the final charge was completed, the trial judge "inquired of counsel if there was 'anything else'. *Id.* Defense counsel "responded:

"Judge, just to preserve it for the record, ..., this morning we had requested an instruction on prior inconsistent statements of substantive offenses that the Court has already ruled on."

Id. This according to the *Baker* panel, shows "that the trial judge was alerted to her desire for the jury instruction in question, but nowhere does she assert that she lodged a specific objection or exception to the instruction that was, in fact, given." *Id.*, at 505-506. From these facts, the *Baker* panel had no problem concluding the instruction issue was waived.

"As the Pennsylvania Supreme Court held in [*Pressley*]: under Criminal Procedural Rules 603 and 647(B), the mere submission and subsequent denial of proposed points for charge that are inconsistent with or omitted from the instructions actually given will not suffice to preserve an issue, absent a specific objection or exception to the charge or the trial court's ruling respecting the points. *Id.*, at 887 A.2d at 225.

Id., 963 A.2d at 506.

In *Commonwealth v. Harris*, 979 A.2d 387,395 (Pa. Super. 2009), one of several claims advanced on appeal was that the trial judge "fail[ed] to properly instruct the jury as to mere presence." Before the jury was charged on a multitude of crimes including conspiracy, the defense offered a proposed charge. The trial judge "responded that the concept of 'mere presence' was 'built into the conspiracy charge' and did not think the proposed charge was necessary. *Id.*, at 395. The trial judge noted the defense's objection. It was the recognition of the objection that led the Superior Court to rule that the trial judge's "earlier acknowledgement that she noted his objection will be viewed as sufficient to preserve his current appellate challenge." *Id.*

In *Commonwealth v. Marquez*, 980 A.2d 145 (Pa. Super. 2009), the Superior Court reviewed a sufficiency challenge to a third degree murder conviction and a jury instruction error. It did not take the *en banc* panel too long to conclude the jury instruction error was not preserved. After quoting Rule 647(b) and *Pressley*, the Court passed on the facts.

"In the instant case, Marquez failed to object at the conclusion of the jury charge, and stated that he had no objections or exceptions to the charge."

Id., at 151. As further support for its waiver conclusion, *Marquez* relied upon *Commonwealth v. Russell*, 938 A.2d 1082 (Pa. Super. 2007). This *en banc* opinion interprets *Russell* in the following way:

"in order to preserve for appeal a challenge to a jury charge, the defendant must lodge a specific objection or exception to the jury charge itself."

Id., at 151.

From this canvas of jurisprudence on preserving jury instruction error, the Court feels the issue was not preserved. While *Harris* is McClendon's friend, that friendship is fleeting. Less than 3 weeks after *Harris* is written by Judge Stevens, he joins eight of his colleagues in deciding *Marquez*, which emphasizes that the specific objection required of *Pressly* must be made to the jury charge itself. The only way one can make an objection to the charge itself is to wait for the charge to be read. In this case, after the jury was charged, the Court inquired of counsel.

Court: Does counsel have any additions or corrections that they wish to propose. Mr. Sontz?

Mr. Sontz: No, Your Honor.

Court: Mr. Pietragallo?

Mr. Pietragallo: No, Your Honor.

TT, 644. This exchange is fatal to preservation. *See, Laird*, 988 A.2d at 646.; *see also, Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010) ("Generally, a defendant waives subsequent challenges to the propriety of the jury charge on appeal if he responds in the negative when the court asks whether additions or corrections to a jury charge are necessary. [citations omitted]"). Even though McClendon recognized the precedent he was dealing with,⁸ he decided not to follow its command or the theme suggested by Justice Castille in *Dickson*. Instead, he engaged in unwarranted criticism of the Superior Court. It was not advocacy's finest moment.

What appears to be lost on McClendon's counsel is the opportunity closing argument may have in persuading the trial judge to revisit his coveted language. The Court will have just heard both lawyers summations and inferential arguments. With the competing versions of the facts before him, the trial judge has before him the clearest picture of what happened. This full airing of the facts and "connecting-the-dots" is precisely why defense counsel wants the court to revisit the previously denied language. The trial judge may finally "see" or "hear" or "get" what counsel has been saying all along. *Commonwealth v. Shamsud-Din*, 995 A.2d 1224, 1226 (Pa. Super. 2010) ("[A] judge's perspective concerning a particular point may be altered based upon a party's arguments."). The post-charge objection, which is part of Pennsylvania law, is the vehicle to effectuate change but only if counsel asks the Court to change its mind. McClendon's counsel did not take advantage of this opportunity.

