IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0009190-2007
	:	PID# 0575009
v.	:	
KEVIN MCKEITHER,	:	727 EDA 2009
Appellant.	:	

RAU, J.

OPINION

I. Introduction

On May 30, 2008, a jury of Kevin McKeither's peers found him guilty of raping and robbing a 77-year-old woman. DNA testing showed that Mr. McKeither's skin was on a scarf and bra used to tie the elderly victim after the rape while she knelt at the top of her basement stairs, fully expecting to be pushed to her death. Instead—perhaps the only small mercy in this case—Mr. McKeither simply emptied her purse and left, allowing the victim to work free of her bonds and call the police.

In this appeal Mr. McKeither argues that the weight of the evidence was against his conviction. The jury, however, was free to accept either the Commonwealth's uncontested DNA evidence that placed Mr. McKeither at the scene or the defense's alternative interpretation of the evidence. Mr. McKeither also appeals two evidentiary decisions that this Court correctly made. Finally, Mr. McKeither claims that his sentence is illegal and that the formalities were not observed at sentencing; on these points he is

simply incorrect. Mr. McKeither received a fair trial before an attentive jury. There is no cause to repeat the process.

II. Factual Background

Slawa Onuferko, now 78 years old, lives at 130 West Gale Street in Philadelphia. (Trial Tr. 135:14-17; 136:8-10, May 21, 2008.) Kevin McKeither's sister lives across the street, at 135 West Gale Street. (Trial Tr. 61:25-62:13; 62:25-63:8, May 22, 2008.) Mr. McKeither briefly lived with his sister a few years before the trial, and continued to come to her house to visit. (Trial Tr. 49:13-50:5, May 29, 2008.)

On July 5, 2007, Mr. McKeither spent the morning sitting on his sister's front porch. He was seen there by Benigno Cruz, who lives down the street. (Trial Tr. 89:25-90:6; 94:16-95:21, May 21, 2008.) A surveillance camera on the corner picked him up on West Gale Street a few minutes before 1:00 p.m. The image quality was too poor to see Mr. McKeither's face but, Cynthia Banks, the block captain had approached him the day before about a block party and recognized the person in the video as wearing the same clothing. (Trial Ex. C-10; C-28, at 3; Trial Tr. 121:5-23; 130:11-14, May 21, 2008; 63:13-64:5; 66:3-67:4, May 22, 2008.)

At approximately 2:00 p.m., Slawa Onuferko arrived at her home.[1] Seventy-seven years old at the time, Ms. Onuferko had taken her 94-year-old friend Tessy grocery shopping. (Trial Tr. 136:8-24, May 21, 2008.) Tessy walked to her home a block away, and Ms. Onuferko unloaded the groceries from her car. (Trial Tr. 139:23-140:2; 140:18-141:3; 141:22-142:3, May 21, 2008.)

[1] Ms. Onuferko remembered it as being between 1:30 and 1:45 p.m.; the corner surveillance camera picked up her car at about 2:25 p.m. (Trial Tr. 138:25-139:2, May 21, 2008; 143:22-25, May 28, 2008.)

Ms. Onuferko took her groceries inside, and then brought the shopping bags back out so she could re-use them. (Trial Tr. 141:14-21; 142:10-21, May 21, 2008.) Her back door was locked and her windows were barred, but there was a minor, almost unnoticeable flaw in her home's security: for the few seconds it took her to walk out to her car with the bags and come back, the front door was unlocked. (Trial Tr. 143:2-7, 12-22; 144:4-12, May 21,2008; Trial Tr. 35:11-24, May 22, 2008.) During this brief opportunity, Mr. McKeither must have slipped into her house.

Ms. Onuferko walked through her living room and took one step into her dining room. (Trial Tr. 145:12-15; 145:25-146:3, May 21, 2008.) There, Mr. McKeither grabbed her from behind with his hands over her mouth. (Trial Tr. 145:14-16; 146:4-7, May 21, 2008.) He demanded her money, and she said she had none. (Trial Tr. 154:6-15, May 21, 2008.) Mr. McKeither then used a knife to cut her dress down the back, took off her underclothes, forced her to the floor face-down, and raped her, with the knife held before her eyes. (Trial Tr. 145:16-18; 146:23-25; 147:2-18; 148:2-13; 149:2-12, May 21, 2008.) After this first rape he ordered her to turn over onto her back and raped her a second time. (Trial Tr. 148:14-18; 150:14-21, May 21, 2008.) Ms. Onuferko could not see Mr. McKeither's face.[2] (Trial Tr. 40:10-14, May 22, 2008.) At some point—perhaps immediately after the rapes were finished, perhaps later—he kicked her in the chest and back. (Trial Tr. 85:23-24, May 23, 2008.)

Mr. McKeither then told Ms. Onuferko to open her basement door, and forced her to kneel in front of it. (Trial Tr. 151:7-9, May 21, 2008; 48:5, May 22, 2008.) Scarves and jackets were hanging on hooks just inside the basement door; Mr. McKeither tied a

[2] There was some confusion in the testimony as to whether he told her to look away, turned his face aside himself, or both. (Trial Tr. 150:25-151:4, May 21, 2008; 40:10-14, May 22, 2008.) How, exactly, Mr. McKeither hid his face is immaterial.

polka-dotted scarf over Ms. Onuferko's mouth and used a blue scarf to tie her hands behind her back. (Trial Ex. C-34A; Trial Tr. 152:10-17; 152:21-153:3; 181:12-182:15, May 21, 2008.) He tied her feet with her own bra. (Trial Tr. 152:18-20, May 21, 2008.)

Ms. Onuferko believed that she was about to be pushed down the stairs, and expected to die: "I knew when he close [sic] me down I wouldn't make it." (Trial Tr. 151:7-11; 153:7-9, May 21, 2008.) However, Mr. McKeither instead took the opportunity to empty her pocketbook onto the floor and take the cash and SEPTA[3] tokens from her wallet.[4] (Trial Tr. 154:16-21; 171:7-11; 172:2-7, May 21, 2008.) Ms. Onuferko looked back long enough to see Mr. McKeither's clothing. (Trial Tr. 155:17-23, May 21, 2008.) He was wearing a black shirt, black shorts, and white sneakers. (Trial Tr. 156:5-17, May 21, 2008.) She never saw his face. (Trial Tr. 38:23-39:2, May 22, 2008.) Mr. McKeither ended the invasion with a threat: "[d]on't say anything to anybody."[5] (Trial Tr. 157:13-17, May 21, 2008.)

A period of quiet followed during which Ms. Onuferko thought Mr. McKeither was counting the money. (Trial Tr. 154:21-23, May 21, 2008.) Finally she looked back and saw that he was gone. (Trial Tr. 154:23-25, May 21, 2008.) She then set about trying to extricate herself from her bonds.

