IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 232 CR 2010
	:	
MICHAEL T. DEGILIO,	:	
Defendant	:	

Cynthia A. Dyrda-Hatton, Esquire — Counsel for Commonwealth
Assistant District Attorney

David S. Nenner, Esquire — Counsel for Defendant
Todd M. Mosser, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – April 24, 2015

On May 15, 2014, Michael T. Degilio ("Defendant") was convicted by a jury of involuntary deviate sexual intercourse,[1] indecent assault,[2] and indecent exposure.[3] In his Post-Sentence Motion filed on December 1, 2014, Defendant challenges principally the sufficiency of the evidence to establish forcible compulsion, a necessary element for conviction under the subsections of involuntary deviate sexual intercourse and indecent assault with which he was charged. Additionally, Defendant questions the weight of the evidence to support the verdict and asserts, for the first time, his competency to be tried. For the reasons which follow, we deny Defendant's Motion.

[1] 18 Pa.C.S.A. § 3123 (a)(1).
[2] 18 Pa.C.S.A. § 3126 (a)(2).
[3] 18 Pa.C.S.A. § 3127 (a).

FACTUAL AND PROCEDURAL BACKGROUND

On February 24, 2009, Jane Doe[4] was alone with Defendant in his office in Mahoning Township, Carbon County, Pennsylvania. Defendant was a practicing licensed psychologist with a doctoral degree in clinical psychology, and Mrs. Doe was his patient. This was their second time together and, because of what happened on that day, their last. The first time was February 20, 2009, when Mrs. Doe met Defendant for the first time as a new patient.

Mrs. Doe had been referred to Defendant by the Behavioral Health Unit of the Gnaden Huetten Memorial Hospital for out-patient therapy. (N.T., 5/12/14, p.42; N.T., 5/14/14, pp.5, 22-23, 69, 71, 73-76). She was voluntarily admitted to that facility on February 14, 2009, following a domestic dispute with her husband which precipitated a nervous breakdown and culminated in her curling into a fetal position for eight hours. (N.T., 5/12/14, pp.33-34, 36-37, 110; N.T., 5/13/14, pp.37-38; N.T., 5/14/14, pp.129-30, 207). Mrs. Doe had a history of depression and anxiety and, while at the Behavioral Health Unit, was given Cymbalta for her depression and Klonopin for anxiety.[5]

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[4] Out of respect for the victim's privacy, her true name has not been used in this published opinion. *Cf.* 42 Pa.C.S.A. § 5988 (a) (prohibiting disclosure of names of child victims of sexual or physical abuse by officers or employees of the court to the public and excluding any records revealing this information from public inspection).

[5] Klonopin belongs to a class of medications known as Benzodiazepines, also known as sedative hypnotics, which are used to calm people down, to control

This was the first time she was prescribed Klonopin, and it caused her to be tired, confused and dazed. (N.T., 5/12/14, pp.38-39). Upon her discharge from the Behavioral Health Unit on February 18, 2009, copies of her medical records were forwarded to Defendant to whom she had been referred for further treatment. (N.T., 5/13/14, p.106; N.T., 5/14/14, pp.78-80, 102-103). These records contained a discharge diagnosis of major depressive disorder. (Commonwealth Exhibit No. 6).

At Mrs. Doe's initial meeting with Defendant on February 20, 2009, Defendant obtained some additional background information from her; told her she was "too beautiful" to be a patient at the Behavioral Health Unit; asked if she ever strayed in her marriage; stated that he enjoyed being with women; and remarked that if anything happened between them it would have to be kept quiet because his license was on the line. (N.T., 5/12/14, pp.53-58). During this meeting, Mrs. Doe also informed Defendant of the new medication she was on, Klonopin, and the dosage. (N.T., 5/12/14, pp.38, 54).[6] Defendant and Mrs. Doe

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their anxiety. (N.T., 5/13/14, p.27). Benzodiazepines are known to cause fatigue, lethargy and confusion. (N.T., 5/13/14, pp.27-28). At high dosages, cognitive functions are impaired, including the capacity to concentrate, to process information, and to exercise judgment. (N.T., 5/13/14, pp.30-31).

[6] Upon her discharge from the Behavioral Health Unit on February 18, 2009, Mrs. Doe was prescribed and began taking eight milligrams of Klonopin a day, two milligrams four times a day. (N.T., 5/12/14, pp.38, 40, 43, 113); N.T., 5/13/14, pp.37-38). Dr. Ilan Levinson, a board-certified psychiatrist called by the Commonwealth, testified that this dosage was extremely high - in his opinion excessive – and would interfere with a person's judgment, verging on delirium, especially if the person was not accustomed to the medication. (N.T., 5/13/14, pp.28-32). As already stated, this was the first time Mrs.

were the only two people present at this meeting which lasted a little over an hour. (N.T., 5/12/14, pp.51, 59, 115). At the time of this meeting, Mrs. Doe was thirty-nine years of age and Defendant was forty years old.

