

Trial Issues

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6.1 CHAPTER OVERVIEW

This chapter examines issues that commonly arise in the trial of rape and sexual assault cases. A suggested outline of a typical criminal trial, with references to the Pennsylvania Rules of Criminal Procedure and Rules of Evidence, is listed in Addendum 1. It is not intended to be a comprehensive review, but rather an accessible listing for quick reference. Section 6.3 provides a detailed discussion on jury selection issues. Sections 6.4 and 6.5 cover evidentiary issues that may be confronted by the prosecution. Sections 6.4 through 6.6 involve necessary evidence offered by the prosecution in its case in chief to prove the elements of the crime(s) charged, centering on the presentation of the victim/complaint. Section 6.7 concerns character evidence, i.e., evidence of the alleged perpetrator's prior record or past bad acts, including a discussion of when this type of evidence may be utilized by the prosecution in its case-in-chief, e.g., evidence of common scheme, or during cross-examination of the defendant on the defense side of the case, e.g., impeachment.

Sections 6.8 and 6.9 cover selected hearsay rules and exceptions. Section 6.10 covers witness competency, and section 6.11 covers the defense of mistake of age. Section 6.12 addresses the sexual assault counsel privilege, and section 6.13 covers 911 tapes and the use of other audiotapes at trial. The chapter concludes with section 6.14, which includes a discussion of the admissibility and relevancy of sexually explicit material, usually in the form of pornographic films and magazines, typically obtained from a search of the accused's home.

6.2 SUGGESTED STAGES OF A CRIMINAL JURY TRIAL

Included in Addendum 1 is a list of the suggested 21 stages of a criminal jury trial. This list is easily modifiable for use in a civil jury trial or non-jury trial.

6.3 JURY SELECTION – VOIR DIRE

A. Strike for Cause

A strike for cause typically is requested by one of the parties after questioning of a juror has elicited responses that establish that he or she cannot be impartial. *Commonwealth v. Johnson*, 445 A.2d 509, 511 (Pa. Super. 1982). Jurors should be disqualified for cause when they do not have the ability or

willingness to eliminate the influences under which they are operating and therefore cannot render a verdict according to the evidence. ***Commonwealth v. DeHart***, 512 Pa. 235, 248, 516 A.2d 656, 663 (1986), *cert. denied*, ***DeHart v. Pennsylvania***, 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987).

A prospective juror should be excused for cause in two situations:

- i. The first is where the prospective juror indicates by his answers that he will not be an impartial juror.
- ii. The second is where, irrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has a close relationship, be it familial, financial, or situational, with any of the parties, counsel, victims or witnesses.¹

The appellate courts will employ a standard of review which affords great deference to the trial judge, who is in the best position to assess the credibility of the jurors and their ability to be impartial. *See Commonwealth v. Bomar*, 573 Pa. 426, 456, 826 A.2d 831, 849 (2003), *cert. denied*, 540 U.S. 1115, 124 S.Ct. 1053, 157 L.Ed.2d 906 (2004); ***Commonwealth v. Impellizzeri***, 661 A.2d 422, 427 (Pa. Super. 1995), *appeal denied*, 543 Pa. 725, 673 A.2d 332 (1996). Where a prospective juror indicates that he or she cannot be an impartial juror, “much depends upon the answers and demeanor of the potential juror as observed by the trial judge.” ***Commonwealth v. Johnson***, 445 A.2d at 512. Reversal by an appellate court is appropriate only in the case of palpable error. ***Commonwealth v. Impellizzeri***, 661 A.2d at 427.

B. Peremptory Challenge

Where a criminal defendant is forced to use a peremptory challenge to excuse a juror who should have been excused for cause and then exhausts his peremptory challenges before the jury is seated, a new trial will be granted. ***Commonwealth v. Blasioli***, 685 A.2d 151, 157-158 (Pa. Super. 1996), *affirmed*, 552 Pa. 149, 713 A.2d 1117 (1998).

The number of peremptory challenges granted to each side is governed by the Pennsylvania Rules of Criminal Procedure since the statutory provisions relating to peremptory challenges were repealed by the Judiciary Act Repealer Act, 42 PA.STAT. § 20002(a). Rule of Criminal Procedure No. 634 governs the number of peremptory challenges for the selection of principal trial jurors; the number of peremptory challenges for the selection of alternate trial jurors is set forth in Pa.R.Crim.P. 645. Pa.R.Crim.P. 634 provides:

¹ ***Commonwealth v. Stamm***, 429 A.2d 4, 7 (Pa. Super. 1981), *quoting Commonwealth v. Colon*, 299 A.2d 326, 327-328 (Pa. Super. 1972).

Pennsylvania Rules of Criminal Procedure
Rule 634. Number of Peremptory Challenges

(A) Trials Involving Only One Defendant:

(1) In trials involving misdemeanors only and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 5 peremptory challenges.

(2) In trials involving a non-capital felony and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 7 peremptory challenges.

(3) In trials involving a capital felony and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 20 peremptory challenges.

(B) Trials Involving Joint Defendants:

(1) In trials involving joint defendants, the defendants shall divide equally among them that number of peremptory challenges that the defendant charged with the highest grade of offense would have received if tried separately; provided, however, that each defendant shall be entitled to at least 2 peremptory challenges. When such division of peremptory challenges among joint defendants results in a fraction of a peremptory challenge, each defendant shall be entitled to the next highest number of such challenges.

(2) In trials involving joint defendants, it shall be within the discretion of the trial judge to increase the number of peremptory challenges to which each defendant is entitled up to the number of peremptory challenges that each defendant would have received if tried alone.

(3) In trials involving joint defendants, the Commonwealth shall be entitled to peremptory challenges equal in number to the total number of peremptory challenges given to all of the defendants.

A short summary of Pa.R.Crim.P. 634 is as follows:

Number of Defendants	Type of Offense	Commonwealth's Peremptory Challenges	Each Defendant's Peremptory Challenges	Minimum Number of Jurors Subject to Challenges
1	Misdemeanor	5	5	22
1	Felony	7	7	26
2	Misdemeanor	6	3	24
2	Felony	8	4	28

6.4 TESTIMONY OF COMPLAINANT (NO CORROBORATION REQUIRED)

To prove that a defendant is guilty of rape or sexual assault, a prosecutor does not need to corroborate a victim's testimony.

18 PA.CON.S.TAT.ANN. § 3106 provides:

The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.

This section parallels § 213.6(5) of the Model Penal Code. It is now well established in Pennsylvania that, in a prosecution for sex offenses, a guilty verdict may rest on the uncorroborated testimony of the victim. **Commonwealth v. Lyons**, 833 A.2d 245, 258 (Pa. Super. 2003), *appeal denied*, 583 Pa. 695, 879 A.2d 782 (2005); **Commonwealth v. Owens**, 649 A.2d 129, 133 (Pa. Super. 1994), *appeal denied*, 540 Pa. 612, 656 A.2d 118 (1995).

- **Medical Evidence Not Necessary: Commonwealth v. Jette**, 818 A.2d 533, 534 (Pa. Super. 2003), *appeal denied*, 574 Pa. 771, 833 A.2d 141 (2003) (“medical evidence is not required if the fact finder believes the victim.”).

Notwithstanding this rule, a prosecutor may choose to corroborate the victim's testimony through physical or testimonial evidence.

A. Temporarily Excluding Spectators From Courtroom When Victim Testifies to Embarrassing or Lurid Details

When a rape victim testifies to facts that could prove embarrassing or painful to her, the trial court has authority to exclude spectators from the trial on a temporary basis.

- **Commonwealth v. Smith**, 421 A.2d 693, 694 (Pa. Super. 1980) (in *dicta*, embarrassment, trauma of rape victim);
- **Commonwealth v. Wright**, 388 A.2d 1084, 1086 (Pa. Super. 1978) (discomfit to victims of sex crimes when testimony requires explication of lurid details).

B. Impeachment of Complainant

Evidence of victim's reputation in community for truth and veracity is admissible in a sex offense trial. The credibility of a rape victim is measured according to the same standard applied to any other crime victim: the reputation witness must attest to the victim's general reputation in the community – the witness may not attest to the victim's specific behavior.²

² **Commonwealth v. Berry**, 513 A.2d 410, 416 (Pa. Super. 1986).

In *In Interest of Lawrence J.*, 456 A.2d 647 (Pa. Super. 1983), the trial court erred under 18 PA.CONS.STAT.ANN. § 3106 in sustaining the Commonwealth’s objections to the testimony by a defense witness concerning the victim’s reputation for truth and veracity. The credibility of the alleged rape victim was to be determined by the same standard as that applied to the victim of any other crime: “The inquiry is limited, however, to the general speech of the community on the subject. The reputation witness can not be asked questions or give answers regarding specific acts, as distinguished from what she has heard in the neighborhood.” 456 A.2d at 655.

6.5 TESTIMONY OF CHILD VICTIM OR WITNESS BY CONTEMPORANEOUS ALTERNATIVE METHOD

A. Permissible Pursuant to 42 PA.CONS.STAT.ANN. § 5985

The ability of a child victim or material witness to testify outside the presence of the defendant, as to a sexual assault or otherwise, is governed by 42 PA.CONS.STAT.ANN. § 5985. Section 5985 was enacted by the legislature on July 15, 2004, following a series of amendments to the Confrontation Clause in Article 1, Section 9, of the Pennsylvania Constitution. The appellate courts of Pennsylvania have upheld the 2004 amendments as constitutional. *See Bergdoll v. Commonwealth*, 858 A.2d 185 (Pa. Cmwlth. 2004) (*en banc*), *aff’d*, 583 Pa. 44, 874 A.2d 1148 (2005).

One purpose of the 2004 amendments was to remove from the Pennsylvania Constitution the right to confront witnesses “face to face” so that the General Assembly could enact laws or the Pennsylvania Supreme Court could adopt rules that permit children to testify in criminal proceedings outside the physical presence of the accused. As a result of the 2004 amendments to the Pennsylvania Constitution, and the decision of the Commonwealth Court and the Supreme Court to uphold the constitutionality of the amendments, prosecutors can now utilize § 5985.

Unlike an earlier version, the current version of § 5985 has not been declared unconstitutional, and its use was approved by the Superior Court in *Commonwealth v. Charlton*, 902 A.2d 554 (Pa. Super. 2006), *appeal denied*, 590 Pa. 655, 911 A.2d 933 (2006).

