COMMONWEALTH OF PENNSYLVANIA vs KENNETH E. THOMPSON, DEFENDANT, (Part 2) Franklin County Branch, Criminal Action - Law Nos. 135, 156, 157-1993

Defendant filed post-verdict motions after a jury convicted him of multiple sex crimes involving three separate victims. The defendant alleged that: there was insufficient evidence; the verdict was against the weight of the evidence; the court erred in failing to sever the actions; a knife entered into evidence was not adequately identified by the Commonwealth's witnesses; testimony of a prior criminal conviction should not have been allowed. The court denied the post-trial motions.

1. The legal standard to determine the sufficiency of the evidence is by viewing the evidence in the light most favorable to the verdict winner, to ascertain whether the jury reasonable could have concluded that all elements of the crime were established beyond a reasonable doubt.

2. Where a defendant challenges the weight of the evidence, the question presented to the court is whether the verdicts were so contrary to the evidence as to shock the court's sense of justice and to make the granting of a new trial imperative.

3. The utilization of a weapon in the course of a sexual assault is relevant to the issue of consent by the victim.

4. Where testimony was presented that the weapon seen by the jury was the weapon used in the commission of the crime, or at least that the weapon was identical to the one used, no error was made in permitting introduction of the knife into evidence.

5. The longer the time span between offenses, the greater the similarities must be to justify admitting evidence to establish a *modus operandi*.

District Attorney, Counsel for Commonwealth of Pennsylvania
James K. Reed, Esquire, Counsel for Defendant

OPINION AND ORDER

KAYE, J., January 21, 1994

OPINION SUR POST VERDICT MOTIONS FOR A NEW TRIAL AND IN ARREST OF JUDGMENT

Following a trial by jury on October 11-12, 1993, the verdicts returned by the jury in the above cases were as follows:

A. Criminal Action 135-1993 (Victim-Nicole Fox):
   1. Aggravated Indecent Assault - guilty
   2. Kidnapping - not guilty

B. Criminal Action 156-1993 (Victim-Tina Sue Stull):
   1. Rape - guilty
   2. Involuntary Deviate Sexual Intercourse - not guilty

   3. Aggravated Indecent Assault - guilty
   4. Indecent Assault - guilty

C. Criminal Action 157-1993 (Victim: Mary Lee Stewart):
   1. Criminal Attempt-Rape - guilty
   2. Indecent Assault - guilty

On October 18, 1993, defendant filed timely post-verdict motions which set forth the following grounds for relief:

1. The evidence was insufficient to sustain the verdict of guilty.

2. The verdict was against the weight of the evidence.

3. The Court erred by failing to sever the criminal actions pending against Kenneth Thompson and by ordering a consolidated trial.

4. The Court erred by admitting into evidence a knife that was not adequately identified by the Commonwealth's witnesses.

5. The Court erred by allowing the Commonwealth to call Anita O'Donnell as a witness to testify as to a prior criminal conviction in Adams County in which Anita O'Donnell was the victim.

The post-verdict motions were listed for argument before the Court in the scheduled January, 1994 argument court. We have received counsels briefs and held oral argument thereon, and the matters are now before the Court for disposition. We will deal with the issues set forth in the post-verdict motions in the order set forth therein.

I. Legal sufficiency of the evidence:

The legal standard to determine the sufficiency of the evidence is by viewing the evidence in the light most favorable to the verdict winner, to ascertain whether the jury reasonably could have concluded that all elements of the crime were established beyond a reasonable doubt. *Commonwealth v. Syre*, 507 Pa. 299, 489 A.2d 1340 (1985), cert. denied 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987).

Viewed by applying the above standard, the evidence presented at trial can be summarized as follows: In late October-early November, 1992, Kenneth Eugene Thompson ("defendant"), then aged 41 years, was engaged in a telemarketing business which he conducted from an office located at the Leland Hotel in Waynesboro, Franklin County. He had invited an acquaintance, Scott DiBello, who is a resident of Erie, Pennsylvania, to visit with him, and had transported DiBello from Erie to Waynesboro even though the latter was on parole, and the travel was not approved by DiBello's parole officer.