Assuming for the moment that the court's interpretation of *Pressley* and its progeny is not correct, McClendon has to demonstrate this Court abused its discretion in rejecting his two requests. This he cannot do.

"An appellate court must assess the jury instructions as a whole to determine whether they are fair and impartial." *Commonwealth v. Collins*, 687 A.2d 1112,1113 (Pa. 1996). "The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. *** We will not rigidly inspect a jury charge, finding reversible error for every technical inaccuracy, but rather evaluate whether the charge sufficiently and accurately apprises a lay jury of the law it must consider in rendering its decision." *Commonwealth v. Hannibal*, 753 A.2d 1265,1269 (Pa. 2000), *cert. denied*, 532 U.S. 1039 (2001) (quoting *Commonwealth v. Prosdocimo*, 578 A.2d 1273,1274, 1276 (Pa. 1990). "For [an] appellant to be entitled to a new trial, the jury instruction must have been fundamentally in error, or misled or confused the jury." *Commonwealth v. Wright*, 961 A.2d 119,145 (Pa. 2008).

This body of law serves as our filter in reviewing McClendon's alleged error regarding two jury instructions.

Reasonable Doubt Charge

The reasonable doubt charge actually read to the jury is repeated here:

"Although the Commonwealth has the burden of proving the Defendant guilty beyond a reasonable doubt this does not mean that the Commonwealth must prove its case beyond all doubt or to a mathematical certainty, nor must it demonstrate the complete impossibility of innocence. Reasonable doubt is a kind of doubt that will cause a reasonably careful and sensible person to pause or hesitate before acting in a matter of importance in his or her own affairs. A reasonable doubt must fairly arise out of the evidence presented with respect to some element of the crimes charged. A reasonable doubt must be a real doubt. It may not be an imagined one, nor may it be a doubt merely manufactured to avoid carrying out an unpleasant duty. To summarize, you may not find the Defendant guilty based upon a mere suspicion of guilt.

TT, 623-624. This comes directly from our standard suggested jury instructions. Pa.SSJI (Crim) 7.01 - First Alternative. McClendon wanted the second alternative read. *See*, Pa.SSJI (Crim) 7.01 - Second Alternative. The Court gave both parties the opportunity to argue their respective positions. McClendon's reasons were not persuasive then and they are not persuasive now. The Court is influenced by the sentiment expressed in the Advisory Committee Notes. There it says "[t]he second alternative is meant as an alternative formulation for courts who believe that the essence of the presumption or reasonable doubt standard may be better explained by the different approach it takes." *Advisory Committee Notes*, (Crim) 7.01. The Court does not believe the second alternative provides for a better explanation of reasonable doubt. The Court is not saying that the second alternative will never be used. However, the push for the second alternative to be used will need to be more subject matter specific than McClendon advances here. The standard suggested jury instruction read to this jury was not erroneous, misleading or confusing.

Identification Charge

The witness identification charge which was read to this jury is repeated here.

"During the trial [Elijah Posey] identified the Defendant as the person who committed the crime. You can evaluate the testimony in addition to the other instructions I have provided you for judging the testimony of witnesses. You should consider the additional following factors: Did the witness have a good opportunity to observe the perpetrator of the offense: Was there sufficient lighting for either of them to make their observations: Were they close enough to the individual to notice facial or other physical characteristics as well as any clothing that he was wearing: Had either of them made a prior identification of the Defendant as the perpetrator of these crimes at any other proceedings: Was either identification positive or was it qualified by any hedging or inconsistencies: During the trial of this case did the witness identify anyone else as the perpetrator: In considering whether or not to accept identification testimony of [Elijah Posey] you should consider all of the circumstances under which the identifications were made. Furthermore, you should consider all evidence relative to the question of who committed the crime including the testimony of any witness from which iden-

tify or non-identity of the perpetrator of the crime may have been inferred. You cannot find the Defendant guilty unless you are satisfied beyond a reasonable doubt by all of the evidence, direct or circumstantial, not only that the crime was committed, but that it was the Defendant who committed it.”

TT, 633-634.

This charge came directly from our standard jury instruction. Pa. SSJI (Crim) 4.07A. It was an accurate reflection of the law as the facts unfolded. The victim of this shooting, Elijah Posey, told the jury the Defendant is the man who shot him. TT, 81. “I got a good look at” him. I’m positive of the identification. “There is no doubt in my mind.” “I looked him right in the eye, he looked me right in the eye, and he started shooting.” TT, 83. The cross-examination did not alter the strength of this identification, TT, 154 (“I got a real good look at his face.”), nor did re-cross examination. (“I told them [the police] that Brandon shot me and Jayna set me up.”). TT, 204. The collective nature of the evidence pushed this Court to give the instruction it did. It was accurate, it was not misleading and it highlighted some points for this jury to consider before reaching a judgment on the believability of Mr. Posey’s identification testimony.

