**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

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| **COMMONWEALTH OF PENNSYLVANIA** | **:** | |
| | **:** | **CR-161-2017** |
| | **:** | **CR-411-2017** |
| | **:** | **CR-580-2017** |
| | **:** | **CR-597-2017** |
| **v.** | **:** | |
| | **:** | |
| **WAYNE CRIPPEN,** | **:** | **POST SENTENCE MOTION** |
| **Defendant** | **:** | |

## OPINION AND ORDER

Wayne Crippen (Defendant), through Counsel, filed a Post-Sentence Motion Pursuant to Pa. R. Crim. P. 720 on March 29, 2019. A hearing on the Motion was held on June 6, 2019. In his Motion, Defendant raised the following issues: The evidence was insufficient to sustain the verdict; The verdict was against the weight of the evidence; This Court erred when it denied Defendant's Omnibus Pretrial Motion;[1] This Court erred when it granted the Commonwealth's Motion to Consolidate; This Court erred in denying Defendant's pre-trial motion to dismiss the seated jury panel; This Court erred when it denied Defendant's motion for a mistrial for an alleged *Brady* violation; and his sentence was unreasonable and excessive. For the following reasons Defendant's Motion is denied.

**Background**

On February 1, 2019, Defendant was convicted on the above docket numbers of four counts of Delivery of a Controlled Substance,[2] four counts of Possession of a Controlled Substance with the Intent to Deliver,[3] four counts of Criminal Use of a Communication

[1] This Court relies on its Opinion and Order dated June 20, 2018, which previously Denied Defendant's Omnibus Pretrial Motion, in denying this portion of Defendant's Post-Sentence Motion.
[2] 35 P.S. § 780-113(a)(30).
[3] 35 P.S. § 780-113(a)(30).

Facility,[4] four counts of Possession of a Controlled Substance,[5] one count of Endangering the Welfare of Children,[6] one count of Possession of a Small Amount of Marijuana,[7] and four counts of Possession of Drug Paraphernalia.[8] Detective Cassandra McCormack (McCormack) of the Lycoming County District Attorney's Office Narcotics Enforcement Unit (NEU), Autumn Day (Day), Officer Matthew Keller (Keller) of the NEU, Former Detective James Capello (Capello) of the NEU, Officer Jeremy Brown (Brown) of the NEU, Agent Justin Snyder (Snyder) of the Williamsport Bureau of Police (WBP), Trooper Edward Dammer (Dammer) of the Pennsylvania State Police (PSP), Kelly Miller (Miller), and Corporal Tyler Morse (Morse) of the PSP testified on behalf of the Commonwealth, while no testimony was provided by Defendant. That testimony and the evidence presented at trial established the following.

On November 16, 2016, McCormack was working with confidential informant (CI), Day, and conducted a strip search of her person, searched anything she brought with her, and her vehicle before setting up any controlled buys or giving Day any prerecorded buy money. This process occurred on November 16, 2016, December 6, 2016, and January 4, 2017. Day had a number, (570) 980-3497, she associated with an individual named "Mikey," whom she had bought heroin from on approximately twelve prior occasions. Day identified "Mikey" as Defendant at the trial. On November 16, 2016 Day called Defendant, who she knew as "Mikey," to buy $100 worth of heroin. Day then met Defendant, got in the back of his white four-door car, exchanged the money for the suspected heroin, and got out of the vehicle. Upon

[4] 18 Pa. C.S. § 7512(a).
[5] 35 P.S. § 780-113(a)(16).
[6] 18 Pa. C.S. § 4304(a)(1).
[7] 35 P.S. § 780-113(a)(31)(i).
[8] 35 P.S. § 780-113(a)(32).

returning to a predetermined location, Day gave Capello eleven bags of suspected heroin stamped "First 48." The eleven bags actually contained a mixture of cocaine and fentanyl. On December 6, 2016 Day again called (570) 980-3497, but received no answer. Day then called (267) 778-8088, which she associated with an individual named "Wiz." Day stated that "Mikey" answered the phone and they had made an arrangement to purchase $100 worth of heroin. Day meet Defendant, who was driving a tan colored SUV, and they conducted a driver side to driver side transaction of the prerecorded $100 for the suspected heroin. Upon returning to a predetermined location, Day gave Capello eleven bags of suspected heroin stamped with a blue lightbulb. The eleven bags contained a mixture of heroin and fentanyl. On January 4, 2017, Day set up another controlled buy by contacting Defendant through his (570) 980-3497 number. This time they agreed to buy a "bun" or ten bags for $90. Day later contacted Defendant, who had not yet arrived, and asked for $100 worth of heroin instead. Defendant gave her a different location and Defendant met her in a blue Honda. Day got in the back passenger side of the vehicle and exchanged the money for heroin. Upon returning to a predetermined location, Day gave Capello twelve bags of heroin stamped "SRT 8." The twelve bags contained heroin.