A. Tina Sue Stull incident:

On October 23, 1992, Tina Sue Stull, then 24 years of age, was a single mother who lived with her one year old child in room 408 of the Leland Hotel. During the evening hours of that date, Stull had visited with a cousin, and had returned to her room and showered prior to retiring for the night. Defendant, who was not known to Stull, knocked at the door, and said the hotel manager had stated that she had been having difficulties with her boyfriend. The conversation lasted for 15-20 minutes, after which defendant asked if he could return to check on Stull's safety, and she agreed. Upon his return, defendant informed Stull of his business, and inquired as to whether she was employed. She replied that she was not employed, whereupon defendant offered her a job as "executive secretary" at $5.50 per hour. Defendant then left to get some cigarettes and, upon his return, entered Stull's room for the first time (prior conversations were held in the doorway to the room, or in the hallway). They conversed for a time, and Stull at some point put her child to bed. Defendant continued to talk for several hours about himself and his business. At about 11:00 o'clock, defendant briefly left the room, and returned with an envelope which allegedly contained information about groups available for promotion by defendant's business. Stull indicated she was getting tired, and defendant indicated he wanted a hug and a kiss. Stull expressed uncertainty about this, and defendant left the room briefly, only to return, locking the room door upon returning. Defendant had a piece of paper with something written on it, and said that Stull's answer had to be "yes", that he would hurt her if her answer as "no". In response to a question by Stull, he said he would throw her out

the window or hit her with a beer bottle if necessary to get her to comply.

> Defendant pulled an unopened knife from his pocket, and told Stull to undress to her bra and underwear. She began to cry, but complied, and defendant told her to lie face down on the bed next to her child. Stull would not do so with the child on the bed, so she placed a blanket on the floor. Defendant undressed, laid on top of her, manipulating himself sexually, and attempted to have intercourse. When Stull said she was having her period, defendant removed the tampon and began to attempt intercourse. Stull said "no" and defendant told her to be quiet or he would hurt her. After Stull went to the bathroom, defendant began to perform oral sex on her, and she said it hurt. Defendant thereupon again had intercourse with the victim who was crying. After the act was completed, she threw a sheet around herself, and defendant then again had sexual intercourse with her. After he had finished, he told Stull not to talk to anyone, or she would be sorry.

After defendant finally left, Stull sat in the shower, and then went to the bed with her daughter, feeling ashamed and frightened by what had occurred. The next morning, she went to the residence of her cousin, Pamela Figueroa, who testified that Stull was upset and crying, that she was "real emotional" and "shook" as she described the incident of the prior night. Although Figueroa tried to talk Stull into going to the police, she did not do so until about three weeks later when she read in the newspaper of defendant's arrest on other sexual assault charges.

B. Mary Lee Stewart incident:

On October 29, 1992, Mary Lee Stewart was 19 years of age and the single mother of a seven month old child. She was out of her residence and planned to pick up her child who was "trick or treating", when she stopped at the Leland Hotel to make a telephone call. Defendant, who was unknown to Stewart, came out of his office, and began to talk to her to ask if she could assist him in accessing a computer disc. She agreed, and did so. As she sat in the office, Stewart's aunt appeared, and returned the child to Stewart. Defendant told Stewart that he was opening up a telemarketing business in the hotel, and was looking for an

"executive secretary" who would do computer work, and who could function around "high powered people-". Defendant offered a job to Stewart, who was unemployed, telling her the money was "good".