Section 5985 states the following:

§ 5985. Testimony by contemporaneous alternative method

(a) **Contemporaneous alternative method.**—Subject to subsection (a.1), in any prosecution or adjudication involving a child victim or a child material witness, the court may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the

courtroom and transmitted by a contemporaneous alternative method. Only the attorneys for the defendant and for the Commonwealth, the court reporter, the judge, persons necessary to operate the equipment and any person whose presence would contribute to the welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during his testimony. The court shall permit the defendant to observe and hear the testimony of the child victim or child material witness but shall ensure that the child cannot hear or see the defendant. The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purposes of providing an effective defense. Examination and cross-examination of the child victim or child material witness shall proceed in the same manner as normally permitted.

(a.1) Determination.—Before the court orders the child victim or the child material witness to testify by a contemporaneous alternative method, the court must determine, based on evidence presented to it, that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant’s presence will result in the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim’s or child material witness’s ability to reasonably communicate. In making this determination, the court may do all of the following:

- (1) Observe and question the child victim or child material witness, either inside or outside the courtroom.
- (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(a.2) Counsel and confrontation.—

- (1) If the court observes or questions the child victim or child material witness under subsection (a.1)(1), the attorney for the defendant and the attorney for the Commonwealth have the right to be present, but the court shall not permit the defendant to be present.
- (2) If the court hears testimony under subsection (a.1)(2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

42 PA.CON.S.TAT.ANN. § 5985.

Accordingly, in pertinent part, the statutory framework can be concisely summarized as follows:

1. Applicability

- Prosecution or adjudication must involve a child victim or a child material witness. *See* 42 PA.CON.S.TAT.ANN. § 5985(a).

2. Manner

- The court may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and transmitted by a contemporaneous alternative method. *See* 42 PA.CON.S.TAT.ANN. § 5985(a).

3. Defendant's Rights

- The trial court must permit the defendant to observe and hear the testimony of the child victim or child material witness and to confer with his attorney. *See* 42 PA.CON.S.TAT. ANN. § 5985(a).

4. Commonwealth's Burden

- The Commonwealth must establish that, if forced to testify in an open forum in the presence and full view of the finder of fact or in the defendant's presence, the child victim or child material witness will suffer serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate. *See* 42 PA.CON.S.TAT.ANN. § 5985(a.1).
- This burden can be satisfied via a hearing with the child victim/witness or through the testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting. *See* 42 PA.CON.S.TAT.ANN. § 5985(a.1)

B. Closed-Circuit Television is Permissible Alternative Method

In *Commonwealth v. Charlton*, 902 A.2d at 559, the Superior Court of Pennsylvania affirmed a trial court's decision to permit a child victim of sexual assault to testify pursuant to § 5985 via closed-circuit television. In *Charlton*, the Commonwealth presented testimony from a psychotherapist that "the victim suffered from depression, suicidal thoughts, and post-traumatic stress disorder which likely would impact her ability to testify effectively" and that the child's testifying "in an open forum poses a significant risk for her emotional wellbeing." *Id.* (citation and internal quotation marks omitted).

6.6 EVIDENCE OF PROMPT COMPLAINT

A. Permissible in Prosecution's Case in Chief

Unlike the typical standard of a prior consistent statement of a witness, testimony or other evidence of a prompt complaint of a rape by an alleged victim may be introduced in the prosecution's case-in-chief. The justification is

that the “alleged victim’s testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part.” *Commonwealth v. O’Drain*, 829 A.2d 316, 322 (Pa. Super. 2002), citing *Commonwealth v. Freeman*, 441 A.2d 1327, 1331 (Pa. Super. 1982).³

Pennsylvania Rule of Evidence Rule 613(c), in addressing other circumstances of a prior consistent statement, provides:

(c) Evidence of prior consistent statement of witness.

Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:

- (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
- (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness’ denial or explanation.

“The fact that a victim made a prompt complaint is no longer required to sustain a rape conviction.” *Commonwealth v. Freeman*, 441 A.2d at 1331.⁴ However, the promptness of reporting a rape or sexual assault is a *factor* to be considered by the jury in such cases pursuant to 18 PA.CON.S.TAT.ANN. § 3105. See *Commonwealth v. Lane*, 521 Pa. 390, 397, 555 A.2d 1246, 1250 (1989) (holding that the striking of a jury venire member for cause by the trial judge because of the member’s willingness to consider a late filed complaint was improper).

According to 18 PA.CON.S.TAT.ANN. § 3105:

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant’s failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.

“Pennsylvania Rule of Evidence 613(c) is commonly known as the prompt complaint exception to the hearsay rule.” *Commonwealth v. O’Drain*, 829 A.2d at 322.

³ See also, *Commonwealth v. Dillon*, 863 A.2d 597, 602 (Pa. Super. 2004) (*en banc*), *appeal granted*, 584 Pa. 691, 882 A.2d 477 (2005).

⁴ Under Pennsylvania common law, the promptness of a complaint, or the “hue and cry” as it was referred to, was considered an element for a jury to consider when weighing the veracity of a complainant. See, e.g. *Commonwealth v. Allen*, 135 Pa. 483, 19 A. 957 (1890).

Pennsylvania Rule of Evidence 613(c)(1) allows evidence of prior consistent statements to rebut an express or implied charge of “fabrication, bias, improper influence or motive, or faulty memory.” In cases involving sexual assault, Rule 613 authorizes the Commonwealth to present evidence in its case-in-chief of a prompt complaint by the victim “because [the] alleged victim’s testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part.” Pa.R.Evid. 613(c) (comment), *citing Commonwealth v. Freeman*, 295 Pa. Super. 467, 441 A.2d 1327, 1331 (1982). “Evidence of a complaint of a sexual assault is ‘competent evidence, properly admitted when limited to establish that a complaint was made and also to identify the occurrence complained of with the offense charged.’” *Commonwealth v. Stohr*, 361 Pa.Super. 293, 522 A.2d 589, 592-593 (1987) (*en banc*), *quoting Commonwealth v. Freeman*, 295 Pa.Super. 467, 441 A.2d 1327, 1331 (1982).

Commonwealth v. O’Drain, 829 A.2d at 321-322.

B. Prompt Complaint Testimony Disallowed

Prompt complaint testimony has been disallowed when it exceeded its permissible limits. *Commonwealth v. Freeman*, 441 A.2d at 1331-1332.

- *Commonwealth v. Green*, 487 Pa. 322, 325-326, 409 A.2d 371, 373 (1979) (all encompassing statement by detective inadmissible since it goes beyond identifying complaint and its nature);
- *Commonwealth v. Pettiford*, 402 A.2d 532, 533 (Pa. Super. 1979) (court erred in admitting, as proof of “prompt complaint,” testimony of three witnesses, one of whom recounted the victim’s rape in great detail).

6.7 RESISTANCE NOT REQUIRED

To prove that a defendant is guilty of a sexual offense, a prosecutor does not have to show that the victim resisted the actions of the defendant.⁵

18 PA.CON.S.TAT.ANN. § 3107 provides:

The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.

⁵ *Commonwealth v. Smith*, 863 A.2d 1172, 1176 (Pa. Super. 2004) (with reference to Sexual Assault, a felony of the second degree under 18 PA.CON.S.TAT.ANN. § 3124.1, “[r]esistance to sexual assault is not required to sustain a conviction.”).

While a victim's nonresistance to the defendant is generally not an element in any criminal offense, it was expressly made a statutory nonrequirement in prosecutions for criminal sexual conduct. The statutory codification of the non-requirement of resistance reflects the belief that there are legitimate reasons for a victim's nonresistance.

For instance, a victim may have the capability to resist but voluntarily choose not to, such as when the victim believes that resistance will cause even greater harm or death. Indeed, a victim may be so frightened and panicked at the thought of being seriously harmed or killed that he or she becomes physically immobilized by the fear or does not know what to do to thwart the sexual assault. A victim may also be physically unable to resist a perpetrator's actions because of restraints, intoxication, unconsciousness, mental incapacity, or physical helplessness.⁶

However, while the victim of a sexual assault need not resist, in prosecutions for Rape under 18 PA.CON.S.TAT.ANN. § 3121, the prosecution must prove the element of forcible compulsion, i.e., the force needs to be such as to demonstrate an absence of consent, including submission without further resistance. *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994); *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).⁷

6.8 EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS

A. Prohibition Against Use of Prior Bad Acts/Criminal Activity

The basic principle of Pa.R.Evid. 404 is consistent with F.R.E. 404 and prior Pennsylvania case law. This means that Pa.R.Evid. 404, with certain enumerated exceptions, provides that evidence of prior bad acts or criminal activity cannot be used to prove conduct on a specific date:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

Pa.R.Evid. 404(b)(1).⁸ Evidence of a defendant's prior criminal activity may not be admitted solely to establish his bad character or criminal propensity.⁹

⁶ MICHIGAN JUDICIAL INSTITUTE, SEXUAL ASSAULT BENCHBOOK, (2002), § 7.10, pp. 369–370.

⁷ It is well accepted that 18 Pa.Cons.Stat. nn. § 3124.1, Sexual Assault, was enacted in response to the Pennsylvania Supreme Court's decision in *Commonwealth v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (1994). "The statute is intended to fill the loophole left by the rape and involuntary deviate sexual intercourse statutes by criminalizing non-consensual sex where the perpetrator employs little if no force." *Commonwealth v. Pasley*, 743 A.2d 521, 524 n.3 (Pa. Super. 1999), *appeal denied*, 563 Pa. 674, 759 A.2d 922 (2000).

⁸ Pa.R.Evid. 404, cmt.

⁹ *Commonwealth v. Watkins*, 577 Pa. 194, 215, 843 A.2d 1203, 1215 (2003), *reargument denied* (2004), *cert. denied*, *Watkins v. Pennsylvania*, 543 U.S. 960, 125 S.Ct. 450, 160 L.Ed.2d 324 (2004).

B. Admissibility of Evidence Under Pa.R.Evid., Rule 404(b)

Subsection (b) of Pa.R.Evid. 404 recognizes legitimate evidentiary purposes for the introduction of evidence of other crimes, wrongs or bad acts. Under Pennsylvania law, evidence of other crimes, wrongs or bad acts offered for a legitimate evidentiary purpose is admissible only if its probative value outweighs the potential for prejudice. *See Commonwealth v. Morris*, 493 Pa. 164, 175, 425 A.2d 715, 720 (1981). Pa.R.Evid. 404(b)(3) codifies Pennsylvania decisional law and is an exception to the general rule defined by Pa.R.Evid. 403.¹⁰

Rule 404(b)(2) states that evidence of **other crimes, wrongs, or acts** may be admitted for other purposes, such as proof of:

- motive,
- opportunity,
- intent,
- preparation,
- plan,
- knowledge,
- identity or
- absence of mistake or accident.

