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Motion to Disqualify Plaintiffs' Counsel due to counsel's prior representation of the individual parties' other company in an unrelated matter denied. Pennsylvania Rule of Professional Conduct 1.9 governs. Defendant failed to offer evidence that the prior attorney-client relationship extended to defendant personally and that the prior representation is adverse to the current interests of defendant. Defendant failed to prove that prior representation is substantially related to the present matter or that counsel acquired confidential information about individual defendant in prior representation that would advance plaintiff's position in the present matter.

PLJ

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OPINIONS

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**Commonwealth of Pennsylvania v.
Adndre Jamal Walker**

Criminal Appeal

In reviewing claim, it was clear that nothing about the evidence in this case shocked the Court's conscious but, rather, the evidence was clear and convincing that the Commonwealth had proven the elements of the offense of aggravated assault beyond a reasonable doubt.

No. CC 201906694. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, J.—September 30, 2021.

OPINION

On March 5, 2020, following a jury trial, the appellant, Andre Jamal Walker, (hereinafter referred to as "Walker"), was convicted of the charge of aggravated assault and found not guilty of the charges of criminal attempt to commit criminal homicide and receiving stolen property. A presentence report was ordered and on June 3, 2020, following a hearing at which Walker presented numerous witnesses, he was sentenced to a period of incarceration of not less than fifty-four nor more than one hundred eight months, to be followed by a period of probation of five years, during which he was to have no contact with the victim, he was to enroll and to complete an anger management class, and he was also to undergo random drug screening.

Walker filed timely post-sentence motions which were denied by operation of law on November 20, 2020. Walker then filed a timely appeal to the Superior Court and in his statement of matters complained of on appeal he has raised three issues. Initially, Walker maintains that even when the evidence is viewed in the light most favorable to the Commonwealth, that the verdict was against the weight of the evidence. Walker further maintains that this Court abused its discretion in sentencing him since he provided substantial mitigating evidence and this Court imposed a manifestly excessive sentence without proper reference or consideration of the Sentencing Code. Finally, Walker maintains that the evidence presented at the time of trial was, as a matter of law, insufficient to sustain a conviction for the charge of aggravated assault.

On May 24, 2019, at approximately 2:40 am, a Pittsburgh Police Officer responded to a call of shots fired and a man down at 951 Liberty Avenue. When the officers arrived at the scene of the shooting, they saw the victim, Kristopher Capron, (hereinafter referred to as "Capron"), lying face down on the sidewalk complaining of multiple gunshot wounds. The officers, in initially assessing Capron's physical condition, noted at least four bullet wounds on his lower back and legs and clothing. In addition, they observed two shell casings and several bullet fragments. Despite being shot, Capron was able to give the police a description of his assailant and identified him as a black male with dreadlocks, who was wearing a white tee-shirt and green shorts. He stated that the shooting occurred at 961 Liberty Avenue and this was verified by the fact that several shell casings were found at that location. Initially, Capron was uncooperative with the police and indicated that he would take care of the matter himself and he would kill the individual who shot him.

The police put out a description of Capron's assailant and Officer Hampt saw an individual fitting that description walking near the Convention Center and stopped him and asked him whether or not he had a weapon on him or in his backpack. Walker told the police that he had a permit to carry a concealed weapon and the police located a gun in his backpack. The police recovered a thirty-eight caliber Smith & Wesson semi-automatic which was empty since neither the magazine, nor the chamber had any live rounds. This weapon was reported stolen by its owner in June of 2018.