Defendant introduced Stewart to Scott DiBello, telling her he had brought him from Delaware to be in the business with him. At defendant's request, Stewart left the hotel to get some marijuana, which she gave to defendant. For about three hours, Stewart continued to perform work on the computer. At about 11:00 o'clock p.m., defendant told Stewart to go upstairs to fill out a job application as that was where all the applications were located. She, defendant, the child, and DiBello went to Room 221, where Stewart began to fill out the application. The child fell asleep in a car seat in the room. Defendant rolled a marijuana cigarette, which he lit. He then went to the bathroom to shower, after which he left the room with DiBello saying he wanted to talk with Stewart some more. After about five minutes, defendant returned alone, turning off the lights and locking the door. Stewart began to feel "uncomfortable" and wanted to leave with her little boy. Defendant walked over to Stewart, saying he wanted a hug and a kiss. He pulled her by the wrists from a seated position to a standing position, then pushed her across the bed, sitting on her. He pulled her pants and panties down to her ankles as he told her to "relax", and then he disrobed. Defendant then pulled up Stewart's shirt, and began to fondle her breasts which he removed from her bra. He manipulated himself sexually, as he touched her vaginal area, and attempted to force her legs apart, which she resisted. This effort caused bruising on her inner thighs.

DiBello then knocked at the door, and defendant told him to return in five minutes. Defendant told Stewart that if DiBello had entered,, they would have "double-raped" her. Defendant then masturbated and ejaculated onto the bed. Stewart got up as soon as defendant got off her, got her child, and started out the door. As she did so, defendant put $40 into her pants pocket. DiBello was at the door as she left crying, and she told him she had been assaulted. She went to the Waynesboro Police Station, and then to the Waynesboro Hospital, where it was determined she had marks or bruising on her wrists and on her inner thighs.

C. Nicole Fox incident:

On November 1, 1992, Nicole Fox was 16 years of age, and was living with a friend, Michelle Miley, in Waynesboro, Pennsylvania. She met defendant and Scott DiBello for the first time on October 30, 1992. On November 1, Fox, Miley, DiBello and defendant went together to a store to cash a check. Later that day, defendant and DiBello returned to the Miley residence and had a conversation with Miley. Defendant indicated that he wanted a female to make a telephone call to his ex-wife. Fox was then requested to make the call, and she agreed to accompany defendant and DiBello in a car for this purpose.

Fox was driven to a Quality Inn Motel in Greencastle, where defendant had rented room 338 under a false name. Upon entering the room, Fox was told that defendant's ex-wife was involved with a man who was molesting defendant's children. Fox knew her friend, Michelle Miley, had worked for defendant in a telemarketing business, and defendant asked her if she wanted to work for him, if she needed a job. She responded "yes".

Defendant told Fox that she was pretty, and mature for her age, that he could do a lot for her and Michelle. Scott DiBello then asked defendant to get a soda for him. While defendant was gone, DiBello told Fox he was going to have sex with her and when defendant returned, both were going to do so. She said "no" to this.

When defendant returned to the room, he handed Fox a note which said someone was "pissing them off" and that if she wouldn't do "it", they would kill her. She began to cry, and asked to go to the bathroom, but attempted to run out of the room. Defendant blocked her way, and held her down as she began to scream. DiBello got a gun out of a jacket pocket. Defendant held a knife to Fox's throat as both he and DiBello held her down, pulling her lower clothing down, as defendant removed his clothing and masturbated. Defendant covered Fox's mouth as she tried to scream.

Defendant touched Fox's vaginal area, and put his finger into her vagina. Fox believed that defendant ejaculated as she

continued to plead for her to be released. DiBello and defendant began to argue, and DiBello told Fox that defendant had paid him to do this. DiBello told Fox he would let her go if she would not tell anyone what had happened.

Fox was driven to her friend, Michelle's, house, arriving at about 12:00-12:30 that night. She was crying and sobbing when she arrived, but could not be convinced to go to the police. However, she remained afraid, could not sleep, and had nightmares. About one week later, she reported this incident to the Waynesboro Police.

In the Stull and Stewart cases, each woman was confined in a room by defendant in the presence of their very young child. Defendant clearly threatened each woman with harm if she resisted his sexual advances. He produced a knife in the Stull and Fox assaults, putting it to the victim's throat in the latter case. Threats were made in each incident to do harm to the victim. An item which the victim believed was a gun was produced in the assault on Nicole Fox, and a confederate assisted in that assault.

