NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. WILLIAM SCOTT RITTER, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 975 EDA 2012

Appeal from the Judgment of Sentence October 26, 2011
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0002238-2009

BEFORE: PANELLA, J., ALLEN, J., and PLATT, J.*

MEMORANDUM BY PANELLA, J. **FILED NOVEMBER 06, 2013**

Appellant, William Scott Ritter, Jr., appeals from the judgment of sentence entered on October 26, 2011, in the Court of Common Pleas of Monroe County. After careful review, we affirm.

On February 7, 2009, Detective Ryan Venneman of the Barrett Township Police Department was conducting undercover operations investigating the crime of internet sexual exploitation of children in a Yahoo Instant Messenger chat room. Detective Venneman was acting as a young female named "Emily" when he was contacted online by Ritter, posing as "delmarm4fun," a 44-year-old male from Albany, New York. At the onset of

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* Retired Senior Judge assigned to the Superior Court.

the online chat, "Emily" specifically identified herself to Ritter as a 15-year-old female from the Poconos.

The online conversation was sexual in nature. During the conversation, Ritter provided "Emily" with a link to his webcam, asking her to share photographs with him. Ritter was particularly interested in whether "Emily's" ex-boyfriend took "any traditional ex pics" of her, by which he meant nude or provocative photographs. In response to Ritter's repeated requests to send additional photos, "Emily" transmitted a photograph to which Ritter replied, "that'l [sic] get a reaction." Ritter then stated that he was "waiting for ["Emily'] to put up another pic so [he] can continue to 'react.'" The webcam was operational at the time and displayed a man's face and upper body area. When queried as to what he meant by "react," Ritter responded that he reacted "below the screen," "where [his] hands are," indicating his hands are "down lower." Ritter then communicated to "Emily" that he was having a "big reaction here" and asked "Emily" if she would like to see more. Ritter then adjusted the webcam to focus on his genital area where he exposed himself to "Emily" and proceeded to masturbate.

Ritter turned off the webcam for a period of time. He, however, continued to engage in sexually explicit communications with "Emily," including asking her if she tasted her ex-boyfriend's penis, her favorite sexual position, if her ex-boyfriend ejaculated inside her, if he used a condom, and if she performed oral sex on him. "Emily" cautioned Ritter that she was only 15 years old and she did not want them to get in trouble

because of their respective ages. Unfazed by "Emily's" age, Ritter asked "Emily," "you want to see it finish?" Ritter then turned on the webcam and ejaculated in front of the camera for "Emily." Detective Venneman then notified Ritter of his undercover status and the undercover operation and directed Ritter to call the police station.

Ritter was subsequently charged with unlawful contact with a minor (sexual offenses), 18 PA.CONS.STAT.ANN. § 6318(a)(1), unlawful contact with a minor (open lewdness), 18 PA.CONS.STAT.ANN. § 6318(a)(2), unlawful contact with a minor (obscene and other sexual materials and performances), 18 PA.CONS.STAT.ANN. §6318(a)(4), corruption of minors, 18 PA.CONS.STAT.ANN. § 6301(a)(1), criminal use of a communications facility, 18 PA.CONS.STAT.ANN. § 7512(a), and indecent exposure, 18 PA.CONS.STAT.ANN. § 3127.

Prior to trial, the Commonwealth uncovered information, via a Google search, of Ritter's prior arrests from online sex sting operations in New York. The public internet search yielded news articles reporting that, in April 2011, Ritter communicated online in a chat room with an undercover police officer posing as a 14-year-old female and arranged to meet the "girl" at a local business in Albany. Ritter arrived at the designated location and was questioned by the authorities; however, he was released without any charges being filed. Two months later, Ritter was again caught in the same kind of sex sting after he tried to lure what he thought was a 16-year-old

female to a fast food restaurant. Ritter was subsequently charged, but the Albany District Attorney placed the case on hold.

Upon discovery of the publicly available articles regarding Ritter's prior engagement in internet sex stings, the Commonwealth requested and later received copies of those records from the Albany County District Attorney's Office. The Commonwealth provided Ritter with copies of the records in compliance with Pa.R.Crim.P. 573. Unbeknownst to the Commonwealth, the New York state records were sealed at the time they were forwarded to the Commonwealth, prompting the Commonwealth to return the records to the Albany County District Attorney's Office. A petition to unseal the records was subsequently filed and granted by the trial court in Albany County[1].

Thereafter, the Commonwealth filed a notice of prior bad acts as well as a motion *in limine* seeking to introduce the New York arrest records at trial. In response thereto, Ritter filed a motion for dismissal/change of venue as well as a motion *in limine* seeking to preclude this evidence. The trial court held a hearing on the motions. At the hearing, the Commonwealth's exhibits, consisting in part of the New York arrest records, were admitted under seal. After the hearing, the trial court entered an order and accompanying opinion granting the Commonwealth's motion *in limine*,

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[1] Ritter filed a motion to vacate the order entered unsealing the record in Albany County which was denied. Ritter then appealed that decision to the Supreme Court of the State of New York, Appellate Division.

permitting evidence of Ritter's prior bad acts in New York to be admitted at trial.

Following a jury trial, Ritter was found guilty of all but one count. Prior to sentencing, the Supreme Court of the State of New York, Appellate Division reversed and vacated the order of the Albany County court unsealing Ritter's records. Ritter then filed a motion for a new trial pursuant to Rule 704(B) or in the alternative to postpone sentencing. The trial court sentenced Ritter on October 26, 2011. At the time of sentencing Ritter made an oral motion for extraordinary relief. After extensive argument regarding the New York records, the trial court denied Ritter's request for a new trial and sentenced Ritter to an aggregate period of 18 to 66 months' imprisonment. Ritter filed post-sentence motions, which the trial court denied. This timely appeal followed.

On appeal, Ritter raises the following issues for our review.

