PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

PLJ

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

Circulation 6,029

PLJ Editorial Staff

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Commonwealth of Pennsylvania v. Mattise Holt

Criminal Appeal—SVP—Waiver—Jurisdiction for Hearing after Sentencing—Expert Report Insufficient

Defendant claims court is divested of jurisdiction to hold SVP hearing more than 30 days after sentencing.

No. CC 201413629. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—March 14, 2017.

OPINION

On June 17, 2015, this Court, after the conclusion of a non-jury trial, convicted Appellant, Mattise Holt, of one count each of Rape Forcible Compulsion (Rape),[1] Statutory Sexual Assault,[2] Unlawful Contact with a Minor,[3] Sexual Assault,[4] Incest,[5] Indecent Assault,[6] Endangering the Welfare of Children ("EWOC"),[7] and Corruption of Minors.[8] On May 18, 2015, after reviewing a Pre-Sentence Report, this Court sentenced Appellant to 78 to 156 months incarceration at the Rape count, with credit for time served. Appellant was sentenced to 78 to 156 months incarceration at the Unlawful Contact count, 36 to 72 months incarceration at the Incest count, and 16 to 32 months incarceration at the EWOC count, each to be served consecutively. The Rape and Sexual Assault counts merged for sentencing purposes. Appellant was sentenced to five years probation at the Statutory Sexual Assault count, five years probation at the Indecent Assault count, and two years probation at the Corruption of Minors Count, each to be served concurrent with one another but consecutive to all incarceration. Appellant's aggregate sentence is 208 to 416 months incarceration. Because Rape is a Tier III sexual offense under the Sex Offender Registration and Notification Act ("SORNA"), Appellant is subject to a lifetime registration requirement as a collateral consequence of his conviction. Appellant filed a Notice of Appeal on October 8, 2015 and his Concise Statement of Errors to be Complained of on Appeal on May 2, 2016. This Court filed its Opinion on August 3, 2016 and the case is currently before the Superior Court of Pennsylvania.

On July 29, 2016, after a hearing at which expert testimony was presented, this Court found that Appellant met the criteria as a Sexually Violent Predator ("SVP"). Appellant filed a Notice of Appeal of the SVP Order on August 25, 2016 and a Statement of Errors Complained of on January 17, 2017.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges three issues on appeal. Appellant alleges that this Court's Order deeming Appellant to be a Sexually Violent Predator was illegal since the Court lacked jurisdiction to make such a determination. Appellant further alleges that this Court abused its discretion by basing its decision to deem Appellant an SVP on the Sexually Violent Predator Assessment of Dr. Allan Pass, arguing that Dr. Pass lacked sufficient information to make a reliable assessment. Lastly, Appellant asserts this Court erred in finding Appellant to meet the criteria as a Sexually Violent Predator by clear and convincing evidence. (Concise Statement of Errors to be Raised on Appeal at 1-4)

DISCUSSION

Appellant first alleges that this Court's Order deeming Appellant to be a Sexually Violent Predator was illegal since the Court lacked jurisdiction to enter such an order. Appellant alleges that this Court was divested of jurisdiction in that thirty days had passed from the imposition of sentence. Appellant cites to 42 Pa.C.S. § 9799.24 (e) (3), which requires an SVP determination to be made prior to the imposition of sentence.

> Appellant's first point is that the statutory language of 42 Pa.C.S.A. § 9795.4(a) indicates the SVP assessment is to be conducted after conviction but before sentencing. This assertion is true enough, but the fact that a statute, like the SVP statute, requires things to be done in a certain way or a certain order does not mean that the requirement cannot be waived. There is always a rule, statute, constitutional right, or other legal requirement at issue when a party claims waiver. Indeed, if there were no rules, statutes, constitutional rights, or other legal requirements, there would never be a question of whether those requirements were waived. Thus, the fact that the statute sets forth a sequence of events does not mean that Appellant could not have waived the required sequence.
>
> Indeed, the law is quite plain that any number of statutory or other rights and requirements may be waived. *Commonwealth v. Mallory*, 596 Pa. 172, 941 A.2d 686, 697 (2008); *Commonwealth v. Byrne*, 833 A.2d 729, 734–35 (Pa.Super.2003). In this case, it is clear that Appellant waived his claim that the statutory language of 42 Pa.C.S.A. § 9795.4(a) prohibited the sequence in which his sentencing and SVP process took place. Having waived his claim, he is not now entitled to relief. Pa.R.A.P. 302(a).
>
> We note Appellant relies on *Commonwealth v. Baird*, 856 A.2d 114 (Pa.Super.2004). We agree that, in *Baird,* this Court did hold that the SVP statute requires an assessment before sentencing. *Id.* at 118. However, this holding was merely a statement of what the statute requires. The holding had nothing whatsoever to do with waiver because waiver was not an issue in *Baird*. Moreover, the appellant in that case (the Commonwealth) did preserve its claim by objecting at sentencing to the trial court's decision to sentence the defendant before the SVP assessment and determination. *Id.* at 115. In the present case, Appellant made no such objection.

Commonwealth v. Whanger, 30 A.3d 1212, 1214 (Pa. Super. 2011). Appellant acknowledges in his Concise Statement that he "purported to waive the requirement". (Concise Statement of Errors to be Raised on Appeal at 2) Under *Whanger*, this Court did have jurisdiction to hold Appellant's SVP hearing and to enter an order finding that he met the criteria to be deemed an SVP.

Appellant's last two issues may be combined for the purpose of this Opinion. Appellant alleges that the SVP classification was not supported by clear and convincing evidence. Appellant further alleges Dr. Pass' report and testimony should not be given weight due to Dr. Pass having insufficient information on which to base his report and subsequent testimony.[9] The standard for a challenge to the sufficiency of evidence at an SVP hearing is as follows:

> In order to affirm an SVP designation, we, as a reviewing court, must be able to conclude that the fact-finder found clear and convincing evidence that the individual is an SVP. As with any sufficiency of the evidence claim, we view all evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth. We will reverse a trial court's determination of SVP status only if the Commonwealth has not presented clear and convincing evidence that each element of the statute has been satisfied.

Commonwealth v. Baker, 24 A.3d 1006, 1033 (Pa. Super. 2011), aff'd, 78 A.3d 1044 (Pa. 2013).

Appellant argues that based on his age, the lack of multiple victims or previous history of sexual offenses and the lack of unusual cruelty would necessitate a finding against an SVP designation. However, Appellant need not meet every assessment factor to be classified as an SVP.