In summary, the prosecutorial misconduct claims failed for a variety of reasons, the claim attacking the weight of the evidence was waived because, at the post-sentence phase, specifics were nowhere to be found, certain evidence was excluded because it was not relevant and the assertion about jury instruction error was waived but, alternatively, those complained of instructions were consistent with Pennsylvania law.

BY THE COURT:
/s/Williams, III, J.

¹ The closing argument equals 1,350 lines of text (25 lines per page x 54 pages = 1,350) and the complained of language amounts to one-tenth of one percent (20 lines divided by 1,350=0.01).

² The government’s response, to a large extent, mirrored the assertions being made by McClendon and this matter (love triangle) was not mentioned by the government’s lawyer. TT, 616- 617.

³ Also contributing to the Court’s conclusion of waiver is once the verdict was recorded, McClendon’s counsel moved for extraordinary relief. TT, 653. “I move to set aside the jury verdict on the grounds that it was unduly tainted by prosecutorial misconduct.” *Id.* No specifics were attached to this naked assertion.

⁴ All four (4) volumes of the trial transcript were filed on January 12, 2010. In the seven (7) intervening weeks, McClendon took no steps to supplement his post-sentence motion.

⁵ The Court notes that McClendon’s *Concise Statement* contains a variety of reason why the verdict was contrary to the evidence’s weight and even contains transcript references. *Concise Statement* pgs. 5,6. However, the inclusion of reasons in a *Concise Statement* does not rescue this claim. The place to raise the reasons *why* was in his post sentence motion.

⁶ *Pressley’s* subsequent history on remand is: *Commonwealth v. Pressley*, 903 A.2d 50 (Pa. Super. 2006), *appeal denied*, 912 A.2d 1291 (Pa. 2006).

⁷ *Commonwealth v. Friend*, 896 A.2d 607 (Pa. Super. 2006), a PCRA case, cites *Pressley* for the notion that decisions can be prospective in nature; *Commonwealth v. Brown*, 911 A.2d 576,582 (Pa. Super. 2006)(“Appellant’s trial occurred prior to the Supreme Court’s pronouncement in *Pressley*, and therefore, its clarification is inapplicable to this case.”); *Commonwealth v. Patton*, 936 A.2d 1170,1175 (Pa. Super. 2007)(“As there were divergent views regarding preservation of jury instruction issues at the time of Appellant’s trial and the Supreme Court held that the rule announced in *Pressley* was to be applied prospectively, ..., we decline to find waiver in this instance.”); *Commonwealth v. Russell*, 938 A.2d 1082,1093 (Pa. Super. 2007)(“[The] final contention is that the trial court abused its discretion by not charging the jury on the corruption of minors statute, which Appellant intended to use as a defense on her behalf. This issue is waived. In order to preserve for appeal a challenge to a jury charge, the defendant must lodge a specific objection or exception to the jury charge itself. [*Pressley*]. Appellant failed to make a specific objection or exception to the trial court’s jury charge, and, as such, the issue is waived. *Id.*, 887 at 225. Accordingly, we dismiss this issue.”); *Commonwealth v. Bullock*, 948 A.2d 818, 825 (Pa. Super. 2008)(“[O]ur review of the record reveals Appellant never asked that an instruction with regard to Ms. Cottrell’s drug-use history be provided to the jury, nor did he object to the trial court’s charge, and, indeed, Appellant has not directed our attention to a place in the record where such a request or objection had been made. As such Appellant has waived this claim as well.”); *Commonwealth v. Ventura*, 975 A.2d 1128 (Pa. Super. 2009), *appeal denied*, 2009 Pa. LEXIS 2836 (Pa. 2009) cites *Pressley* for a reason other than the actions necessary to avoid waiver; in *Commonwealth v. Shamsud-Din*, 995 A.2d 1224,1228 (Pa. Super. 2010), the Court was somewhat equivocal. (“Thus, as Appellant failed to object to the trial court’s consideration of the jury charge or to its conviction of [A]ppellant of simple assault as a misdemeanor of the third degree, this issue is arguably waived.”).

⁸ At the end of the charge conference, McClendon’s lawyer said: “The Appellate Court has required that I object after you read the instructions in order to preserve any challenges that I would have to the instructions.” TT, 610.

Commonwealth of Pennsylvania v. Frazier Cisco Grace

Rape—Kidnapping—Other Crimes Evidence—Prior Abuse of Victim

No. CC 200515667. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Zottola, J.—October 28, 2010.