1. Did the trial judge err in allowing the prosecution to bring out at trial the Appellant's two police encounters involving like conduct in New York in 2001?

    a. Should the trial judge have granted the Appellant a new trial when it became known that the New York courts had ruled on October 20, 2011 that the evidence of the Appellant's police encounters in New York in 2001 should never had been unsealed and made available to Pennsylvania prosecutors?

    b. Did the trial judge abuse her discretion in admitting the New York evidence under Rule 404(b) and Rule 403?

    c. Should the trial judge have granted the Appellant's motion for mistrial at the conclusion of the prosecutor's cross-examination of the Appellant and his closing

speech to the jury which emphasized the New York evidence?

d. Should the trial judge have granted the Appellant's motion for a mistrial during the cross-examination of the Appellant with a statement he allegedly made to New York investigators?

e. Has the Commonwealth established that this error was harmless beyond a reasonable doubt?

Appellant's Brief, at 2-3.

"We review a trial court's decision to grant … a motion *in limine* with the same standard of review as admission of evidence at trial." ***Commonwealth v. Flamer***, 53 A.3d 82, (Pa. Super. 2012) (citation omitted). "The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion." ***Commonwealth v. Weakley***, 972 A.2d 1182, 1188 (Pa. Super. 2009). "[If] the trial court overrides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error." ***Commonwealth v. Surina***, 652 A.2d 400, 402 (Pa. Super. 1995) (internal citations and quotations omitted). "In determining whether evidence should be admitted, the trial court must weigh the relevant and probative value of the evidence against the prejudicial impact of that evidence." ***Weakley***, 972 A.2d at 1188 (citation omitted).

After a careful review of the certified record, as well as the briefs of the parties, we are confident that the trial court did not err in allowing the admission of Ritter's New York records into evidence. The New York records

were unsealed *at the time* of their production to the Commonwealth by the Albany County Court and *at the time* of Ritter's jury trial. The records elicited a common scheme or plan as well as Ritter's propensity for crimes involving the internet sexual exploitation of children and their probative value outweighed any prejudicial effect to Ritter.

The trial court ably and methodically reviewed and analyzed all of the issues raised by Ritter related to admissibility of the New York records in its opinion filed on March 20, 2012. As such, we affirm Issues 1(a) and (b) on the basis of that well-written decision. ***See*** Trial Court Opinion, filed 3/20/12.

Similarly, the issues presented by Ritter in subsections (c), (d), and (e) *supra*, lack merit. Ritter argues that the trial court erred in denying his motion for a mistrial at the conclusion of the Commonwealth's cross-examination of Ritter and, the Commonwealth's closing argument to the jury as both elicited improper testimony relating to statements Ritter made to New York investigators. We disagree.

"The decision to declare a mistrial is within the sound discretion of the [trial] court and will not be reversed absent a flagrant abuse of discretion. A mistrial is an extreme remedy … [that] … must be granted only when an incident is of such a nature that is unavoidable effect is to deprive defendant of a fair trial." ***Commonwealth v. Bracey***, 831 A.2d 678, 682-683 (Pa. Super. 2003) (internal quotation marks and citations omitted; brackets in original).

Here, Ritter takes issues with the following exchange during the Commonwealth's cross-examination:

> PROSECUTOR: So you're saying that in February of '07 you must be back in this dark place again that you were in in 2001; right?
>
> RITTER: Not as severe, but, yes, I was.
>
> PROSECUTOR: And you were back doing the same thing in regard to masturbating and so forth over the Internet; right?
>
> RITTER: Yes, sir.
>
> PROSECUTOR: And, obviously, that's a problem; correct?
>
> RITTER: Yes, sir.
>
> PROSECUTOR: You tried the best you could to contain it but you couldn't contain it; right?
>
> RITTER: Yes, sir.
>
> PROSECUTOR: Just one thing. Going back to 2001. You actually told Tom Breslin that you needed help because your problem progressed to the point where you wanted to meet underaged girls.

N.T., Trial, 4/13/11, at 123-124. Defense counsel, Attorney Kohlman, objected to this line of questioning and immediately requested permission to approach the bench where he motioned for a mistrial. ***See id***., at 124. The trial court denied counsel's request for a mistrial, but permitted Attorney Kohlman to place his reasons for requesting a mistrial on the record. ***See id***., at 124-125.

The crux of defense counsel's reasoning was that "40 some minutes" of cross-examination was "focused solely on events in New York" and, in

particular, relative to out-of-court statements made by Ritter during the course of investigations in New York. ***See id***., at 125. Defense counsel argued that the out-of-court statements referenced by the Commonwealth on cross-examination were not in the discovery provided by the Commonwealth and that the "first time that [the defense] had any notification whatsoever of anything else to deal with other than the chats themselves, was approximately 11:30 in the morning on Monday the day before trial." ***Id***., at 125-126. As such, defense counsel argued that it was "extraordinarily prejudicial" to allow the information to be used during cross-examination. ***Id***., at 126.

In contrast, the Commonwealth argued that Ritter opened the door to such questioning on cross-examination by his own testimony that "he has a problem, that he goes on the Internet, that there is a sexual contact between adults." ***Id***., at 127. The Commonwealth queried Ritter in an effort to elicit "what kind of conduct" Ritter was referring to because Ritter said "he masturbates in front of woman" and "the whole reason he does this in '01 is to get caught by the police because he has a problem, he needs help." ***Id***., at 127.

The trial court denied defense counsel's request for a mistrial because "[Ritter] testified that he never intended to enter in an adult chat room for the purpose of having inappropriate conversations with a minor." ***Id***. As such, the testimony elicited on cross-examination was appropriate.

We can find no abuse of discretion in this ruling. Ritter opened the door to cross-examination on this issue by his own testimony.

Lastly, we can find no abuse of discretion on the part of the trial court in denying Ritter's motion for mistrial at the conclusion of the Commonwealth's closing argument.