When Capron was initially interviewed by the police he told them that he had just finished his four to twelve shift for a security company and had decided to have a couple of drinks. He went to the Images Bar since it was the only one open, despite the fact that he had no knowledge about that bar. After he was there for some time, he determined that this was a gay bar since he did not recognize anyone in the bar and that the actions and activities of the patrons indicated that this was a bar frequented by homosexuals. Eventually Capron noticed Walker in the bar and while he did not know his name, he recognized him from living in the same neighborhood that he resided. Initially they talked and had no problem, however, Capron was curious as to why Walker was in the bar and proceeded to ask him whether or not he was a homosexual. When Capron did not get what he perceived to be a definitive answer, he again asked Walker as to his sexual orientation and asked the question at least five more times. At last call, Capron got a drink and then went outside of the bar to have a cigarette. Capron saw Walker and went over to him and once again asked him whether or not he was a homosexual at which Walker appeared to become upset since he was being constantly questioned by Capron. Noticing that Walker was upset, Capron asked him if he wanted to fight and indicated that this fight would be a fist fight and in response to that question, Walker drew his gun and initially pointed it to the ground and then fired a warning shot and several shots thereafter, which hit Capron in the back and lower legs. In a second interview with the police, Capron stated that he had desired to buy some marijuana from Walker and after making the purchase, noticed that he had not received the amount of marijuana for which he bargained, and then got into an argument with him at which point Walker pulled a gun and shot him.

When Walker was apprehended by the police he initially told him that he had purchased the gun off of the street for the sum of two hundred dollars and that he had nothing to do with the shooting. Walker verified the fact that Capron continuously asked him about whether or not he was a homosexual while he was in the Image Bar and this continued even when they had left the bar. At no time did Capron ever attack Walker but, rather, Walker became irritated with Capron about asking him the same question over and over and then fired a warning shot, and several other shots thereafter in the hopes of steering the victim away from him.

Initially, Walker maintains that the verdict was against the weight of the evidence and in support of that claim, asserts six examples of contradictory testimony which he believes demonstrates that the verdict was against the weight of the evidence. Walker maintains that Capron testified that he only knew Walker from the neighborhood and yet later in his testimony testified that they were good friends. Capron testified that while he did not know the defendant by name, he knew him from the neighborhood and that they used to laugh and joke around and go about their own business. Although he did not know his name, he did say that if he saw him, he would stop and say hello and ask him how he was doing, (Trial Transcript, page 123). Capron also testified that he believed and he and Walker were good friends and despite seeing Walker pull a gun, he did not believe that Walker would shoot him with that gun because of their friendship. When viewing the entirety of Capron's testimony, it is clear that these individuals knew each other from the neighborhood, would talk to each other if they saw each other and had no animosity between them. Capron's testimony as to whether or not they were good friends only underscored his belief that because they knew each other, that he did not believe that Walker would shoot him.

Walker next believed that Capron testified that Images was a gay bar and also testified that it was not a gay bar. A review of Capron's testimony indicates that when he went into the bar he did not know that it was a gay bar but only after the interaction of several of the patrons, did he come to the conclusion that it was a gay bar. The only reason that this testimony is significant is that it appears to provide the reason why Walker shot Capron. At the time of the shooting it is clear that all of the parties were aware of the fact that the bar was fact a gay bar.

Walker maintains that Capron contradicted himself when he said that Walker wanted to fight and that Walker told him to chill. In reviewing all of his testimony and the statement by Capron to Walker as to whether or not he wanted to fight, was limited to a fist fight and not a gun fight. Walker's statement that Capron was to chill was to have him stop pestering him about the question of whether or not he was a homosexual.

Walker next maintains that the conflict in the testimony provided by Capron that he initially said he did not see the gun and then testified that he saw the gun pointed downwards. In reviewing Capron's testimony in its entirety, it is clear that when he was looking at Walker prior to his being shot, that he was considering whether or not Walker was going to engage him in a fist fight and that he was not looking for a weapon and then saw that Walker had pulled a gun from his waistband and was pointing it initially at the ground.

Walker also maintains that there was misinformation as to the number of times he fired the gun, indicating that at one time only one shot was fired and then information was subsequently developed that numerous shots were fired. The physical evidence in this particular case obviously demonstrates that more than one shot was fired since Capron's suffered multiple gunshot wounds and the City police observed four gunshot wounds at the time that they encountered him shortly after the shooting and that there were two shell casings recovered, two spent bullets and that there were bullet fragments in Capron's body which were not removed. The question of how many shots were fired was one meant for the jury, however it is clear from the testimony and the physical facts, that more than one shot was fired.