> [Appellant]'s ... [position is also] that there was no evidence presented to indicate that the offenses involved displayed unusual cruelty and also that there was no evidence presented that [Appellant] exceeded them means necessary to achieve the offense as evidenced by the lack of force, threats, or weapons. In the S.O.A., Dr. Pass wrote, "[T]here is no scientific assignment of weighted values determining that one or all of the Megan's Law assessment factors are more or less important. A[n] [individual] may meet the classification criteria for a sexually violent predator with one or all of the factors." (S.O.A., p. 2). According to [42] Pa.C.S.A. § 9795(4), an assessment shall include an examination of the list of factors described above. It is not necessary for the offense to display unusual cruelty, nor is it necessary to show that offender exceeded the means necessary to achieve the offense. [Appellant also asserts] that the designation of [him] as a violent predator was inappropriate because he had no prior criminal history and there was only one victim. It is not necessary for an offender to have a prior criminal history, or for the offense to include more than on victim. These factors are simply to be considered in the determination of an offender's sexually violent predator status.... *Askew*, 907 A.2d [at 629–30]. Thus, this claim lacks merit.

Commonwealth v. Whanger, 30 A.3d at 1216-1217.

Appellant stipulated at the SVP hearing to Dr. Pass' qualifications as an expert in violent and psychosexual psychology and to the admission of his report. (Transcript of SVP hearing, hereinafter Tr. At 12) Dr. Pass' report provides clear and convincing evidence that Appellant meets the criteria for SVP designation. Dr. Pass found that Appellant "suffer[ed] from a congenital and/or acquired condition which is the impetus for his sexual offending specifically identified as pedophilic disorder." (Assessment at 4) Dr. Pass based his finding "upon the fact that [Appellant] has participated in illegal sexual misconduct with a prepubescent child over the course of [...] approximately 5 years." *Id.* Dr. Pass further concluded that Appellant suffers from a lifetime condition identified as pedophilic disorder which did override his emotional/volitional control as evidenced by his repetitive sexual reoffending of a prepubescent girl for five years. *Id.* Dr. Pass concluded that Appellant has a high likelihood of re-offending. *Id.* He further concluded that Appellant used his position "as the victim's father to engage her in sexual exploitation under fear of physical threat and force to herself and other family members." *Id.* at 4-5. Dr. Pass opined, and this Court agreed, that Appellant's criminal behavior does meet the statutory criteria for SVP designation.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

[1] 18 Pa.C.S. § 3121(a) (1).

[2] 18 Pa.C.S. § 3122.2.

[3] 18 Pa.C.S. § 6318(a) (1).

[4] 18 Pa.C.S. §3124.1.

[5] 18 Pa.C.S. § 4302.

[6] 18 Pa.C.S. § 3126(a) (7).

[7] 18 Pa.C.S. § 4304(a) (1).

[8] 18 Pa.C.S. § 6301(a) (1).

[9] Appellant declined to participate in the SOAB assessment process. ("Sexually Violent Predator Assessment" 8/7/15, hereinafter "Assessment" at 2)

Commonwealth of Pennsylvania v. James Hamlett, Jr.

Criminal Appeal—Sentencing (Legality)—Sufficiency—Prior Consistent Statement—Improper Grading—Kidnapping

Alleyne not applicable to prior convictions; statement of child victim is "particularly probative" and will not be excluded as a prior consistent statement.

No. CC 201514824. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—March 13, 2017.

OPINION

On June 28, 2016, a jury convicted Appellant of one count each of Unlawful Restraint of Minor, Aggravated Indecent Assault Complainant Less than 16 Years Old, Aggravated Indecent Assault by Forcible Compulsion, Simple Assault, Indecent Assault Person Less than 16 Years of Age, Criminal Attempt (Rape by Forcible Compulsion), Terroristic Threats, and Kidnapping.[1] On June 30, 2016, this Court imposed concurrent life sentences at both Aggravated Indecent Assault counts and the Criminal Attempt count. At the Unlawful Restraint and Terroristic Threats counts, this Court imposed a concurrent 10 year term of probation, consecutive to the life sentences.[2] Appellant's Post Sentence Motion was denied on July 13, 2016. Appellant filed a Notice of Appeal on August 10, 2016 and a Concise Statement of Errors Complained of on Appeal on November 29, 2016.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges seven errors on appeal. Appellant alleges two errors in regards to *Alleyne v. United States*, 133 S.Ct. 2151 (2013), two evidentiary errors, and challenges the sufficiency of the evidence on three counts. (Concise Statement of Errors Complained of on Appeal at 3-5).

DISCUSSION

Appellant raises two *Alleyne* issues. On June 17, 2013, the United States Supreme Court held that a criminal defendant may not be sentenced to a mandatory minimum sentence unless the fact-finder found the underlying facts triggering the imposition of the mandatory to have been proven beyond a reasonable doubt. *Alleyne v. United States*, 133 S.Ct. 2151 (2013). An *Alleyne* claim is a non-waivable challenge to the legality of sentence. Such a claim may be raised on direct appeal, or in a timely filed PCRA petition. *Commonwealth v. Ruiz*, 131 A.3d 54, 60 (Pa. Super. 2015).

Appellant asserts that the life sentences imposed at Counts 2, 3, and 6 are illegal in that the Commonwealth failed to include "notification in the criminal information that they are prosecuting the accused for what amounts to a new, aggravated crime." (Concise Statement of Errors Complained of on Appeal at 4) Appellant further alleges that the mandatory minimum life sentences imposed by this Court are unconstitutional under *Alleyne* because his prior conviction increases the mandatory minimum, and therefore, is an element that must be proven to the jury beyond a reasonable doubt. However, in *Almendarez-Torres v. United States*, 118 S.Ct. 1219 (1998), the United States Supreme Court held that the fact of a prior conviction does not need to be submitted to a jury and found beyond a reasonable doubt. *Id.* at 1232. The state "need *not* allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was 'necessary to bring the case within the statute.'" 118 S.Ct. at 1231. The *Alleyne* Court explicitly noted that *Almendarez-Torres* remains good law and constitutes a narrow exception to the holding in *Alleyne. Alleyne* at 2160 n.1 (2013). Pursuant to the Supreme Court's ruling in *Almendarez-Torres*, and the Court's recognition of this exception in *Alleyne*, Appellant's claim fails.

Next, Appellant alleges that this Court abused its discretion in permitting the Commonwealth to admit the victim's forensic interview video as a prior consistent statement. Appellant further alleges that this Court abused its discretion in admitting the forensic interview because it duplicated the accuser's testimony and was unfairly prejudicial. When offered for the truth of the matter asserted therein, prior consistent statements are usually inadmissible hearsay. However, when offered to corroborate in-court testimony, a prior consistent statement is not hearsay. *Commonwealth v. Willis*, 552 A.2d 682, 691 (Pa. Super. 1988).