> It is well established that a prosecutor is permitted to vigorously argue his case so long as his comments are supported by the evidence or constitute legitimate inferences arising from that evidence.
>
> > In considering a claim of prosecutorial misconduct, our inquiry is centered on whether the defendant was deprived of a fair trial, not deprived of a perfect one. Thus, a prosecutor's remarks do not constitute reversible error unless their unavoidable effect ... [was] to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. Further, the allegedly improper remarks must be viewed in the context of the closing argument as a whole.

Commonwealth v. Luster, 71 A.3d 1029, 1048 (Pa. Super. 2013) (en banc) (internal quotation marks and citations omitted).

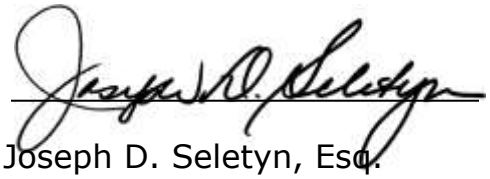
Here, Ritter contends that the Commonwealth "went way beyond the boundaries of intent and mistake and knowledge and for all the world was arguing common schedule, plan and design" in his closing argument. ***See*** N.T. Trial, 4/14/11, at 63. Specifically Ritter takes issue with the following comments by the Commonwealth: (1) that the New York cases were important because in those incidents, Ritter twice engaged in internet chats with what he should have believed was an underage girl, ***see id***., at 36; (2)

that the prosecutor referred to the screen name that Ritter had used, "OnExhibit", as supporting an inference that he was an "exhibitionist." ***see id***., at 42; (3) that in both New York chats, Ritter referred to masturbation; ***see id***.; (4) that in the New York cases in 2001 Ritter claimed he wanted to be caught; ***see id***., at 43-47; and (5) that since Ritter had been engaged in similar chats in two previous occasions in New York, he had to know that in his 2009 chat in Pennsylvania, the other party could be a minor and that conversation would be illegal. ***See id***., at 50, 53. ***See,*** Appellant's Brief at 17-19.

Based upon our review of the record, we are confident that the Commonwealth's closing arguments were fully support by the evidence presented or were suitable inferences derived therefrom. As stated previously, the admission of the New York evidence was permissible as it was relevant under Rule 404(b) and unsealed at the time of its admission. Therefore, any reference to the New York information was proper. The statements made by the Commonwealth were in no means inflammatory to such a degree that it would fix bias and hostility against Ritter in the minds of the jury. For these reasons, and in light of the overwhelming evidence of Ritter's guilt, we find a new trial is not warranted on this basis.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/6/2013

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. 2238 CRIMINAL 2009
	:	
vs.	:	DEFENDANT'S RULE 720
	:	POST-SENTENCING MOTION
WILLIAM SCOTT RITTER, JR.,	:	FOR A NEW TRIAL OR,
	:	IN THE ALTERNATIVE,
Defendant	:	RESENTENCING

OPINION

Defendant, William Scott Ritter, Jr., has been charged by Criminal Complaint with three separate counts of Unlawful Contact with a Minor, 18 Pa.C.S. §6318(a)(1), (2), (4); Criminal Use of Communication Facility, 18 Pa.C.S. §7512(a); Possessing Instruments of Crime, 18 Pa.C.S. §907(a); Indecent Exposure, 18 Pa.C.S. §3127(a); five individual counts of Criminal Attempt to commit the crimes of Unlawful Contact with a Minor, Obscene and Other Sexual Materials and Performances, Corruption of Minors, Criminal Use of a Communications Facility, and Indecent Exposure, 18 Pa.C.S. §901(a); and five individual counts of Criminal Solicitation to commit the crimes of Unlawful Contact with a Minor, Obscene and Other Sexual Materials and Performances, Corruption of Minors, Criminal Use of a Communications Facility, and Indecent Exposure, 18 Pa.C.S. §902(a).

The charges stem from an internet investigation by the Barrett Township Police Department. As part of the investigation, Detective Ryan Venneman ("Detective") of the Barrett Township Police Department was conducting undercover operations and investigating the crime of internet sexual exploitation of

children via the computer. While conducting the investigation, Detective purported to be a 15-year-old minor female named "Emily." Detective was then contacted by an individual identified as "delmarm4fun," a 44-year-old male from Albany, New York. The conversation was initiated by "delmarm4fun" in a Yahoo Instant Messenger chat room.

During the conversation, "delmarm4fun" was advised that "Emily" was a 15-year-old female from the Poconos, Pennsylvania. The conversation was sexual in nature, during which "delmarm4fun" requested "Emily" to give him another picture so he could continue to "react". Shortly after, he provided the purported 15 year old a link to his web camera. The camera displayed a male's face and upper body area. "Delmarm4fun" later adjusted the camera to focus on his penis area and began to masturbate. "Emily" asked him if he had a phone number where "she" could call him. "Delmarm4fun" provided a cell phone number of 518-365-6530.

"Delmarm4fun" continued to masturbate on web cam and again asked "Emily's" age. He was advised a second time that she was 15 years old. He stated he didn't realize that she was 15 and turned off his web camera. He then stated he did not want to get in trouble and said "I was fantasizing about fucking you." "Emily" replied "I guess u turned it off np". "Delmarm4fun" responded by asking "Emily" if she wanted "to see it finish". He again sent to "Emily" a link to his web camera which showed him masturbating and then ejaculating.

Detective then called the Nextel wireless phone number provided by "delmarm4fun" and advised the individual that he was a Police Officer with the Barrett Township Police Department. During the conversation, "delmarm4fun" provided his personal information as William Scott Ritter Jr. of Delmar, New York ("Defendant"). Detective obtained several photographs of Defendant and compared them to the web camera video obtained while "delmarm4fun" was masturbating on camera. Detective determined that the photos and video were of the same person.