1. Natural History of the Case or Natural Development of the Facts

“Evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts.”¹¹

- ***Commonwealth v. Spatz***, 552 Pa. 499, 513, 716 A.2d 580, 586 (1998), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1466, 143 L.Ed.2d 551 (1999) (***Spatz*** I): The Supreme Court of Pennsylvania recognized that evidence of prior bad acts or crimes may be admitted where such evidence was part of the chain or sequence of events which became part of the history of the case in question and formed part of the natural development of the facts.
- ***Commonwealth v. Lark***, 518 Pa. 290, 303, 543 A.2d 491, 497 (1988): “[E]vidence of another crime may also be introduced where such evidence was part of the chain or sequence of events which became part of the history of the case in question and formed part of the natural development of the facts.”

¹⁰ Pa.R.Evid. 404, cmt.

¹¹ ***Commonwealth v. Watkins***, 577 Pa. at 215, 843 A.2d at 1215; ***Commonwealth v. Collins***, 550 Pa. 46, 55, 703 A.2d 418, 423 (1997), *cert. denied*, ***Collins v. Pennsylvania***, 525 U.S. 1015, 119 S.Ct. 538, 142 L.Ed.2d 447 (1998).

2. Impeachment Evidence

(a) Impeachment of Testifying Defendant

Evidence of other crimes, wrongs or acts may be used to impeach the testimony of a testifying defendant.¹²

(b) Impeachment of Testifying Character Witness

The Pennsylvania Supreme Court noted in *Commonwealth v. Peterkin*, 511 A.2d 299, 318, 513 A.2d 373, 382-383 (1986), *cert. denied*, *Peterkin v. Pennsylvania*, 479 U.S. 1070, 107 S.Ct. 962, 93 L.Ed.2d 1010 (1987), that “although evidence of good character may not be rebutted by evidence of specific acts of misconduct, a character witness may be cross-examined regarding his knowledge of particular acts of misconduct by the defendant to test the accuracy of his testimony and the standard by which he measures reputation.”¹³

3. Introduction of Prior Bad Acts that are Used to Threaten the Victim

Evidence of other crimes, wrongs or acts may be introduced when the defendant has used the prior bad acts to threaten the victim.⁷

- In *Commonwealth v. Claypool*, 508 Pa. 198, 205, 495 A.2d 176, 179 (1985), the Pennsylvania Supreme Court held that the trial court properly admitted evidence of the defendant’s statements that he had committed prior rapes because it was relevant to his attempts to scare her into submission.
- *Commonwealth v. Corley*, 638 A.2d 985, 987-988, (Pa. Super. 1994), *appeal denied*, 538 Pa. 641, 647 A.2d 896 (1994): in prosecution for rape and involuntary deviate sexual intercourse, among other charges, the defendant’s statement to rape victim that he had “done this twice before” was properly admitted to show threat or force in rape of victim.

4. Common Scheme, Plan or Design

Evidence of prior bad acts or criminal conduct may be admitted to show a common pattern, to establish a scheme, plan or design.

- *Commonwealth v. Elliott*, 549 Pa. 132, 146-147, 700 A.2d 1243, 1249-1250 (1997), *cert. denied*, 524 U.S. 955, 118 S.Ct. 2375, 141 L.Ed.2d 742 (1998): In prosecution for murder, rape and involuntary deviate sexual intercourse, because trial court gave several cautionary instructions to the jury indicating that evidence of defendant’s prior sexual attacks on three different victims could not be used to infer bad character or

¹² *Commonwealth v. Reid*, 571 Pa. 1, 35, 811 A.2d 530, 550 (2002), *cert. denied*, *Reid v. Pennsylvania*, 540 U.S. 850, 124 S.Ct. 131, 157 L.Ed.2d 92 (2003).

¹³ *Commonwealth v. Busanet*, 572 Pa. 535, 551, 817 A.2d 1060, 1069 (2002), *cert. denied*, *Busanet v. Pennsylvania*, 540 U.S. 869, 124 S.Ct. 192, 157 L.Ed.2d 126 (2003).

¹⁴ *Commonwealth v. Reid*, 571 Pa. at 35, 811 A.2d at 550.

criminal tendencies and repeated this cautionary charge in the final instructions, no prejudice was found from use of this evidence to establish common scheme, plan or design.

- There were sufficient factual similarities between two crimes involving the sexual assault of young boys to show a common scheme plan or design in ***Commonwealth v. O'Brien***, 836 A.2d 966 (Pa. Super. 2003), *appeal denied*, 577 Pa. 695, 845 A.2d 817 (2004). Therefore, the evidence of a defendant's prior sexual assaults of children was admissible in prosecution of defendant for currently alleged sexual assault of a minor.

5. Knowledge, Identity or Absence of Mistake or Accident

In ***Commonwealth v. Boczkowski***, 577 Pa. 421, 444-445, 846 A.2d 75, 88-89 (2004), the Court found remarkable similarities between the manner in which both of the defendant's wives were killed; therefore, evidence concerning the circumstances of his first wife's death supported a reasonable inference that his second wife's death was not accidental, but rather was a result of a deliberate act. Therefore, the Court found that the evidence was highly relevant and that its probative value outweighed any potential for unfair prejudice.

6. Motive

A defendant's motive in committing one crime may be to conceal, or to prevent his conviction of, a previous crime. *See Commonwealth v. Paddy*, 569 Pa. 47, 71-72, 800 A.2d 294, 309-310 (2002).

- ***Commonwealth v. Spatz***, 552 Pa. at 512-513, 716 A.2d at 586 (***Spatz I***): "[W]hile evidence of a defendant's prior criminal activity is generally inadmissible, this Court has recognized that there are certain exceptions to the rule. ***Commonwealth v. Walker***, 540 Pa. 80, 656 A.2d 90, 99 (1995), *cert. denied*, 516 U.S. 854, 116 S.Ct. 156, 133 L.Ed.2d 100 (1995). For example, evidence of prior criminal activity may be admitted if introduced to show motive, intent, absence of mistake or accident, a common scheme or identity."

C. Prerequisite for Use - Reasonable Notice

The prosecution must provide reasonable notice of its intent to introduce other crimes, wrongs or acts, unless the court excuses such notice upon good cause shown.¹⁵ Pa.R.Evid. 404(b)(4) provides:

In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of any such evidence it intends to introduce at trial.

¹⁵ Pa.R.Evid. 404(b)(4).

D. Prerequisite for Use – Probative Value

Pa.R.Evid. 404(b)(3) provides:

Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

Evidence of other crimes, wrongs or acts is only admissible if the probative value outweighs the potential for prejudice.¹⁶ See **Commonwealth v. Morris**, 493 Pa. 164, 175, 425 A.2d 715, 720 (1981).

- **Commonwealth v. O'Brien**, 836 A.2d at 972: the Superior Court found the probative value of the evidence of the defendant's prior sexual assaults of children outweighed its prejudicial effect because it tended to show common scheme, plan or design exception to the general rule, in that all of the charges stemmed from defendant's sexually assaulting young boys and all of the victims shared similar personal characteristics, and the crimes were not too remote in time.

1. The Remoteness Test

Remoteness is a factor in the determination of the probative value of prior bad acts or criminal conduct of the defendant. **Commonwealth v. Shively**, 492 Pa. 411, 416, 424 A.2d 1257, 1259 (1981).

- See **Commonwealth v. Smith**, 635 A.2d 1086, 1089 (Pa. Super. 1993): "the issue of remoteness under the common plan exception is determined by analyzing the time involved between each of the criminal incidents."
- **Commonwealth v. Frank**, 577 A.2d 609, 614 (Pa. Super. 1990), *appeal denied*, 526 Pa. 629, 584 A.2d 312 (1990): "If the evidence reveals that the details of each criminal incident are nearly identical, the fact that the incidents are separated by a lapse of time will not likely prevent the offer of evidence unless the time is excessive."

E. Prerequisite for Use – Cautionary Instruction

An appropriate cautionary instruction should be given whenever evidence of a defendant's prior criminal activity is admitted for one of the legitimate purposes under Pa.R.Evid. 404(b). The instruction should be given at the time the evidence is admitted and repeated in the final charge to the jury.

- In **Commonwealth v. Claypool**, 508 Pa. 198, 205, 495 A.2d 176, 179 (1985), the Pennsylvania Supreme Court held that the trial court properly admitted

¹⁶ Pa.R.Evid. 404(b)(3). See, **Commonwealth v. Santiago**, 822 A.2d 716, 728 (Pa. Super. 2003), *appeal denied*, 577 Pa. 679, 843 A.2d 1237(2004), *cert. denied*, 124 S.Ct. 2916, 159 L.Ed.2d 820, 72 WSLW 3768 (2004) (the prejudicial impact of the jury learning that the defendant had been on parole outweighed the probative value – it would have led the jury to conclude that he had a prior serious record).

evidence, with a cautionary instruction, of the defendant's statements to victim that he had committed prior rapes because it was relevant to his attempts to scare her into submission.

- A cautionary instruction by the trial court lessens a claim of prejudice. *Commonwealth v. Watkins*, 577 Pa. at 215, 843 A.2d at 1215.
- *Commonwealth v. Spatz*, 562 Pa. 498, 524-525, 756 A.2d 1139, 1153 (2000) (*Spatz II*), *cert. denied*, *Spatz v. Pennsylvania*, 532 U.S. 932, 121 S.Ct. 1381, 149 L.Ed.2d 307 (2001): No prejudice shown when trial court clearly instructed jury that it could only consider other crimes evidence for relevant limited purposes and not merely as evidence of appellant's propensity to commit crimes.

6.9 SELECTED HEARSAY RULES AND EXCEPTIONS

A. Hearsay Generally Not Admissible

Hearsay is not admissible except as provided in the Pennsylvania Rules of Evidence, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.¹⁷ When hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections:

- (1) admission of the evidence would violate the hearsay rule;
- (2) admission of the evidence would violate defendant's right to confront the witnesses against him under the Sixth Amendment to the United States Constitution; and
- (3) admission of the evidence would violate defendant's right of confrontation under Article I, Section 9 of the Pennsylvania Constitution.¹⁸

Note that "hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."¹⁹

Rule 801 of the Pennsylvania Rules of Evidence states the following:

The following definitions apply under this article:

- (a) Statement. A "**statement**" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. A "**declarant**" is a person who makes a statement.

¹⁷ Pa.R.Evid. 802.

¹⁸ Pa.R.Evid., Rule 801, introductory cmt.

¹⁹ Pa.R.Evid., 805.