At the time of the controlled buys Day only knew Defendant as "Mikey" and on November 16, 2016 described him as a black male with a medium build, facial hair and glasses. Keller, Capello, Brown and Snyder all testified regarding their surveillance and involvement during the controlled buys. They testified to a similar account of events. They also explained during surveillance that no one individual had a visual of Day the entire time and that it is difficult to video and photograph transactions without drawing attention during surveillance.

Following the controlled by that occurred on December 6, 2016, Snyder contacted Dammer to conducted a vehicle stop of the tan SUV and to get a proper identification of Defendant. Dammer conducted a stop after the SUV rolled through a stop sign. At that time, Dammer contacted Snyder to let him know he smelled marijuana and whether he wanted him with a search to proceed or not. Defendant was then searched and found to have marijuana in his pocket and the prerecorded money from that day's controlled buy with Day. There was nothing else in the vehicle. Dammer had both Snyder and the Montoursville Police Department call (267) 778-8088 that was used in the controlled buy with Day. Both times the cellphone taken off Defendant began to ring. An issue was raised at trial based on the motion video recording (MVR) from that day. It appeared the individual stopped was missing a tooth, but Dammer explained the individual he stopped that day was not missing any teeth, that Defendant was the person he stopped that day, and it is most likely pixilation from the MVR causing the black gap.

The last two individuals to testify for the Commonwealth were Miller and Morse regarding a separate controlled buy that occurred on December 5, 2016. On that date, Miller met with Morse to conduct a controlled buy. Miller contacted an individual in his phone known as "D Boy Car Nick" whom he has purchased heroin from approximately a dozen times in the past. The number for "D Boy Car Nick" was the same (570) 980-3497 number Day used to make controlled buys on November 16, 2016 and January 4, 2017. Miller asked for a "brick" or fifty bags of heroin for $400. Morse and Miller rode together to meet "D Boy Car Nick" to purchase the heroin. Morse gave Miller $400 of prerecorded currency. A vehicle went by them and honked its horn indicating they should follow. When it stopped Miller got out of the car and into the back seat of the other vehicle and exchanged the money for the suspected

heroin. Miller stated when he got in the vehicle a child of about five or six was sitting in the back next to him, unrestrained on top of a pile of money. Back at the station Morse looked over the suspected heroin and found there were forty-six bags, each stamped with either a red or blue lightbulb. The forty-six bags contained a mixture of heroin and fentanyl. Miller described "D Boy Car Nick" as a light skinned black male that was stalky with a beard and glasses. On January 4, 2017 Morse spoke with Snyder and Brown about their ongoing investigation and had them provide him with a photo of Defendant. On January 5, 2017 Miller was shown a photo array, which he could not positively identify "D Boy Car Nick" and asked if he could see pictures of individuals with glasses. Miller than went through a second photo array of individuals with glasses and positively identified Defendant as the individual that sold him the suspected heroin on December 5, 2016. Miller also identified Defendant as the individual he knew as "D Boy Car Nick" who sold him the suspected heroin on December 6, 2016 at trial.

**Discussion**

***Whether the Evidence was Insufficient to Sustain a Conviction***

Defendant asserts the Commonwealth's evidence presented at trial was insufficient to justify a verdict of guilty and therefore requests either Judgment of Acquittal, relief in Arrest of Judgment or a New Trial. When evaluating the sufficiency of the evidence a Court "must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt." *Commonwealth v. Brown*, 52 A.3d 320, 323 (Pa. Super. 2012). All reasonable inferences are drawn in favor of the verdict winner. *Commonwealth v. Watley*, 81 A.3d 108, 113 (Pa. Super. 2013). "[T]he evidence established at

trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented." *Brown*, 52 A.2d at 323.

An individual commits the crime of Delivery of a Controlled Substance if the person transfers from one person to another a drug, substance, or immediate precursor, which under the Controlled Substance, Drug, Device and Cosmetic Act includes cocaine, heroin, and fentanyl. 35 P.S. §§ 780-102(b), 780-104(1)(ii)(10), (1)(ii)(23), (2)(i)(4), 780-113(a)(30). Testimony provided by Day established that on November 16, 2017, December 6, 2016, and January 4, 2017 Defendant sold her what she believed to be heroin. That on those days she either got in his vehicle or through a driver side window to driver side window exchanged prerecorded funds for suspected heroin. Lab reports submitted at trial established that the baggies contained cocaine and heroin, heroin and fentanyl, and heroin. Similarly, Miller testified that Defendant, on December 5, 2016, exchanged a "brick" of suspected heroin for prerecorded currency. Lab reports submitted at trial showed the substance in those baggies was heroin and fentanyl. Therefore evidence was submitted for the jury to find Defendant guilty on every element of Delivery of a Controlled Substance.[9]

An individual commits the crime of Criminal Use of a Communication Facility if the person uses "a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or . . . The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section." 18 Pa. C.S. § 7512(a). Day

[9] This also means enough evidence was submitted to establish the underlying crimes of Possession of a Controlled Substance with the Intent to Deliver and Possession of a Controlled Substance, as the charges merge. Summarily Possession of Drug Paraphernalia is also satisfied by the packaging of the controlled substances alone although the two crimes do not merge for sentencing. *See Commonwealth v. Pitner*, 928 A.2d 1104, 1111 (Pa. Super. 2007).

testified that she spoke on the phone with who she knew as "Mikey," then "Mikey" is the individual that sold her the drugs on all three occasions, and she identified Defendant as "Mikey." Similarly Miller testified that he spoke on the phone with "D Boy Car Nick," then "D Boy Car Nick" is the person who sold him the drugs, and he identified Defendant as "D Boy Car Nick." Therefore the four convictions of Criminal Use of a Communication Facility are supported by the evidence submitted at trial.