On April 22, 2009, Detective secured a Court Order for Nextel Wireless to provide subscriber information for the wireless number of 518-365-6530. On October 13, 2009, Detective received the subscriber information confirming the wireless number was assigned to William Ritter of Delmar, NY at the time of the incident on February 7, 2009. Defendant was later charged with the above stated crimes.

Defendant waived his right to a preliminary hearing and to a formal arraignment in anticipation of entering into a negotiated plea to one count of Unlawful Contact with a Minor, 18 Pa.C.S. §6318(a)(4), a felony of the third degree. The Commonwealth filed a Criminal Information on January 11, 2010 charging Defendant with a single count of Unlawful Contact with a Minor. Defendant filed an Omnibus Pretrial Motion and a Motion for Discovery on January 14, 2010. Both motions were withdrawn on February 3, 2010. Defendant thereafter did not enter a plea of guilty to the Unlawful Contact charge.

On June 15, 2010, the Commonwealth filed a Notice of Prior Bad Acts pursuant to Pa.R.E. §404 as well as a Motion *In Limine* seeking to allow testimony of Defendant's prior bad acts at trial. Specifically, the Commonwealth sought to admit at trial evidence of charges filed in New York State against Defendant for offenses similar to those at issue before this Court. A hearing on the Commonwealth's Motion was scheduled for June 28, 2010 and thereafter continued generally at the request of counsel for the Commonwealth with the concurrence of Defendant to be relisted for hearing upon application of either counsel.

On June 16, 2010, the Commonwealth filed a Motion for Leave to Amend the Criminal Information arguing that the Commonwealth should be permitted to amend the Criminal Information to include all counts charged in the Criminal Complaint. The Commonwealth argued that it filed the one-count Information in reliance on the earlier plea agreement reached with Defendant in which Defendant agreed to waive his preliminary hearing and plead guilty to the Unlawful Contact with a Minor charge in exchange for the Commonwealth withdrawing the remaining charges alleged in the Criminal Complaint. In reliance on this agreement, the Commonwealth filed a Criminal Information with one count of 18 Pa.C.S. §6318(a)(4) with the understanding that if the case was not resolved with a guilty plea, all charges in the Criminal Complaint would be reinstated. The Commonwealth's Motion was granted. An Amended Criminal Information was filed charging Defendant with Unlawful Contact with a Minor (sexual offenses), 18 Pa.C.S. §6318(a)(1); Unlawful Contact with a Minor (open lewdness), 18 Pa.C.S.

§6318(a)(2), Unlawful Contact with a Minor (obscene and other sexual materials and performances), 18 Pa.C.S. §6318(a)(4); Criminal Attempt to Commit Obscene and Other Sexual Materials and Performances, 18 Pa.C.S. §901; Criminal Attempt to Commit Corruption of Minors, 18 Pa.C.S. §901; and Criminal Use of a Communication Facility, 18 Pa.C.S. §7512.

On August 10, 2010, Defendant filed a Motion for Dismissal/Change of Venue as well as a Motion *In Limine* to exclude evidence regarding past allegations of misconduct pursuant to Pa.R.E. §404. The Commonwealth filed a second Motion *In Limine* on August 27, 2010 seeking to preclude the defense experts' testimony as to: (1) proper undercover procedures in conducting online chat investigations; (2) the results of a forensic review of the Defendant's household computers; and (3) the ability of consenting participants in adult internet chat rooms to fantasize and assume that other adult participants are doing likewise. A hearing on all motions, including the Commonwealth's first Motion *In Limine*, was held on August 31, 2010.

At the hearing, counsel for both parties represented to the Court that the Commonwealth had obtained records of Defendant's New York arrests which were sealed by a court of that state in 2001. The records in question were admitted as Commonwealth's Exhibits 1 through 11, and placed under seal pending a decision by this Court on the parties' respective Motions *In Limine*. The Commonwealth's Exhibits are comprised of the following documents:

1. Criminal Complaint filed in the present case;

2. Transcript of chat log dated February 7, 2009;

3. Wikipedia computer print outs re: Defendant

4. January 14, 2010 letter from Monroe County Assistant District Attorney Michael Rakaczewski to Albany County, New York District Attorney P. David Soares requesting New York investigator's name and file re: Defendant;

5. February 8, 2010 letter from Robert G. Muller, Senior Criminal Investigator, Albany County, New York District Attorney's Office to Monroe County ADA Rakaczewski forwarding Defendant's criminal file;

6. April 23, 2010 letter from Defense Counsel to Monroe County District Attorney David Christine re: New York records of Defendant;

7. June 2, 2010 letter from Monroe County ADA Rakaczewski to Albany County, New York Chief Assistant District Attorney David M. Rossi returning records;

8. June 2, 2010 letter from Monroe County ADA Rakaczewski to Albany County, New York Chief Assistant District Attorney David M. Rossi enclosing proposed Motion to unseal records;

9. June 29, 2010 Order of the Albany County Court, Stephen W. Herrick, Judge, unsealing criminal records of Defendant;

10. New York State arrest records for Defendant;

11. August 24, 2010 letter from Defense counsel Gary Kohlman, Esquire to Monroe County ADA Rakaczewski re: Defense experts.

The Commonwealth further represented to the Court that the Commonwealth came into possession of Defendant's New York records as a result

of an internet "Google" search Assistant District Attorney Rakaczewski performed on Defendant's name. The "Google" search revealed the Wikipedia computer results set forth in Commonwealth Exhibit #3. As a result of the internet search results, Attorney Rakaczewski sent a letter to Attorney Soares of the District Attorney's Office in Albany County, New York, advising Attorney Soares that the Monroe County District Attorney's Office was "prosecuting [Defendant] in similar charges to his arrest in Albany County in 2001" and requesting that Attorney Soares' Office "provide [ADA Rakaczewski] with the name of the officer or detective who investigated these cases, as well as copies of your documents." [*See* Exhibit 4.] Attorney Soares' Office responded by sending copies of their entire file as well as the contact information for the Investigator on the case. [*See* Exhibit 5.] The discovery received contained police reports concerning alleged criminal incidents involving Defendant that took place in 2001 in New York State. [*See* Exhibit 6.]