- (c) Hearsay. “**Hearsay**” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

“A statement, other than one made by the declarant while testifying at the trial or hearing (an out-of-court statement), is hearsay only if it is offered to prove the truth of the matter asserted.”²⁰

B. Exceptions to the Hearsay Rule: *Availability of Declarant Immaterial*

Rule 803 of the Pennsylvania Rules of Evidence provides that certain out of court statements are not excluded by the hearsay rule, even though the declarant may or may not be available as a witness.²¹

The Rule provides:

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant’s will.

(4) Statements for purposes of medical diagnosis or treatment. A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

²⁰ Pa.R.Evid., Rule 801, cmt.

²¹ Pa.R.Evid. 803.

(5) Recorded recollection: not adopted; addressed in Pa.R.Evid. 803.1(3).

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6): not adopted.

(8) Public records and reports: not adopted; an exception to the hearsay rule for public records is provided in 42 Pa.Cons.Stat. Ann. § 6104.

(9) Records of vital statistics: not adopted; records of vital statistics are also business records and may be excepted to the hearsay rule by Pa.R.Evid. 803(6). Records of vital statistics are public records and they may be excepted to the hearsay rule by 42 Pa.C.S.A. § 6104 (text quoted in Comment to Pa.R.Evid. 803(8)).

(10) Absence of public record or entry: not adopted;

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document, other than a will, purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises: not adopted; Pennsylvania does not recognize an exception to the hearsay rule for learned treatises.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction: not adopted; with respect to facts essential to sustain a judgment of criminal conviction, there are four basic approaches that a court can take:

1. The judgment of conviction is conclusive, i.e., estops the party convicted from contesting any fact essential to sustain the conviction.
2. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction, only if offered against the party convicted.
3. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction when offered against any party (this is the federal rule for felonies, except that the Government cannot offer someone else's conviction against the defendant in a criminal case, other than for purposes of impeachment).
4. The judgment of conviction is neither conclusive nor admissible as evidence to prove a fact essential to sustain the conviction (common law rule).

(23) Judgment as to personal, family, or general history or boundaries: not adopted.

(24) Other exceptions: not adopted.

(25) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement may be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

1. Present Sense Impression – Pa.R.Evid., Rule 803(1)

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

“For this exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory.”²²

- ***Commonwealth v. Harper***, 614 A.2d 1180, 1183 (Pa. Super. 1992), *appeal denied*, 533 Pa. 649, 624 A.2d 109 (1993): in prosecution for rape and other charges, trial court properly admitted testimony of police officer who repeated statement of defendant’s girlfriend, i.e., when she looked into the window of the victim’s house, she observed a sock on the victim’s bed which belonged to her boyfriend. This was within present-sense-impression exception to hearsay rule and admissible; the girlfriend’s statement was contemporaneous verbalization of her having observed the sock on the bed when she had looked into window and there was no opportunity for retrospective thought on her part prior to her relating her impression to the police officer.

2. Excited Utterance – Pa.R.Evid., Rule 803(2)

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

An excited utterance is “a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”²³ The comments to Pa.R.Evid. 803(2) provide:

There is no set time interval following a startling event or condition after which an utterance relating to it will be ineligible for exception to the hearsay rule as an excited utterance. In ***Commonwealth v. Gore***, 262 Pa. Super. 540, 547-48, 396 A.2d 1302, 1305 (1978), the court explained: The declaration need not be strictly contemporaneous with the existing cause, nor is there a definite and fixed time limit. . . . Rather, each case must be judged on its own facts, and a lapse of time of several hours has not negated the characterization of a statement as an “excited utterance.” . . . The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the

²² Pa.R.Evid. 803(1), cmt.

²³ Pa.R.Evid., Rule 803(2), cmt.

nervous excitement continues to dominate while the reflective processes remain in abeyance.²⁴

“An excited utterance (1) need not describe or explain the startling event or condition; it need only relate to it, and (2) need not be made contemporaneously with, or immediately after, the startling event. It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.”²⁵

- ***Commonwealth v. Crosby***, 791 A.2d 366, 370-371 (Pa. Super. 2002): in a prosecution for indecent assault, the trial court properly admitted the testimony of the victim’s mother as to what the victim had told her, i.e., the indecent assault when she was alone with the defendant. The testimony was admissible under the excited utterance exception to the hearsay rule because the victim’s statements were made within minutes of the event, the victim’s mother stated that the victim had lowered her head while she talked, which indicated that she was upset, and the victim cried while she described the event.
- ***Commonwealth v. Clark***, 512 A.2d 1282, 1284 (Pa. Super. 1986), *appeal denied*, 514 Pa. 638, 523 A.2d 345 (1987): trial court properly admitted hearsay testimony of police officer, under “excitable utterance” exception to hearsay rule, regarding victim’s statement to him that defendant had penetrated her, which statement was made immediately after the rape occurred.
- ***Commonwealth v. Pettiford***, 402 A.2d 532, 533 (Pa. Super. 1979): The trial court properly admitted the hearsay testimony of three witnesses, one of whom was allowed to recount the entire criminal episode of the rape in great detail, as told to her by the victim shortly after the rape occurred, under the excitable utterance exception. The victim had been subjected to a forcible rape and was in a hysterical state of mind when, 15 to 20 minutes after the rape occurred, the victim recounted its details to the witnesses.

3. Then Existing Mental, Emotional, or Physical Condition – Pa.R.Evid., Rule 803(3)

(3) Then existing mental, emotional, or physical condition.

A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant’s will.

²⁴ Pa.R.Evid., Rule 803(2), cmt.

²⁵ *Id.*

This rule is sometimes referred to as the “*state of mind*” exception. See ***Commonwealth v. Pronkoskie***, 477 Pa. 132, 383 A.2d 858 (1978) (statements of present physical condition and emotional feelings); ***Commonwealth v. Marshall***, 287 Pa. 512, 135 A. 301 (1926) (statement of intent or plan); ***Ickes v. Ickes***, 237 Pa. 582, 85 A. 885 (1912) (statement of motive or design).²⁶

“A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief offered to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant’s will.”²⁷

- ***Commonwealth v. Jorden***, 482 A.2d 573, 579 (Pa. Super. 1984): in rape case, trial court properly admitted testimony of investigating detective’s observations of the victim, four hours after the rape, to demonstrate the victim’s state of mind at the time of her statement. The complainant was crying, sobbing and trembling, which helped to explain the inconsistencies in her testimony because she was upset.

4. Statements for Purposes of Medical Diagnosis or Treatment- Pa.R.Evid., Rule 803(4)

(4) Statements for purposes of medical diagnosis or treatment. A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, diagnosis in contemplation of treatment.

In ***Commonwealth v. Smith***, 545 Pa. 487, 493, 681 A.2d 1288, 1291 (1996), the Supreme Court stated that there are essentially two requirements for a statement to come within this exception:

First, the declarant must make the statement for the purpose of receiving medical treatment; and

Second, the statement must be necessary and proper for diagnosis and treatment.

Note that statements are only admissible if they are made in contemplation of treatment: “A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as

²⁶ Pa.R.Evid. 803(3), cmt.

²⁷ Pa.R.Evid. 803(3), cmt.

reasonably pertinent to treatment, or diagnosis in contemplation of treatment.”²⁸ “The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully.”²⁹

This exception is not limited to statements made to physicians. Statements to a nurse have been held to be admissible.³⁰

(a) Prohibition: Statements for Purposes of Litigation

“Statements made to persons retained solely for the purpose of litigation are not admissible under this rule.”³¹

(b) Prohibition: Identification Statements

“Statements as to causation may be admissible, but statements as to fault or identification of the person inflicting harm have been held to be inadmissible.” *Commonwealth v. Smith*, 545 Pa. 487, 496, 681 A.2d 1288, 1293 (1996).

- ***Commonwealth v. D.J.A.*, 800 A.2d 965, 976-977 (Pa. Super. 2002) (en banc), appeal denied**, 579 Pa. 700, 857 A.2d 677 (2004): **in case in which defendant was charged with rape, involuntary deviate sexual intercourse, indecent assault, corruption of minors, and endangering the welfare of children, trial court properly held as inadmissible the minor victim’s statement to her doctor, which statement in addition to explaining her condition, identified the defendant as the assailant. The Superior Court rejected the prosecution’s argument that the threat of a sexually transmitted disease exempts sexual assault cases from the general rule that identification of the person inflicting the harm is not admissible under this hearsay exception.**

5. Records of Regularly Conducted Activity – Pa.R.Evid., Rule 803(6)

(5) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of

²⁸ Pa.R.Evid. 803(4), cmt (emphasis added).

²⁹ *Id.*

³⁰ See *Commonwealth v. Smith*, 545 Pa. 487, 494, 681 A.2d 1288, 1291 (1996).

³¹ Pa.R.Evid. 803(4), cmt.

trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

“A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”³²

- ***Commonwealth v. Campbell***, 368 A.2d 1299, 1301-1302 (Pa. Super. 1976) (*en banc*): in rape trial, prosecution called representative of medical records department of hospital where the complainant had been taken to introduce medical records which indicated that spermatozoa was present in victim at time of examination. Superior Court affirmed trial court’s decision that the tests to determine the presence of sperm were basic and routine and led to an indication of “fact” and not a conclusion or opinion.

(a) Authentication

Records of regularly conducted activity may be authenticated by certification. This amendment is designed to save the expense and time consumption caused by calling needless foundation witnesses. The notice requirements provided in Pa.R.Evid. 902(11) and (12) will give other parties a full opportunity to test the adequacy of the foundation.³³

(b) Prohibition: Opinions and Diagnoses

“Pa.R.Evid. 803(6) does not include opinions and diagnoses.”³⁴

(c) Prohibition: Lack of Trustworthiness

Additionally, Pa.R.Evid. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if the “sources of information or other circumstances indicate lack of trustworthiness.”³⁵

³² Pa.R.Evid. 803(6), cmt.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

(d) Prohibition: Confrontation Clause

If offered against a defendant in a criminal case, an entry in a business record may be excluded if its admission would violate the defendant's constitutional right to confront the witnesses against him or her. *See Commonwealth v. Mc Cloud*, 457 Pa. 310, 315-316, 322 A.2d 653, 656-657 (1974).³⁶

- In *Commonwealth v. Mitchell*, 570 A.2d 532, 534 (Pa. Super. 1990), *appeal denied*, 527 Pa. 599, 589 A.2d 689 (1990), the defendant was charged with murder and rape, *inter alia*. At trial, the medical examiner was permitted to read facts from the autopsy report, not any opinions or conclusion from the doctor who had prepared the report, and then opined based upon those facts. The Superior Court found no error or violation of the Confrontation Clause, and stated that "Experts may offer testimony based on the reports of others."