Walker also maintains the fact that there were two shell casings found at the scene indicate that it supports his contention that he did not shoot at the defendant numerous times. As previously noted, this contention has been refuted by virtue of the number of wounds suffered by the victim, the number of shell casings and bullet fragment, recovered and not recovered, since two were to remain in the victim, and the number of shots which the victim heard. All of this information was for the jury to assess and the jury was properly able to dismiss all of these contentions since the physical facts supported the version presented by the Commonwealth.

In order to grant a new trial on the basis that the verdict was against the weight of the evidence, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscious of the Court. *Commonwealth v. Chine*, 40 A.3d 1239 (Pa. Super. 2012). The verdict shocks the judicial conscious when "the figure of Justice totters on her pedestal," or when "the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench." *Commonwealth v. Davidson*, 860 A.2d 575, 581 (Pa. Super. 2004). In reviewing Walker's claim it is clear that there is nothing about the evidence in this case that shocked this Court's conscious but, rather, the evidence was clear and convincing that the Commonwealth had proven the elements of the offense of aggravated assault beyond a reasonable doubt.

Walker next maintains that this Court abused its discretion in sentencing him since it did not consider the mitigating evidence that he presented, thereby imposing a manifestly excessive sentence which demonstrated a lack of consideration of the Sentencing Code. As noted in *Commonwealth v. Moury*, 992 A.2d 162, 170 (Pa. Super. 2010):

An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:

[W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. §9781(b).

Commonwealth v. Dempster, 187 A.3d 266, 272 (Pa. Super. 2018), Court En Banc (citations omitted).

In *Commonwealth v. Gonzalez*, 109 A.3d 711, 731 (Pa. Super. 2015), the Court set forth the standard for review for a sentencing challenge as follows:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

In formulating the sentence, the sentencing Court must consider the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. *Commonwealth v. Ventura*, 975 A.2d 1128 (Pa. Super. 2009). In the instant case, this Court ordered a presentence report and conducted a sentencing hearing at which time the defendant presented numerous witnesses and had the benefit of the record in this case with respect to the manner of how the victim was shot and his injuries. After reviewing the sentencing transcript in this case, it is clear that the sentence that was imposed upon Walker was not manifestly excessive nor did it violate the Sentencing Code. It should also be noted that the sentence of incarceration of fifty-four to one hundred eight months was in the standard range for his offense and his prior record score. Since this Court was aware of the guidelines, had a presentence report and took evidence with respect to what an appropriate sentence could be with respect to Walker, it is clear that his sentence was not manifestly excessive but, rather, was in accordance with the Sentencing Code.

Finally, Walker maintains that the evidence was insufficient to support a conviction for aggravated assault since the Commonwealth did not disprove his right of self-defense. In *Commonwealth v. Estep*, 17 A.3d 939, 943-944 (Pa. Super. 2011), the Court set forth the standard for evaluating the sufficiency of the evidence as follows:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every

element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Walker maintains that since Capron challenged him to a fight that he was entitled to exercise his right of self-defense. His claim of justification is predicated upon his belief that Section 503 of the Pennsylvania Crimes Code¹ is applicable to his case.

(a) General rule.--Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

- (1) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
- (2) neither this title nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
- (3) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(b) Choice of evils.--When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

The use of force, including the use of deadly force, however is governed by the restrictions placed upon an individual by Section 505 of the Crimes Code² which provides as follows

(a) Use of force justifiable for protection of the person.--The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(b) Limitations on justifying necessity for use of force.--

(1) The use of force is not justifiable under this section:

(i) to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful; or

(ii) to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(A) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest;

(B) the actor has been unlawfully dispossessed of the property and is making a reentry or recaption justified by section 507 of this title (relating to use of force for the protection of property); or

(C) the actor believes that such force is necessary to protect himself against death or serious bodily injury.

(2) The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating, except the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.

(2.1) Except as otherwise provided in paragraph (2.2), an actor is presumed to have a reasonable belief that deadly force is immediately necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat if both of the following conditions exist:

(i) The person against whom the force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcefully entered and is present within, a dwelling, residence or occupied vehicle; or the person against whom the force is used is or is attempting to unlawfully and forcefully remove another against that other's will from the dwelling, residence or occupied vehicle.