When Mrs. Doe and Defendant met on February 24, 2009, Defendant had Mrs. Doe sit on a small sofa/loveseat in his office, and Defendant sat down beside her. (N.T., 5/12/14, pp.65, 67, 122). Defendant again commented that if anything happened between them, he could lose his license. (N.T., 5/12/14, p.66). When Mrs. Doe asked if he could help her, Defendant assured her he would. (N.T., 5/12/14, p.67).

At this second meeting, Mrs. Doe told Defendant she was depressed and suicidal, also that the new medication she was taking was affecting her coordination and she was stumbling into walls. (N.T., 5/12/14, pp.61, 66). Defendant then began kissing Mrs. Doe on the lips, pulled the front of her shirt and bra down, and kissed her right breast. Next, Defendant, who had been sitting beside Mrs. Doe, stood up and faced her, pressing

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Doe was given Klonopin. (N.T., 5/12/14, pp.37-38, 103; N.T., 5/13/14, pp.25-26; N.T., 5/14/14, p.212).

Dr. Levinson testified that as a sedative hypnotic and at a dose of eight milligrams per day, the effects of Klonopin are almost like functioning under the influence of alcohol or sleeping medications, with symptoms of extreme confusion, fatigue and gait impairment. (N.T., 5/13/14, pp.30, 52). Mrs. Doe's friend, Tracy Sherwood, noticed these effects in Mrs. Doe within a few days after her discharge from the Behavioral Health Unit on February 18, 2009. (N.T., 5/13/14, p.77). Mrs. Doe described the effect of Klonopin on her as being "zoned out." (N.T., 5/12/14, p.39). Dr. Levinson further testified that when a person who suffers from depression takes a high dosage of Klonopin they are extremely vulnerable and susceptible to manipulation by a dominant person. (N.T., 5/13/14, pp.31-32).

his knees against hers. Mrs. Doe remained seated in the love seat, the right side of her body boxed in by the arm rest. Defendant then dropped his pants, exposed his genitals, placed Mrs. Doe's right hand on his penis, and with one of his hands drew Mrs. Doe's head toward his erect penis where he had her perform oral sex on him. (N.T., 5/12/14, pp.67-68, 73-78). While this was occurring, Mrs. Doe repeatedly asked Defendant if he would help her and he said he was.[7] (N.T., 5/12/14, pp.66, 75, 78).

When questioned on direct examination, Mrs. Doe repeatedly stated she did not want what happened to happen. (N.T., 5/12/14, pp.68, 73-74, 77-78). She testified that Defendant's sexual contact with her was non-consensual, that she was confused, and that she did not resist because she thought Defendant was helping her. (N.T., 5/12/14, pp.73-75, 77-80, 147, 155-56). She also testified that after Defendant ejaculated he asked if she felt better and she said no. (N.T.,

[7] At trial Defendant denied not only having sexual relations with Mrs. Doe, but also that he was even present in his office at the time. This alibi was corroborated by Bernadette Beckett, who testified that she and Defendant were together on the date and at the time Mrs. Doe claimed she was assaulted. Defendant's and Ms. Beckett's testimony was clearly not accepted by the jury, in part we suspect, because Mrs. Doe was able to identify a birthmark in the lower left quadrant of Defendant's abdomen, below his belt line and approximately three inches below his naval, which she testified she observed at the time of the assault. (N.T., 5/12/14, pp.80-81, 214-15). The existence of this birthmark was confirmed by the police upon a body examination of Defendant on July 7, 2009. (N.T., 5/12/14, pp.171, 210, 213-14).

5/12/14, p.81). This second meeting, according to Mrs. Doe, also lasted a little over an hour.

DISCUSSION

Sufficiency of the Evidence

On these facts, as further discussed below, Defendant was convicted of involuntary deviate sexual intercourse and indecent assault. Both have "forcible compulsion" as an element of the offense. The offense of involuntary deviate sexual intercourse occurs, *inter alia*, when a person engages in deviate sexual intercourse with a complainant by forcible compulsion. 18 Pa.C.S.A. § 3123 (a)(1). Indecent assault occurs, *inter alia*, when a person has indecent contact with the complainant by forcible compulsion. 18 Pa.C.S.A. § 3126 (a)(2). The element of forcible compulsion describes not the type of force used – which can be physical, intellectual, or psychological - but the effect of the force used on the complainant's will to resist, such that the complainant's participation is non-volitional. Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986). Forcible compulsion requires that the defendant by his conduct overcome the complainant's freedom of choice. *Id.*

In Commonwealth v. Rhodes, the Pennsylvania Supreme Court stated that forcible compulsion includes "not only physical force or violence, but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse

against that person's will." 510 A.2d at 1226. Lack of consent, by itself, is insufficient to prove forcible compulsion. Something more is required, that something being the use of force upon the will of the complainant to resist. Forcible compulsion requires that force be used - whether physical, intellectual, moral, emotional, or psychological (*see* 18 Pa.C.S.A. § 3101 (Definitions)) - and that such force renders the complainant's submission non-volitional. *Id.* at 1226; Commonwealth v. Buffington, 828 A.2d 1024, 1031 (Pa. 2003).