> The general rule precluding corroboration of unimpeached testimony with prior consistent statements is subject to exceptions when particular circumstances in individual cases tip the relevance/prejudice balance in favor of admission. Among the common examples of such exceptions are prior consistent statements which constitute prompt complaints of sexual assault. . . Evidence of a prompt complaint of sexual assault is considered [e]specially relevant because (rightly or not) a jury might question an allegation that such an assault occurred in absence of such evidence. . . Similarly, jurors are likely to suspect that unimpeached testimony of child witnesses in general, and child victims of sexual assaults in particular, may be distorted by fantasy, exaggeration, suggestion, or decay of the original memory of the event. Prior consistent statements may therefore be admitted to corroborate even unimpeached testimony of child witnesses, at the trial court's discretion, because such statements were made at a time when the memory was fresher and there was less opportunity for the child witness to be effected by the decaying impact of time and suggestion.

Id. at 691-692. *See also Commonwealth v. Hunzer,* 868 A.2d 498 (Pa. Super. 2005).

Appellant argues that prior consistent statements are only admissible in rebuttal to show that a witness is fabricating their testimony as a result of a corrupt motive. This claim lacks merit. The exceptions defined by the Superior Court include child victims of sexual assault and does not require prior impeachment. *Id.* The forensic interview falls within this exception, and this Court did not abuse its discretion by admitting the tape.

The witness, thirteen year old R.E., made a prior consistent statement in a forensic interview conducted the day after the assault. R.E.'s in-court testimony was identical to her testimony from the forensic interview and the preliminary hearing. (Jury Trial Transcript of June 24-28, 2016, hereinafter TT, at 21-22) She reiterated the details of the assault to the jury in great detail. R.E. shared what she and Appellant ate at Quaker Steak and Lube, listed the neighborhoods Appellant drove through, discussed her attempted escape from Appellant's control, and shared the specific ways in which Appellant assaulted her. (TT 44-62) The tape was played for the purpose of corroborating R.E.'s testimony. *Hunzer, supra*, at 512. Courts have long recognized that a prior consistent statement of a child in a sexual assault case is particularly relevant and probative. *Id.* In this case, the probative value of establishing that the child's testimony had not been "distorted by fantasy, exaggeration, suggestion, or decay of the original memory of the event" outweighed any potential danger of unfair prejudice.

Appellant challenges the sufficiency of the evidence on three counts. First, Appellant alleges that the Commonwealth failed to prove that the victim was under the age of thirteen at the time of the incident and therefore cannot convict him of Aggravated Indecent Assault of a Child. Appellant is correct. Per the medical records, which were admitted without objection, the victim's date of birth is 8/7/2002. (TT 26) The parties stipulated that the Pirate game after which the alleged assault occurred was on 9/16/2015. *Id.* Therefore, the victim was thirteen years old at the time and Appellant should have been charged at this Count as a second degree felony and not a first degree felony.

Appellant also alleges that he cannot be convicted of Kidnapping of a Minor because the Commonwealth failed to prove that he confined R.E. for a substantial period of time in a place of isolation. The statute provides:

> A person is guilty of kidnapping of a minor if he unlawfully removes a person under 18 years of age a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines a person under 18 years of age for a substantial period in a place of isolation, with any of the following intentions:
>
> * * *
>
> (3) To inflict bodily injury on or to terrorize the victim or another.

18 Pa.C.S. § 2901(a.1) (3). The "substantial period" element includes not only the "exact duration of confinement, but also whether the restraint, by its nature, was criminally significant in that it increased the risk of harm to the victim." *Commonwealth v. Markman*, 916 A.2d 586, 600 (Pa. 2007). The "place of isolation" is not intended to be solely geographic isolation, but rather "effective isolation from the usual protections of society." *Commonwealth v. Jenkins*, 687 A.2d 836, 838 (Pa. Super. 1996), *citing* Model Penal Code § 212.1.

The testimony of the victim supports the jury's verdict at this Count. R.E. testified that after leaving a late dinner around midnight, she was kept in Appellant's car for the next several hours. (TT 45-46) She stated that she woke up in the vehicle at approximately 2:00 a.m. and observed that Appellant was driving through neighborhoods for no apparent reason. (TT 47) R.E. pleaded with Appellant to go home because she was tired and needed to use the restroom, but Appellant drove past her house and stated "just one more ride." (TT 48) Appellant then took R.E. to an abandoned alley where she attempted to exit the car and was pulled back in by a headlock. (TT 51-52) Appellant dragged R.E. into the back of the vehicle and locked the doors, and assaulted her. (TT 54) R.E. was not returned to her home until 3:14 a.m. (TT 73) R.E. was locked in Appellant's car for over three hours, which increased her risk of harm, and was taken to an isolated area, preventing her from the usual protections of society. Therefore, the evidence was sufficient to convict for Kidnapping of a Minor.

Appellant's sufficiency claim in regards to Unlawful Restraint of a Minor is also refuted by R.E.'s testimony. The statute provides:

> If the victim is a person under 18 years of age, a person who is not the victim's parent commits a felony of the second degree if he knowingly: (1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury.

18 Pa.C.S. § 2902(b) (1). The Superior Court of Pennsylvania has previously held that a small woman who was pulled by the neck by a grown, adult male is sufficient to constitute the risk of serious bodily injury. *Commonwealth v. McBall*, 463 A.2d 472, 499 (Pa. Super. 1983). R.E. testified that Appellant placed her in a headlock and pulled her while holding a sharp object against her neck in order to force her into submission. (TT 52-55) R.E.'s testimony was corroborated by her medical records. Exhibit A-3, a photograph, depicted a mark where Appellant pushed the object into her neck. (TT 68) These actions by Appellant, a full-grown adult male, towards a small thirteen year old girl put her at risk of serious bodily injury. As a result, the evidence was sufficient to convict Appellant of Unlawful Restraint of a Minor.

CONCLUSION

Having conceded that Appellant should not have been sentenced to a first degree felony at the Aggravated Indecent Assault Count, this Court requests the Superior Court of Pennsylvania to remand the case back for resentencing at that Count. Regarding Appellant's remaining claims of error, for all of the above reasons, the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

[1] 18 Pa.C.S. §§ 2902(b)(1), 3125(a)(8), 3125(a)(2) and (a)(3) and (b), 2701(a)(1), 3126(a)(8), 901(a), 2706(a)(1), and 2901(a.1)(3), respectively.

[2] No further penalty was imposed at the remaining counts.

Commonwealth of Pennsylvania v. Christopher Thomas

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—Recusal

Defendant claims counsel ineffective for failing to seek recusal, but the trial court had ruled in her favor on the suppression motion.