(ii) The actor knows or has reason to believe that the unlawful and forceful entry or act is occurring or has occurred.

Since Walker interjected a gun into his dispute with Capron, it is unquestioned that Walker intended to use deadly force in order to end this dispute. Accordingly, the rules that apply to deadly force are applicable to any claim of justification that Walker could assert. In this regard, it is clear that Walker knew that he could avoid the use of deadly force since he could have retreated with complete safety from the actor since the actor did not possess the ability to use deadly force against Walker. While all of the business in the area where the shooting occurred were closed, this does not mean that Walker could not have just walked away from his confrontation with Capron since Capron was unarmed.

The Commonwealth was required to prove all of the elements of the charge of aggravated assault which is defined in Section 2702 of the Crimes Code³ as follows:

(a) Offense defined.--A person is guilty of aggravated assault if he:

(1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

(2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee of an agency, company or other entity engaged in public transportation, while in the performance of duty;

(3) attempts to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty;

(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon;

(5) attempts to cause or intentionally or knowingly causes bodily injury to a teaching staff member, school board member or other employee, including a student employee, of any elementary or secondary publicly-funded educational institution, any elementary or secondary private school licensed by the Department of Education or any elementary or secondary parochial school while acting in the scope of his or her employment or because of his or her employment relationship to the school;

(6) attempts by physical menace to put any of the officers, agents, employees or other persons enumerated in subsection (c), while in the performance of duty, in fear of imminent serious bodily injury;

(7) uses tear or noxious gas as defined in section 2708(b) (relating to use of tear or noxious gas in labor disputes) or uses an electric or electronic incapacitation device against any officer, employee or other person enumerated in subsection (c) while acting in the scope of his employment;

(8) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to a child less than six years of age, by a person 18 years of age or older; or

(9) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to a child less than 13 years of age, by a person 18 years of age or older.

Walker attempted to cause serious bodily injury to another individual and knowingly and intentionally under circumstances manifesting an indifference to the value of human life and did so while he possessed a deadly weapon. While Capron may have instituted the confrontation between himself and Walker, Capron never introduced a deadly weapon into their difficulties. A deadly weapon was used by Walker and he did so claiming that he had a right to self-defense when he could have used non-deadly force or he could have retreated from the scene where the shooting occurred. A review of the entire record in this case clearly demonstrates that this claim as with Walker's other claims were without merit.

BY THE COURT:

/s/Cashman, J.

DATED: September 30, 2021

¹ 18 Pa.C.S.A. §503

² 18 Pa.C.S.A. §505

³ 18 Pa.C.S.A. §2702.

Commonwealth of Pennsylvania v. Kelly Norman Rini

Criminal Appeal—Credibility of Witnesses—Indecent Assault—Sentencing—Discretion of Court—Sufficiency of the Evidence—Weight of the Evidence

The Court touches on a number of good criminal law issues in a fairly simple, straight forward case

No. CC 2020-04229. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Mariani, J.—January 18, 2022.

OPINION

This is a direct appeal wherein the defendant, Kelly Norman Rini, appeals from the judgment of sentence of June 29, 2021 which became final on July 27, 2021 when post-sentencing motions were denied. Germane to this appeal, after a non-jury trial, this Court found the defendant guilty of Indecent Assault and not guilty of Involuntary Deviate Sexual Intercourse. This Court sentenced the defendant to a period of incarceration of not less than nine months nor more than 18 months followed by a term of three years' probation. The defendant challenges the convictions as set forth in the Concise Statement of Matters Complained of on Appeal alleging that the evidence was legally insufficient to convict him, the verdict was against the weight of the evidence and that this Court's sentence was manifestly excessive.