The degree of force required to meet this standard is relative and rests on the totality of the circumstances of a given case. Factors to be considered are

> the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress.

Rhodes, 510 A.2d at 1226. That the victim resisted is not a prerequisite to proving forcible compulsion. *Id.*; 18 Pa.C.S.A. § 3107.

The degree of physical force exercised by Defendant when he guided Mrs. Doe's head to his genitals, while minimal and not sufficient by itself to meet the standard of forcible compulsion, is nevertheless a factor to be considered given the

circumstances of this particular victim and the facts and circumstances of the case. As noted in Rhodes, and applicable by analogy to the instant facts where Mrs. Doe's ability to make clear-headed decisions and to fend for herself was compromised and not equal to that of Defendant,

> There is an element of forcible compulsion, or the threat of forcible compulsion that would prevent resistance by a person of reasonable resolution, inherent in the situation in which an adult who is with a child who is younger, smaller, less psychologically and emotionally mature, and less sophisticated than the adult, instructs the child to submit to the performance of sexual acts. This is especially so where the child knows and trusts the adult. In such cases, forcible compulsion or the threat of forcible compulsion derives from the respective capacities of the child and the adult sufficient to induce the child to submit to the wishes of the adult ("prevent resistance"), without the use of physical force or violence or the explicit threat of physical force or violence.

Id. at 1227. *See also* Commonwealth v. Frank, 577 A.2d 609, 619 (Pa.Super.), *appeal denied*, 584 A.2d 312 (Pa. 1990) (finding therapist-patient relationship, plus therapist's threat to sabotage eleven or twelve-year-old patient's chances of adoption if he did not engage in sexual acts during therapy sessions, sufficient to establish psychological forcible compulsion).

The *sine qua non* of forcible compulsion is the use of superior force – physical, moral, psychological or intellectual – to compel another to do a thing against that person's will. Commonwealth v. Ables, 590 A.2d 334, 337 (Pa.Super.), *appeal*

denied, 597 A.2d 1150 (Pa. 1991); Rhodes, 510 A.2d at 1225. Here, Defendant was clearly in a dominant position *vis-à-vis* Mrs. Doe. (N.T., 5/14/14, p.135). Defendant was a licensed psychologist, trained and experienced in his field. (N.T., 5/14/14, pp.20-22). Mrs. Doe had been referred to Defendant for out-patient treatment and she was in Defendant's office, alone with him, for these purposes. Defendant was the doctor in charge and Mrs. Doe the patient. Mrs. Doe had only recently been discharged from a mental health facility where she had been diagnosed with major depressive disorder, was heavily medicated for this condition, and was vulnerable to being taken advantage of, all of which Defendant was aware of at the time of the assault.[8]

Before Defendant met with Mrs. Doe, Mrs. Doe's record of medical treatment at the Behavioral Health Unit was forwarded to him, together with her diagnosis of severe mental depression. Mrs. Doe told Defendant that she was depressed and suicidal,

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[8] Dr. Levinson testified that the combined effects of Mrs. Doe's severe depression and high dosage of Klonopin made her extremely vulnerable and susceptible to manipulation. On this point, which clearly implicates her will to resist, Dr. Levinson testified:

> One of the core symptoms of severe depressive state is that your self-esteem is very low. You look at yourself, at the world, at the future through dark glasses. You are not sure any more about your decisions. You're not sure about what you should do, what steps you should take. So anybody that comes across as strong and confident and knows what he's doing can easily manipulate you. If you add to this the fact that you're drugged by a medication, being overdosed by a medication and completely delirious, then obviously, you're more vulnerable, more susceptible to being taken advantage of by others.

(N.T., 5/13/14, pp.31-32).

that she was on new medication – Klonopin - and its dosage, and that this medication was affecting her coordination and balance. As a trained psychologist, Defendant knew that Mrs. Doe was susceptible to manipulation, that her mental functioning was diminished, and that she was desperate for help. Knowing this, Defendant not only flattered and flirted with Mrs. Doe, he virtually told her flat out that he wanted to have sexual relations with her and that this would make her feel better. Defendant had to know that a rational person in her right mind, seeking treatment for mental illness, would not believe such treatment included having sexual relations with her doctor, yet, this is exactly what Mrs. Doe conveyed when she submitted to Defendant's advances, without resistance, asking at the same time, "will this help me?"

Mrs. Doe was confused and insecure. She was assured by the Defendant that he cared for her, and she trusted and believed the Defendant when he told her he would help her. She viewed the Defendant as a professional person who knew what he was doing, and she submitted to his demands, behind closed doors, at a time when she was clearly vulnerable to being taken advantage of and was physically restricted in her ability to walk away, accepting, beyond rational comprehension, Defendant's assurances that gratifying Defendant sexually would help in her treatment.