After receipt and review of the records from New York State, ADA Rakaczewski sent copies of the records to counsel for Defendant. Thereafter, on April 23, 2010, defense counsel wrote to the Monroe County District Attorney advising that the Defendant's New York records were subject to a New York sealing and expungement order requiring that the records be sealed and/or destroyed. [*See* Exhibit 6.] The letter further stated that the Commonwealth's possession of the records was "illegal," demanded that the Commonwealth "turn–over" all copies of the records, "divulge" how the Commonwealth came into possession of same,

and meet with defense counsel to discuss defense counsel's views on "where this case should go at this point." [Id.]

In response, the Commonwealth returned the original documents received to the Albany Chief Assistant District Attorney. [*See* Exhibit 7.] The Commonwealth also provided the Chief ADA in Albany with a Motion to be filed in the New York State Supreme Court for Albany County requesting to have the records unsealed ex parte pursuant to New York State Criminal Procedure Law §160.50(1)(D). [*See* Exhibit 8.] The Office of the Albany County District Attorney filed the ex parte motion on behalf of the Barrett Township Police Department and the Monroe County District Attorney's Office. [*See* Exhibit 9.] By Order dated June 29, 2010, the Honorable Stephen W. Herrick of the State of New York, Albany County Court, ordered that the Albany County District Attorney's Office, as well as the Colonie Police Department and the Colonie Town Court make their file pertaining to Defendant available to the Monroe County District Attorney's Office and the Barrett Township Police Department. [*Id.*]

After hearing and consideration of both parties' briefs, the Court issued an Opinion and Order on December 16, 2010 denying the Commonwealth's Motion to Exclude Expert Testimony as to Forensic Review of Defendant's Computers and denying Defendant's Motions to Dismiss, Exclude Prior Bad Acts and for Change of Venue. The Court granted the Commonwealth's Motions to Allow Evidence of Prior Bad Acts, Exclude Expert Testimony as to Undercover Police Procedures, and Exclude Expert Testimony regarding fantasy based

conversation. The Order also directed that the Commonwealth's Exhibits #1-11 be unsealed.

Jury trial commenced on April 12, 2011. A verdict was reached on April 14, 2011 convicting Defendant of six of the seven charges, including: Unlawful Contact with a Minor – Indecent Exposure, Unlawful Contact with a Minor – Open Lewdness, Unlawful Contact with a Minor – Dissemination of Obscene or Sexually Explicit Materials or Performances, Criminal Attempt – Corruption of a Minor, Criminal Use of a Communication Facility, and Indecent Exposure.[1]

Sentencing in this matter was scheduled for May 17, 2011, and Defendant was directed to undergo an assessment with the Pennsylvania Sexual Offenders Assessment Board pursuant to 42 Pa.C.S. §9795.4 (relating to Registration of Sexual Offenders) for purposes of determining whether Defendant is a sexually violent predator. After various Motions for Continuance, sentencing and hearing on Defendant's potential status as a sexually violent predator ("SVP hearing") were ultimately rescheduled to October 26, 2011.

On October 21, 2011, Defendant filed a Rule 704(B) Motion for New Trial or, in the Alternative, to Postpone Sentencing. In his Motion, Defendant related that while the case in Pennsylvania proceeded, Defendant took steps to challenge the June 29, 2010 Order of the New York Court granting the ex parte motion to unseal the records pertaining to his 2001 arrests. On November 8, 2010,

[1] Defendant was acquitted of Criminal Attempt – Dissemination of Obscene or Sexually Explicit Materials or Performances.

Defendant filed a Motion to Vacate the ex parte Order in the Albany County Court, which was denied on December 29, 2010. In March of 2011, Defendant appealed that Order. On October 20, 2011, the Third Department of the Appellate Division of the New York State Supreme Court reversed the December 29, 2010 Order of the Albany County Court denying Defendant's Motion to Vacate and vacated the Albany County Court's June 29, 2010 Order. In its decision, the New York Appellate Court held that the Pennsylvania authorities did not seek the sealed records for permissible purposes under New York State's sealing statute, C.P.L. §160.50. As such, Defendant asserted in his Motion that he was entitled to a new trial, or in the alternative for sentencing to be postponed.

Hearing on Defendant's Motion for Extraordinary Relief was scheduled for October 26, 2011, the same date and time as sentencing and the SVP hearing, and oral argument was heard by both parties. Counsel for Defendant was permitted extensive opportunity to argue his position, however, the Court informed Counsel that Defendant's filing of its written motion for extraordinary relief prior to sentencing was invalid, as Rule 704 does not permit the filing of a *written* motion prior to sentencing. *See* Pa.R.Crim.P. §704; Commonwealth v. Askew, 907 A.2d 624 (Pa. Super. 2006). As such, Defendant orally withdrew his written Rule 704(B) Motion, and renewed same orally in open court. Because the issue presented by Defendant appears to one of first impression in this Commonwealth, the Court found that Defendant's right to the requested relief was not clear and that

the Court was, therefore, required under Rule 704 to proceed with the SVP hearing and sentencing.

At the hearing, the Court heard testimony from Paula Brust of the Pennsylvania Sexual Offender's Assessment Board regarding Defendant's assessment and concluded that Defendant was a sexually violent predator. Immediately following the hearing, and after considering the arguments of Counsel and the Pre-Sentence Investigation Report ("PSI") prepared by the Monroe County Probation Department, Defendant was sentenced to undergo a period of incarceration in a state correctional institution of not less than 18 months with a maximum not to exceed 66 months. Defendant was also ordered to comply with the registration requirements set forth at 42 Pa.C.S. §9795.1 pertaining to Megan's Law.