OPINION

The Defendant, Frazier Grace, was charged at CC 200515667 with one count of rape, one count of involuntary deviate sexual intercourse, one count of sexual assault, one count of kidnapping, one count of unlawful restraint, and one count of simple assault.

On February 14, 2007, following a jury trial where the Defendant acted *pro se*, the Defendant was convicted on all six counts. On May 14, 2007, this court sentenced the Defendant to a period of incarceration of not less than 120 nor more than 240 months for count one, Rape, and at count two, Involuntary Deviate Sexual Intercourse, to run consecutive to count one, a period of incarceration of not less than 114 months nor more than 228 months.

On June 16, 2010, the Defendant's appellate rights were reinstated *nunc pro tunc* by an Order of Court and a notice of appeal was filed on July 9, 2010 appealing judgment of the May 14, 2007 sentence.

Pursuant to Rule Pa.R.A.P. 1925(b), the Defendant filed a Statement of Matters Complained of on Appeal on August 17, 2010, from which the following is taken verbatim:

1. The Trial Court erred or abused its discretion when granting the Commonwealth's motions to allow the introduction of prior instances of the Defendant's alleged other crimes, wrongs or acts, said instances having no bearing on the alleged crimes charged in the instant matter and with the prejudice accompanying the introduction of said other crimes, wrongs or acts outweighing any probative value; and
2. The Trial Court erred or abused its discretion when granting the Commonwealth's motion to amend the criminal information to reflect the change in the date of the alleged incident that formed the basis of the charged offenses from August 27, 2005 to August 26, 2005, which Defendant argues is both a substantial change and highly prejudicial since it is alleged that the Defendant had already supplied an alibi for the original date listed; and
3. The Trial Court erred or abused its discretion when denying the Defendant's challenge to the jurisdiction of this Honorable Court in that all crimes alleged to have occurred took place in Westmoreland County including the charge of Kidnapping, which is charged in the criminal information as having taken place at 1510 Constitution Avenue, New Kensington, Westmoreland County, PA; and
4. The Trial Court erred when it denied Defendant's Motion for Judgment of Acquittal Pursuant to Pa. R. Crim. P. 606, or in the alternative, the Commonwealth failed to present sufficient evidence as to each and every element beyond a reasonable doubt that the Defendant committed the crimes of Rape, IDSI and Sexual Assault, and more specifically, the Commonwealth failed to prove beyond a reasonable doubt that the Defendant engaged in sexual intercourse with the victim by forcible compulsion or threat of forcible compulsion that would prevent resistance by a person of reasonable resolution and with regard to the sexual assault charge, that the Defendant either engaged in sexual intercourse or IDSI with the victim, or that there was a lack of consent; and
5. The Trial Court erred when it denied Defendant's Motion for Judgment of Acquittal Pursuant to Pa. R. Crim. P. 606, or in the alternative, the Commonwealth failed to present sufficient evidence as to each and every element beyond a reasonable doubt that the Defendant committed the crimes of Kidnapping and Unlawful Restraint and more specifically, the Commonwealth failed to prove beyond a reasonable doubt the Defendant unlawfully confined the victim for a substantial period of time or unlawfully restrained the victim in circumstances exposing the victim to risk of serious bodily injury or knowingly held such person in condition of involuntary servitude at 1510 Constitution Avenue or any time prior thereto; and
6. The Trial Court erred when it denied Defendant's Motion for Judgment of Acquittal Pursuant to Pa. R. Crim. P. 606, or in the alternative, the Commonwealth failed to present sufficient evidence as to each and every element beyond a reasonable doubt that the Defendant committed the crime Simple Assault and more specifically, the Commonwealth failed to prove beyond a reasonable doubt that the Defendant intentionally, knowingly or recklessly caused bodily injury to the victim; and
7. The Trial Court erred when it denied Defendant's Motion Challenging the Weight of the Evidence pursuant to Pa. R. Crim. P. 607 in that the verdict shocks one's sense of justice since the Commonwealth was incapable of proving beyond a reasonable doubt the elements of the charged offenses as described above since there were no medical records supporting any of the accusations made by the victim and the victim supplied multiple, conflicting statements as to the events that occurred that formed the basis of the charges in the instant matter.

STATEMENT OF THE CASE

On August 26, 2005, Angela Beasley, the victim, and a female friend from the Women's Center Shelter, were approaching on foot the corner of Larimer and Broad in the City of Pittsburgh when the Defendant pulled up next to them in his car. (J.T. pp. 64)¹. The victim testified that as the Defendant pulled up he screamed, "You all get the fuck in this car right now." (J.T. pp. 64). After the victim and the friend got into the car, the victim testified that the Defendant started screaming at both women, locked the doors to the car, pushed the victim's seat all the way back, and continually verbally assaulted the victim and her friend while banging on the center console of the car. (J.T. pp. 65-66).