"Rape" is committed when one has sexual intercourse with a non-spouse by forcible compulsion, or "by threat of forcible compulsion that would present resistance by a person of reasonable resolution". 18 Pa.C.S.a. §3121(a)&(b). "Attempted Rape" is committed when a substantial step is taken toward the commission of the crime when done with the intent to commit the crime. In the rape of Tina Sue Stull, there clearly was evidence of sexual intercourse, and of both actual forcible compulsion and of threats of forcible compulsion which would prevent resistance by a person of reasonable resolution. The victim was forced to submit to sexual intercourse by threats of harm, and the implicit threat arising from display of a knife. Moreover, the victim's very young child was present in the same room as the assault occurred in, and this clearly would place a limit on the amount and type of resistance the victim could offer without endangering the child. In order to protect her child from harm, it is apparent that she limited her resistance in order at least to persuade the perpetrator of this crime to allow her to move the assault to an area where the child would not be injured.

Similarly, the attempted rape of Mary Lee Stewart occurred in the presence of her very young child. Defendant physically restrained the victim, and sat on her while he removed his clothing and hers, while masturbating and attempting to force her legs apart as he touched her vagina. As a result of her resistance, Ms. Stewart suffered injuries to her wrists and inner thighs. Under the circumstances, we find that the jury could have reached the verdict it did on these charges.

"Aggravated indecent assault" is committed when one penetrates the genitals or anus of the victim with a part of the perpetrator's body when without the victim's consent, unless done for good faith medical, hygienic or law enforcement procedures. 18 Pa.C.S.A. 53125(l).

In the Tina Sue Stull case, defendant both had sexual intercourse with her, and performed oral sex on her in circumstances when she clearly had not given her voluntary consent. Moreover, defendant invaded her genital area manually by removing her tampon prior to committing the sexual acts. These actions were sufficient to permit the jury to render the verdict of guilty.

In the Nicole Fox case, defendant digitally penetrated the victim's vagina after he had made threats to her and confined her to the room, and while he held a knife to her throat. Both defendant and his accomplice held the defendant down while she attempted to scream for assistance. This evidence is sufficient to warrant the verdict rendered.

The verdicts of guilty as to the charge of indecent assault in the cases wherein Tina Sue Stull and Mary Lee Stewart were the victims clearly was justified because of the evidence already set forth herein regarding the defendant's touching of the victim's private parts both without their consent, and against their resistance. This conduct constitutes the crimes for which the verdicts of guilty were returned. 18 Pa.C.S.A. §3126.

II. Weight of the evidence:

Where a defendant challenges the weight of the evidence, the question presented to the Court is whether the verdicts were so contrary to the evidence as to shock the Court's sense of justice

and to make the granting of a new trial imperative. *Commonwealth v. Pirela,* 398 Pa.Super. 76, 580 A.2d 848 (1990), app. den. 527 Pa. 672, 594 A.2d 658 (1991).

We have reviewed the evidence as set forth in section I of this opinion, and find that the weight of the evidence was sufficient to support the verdicts rendered by the jury.

III. Failure to sever/consolidation of charges for trial:

On July 16, 1993, we filed an opinion in support of our order denying defendant's motion for severance. We think that the opinion set forth therein adequately sets forth the standard for determining this issue.

However, we do note that at page 4. of that opinion, we recited that one of the victims, Nicole Fox, accompanied defendant and his accomplice to a motel ..with the promise that [defendant] would offer [the victim] a job in telemarketing." The evidence adduced at trial actually indicated that Ms. Fox went to the motel room to make a telephone call to defendant's ex-wife, rather than upon a promise of a job in the telemarketing business. While this aspect of the case differs from what the evidence presented at the time of the omnibus pre-trial hearing and from the inducement that brought the other two victims into contact with defendant in a hotel room, nonetheless we do not think a different result is warranted.