The facts of record adduced in this case are as follows:

On February 8, 2020, the victim in this case and her friend went out for a night of drinking in Pittsburgh, Pennsylvania. The victim and her friend became intoxicated. The victim called Uber to obtain a ride home¹. The Uber driver arrived to pick them

up and began driving the victim and her friend to the victim's residence. The Uber driver was the defendant. During the ride home, the victim and her friend began arguing. The defendant stopped the vehicle and ordered the victim's friend to exit the vehicle. The defendant drove the victim to her residence. Upon arriving at her residence, the victim realized she left her apartment keys in her vehicle which she left behind at the drinking establishment. The defendant ended the Uber ride but took the victim back to her vehicle to obtain her apartment keys. The defendant then transported the victim back to her residence. At approximately 6:15 a.m., the victim and the defendant arrived at her apartment. The defendant escorted her into the apartment and the victim realized she left her phone in the defendant's vehicle. The defendant offered to retrieve the phone. The victim gave the defendant her apartment keys so the defendant could get back into her apartment after retrieving the phone. The defendant retrieved the phone and came back into the victim's apartment.

The victim testified that upon entering her apartment, she went to bed. She believed she passed out. She awoke to the defendant using a vibrator on her genital area. She was wearing underwear but the defendant had pulled the underwear to the side and had partially inserted the vibrator past her labia and it was forcefully pressing against her clitoris. It took the victim a few seconds to realize what had occurred and she immediately told the defendant to stop. She did not know if the defendant left right away but she was lying on her bed in a fetal position wearing nothing but a shirt and panties.

When the victim woke up the next morning, the defendant sent her a text message advising that he still had her apartment keys and her work badge. The victim sent the defendant a text message accusing him of touching her while she was asleep. The defendant responded by admitting that he touched her. He further admitted he was "totally wrong" and he apologized for touching her. The victim called the police and charges were filed against the defendant.

The defendant first claims that the evidence was legally insufficient to convict him. The standard of review for sufficiency of the evidence claims is well settled:

the standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proof [of] proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. More-over, in applying the above test, the entire record must be evaluated and all the evidence actually received must be considered. 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. Lehman, 820 A.2d 766, 772 (Pa. Super. 2003)

Defendant first claims that the evidence was insufficient to convict him of indecent assault. That offense is set forth in 18 Pa.C.S.A. § 3126:

(a) Offense defined.--A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:

* * *

(4) the complainant is unconscious or the person knows that the complainant is unaware that the indecent contact is occurring;

"Indecent contact" is defined as "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 Pa.C.S. § 3101.

This Court finds the testimony of the victim credible. "[T]he uncorroborated testimony of a sexual assault victim, if believed by the trier of fact, is sufficient to convict a defendant. ..." Commonwealth v. Charlton, 2006 PA Super 149, 902 A.2d 554, 562 (Pa. Super. 2006). The victim did not unequivocally consent to the indecent contact of the defendant and there is sufficient evidence in the record to also demonstrate that the victim was unaware that she was being touched by the defendant in the manner she described at trial. She told the defendant to stop upon realizing she was being touched and the defendant admitted he touched her and apologized for touching her the next day.

Additionally, the evidence in this case clearly indicates that the defendant had touched the victim's labia and clitoris with a vibrator while the victim was unaware that such conduct was occurring. The obvious purpose of the touching was to arouse or gratify sexual desire both in the defendant and in the victim. The implement used to touch the victim, a vibrator, is an object that is used for sexual arousal. This evidence clearly demonstrates non-consensual indecent sexual contact as described in the statute. Accordingly, the defendant's conviction for indecent assault should be affirmed.

The defendant next claims that the guilty verdict was contrary to the weight of the evidence. As forth in *Criswell v. King*, 834 A.2d 505, 512. (Pa. 2003):

Given the primary role of the jury in determining questions of credibility and evidentiary weight, the settled but extraordinary power vested in trial judges to upset a jury verdict on grounds of evidentiary weight is very narrowly circumscribed. A new trial is warranted on weight of the evidence grounds only in truly extraordinary circumstances, i.e., when the jury's verdict is so contrary to the evidence that it shocks one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. The only trial entity capable of vindicating a claim that the jury's verdict was contrary to the weight of the evidence claim is the trial judge -- decidedly not the jury.