The Defendant, at some point later, kicked the female friend out of the car. (J.T. pp. 68). Scared to death, and unable to jump out of the car, the victim testified that the Defendant continually swung his hand, hitting her on the left side of her face. (J.T. pp. 68-69). The Defendant drove the victim to his stepfather's house in New Kensington, during which the victim testified that the Defendant spoke of how he was going to kill her that night. (J.T. pp. 70).

Upon arrival at the Defendant's stepfather's house, the Defendant told the victim to sit down, as he took his stepfather into the kitchen to talk. (J.T. pp. 76). Afterwards, the stepfather left the house, and the Defendant then told the victim to get undressed saying, "Strip down now. You know the routine." (J.T. pp. 78). The victim testified that the Defendant then made her get in the shower and instructed her to get on her knees while he undressed himself from his bottom down, and began urinating on her face. (J.T. pp. 79). After making the victim rinse and dry off in the bedroom, the Defendant told the victim to get down on her knees and perform oral sex as he pulled her head towards him. (J.T. pp. 81). The victim then testified that the Defendant turned her around and began having vaginal intercourse with her, afterwards ejaculating in her mouth. (J.T. pp. 82).

After the incident, the victim testified that the Defendant calmed down, and decided that he wanted her to go over to a house in Hazelwood and pick up his clothes. (J.T. pp. 82). Before this, the Defendant had stated to the victim that he wanted to go to the store to get supplies in order to put that house on fire. (J.T. pp. 83). Both the Defendant and the victim left New Kensington together, the Defendant driving, on route to the Home Depot back in East Liberty. (J.T. pp. 83-84). On route, the victim called a taxi for the purposes of taking her to the house in Hazelwood to get the Defendant's clothes. (J.T. pp. 85). The taxi was supposed to meet

them at Home Depot. (J.T. pp. 86). While in Home Depot, the victim attempted to call the shelter using the 911 phone they gave her, but was only able to speak with a woman for one second before the Defendant noticed. (J.T. pp. 84).

After Home Depot, the victim and the Defendant entered Family Dollar; when exiting the store, the victim jumped into the taxi, wherein she told the driver to take her back to the shelter. (J.T. pp. 86).

The following Monday, August 29, 2005, the victim filed for a Protection from Abuse Order. (J.T. pp. 141). That same day, the victim had called Mr. Jeff Smith and reported to him over the phone what had occurred. (J.T. pp. 148-150). Mr. Smith insisted that the victim go to the police and make a written statement, (J.T. pp. 150), wherein she did with a Mr. Timothy Douglas. (J.T. pp. 155). Mr. Smith testified that within two weeks or so after the incident was reported, the police had an encounter with the Defendant who admitted to striking the victim on that day in question. (J.T. pp. 151).

The Defendant testified at trial, and denied the allegations of the day in question. The Defendant testified that the only time he saw the victim was later that night at Home Depot. (J.T. pp. 191). He testified that he went into Family Dollar for the purpose of buying cosmetics for the victim. (J.T. pp. 192). The Defendant testified that he and the victim got into an argument; afterwards he paid for the victim's taxi back to the shelter. (J.T. pp. 192).

At a jury trial held on February 12-13, 2007, the Defendant was found guilty at all six counts of Rape, Involuntary Deviate Sexual Intercourse, Sexual Assault, Kidnapping, Unlawful Restraint, and Simple Assault.

MATTERS COMPLAINED OF ON APPEAL

The standard for review for these errors asserted on this court is abuse of discretion. "An abuse of discretion is not a mere error in judgment but, rather, involves bias, prejudice, partiality, ill will, manifest unreasonableness, or a misapplication of law." *Commonwealth v. Carroll*, 936 A.2d 1148, 1152-1153 (Pa. Super. 2007).

First, the Defendant claims that the trial court erred in granting the Commonwealth's motion to allow evidence of prior instances of the Defendant's prior acts of abuse with the victim. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, Pa. R. E. 404(b)(1); however, evidence of other crimes, wrong, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Pa. R. E. 404(b)(2). Such evidence may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice. Pa. R. E. 404(b)(3). In a criminal case, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Pa. R. E. 404(b)(4).

To determine if evidence of other offenses is admissible, a court must first assess whether the evidence of the other offenses is relevant to a permissible purpose and second assess whether its probative value outweighs its potential for prejudice. *Commonwealth v. Hacker*, 959 A.2d 380 (Pa. Super. 2008).