Freeing herself proved difficult. Her "hands were shaking," and so she "struggled for a long time." (Trial Tr. 158:20-21, May 21, 2008.) Eventually she was able to get

[3] The South Eastern Pennsylvania Transit Authority—the Philadelphia region's bus and train service.
[4] He may also have taken the wallet itself; the robbery was more than sufficiently proven either way. (Trial Tr. 171:7-11, May 21, 2008.)
[5] Ms. Onuferko told police that the attacker also "said for me not to call the police because he has watched me and he knows that my sister and I come home between 6:00 and 7:00 p.m." (Trial Tr. 25:4-18, May 22, 2008.) Ms. Onuferko did not remember this statement by the time of trial even after an attempt to refresh her recollection, and thus did not testify to the jury about it. One of the detectives who testified, Harry Young, let slip that Ms. Onuferko had previously told police that "they were being watched by the bad guy between 6:00 and 7:00." (Trial Tr. 32:3-5, May 29, 2008.) The jury was promptly told to strike the question and answer. (Trial Tr. 38:4-7, May 23, 2008.)

her right hand free, but then there was an even taller hurdle to clear. The bra around her ankles had been knotted many times, and it proved more difficult to remove. (Trial Tr. 158:23-25; 183:21-24, May 21, 2008.)

Once she was free Ms. Onuferko washed herself with a washcloth—she was shaking too hard to shower—and put on fresh clothes. (Trial Tr. 172:18-173:3, May 21, 2008.) She then called Tessy and the police. (Trial Tr. 170:6-9, May 21, 2008.) However, she did not report to the police she had been raped; rather, she told them only that her home had been invaded and money taken. (Trial Tr. 89:3-8; 96:22-97:4, May 22, 2008.) She told the first officers to arrive that the attacker was a black male, medium complexion, age 35 to 45, between 6'3" and 6'5" in height, weighing between 250 and 260 pounds. (Trial Tr. 109:3-110:12, May 22, 2008.) The officers began to process the crime scene as a burglary.

Medics arrived shortly after the police and took Ms. Onuferko to Albert Einstein Medical Center, one of Philadelphia's hospitals. There she informed doctors that she had been raped, and hospital staff informed the police. (Trial Ex. C-30.) While at the hospital she gave a similar description to the one she gave the officers on the scene—"tall black male, dark complexion, over six feet, husky build . . . balding and clean-shaven . . . between 35 and 50 . . . ." (Trial Tr. 45:2-6, May 22, 2008.) She stayed in the hospital ten days while being treated for bruising of her heart resulting from the kicks and a possible heart attack caused by the trauma of the attack. (Trial Tr. 176:22-23, May 21, 2008; 91:16-18; 92:5-11; 102:6-12, May 23, 2008.) Recovery from the attack took more than ten days, however; her depression lasted two months, during which time she "could hardly move." (Trial Tr. 32:22-24, May 22, 2008.)

Mr. McKeither succeeded in hiding his face from Ms. Onuferko. His clothing was not particularly distinctive. Ms. Onuferko said his shirt and shorts were "black" and that the shorts "came past his knees." Another witness, Mr. Cruz, varied in his description of Mr. McKeither's clothing between "dark pants" and "jean shorts," also saying he was wearing a "black t-shirt." The block captain, Cynthia Banks, described a "[b]lack t-shirt [and] jean shorts that came past his knees" or "dark" shorts. (Trial Ex. C-9, at 2; C-27; D-1; Trial Tr. 96:18; 106:17-20; 155:21-22; 156:13-14, May 21, 2008; 64:19-20; 80:2-5, May 22, 2008; 181:8-9, May 28. 2008.)

However, Mr. McKeither had made a critical error which enabled him to be placed at the scene of the crime: when he tied Ms. Onuferko with her own clothing, he left his skin cells behind. Skin cells are often left by simple touch—and they, like most cells, contain DNA. (Trial Tr. 177:11-12, May 27, 2008.) Under the right circumstances forensic technicians can extract the DNA from skin cells left on an object and use now-standard DNA analysis techniques to match the cells to the perpetrator. (Trial Tr. 156:2-159:9; 160:15-161:8, May 27, 2008.)

The assailant's skin cells left on Ms. Onuferko had almost all been lost when she washed herself, leaving only a few stray bits of DNA too few in number for use in identifying anyone. (Trial Ex. C-22, at 2; 193:20-194-2; 194:10-197:10, May 27, 2008.) She had not, however, washed the scarves or the bra.[6] Those items were particularly good candidates for DNA testing, because they had been pulled and tied. Such

[6] There was some uncertainty about how the bra that was ultimately tested related to the assault. The tested bra was the one Ms. Onuferko wore to the hospital. That may have been the bra she was actually wearing when she was attacked, or it may have been one she put on after washing. Ms. Onuferko thought it was a new one, but explained that "I was so excited when I untied my feet, it's a possibility that I had [the original bra] in my hand and carried it upstairs. I don't know." (Trial Tr. 186:17-21, May 21, 2008.) Investigators found no bra on the floor of the dining room where the attack occurred. (Trial Tr. 123:7-20, May 28, 2008.)

extended, forceful handling made it more likely that skin cells would be left on them. (Trial Tr. 177:11-15, May 27, 2008.)

The scarves and the bra were sent to the Philadelphia Police forensic laboratory. Ryan Gallagher, qualified by the Court as an expert in forensic science and analyzing crime scene and sexual assault evidence,[7] prepared swabs of the bra's straps, inside and outside, for analysis. (Trial Tr. 70:10-71:18, May 27, 2008.) Francis Padayatty, qualified by the Court in the same field,[8] swabbed the scarves. He took samples of the blue scarf, which was folded in two, at the ends and middle (i.e., the two ends of the folded-over scarf) and of the polka-dotted scarf at its four corners. (Trial Tr. 122:13-123:21; 124:22-126:9, May 27, 2008.) It was self-evident that Mr. Padayatty chose those places to swab because they were where the attacker would have held the scarves while tying them and would be more likely to have DNA from his skin cells.

Laurie Wisniewski, a DNA analyst in the police forensic laboratory qualified as an expert in forensic science and DNA analysis,[9] was responsible for testing the swabs. She testified to the reliability of the laboratory's methods. Its technique for turning a tiny amount of DNA left on evidence into a testable sample, polymerase chain reaction, has been in use since 1985. (Trial Tr. 148:25-149:3; 157:13-158:13, May 27, 2008.) The

[7] Mr. Gallagher had a B.S. from Temple University, a Master's degree from Arcadia University in forensic science, and work experience with a research laboratory at the Fox Chase Cancer Center. He completed a six-month training internship at the Philadelphia Police forensic laboratory, becoming a full-time employee in December 2006. (Trial Tr. 40:16-25; 43:6-20, May 27, 2008.)

[8] Mr. Padayatty had a B.S. in physics and a B.A. in organizational management, 24 credits of chemistry at St. Joseph's University, 15 years of experience in the Philadelphia Bureau of Medical Analysis, five years of experience in the police forensic laboratory, and training with the FBI and the ATF in addition to internal training within the police laboratory. (Trial Tr. 115:19-117:2, May 27, 2008.) Mr. Padayatty was qualified in the area of "forensics" rather than "forensic science;" his role in the laboratory was the same as Mr. Gallagher's and the difference in wording did not reflect an effort to differentiate between them in terms of training or specialty.