834 A.2d at 512. *Armbruster v. Horowitz*, 572 Pa. 1, 813 A.2d 698, 703 (Pa. 2002); *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177, 1189 (Pa. 1994)). Although *Criswell* spoke in terms of a jury verdict, there is no distinction relative to a non-jury verdict.

The initial determination regarding the weight of the evidence is for the fact-finder. *Commonwealth v. Jarowecki*, 923 A.2d 425, 433 (Pa.Super. 2007). The trier of fact is free to believe all, some or none of the evidence. *Id.* A reviewing court is not permitted to substitute its judgment for that of the fact-finder. *Commonwealth v. Small*, 741 A.2d 666, 672 (Pa. 1999). A verdict should only be reversed based on a weight claim if that verdict was so contrary to the evidence as to shock one's sense of justice. *Id.* See also *Commonwealth v. Habay*, 934 A.2d 732, 736-737 (Pa.Super. 2007). Importantly “[a] motion for a 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 but claims 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.’” *Commonwealth v. Widmer*, 744 A.2d 745 (Pa. 2000)). When the challenge to the weight of the evidence is predicated on the credibility of trial testimony, appellate review of a trial court's decision is extremely limited. Unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, weight of evidence claims shall be rejected. *Commonwealth v. Rossetti*, 2004 PA Super 465, 863 A.2d 1185, 1191 (Pa. Super. 2004). The fact-finder's rejection of a defendant's version of events or the rejection of an affirmative defense is within its discretion and not a valid basis for a weight of evidence attack. *Commonwealth v. Bowen*, 55 A.3d 1254, 1262 (Pa.Super. 2011).

The defendant's weight claim essentially argues that the sexual contact between the victim and the defendant was consensual. Inasmuch as the defendant's weight claim concedes that the evidence was sufficient to convict in this case, the issue of consent was specifically considered by this Court after assessing the credibility of the victim. Because a weight of the evidence claim cannot be based solely on a challenge to the Court's credibility determinations, the defendant's weight claim fails. The trial evidence presented by the Commonwealth has been recounted herein and was credible, competent and reliable and established every element of indecent assault. This Court has reviewed the trial record and believes that the verdict does not shock any rational sense of justice and, therefore, the verdict was not against the weight of the evidence.

The defendant's final claim is that this Court's sentence was excessive and unreasonable. A sentencing judge is given a great deal of discretion in the determination of a sentence, and that sentence will not be disturbed on appeal unless the sentencing court manifestly abused its discretion.” *Commonwealth v. Boyer*, 856 A.2d 149, 153 (Pa. Super. 2004), citing *Commonwealth v. Kenner*, 784 A.2d 808, 811 (Pa.Super. 2001) appeal denied, 568 Pa. 695, 796 A.2d 979 (2002); 42 Pa.C.S.A. §9721. An abuse of discretion is not a mere error of judgment; it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness. See *Commonwealth v. Flores*, 921 A.2d 517, 525 (Pa.Super. 2007), citing *Commonwealth v. Busanet*, 817 A.2d 1060, 1076 (Pa. 2002).

Furthermore, the “[s]entencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime.” *Boyer*, supra, quoting *Commonwealth v. Moore*, 617 A.2d 8, 12 (1992). Discretion is limited, however, by 42 Pa.C.S.A. §9721(b), which provides that a sentencing court must formulate a sentence individualized to that particular case and that particular defendant. Section 9721(b) provides: “[t]he court shall 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” *Boyer*, supra at 153, citing 42 Pa.C.S.A. §9721(b). Furthermore,

In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a presentence investigative report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.

Boyer, supra at 154, citing *Commonwealth v. Burns*, 765 A.2d 1144, 1150-1151 (Pa.Super. 2000) (citations omitted).

In fashioning an appropriate sentence, courts must be mindful that the sentencing guidelines “have no binding effect, in that they do not predominate over individualized sentencing factors and that they include standardized recommendations, rather than mandates, for a particular sentence.” *Commonwealth v. Walls*, 592 Pa. 557, 567, 926 A.2d 957, 964 (2007). A sentencing court is, therefore, permitted to impose a sentence outside the recommended guidelines. If it does so, however, it “must provide a written statement setting forth the reasons for the deviation....” *Id.*, 926 A.2d at 963.