(e) The Uniform Business Records as Evidence Act

Note that PA R.E. 803(6) differs only slightly from 42 PA.CON.S.TAT. § 6108, which provides:

(a) Short title of section. - This section shall be known and may be cited as the "Uniform Business Records as Evidence Act."

(b) General Rule. - A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

(c) Definition. - As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.

6. Admission by Party-Opponent

An admission by a party-opponent is admissible when the statement is offered against a party and is either:

- (A) the party's own statement in either an individual or a representative capacity, or
- (B) a statement of which the party has manifested an adoption or belief in its truth, or
- (C) a statement by a person authorized by the party to make a statement concerning the subject, or

³⁶ Pa.R.Evid., Rule 803(6), cmt.

- (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
- (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement may be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).³⁷

C. Exceptions to the Hearsay Rule: *Availability of Declarant Necessary*

Rule 803.1 of the Pennsylvania Rules of Evidence states:

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement:

(1) Inconsistent statement of witness. A statement by a declarant that is inconsistent with the declarant's testimony, and (a) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement.

(2) Statement of identification. A statement by a witness of identification of a person or thing, made after perceiving the person or thing, provided that the witness testifies to the making of the prior identification.

(3) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, providing that the witness testifies that the record correctly reflects that knowledge. If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

D. Exceptions to the Hearsay Rule: *Declarant Unavailable*

Pennsylvania Rule of Evidence 804 provides for exceptions to the hearsay rule under circumstances in which the declarant is unavailable at trial. The rule states:

³⁷ Pa.R.Evid. 803(25), cmt.

Hearsay Exceptions. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. A statement, made before the controversy arose:

(A) concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage, or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions [not adopted].

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Rule 804 of the Pennsylvania Rules of Evidence defines unavailability as follows:

“Unavailability as a witness” includes situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant’s statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability due to death or illness, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.³⁸

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

1. Former Testimony, Pa.R.Evid., Rule 804(b)(1)

Former testimony is “testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”³⁹

“Depositions are the most common form of prior testimony that is introduced at a modern trial. Their use is provided for not only by Pa.R.Evid. 804(b)(1), but also by statute and rules of procedure promulgated by the Pennsylvania Supreme Court.”⁴⁰

³⁸ Pa.R.Evid. 804(a).

³⁹ Pa.R.Evid. 804, cmt.

⁴⁰ *Id.*

The admissibility of depositions in a criminal case is governed by 42 PA.CON.S.TAT.ANN. § 5919 which provides:

The testimony of witnesses taken in accordance with section 5325 (relating to when and how a deposition may be taken outside this Commonwealth) may be read in evidence upon the trial of any criminal matter unless it shall appear at the trial that the witness whose deposition has been taken is in attendance, or has been or can be served with a subpoena to testify, or his attendance otherwise procured, in which case the deposition shall not be admissible.

“The Pennsylvania Supreme Court, as a matter of common law development, has recognized an exception to the hearsay rule for depositions that is broader than the statute. *See Commonwealth v. Stasko*, 471 Pa. 373, 370 A.2d 350 (1977).”⁴¹

2. Statement Under Belief of Impending Death

A statement made under belief of impending death is “a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.”⁴² Statements that qualify under this exception are admissible in all cases, which is a departure from prior Pennsylvania law.⁴³

3. Statement Against Interest

A statement against interest is defined as “a statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.”⁴⁴

4. Forfeiture by Wrongdoing

Hearsay is admissible under the forfeiture by wrongdoing exception when it is “a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”⁴⁵

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Pa.R.Evid. 804, cmt.

⁴⁵ Pa.R.Evid. 804, cmt.

E. Attacking and Supporting the Credibility of the Declarant of a Hearsay Statement

Rule 806 of the Pennsylvania Rules of Evidence states:

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

“The requirement that a witness be given an opportunity to explain or deny the making of an inconsistent statement provided by Pa.R.Evid. 613(b) is not applicable when the prior inconsistent statement is offered to impeach a statement admitted under an exception to the hearsay rule. In most cases, the declarant will not be on the stand at the time when the hearsay statement is offered and for that reason the requirement of Pa.R.Evid. 613(b) is not appropriate.”⁴⁶

6.10 SPECIAL HEARSAY EXCEPTION: TENDER YEARS EXCEPTION

The “tender years exception” to rule against hearsay permits a hearsay statement of a child sexual abuse victim, or a child witness, under the age of twelve to be admissible if the evidence is relevant and if the time, content and circumstances of the statement provide sufficient indicia of reliability. *Commonwealth v. Hunzer*, 868 A.2d 498, 510 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005). “The tender years exception allows for the admission of a child’s out-of-court statement due to the fragile nature of young victims of sexual abuse.” *Commonwealth v. Fink*, 791 A.2d 1235, 1248 (Pa. Super. 2002).

Under 42 PA.CON.S.TAT.ANN. § 5985.1, certain out of court statements of child victims and child witnesses are admissible under the following standards:

Child Victims and Witnesses

5985.1. Admissibility of certain statements

(a) **General rule.**—An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs.

⁴⁶ Pa.R.Evid. 806, cmt.

25 (relating to criminal homicide),
27 (relating to assault),
29 (relating to kidnapping),
31 (relating to sexual offenses),
35 (relating to burglary and other criminal intrusion), and
37 (relating to robbery), not otherwise admissible by statute or
rule of evidence, is admissible in evidence in any criminal or
civil proceeding if:

- (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
- (2) the child either:
 - (i) testifies at the proceeding; or
 - (ii) is unavailable as a witness.

(a.1) Emotional distress.—In order to make a finding under subsection (a)(2) (ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress that would substantially impair the child’s ability to reasonably communicate. In making this determination, the court may do all of the following:

- (1) Observe and question the child, either inside or outside the courtroom.
- (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.

(a.2) Counsel and confrontation.—If the court hears testimony in connection with making a finding under subsection (a)(2)(ii), all of the following apply:

- (1) Except as provided in paragraph (2), the defendant, the attorney for the defendant and the attorney for the Commonwealth or, in the case of a civil proceeding, the attorney for the plaintiff has the right to be present.
- (2) If the court observes or questions the child, the court shall not permit the defendant to be present.

(b) Notice required.—A statement otherwise admissible under subsection (a) shall not be received into evidence unless the proponent of the statement notifies the adverse party of the proponent’s intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

A. Factors to be Considered for Admission

The factors to be considered by a trial court in determining whether the child's out-of-court statement should be admitted are designed to assist the court in determining whether the child-declarant was likely to be telling the truth when the statement was made:

- (1) the spontaneity and consistent repetition of the statement(s);
- (2) the mental state of the declarant;
- (3) the use of terminology unexpected of a child of similar age; and
- (4) the lack of motive to fabricate.

Commonwealth v. Lyons, 833 A.2d 245, 255 (Pa. Super. 2003), *appeal denied*, 583 Pa. 695, 879 A.2d 782 (2005); **Commonwealth v. Hanawalt**, 615 A.2d 432, 438 (Pa. Super. 1992).

B. Notice Requirement

Pennsylvania courts, thus far, have strictly applied the notice requirements of the tender years exception: in **Commonwealth v. Crossley**, 711 A.2d 1025, 1028 (Pa. Super. 1998), a panel of the Superior Court held that the tender years exception statute mandates more than ordinary discovery and mandates heightened discovery. The statute requires that the proponent of the out-of-court statement, in order to provide the adverse party with a fair opportunity to prepare, must:

- notify the adverse party, sufficiently in advance of trial, of the proponent's intention to use the statement at trial; and
 - notify the adverse party, sufficiently in advance of trial, of the particulars of the statement.
- **Commonwealth v. O'Drain**, 829 A.2d at 320–321: notice requirement satisfied when Commonwealth gave separate and distinct notice, beyond the requirements of discovery, to defendant of its intention to proceed by way of the tender years exception; Commonwealth did not merely provide defendant with discovery packet containing relatives' statements - Commonwealth specified in its notice that it might introduce at trial testimony that child told her mother that the defendant kissed her with his tongue on various parts of her body.
 - **Commonwealth v. Hunzer**, 868 A.2d 498, 511 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005): It was not necessary that notice contain exact word-for-word recitation of the out-of-court statement, but only that notice contain "the particulars of the statement."

6.11 COMPETENCY OF WITNESSES

A. Pennsylvania Rule of Evidence 601

Pennsylvania Rule of Evidence 601 provides:

- a. General Rule. Every person is competent to be a witness except as otherwise provided by statute or in these Rules.
- b. Disqualification for Specific Defects. A person is incompetent to testify if the Court finds that because of a mental condition or immaturity the person:
 - (1) is, or was, at any relevant time, incapable of perceiving accurately;
 - (2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
 - (3) has an impaired memory; or
 - (4) does not sufficiently understand the duty to tell the truth.

42 PA.CON.S.TAT.ANN. §§ 5911 and 5921 provide that all witnesses are competent except as otherwise provided. Pennsylvania statutory law provides several instances in which witnesses are incompetent. *See, e.g.,* 42 PA.CON.S.TAT.ANN. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 PA.CON.S.TAT.ANN. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 PA.CON.S.TAT.ANN. §§ 5925, 5926, and 5927); 42 PA.CON.S.TAT.ANN. §§ 5930-5933 and 20 PA.CON.S.TAT.ANN. § 2209 (“Dead Man’s Statute”).

Pa.R.Evid. 601(b) is consistent with Pennsylvania law concerning the competency of persons with a mental defect and children of tender years. *See Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (immaturity). The application of the standards in Pa.R.Evid. 601(b) is a factual question to be resolved by the Court. Expert testimony has been used when competency under these standards has been an issue. *E.g., Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976); *Commonwealth v. Gaertner*, 484 A.2d 92 (Pa. Super. 1984). Pa.R.Evid. 601(b) is intended to preserve existing law and not to expand it.

B. Spousal Competence

Spousal competence in criminal cases is governed by 42 PA.CON.S.TAT.ANN. § 5913 which provides, in pertinent part:

Except as otherwise provided in this subchapter, in a criminal proceeding a person shall have the privilege, which he or she may waive, not to testify against his or her then lawful spouse except that there shall be no such privilege . . .

(1) in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor child in their care or custody, or in the care or custody of either of them; or

...

(4) in any criminal proceeding in which one of the charges pending against the defendant includes murder, involuntary deviate sexual intercourse or rape.