No. CC 2011-01 010, 2011- 09188. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Williams, J.—March 21, 2017.

OPINION

On February 15, 2017, the Superior Court issued a memorandum opinion. It affirmed our decision denying relief on Mr. Thomas' claim of ineffective assistance of counsel (IAC) regarding a closing argument. It remanded the matter so this Court could address an IAC claim with respect to recusal.

According to Thomas his trial lawyer was ineffective because she did not asked for recusal after this court ruled on and granted a motion in limine to exclude prior burglary convictions under Rule 609(b) of our Rules of Evidence. Three prongs of an IAC claim are well known and the Superior Court has specifically asked this court to address the merit and prejudice prongs of his recusal based ineffectiveness claim.

"'The party who asserts that a trial judge must be disqualified must 'produce evidence establishing bias, prejudice, or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially." *Lomas v. Kravitz*, 130 A.2d 107,122 (Pa. Super. 2015), *citing, Arnold v. Arnold*, 847 A.2d 674, 680 (Pa. Super. 2004). "'There is a presumption that judges of this Commonwealth are 'honorable, fair and competent,' *Id., citing, In re Lokuta*, 11 A.3d at 453 (Pa. 2011), and, when confronted with a recusal demand, are able to determine whether they can rule 'in an impartial manner, free of personal bias or interest in the outcome,' *Id.*, at 122. "If the judge determines he or she can be impartial, 'the judge must then decide whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make.'" *Id.* "A judge's decision to deny a recusal motion will not be disturbed absent an abuse of discretion." *Id.*

The merits discussion begins and ends with the obvious. This Court granted Thomas' motion to exclude certain material from his trial. So, any unfairness, bias or prejudice that Thomas feels was being harbored by this Court is non-existent. Trial judges are presumed to disregard material to which it has sustained an objection or excluded from one side's evidentiary arsenal. This case is a perfect example of that principle.

As for the prejudice prong, Mr. Thomas "must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's" failure to move for recusal. *Commonwealth v. Spotz*, 18 A.3d 244, 260 (Pa. 2011). Thomas fails on this front because of the evidence produced at trial. While only one of the burglaries had identification witnesses, there was plenty of other evidence.

> "Your blood is at the scene of one of the breakins. You were at the scene where five of those cell phones were – five different stores that were broken in. You happened to be with the employer that is there with the cell phones. When I looked at the video, to me it is the same person that is involved in each one of the activities, after it was ascertained that the person that robbed the Radio Shack fit the same description.
>
> At the scene when you are stopped running from the Radio Shack, you have a face mask that one would have in sub-zero weather, when it is 45 to 50 degrees. You have gloves which whoever broke into the store would have on. You have MP3 players bulging out of your pockets. You have a laptop, all which correspond to items stolen from the Radio Shack store."

Superior Court Opinion, 1238 WDA 2013, pg. 17 (May 30, 2014). It is this Court's firm belief that had the same collection of evidence been put forth before a different jurist, the verdict would have been the same.

This Court has concluded the task assigned by the Superior Court of Pennsylvania. Our Department of Court Records should return the certified record to that Court in due course.

BY THE COURT:
/s/Williams, J.

Commonwealth of Pennsylvania v. Charles Theisen

Criminal Appeal—Theft—Suppression—Sentencing (Discretionary Aspects)—Aggravated Assault—Photo Array—Prior Bad Acts

Man receives lengthy sentence for series of robberies, including removing 73-year-old woman's purse from the front seat of her car.

No. CC 201412533, 201413588, 201414997. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Cashman, A.J.—May 27, 2017.

OPINION

On August 21, 2014, the appellant, Charles Robert Theisen, (hereinafter referred to as "Theisen"), was arrested and subsequently charged with one count of receiving stolen property[1] when he got into a 1994 Buick Century automobile and attempted to drive it away. The police were on the lookout for this particular vehicle, not only because it had been reported stolen but, also, because it apparently was involved in a series of purse-snatchings that occurred a couple of weeks prior to Theisen's arrest.

As a result of the ongoing investigations conducted by a number of different police departments, Theisen was charged on September 1, 2014, with one count of aggravated assault, one count of robbery, two counts of criminal attempt to commit theft by unlawful taking, two counts of simple assault, two counts of theft by unlawful taking, one count of recklessly endangering another person, one count of reckless driving and one count of driving while his operator privileges had been suspended.[2] These charges are the result of an incident that occurred on August 8, 2014. On October 27, 2014, a third complaint was filed against Theisen, charging him one count of robbery, one count of recklessly endangering another person and one count of criminal mischief arising out of an incident that occurred on August 8, 2014.[3]

A fourth case was filed against Theisen[4] and in that complaint Theisen was charged with receiving stolen property, the unauthorized use of a motor vehicle and driving without a license. This case is not part of Theisen's appeal since he entered a plea of guilty to the charges of receiving stolen property and the unauthorized use of a motor vehicle on April 18, 2016. At the time of the entry of his plea, pursuant to a plea agreement, the Commonwealth withdrew the summary offense of driving without a license. Theisen was sentenced to a period of incarceration of not less than one nor more than two years which sentence of incarceration was to run concurrently with any and all other sentences of incarceration he was to serve and that sentence of incarceration was to be followed by a period of probation of three years, which was also to run concurrent with any period of probation that he received and he was also required to pay restitution to the victim in the amount of one thousand one hundred eight-six dollars and seventy-eight cents.

Theisen filed several pre-trial motions, one of which was for the appointment of an expert witness to testify as to the mistakes that someone can make in providing eyewitness identification testimony. In addition to that motion, Theisen also filed a motion seeking to suppress the photo array which was shown to the victims who identified Theisen from that photo array. Theisen maintained that the photographs were unduly suggestive or designed to have the victim identify him as the perpetrator.

Theisen proceeded with a jury trial on his first three cases on October 7, 2015. A jury returned guilty verdicts on all of the charges that were filed against Theisen on October 14, 2015. A presentence report was ordered and sentencing was scheduled for January 12, 2016. Theisen was sentenced to a period of incarceration of not less than eighteen nor more than thirty-six months for his conviction of the charge of receiving stolen property that had been filed at criminal complaint 201412533. That period of incarceration was to be followed by a period of probation of four years. At criminal complaint 201413588, Theisen was sentenced to a period of incarceration of not less than ninety nor more than one hundred eighty months to be followed by a period of probation of ten years for his conviction of the crime of robbery. A consecutive sentence of a period of incarceration of not less than ninety nor more than one hundred eighty months and a five-year period of probation was imposed upon him for his conviction of the crime of aggravated assault. Finally, a period of incarceration of not less than eighteen nor more than thirty-six months, to be followed by a period of probation was imposed upon him for his conviction of the charge of theft. No further penalty was imposed upon him with respect to his remaining convictions at that criminal complaint. At his third case at criminal complaint 201414997, Theisen received a sentence of a period of incarceration of not less than thirty nor more than sixty months, to be followed by a period of probation of five years for his conviction of the charge of robbery. All of the periods of incarceration were to run consecutive to each other and all of the period of probation were to run concurrent with each other. The aggregate sentence imposed on Theisen was a period of incarceration of not less than twenty and one-half nor more than forty-one years to be followed by a period of probation of ten years.