The Commonwealth properly gave reasonable notice in advance of trial of the nature of the prior acts to be introduced at trial. (J.T. pp. 3-4). The Commonwealth offered three instances—all occurring the same year as the alleged date of the current charges—of the Defendant's prior abuse on the victim to show the victim's state of mind as to why she reacted on the way she did on the day in question. (J.T. pp. 48-59). The victim had been abused many times by the Defendant and believed that if she fought or disobeyed the Defendant, that it would only make the Defendant's behavior towards her more violent. Without this evidence, the Commonwealth's proof of any kind of force used against the victim during the crimes charged is minimal. Therefore, the probative value of the prior acts outweighs its potential for prejudice. The Defendant was given full opportunity to cross-examine the victim about these alleged prior bad acts at trial. Additionally, although there was no request for a jury instruction by the Defendant, there was available the opportunity to request such a cautionary instruction to the jury about how to treat the 404(b) evidence.

Therefore, for the reasons stated above, the Defendant's claim that this court abused its discretion must fail.

Second, the Defendant claims that the trial court erred in granting the Commonwealth's motion to amend the criminal information to reflect the change in the date of the alleged incident. The court may allow an information to be amended when there is a defect in form, the description of the offense(s), the description of any person or any property, or the date charged, provided the information as amended does not charge an additional or different offense. Pa. R. Crim. P. 564. Upon amendment, the court may grant such postponement of trial or other relief as is necessary in the interests of justice. *Id.*

The Commonwealth properly moved for the amendment of the criminal information as a pretrial motion. The Commonwealth moved to amend the date of the alleged crime from August 27, 2005 to August 26, 2005. The one day difference amendment is within the purview of the rule. The purpose of Rule 564 "is to ensure that a defendant is fully apprised of the charges, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed." *Commonwealth v. J.F.*, 800 A.2d 942, 945 (Pa. Super. 2002) (citing *Commonwealth v. Davalos*, 779 A.2d 1190, 1194 (Pa. Super. 2001)). The defendant in this case was not prejudiced by a change of date. The defendant had ample time to create a defense alibi for the amended date before trial; the defendant was fully informed of the charges set against him and those charges never changed. Therefore, the Defendant's claim that this court abused its discretion must fail.

Third, the Defendant claims that the trial court erred in denying the Defendant's challenge to the jurisdiction of this court in claiming that the crimes alleged took place, including the charge of kidnapping, in New Kensington, Westmoreland County. Pennsylvania law states that,

A person may be convicted under the law of this Commonwealth of an offense by his own conduct...for which he is legally accountable if either: (1) the conduct which is an element of the offense or the result which is such an element occurs within the Commonwealth; (4) conduct occurring within this Commonwealth establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which also is an offense under the law of this Commonwealth.

18 Pa. C.S.A. § 102(a)(1) and (4).

The unlawful removal of another a substantial distance from the place where he or she is found with the intent to inflict bodily injury on or to terrorize the victim defines the elements of kidnapping. 18 Pa. C.S.A. § 2901(a)(3). The first element, the alleged unlawful removal of another, occurred within Allegheny County. Because the kidnapping, or beginning elements of the kidnapping, began the continuing course of conduct leading to the other alleged crimes, this court does have jurisdiction. Therefore, the Defendant's claim that this court abused its discretion must fail.

Fourth, the Defendant claims that the trial court erred in denying the Defendant's Motion for Judgment of Acquittal Pursuant

to Pa. R. Crim. P. 606, asserting specifically that the Commonwealth failed to present sufficient evidence as to each and every element beyond a reasonable doubt that the Defendant committed the crimes of Rape, Involuntary Deviate Sexual Intercourse, and Sexual Assault. “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). The Commonwealth can reach its burden of proof by using wholly circumstantial evidence. *Commonwealth v. Lyons*, 833 A.2d 245, 258 (Pa. Super. 2003) (citing *Commonwealth v. Morgan*, 625 A.2d 80, 82 (Pa. Super. 1993)).

“A reviewing court must...recognize and honor the right and obligation of the trier of fact to believe all, part or none of the evidence.” *Commonwealth v. Griscavage*, 517 A.2d 1256, 1259 (Pa. 1986). It is also within the purview of the fact finder’s responsibilities to determine credibility of witnesses. *Lyons*, 833 A.2d 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.*

In regards to the error asserted by the Defendant that the Commonwealth failed to prove beyond a reasonable doubt that the Defendant engaged in sexual intercourse with the victim by forcible compulsion or threat of forcible compulsion or that the Defendant either engaged in sexual intercourse or IDSI with the victim, it has been vastly held that, “in the case of sexual offenses, the testimony of the victim alone is sufficient to convict, and medical evidence is not required if the fact finder believes the victim.” *Commonwealth v. Jette*, 818 A.2d 533, 534 (Pa. Super. 2003).