Not only is a spouse competent to testify when these exceptions apply, he or she may be compelled to testify. ***Commonwealth v. Hess***, 411 A.2d 830, 833 (Pa. Super. 1979), *appeal dismissed*, 499 Pa. 206, 452 A.2d 1011 (1982).

- Requirement that spouse or minor in a protected class be the victim:

The statutory exception to the spousal privilege in criminal proceedings, provided in 42 PA. CONS. STAT. § 5913, is limited to proceedings in which the person was on trial for an act against his spouse, or against a minor child in the protected class.

- ***Commonwealth v. Scott***, 516 Pa. 346, 532 A.2d 426 (1987) (Defendant's estranged wife could not testify about the defendant's violence toward her boyfriend). As long as a spouse or minor child in the protected class is one of the victims in a criminal proceeding, the spousal privilege does not apply.

- ***Commonwealth v. John***, 596 A.2d 834 (Pa. Super. 1991) (Spousal privilege did not apply in a criminal proceeding where the husband was on trial for attempting to burn down a bingo hall that his wife was in).

- **Requirement of a valid marriage:**

The basis for invoking the marital privilege is the existence of a valid marriage; where at the time the woman was living with defendant she was still legally married to another man, therefore the woman and defendant were not validly married so the marital privilege did not apply.

Commonwealth v. Maxwell, 505 Pa. 152, 477 A.2d 1309 (1984), *cert. denied*, 469 U.S. 971, 105 S.Ct. 370, 83 L.Ed.2d 306 (1984).

C. Competency of Child

In addressing an objection to the competency of a minor who testifies, there are a number of standard policies:

- (1) a child witness, like any other witness, is presumed competent to testify unless proven otherwise. ***In Interest of J.R.***, 648 A.2d 28, 31 (Pa. Super. 1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995).
- (2) the burden to prove that a witness is not competent falls on the objecting party. ***Commonwealth v. Short***, 420 A.2d 694, 696 (Pa. Super. 1980).

- (3) the determination of a witness's competency to testify is left to the sound discretion of the trial judge, and the judge's ruling on the matter will not be reversed absent a flagrant abuse of that discretion. **Commonwealth v. Delbridge**, 580 Pa. 68, 73, 859 A.2d 1254, 1257 (2004) (case involved a child sexual abuse victim).
- (4) When the witness is under fourteen years of age, there must be a searching judicial inquiry as to mental capacity, but discretion nonetheless resides in the trial judge to make the ultimate decision as to competency. **Commonwealth v. D.J.A.**, 800 A.2d 965, 969 (Pa. Super. 2002), *appeal denied*, 579 Pa. 700, 857 A.2d 677 (2004).
- (5) **Commonwealth v. Hunzer**, 868 A.2d 498, 507 (Pa. Super. 2005), *appeal denied*, 584 Pa. 673, 880 A.2d 1237 (2005): In making its determination, the court must inquire whether the child possesses:
1. capacity to communicate, including as it does both an ability to understand questions and an ability to frame and express intelligent answers,
 2. mental capacity to observe the occurrence itself and the capacity of remembering what it is that she is called to testify about, and
 3. a consciousness of the duty to speak the truth.

6.12 MISTAKE AS TO AGE

18 PA.CON.S.TAT.ANN. § 3102. Mistake as to age

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

- **Commonwealth v. Robinson**, 497 Pa. 49, 54, 438 A.2d 964, 966-967(1 9 8 1), *appeal dismissed*, **Robinson v. Pennsylvania**, 457 U.S. 1101 (1982): statutory rape statute valid and constitutional – plainly evidenced legislature's intent to make violation thereof a strict liability offense where victim is less than fourteen years of age, where the statute specifically indicated that mistake as to age was not a defense.
- **Commonwealth v. Hall**, 418 A.2d 623, 624 (Pa. Super. 1980): even if justified, defendant's mistaken belief as to the victim's age was irrelevant and not a defense to corruption of minors or voluntary deviate sexual intercourse.

- **Commonwealth v. Fetter**, 770 A.2d 762, 768 (Pa. Super. 2001), *affirmed*, 570 Pa. 494, 810 A.2d 637 (2002): defendant was convicted of statutory sexual assault, involuntary deviate sexual intercourse; the victim was 15 at the time of the incident. The trial court properly denied defendant’s attempts to cross examine the victim as to her beliefs as to how old she looked: victim’s beliefs were irrelevant to defendant’s beliefs and knowledge of her actual age.

6.13 SEXUAL ASSAULT COUNSEL PRIVILEGE

The sexual assault counselor victim privilege is an absolute privilege which protects the documents and the testimony of sexual assault counselors. 42 PA.CON.S.TAT.ANN. § 5945.1 provides, in pertinent part:

§ 5945.1. Confidential Communications to Sexual Assault Counselors

...

(a) Privilege

(1) No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written consent of the victim, disclose the victim’s confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.

(2) No coparticipant who is present during counseling may disclose a victim’s confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim.

The privilege is absolute and is not outweighed by the defendant’s state and federal constitutional rights to confrontation. **Commonwealth v. Wilson / Aultman**, 529 Pa. 268, 602 A.2d 1290 (1992), *cert. denied*, **Aultman v. Pennsylvania**, 504 U.S. 977 (1992).

Because the statutory privilege is absolute, no court review is required. The materials are not subject to any access by counsel.⁴⁷ The privilege applies regardless of whether the party seeking disclosure is the prosecution or defense.

Commonwealth v. Gibbs, 642 A.2d 1132, 1135 (Pa. Super. 1994).

A. Motion to Quash Subpoena

Pennsylvania Rule of Criminal Procedure 578 allows the filing of a Motion to Quash Subpoena as a pretrial motion. “The Constitution does not require that the defendant be given the right to secure the attendance of a witness that the defendant has no right to use.”⁴⁸

⁴⁷ PENNSYLVANIA BENCHBOOK FOR CRIMINAL PROCEEDINGS, § 25.02.

⁴⁸ *Id.* at § 37.02.

B. Waiver

The privilege can be waived. If the prosecution is accorded access to the information covered by the privilege, then the statutory privilege must yield to the defendant's rights of confrontation and compulsory process. ***B.T. v. Family Services of Western Pennsylvania***, 705 A.2d 1325, 1337, n.18 (Pa. Super. 1998), *aff'd*, 556 Pa. 430, 728 A.2d 953 (1999).

- ***Commonwealth v. Davis***, 543 Pa. 628, 632, 674 A.2d 214, 216 (1996): in case in which defendant was charged with deviate sexual intercourse and corruption of minor, *inter alia*, child sexual abuse victim and his family **waived** any privilege to information contained in family therapy counseling records by giving prosecution access to them, and defendant was entitled to such information in order to confront witnesses at trial regardless of appropriateness of his designs as to use at trial of information hypothetically contained in records.
- **No Waiver: *Commonwealth v. Askew***, 666 A.2d 1062, 1065 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996): defendant charged with statutory rape and involuntary deviate sexual intercourse, *inter alia*. Because counselor had a statutory duty to reveal allegation of child abuse to police under the Child Protective Services Act, 23 PA.CON.S.TAT.ANN. § 6311 *et seq.*, no waiver when counselor informed police of the allegations, nor when minor victim's mother consented to the disclosure.

6.14 "911" TAPES AND OTHER AUDIOTAPED EVIDENCE

A. Use of 911 Tapes and Other Audiotapes at Trial

Audiotaped evidence, such as recordings of "911" calls, often plays a prominent role in sexual violence and domestic violence cases. For purposes of establishing prompt complaint, as well as the natural history or development of a case, the prosecution will attempt to move into evidence the recordings of emergency call audiotapes.⁴⁹

This type of evidence can play a pivotal role at trial, especially where the victim or witness is unavailable at trial or does not wish to cooperate with the prosecution. It adds credibility to the victim's testimony at trial. Basic rules of admissibility and relevancy apply.⁵⁰

- **Natural History or Development of Case:**

In ***Commonwealth v. Robinson***, 581 Pa. 154, 227, 864 A.2d 460, 503 (2004), *cert. denied*, ___ U.S. ___, 126 S.Ct. 559, 163 L.Ed.2d 470 (2005), the

⁴⁹ See 3 A.L.R.5th 784, ADMISSIBILITY OF TAPE RECORDING OR TRANSCRIPT OF "911" EMERGENCY TELEPHONE CALL.

⁵⁰ Evidence is admissible if it is relevant: "that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact." ***Commonwealth v. Wynn***, 580 Pa. 713, 850 A.2d 730, 733 (Pa. Super. 2004), *appeal denied*, 862 A.2d 1255 (2004).

trial court permitted tape recordings of the 911 calls made to the Allentown Police Department after the discovery of the murder victim. The defendant argued that the tape was cumulative to other evidence proffered through witnesses present at trial. The Supreme Court of Pennsylvania ruled that the tapes did not contain any inflammatory or impassioned excerpts, and therefore were not prejudicial even if somewhat cumulative.

▪ **Natural History or Development of Case:**

In *Commonwealth v. Hood*, 872 A.2d 175, 181-184 (Pa. Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005), the trial court permitted 911 calls of a shooting, two of which identified the defendant as the shooter, into evidence to establish the initial reports of the incident.

▪ **Initial Report of Crime:**

In *Commonwealth v. Cunningham*, 805 A.2d 566, 572-573 (Pa. Super. 2002), *appeal denied*, 573 Pa. 663, 820 A.2d 703 (2003), the trial court permitted the jury to hear the tape of a 911 call made by bystanders who were working nearby and saw the robbery in issue unfolding. The tape was admitted under the present sense exception to the hearsay rule.

▪ **To Rebut Voluntariness of Confession:**

In *Commonwealth v. Cameron*, 780 A.2d 688, 694-695 (Pa. Super. 2001), the Superior Court remanded for a hearing before the trial court to determine if the audiotape of the defendant's confession was relevant to the defendant's argument that his confession was not voluntary.

▪ **To Show Prior Consistent Statement in Rebuttal:**

In *Commonwealth v. Polston*, 616 A.2d 669, 674-675 (Pa. Super. 1992), *appeal denied*, 534 Pa. 638, 626 A.2d 1157 (1993), the Superior Court held that an audiotaped (as well as videotaped) prior consistent statement by a victim of child sexual abuse should not have been admitted in the prosecution's case in chief as substantive evidence, but could have been used in rebuttal to rehabilitate the victim if impeached. In any event, the tape was admissible under the Tender Years Exception, 42 PA.CON.S.TAT.ANN. § 5985.1.

B. Issues Regarding Admissibility

Four issues must usually be addressed before 911 tapes, as well as other forms of audiotaped evidence, are admissible. These are:

- (1) Foundation and Authentication;
- (2) Hearsay Considerations;
- (3) Relevancy; and
- (4) Prejudice.