We agree with Defendant's position that proof of "forcible compulsion" requires proof of "something more" than mere lack of consent, but disagree that this something more was not proven. *See* Buffington, 828 A.2d at 1031-32; Commonwealth v. Berkowitz, 641 A.2d 1161, 1164-65 (Pa. 1994); *see also* Commonwealth v. Smolko, 666 A.2d 672, 676 (Pa.Super. 1995) ("Where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the 'forcible compulsion' requirement . . . is not met.").[9]

In arguing that Mrs. Doe consented to his advances, that she allowed them to occur, and that she voluntarily participated, Defendant asks us to ignore why Mrs. Doe was in his office, the nature of the relationship between them, and that her ability to exercise normal judgment was severely impaired by her mental illness and the medication she was taking. Though not as palpable as physical force, or the threat of physical force, the vulnerability of an individual in deep depression is something Defendant was acutely aware of given his profession. And, as already noted, the test for forcible

[9] In its opinion in Buffington, the Pennsylvania Superior Court explained that whereas the element of forcible compulsion looks to the conduct of the defendant, the element of lack of consent implicates the conduct of the complainant. Commonwealth v. Buffington, 786 A.2d 271, 274 (Pa.Super. 2001), *aff'd*, 828 A.2d 1024 (Pa. 2003). We agree with this assessment, noting, however, that while the absence of consent alone will not satisfy the element of forcible compulsion, forcible compulsion encompasses within its meaning a lack of consent as interpreted by our case law. *See* Commonwealth v. Buffington, 828 A.2d 1024, 1031 (Pa. 2003).

compulsion takes into account the particular circumstances and vulnerability of the victim. *See* Rhodes, 510 A.2d 1217 (finding forcible compulsion based upon the child's physical and emotional helplessness in the face of her neighbor's commands, especially when the child knew and trusted the adult neighbor); Commonwealth v. Smolko, 666 A.2d 672 (Pa.Super. 1995) (finding forcible compulsion where the defendant performed oral sex on a victim who suffered from Pelizaeus-Merzbacher Syndrome and was confined to a wheelchair, and who was unable to physically defend himself or otherwise stop the assaults which the victim did not want to occur; the victim was vulnerable, the defendant in a position of authority, and the victim so physically deficient as to be unable to exert his will to resist the sexual demands of the defendant).

In testing the waters during his first appointment with Mrs. Doe and then crossing the line in the second appointment, Defendant took advantage of Mrs. Doe's weakened condition and emotionally and psychologically compelled her to engage in acts against her will. *Cf.* Commonwealth v. Gonzalez, 109 A.3d 711 (Pa.Super. 2015) (finding that notwithstanding the existence of a dating relationship and the initial consensual nature of the parties' physical contact with one another - kissing and touching each other's genitals over their clothing - and even though the physical force used was minimal, the element of

forcible compulsion was met given the victim's vulnerability as one suffering from cerebral palsy and her verbal request that defendant stop).[10]

A challenge to the sufficiency of the evidence is measured by viewing the evidence admitted at trial in a light most favorable to the Commonwealth as the verdict winner and accepting as true all evidence and reasonable inferences drawn therefrom which, if believed, the jury could have relied upon in reaching its verdict. It is from this perspective that the court must determine whether the evidence is sufficient to support the verdict. Gonzalez, 109 A.3d at 716. When viewed in this light, as set forth above, we find the evidence sufficient to support the verdict.[11]

Weight of the Evidence

[10] We reject Defendant's suggestion that because Defendant was not charged with either sexual assault (18 Pa.C.S.A. § 3124.1) or indecent contact without consent (18 Pa.C.S.A. § 3126 (a)(1)), both of which require only that the victim did not consent, but with violating Sections 3123 (a)(1) and 3126 (a)(2) of the Crimes Code which go one step further and require proof of forcible compulsion, Defendant's convictions are not sustainable. While we note that inherent in a finding of forcible compulsion is an absence of consent, the fact that Defendant may also have been charged with these other offenses and been convicted does not preclude a conviction under Sections 3123 (a)(1) and 3126 (a)(2) where the elements of such offenses have been proven beyond a reasonable doubt. *Cf.* Commonwealth v. Rhodes, 510 A.2d 1217, 1229 (Pa. 1986).

[11] In paragraph 29 of Defendant's Post-Sentence Motion, Defendant contends the evidence was insufficient to support his conviction of indecent exposure under 18 Pa.C.S.A. § 3127 (a). This Section provides that "a person commits indecent exposure if that person exposes his. . . genitals. . . in any place where there are present other persons under circumstances in which he. . . knows or should know that this conduct is likely to offend, affront or alarm." Because we believe it evident that a doctor exposing his genitals to a patient during treatment is conduct likely to offend, affront or alarm that patient, no further discussion of this issue is necessary.