Theisen filed timely post-sentence motions and a hearing was held on those motions on April 18, 2016, and after that hearing, his post-sentence motions were denied. Theisen then filed a timely appeal to the Superior Court and was directed, pursuant to

Pennsylvania Rule of Appellate Procedure 1925(b), to file a concise statement of matters complained of on appeal. In his concise statement, Theisen has raised four claims of error. Initially, Theisen maintains that this Court erred when it denied his motion to suppress the photo array as unduly suggestive without a hearing. Theisen also has suggested that this Court erred in admitting evidence of Theisen's prior convictions for the crimes of robbery. Theisen then alleges that the sentences imposed upon him were an abuse of discretion and manifestly excessive. Finally, this Court erred in permitting Detective Dawn Mercurio to testify at Theisen's sentencing hearing.

On October 8, 2014, Daniel Eisel was driving his mother's car, a 1994 Buick Century on Hazeldell Street when he decided to stop and get something to eat. Eisel parked the car across the street from 2210 Hazeldell Street and although he had locked the doors, the driver's window and front seat passenger window were left open for approximately one inch. When he returned from eating, that car was no longer there. Later that day, Gloria Wolowski completed her shopping in the Town Square complex located in Brentwood. She went to her car, placed her purse on the driver's seat and then proceeded to place her groceries in the trunk of her car. She then noticed an unknown white male, approximately thirty years of age, wearing a Steeler jersey with facial hair with a thin build, driving an older blue car which pulled up next to her car, striking her vehicle with his mirror. The driver of that car never got out of the vehicle and apparently slid across the seat, opened her door and grabbed her purse. Wolowski observed this and then ran to the other car and got ahold of her purse and was fighting to get it back when the driver started to speed away causing her to violently fall to the pavement. This theft was witnessed by Greg Mondry and Wes Stabler, who ran to Wolowski's aid. Mondry got a good look at the actor and gave basically the same description as Wolowski did to the police. Wolowski was transported to St. Clair Hospital to be treated for a fractured scapula, fractured rib, lacerations, swelling and bruising on her left knee and right wrist. Wolowski was seventy-three years old at the time of this robbery.

On August 9, 2014, Donna Gall had just completed her shopping at the Giant Eagle located at Parkway Center Mall in Greentree, Pennsylvania, and was placing her groceries in her car when she noticed that a vehicle had pulled extremely close to her driver's side door with is driver's side door and attempted to grab her purse from her arm. The driver of the other car never exited his vehicle and Gall struggled with this individual, refusing to give her purse when he had to speed away, causing Gall to get tangled in her purse and having to run alongside the speeding automobile for approximately ten feet. Gall then fell to the ground and the purse was ripped from her. Greentree Police were able to obtain a video of the vehicle that was used during the robbery and it revealed that Easel's stolen vehicle, the 1994 Buick Century, was used during the commission of this robbery. Gall described the driver as being in his late twenties, thin build, medium height, and wearing a black shirt and had dark hair and also had facial hair. Gall suffered injuries to both of her knees in addition to several bruises and contusions. She believed that her life was in danger. Gall was sixty-four years old at the time of this robbery. Later on August 9, 2014, Soon Ja Hong was walking along Noblestown Road when she heard the engine of a speeding vehicle approach her. Hong observed an older blue vehicle pull up to her at an extremely close range and grab her purse that was hanging from her arm. The driver of the car grabbed her purse and Hong and the driver proceeded to struggle over this purse, however, he was unable to get the purse from her and then sped away. Hong described the individual who attempted to take her purse as a being a white male of thin build and medium height. She also described the car used in this attempted robbery as an older blue Buick.

After Easel's vehicle had been stolen on August 8, 2014, the police put out a description of that vehicle in an attempt to locate it. On August 20, 2014, Pittsburgh Police received an anonymous phone call saying that a blue Buick Century was parked outside of 338 Sweetbriar Street. The police then went to that address and noticed that the car was parked with all of its windows down. The police set up surveillance to see who would attempt to drive that car and they then saw an individual wearing a Steeler jersey approach the vehicle. That individual got into that vehicle and was attempting to leave when the police pulled in, blocking his exit. The driver of this vehicle was then identified as Theisen. When he was questioned by the police Theisen said he just received that vehicle from another individual and that he could not have committed these robberies since he was in the hospital and was treated for fractures of both of his heels. When Theisen was arrested he had casts on both legs up to his shins. Theisen told the police that he had stolen this car on Paul Street in Mt. Washington on August 17 and wondered what took the police so long to get him. When he was questioned about his injuries, he said that he had fallen off of a roof and went to the hospital on August 1 and then signed himself out on August 10 and went to another hospital on that date and stayed there until being released on August 15. The police got a search warrant for Theisen's medical records and determined that Theisen signed off on a release against medical advice on August 6, 2014, when he left Mercy Hospital.

In his first claim of error, Theisen maintains that this Court erred when it denied his motion to suppress his identification from a photo array without a hearing. Theisen filed an extensive pre-trial motion to suppress his identification from the photo array which was twelve pages long and had seventeen exhibits which consisted of the two photo arrays that were put together in Theisen's case. Fifteen of the seventeen exhibits were photocopies of the photos that were faxed to the various police departments and in looking at those photographs, it is clear that were very poor reproductions of the original photographs that were used. One of the exhibits is, in fact, the color photo array that was put together from which the victim's identified Theisen as their attacker.[5] In his motion to suppress the identification from the photo array, Theisen set forth several allegations which he believed demonstrates the suggestiveness of the photo array. Initially, he maintains that he is the only individual in the photo array with a Steeler jersey when the victims related to the police at the time they were initially interviewed that their attacker was wearing a Steeler tee-shirt. Theisen then suggested that he is the only individual who is not in the center of the photograph and being off-center causes him to stand out. Next Theisen maintains that he was the only individual who was not directly looking into the camera and since he is not looking straight forward, that his picture stands out when viewed against the other seven photographs. It should be noted that nowhere in Theisen's motion to suppress does he ever suggest that the police improperly displayed the photo array to the victims or that they attempted to have Theisen identified as the attacker by each victim. In *Commonwealth v. Stiles*, 143 A.3d 968, 978 (Pa. Super. 2016), the Court set forth a standard for review of a claim that the photo array was unduly suggestive as follows:

> When reviewing the **propriety** of a suppression order, an appellate court is required to determine whether the record supports the suppression court's factual findings and whether the inferences and legal conclusions drawn by the suppression court from those findings are appropriate. Where the record supports the factual findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. However, where the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's conclusions of law are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts.