Indeed, the distinction in the *modus operandi* of defendant in this case would tend to support the second prong of the analysis[1] set forth in *Commonwealth v. Newman*, 528 Pa. 393, 398, 598 A.2d 275, 278 (1991), which we cited in our previous opinion, i.e. whether such evidence can easily be separated by the jury so as to avoid confusion. This distinctive fact about this case would tend to prevent the confusion of facts by the jury in arriving at the verdicts.

[1] We note that the analysis required is itself somewhat internally conflicting, since one prong requires that the separate offenses demonstrate an unusual or distinctive *modus operandi*, while another prong requires a finding that the evidence can be separated by the jury so as to avoid confusion. Presumably, then, the more nearly similar the conduct, the more the first prong is satisfied while, simultaneously, the more remarkable the similarity, the more likely the resultant confusion to the jury. Nonetheless, we think that the jury in the instant case would have had no difficulty whatever in distinguishing defendant's prior crime from his conduct in the instant cases.

We would note further that the jury returned two (2) not guilty verdicts, as to a charge of kidnapping at criminal action number 135-1993, and as to a charge of involuntary deviate sexual intercourse at criminal action number 156-1993, as supporting our belief that the jury did not lump the charges together due to confusion, but rather, considered each charge deliberately and with great care on its individual merits. We conclude that it was not error to deny the motion to sever.

IV. Admission of evidence of knife:

Defendant claims that it was error for the Court to admit into evidence a knife that was seized from him following his incarceration at Franklin County Prison, due to the asserted inadequacy of its identification as a weapon used in the commission of the offenses involved herein.

Although we write without benefit of a transcript of the notes of testimony, it is our recollection that at least one of the victims identified the knife in question as being identical to the one used in the course of the commission of the sexual assault on her by defendant. Obviously, the utilization of a weapon in the course of such an assault is relevant on the issue of consent by the victim to the assault, and the visualization by the jury of the weapon used, or one identical in appearance to it, could assist it in resolving the issue of consent.

> "...the admissibility of evidence is a matter addressed to the sound discretion of the trial court..."
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> *Commonwealth v. Claypool,* 508 Pa. 198, 203-205, 495 A.2d 176, 178 (1985), [citation omitted], cited in Packel and Poulin, *Pennsylvania Evidence*, §108.1.

In *Commonwealth v. Clark*, 280 Pa.Super. 1, 421 A.2d 374 (1980), aff'd. 501 Pa. 393, 461 A.2d 794 (1983), wherein defendant was convicted of rape and aggravated assault, the

victim testified that although it was dark at the time of the assault, and she could not see the weapon used, she felt a sharp object held to her throat. One month and four days later, the victim observed defendant and recognized him as the perpetrator of the assault. She yelled, and police were summoned to the scene, where they placed defendant under arrest. A search of his person was conducted, and an eight-inch folding pocket knife was found. On appeal, defendant asserted that the weapon should not have been admitted into evidence at his trial. In rejecting this claim, Superior Court noted, *inter al.,:*

> [I]t is well established in Pennsylvania that all that is demanded before a weapon may be introduced into evidence is sufficient foundation revealing circumstances justifying an inference of the likelihood that the weapon was used in the course of the crime charged. *Commonwealth v. Ford,* 451 Pa. 81, 301 A.2d 856 (1973); *Commonwealth v. Mangus,* 229 Pa.Super. 29, 323 A.2d 398 (1974). The Commonwealth is not required to establish before introduction that the particular instrument was the weapon actually used in the attack. *Commonwealth v. Brown*, 467 Pa. 512, 369 A.2d 393 (1976). Appellant argues that the likelihood of the use of the knife, and hence its relevance, was not established because it was seized five weeks after the crime occurred and the victim was unable to testify that the instrument used to force her submission had been a knife.
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> In testing the relevance of evidence, the courts of this Commonwealth have cited with approval the following definition: "Relevant evidence then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible." *Commonwealth v. Shoatz,* 469 Pa. 545, 564, 366 A.2d 1216, 1225 (1976); *Commonwealth v. Walzack*, 468 Pa. 210, 218, 360 A.2d 914, 918 (1976) (both quoting C. McCormick, Evidence §185 at 437-38 (2d ed. 1972)). The accused's possession of an implement or weapon giving him the means to