On November 7, 2011 Defendant filed a Rule 720 Post-Sentencing Motion for a New Trial or, in the Alternative, Resentencing along with a brief. A hearing on the Motion was held on December 8, 2011, at which time Defendant reiterated his position from the Rule 704(B) hearing, as well as made additional argument that the Court should vacate Defendant's convictions due to a lack of sufficiency of the evidence and because the weight of the evidence did not support the jury's verdict. On December 22, 2011, Defendant filed a supplemental brief in support of his position; the Commonwealth filed a brief in opposition on January 12, 2012. We are now prepared to decide this matter.

DISCUSSION

By filing his Rule 720 Motion, Defendant moves the Court to vacate Defendant's convictions and order a new trial, or, in the alternative, to resentence him and, at the very minimum, to set forth conditions that will allow him to be released on bail pending the outcome of his appeal. We will deny Defendant's Motions for the reasons stated below.

Motion for New Trial

Defendant first argues that at time of trial, the Commonwealth made extensive use of records, specifically two transcripts of online chats that Defendant had with undercover New York police officers, relating to two previous arrests of Defendant in 2001 in Albany County, New York. Defendant avers that the transcripts had been sealed pursuant to a New York Statute, and that the Commonwealth obtained an ex parte order from the County Court unsealing the records and extensively used the sealed material in presenting its case at trial. Defendant argues that since the Appellate Division of the New York State Supreme Court ultimately vacated the Albany County Court's Order unsealing the records that were used at trial, this Court must give "full faith and credit" to the New York Appellate Court's decision and grant Defendant a new trial at which the improperly-obtained evidence of Defendant's prior bad acts is not introduced. We disagree for several reasons.

First, at the time we allowed the admission of evidence of Defendant's 2001 records, a valid Albany County Court Order existed to which we gave "full faith and credit." At that time, we stated that we would not usurp the power and decision of a New York Court with respect to the interpretation of a New York Statute. The fact that this Order was vacated after Defendant's conviction does not automatically entitle Defendant to a new trial. We have found no Pennsylvania law, or New York law binding upon this Court, that requires the Court to hold a new trial other than for issues of fundamental fairness or due process. Under the circumstances at hand, we find that a new trial is not warranted because the admission of the records was, at worst, harmless error. Based upon the evidence presented at trial, we conclude that even if the New York records were deemed inadmissible, the Commonwealth would still have presented sufficient evidence of the offenses charged for the jury to find Defendant guilty beyond a reasonable doubt.

Second, even if certain records utilized by the Commonwealth at trial should have remained sealed as "official records and papers" as provided by the New York unsealing statute,[2] we find that the evidence derived from such records could still have been obtained from other sources. For example, we find nothing in the New York statute that would have prohibited a police officer with personal knowledge of the arrests from testifying to their details.[3] Moreover, the Attorney for

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[2] N.Y Crim. Proc. Law §160.50(1)(c),

[3] Under New York State law, once a criminal action is terminated in favor of a person, "[A]ll official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court,

the Commonwealth acknowledged that a majority of the documents he used at trial were found on the internet and were public information. Indeed, a Google search for "William Scott Ritter New York arrests" yields over 134,000 results, including links to news stories, commentaries, and official records, all detailing Defendant's previous sexual crimes.

Finally, we find that the transcripts of the 2001 chat logs as well as information solicited from the detective involved in the 2001 arrests are not "official records and papers" subject to the New York sealing statute. In Harper v. Angiolillo, the New York Superior Court stated:

> [A]lthough CPL 160.50 specifies judgments and orders of a court as items "included" in the category of official records and papers, the statute is otherwise silent on the nature of such "official" material (*see*, CPL 160.50[1][c]) further supporting the conclusion that bright line rules are not wholly appropriate in this area. Indeed, such records and papers are not always subject to easy identification and may vary according to the circumstances of a particular case.
>
> Thus, in *Matter of Dondi*, we held that "on the facts of this case" certain "testimonial evidence" consisting of an incriminatory tape recording constituted an official record subject to CPL 160.50(1)(c). However, in *Matter of Hynes v. Karassik*, we affirmed the Appellate Division's determination that "two tape recordings introduced into evidence at the criminal trial were not within the definition of 'official records and papers' protected by the sealing statute." Consequently, while some recordings may qualify as an official record under certain

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police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency. N.Y Crim. Proc. Law §160.50(1)(c) (McKinney 2004). However, no bright line test exists to determine what evidentiary items are included in the category of "official records and papers." Harper v. Angiolillo, 680 N.E.2d 602, 604 (N.Y. 1997).

> circumstances, not all tape recordings will qualify as an official record in every case. ...

680 N.E.2d 602, 604-05 (N.Y. 1997) (internal citations omitted). Further, New York courts have held that records such as investigative and audit reports prepared by a prosecutor as well as tape recordings made in the course of an investigation do not constitute "official records and papers" within the meaning of CPL 160.50(1)(c). See People v. Neuman, 428 N.Y.S.2d 577, 579 (N.Y. App. Div. 1980); Hynes v. Karassik, 405 N.Y.S.2d 242, 243 (N.Y. 1978). Courts are clear that there is no bright line test for determining what are or are not "official records and papers," and that the evidence must be viewed and a decision made on a case by case basis. Id. Here, we find that the transcripts of the 2001 chat logs as well as the information obtained from the detective involved in the 2001 arrests are not testimonial in nature and are more akin to tape recordings and investigative reports than judicial orders or official police records. Thus, the evidence at issue does not constitute "official records and papers" under the statute and was properly admitted at trial as evidence of Defendant's prior bad acts.

Defendant equates this case to cases that arise in the context of unlawfully obtained evidence under the Fourth Amendment of the Constitution or Article I, Section 8 of the Pennsylvania Constitution and makes detailed arguments as to whether New York or Pennsylvania law should apply to determine whether or not the previous arrest records should be suppressed. However, we need not address those arguments as the issue here is not one of suppression, but rather

one of admissibility. There is no question that the Commonwealth lawfully obtained the records in question, regardless of whether they were provided by Albany County or downloaded from the internet. While the New York Appellate Division subsequently ruled that the records should not have been unsealed, this ruling in no way makes the Commonwealth's use and possession of the records unlawful.