> Whether an out of court identification is to be suppressed as unreliable, and therefore violative of due process, is determined from the totality of the circumstances. Suggestiveness in the identification process is a factor to be considered in determining the admissibility of such evidence, but suggestiveness alone does not warrant exclusion. Identification evidence will not be suppressed unless the facts demonstrate that the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than the others, and the people depicted all exhibit similar facial characteristics.
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> *Commonwealth v. Fulmore*, 25 A.3d 340, 346 (Pa.Super.2011) (internal citations and quotation marks omitted).

In *Commonwealth v Johnson* 139 A.3d 1257, 1278 (Pa. 2016), the Court noted that the claim of the unreliability of out of court identification is governed by a totality of the circumstances test.

> A court must assess the **reliability** of an out-of-court identification by examining the totality of the circumstances. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). A pre-trial identification violates due process only when the facts and circumstances demonstrate that the identification procedure was so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification. *Commonwealth v. Hughes*, 521 Pa. 423, 555 A.2d 1264, 1272–73 (1989).

In *Commonwealth v. Kendricks*, 30 A.3d 499, 504 (Pa. Super. 2011), the Court sets forth some of the facts that should be conceded in making a determination as to whether or not the photo array was unduly suggestive.

> Our Supreme Court has instructed that a **photographic identification** is unduly suggestive if, under the totality of the circumstances, the **identification** procedure creates a substantial likelihood of misidentification. *Commonwealth v. DeJesus*, 580 Pa. 303, 860 A.2d 102, 112 (2004) (citation omitted).
>
> Whether an out-of-court **identification** is to be suppressed as unreliable, and therefore violative of due process, is determined from the totality of the circumstances. We will not suppress such **identification** unless the facts demonstrate that the **identification** procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
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> *Commonwealth v. Burton*, 770 A.2d 771, 782 (Pa.Super.2001) (citations and quotations omitted). The variance between the photos in an array does not necessarily establish grounds for suppression of a victim's **identification**. *Id.* "Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than those of the others, and the people depicted all exhibit similar facial characteristics." *Commonwealth v. Fisher*, 564 Pa. 505, 769 A.2d 1116, 1126 (2001). "[E]ach person in the array does not have to be identical in appearance." *Burton*, 770 A.2d at 782. The photographs in the array should all be the same size and should be shot against similar backgrounds. *Commonwealth v. Thomas*, 394 Pa.Super. 316, 575 A.2d 921 (1990).

In *Commonwealth v. Kubis*, 978 A.2d 391, 396-397 (Pa. Super. 2009), the Court noted that although a photo array might be suggestive, that in and of itself does not warrant the exclusion of the identification testimony.

> In his third question for review, Appellant presents a claim that the trial court improperly denied Appellant's motion to suppress identification evidence. The crux of Appellant's argument on this point rests on the allegation that the lineup was suggestive to the point of creating a likelihood of misidentification. Brief for Appellant at 19. We find this claim meritless. When determining the admissibility of identification testimony, this Court has held that suggestiveness in the identification process is a factor to be considered in determining the admissibility of such evidence, but "suggestiveness alone does not warrant exclusion." A pretrial identification will not be suppressed as violate of due process rights unless the facts demonstrate that the identification procedure was so infected by suggestiveness "as to give rise to a substantial likelihood of irreparable misidentification." *Commonwealth v. Bruce*, 717 A.2d 1033, 1037 (Pa.Super.1998) (citation omitted).
>
> In the instant case, we conclude that the circumstances surrounding Mr. Stencler's identification of Appellant were not suggestive. Appellant would have us find undue suggestiveness on three grounds: the selected photographs did not bear sufficient resemblance to Appellant's photograph; Appellant's eyes were not focused on the camera; and Detective Schlotter's comments to Stencler during the line up were suggestive. We disagree that any of these contentions entitle Appellant to relief.
>
> Detective Schlotter chose pictures of men with the same basic identifying features when he assembled the photo array; all were in some stage of balding with fair complexions, blue eyes, and mustaches. In his brief, Appellant relies on the allegation that only three of the men in the line up had round faces like Appellant. In its opinion, the trial court stated,
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> > Although some of the faces in the line-up appear longer than Appellant[']s, it cannot be said that five of the seven other faces are strikingly longer than Appellant's so as to create suggestivity. The similar characteristics between all eight men in the line-up outweigh any difference in the length of their faces. Trial Court Opinion (T.C.O.), 10/31/08, at 12. After reviewing the photographs, we agree that the trial court did not err in its determination on this matter.
>
> Second, Appellant argues that the photo array was somehow unduly suggestive because his photo shows him looking away from the camera. In the picture, Appellant's head is facing forward, providing a frontal view of his face that matches that of the rest of the photos. His eye position is not readily distinguishable from the eye positions of the men in the other images, and even if it were, such a discrepancy would not create a substantial likelihood of misidentification.
>
> Third, we find that Detective Schlotter's comments to Mr. Stencler were not suggestive. Appellant contends that he is entitled to relief because Detective Schlotter told Stencler that the police had a suspect in mind before Stencler chose Appellant from the lineup. Appellant also contends that Detective Schlotter created a suggestive environment when, after Stencler had made his selections, the detective indicated that one of the two men Stencler chose was the suspect. However, Appellant makes no argument as to why these statements would create a substantial likelihood of misidentification. **Accordingly**, we find the out-of-court identification was not suggestive, and the trial court properly denied Appellant's motion to suppress it.

In Theisen's motion to suppress the photo array identification, he makes no claim that the police engaged in any type of activity or comment which was designed to influence the ultimate result of his identification. The only claims of suggestiveness are the photographs of themselves. In this regard, Theisen has suggested because he stands out because he is the only one wearing a Steeler tee-shirt, he is the only one is not looking directly into the camera, and he is the only one that was not in the center of his picture. In light of the claims asserted by Theisen, there was no need to hold a hearing to elicit testimony as to three claims asserted by Theisen. Theisen's motion also contained numerous citations to the case law applicable to claims of suggestiveness of photo arrays. The only thing that needed to be done was for this Court to review the photographs to make a determination as to whether or not the photographs were selected in such a manner as to cause Theisen's photograph to stand out against the others.