In contrast, a challenge to the weight of the evidence requires a review of all of the evidence admitted at trial and a determination whether the verdict is so contrary to the evidence as a whole so as to shock the court's sense of justice. Commonwealth v. Boyd, 73 A.3d 1269, 1274-75 (Pa.Super. 2013) (*en banc*). The role of the trial judge in this review is to determine whether certain facts are so clearly of greater weight than others that for the jury to have ignored them or to give them equal weight with other facts is to deny justice. Gonzalez, 109 A.3d at 723. Because an appellate court's review of a trial court's order denying a weight of the evidence claim is a review of the trial court's exercise of discretion in reaching its decision, rather than a direct review of the evidence and a determination on its own as to whether the jury abused its discretion in evaluating and weighing the evidence, the denial of a motion for new trial on this basis is one of the most unassailable on appeal. Gonzalez, 109 A.3d at 723; Commonwealth v. Diggs, 949 A.2d 873, 879-80 (Pa. 2008).

We have no doubt that the evidence presented in this case was more than sufficient to justify an acquittal had the jury so decided. The jury could have found that the police investigation was inadequate and incomplete and that, as a result, it was in doubt as to what actually happened. (N.T., 5/12/14, pp.89, 138-39, 237-42, 252-55; N.T., 5/13/14, pp.89-90,

99-100). The jury could have accepted Defendant's testimony that Mrs. Doe never appeared for her appointment on February 24, 2009, that he never saw her that day, and that he never assaulted her. The jury could have believed Rebecca Kadingo, the mother of a patient Defendant was treating, who testified that she was present in Defendant's office on February 20, 2009, when Mrs. Doe arrived for her appointment; that Defendant handed Mrs. Doe some paperwork to fill out which she worked on for five to ten minutes; that as Mrs. Doe was completing this paperwork, Defendant told Mrs. Kadingo about a skin tag near his belt line he was having checked out; that she sat in the waiting room outside Defendant's office whose door was opened by several inches while he met inside, in private, with Mrs. Doe; that she overheard some of what occurred between them; that at one point she entered Defendant's office to get bandages for a bleeding finger; that she heard no suggestive or inappropriate solicitations made by Defendant; and that at the end of her session with Defendant, Mrs. Doe was upset and stomped out of the office like a little two-year-old. (N.T., 5/13/14, pp.211-17, 237-38). The jury could also have been persuaded by Ms. Beckett who, without skirting detail, testified of a sexual rendezvous between her and Defendant on February 24, 2009, at the very time when Mrs. Doe testified Defendant was with her. (N.T., 5/13/14, pp.150, 152-54). The jury could also have

legitimately questioned the veracity of Mrs. Doe, finding that given her state of mind and the effect Klonopin can have on a person's ability to think clearly, she either imagined having been attacked or misinterpreted what actually happened. (N.T., 5/13/14, p.118; N.T., 5/14/14, pp.202-204, 220).

But, this is not the standard by which to evaluate a challenge to the weight of the evidence. "A verdict is not contrary to the weight of the evidence because of a conflict in testimony or because the reviewing court on the same facts might have arrived at a different conclusion than the factfinder." Commonwealth v. Morales, 91 A.3d 80, 91 (Pa. 2014) (citation omitted). The jury had every right to make its own assessment of credibility and to disbelieve any or all of Defendant's evidence and reject the inferences therefrom.

Without question, the police investigation could have been more thorough, but that does not mean something more would have been found or that Mrs. Doe's version of what occurred would have been contradicted. The jury had a right to judge Defendant's testimony taking into consideration that his professional license was on the line if convicted and that a conviction would likely result in imprisonment. The jury may well have found that the timing of Defendant in providing Mrs. Kadingo's name to the police, within five hours of when he was interviewed by the police on July 7, 2009, and after speaking

with Mrs. Kadingo who reminded him that she was in the office on February 20, 2009, was suspicious (N.T., 5/12/14, pp.218-20; N.T., 5/13/14, 234-35, 241-42; N.T., 5/14/14, pp.41, 151)[12] and that her testimony was too convenient: did it really make sense that an experienced psychologist would leave the door to his office open two to three inches while meeting with a patient - here, Mrs. Doe - thereby allowing Mrs. Kadingo to eavesdrop on what was being said, or that Mrs. Kadingo would knowingly interrupt Defendant while he was meeting with a patient inside his office, or that Defendant would mention his skin tag to Mrs. Kadingo in the presence of Mrs. Doe whom he had never met before and was in his office for the first time. (N.T., 5/13/14, pp.213-17, 223-24, 238-39; N.T., 5/14/14, pp.58-59, 63-65, 151-54, 156-57, 159).[13] Similarly with respect to Ms. Beckett: did it really make sense that a spur of the moment liaison would be documented in her office calendar, rather than a more likely explanation, that as a former paramour for two years, Ms. Beckett still had strong feelings for Defendant and was willing to help him at all costs. (N.T., 5/13/14, pp.147-49, 160-61, 167-68, 176-82, 195).

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[12] For instance, Mrs. Kadingo testified that she contacted the Defendant to let him know she was in the office that day only after she learned of his arrest. (N.T., 5/13/14, pp.231, 241-42). Defendant was not arrested until January 28, 2010.