While New York law may allow the Defendant to have the official records sealed, in essence this is mere formality. New York courts cannot purge accounts of the arrests from the internet, newspapers, and the minds of those who witnessed them. We ruled in our December 16, 2010 Opinion that evidence of the Defendant's prior bad acts, including previous arrests, was admissible and we stand by that ruling now. Even if the records in question were never unsealed, there were various avenues through which the Commonwealth could still have introduced evidence of Defendant's previous arrests. As such, Defendant's Motion for New Trial under Rule 720 will be denied.

Motion for a New Sentencing Hearing

Defendant next argues that Due Process requires that the Court hold a new sentencing hearing and order the preparation of new reports from the Pennsylvania Sexual Offenders Assessment Board and the Monroe County Probation Department because both reports referred to evidence pertaining to the 2001 arrests that should not have been considered at sentencing under New York law. In the alternative, Defendant argues that the Court should modify Defendant's

sentence because five of the six offenses Defendant was found guilty of should merge for the purposes of sentencing, as they each involve identical conduct of "inappropriate sexual conduct," which was proven by the same act, notwithstanding the fact that they are stated in different words.

In addressing Defendant's Motion for a New Sentencing Hearing, for the reasons stated on the record at time of hearing on Defendant's post-sentencing motion, and for the reasons stated above, we find that the records of Defendant's prior arrests in 2001 were still a part of the record at time of sentencing, having been properly admitted at trial. As such, it was appropriate at the time of sentencing for the Monroe County Probation Department as well as Ms. Brust of the Pennsylvania Sexual Offenders Assessment Board to rely upon all evidence lawfully admitted at time of trial. Moreover, regardless of whether evidence of Defendant's prior arrests were admitted, said records were not the sole basis for this Court's decision, as other facts of record exist to support the sentence imposed by this Court.

As to Defendant's Motion for Modification of Sentence, Defendant argues that the five offenses that should merge are: (1) unlawful contact with a minor, indecent exposure; (2) indecent exposure; (3) unlawful contact with a minor, open lewdness; (4) unlawful contact with a minor, dissemination of obscene or sexually explicit materials or performances; and (5) criminal attempt to commit the offense of corruption of a minor. We disagree.

42 Pa.C.S. §9765, Merger of Sentences, provides in relevant part as follows:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S. §9765. The three offenses pertaining to Unlawful Contact with a Minor of which Defendant was convicted are as follows:

> 18 Pa.C.S.A. §6318. Unlawful Contact with a Minor –
>
> (a) Offense defined.-- A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:
>
> (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).
>
> (2) Open lewdness as defined in section 5901 (relating to open lewdness).
>
> (4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).

18 Pa.C.S. §6318.

Indecent exposure, as enumerated in Chapter 31 (relating to sexual offenses) requires a person who commits indecent exposure to expose his or her

genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm. 18 Pa.C.S. § 3127. On the other hand, the offense of open lewdness requires that a person commit any lewd act which he knows is likely to be observed by others who would be affronted or alarmed. Moreover, the offense of obscene and other sexual materials and performances prohibits any person who knows the obscene character of the materials or performances involved to display any explicit sexual materials where minors, as a part of the general public or otherwise, are or will probably be exposed to view all or any part of such materials. 18 Pa.C.S.§5903(a)(1). Although Defendant's convictions for Unlawful Contact With a Minor arose from the same set of facts, based upon the different statutory requirements, and the fact that not all of the statutory elements of one offense are included in the statutory elements of the other offenses, these offenses do not merge for purposes of sentencing.

Furthermore, Defendant was convicted of both Criminal Attempt to Commit the Act of Corruption of Minors, Criminal Use of a Communication Facility, and Indecent Exposure. As these offenses contain various elements not coinciding with each other or the offenses explained above, we find it superfluous to address whether they merge for purposes of sentencing. Moreover, regardless of whether or not the above offenses merged for purposes of sentencing, this Court ordered concurrent sentences for Counts 1, 2 and 3 relating to Unlawful Contact with a Minor – Indecent Exposure, Unlawful Contact with a Minor – Open Lewdness, and

Unlawful Contact with a Minor – Obscene and other Sexual Materials and Performances. As such, Defendant's argument with respect to Counts 1, 2 and 3 is moot. Defendant's motion will be denied.

Sufficiency of the Evidence Claim and Weight of the Evidence

Defendant cursorily alleges in his Motion that there was insufficient evidence to support the charges against Defendant and that the verdict was contrary to the weight of the evidence. However, at no time during hearing on Defendant's post-sentence motions, or in any of Defendant's elaborate briefs did Defendant argue his position with respect to his sufficiency of the evidence or weight of the evidence claims. As such, we are unable to fully address his arguments at this time. However, in the interest of judicial economy, we will address his claims generally as they apply to the Rules of Criminal Procedure.

A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged in a motion for judgment of acquittal made after sentence is imposed pursuant to Pa.R.Crim.P. §720(B). Pa.R.Crim.P. §606. A defendant shall also raise a claim that the verdict was against the weight of the evidence in a motion for a new trial in a post-sentence motion. Pa.R.Crim.P. §607. However, Pa.R.Crim.P. §720 provides in relevant part as follows:

> (B) Optional Post-Sentence Motion.
> (1) *Generally*.

(a) The defendant in a court case shall have the right to make a post-sentence motion. All requests for relief from the trial court shall be stated with specificity and particularity, and shall be consolidated in the post-sentence motion, which may include:

(i) a motion challenging the validity of a plea of guilty or *nolo contendere*, or the denial of a motion to withdraw a plea of guilty or *nolo contendere*;

(ii) a motion for judgment of acquittal;

(iii) a motion in arrest of judgment;

(iv) a motion for a new trial; and/or

(v) a motion to modify sentence.