As noted by Detective Dawn Mercurio, all of the victims had the same general description of their attacker to the police, saying that he was wearing a Steeler tee-shirt, he was a white male with scruffy facial hair and unkempt. In reviewing the photo array that was used to identify Theisen, it is clear that all eight individual who were pictured were all wearing a tee-shirt. Theisen shows that his tee-shirt is black and on the top of the right shoulder, there appeared two white marks. It is difficult to tell whether these white marks are letters, numbers or symbols, however it is impossible to tell from Theisen's picture anything more about the tee-shirt and in no way does that tee-shirt demonstrate that it was a Steeler tee-shirt. Theisen's photographs ends at the top of his chest and, accordingly, there is nothing shown on the front of the tee-shirt which would lead someone to conclude that it was a Steeler tee-shirt. The only thing that one can depict from Theisen's picture is that he is wearing a black tee-shirt with two white marks on the right shoulder. It should be noted that five of the other individuals pictured in that photo array also had a black tee-shirt, while one individual had a white tee-shirt and the other one had a multi-colored tee-shirt. All of these individuals appeared to be in their late twenties, early thirties, having some form of facial hair and receding hairlines.

Theisen also maintains that since he is not in the middle of the photograph and slightly to the right of center that his photograph becomes suggestive since he now stands out. This is a similar argument to the one that he makes when he says since he is not directly looking at the camera, he is also being picked out since everyone else in the photo array is in the center of the photograph and they are all looking directly at the camera. In reviewing all of these photographs, it did not become apparent to this Court that the photographs were duly suggestive since Theisen's photograph was slightly off center and he was not looking directly at the camera. This Court rejected those contentions for the same reasons that the Superior Court rejected them in *Commonwealth v. Kubis, supra.* There was no need for testimony since the claims of suggestiveness went to the photographs in and of themselves, the only thing required of this Court was to review the photographs, which it did and advised counsel following its review, that it did not believe that the photo array was unduly suggestive.[6]

In his next claim of error, Theisen maintains that this Court erred in permitting 404(b) evidence of Theisen's prior convictions for robbery. The Commonwealth presented testimony from Carol Sykes, Cathy Tressler, Nancy Coquet, Thomas Andrezejcak who were victims of Theisen in 2007. Carol Sykes testified that on June 27, 2007, that she had returned to her home after shopping at the Shop 'N Save grocery store in Greentree. She got out of her car and was attempting to take her groceries out of the car and take them into her house when she was confronted by an individual who was later identified as Theisen. He slammed her against the car, grabbed her purse and then ran from her home. At the time of this robbery, she was sixty-eight years old. Cathy Tressler testified that on June 27, 2007, she had also done grocery shopping at the Giant Eagle grocery store in Greentree when she returned to her home and parked her car in the driveway. She was unloading her groceries and felt something tug at her shoulder and felt that her purse was being cut away from her. As a result of the struggle she fell to the ground and she was required to have several staples in the back of her head. Nancy Coquet testified that on July 4, 2007, she had finished her shopping at the Shop 'N Save grocery store and was returning home when she saw that she was being followed by an individual driving a Camaro sports car. When she pulled into her driveway, she began the task of unloading when she saw an individual coming toward her. That individual grabbed her purse and pulled her purse from her shoulder and pulled into a telephone pole that abutted her driveway. At the time of this robbery, she was sixty-eight years old. Thomas Andrezcjak testified that on July 4, 2007, that he was awakened at approximately five forty in the morning when he heard his car start up. He ran to his bedroom and saw his car being driven away from his home. He called 911 to make a report of a stolen car and gave the police a description of his car which was a 1988 Camaro IROC-Z. Andrezcjak testified that he had never met Theisen and, accordingly, Theisen had no permission to operate his motor vehicle.

Theisen maintains that the introduction of this evidence of his convictions for crimes committed in 2007 was in violation of Pennsylvania Rule of Evidence 404(b), which provides as follows:

> **(b) Crimes, Wrongs or Other Acts.**
>
> *(1) Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> *(2) Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.
>
> *(3) Notice in a Criminal Case.* In a criminal case the prosecutor must 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 the prosecutor intends to introduce at trial.

There are several reasons for the exclusion of evidence of prior bad acts since the production of that evidence may be unduly time-consuming or cumulative and may also raise collateral issues which distract the jury from the case at hand. The fundamental reason, however, is that it may unfairly prejudice the party against whom it is admitted. In *Commonwealth v. Spruill*, 480 Pa. 601, 391 A.2d 1048, 1049-1050 (1978), the Court explained the purpose of the rule of excluding evidence of prior crimes and bad acts against a defendant as follows:

> Evidence of prior **criminal activity** (particularly of the type of conduct suggested by this statement) is probably only equaled by a confession in its prejudicial impact upon a jury. Thus, fairness dictates that courts should be ever vigilant to prevent the introduction of this type of evidence under the guise that it is being offered to serve some purpose other Than to demonstrate the defendant's propensity to commit the charged crime. An additional reason why we caution trial courts against being innovative in carving out new exceptions to the rule is that evidence of prior **criminal activity** requires the accused to answer additional charges which were not included in the indictment returned against him.

> Where the testimony is admissible under the traditional exceptions counsel for an accused can anticipate its introduction and thus prepare a response. Where a novel exception provides the basis for the entry of such testimony, the appellant cannot reasonably be expected to be prepared to meet it. In the latter case, serious due process concerns are raised.

Pennsylvania Rule of Evidence 404(b) does recognize, however, evidence of prior crimes and bad acts are relevant to show any one of five things: 1) motive; 2) intent or knowledge; 3) absence of mistake or accident; 4) common scheme or plan; and, 5) identity. The Commonwealth maintained that the introduction of this evidence would meet the criteria for Rule 404(b) and that it would help establish the identity of the individual committing these crimes and establish a common plan or scheme. In reviewing the record in light of the Commonwealth's assertion, it is clear that evidence of Theisen's prior convictions for robbery is relevant for establishing his motive, his common plan or scheme and his identity as the individual who committed the crimes in August of 2014. Theisen acknowledged that the reason that he committed all of these crimes was that he needed money to support his significant drug habit. The common plan or scheme is readily evident from a review of his past activities and the crimes that were under consideration by the jury. In both sets of cases he stole a vehicle which would allow him to perpetrate the crimes of robbery against his victims. All of his victims had completed their grocery shopping, the only difference between the 2007 and 2014 robberies were that the robberies in 2007 were committed on foot and at the homes of the victims, whereas the robberies in 2014, were committed with the use of a motor vehicle at the grocery store. All of the victims of Theisen's robberies were women in their late sixties and early seventies and almost all of his victims, in both cases, sustained some type of physical injury as a result of the physical force used by Theisen to get their purses. Theisen's actions established a clear plan of what he intended to do, and that was to initially steal a motor vehicle to enable him to carry out these crimes of robbery against elderly women who had completed their grocery shopping. When these prior convictions reviewed in the light of the purpose of Pennsylvania Rule of Evidence 404(b), it is clear that they were properly admitted as they did establish a common plan, a motive, and the identity of the individual who committed the 2014 crimes.