The victim in this case testified to the events which occurred on August 26, 2005. She testified that the Defendant, after urinating on her face while on her knees in the shower, pulled her head towards him and put his penis in her mouth, forcing her to perform oral sex. (J.T. pp. 81). The victim testified throughout direct examination that she complied with the Defendant’s orders because she was scared, (J.T. pp. 81), and that if she resisted or fought back, he would become more violent, creating a higher risk of harm to her. (J.T. pp. 68-70). More so, the victim continued to testify that after she was forced to perform oral sex on the Defendant, the Defendant turned her around and “put his penis inside [her], inside [her] vagina and was having sex with [her].” (J.T. pp. 81-82). She then testified that the Defendant ejaculated in her mouth and told her to swallow it. (J.T. pp. 82). Taken in the light most favorable to the Commonwealth, this testimony and evidence presented was sufficient to support the convictions of Rape, IDSI, and Sexual Assault. Therefore, the Defendant’s claim that insufficient evidence existed to support such convictions must fail.

Fifth, the Defendant claims that the trial court erred in denying the Defendant’s Motion for Judgment of Acquittal Pursuant to Pa. R. Crim. P. 606, asserting that the Commonwealth failed to present sufficient evidence as to each and every element beyond a reasonable doubt that the Defendant committed the crimes of Kidnapping and Unlawful Restraint. The Defendant asserts that the Commonwealth failed to prove beyond a reasonable doubt that the Defendant unlawfully confined the victim for a substantial period of time or unlawfully restrained the victim in circumstances exposing the victim to risk of serious bodily injury or knowingly held such person in condition of involuntary servitude.

The victim testified that when the Defendant first pulled up in his car, he screamed at her and told her to get in the car. (J.T. pp. 65). Although she hesitated, the victim testified that she got into the car instead of running away, because she was too scared not knowing then what the Defendant would have done to her. (J.T. pp. 65). After the victim got into the car, the Defendant locked the doors, made the victim put her seat belt on, and pushed her seat all the way back, all the while screaming and hollering at her. (J.T. pp. 65-66). The Defendant continued to verbally threaten the victim, and to physically pound on the center console and hit the victim on the side of her face with his hand. (J.T. pp.66; 68).

Furthermore, after kicking the victim’s friend out of the car, the Defendant drove the victim to his mom’s house in New Kensington where his stepfather was that night. (J.T. pp. 71). While at that residence, the Defendant locked the front door to the house and psychologically forced the victim, who was scared for her life, from leaving the house. (J.T. pp. 70; 78). It was at this residence, some fifteen to twenty minutes from the area where the victim was taken—where she knew no one—that the Defendant raped and assaulted the victim. (J.T. pp. 78-83). Taken in the light most favorable to the Commonwealth, the evidence presented was sufficient to support the conviction.

Therefore, the Defendant’s claim that insufficient evidence existed to support a conviction must fail.

Sixth, the Defendant claims that the trial court erred in denying the Defendant’s Motion for Judgment of Acquittal Pursuant to Pa. R. Crim. P. 606, asserting that the Commonwealth failed to present sufficient evidence as to each and every element beyond a reasonable doubt that the Defendant committed the crime of Simple Assault. The Defendant asserts that the Commonwealth failed to prove beyond a reasonable doubt that the Defendant intentionally, knowingly or recklessly caused bodily injury to the victim.

The victim testified that while the Defendant was driving he made a phone call to his stepfather and “asked him who was there, what was he doing, and he needed the house for a few minutes.” (J.T. pp. 69-70). Furthermore, the victim testified that the Defendant, later in the same conversation, told his stepfather that “he would be there soon and that he needed him to leave.” (J.T. pp. 74). These statements by the Defendant show an intent to go to his stepfather’s house to be alone with the victim for a purpose. The Defendant called ahead of time, telling the stepfather that he was going to have to leave the house. The Defendant’s violent and verbally abusive behavior prior to arriving at the house constitutes a substantial step toward causing bodily injury to the victim. Taken in the light most favorable to the Commonwealth, the evidence presented was sufficient to support the conviction. Therefore, the Defendant’s claim that insufficient evidence existed to support a conviction must fail.