[9] Ms. Wisniewski has a Bachelor's degree in biology and approximately seven and a half years of experience in the Philadelphia Police forensic laboratory, during which she has received annual continuing education and has examined approximately 200 items for DNA testing purposes a year. (Trial Tr. 144:8-147:13, May 27, 2008.)

laboratory's process for taking a picture of that sample for actual analysis[10] is a standard one that the Philadelphia Police forensic laboratory has used for approximately five years and is used by "probably three or four labs in the United States." (Trial Tr. 148:14-161:19, May 27, 2008.) The FBI calls for forensic laboratories to test a minimum of 13 parts of the DNA strand; the Philadelphia Police forensic laboratory tests 16. (Trial Tr. 162:9-164:8, May 27, 2008.) To detect contamination in the laboratory Ms. Wisniewski tests control samples and makes sure they read correctly. (164:9-165:6, May 27, 2008.) The laboratory is internationally accredited, follows FBI and ISO guidelines, and undergoes an annual outside audit. (Trial Tr. 149:23-150:14, May 27, 2008.)

Applying these methods, Ms. Wisniewski concluded that:

1. The blue scarf was also "consistent with" a mixture of Ms. Onuferko's and Mr. McKeither's DNA. (Trial Ex. C-22, at 2; Trial Tr. 169:15-171:10, May 27, 2008.) "This combination," she calculated, "is 2.5 billion times more likely a mixture of Slawa Onuferko and Kevin McKeither than a mixture of Slawa Onuferko and a random unrelated man in the African American population, 3.3 billion times more likely a mixture of Slawa Onuferko and Kevin McKeither than a mixture of Slawa Onuferko and a random unrelated man in the Caucasian population, and 901 million times more likely a mixture of Slawa Onuferko and Kevin McKeither than a mixture of Slawa Onuferko and a random unrelated man in the Hispanic population." (Trial Ex. C-22, at 2; Trial Tr. 173:14-174:9, May 27, 2008.)

2. On the outside of the bra straps, the DNA was "consistent with a mixture of Slawa Onuferko and Kevin McKeither." (Trial Ex. C-24; Trial Tr. 208:8-11, May 27, 2008.) The DNA found there was so distinctive

[10] "We use a gel base system. It's similar to Jell-O that you would use in your house just much for [sic] refined. DNA has a negative charge, so when you apply a charge to it, it will move towards a positive electrode. So the DNA is injected into this gel and a currant [sic] is applied to it and the DNA moves to the electrode and based on the size and shape of the DNA it will only move through the gel to a certain point. It is like a mesh that will trap it."

"After that process is complete, the gel is scanned on a flat bed scanner that detects fluorescence and the DNA fluoresces when the laser hits it and it creates an image that looks similar to a bar code. It's a white background with black lines and the black lines are the DNA and from there we interpret the results." (Trial Tr. 158:16-159:9, May 27, 2008.)

that only about 0.1% of the black, white, and Hispanic populations could have provided it. (Trial Tr. 208:11-17, May 27, 2008.)

3. On the inside of the bra straps, the DNA was again "consistent with a mixture of Slawa Onuferko and Kevin McKeither." (Trial Ex. C-24; Trial Tr. 210:15-211:4, May 27, 2008.) The DNA profile from the inside of the straps was less complete, but even so Ms. Wisniewski could see that less than 3% of the black, white, and Hispanic population would match it. (Trial Ex. C-24; Trial Tr. 211:4-10; 215:16-18, May 27, 2008.)

Mr. McKeither called his own expert, Katherine Cross, to the stand. Ms. Cross, qualified as an expert in forensic biology and DNA analysis,[11] did not dispute any aspect of what the police forensic laboratory had done. To the contrary, her testimony spoke of the police laboratory's quality and the competence of its technicians:

> [The prosecutor]: You would agree, in general, with the methods that were used in doing the testing; right?
> [Ms. Cross]: Yes.
> Q. You would agree that there was no sign within any of those hundreds of pages of records that there was any contamination in the lab?
> A. That's correct.
> . . .
> Q. Going further down the line of what you reviewed, obviously both the criminalistics laboratory, and the DNA lab reached conclusions, and you agree that they were accurate; right?
> A. Yes, I do.
> Q. If I can back up, first they kind of, specially DNA, came up with some results of their analysis. D-9, I think was up on the board, you saw all the alleles. You agree with those results, that they were accurate?
> A. Yes, I do.
> Q. And then from there they drew conclusions, and you agree that they were accurate?
> A. Yes.
> Q. And then as to some of those conclusions statistics were generated, and while there could be another way to do it, you agree that the statistics are accurate?
> A. That's correct.

[11] Ms. Cross had a B.S. in biology from the University of North Carolina, a Master's in pharmacology with a concentration in forensic DNA and serology from the University of Florida, and nearly 17 years of experience in Acadiana Crime Lab in Louisiana, the DNA Unit of the North Carolina State Bureau of Investigation, and MNS Labs, a private laboratory. She taught attorneys and law enforcement officials and attended continuing education programs. (Trial Tr. 51:11-54:11, May 28, 2008.)

. . .
Q. When you generated D-12, your own statistics, would it be fair to say that you used and relied on the results from the Philadelphia Crime Lab?
A. Yes, I did.
Q. You didn't adjust them in any way?
A. No, I did not.
Q. Fair to say there was no need to, because you found them to be accurate?
A. That's correct.

(Trial Tr. 89:16-22; 91:3-21; 92:13-21, May 28, 2008.)

Ms. Cross' only criticism was that the statistics regarding the blue scarf were expressed in a way that might be confusing. (Ex. D-11; 58:5-59:19, May 28, 2008.) Ms. Wisniewski had concluded that the combination of the DNA on the blue scarf "is 2.5 billion times more likely a mixture of Slawa Onuferko and Kevin McKeither than a mixture of Slawa Onuferko and a random unrelated man in the African American population." (Trial Ex. C-22, at 2; Trial Tr. 173:14-174:9, May 27, 2008.) Ms. Cross' preferred way of explaining the same results was that only about 0.01% of the population —"about 1 in 13,000 people"—could have left the DNA on the blue scarf. (Trial Tr. 63:22-64:11, May 28, 2008.) Even using Ms. Cross' way of expressing the DNA results, if only one in 13,000 people could have contributed the DNA combination found on the blue scarf, it seems quite unlikely that another such person was also on West Gale Street on July 5, 2007. Unrebutted video and testimonial evidence placed Mr. McKeither on that block that day.