[13] At any rate, it was clear that Mrs. Kadingo wanted to help Defendant. (N.T., 5/14/14, p.170).

As to Mrs. Doe, her sincerity was apparent. She readily admitted that she was depressed, suicidal, confused and heavily medicated at the time of the assault.[14] Further, that after she was readmitted to the Behavioral Health Unit on February 26, 2009, and none of the staff believed her story, she had self-doubts and commented, "But it seemed so real." (N.T., 5/12/14, pp.138-40; N.T., 5/13/14, pp.67, 118). More importantly, Mrs. Doe also testified that as she got better and her dosage of Klonopin was reduced, her mind cleared, and not only could she recall in greater detail what had happened, she was certain it did happen. (N.T., 5/12/14, pp.91, 97, 143-45, 204, 206; N.T., 5/13/14, pp.64, 88-89). The sincerity of this belief was evident in her resulting diagnosis of post-traumatic stress disorder specifically related to the assault by Defendant and her re-admission to the Behavioral Health Unit on February 26, 2009. (N.T., 5/13/14, pp.23-24, 26; N.T., 5/14/14, pp.205-206).

Giving further credence to Mrs. Doe was her immediate

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[14] Dr. Levinson, who was Mrs. Doe's treating psychiatrist after the assault by Defendant, testified that for a person who is not accustomed to Klonopin, as was the case with Mrs. Doe, he "can become extremely confused, delirious, tired, sleeping a lot, can have gait impairments." (N.T., 5/13/14, p.30). In further explanation, Dr. Levinson testified:

> Eight milligrams of Kloponin is extremely high dosage, way above the recommended dose. It can cause confusion, sedation, cognitive impairments and even gait impairments. Ms. Doe reported to me that she had all of these symptoms. She said that she occasionally bumped into objects. She said that she was tired all the time. She said that it was hard for her to stay alert. I believe that this combination of symptoms affected her capacity to function in multiple levels, including taking care of her children.

(N.T., 5/13/14, p.52).

reporting of what happened to her close friend, Tracy Sherwood, within an hour of when she left Defendant's office on February 24, 2009. (N.T., 5/12/14, pp.83-84, 133; N.T., 5/13/14, pp.71, 93-94). Mrs. Sherwood testified of meeting with Mrs. Doe on that date, of Mrs. Doe telling her what had happened, of Mrs. Doe feeling betrayed and guilty at the same time, and of her own observations of Mrs. Doe whom she described as a mess: shaking, confused, and distraught, with heavy breathing and slurred speech. (N.T., 5/13/14, pp.83-86).

While perhaps this by itself may not have been enough to convince the jury of the validity of what Mrs. Doe claimed, hard evidence existed to support her accusations. Mrs. Doe recalled Defendant's birth mark which was below his belt line, near his genitals. She knew where it was, its shape and its color. (N.T., 5/12/14, pp.213-14). This was solid evidence to back Mrs. Doe's account of what occurred and the existence of this birth mark was confirmed by the police on their examination of Defendant.

That the jury believed Mrs. Doe over Defendant and accepted her version of what occurred on February 24, 2009, does not shock our sense of justice. That the jury found that Defendant's sexual assault of Mrs. Doe was the result of forcible compulsion, that Mrs. Doe was severely compromised at the time, that she believed Defendant when he told her the

sexual relationship was therapeutic, and that Defendant exercised moral, psychological and intellectual force in taking advantage of Mrs. Doe is supported by the evidence.

Competency to Stand Trial

Finally, Defendant contends that he should never have gone to trial in May 2014, that he was unable to effectively assist his counsel in his defense, and that, when he testified, he was cognitively impaired. As a consequence, Defendant asserts he had difficulty remembering facts, concentrating on what was being asked and articulating his responses, at times contradicting testimony of other witnesses favorable to his defense. The cause of these problems, according to Defendant, was hypothyroidism, which was not diagnosed until after trial. Legally, Defendant claims he was incompetent to stand trial.[15]

A criminal defendant is incompetent to stand trial if he is either unable to understand the nature of the proceedings against him or to participate in his own defense. Commonwealth Brown, 872 A.2d 1139, 1156 (Pa. 2005). The defendant is presumed competent and the burden of showing otherwise, by a preponderance of the evidence, is upon the defendant. *Id.* Here, Defendant only challenges his ability to assist and

[15] Although raised for the first time in Defendant's Post-Sentence Motion, this issue has not been waived. The Pennsylvania Supreme Court has consistently held that "the issue of whether a defendant was competent to stand trial is an exception to the waiver rule in cases on direct appeal." Commonwealth v. Brown, 872 A.2d 1139, 1153 (Pa. 2005) (citations omitted).

participate in his own defense, not his understanding of the nature or object of the proceedings against him. This challenge fails for the reasons which follow.