A sentencing judge can satisfy the requirement of placing reasons for a particular sentence on the record by indicating that he or she has been informed by the pre-sentencing report; thus properly considering and weighing all relevant factors. *Boyer*, supra, citing *Burns*, supra, citing *Commonwealth v. Egan*, 451 Pa.Super. 219, 679 A.2d 237 (1996). See also *Commonwealth v. Tirado*, 870 A.2d 362, 368 (Pa.Super. 2005) (if sentencing court has benefit of presentence investigation, law expects court was aware of relevant information regarding defendant's character and weighed those considerations along with any mitigating factors). In *Commonwealth v. Moury*, 992 A.2d 162, 171 (Pa.Super. 2010), the Superior Court explained that where a sentencing court imposes a standard-range sentence with the benefit of a presentence report, a reviewing court will not consider a sentence excessive.

The record in this case supports the sentence imposed by this Court. The sentence imposed by this Court was within the standard range of the sentencing guidelines. The record reflects that this Court was guided by the presentence report and that the defendant did not object to the contents of that report. The defendant provided a presentence statement denying culpability in this matter. This Court considered the fact that the defendant failed to accept responsibility for his actions in this case. Additionally, in this Court's view, the defendant, as an Uber driver operating a taxi service, was in a position of care and owed a duty of care to the victim. Rather than honor that duty of care, the defendant violated the duty of care, entered the apartment of the victim and indecently assaulted the victim while the victim was unaware of the circumstances. The defendant was keenly aware of the victim's intoxicated state and took advantage of the victim's intoxication for his own personal selfish sexual arousal. This Court believed that a standard range sentence was appropriate.

Defendant finally includes in his concise statement of issues complained of on appeal a section titled “Intermediate Punishment.” There is no claim of error challenging a ruling of this Court included in this section. Accordingly, that section is not addressed in this opinion.

For the foregoing reasons, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

¹ Uber is a private taxi service.

**Brad Bayles, an individual for himself,
and on behalf of Jefferson of Monticello, Inc. a Pennsylvania Corporation v.
Robert Hamrock, an individual and
Jefferson of Monticello, Inc. a Pennsylvania Corporation**

Motion to Disqualify Counsel—Conflicts of Interest—Pennsylvania Rules of Professional Conduct 1.9

Motion to Disqualify Plaintiffs' Counsel due to counsel's prior representation of the individual parties' other company in an unrelated matter denied. Pennsylvania Rule of Professional Conduct 1.9 governs. Defendant failed to offer evidence that the prior attorney-client relationship extended to defendant personally and that the prior representation is adverse to the current interests of defendant. Defendant failed to prove that prior representation is substantially related to the present matter or that counsel acquired confidential information about individual defendant in prior representation that would advance plaintiff's position in the present matter.

No. GD 18-2757. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—January 12, 2022.

OPINION

This Opinion supports my October 18, 2021 Order of Court which denied Defendants' Motion to Disqualify Lampl Law Office as Plaintiffs' counsel. Plaintiff Brad Bayles and Defendant Robert Hamrock are each shareholders of Jefferson of Monticello Inc. The parties are also each 50% shareholders/owners of a company called B&B Rainbow. Plaintiff Bayles initiated this action alleging that Defendant Hamrock abused decisions and corporate assets of Jefferson of Monticello. Following a jury trial and verdict in favor of the Plaintiffs, Robert Lampl, Esq. entered his appearance on behalf of Plaintiffs. Defendant Hamrock filed an objection to the entry of appearance of the Robert O. Lampl law office¹ based on Mr. Lampl's representation of the B&B Rainbow corporation in bankruptcy proceedings. I denied Defendant Hamrock's request to disqualify the Lampl Law Office and this appeal followed. Defendant Hamrock's Concise Statement of Matters Complained of on Appeal alleges that I erred in my "decision to deny Defendants' Motion to Disqualify Robert O. Lampl and his law firm from representing Plaintiffs due to his prior representation of the individual Parties' other company, B&B Rainbow, for more than sixteen (16) years."