carry out the crime constitutes some evidence of the probability that he committed the crime and is a relevant part of the Commonwealth's case. *Commonwealth v. Bederka,* 459 Pa. 653, 331 A.2d 181 (1975); *Commonwealth v. Yount*, 455 Pa. 303, 314 A.3d 242 (1974) (citing with approval, 1 Wharton's Criminal Evidence §157 at 289-90 (13th ed. C. Torcia 1972)). As the interval of time between the possession of the instrument of crime and the criminal event lengthens, the probative value of the evidence may become more tenuous, but that consideration is one for the jury to resolve in evaluating the weight of the evidence; the competency of the evidence is not affected. *Commonwealth v. Tallon*, 478 Pa. 468, 387 A.2d 77 (1978); *Comnonwealth v. Shoatz, supra.* The lack of positive identification that the knife was the actual weapon used likewise affects the weight of the evidence and not its admissibility. *Commonwealth v. Ford, supra.* A pocketknife is of such a size and character that one may carry it as a matter of course. This strengthens the likelihood that appellant would have been carrying the knife at the time of the crime five weeks earlier and supports its relevance.

Of course, the prejudicial impact of the evidence may outweigh its probative value, and the court may be moved to exclude the evidence on this basis. *Commonwealth v. Hickman,* 453 Pa. 427, 309 A.2d 564 (1974); *Commonwealth v. Ouarles,* 230 Pa.Super. 231, 326 A.2d 640 (1974). In determining whether evidence is so remote that the prejudicial effect outweighs the probative value, the court has no fixed standard on which to rely, but must instead consider the nature of the crime, the evidence being offered, and all attendant circumstances. *Commonwealth v. Kinnard,* 230 Pa.Super. 134, 326 A.2d 541 (1974). The trial judge's determination that evidence is not too remote to be admissible is within his sound discretion and will not be overturned absent an abuse. *Id.*

280 Pa.Super. at 5-7,
421 A.2d at 376.

In the instant case, testimony was presented that the weapon seen by the jury, was the weapon used in the commission of the crime, or at least that the weapon was identical to the one so used, so there clearly was a much stronger foundation established herein than in the cited case. We conclude that no error was made in permitting introduction of the knife into evidence.

V. Testimony of witness regarding prior sexual assault conviction of defendant:

At trial, the Commonwealth presented the testimony of Anita M. O'Donnell, regarding defendant's conviction for committing an indecent assault on her and the circumstances surrounding the assault.

Her testimony was to the effect that on March 21, 1989, she was 18 years of age, and was employed by defendant and another individual in a telemarketing business. She was making telephone calls for the business in a community she was not familiar with, and accepted a ride home with defendant. In transit, defendant began to talk angrily about his girlfriend. Eventually, he told the victim she would do what he wanted or he would rape her.

Defendant took the victim to a motel room in Cross Keys, Adams County, where he told her to remove her clothing. She complied, crying as she did so, and as defendant touched her body. He had sexual intercourse with her, then masturbated. Thereafter, he told her to go to the bathroom, and warned her not to go to the police or he would use "tapes" that he had recorded. Nonetheless, she went to the police, and defendant was charged with various sexual offenses, and convicted of indecent assault.

Initially, we would note the obvious similarities in the testimony of O'Donnell with that of the victims in the instant matter: O'Donnell was a young woman who was involved with defendant while engaged in the, conduct of his telemarketing business, and

at a time when he was middle-aged. [2] The assault took place in a motel room, involved defendant ordering her to remove her clothing while he fondled her and then sexually assaulted her, in the course of which he masturbated. He then released the victim who was not otherwise physically harmed.