1. Foundation and Authentication

Pennsylvania Rule of Evidence 901(a) is identical to Federal Rule of Evidence 901(a) and consistent with Pennsylvania case law. Rule 901(a) provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Section (b) of Rule 901 provides examples of the ways authentication may be accomplished. Two of the examples are applicable to these types of audiotapes:

Pa.R.Evid. 901(b)

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

...

5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

In addition to being relevant, demonstrative evidence must also be properly authenticated by evidence sufficient to show that it is a fair and accurate representation of what it is purported to depict.

Commonwealth v. Reid, 571 Pa. 1, 38, 811 A.2d 530, 552 (2002), *cert. denied*, ***Reid v. Pennsylvania***, 540 U.S. 850 (2003). “Demonstrative evidence may be authenticated by testimony from a witness who has knowledge of what the evidence is proclaimed to be. Pa.R.Evid. 901(b)(1).” *Id.*

2. Hearsay Considerations

When an out-of-court statement is offered for a purpose other than proving the truth of its contents, it is not hearsay and is not excludable under the hearsay rule. ***Commonwealth v. Cunningham***, 805 A.2d at 572. Therefore, 911 calls which are not used to prove the truth of the matter asserted are not barred by the hearsay rule.

In cases where 911 calls, or other audiotaped evidence, fall within the definition of hearsay, trial courts have admitted the evidence under the

excited utterance and present sense impression exceptions, as well as other exceptions.

Constitutional Right of Confrontation: An additional consideration is the prohibition against testimonial statements from *Crawford v. Washington*, 541 U.S. 36, 125 S.Ct. 1354 (2004). *Crawford* holds that out-of-court statements by witnesses that are testimonial are barred under the confrontation clause, notwithstanding their designation as hearsay exceptions, unless the witnesses are unavailable and defendants had prior opportunity to cross-examine the witnesses. There are a number of cases that find a distinction between non-testimonial statements and statements made in contemplation of litigation:

A statement is more likely to have been made with the expectation that it would be used as evidence if it was given in response to questioning by a government official than it would if it had been volunteered. Emergency 911 calls offer a good illustration of this point. Many courts have concluded that a hearsay statement made in a 911 call is not testimonial, because the statement is not made in response to police questioning, and because the purpose of the call is to obtain assistance, not to make a record against someone.

***Commonwealth v. Gray*, 867 A.2d 560, 576 (Pa. Super. 2005), appeal denied**, 583 Pa. 694, 879 A.2d 781 (2005).⁵¹ **In *Gray*, the Superior Court concluded that the witness’s excited utterances to police at the scene of crime did not fall under “extrajudicial statements contained in formalized testimonial materials” classification of testimonial statements articulated in *Crawford*.**

(a) Excited Utterances

In determining whether an audiotaped statement is admissible as an excited utterance, the taped statement must relate to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. The fact that a statement was not made immediately after a startling event is not dispositive of its admissibility as an excited utterance. *Commonwealth v. Keys*, 814 A.2d 1256, 1258 (Pa. Super. 2003). The crucial question, regardless of time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective process remains in abeyance. *Commonwealth v. Carmody*, 799 A.2d 143, 147 (Pa. Super. 2002).

⁵¹ In *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004), the victim called 911 to report that a prowler had entered her home. On the following night, the victim was murdered. At the defendant’s trial, the trial court admitted the 911 call, as excited utterances, and Leavitt was convicted. On appeal, the Court concluded that the victim’s statements were properly introduced as excited utterances and that the statements did not qualify as “testimonial” under *Crawford v. Washington*, 541 U.S. 36 (2004).

The excited utterance (1) need not describe the startling event, it need only relate to it, and (2) need not be made contemporaneously with, or immediately after, the startling event.⁵² Pa.R.Evid. 803(2) provides: “**Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

- **Other Corroborating Evidence:** with respect to excited utterances by unidentified bystanders, i.e., anonymous 911 calls, the law in Pennsylvania has evolved to add an additional proof requirement for admissibility. In order to assure that an unidentified bystander actually witnessed the event discussed on the 911 call, and which is relevant at the time of trial, the Pennsylvania Supreme Court has held that that it is incumbent upon the party seeking the admission of the out-of-court statement to demonstrate by the use of “*other corroborating evidence*” that the declarant actually viewed the event “of which he speaks.” *Commonwealth v. Hood*, 872 A.2d at 181, citing *Carney v. Pennsylvania Railroad Co.*, 428 Pa. 489, 496, 240 A.2d 71, 75 (1968).

(b) Present Sense Impressions

The present sense impression exception, regardless of the availability of the declarant to testify at trial, allows the admission of a 911 call, or other audiotaped statement, under certain conditions. Pa.R.Evid. 803(1) provides: “(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”

The observation must be made at the time of the event or shortly thereafter, making it unlikely that the declarant had the opportunity to form an intent to misstate his observation. Consequently, the trustworthiness of the statement depends upon the timing of the declaration. *Commonwealth v. Gray*, 867 A.2d at 570. “In addition, the present sense impression does not require that the comments be made to another person also present at the scene, but may be made over the telephone.” *Commonwealth v. Cunningham*, 805 A.2d at 573.

- **Other Corroborating Evidence:** with respect to 911 calls by unidentified bystanders, admitted under the present sense impression exception, the Superior Court in *Commonwealth v. Hood*, 872 A.2d at 184, held in dicta the same additional proof requirement for admissibility as excited utterances. In order to assure that an unidentified bystander actually witnessed the event discussed on the 911 call, and which is relevant at the time of trial, it is incumbent upon the party seeking the admission of the out-of-court statement to demonstrate by the use of “*other corroborating evidence*” that the

⁵² *Commonwealth v. Hood*, 872 A.2d at 181.

declarant actually viewed the event “of which he speaks.” *See Carney v. Pennsylvania Railroad Co.*, 428 Pa. 489, 496, 240 A.2d 71, 75 (1968).

3. Relevancy

In *Commonwealth v. Witman*, 750 A.2d 327 (Pa. Super. 2000), *appeal denied*, 564 Pa. 138, 764 A.2d 1053 (2000), *cert. denied*, *Witman v. Pennsylvania*, 534 U.S. 815 (2001), the court found 911 tapes to be relevant in a suppression hearing on a number of grounds:

This evidence forms the very foundation for the relationship appellee established with police. Appellee maintains no expectation of privacy with respect to his statements and, furthermore, careful review of the 911 tape fails to reveal unfair prejudice to the defense. To the contrary, the statements made by appellee when he called 911 appear to be wholly consistent with all of his subsequent statements to the police. It may also be necessary during trial, as a truth-determining process, to test prior consistent or inconsistent statements on behalf of either the appellee or the Commonwealth. It is the best evidence of what transpired in the opening minutes of this event and as such may be required as evidence of the occurrence pursuant to Pa.R.Evid. 1002, Requirement of Original. At worst, the 911 recording and transcript would be cumulative and corroborative evidence; however, this evidence, more than any other, demonstrates what transpired in the opening moments of police involvement initiated by appellee and goes to appellee’s state of mind. In his Opinion, the trial court acknowledged that police involvement originated with the 911 call and the contents of that call relayed to police are inseparable from their conduct in reaching the house and their treatment of the appellee. Based upon the foregoing, we find erroneous the suppression court’s exclusion of the 911 recording and transcript. While the Commonwealth did not object to the ruling by the trial court on this issue, our ruling may avoid the necessity of an appeal on admissibility of the tapes or transcripts should the matter arise at trial.

Commonwealth v. Witman, 750 A.2d at 336.

4. Prejudice

To test whether demonstrative evidence should be admitted, the trial court should conduct a two part test. First, the court determines whether the evidence is inflammatory in nature. If the evidence is inflammatory, the court then decides whether the evidence is of “essential evidentiary value” such that its need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.⁵³

- **Harmless Error:** It was error to admit into evidence tape recording of 911 telephone call made during the course of the murder because victim's screams would inflame the jury, however, because of overwhelming evidence of guilt, determined to be harmless error. **Commonwealth v. Groff**, 514 A.2d 1382, 1384-1385 (Pa. Super. 1986), *appeal denied*, 515 Pa. 619, 531 A.2d 428 (1987).
- **Harmless Error:** During 911 call by victim on day she was murdered, victim told the 911 operator that the defendant had just called her and threatened her life. The Commonwealth asserted that the 911 call was properly admitted pursuant to the excited utterance exception to the hearsay rule. The Supreme Court did not reach the issue of the hearsay objection because, even if the trial court erred in its admission of the 911 call, it constituted harmless error. "The statement regarding [the defendant's] threat made during the 911 call was merely cumulative of other properly admitted evidence. Moreover, given the other overwhelming evidence of [the defendant's] guilt in the record, we do not find that [the defendant] was prejudiced by the court's admission of this evidence." **Commonwealth v. Stallworth**, 566 Pa. 349, 368, 781 A.2d 110, 120-121 (2001).

6.15 EVIDENCE OF SEXUALLY EXPLICIT MATERIALS

It is not uncommon for the prosecution, in a sexual violence case, to attempt to admit into evidence items seized from a search of the defendant's residence, especially sexually explicit materials, including pornography. Arguments on behalf of the prosecution in support of admissibility include:

- the materials show abnormal sexual behavior;
- the defendant's sexual desires were out of the ordinary;
- the defendant's sexual preferences were aberrant.⁵⁴

A. Basic Rules of Admissibility

Admissibility is based upon a determination of relevancy, and relevancy is determined by examining whether the evidence sought to be introduced tends to "establish a material fact or make a fact at issue more or less probable."

Commonwealth v. Griffin, 684 A.2d 589, 594 (Pa. Super. 1996). Evidence that is relevant, i.e., probative of a material fact, may still be excluded if its probative value is outweighed by its prejudicial effect. **Commonwealth v. Dillon**, 863 A.2d 597, 601 (Pa. Super. 2004) (en banc), *appeal granted*, 584 Pa.

⁵³ **Commonwealth v. Conway**, 534 A.2d 541, 544 n.3 (Pa. Super. 1987), *appeal denied*, 520 Pa. 581, 549 A.2d 914 (1988); **Commonwealth v. Groff**, 514 A.2d at 1384.

⁵⁴ **Commonwealth v. Impellizzeri**, 661 A.2d 422, 430 (Pa. Super. 1995), *appeal denied*, 543 Pa. 725, 673 A.2d 332 (1996).