Ms. Cross' purpose on the stand was not to attack the police laboratory—she did not—but instead to support the defense's explanation for the presence of Mr. McKeither's DNA on the blue scarf and the bra. Through a process called "secondary transference," the defense argued, Mr. McKeither's DNA had gotten onto those items without his ever having touched them. Instead, the defense argued, Detective Latorre,

one of the investigating officers who talked to neighbors on the day of the assault, accidentally put it on them. According to the defense, Detective Latorre spoke to Mr. McKeither, shook his hand, and then went back into Ms. Onuferko's house. At that point he was carrying Mr. McKeither's skin cells on his hand. In the defense's theory Detective Latorre then picked up the blue scarf and bra, transferring Mr. McKeither's skin cells onto them.

Both the prosecution and defense DNA experts agreed that the defense theory was "possible" or "within the realm of science." (Trial Tr. 241:19-23, May 27, 2008; 75:15-18, May 28, 2008.) However, they also agreed that there was no indication that a third person's DNA was on the scarf or the bra. (Trial Tr. 104:8-11, May 28, 2008.) This finding made the defense theory problematic: the theory required both Detective Latorre and the purported assailant's DNA to also be on the blue scarf and bra. Detective Latorre's DNA should have passed in the secondary transfer and if Mr. McKeither was not the assailant, the perpetrator's DNA also should have been found.

Detective Latorre was not available to testify. The parties stipulated that if he had testified he would have said that he habitually gave his card to, and shook hands with, possible witnesses, but that he did not recall whether or not he shook hands with Mr. McKeither. (Trial Tr. 83:20-23, May 29, 2008.) He also would have testified that he did not go into Ms. Onuferko's home after speaking with Mr. McKeither. (Trial Tr. 83:16-17, May 29, 2008.) The crime scene log indicates that Detective Latorre arrived on the scene and departed somewhat thereafter; it does not indicate whether or not he entered the property. (Trial Ex. C-11, at 2.) Detective Young knew that "[n]obody went in the house until the Crime Scene Unit arrived." (Trial Tr. 18:25-19:2, May 23, 2008.) Officer

Obuchowicz testified generally that Detective Latorre was "outside," at least until the Crime Scene Unit arrived. (Trial Tr. 133:25-135:4, May 22, 2008.) Officer Lichtenhahn, the assigned investigator, recalled that Detective Latorre never entered the house but instead canvassed the neighborhood for possible witnesses. (Trial Tr. 149:7-12; 152:15-23, May 23, 2008; 28:19-29:4, May 29, 2008.)

Two of the items sent for DNA testing were found not to have Mr. McKeither's DNA. The polka-dotted scarf and a cigarette butt had DNA on them that definitively was not Mr. McKeither's. (Trial Ex. C-22.) This DNA on the polka-dotted scarf could have come from one of the detectives, a passerby who happened to brush against Ms. Onuferko, someone else who had used the scarf on an earlier occasion, or, as the defense argued, the real perpetrator. Likewise, the DNA on the cigarette butt could have been from one of the detectives or officers on the scene. There had been no testimony by Ms. Onuferko that her attacker had smoked a cigarette at any time. The jury was aware of these findings and had every opportunity to take them into account when making its decision.

Mr. McKeither also introduced into evidence that he is 5'8" tall and that he weighed 165 pounds when he was arrested, making him much shorter and smaller than Ms. Onuferko's description of the attacker. (Trial Ex. D-15.) There was also evidence that he had "[r]agged" and "unkept" facial hair and hair atop his head, while Ms. Onuferko described her assailant as clean-shaven and bald. (Trial Ex. C-7, at 1; Trial Tr. 42:25-43:9; 111:10-25, May 22, 2008; 47:4-18, May 29, 2008.) Indeed, the police initially did not consider Mr. McKeither a suspect because he did not match her description. (Trial Tr. 24:8-13, May 23, 2008; 24:8-13, May 29, 2008.) Ms. Onuferko

has serious eye problems, was traumatized, and was observing Mr. McKeither from a kneeling position; these may have affected her description or may not have. (Trial Tr. 23:14-20, May 22, 2008.) In addition, one of the first police officers on the scene, Officer McGonigle, was aware that many people have difficulty estimating heights and weights and used his 6'2"-6'3" partner, Officer Redanauer, as a point of comparison. (Trial Tr. 112:9-113:8, May 22, 2008.) It is realistic to think that, presented with a very tall person as a point of reference, Ms. Onuferko described her assailant as being similarly tall. Given the brutality of the attack it would not be surprising for Ms. Onuferko to overestimate the size of her attacker. Again, the jury was aware of the problems with the identification when it found Mr. McKeither guilty.

Finally, the defense directed the jury's attention to problems in the handling of the crime scene to bolster the theory that Detective Latorre may have transferred Mr. McKeither's skin cells to the blue scarf and bra. The crime scene investigator picked up Ms. Onuferko's torn dress, some underclothing and a sandal strap. (Trial Tr. 162:23-163:2; 164:4-8, May 22, 2008.) The investigator explained that he did not initially retrieve the scarves because he did not realize their importance. However, a detective testified that he specifically told the investigator to bring them in. (Trial Tr. 201:24-202:9, May 22, 2008; 27:2-6; 64:7-21, May 23, 2008.) Another officer was responsible for logging every person who entered or exited the property, but he did not track the medics who tended to Ms. Onuferko and did not note the departure times of the various officers. (Trial Tr. 126:11-14; 138:13-139:19, May 22, 2008; 67:2-7, May 23, 2008.)

The defense's suggestion that the evidence had been contaminated through poor handling of the crime scene was, like the DNA evidence and the identification, an issue

that had been put before the jury. The jury was convinced beyond a reasonable doubt by the DNA and other circumstantial evidence that Mr. McKeither was Ms. Onuferko's attacker and rejected evidence contamination via secondary transfer of Mr. McKeither's skin cells DNA as an explanation.

III. Procedural History

A. Pretrial Motions

Pretrial motions were argued before this Court on April 28, 2008. Most of Mr. McKeither's motions were granted. The only motion on which the Court ruled for the Commonwealth was the Commonwealth's motion to admit a videotape showing a Shop Rite lottery counter from noon until 4:00 p.m. on the day of the assault. The prosecution's theory was that Mr. McKeither loitered about his sister's porch waiting for an opportunity to slip into Ms. Onuferko's house, but Mr. McKeither told police that he "went out around noon" and "play[ed] the Lottery at the Shoprite." (Motions in Limine, at 13.) Thus, the prosecution argued that the video was relevant as a partial rebuttal to Mr. McKeither's statement.[12] The defense argued that Mr. McKeither's whereabouts at noon were collateral, since the incident occurred between 2:25 and 2:55 p.m.

The Court denied motion (3), and would have permitted the prosecution to show the video. However, the Commonwealth did not use either the video or Mr. McKeither's statement at trial. As a result, Mr. McKeither suffered no prejudice from this ruling.

[12] The prosecutor agreed with the defense that the second half of the video, from 2:00 to 4:00 p.m., was irrelevant, and did not seek its admission.