Dr. Megan Leary, a board-certified neurologist, first saw Defendant on November 7, 2013, when she was assisting Defendant in his recovery from the effects of a stroke he suffered in May 2013. Dr. Leary testified that on May 21, 2014, one week after the jury's verdict, Defendant contacted her office complaining of problems he was having when communicating with others: specifically, Defendant reported having trouble processing and understanding what was being said to him and in articulating what he wanted to say in response. This problem, as described by Defendant, first began shortly after he last met with Dr. Leary on April 4, 2014, and gradually worsened thereafter.

At first, Dr. Leary's staff thought Defendant's cognitive difficulty was a side effect of anti-seizure medication he was taking, however, after the results of blood tests ordered by Defendant's primary care physician which were taken on June 28, 2014, and July 15, 2014, reported TSH ("Thyroid Stimulating Hormone") levels of 18.22 and 23.26, respectively, Defendant was diagnosed with hypothyroidism.[16] Dr. Leary testified that confusion and poor concentration are known symptoms associated

[16] Dr. Leary testified that the normal range for TSH is 0.56 to 4.0. According to Dr. Leary, because Defendant's levels were more than four times normal, this was suggestive of hypothyroidism.

with hypothyroidism and that within one to two weeks of being given medication for this condition, Defendant reported improved concentration and ability to communicate. Ultimately, Dr. Leary opined that Defendant's difficulty in concentrating and focusing at trial had a medical basis (*i.e.*, hypothyroidism), and that this affected his ability to participate and assist with his defense.[17]

On cross-examination, Dr. Leary acknowledged that persons with hypothyroidism do not necessarily experience confusion and poor concentration, and that because the symptoms are subjective, their existence depends on reliable self-reporting.[18] She also testified that when confusion and poor concentration is due to hypothyroidism, the effect is widespread, not discrete, and generally does not fluctuate from day to day. Consequently, the testimony of Defendant's trial counsel, John Waldron, Esquire, who testified that Defendant exhibited no difficulty in responding to questions or recalling facts when he reviewed Defendant's testimony with him the evening before Defendant testified, as well as Defendant's ability while testifying at

[17] Significantly, Dr. Leary made a distinction between encephalopathy, a confused state caused by metabolic problems, which can wax and wane over time, and memory loss which is constant. Dr. Leary attributed Defendant's presumed inability to focus and pay attention to encephalopathy. Yet, a close reading of Defendant's testimony shows Defendant was not confused by the questions he was asked. When he exhibited difficulty, it was in recalling what had happened or remembering what he had already said.

[18] In this regard, it is not insignificant that Defendant is a practicing psychologist, and that his field of practice is clinical and forensic psychology. (N.T., 5/14/14, pp.20-22). As such, Defendant was familiar with the legal standard for competency.

trial to recall in detail many and varied facts, and to regain his train of thought after some initial confusion, dictates against hypothyroidism as a cause of any shortcomings in Defendant's testimony. Moreover, Attorney Waldron testified that Defendant was medically cleared for trial by Dr. Leary.[19]

Attorney Waldron is an experienced, respected criminal defense attorney. He testified that he met and discussed Defendant's case with Defendant multiple times prior to trial, that Defendant was active and instrumental in trial preparation, that he noticed no limitations in Defendant's ability to assist or participate in his defense, that Defendant was active in the jury selection which occurred on May 5, 2014, and that during the two days of trial testimony which preceded Defendant taking the stand, and even after Defendant had testified, Defendant never mentioned that he was having difficulty concentrating or following what was occurring.[20] Instead, Attorney Waldron noted what is common knowledge among experienced trial counsel, that sometimes, regardless of the defendant's knowledge of the facts, and regardless of preparation, the defendant freezes on the

[19] Defendant advised Attorney Waldron in writing of this medical clearance by e-mail dated January 21, 2014. (*See* Commonwealth Exhibit No.2 introduced at the hearing on Defendant's Post-Sentence Motion held on February 4, 2015). In Defendant's Post-Sentence Motion, Defendant also acknowledged that he was medically cleared for trial. (Post-Sentence Motion, paragraph 41). However, Dr. Leary denied that she ever medically cleared Defendant for trial or that she was even asked to do so.

[20] The first time Attorney Waldron learned that Defendant claimed he was having difficulty at trial was after the verdict was returned and Attorney Waldron was advising Defendant of his right to appeal.

witness stand, is unable to recall what occurred when asked, or even to remember what he has previously said in response to the same question, and says things that are better left unsaid.[21]

In reviewing Defendant's testimony, it is true that Defendant did not know the answers to certain questions asked and that in certain instances his testimony did not support and at times contradicted the testimony of other defense witnesses which was favorable to him. (N.T., 5/13/14, pp.175, 187-91, 213, 240; N.T., 5/14/14, pp.27, 139-40, 151, 154, 157-59, 175-76). It is also true that more than five years had passed from the events on which Defendant's prosecution was based and that a natural lapse in memory could be expected, and that where contradictions occurred, Defendant may well have been more accurate than the witness whose testimony was contradicted. (N.T., 5/14/14, pp.135, 140, 163, 168).[22] As to being confused,

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[21] Defendant's wife, also a forensic psychologist, was present when Defendant testified at trial. She too was disappointed in Defendant's demeanor and the manner in which he testified. At the hearing held on Defendant's Post-Sentence Motion, Mrs. Degilio testified that she did not question Defendant's competency at the time, knowing that he had been medically cleared for trial, but attributed his poor performance to the stress of trial.