In *Commonwealth v. Shively*, 492 Pa. 411, 424 A.2d 1257 (1981), which involved convictions for rape, involuntary deviate sexual intercourse, aggravated assault, and felonious restraint, the Pennsylvania Supreme Court held:

> It is well settled that:
> "...Evidence of other crimes is admissible when it tends to prove a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others or to establish the identity of the person charged with the commission of the crime on trial, -in other words where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other." *Commonwealth v. Wable*, 382 Pa. 80, 82, 114 A.2d 334, 336-37 (1955) (Emphasis added.)
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> As McCormick has stated, evidence of prior crimes is admissible:
> "...to prove other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused. Here, much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature." McCormick, Evidence, § 190 (1972 2d ed.) (Emphasis added) (Footnotes omitted).

[2] In criminal action number 135-1993, the victim (Nicole Fox) was not so employed, but met defendant through a female friend who had been so employed.

In the instant case, we are simply unable to find enough similarities between the two criminal episodes to brand the device as "so unusual and distinctive as to be like a signature."

As the Commonwealth points out in its brief, the evidence of appellee's guilty plea and the facts surrounding said plea were used for one purpose, i.e. to establish identity of the perpetrator. As Wigmore has theorized, use of prior criminal conduct to establish identity requires significant similarities between the two acts to show that it is more likely than not that the same individual committed both acts. Wigmore, Evidence, §304 (1940 3d ed.) Even if the time period between the two crimes at issue instantly was only seven months, we cannot find sufficient similarity to allow admission of evidence concerning appellee's guilty plea in 1972.

We have held that even if evidence of prior criminal activity is admissible under *Commonwealth v. Fortune, supra,* said evidence will be rendered inadmissible if it is too remote. *Commonwealth v. Brown*, 482 Pa. 130, 393 A.2d 414 (1978). Remoteness, in our view, is but another factor to be considered in determining if the prior crime tends to show that the same person committed both crimes. The degree of similarity between the two incidents necessary to prove common identity of the perpetrator is thus inversely proportional to the time span between the two crimes. Even if the time span instantly is only seven months, we fail to perceive enough similarity between the two episodes to allow admission of the prior activity.

492 Pa. at 415-416, 435 A.2d at 1259

Although the Supreme Court, in *Shively, supra*, upheld Superior Court's reversal of the conviction on the ground it was error to admit evidence of prior criminal conduct, it did so on the ground that the crimes were so dissimilar that they did not meet

the standard for admissibility set forth in the cited decisions. In the cases *sub judice*, there were numerous factual similarities in the commission of these crimes and the facts in the prior crime as noted above.

Obviously, there are additional factors which distinguish the instant case from *Shively.* In the instant case, defendant's identity was not in issue, so the evidence was admissible to establish a "common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others....", i.e. to establish a *modus operandi*.

While the amount of time that passed between the crime committed against Ms. O'Donnel is greater (i.e. approximately 3 1/2 years) than in *Shively* (7 months), nonetheless, this does not render the evidence of the prior conviction inadmissible on grounds of remoteness. Rather, as found in *Shively,* the longer the time span between the offenses, the greater the similarities must be to justify admitting the evidence. We find that the similarities present in defendant's prior conviction with the instant cases were so great that it was proper for the jury to be permitted to hear testimony of the prior conviction. See, e.g., *Commonwealth v. Frank,* 395 Pa.Super. 412, 577 A.2d 609 (1990.), alloc. den. 584 A.2d 312 (1990). (in a rape prosecution in which it was alleged that a male therapist who counselled troubled teenagers and their families had raped a teenaged male patient, it was held not to be error to admit testimony by six teenagers who had been counselled by defendant that the counsellor had initiated sexual contact with them, even though some of the incidents had occurred 3-4 years prior to the incident being prosecuted).

Furthermore, we instructed the jury as to the limited use for which the evidence of the prior crime could be utilized. This instruction followed immediately the testimony by the victim of that earlier offense.

We think it was appropriate for the evidence of the prior crime to be presented to the jury the unusual and unique circumstances presented herein, and thus conclude that this does not provide a basis for the relief sought.

ORDER OF COURT

NOW, January 21, 1994, defendant's post-trial motions are DENIED.

The Franklin County Probation Department is directed to prepare a pre-sentence investigation report, and sentencing is deferred to the call of the District Attorney.