B. Trial and Sentencing

The trial in this case began on May 19, 2008 and concluded the following week on May 30, 2008. Mr. McKeither was found guilty on all charges: rape,[13] robbery,[14] burglary,[15] criminal trespass,[16] theft by unlawful taking,[17] and possession of a criminal instrument.[18]

On December 5, 2008, the Court held a hearing to determine whether or not Mr. McKeither is a sexually violent predator under Pennsylvania's "Megan's Law," 42 Pa. C.S. § 9791 et seq. While the crime was both violent and predatory, the Court found that the Commonwealth did not present clear and convincing evidence that Mr. McKeither has "a mental abnormality or personality disorder . . . ."[19] (Sentencing Tr. 117:15-17; 118:17-119:8, Dec. 5, 2008.) 42 Pa. C.S. § 9792. The Court therefore found Mr. McKeither did not to meet the statutory definition.

The Court proceeded immediately to the sentencing. The crimes of theft by unlawful taking and criminal trespass merged into the crimes of robbery and burglary, respectively. After considering the sentencing guidelines, pre-sentence reports, statements provided by Mr. McKeither's supporters, the facts of the case, the crime's effect on the community, and Mr. McKeither's history and potential for rehabilitation, the

[13] 18 Pa. C.S. § 3121.
[14] 18 Pa. C.S. § 3701.
[15] 18 Pa. C.S. § 3502.
[16] 18 Pa. C.S. § 3503.
[17] 18 Pa. C.S. § 3921.
[18] 18 Pa. C.S. § 907.
[19] The Commonwealth's expert, Dr. Ziv, stated that there was not enough evidence for her to conclude that Mr. McKeither has a personality disorder. (Sentencing Tr. 36:21-24, Dec. 5, 2008.) At most she could diagnose him with "paraphilia not otherwise specified" on the basis of a prior conviction and arrest for sexual offenses and the instant rape. (Sentencing Tr. 16:12-13; 18:3-6; 26:10-12, Dec. 5, 2008.) It was later revealed that Dr. Ziv had been given incorrect information regarding Mr. McKeither's history, and that he did not meet the requirements for paraphilia not otherwise specified in the revised fourth edition of the Diagnostic and Statistical Manual. (Sentencing Tr. 44:21-47:25; 81:14-85:3; 88:6-88:17, Dec. 5, 2008.)

Court sentenced Mr. McKeither to a total of 30-60 years of incarceration. Specifically, the Court gave Mr. McKeither three consecutive sentences of 10-20 years each for rape, robbery, and burglary, with a concurrent 2½-5 year sentence for possessing a criminal instrument.

C. Post-trial

Mr. McKeither filed on his own behalf a written "Motion for Extraordinary Relief" before sentencing, arguing in the main that the evidence was insufficient to support a guilty verdict. The Court denied this motion at the sentencing. Defense counsel thereafter filed a Motion to Reconsider and Modify Sentence, arguing that the sentence was illegal or, in the alternative, manifestly excessive. The Court scheduled a hearing to address why the defense viewed the sentence as illegal and arranged to have Mr. McKeither attend by way of videoconference. Defense counsel conceded at the hearing that the sentence was legal but simply argued that it was excessive. (Hearing Tr. 6:16-7:11, Feb. 20, 2009.) The Court denied the defense post trial motion.

This appeal, with a timely statement under Pennsylvania Rule of Appellate Procedure 1925(b),[20] followed.

IV. Legal Discussion

A. No part of Officer Lichtenhahn's testimony was hearsay, and therefore it was properly admitted.

The Court was correct in allowing Officer Lichtenhahn to testify that he had received no information that anyone went into Ms. Onuferko's home when they were not supposed to because that testimony was not hearsay. Silence in this context was not

[20] The deadline for the Rule 1925(b) statement had to be extended multiple times while the stenographers prepared the many transcripts in this matter.

assertive, and without an assertion there can be no hearsay. The claim that the Court erred in permitting this testimony, issue (2)(a) in Mr. McKeither's Rule 1925(b) statement, is meritless.

As a general rule, hearsay—an out-of-court statement repeated in court to prove what it says—is not admissible in court. Pa.R.E. 801(c); 802. "Statements" take many forms, including both words and conduct. Pa.R.E. 801(a). However, only conduct which makes an assertion qualifies as a statement. Pa.R.E. 801(a). See also, e.g., Commw. v. Lewis, 623 A.2d 355, 356-57 (Pa. Super. Ct. 1993) ("Appellant's actions [giving a co-conspirator a Walkman and then looking around while the co-conspirator pocketed it] do not fall within the category of assertive conduct . . . ."). "Nonverbal conduct not intended as an assertion—and thus not hearsay—includes silence or inaction (i.e., a failure to speak or act) as the basis for an inference that conditions were such as not to evoke speech or action." EDWARD D. OHLBAUM, OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE § 801.07[3] (2007-2008 ed.), citing Bonegre v. Worker's Comp. Appeal Bd. (Bertolini's), 863 A.2d 68 (Pa. Commw. Ct. 2004). The admission or exclusion of evidence is within the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. Commw. v. VanDivner, 962 A.2d 1170, 1179 (Pa. 2009).

During the trial, Officer Lichtenhahn testified twice from his personal knowledge regarding Detective Latorre's whereabouts. He stated that "Detective Latorre was doing neighborhood surveys"[21] and that he did not see Detective Latorre go into Ms.

[21] He went on to say "and I believe Detective Latorre was doing the same thing." (Trial Tr. 152:22-23, May 29, 2008.) It is unclear whether this is a typographical error in the transcript or whether he misspoke. Either way, his point was made—Detective Latorre was not in Ms. Onuferko's home spreading Mr. McKeither's DNA by accident but rather was going door-to-door outside.

Onuferko's house. (Trial Tr. 152:15-23, May 23, 2008; 28:19-29:4, May 29, 2008.) Mr. McKeither's appeal focuses on the following portion of Officer Lichtenhahn's testimony:

> "Q. At any point between June 5th of 2007 when you left the crime scene at 9:10 and June 6th of 2007 when you again left the crime scene at some time in the early afternoon, had you received any information from anybody that there had been anybody going into the property?
>
> Ms. McHugh [defense counsel]: Objection. Calls for hearsay.
>
> The Court: Overruled.
>
> By Mr. Davis [prosecutor]: Q. Did you receive any information like that from anybody?
>
> A. No."

(Trial Tr. 179:15-180:3, May 23, 2008.) The defense argues that this latter testimony was hearsay and should have been excluded.

Mr. McKeither's claim misconstrues the testimony. Officer Lichtenhahn did not, as the defense would have it, "testify . . . that he was told by others that no one had entered or exited the crime scene . . . ." (Statement of Errors Complained of on Appeal, hereinafter "Rule 1925(b) statement," ¶ (2)(a).) Rather, Officer Lichtenhahn testified that no one had told him anything about entering or exiting Ms. Onuferko's house. These non-acts by others were not assertions; they were, quite literally, nothing. Since there were no assertions, there were no statements, and without statements there can be no hearsay. The testimony thus was not hearsay and was properly admitted.