Lastly, the Defendant claims that the trial court erred in denying the Defendant’s Motion Challenging the Weight of the Evidence pursuant to Pa. R. Crim. P. 607 in that the Commonwealth was incapable of proving beyond a reasonable doubt the elements of the charged offenses. A challenge to a verdict on the theory that it was against the weight of the evidence must establish that the verdict was so contrary to the evidence that it shocks one’s sense of justice and makes a new trial imperative. *Commonwealth v. Butler*, 647 A.2d 92 (1994). “The determination of whether to grant a new trial because the verdict is against the weight of the evidence rests within the discretion of the trial court, and we will not disturb that decision absent an abuse of discretion.” *Commonwealth v. Lyons*, 833 A.2d 245, 259 (Pa. Super. 2003).

The Defendant bases his claim on the fact that the Commonwealth’s case fails because there were no medical records supporting any of the accusations made by the victim and the victim supplied multiple, conflicting statements as to the events that occurred.

Assessing the credibility of a witness and according that testimony appropriate weight is within the province of the trier of fact, here in the trial judge. *Commonwealth v. Westcott*, 523 A.2d 1140 (Pa. Super. 1987), alloc. denied, 533 A.2d 712 (Pa. 1987). In passing upon the credibility of a witness, the fact finder is free to believe all, part, or none of the evidence. *Id.* Additionally, it has been

vastly held that, “in the case of sexual offenses, the testimony of the victim alone is sufficient to convict, and medical evidence is not required if the fact finder believes the victim.” *Commonwealth v. Jette*, 818 A.2d 534.

Here, the trial judge was satisfied that the testimony of Angela Beasley was credible, and that victim testimony provided a valid basis for the trial court’s guilty verdicts. Therefore, the Defendant’s claim that the verdict was against the weight of the evidence must fail.

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

BY THE COURT:

/s/Zottola, J.

¹ J.T. refers to the transcript from the Jury Trial dated February 12-13, 2007.

CAPSULE SUMMARIES

Michael P. Gunning v. Maureen A. O'Toole

Counsel Fee Award

1. The parties, who are divorced, are the parents of two children. Mother has primary custody and Father has partial custody.
2. Upon Father's motion, Mother was ordered on March 17, 2010, to produce the children's health and social security cards. Upon father's second motion on June 10, 2010, Mother was again ordered to produce the health and social security cards, to sign consent forms for passports unless she objected to Father's travel plans, and to pay \$750.00 in counsel fees because of her failure to comply with the Court's original order.
3. On June 30, 2010, Father presented a third motion, alleging that Mother had still failed to provide the health and social security cards, to sign the consent form or pay the \$750.00 in counsel fees. By order that date, Mother was ordered to immediately provide the documents, sign the consent, and to pay an additional \$750.00 in counsel fees in addition to the original amount she owed.
4. On that same date, Mother presented two motions, one which objected to Father's travel plans and the other for reconsideration of the Court's order directing that she turn over the cards, sign the consents for the passports and pay the counsel fees. Both motions were denied.
5. Mother appealed, alleging that the Court had erred in entering the orders without conducting a hearing because the matter related to custody, and to determine the amount and reasonableness of the award of counsel fees.
6. In rejecting Mother's argument the Court opined that the matters related to the children but did not change the underlying custody arrangement between the parties and thus could be dealt with at motion's court, particularly after Father's counsel provided the details of the travel arrangements. The Court further noted that Father had a right to the medical and social security cards in light of his shared legal custody
7. As for the counsel fees, the Court noted that Mother's behavior met the definition of dilatory, obdurate or vexatious conduct because she gave no legitimate reason for her non-compliance.

(Sally R. Miller)

Robb D. Bunde for Plaintiff.

Jeffrey T. Morris for Defendant.

No. FD 03-7857-003.

In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Wecht, A.J.—September 7, 2010.

Ines Cervoni-Marrero v. Miguel A. Marrero

Custody—Expert Testimony—Sanctions Against Attorney

1. The preference of a seventeen-and-a-half-year-old not to spend time with her father is not dispositive of mother's petition for primary physical and legal custody when the history of the case demonstrates that mother has engaged in a pattern of alienating the parties' four children from their father.
2. The testimony of a child's counselor is not to be given added weight in making a custody determination when the counselor's contact with the child was intermittent until only two to three months prior to the hearing; the counselor had minimal and unpleasant contact with father; and her testimony was deemed a recapitulation of the child's stated preference.
3. Sanctioning mother's attorney \$1,000 to be donated to charity was an appropriate punishment when the attorney, out of the presence of the court, told father's twin 16-year-old stepchildren that they had "a lot of nerve" for being in court to testify about their relationship with their step sister.

(Sally R. Miller)

Elizabeth Beroes for Plaintiff.

Aimee Burton for Defendant.

No. FD 99-9918-003.

Superior Court #1260 WDA 2010

In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Wecht, A.J.—September 8, 2010.