Theisen next maintains that his sentence is an abuse of discretion and manifestly excessive. Following his convictions on all of the charges filed against him, this Court ordered a presentence report and scheduled sentencing for January 20, 2016. At criminal complaint 201413588, Theisen was sentenced to a period of incarceration of ninety to one hundred eighty months, to be followed by a period of probation of two years for his conviction of the crime of robbery, to a consecutive period of incarceration of ninety to one hundred eighty months with a five year period of probation for his conviction of the crime of aggravated assault, and a consecutive sentence of eighteen to thirty-six months with a five year period of probation for his conviction of theft by unlawful taking. No further penalty was imposed at the remaining offenses. At criminal complaint 2014149997, Theisen was sentenced to a period of incarceration of thirty to sixty months to be followed by a period of probation. No further penalty was imposed at the remaining counts. And, finally, at criminal complaint 201412533, Theisen was sentenced to a period of incarceration of not less than eighteen nor more than thirty-six months to be followed by a period of probation of four years for his conviction of the charge of receiving stolen property. All of the sentences of incarceration were to be run consecutively and his periods of probation to be run concurrently, the aggregate effect of which was a sentence of not less than twenty and one-half nor more than forty-one years, to be followed by a period of probation of ten years. In *Commonwealth v. Mouzon*, 571 Pa. 419, 812 A.2d 617, 620 (2002), set forth the factors a Court must consider in fashioning a sentence upon a defendant.

> **Traditionally**, the trial court is afforded broad discretion in sentencing criminal defendants "because of the perception that the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." *Commonwealth v. Ward*, 524 Pa. 48, 568 A.2d 1242, 1243 (1990). Under Pennsylvania's Sentencing Code, 42 Pa.C.S. § 9701 *et seq*., a trial court must "follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant."1 *Id.* § 9721(b). The court must also consider the statutory Sentencing Guidelines, which were promulgated in order to address the problems associated with disparity in sentencing. *See id.; see also* 42 Pa.C.S. §§ 2151- 2155 (governing creation and adoption of the Sentencing Guidelines); 204 Pa.Code §§ 303.1-303.18 (Pennsylvania Sentencing Guidelines); *see generally Commonwealth v. Sessoms*, 516 Pa. 365, 532 A.2d 775, 776-77 (1987) (discussing the formation of the Sentencing Commission and the development of the Guidelines).2
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> The Sentencing Guidelines enumerate aggravating and mitigating circumstances, assign scores based on a defendant's criminal record and based on the seriousness of the crime, and specify a range of punishments for each crime.3 "In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed." 42 Pa.C.S. § 9721(b); *see* 204 Pa.Code § 303.1(d). The Sentencing Guidelines are not mandatory, however, so trial courts retain broad discretion in sentencing matters, and therefore, may sentence defendants outside the Guidelines.4 *See* 42 Pa.C.S. § 9721(b); *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa.Super.1997). If a court departs from the sentencing recommendations contained in the Sentencing Guidelines, it must "provide a contemporaneous written statement of the reason or reasons for the deviation."

In fashioning a sentence on a defendant, a Court is required, pursuant to the Sentencing Code, to take into consideration the impact upon the victim, the impact upon society, the likelihood that that defendant will reoffend and the need for a defendant's rehabilitation. This Court had the opportunity to review the presentence report that it had ordered for Theisen and also, a presentence report that was prepared for Judge Colville in 2003. In addition to those presentence reports, this Court had the benefit of the guidelines that were promulgated for each of his crimes and considered all of those factors in making a determination that the sentence of total confinement was necessary for Theisen in light of his continued criminal activity. At the time of his sentencing, Theisen was thirty-five years old and had twenty-one cases in the criminal justice system. All of these cases demonstrated a long and lengthy use and abuse of drugs and as noted at the time of sentence, he had numerous opportunities to avail himself of drug treatment programs in an effort to rid himself or control his affliction, however, he never took advantage of any of these particular programs. Theisen's criminal history demonstrated that he was a predator, praying upon elderly women who were basically defenseless, stealing from them without concern for their physical safety as witnessed by the fact that in almost every case his victim sustained some type of injury, some more disabling than others. More disturbing is that he had no remorse or concern for his victims since he referred to them as "Old MFers".

This Court believes that Theisen is a danger to society and that he had a significant impact upon each and every one of his victims and that he is incapable of rehabilitation as evidenced by his twenty-one cases. His drug addiction controls all of his actions and unfortunately those actions include his criminal activity and his willingness to inflict serious bodily injury on his victims. In reviewing his prior criminal history, it is clear that he had numerous opportunities to attempt to treat his drug addiction but refused to do so. Accordingly, this Court believes that he is incapable of rehabilitation and that sentences of total confinement were necessary for him and those sentences were to be run consecutively. Any other fashioning of this sentence would deprecate the seriousness of his crimes and ignore his lack of remorse of the commission of those crimes. Theisen's sentences were not an abuse of discretion nor were they manifestly excessive since they were all within the guidelines and did not exceed the statutory maximum.

Theisen's final claim of error is that this Court should not have permitted Detective Mercurio to testify at the time of his sentencing. Detective Mercurio was the lead detective on Theisen's cases and interviewed him with conjunction with those cases. She noted that during the course of the interviews that he referred to his victims as "Old MFers". She did not detect a sense of remorse for the commissions of these crimes and considered that he is a dangerous individual who prays on elderly women. Detective Mercurio's testimony at the time of sentencing consisted of less than two pages of the transcript, however, it reflects the statements made by Theisen in jail house tapes as once again referring to his victims as "Old MFers." That information was previously before the Court and in no way did Detective Mercurio's testimony in refreshing the Court's recollection of his disdain for his victims, prejudice this Court.

BY THE COURT:
/s/Cashman, A.J.

Dated: May 27, 2017

[1] Criminal Complaint 201412533.

[2] Criminal Complaint 201413588.

[3] Criminal Complaint 201414997.

[4] Criminal Complaint 201412344.

[5] The remaining exhibit is the picture of the back of the pictures in the first photo array that, after two victims identified Theisen as their attacker, both signed the same photograph on two different dates.

[6] See Post-Sentence Hearing Transcript of April 18, 2016, page 11.