It is also noteworthy that the question did not elicit hearsay. The question was not "did anyone go in" but "had you received any information . . . that there had been anybody going into the property." (Trial Tr. 179:18-20, May 29, 2008.) As it was asked, the question called not for hearsay but for personal knowledge. See generally Bonegre,

863 A.2d at 72 ("Sam's and Kislow's statements were not made to prove that Claimant was not injured at work, but merely to show that no one heard that he was injured at work. Thus, they do not constitute hearsay.").

Finally, even if this testimony were hearsay and had been admitted in error, the error would have been harmless. The only reason why Officer Lichtenhahn was explaining Detective Latorre's whereabouts was to rebut the defense theory of secondary transference. In order for that theory to be correct Detective Latorre would have had to shake hands with Mr. McKeither and then accidentally pick up both the blue scarf and bra in exactly the places where the attacker would have held them to tie them and have Mr. McKeither's skin cells, but not the detective's, rub off onto the items. Moreover, in this theory, Mr. McKeither's but not the purported attacker's skin cells would have been the only cells left behind other than Ms. Onuferko's. Officer Lichtenhahn already testified from his personal knowledge that he saw Detective Latorre doing neighborhood surveys and never saw him enter Ms. Onuferko's house. It is extremely unlikely that the jurors would have reached a different verdict if Officer Lichtenhahn had been precluded from saying that he received no information about anyone entering Ms. Onuferko's property.

If Officer Lichtenhahn had actually testified "that he was told by others that no one had entered or exited the crime scene . . . ," the defense would have a stronger[22] hearsay argument. (Rule 1925(b) statement, at 2.) Instead, Officer Lichtenhahn recounted only the silence he heard, and that silence was not hearsay at all. Moreover, even had the testimony been hearsay it would have had no impact on the jury's verdict. This issue has no merit and warrants no relief.

[22] Albeit still meritless.

B. The verdict was not against the weight of the evidence and Mr. McKeither's conviction does not shock the Court's sense of justice.

Mr. McKeither's claim that the weight of the evidence is against his conviction is incorrect. The strong DNA evidence coupled with evidence placing Mr. McKeither on the block that day overwhelmingly supported Mr. McKeither's conviction. It was the jury's obligation to consider the evidence for him and against him, and to render a verdict supported by the evidence. The jury met that obligation and this Court will not overturn the jury's decision.

> "The trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings."

Commw. v. Cousar, 928 A.2d 1025, 1036 (Pa. 2007).

Put simply, the jury's verdict of guilt was not at all shocking. The defense's theory of innocence was that Detective Latorre who interviewed Mr. McKeither and shook his hand unconsciously but incautiously transferred Mr. McKeither's skin cells to the blue scarf and bra which would explain why Mr. McKeither's DNA appeared in later DNA testing of those items. This theory required the jury to believe that the detective made this secondary transfer without leaving any of his own skin cells and that he transferred Mr. McKeither's DNA to precisely the end sections of the scarf where the assailant would have had to pull hard in order to tie Ms. Onuferko's hands. Moreover, the hypothetical "real" attacker would have had to touch those very same places without leaving any of his own skin cells behind. Mr. McKeither's own DNA expert could say no

more than that this theory was "possible." The jury apparently chose not to believe this unlikely scenario.

It is true that there was some evidence whose meaning was still ambiguous at the end of the trial. There was DNA which clearly was not Mr. McKeither's on the polka-dotted scarf and a cigarette butt found at the scene.[23] In addition, there was confusion as to which bra Ms. Onuferko wore to the hospital. And, of course, no definitive DNA evidence could be obtained from the few skin cells left on Ms. Onuferko after she washed. However, a jury's verdict is not wrong or unjustified merely because some side questions remained unresolved.

It is also true that there was some evidence which worked directly in Mr. McKeither's favor. Most notably, Ms. Onuferko described her attacker as being much larger than Mr. McKeither. However, there was a perfectly reasonable explanation for this: Ms. Onuferko's perception of her attacker was affected by her poor eyesight and the savagery of the attack, with the result that she described Mr. McKeither as the towering threat she felt him to be instead of the 5'8", 165-pound man he was. The jury clearly decided that Ms. Onuferko was wrong, her problematic vision further clouded by pain and shock, and that the coldly objective DNA testing was right. The jury's verdict was entirely within the law; the jury can believe some evidence, reject other evidence, and base its verdict only on what it believes.

The jury's verdict was not shocking to the Court's sense of justice. Mr. McKeither's DNA was found on the blue scarf and bra precisely where an assailant would have had to pull the scarf and bra when tying Ms. Onuferko's hands and feet.

[23] There was never any evidence that the attacker was smoking. The cigarette butt was most likely tracked into the home before or after the assault.

The DNA evidence coupled with additional evidence that Mr. McKeither was seen on the block across the street from Ms. Onuferko's home on the day of the attack made the prosecution's case nearly impossible to counter. The jury's verdict reflected the most likely reading of evidence that had been developed using the best forensic science available. This Court would have been extremely surprised had the jury not convicted Mr. McKeither.

C. No error was made during sentencing; the Court correctly permitted the prosecutor to give an update on the victim's status but did not rely on it.

The defense argument that Mr. McKeither was denied due process when the prosecutor referred to Ms. Onuferko's continuing treatment for depression at sentencing is meritless because the statements were properly admitted and, in any event, the Court did not consider this information when imposing the sentence. In order to achieve the goal of individualized sentencing courts are permitted to consider a wide range of information, including certain forms of hearsay. See generally Commw. v. Medley, 725 A.2d 1225, 1230 (Pa. Super. Ct. 1999) ("[S]entencing courts, as a matter of course, consider hearsay evidence in nearly every sentencing case since pre-sentence investigations are routinely ordered and considered by the court, and a pre-sentence report is the very definition of hearsay . . . ."). The Court thus could properly have relied upon the new information. However, the Court in this case did not rely on Ms. Onuferko's current medical treatment. When delivering the sentence, the Court outlined the numerous factors that warranted imposing the substantial sentence and never once mentioned Ms. Onuferko's current medical condition. Thus, there was no error and, even if there had been, Mr. McKeither was not prejudiced.

Mr. McKeither's appeal focuses on statements made by the prosecutor describing his efforts to communicate with the victim about the sentencing:

> "I reached out to her one last time recently just to make sure that she knew when it [i.e., the sentencing] was and that she could be here if she wanted to and I wouldn't bother her any more. And I found out at that time that she had been admitted to Einstein Hospital. She is there now. She is being treated for depression.
>
> I spoke to her nurse who is a Ms. Jane Barnes just this morning. She is not doing too well. She is 78 years old now. She has some physical health concerns, blood pressure, but apparently the problem really is the depression. She stopped taking care of herself. I will get into more of that in my argument. The nurse said that this crime is really what put her there.
>
> . . .
>
> She stopped taking care of herself some time after this crime, actually some time after the conviction was handed down by the jury. And now she is in Einstein Hospital not because she is 78 and has medical problems but because this crime really broke her. And I am not going to go on any more because the tragedy that is there I can't really articulate."