691, 882 A.2d 477 (2005). However, since all Commonwealth evidence in a criminal case will be prejudicial to the defendant, exclusion of otherwise relevant evidence will only be necessary where “the evidence is so prejudicial that it may inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.” **Commonwealth v. McMaster**, 666 A.2d 724, 729 (Pa. Super. 1995) (internal quotations omitted).

It is well settled in Pennsylvania that “a trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury’s consideration where those facts form part of the history and natural development of the events and offenses with which the defendant is charged.” **Commonwealth v. Peer**, 684 A.2d 1077, 1083 (Pa. Super. 1996). Unless otherwise barred by a legal impediment, the trial judge enjoys broad discretion in admitting or excluding evidence, and appellate review is limited: “[t]he admission of evidence is a matter vested in the sound discretion of the trial court, whose decision thereon can only be reversed by this Court upon a showing of an abuse of discretion.” **Commonwealth v. Travaglia**, 792 A.2d 1261, 1263 (Pa. Super. 2002), appeal denied, 572 Pa. 733, 815 A.2d 633 (2002), cert. denied, 540 U.S. 828 (2003).

B. Sexually Explicit Materials - Probative Value

Although mere possession of pornographic materials does not tend to establish guilt in a sexual violence case,⁵⁵ the possession of such materials by the defendant will be admissible if probative of an issue in the case. In **Commonwealth v. Impellizzeri**, 661 A.2d 422 (Pa. Super. 1995), *appeal denied*, 543 Pa. 725, 673 A.2d 332 (Pa. 1996), the Superior Court held that mere possession of sexually explicit materials does not tend to establish guilt and, therefore, does not require admission. 661 A.2d at 431. In **Impellizzeri**, the magazine at issue, which was seized at the defendant’s home pursuant to a search warrant, dealt with anal sex; although the victim had been:

subjected to anal intercourse, as well as vaginal and oral sex, there was no evidence that the magazine had been used in any way in the sexual attack or even shown to the victim. The Superior Court held that it was error to admit the magazine, which had little probative value on “whether the sexual activity was forced or consensual under the circumstances presented...”

Id. In **Commonwealth v. Palmer**, 700 A.2d 988 (Pa. Super. 1997), *appeal denied*, 552 Pa. 695, 716 A.2d 1248 (1998), *overruled on other grounds*, **Commonwealth v. Archer**, 722 A.2d 203 (Pa. Super. 1998), explicit photographs and pornographic films not only served to corroborate the victim’s claim that the pictures and films were shown to the minor victim, but were also probative of a fact in controversy. In **Palmer**, sexually explicit photographs of the minor victim were found at the defendant’s home, along with pornographic films and explicit photographs of another girl similar to the

⁵⁵ *Id.*

photographs of the victim. At trial, the minor victim testified that the defendant had watched the pornographic movies with her; therefore, the admission of the films tended to corroborate the testimony of the victim. The explicit photographs of the other girl, taken under similar circumstances, tended to show that more likely than not the defendant had taken the pictures of the minor victim. *Id.* at 993.

C. Sexually Explicit Materials – Lessening Prejudicial Impact

In *Commonwealth v. Palmer*, 700 A.2d at 993, the probative value of sexually explicit materials in a prosecution for rape, involuntary deviate sexual intercourse, and corrupting morals of a minor was not outweighed by the prejudicial impact of the materials; the trial judge deliberately delimited the physical evidence admitted or submitted to jury, which was permitted to see only external packaging of individual videos to confirm that they were adult videos, and which did not view six photos of a young woman that were identified by the minor victim.

Suggested Stages of a Criminal Jury Trial

1. **Juror Information Questionnaire**
 - Have all prospective jurors complete the standard juror information questionnaire. *Pa.R.Crim.P. 631(D) & 632.*
 - Questionnaires are destroyed at completion of jurors' service. *Pa.R.Crim.P. 632(F) & (G).*

2. **Preliminary Instructions to Jury Panel**
 - Trial Judge addresses opening remarks to jury panel in preparation for voir dire

3. **Jury Panel Sworn**
 - Have court reporter swear in panel members. *Pa.R.Crim.P. 631(B).*
 - Judge must be present unless waived. *Pa.R.Crim.P. 631(A).*

4. **Conduct Voir Dire**
 - Typically prosecution first, followed by defense.
 - "The purpose of voir dire is to secure a competent, fair, impartial and unprejudiced jury. The scope of voir dire rests in the sound discretion of the trial court and will not be reversed on appeal in the absence of palpable error." *Commonwealth v. Proctor*, 526 Pa. 246, 257, 585 A.2d 454, 460 (1991).
 - To explore possible racial bias, see *Commonwealth v. Futch*, 469 Pa. 422, 426-428, 366 A.2d 246, 248 (1976); *Commonwealth v. Stinson*, 628 A.2d 1165, 1167-1168 (Pa.Super. 1993), *appeal denied*, 537 Pa. 608, 641 A.2d 309 (Pa. Feb 11, 1994).
 - Challenges for Cause: out of hearing of jury, hear challenges for cause.
 - Number of peremptory challenges calculated in accordance with *Pa.R.Crim.P. 634.*

5. **Clerk Reads Names of 12 Jurors and 2 Alternates**
 - Excuse remaining jurors.
 - Clerk swears in trial jury panel. *Pa.R.Crim.P. 640.*

6. **Preliminary Instructions to Trial Jury**
 - Trial Judge gives preliminary trial instructions to Trial Jury.¹

¹ "The trial judge may give instructions to the jury before the taking of evidence or at anytime during the trial as the judge deems necessary and appropriate for the jury's guidance in hearing the case." *Pa.R.Crim.P. 647(D)*. At a minimum, the preliminary instructions should orient the jurors to the trial procedures and to their duties and function as jurors. Comment following Rule 647.

7. Opening Statements²

- Commonwealth Attorney opens first to the jury. *Pa.R.Crim.P. 604(A)*.
- Defense Counsel then opens to the jury, or reserves to immediately prior to defense testimony. *Pa.R.Crim.P. 604(A)*.

8. Commonwealth's Case

- The Commonwealth presents its case-in-chief. *See Pa.R.E. 611, Mode and Order of Interrogation and Presentation*.

9. Defense Motions

- Trial Judge hears defense motions outside the hearing of the jury but on the record.
- Appropriate motion at the close of the Commonwealth's case-in-chief is a motion for judgment of acquittal. *Pa.R.Crim.P. 606(A)(1)*.³

10. Defense Case

- The defense attorney may present evidence on behalf of the defendant. *See Pa.R.E. 611, Mode and Order of Interrogation and Presentation*.

11. Commonwealth's Rebuttal Evidence

- Admission or rejection of rebuttal evidence is within the sound discretion of the trial court.⁴

12. Defense Motions

- Trial Judge hears defense motions outside the hearing of the jury but on the record.
- Appropriate motion at the close of all evidence is a motion for judgment of acquittal. *Pa.R.Crim.P. 606(A)(2)*.⁵

² "A prosecutor's opening statements must be based on evidence that she plans to introduce at trial, and must not include mere assertions designed to inflame the jury's emotions. However, a prosecutor's opening statements may refer to facts that she reasonably believes will be established at trial. Additionally, the prosecution, as well as the defense, is afforded reasonable latitude in presenting opening arguments to the jury. Relief will be granted for prosecutorial misconduct only where the unavoidable effect of the prosecutor's conduct was to prejudice the jury so as to form in their minds a fixed bias towards the accused and to impede their ability to objectively weigh the evidence and render a true verdict." *Commonwealth v. Begley*, 566 Pa. 239, 274, 780 A.2d 605, 626 (2001).

³ "A motion for judgment of acquittal shall not constitute an admission of any facts or inferences except for the purpose of deciding the motion. If the motion is made at the close of the Commonwealth's evidence and is not granted, the defendant may present evidence without having reserved the right to do so, and the case shall otherwise proceed as if the motion had not been made." *Pa.R.Crim.P. 606(B)*.

⁴ *Commonwealth v. Miles*, 846 A.2d 132, 136 (Pa. Super. 2004), *appeal dismissed as improvidently granted*, 582 Pa. 403, 871 A.2d 1248 (2005).

⁵ "If a defendant moves for judgment of acquittal at the close of all the evidence, the court may reserve

13. Suggested Jury Instructions

- Trial Judge receives and reviews suggested jury instructions. *Pa.R.Crim.P. 647*.⁶
- Trial Judge holds charge conference, on the record, with counsel to discuss the suggested jury instructions, enter rulings, and make final decisions regarding charge.⁷

14. Trial Judge Gives Instructions to Jury Re: Closing Arguments

15. Closing Arguments

- Defense Counsel gives closing argument first. *Pa.R.Crim.P. 604(B)*.
- Prosecutor gives closing argument. Regardless of number of defendants, prosecutor always makes closing argument last. *Pa.R.Crim.P. 604(B)*.

16. Charge of the Court

- Trial Judge gives jury final instructions. *Pa.R.Crim.P. 647*.
- Charge broken up into four sections:
 - (1) Key concepts: the burden of proof, presumption of innocence, and the standard of beyond a reasonable doubt;
 - (2) Instructions regarding the review of evidence, including credibility decisions;
 - (3) Specifics of Case: elements of crimes, specific law regarding defenses, and review of testimony;
 - (4) Concluding instructions on the manner jury is to handle deliberations.
- Trial judge makes formal rulings on submitted points for charge before dismissing jury; grants counsel opportunity to make specific objections to refused points or other matters.⁸

17. Send Jury to Deliberate

- Send 12 principal jurors to deliberate.

decision until after the jury returns a guilty verdict or after the jury is discharged without agreeing upon a verdict.” *Pa.R.Crim.P. 606(C)*.

⁶“Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge’s rulings on all written requests. The trial judge shall charge the jury after the arguments are completed.” *Pa.R.Crim.P. 647(A)*.

⁷See *Pa.R.Crim.P. 647(A)*.

⁸“No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.” *Pa.R.Crim.P. 647(B)*. See also, *Pa.R.A.P. 302(b)*.

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- Hear arguments of counsel on the record and make record if any exhibits go out with jury. *Pa.R.Crim.P. 646*.
 - Excuse alternates.

18. Enter the Verdict

19. Defense Motions If Conviction

- Defense may make an oral motion for judgment of acquittal immediately after verdict. *Pa.R.Crim.P. 606(A)(4)*.

20. Excuse Jurors

21. Colloquy Following Verdict If Conviction

- Set Sentencing Date.⁹
- Order Presentence Investigation Report, if necessary.
- Address Bail.¹⁰

⁹ In accordance with Pa.R.Crim.P. 704(A), sentencing must typically be within 90 days of conviction.

¹⁰ Pa.R.Crim.P. 521.