Pennsylvania Rule of Professional Conduct 1.9(a) prohibits an attorney from representing a person in "the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client...." While it is true that courts may disqualify counsel for a violation of ethical rules, they "should not lightly interfere with the right to counsel of one's choice." *Weber v. Lancaster Newspapers, Inc.*, 2005 Pa.Super. 192, 878 A.2d 63, 80. The Superior Court of Pennsylvania has held that two representations involving "related facts" is insufficient to warrant disqualification of an attorney. *Estate of Pew*, 440 Pa.Super. 195, 244 (1994). Instead "the test is whether information acquired by an attorney in his former representation is substantially related to the subject matter of subsequent representation." Pa.R.P.C. 1.9 would also prohibit an attorney from representing a subsequent client with adverse interests when the attorney might have "acquired confidential information related to the subsequent representation...." *Id.* At 244, internal citations omitted.

Pennsylvania Rule of Professional Conduct 1.9(b) prohibits a lawyer from representing a client when a law firm with which the lawyer was formerly associated previously represented a client (1) whose interests are materially adverse to [the new client's] interest and (2) about whom the lawyer acquired protected information. When a former client seeks to disqualify an entire law firm from representing an adverse party based on its past relationship with a member of the law firm, the party seeking disqualification bears the burden of proving (1) that a past attorney/client relationship existed which was adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; (3) that a member of the law firm, as attorney for the adverse party, acquired knowledge of confidential information from or concerning the former client, actually or by operation of law. *Id.* at 244.

As the criteria for disqualification for a conflict of interest based on a previous representation is similar, whether the previous representation is specific to the attorney in the case or a law firm with which the attorney was associated, and Defendant Hamrock does not distinguish his objection between applying specifically to Mr. Lampl and his law firm, I will address the issues as one. To disqualify Mr. Lampl and his whole firm, Defendant Hamrock must first prove that a past relationship existed that is adverse to his interests. Mr. Lampl and his law firm previously represented another company owned by the parties, and did not represent either of the parties individually. Defendant Hamrock has failed to offer any evidence (1) that the attorney/client relationship extended from Mr. Lampl to B&B Rainbow included Mr. Hamrock personally as a shareholder and (2) that Mr. Lampl's representation of B&B Rainbow is adverse to the interests of Mr. Hamrock in relationship to his role at Jefferson of Monticello, Inc.

Next Mr. Hamrock must establish that the subject matter of each attorney/client relationship is "substantially related." The explanatory comments to Pa.R.P.C. 1.9 offer guidance to the meaning of "substantially related." Issues are substantially related "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Pa.R.P.C. 1.9, comment 3. Mr. Hamrock has failed to prove that the bankruptcy of B&B Rainbow involves the same transactions or legal dispute as his misconduct with Jefferson of Monticello. In fact, Mr. Hamrock does not address at all how the matters are related beyond an assertion that B&B Rainbow and Jefferson of Monticello "frequently transferred money between the companies...."

Finally, Mr. Hamrock is unable to show that Mr. Lampl acquired confidential information about Mr. Hamrock. Mr. Hamrock argues that during his representation of B&B Rainbow Mr. Lampl learned details regarding properties owned by B&B Rainbow, but fails to establish a) that this information is confidential and b) how this knowledge would advance Mr. Bayles's position in the present litigation regarding Jefferson of Monticello.

Therefore, Mr. Hamrock has failed to prove that Mr. Lampl and his law firm should be disqualified from representing Mr. Bayles and I committed no error.

BY THE COURT:
/s/Hertzberg, J.

¹ As this opinion was being written, I discovered that “Defendant’s Objection to the Entry of Appearance of Robert O. Lampl Law Office” had been served on me but not filed with the Department of Court Records. Therefore, on January 10, 2022 I had it filed with the Department of Court Records, more than three months after it was served.