(Sentencing Tr. 139:11-140:1; 149:11-19, Dec. 5, 2008.)[24] This information came as no major surprise to the Court since during the trial there was evidence regarding Ms. Onuferko experiencing depression after the violent rape. (Trial Tr. 32:22-24, May 22, 2008.)

It is worth noting that Mr. McKeither's Rule 1925(b) statement is incorrect in saying that "the defense was given no opportunity to contest, question, or respond in any meaningful manner to this [hearsay] . . . ." (Rule 1925(b) statement, ¶ (2)(c).) The defense could have challenged the prosecutor by calling Nurse Barnes, whose name and place of work had just been given. Instead, Mr. McKeither's counsel merely asked the Court to "note my objection for the record." (Sentencing Tr. 140:3, Dec. 5, 2008.) "I understand and do not doubt that she is in Einstein Hospital," his attorney explained, "however, these are obviously statements by other people that I don't know."

[24] The defense objected to the portion before the ellipsis but not to the second passage.

(Sentencing Tr. 140:4-7, Dec. 5, 2008.) As the record shows, the Court did not prevent the defense from pursuing this issue. Mr. McKeither's attorney chose not to because she thought the hearsay statement of Ms. Onuferko's condition true and correct.

Pennsylvania courts have long taken the view that "[a] proceeding held to determine sentence is not a trial, and the court is not bound by the restrictive rules of evidence properly applicable to trials." Commw. v. Orsino, 178 A.2d 843, 847 (Pa. Super. Ct. 1962). See also Medley, 725 A.2d at 1229 (quoting Orsino). This principle survived the adoption of the Pennsylvania Rules of Evidence in 1998. The Official Commentary to Rule 101 provides: "Traditionally, our courts have not applied the law of evidence in its full rigor in proceedings such as . . . sentencing hearings . . . The Pennsylvania rules of Evidence are not intended to supersede these other provisions of law . . . ." Examples of the admission of hearsay at sentencing include not just reported decisions like Commonwealth v. Medley, where hearsay was used to increase the offender's prior record score, but also every case in which a pre-sentence report is completed. Medley, 725 A.2d at 1228-30.

Of course, the court cannot rely on any gossip or innuendo that happens to swirl about the room. Courts must reject the influence of improper considerations during sentencing. Thus, in Commonwealth v. Cruz the Superior Court disapproved of relying on a detective's hearsay testimony that "unnamed informants and undercover agents" had told him that the offender was a "weight dealer." Commw. v. Cruz, 402 A.2d 536, 537 (Pa. Super. Ct. 1979).[25] Sentences based on improper factors are remanded for

[25] Notably, a sentence which is within the statutory range but is based on an improper factor is invalid rather than illegal. The distinction matters because a claim that a sentence was invalid challenges discretionary aspects of the sentence and an appeal therefore does not lie of right. Commw. v. Chase, 530 A.2d 458, 460 (Pa. Super. Ct. 1987). See also Commw. v. Thomas, 879 A.2d 246, 262-63 (Pa.

resentencing "if it reasonably appears from the record that the sentencing court relied in whole or in part on an erroneous consideration." Commw. v. Kerstetter, 580 A.2d 1134, 1136 (Pa. Super. Ct. 1990).

Under Orsino, Medley, and the Comment to Rule 101, the Court properly allowed the prosecutor to provide information regarding Ms. Onuferko's continuing medical care. While he did relate hearsay, the prosecutor explained exactly who he spoke to (Nurse Jane Barnes), where that person worked (Einstein Hospital), and when he spoke with her ("just this morning"). (Sentencing Tr. 139:15-19, Dec. 5, 2008.) Previous cases have found hearsay sufficiently reliable for sentencing where it is backed by named people rather than unnamed and unknown sources. See Commw. v. P.L.S., 894 A.2d 120, 132 (Pa. Super. Ct. 2006) (rejecting a challenge to hearsay presented at sentencing because "the district attorney offered to have [the hearsay declarant] testify so as to alleviate any hearsay problem"); Medley, 725 A.2d at 1228, 1230 (finding reliance on hearsay appropriate where a detective named the other law enforcement officers he spoke with, gave their agencies of employment, and explained what they did). Since the prosecutor provided that level of detail here, his statements were properly admitted.

Moreover, the testimony played no role in the sentence. The victim was raped multiple times, placed in fear of death, and kicked in the chest so hard that her heart was bruised causing her to remain in the hospital for ten days from the physical injuries. Mr. McKeither's background offered no mitigating circumstances, and he was a poor

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Super. Ct. 2005) ("Appellant's final challenge to his sentence--that the court considered an improper factor--is a challenge to the discretionary aspects of sentencing."). The Court reviews this claim on the merits so as to be of assistance to the Superior Court if it decides to permit an appeal on this issue. See Commw. v. McAfee, 849 A.2d 270, 274-75 (Pa. Super. Ct. 2004) (reviewing the requirements for such a challenge).

candidate for rehabilitation; not only was this his second conviction for a sexual offense, but he violated the terms of his sentence on that prior charge no fewer than four times. Judge Myers-Clark ultimately imposed the maximum possible sentence. The record already demanded a severe penalty in this case. There was no need for still another reason to impose a lengthy sentence.

Mr. McKeither's sentencing was conducted in accordance with the law, and the prosecutor's statement that the victim was back in the hospital was properly received. Furthermore, the Court did not rely on Ms. Onuferko's current status because the trial evidence, in and of itself, called for a stern sentence. The Court carefully listed the factors that went into its decision, including the victim's "serious physical injuries" and "emotional damage"—both of which were entirely shown by Ms. Onuferko's and her doctor's trial testimony. (Sentencing Tr. 158:22-159:2, Dec. 5, 2008.) The trial testimony sufficiently convinced the Court that Ms. Onuferko would suffer lasting emotional damage from the savage attack. Later information that Ms. Onuferko remained depressed would not be unexpected. The specifics of Ms. Onuferko's current medical treatment at the time of sentencing did not sway or impact the Court's decision about the length of the sentence. Consequently, no relief is warranted on this issue.

D. Mr. McKeither's sentence was legal and appropriate.

Mr. McKeither's challenge to the length of his sentence[26] is without merit because the upward departure from the guideline sentence was necessitated by the unusual viciousness of the crime and was properly justified on the record at sentencing. The Court was required to consider certain factors in arriving upon the sentence and to

[26] Like issue (2)(c) addressed immediately above, this is a challenge to a discretionary aspect of the sentence. Here again, the Court chooses to address this issue on the merits in order to facilitate the resolution of this appeal.

give adequate reasons for the departure. The Court did both. While the sentence is lengthy, it is a just and considered response to the crime and the Court abided by all of the formal requirements of a sentencing proceeding.

When sentencing a defendant, the Court must have available:

1. a pre-sentence investigation report or equivalent information;
2. a victim impact statement "as provided by law;" and
3. a list of the offender's open cases, any sentences currently being served, and information on any time credit due.