[22] A defendant's inability or failure to recall key events surrounding the criminal offenses with which he has been charged, even to the extent of total amnesia, does not *per se* render him incompetent to stand trial. Commonwealth v. Stevenson, 64 A.3d 715, 720-21 (Pa.Super.), *appeal denied*, 80 A.3d 777 (Pa. 2013).

> Absent evidence of a mental disability interfering with the defendant's faculties for rational understanding, it is settled that mere vacuity of memory is not tantamount to legal incompetence to stand trial. It is only where the loss of memory affects or is accompanied by a mental disorder impairing the amnesiac's ability to intelligently comprehend his position or to responsibly cooperate with counsel that the accused's guaranties to a fair trial and effective assistance of counsel are threatened and therefore incapacity to stand

this certainly was not the case throughout Defendant's entire testimony, and on several occasions when it did occur, Defendant demonstrated the ability to catch himself and get back on track. (N.T., 5/14/14, pp.42-44). Even beyond this, at times Defendant sought to clarify statements he had given five years earlier which may have been confusing when made. (N.T., 5/14/14, pp.136-37). In addition, as a general statement, Defendant had more difficulty answering questions on cross-examination than he did on direct, which is natural and to be expected of any witness. (N.T., 5/14/14, pp.26, 154).

The Commonwealth called Dr. Frank Dattilio as its expert to evaluate Defendant's competence to be tried. Dr. Dattilio is a licensed and board-certified psychologist; Dr. Dattilio's practice is in clinical and forensic psychology.[23] After reviewing Defendant's trial testimony, as well as Dr. Leary's medical records, and interviewing defense counsel, Dr. Dattilio concluded that while Defendant experienced difficulty, at times, in answering questions and recalling events, a review of when this occurred and the circumstances did not support a finding

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trial may be demonstrated.
Id. at 720 (quoting Commonwealth v. Epps, 411 A.2d 534, 536 (Pa.Super. 1979)).

[23] Dr. Dattilo testified he has evaluated the legal competence of numerous criminal defendants and been qualified in multiple jurisdictions to provide expert opinion evidence with respect to such evaluations. In contrast, Dr. Leary readily admitted that she was not familiar with the legal standards for determining a criminal defendant's competency to stand trial.

that Defendant was "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense." 50 P.S. § 7402 (a) (Definition of Incompetency). Finding Dr. Dattilio to be credible and his reasoning persuasive, we likewise conclude that because Defendant was able to prepare and participate effectively with his counsel in his defense and possessed a rational and factual understanding of the proceedings, he was competent. Dusky v. United States, 362 U.S. 402 (1960). *See also* Commonwealth v. Hughes, 555 A.2d 1264 (Pa. 1989)

CONCLUSION

The quality and quantity of force necessary to constitute "forcible compulsion" under Chapter 31 of the Crimes Code is relative and depends upon the facts and particular circumstances of each case. Such force is not limited to physical force, but encompasses, as well, moral, emotional, psychological and intellectual force if used to compel a person to engage in conduct against that person's will. The evidence, when viewed most favorably to the Commonwealth, was sufficient for the jury to conclude not only that Defendant was peculiarly aware of Mrs. Doe's vulnerability to emotional and psychological pressure, but that he used that knowledge to prey upon her, taking advantage of his position of authority and betraying the trust and confidence she rightly reposed in him, so as to compel and

coerce her to engage in oral sex against her will. Nor, when viewed in its entirety, did the jury abuse its discretion in reaching this conclusion.

Separate from Defendant's challenge to the sufficiency and weight of the evidence to support his convictions, whether Defendant was competent to stand trial, an issue Defendant raised for the first time after the jury reached its verdict, was not waived and could be decided in a retrospective hearing. Commonwealth v. Santiago, 855 A.2d 682, 692-93 (Pa. 2004). Here, the relatively short time period between trial and the hearing held on this issue, the nature of the cause of the incompetency claimed, the content of statements made by Defendant at trial, the availability of Defendant's medical records shortly before and shortly after trial, and the availability of witnesses, both expert and non-expert, offering testimony regarding Defendant's mental status at the time of trial, all favor this review. As such, the hearing held on Defendant's Post-Sentence Motion challenging his competency to stand trial was both appropriate and timely.

Having heard the evidence presented on this issue, and having thoroughly reviewed Defendant's trial testimony and been present when this testimony was presented, we are not convinced that Defendant was legally incompetent to be tried or to be called as a witness on his own behalf. Defendant's impairment,

such as it was, did not affect to any significant degree his understanding of the proceedings or his ability to participate and assist in his defense.

BY THE COURT:

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P.J.