(b) The defendant may file a supplemental post-sentence motion in the judge's discretion as long as the decision on the supplemental motion can be made in compliance with the time limits of paragraph (B)(3).

(c) Issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues.

Pa.R.Crim.P. §720(B)(1)(a) – (c). The Comments to the Rule provide that "[u]nder paragraph (B)(1)(a), the grounds for the post-sentence motion should be stated with particularity. Motions alleging insufficient evidence, for example, must specify in what way the evidence was insufficient, and motions alleging that the verdict was against the weight of the evidence must specify why the verdict was against the weight of the evidence." *See* Comment to Pa.R.Crim.P. §720. "Because the post-

sentence motion is optional, the failure to raise an issue with sufficient particularity in the post-sentence motion will not constitute a waiver of the issue on appeal as long as the issue was preserved before or during trial." *See* Pa.R.Crim. P. §720(B)(1)(c).

Here, Defendant fails to state with particularity in what way the evidence was insufficient, or why the verdict was against the weight of the evidence, with the exception of the argument that the evidence of Defendant's prior offenses should be found inadmissible. Inasmuch as we have addressed this issue above, we are constrained to deny Defendant's motions at this stage. However, in the interest of judicial economy, and in viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, we find that there is more than ample evidence to support Defendant's convictions for all of the charges of which he was found guilty, including Unlawful Contact with a Minor – Indecent Exposure, Indecent Exposure, Unlawful Contact with a Minor – Open Lewdness, Unlawful Contact with a Minor – Dissemination of Obscene or Sexually Explicit Materials or Performances, Criminal Attempt – Corruption of a Minor, and Criminal Use of a Communication Facility.

When reviewing a sufficiency of the evidence claim, our appellate courts apply the following standard:

> [V]iewing 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.

Commonwealth v. Hutchinson, 947 A.2d 800, 805-06 (Pa. Super. 2008) (emphasis and citations omitted). The credibility of witnesses and the weight to be afforded the evidence produced are matters within the province of the trier of fact; the fact finder is free to believe all, some, or none of the evidence. Commonwealth v. Smith, 502 Pa. 600, 467 A.2d 1120, 1122 (1983). With respect to the weight of the evidence argument, our Appellate Courts have explained:

> the weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice.

Commonwealth v. Moreno, 14 A.3d 133, 135 (Pa. Super. 2011) (quotation omitted).

Viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, we find that it was well within the province of the jury to conclude that there is sufficient evidence to enable them to find every element of each of the crimes of which Defendant was convicted beyond a

reasonable doubt. The facts ascertained at trial established that Detective, purporting to be a 15-year-old minor female, engaged in conversations of a sexual nature with Defendant over the internet. Defendant displayed his penis over a web camera and began to masturbate so that Detective could witness. Defendant was advised several times that Detective was a "15-year-old female" yet continued to engage in the act of masturbation over the internet.

After reviewing the record in considerable detail and taking into consideration the testimony of all the witnesses, the Defendant's statements, and the direct and circumstantial evidence presented at trial, we believe it was well within the province of the jury to conclude that Defendant was guilty of the crimes charged. As the fact-finder, the weight and credibility determinations were exclusively for the jury to make, and there was more than ample evidence to support the verdict, even without the evidence or records of Defendant's prior New York offenses. We do not find the verdict so contrary to the evidence as to shock one's sense of justice. Defendant's motion to vacate his convictions due to a lack of sufficiency of the evidence and because the weight of the evidence did not support the jury's verdict will be denied.

Bail Pending Appeal

Finally, Defendant requests that he be granted bail pending appeal if the Court does not vacate his convictions and provide him a new trial. Defendant argues that there are conditions of release that can be fashioned in response to the

Court's stated concerns placed on the record during hearing on Defendant's post-sentence motions in regards to releasing Defendant on bail pending his appeal. Specifically, Defendant suggests, for example, computer monitoring software that blocks websites and monitors internet activity, as well as continued treatment with Dr. Hamill who will verify Defendant's participation with the Probation Department on a weekly basis, and Defendant surrendering his passport. Moreover, Defendant expressed at the time of hearing that his wife would be willing to closely monitor his actions. We disagree, and for reasons placed on the record by this Court at time of hearing on Defendant's post-sentencing motions, and the law as provided in Pa.R.Crim.P. §§521and 523 regarding bail after a finding of guilt and release criteria, respectively, we stand by our position and will not address this matter further.

Accordingly, we enter the following Order.

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**No. 2238 CRIMINAL 2009**
	:	
vs.	:	**DEFENDANT'S RULE 720**
	:	**POST-SENTENCING MOTION**
WILLIAM SCOTT RITTER, JR.,	:	**FOR A NEW TRIAL OR,**
	:	**IN THE ALTERNATIVE,**
Defendant	:	**RESENTENCING**

ORDER

AND NOW, this 20th day of March 2012, Defendant's Rule 720 Post-Sentencing Motion for a New Trial or, in the Alternative, Resentencing, is **DENIED**. Defendant's Motion for Bail Pending Appeal is **DENIED.**

Defendant is advised that he has thirty (30) days from the date of this Order within which to file an Appeal with the Superior Court of Pennsylvania. Defendant is further advised that he has the right to assistance of counsel in the preparation of the appeal and, if he is indigent, to appeal *in forma pauperis* and to have counsel appointed to represent him free of charge. *See* Pa.R.Crim.P. §720(B)(4).

BY THE COURT:

JENNIFER HARLACHER SIBUM, J.

cc: Michael Rakaczewski, Esquire, ADA
W. Gary Kohlman, Esquire
Todd E. Henry, Esquire
Joshua B. Shiffrin, Esquire
JHS2012.016

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CLERK OF COURTS
MONROE COUNTY, PA