42 Pa. C.S. § 9737; Commw. v. Goggins, 748 A.2d 721, 728 (Pa. Super. Ct. 2000); Pa.R.Crim.P. 702(A)(4).

At the sentencing hearing, the Court must:

1. allow the defendant and his attorney to be present and to speak;
2. allow the prosecutor to speak;
3. consider:
    a. the Sentencing Guidelines;
    b. the public's safety;
    c. the impact of the offense on the victim and the community;
    d. the rehabilitative needs of the defendant; and
    e. any "extenuating or mitigating circumstances;"
4. state the reasons for the sentence imposed; and
5. make sure the offender has received the warnings listed in Pa.R.Crim.P. 704(C)(3)(a)-(e).

42 Pa. C.S. § 9721(b); Commw. v. Ruffo, 520 A.2d 43, 48 (Pa. Super. Ct. 1987); Pa.R.Crim.P. 704(C)(1)-(2).[27]

At the sentencing, this Court had access to a detailed pre-sentence report. Ms. Onuferko chose not to attend, but had testified at trial to the impact of the crime including the depression she suffered after the attack. (Trial Tr. 32:22-24, May 22,

[27] Appellate courts review sentences to determine whether or not they are "unreasonable." 42 Pa. C.S. § 9781(c)(3). In particular, they are called upon to consider "[t]he nature and circumstances of the offense and the history and characteristics of the defendant," "[t]he opportunity of the sentencing court to observe the defendant, including any presentence investigation," "[t]he findings upon which the sentence was based," and "[t]he guidelines promulgated by the commission." 42 Pa. C.S. § 9781(d).

2008.) The Court was also aware of Mr. McKeither's criminal record, which included a conviction for indecent assault against a 13-year-old. The Court carefully reviewed all of that information and more besides—an addendum to the pre-sentence report, a mental health report, and letters from Mr. McKeither's supporters.

Mr. McKeither was permitted to address the Court. Indeed the Court worked patiently with Mr. McKeither to make sure he took the opportunity to inform the Court of anything he wished to in relation to the sentencing.[28] His attorney spoke on his behalf, and the prosecutor spoke in his turn. Each of them was given a full and fair opportunity to express anything they wished. In addition, the Court permitted supporters who attended on Mr. McKeither's behalf to address the Court.

The Court considered the sentencing guidelines and the required factors at some length, beginning even before the sentencing hearing commenced—but being careful to make no decisions until after it had heard all of the testimony and argument. (Sentencing Tr. 9:2-7, Dec. 5, 2008.) The Court stated the guideline-recommended sentencing range on the record, and acknowledged that the sentence departed upward from the sentencing guidelines. (Sentencing Tr. 158:4-12, Dec. 5, 2008.) The Court explained, again on the record and before Mr. McKeither, that the sentence was above the recommended guidelines because there was a "need for this court to protect the public" and the crime was "chilling." (Sentencing Tr. 158:16-17, Dec. 5, 2008.) It noted the "serious physical injuries" inflicted by the entirely unnecessary kicking of a helpless elderly woman and "[t]he emotional damage that this crime caused" which "will overshadow [the victim] for the rest of her life." (Sentencing Tr. 158:22-23; 158:25-

[28] Mr. McKeither insisted at some length that he was wrongly convicted. When encouraged to limit himself to issues of sentencing and asked if he had anything to say in that regard, he simply responded "[n]o." (Sentencing Tr. 157:24-158:2, Dec. 5, 2008.)

159:2, Dec. 5, 2008.) The Court further expressed that it had considered whether or not Mr. McKeither is amenable to rehabilitation. (Sentencing Tr. 158:18-19, Dec. 5, 2008.)

The Court did not consider the offense alone. It placed great weight on the totality of the circumstances surrounding the offense and pored through the pre-sentence report, the mental health report, and the letters sent to the Court. Unfortunately for Mr. McKeither, even that information not previously of record simply increased the Court's disquiet: "I reviewed Mr. McKeither's prior history in an effort to understand why he could commit such a heinous crime. I searched for some explanation but found none. I also searched for something in Mr. McKeither's history that would warrant more lenient treatment and have found none." (Sentencing Tr. 159:11-14, Dec. 5, 2008.)

When the sentence had been announced and after putting all of the reasons for the sentence on the record, the Court had the prosecutor explain Mr. McKeither's obligations under Megan's Law, 42 Pa. C.S. § 9791 et seq. (Sentencing Tr. 160:10-162:6, Dec. 5, 2008.) It also ensured that his attorney explained his appellate rights. (Sentencing Tr. 163:4-164:3, Dec. 5, 2008.) Thus, all of the requirements for a sentencing were carefully observed.

The defense argues that Mr. McKeither's sentence is "manifestly excessive and unreasonable" and that it is without "sufficient justification." (Rule 1925(b) statement, ¶ (2)(d).) However, the sentence was entirely reasonable given the villainous crimes committed and it was justified at length at the sentencing. As the sentence is appropriate and the formalities were observed, Mr. McKeither's sentencing claims fail.

E. Mr. McKeither was properly permitted to participate in a post-sentence motion hearing by way of videoconference.

Mr. McKeither contends that the hearing on his motion for reconsideration of sentence was insufficient because he was not physically present, but instead attended only by videoconference. This claim is meritless because trial courts are not required to grant hearings on post-sentence motions. Pa.R.Crim.P. 720(B)(2)(b); Comment to Pa.R.Crim.P. 720. The Court's discretion to deny Mr. McKeither's motion without a hearing is accentuated in light of the defense counsel's later agreement that his sentence was legal. (Hearing Tr. 6:16-7:11, Feb. 20, 2009). See Commw. v. Dalberto, 648 A.2d 16, 23 (Pa. Super. Ct. 1994) (noting that because post-sentencing proceedings are designed to give the trial court an opportunity to correct any errors it made at sentencing, a hearing is only necessary if the sentencing record discloses errors). Furthermore, even when oral argument is heard on a post-sentence motion, "the defendant need not be present." Comment to Pa.R.Crim.P. 720. See also Commw. v. Gaffney, 702 A.2d 565, 566 (Pa. Super. Ct. 1997) (citing the comment to Pa.R.Crim.P. 720 and holding that the defendant does not need to be in the courtroom during oral argument on a post-sentence motion). Notwithstanding the rule permitting the Court to have the hearing in a defendant's absence, this Court made arrangements to have Mr. McKeither participate by videoconference so that he could hear, participate and understand what was taking place. Mr. McKeither was therefore afforded more process than is required under the law when he attended the hearing on his motion for reconsideration of sentence via videoconference.

V. Conclusion

Mr. McKeither committed a crime that mixed unrestrained physical brutality with the calculated infliction of fear to produce an act of extreme cruelty. Fortunately for the citizens of Philadelphia, modern science stepped in to establish his guilt beyond a reasonable doubt. That evidence far outweighed the tertiary questions Mr. McKeither raises, and the sentence was a considered and reasonable response to the crime.

BY THE COURT:

_____
Lisa M. Rau, J.

DATED: _____