Endangering the Welfare of a Child occurs when an individual knowingly violates a duty of care, protection, or support and the parent is the person supervising the welfare of the child and the child is under the age of eighteen. 18 Pa. C.S. 4304(a). Miller testified that a young child was sitting in the back seat of the vehicle, where he got in, was sitting on a pile of money. Defendant was conducting hand to hand drug transactions right in front of/over the head of the child. The evidence was sufficient from Miller's description to establish the child was under eighteen and Defendant, who was the driver of the vehicle, was supervising the child. The evidence was also sufficient for a jury to conclude that Defendant was knowingly endangering the child by having them sit on the back seat on a pile of cash, not properly restrained, having individuals looking to buy narcotics get in the back seat right next to the child, and then to be selling fentanyl laced heroin right in front of/over the head of the child. Therefore there was sufficient evidence presented at trial for a jury to convict Defendant of Endangering the Welfare of a Child.[10]

Lastly, Defendant disputes his charges of Possession of a Small Amount of Marijuana, and Possession of Drug Paraphernalia, from the traffic stop that occurred on December 6,

[10] Jury's attentiveness is demonstrated in the verdict. They found Defendant guilty of Endangering the Welfare of Children, but not the aggravator of a child under six, because the only evidence was provided was Miller's description that the child was about five or six.

2016. Dammer testified that after stopping his vehicle and searching Defendant's person on that date he located a small amount of marijuana in a Ziploc bag in his pocket. Therefore there is sufficient evidence to establish Defendant possessed a small amount of marijuana and paraphernalia, the Ziploc bag.

Defendant raises a last issue under this subsection, stating that the Commonwealth did not provide required discovery including preliminary transcripts. Defense counsel never raised the issue that discovery was lacking until this Motion. Additionally, this Court would note that the preliminary hearing transcripts were attached as Exhibits E and G in the Commonwealth's Response to Defendant's Post Suppression Hearing Brief, which was available to Defendant. Therefore Defendant's contention has no merit.

***Whether the Verdict was Against the Weight of the Evidence***

Defendant contends that the verdict reached by the jury was against the weight of the evidence provided at trial. More specifically, Defendant argues both Day and Miller failed to testify credibly and mistakenly identified Defendant. "[T]he trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence." *Commonwealth v. Knox*, 50 A.3d 749. 754 (Pa. Super. 2012). This finding rest exclusively with the jury as the trier of fact. *Commonwealth v. Rice*, 902 A.2d 542, 546 (Pa. Super. 2006).

> The weight given to trial evidence is a choice for the factfinder. If the factfinder returns a guilty verdict, and if a criminal defendant then files a motion for a new trial on the basis that the verdict was against the weight of the evidence, a trial court is not to grant relief unless the verdict is so contrary to the evidence as to shock one's sense of justice.
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> *Commonwealth v. West*, 937 A.2d 516, 521 (Pa. Super. 2007).
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> On cross examination Defense Counsel elicited from Day that she was doing this

because she had pending charges, she was a past heroin user, she was expecting consideration in exchange for her testimony, and she was acting as a CI for police with other potential cases. Defense counsel also brought up that she could not recall the locations of the controlled buys in past testimony and she described Defendant differently in past testimony. Defense counsel during cross examination of Miller elicited similar evidence. Miller had pending charges, was a past heroin user, had conducted multiple controlled buys for Morse, and he was expecting leniency in exchange for his testimony against Defendant. Additionally, Defense counsel pointed out on cross examination how Miller had difficulty providing the color of the car in his past testimony and describing Defendant on prior occasions. Defense counsel on cross examination revealed enough evidence for the jury to make a proper determination on whether Day and Miller were fabricating their testimony in exchange for consideration and/or whether they in fact viewed Defendant or someone else at the time of the controlled buys. The trier of fact was provided enough information to believe all, part, or none of the testimony provided by Day and Miller and chose in their sole discretion to believe their testimony. The jury's determination does not shock one's sense of justice to the extent this Court will overturn their determination. Therefore the Court finds Defendant's claim that the verdict was against the weight of the evidence is meritless.

***Whether This Court Erred in Granting the Commonwealth's Motion to Consolidate***

Defendant next contends this Court erred by granting Commonwealth's Motion to Consolidate the above informations. Offenses may be tried together if: "the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or the offenses charged are based on the same act or transaction." Pa. R. Crim. P. 582(a)(1). After making that evaluation a "court must

also consider whether consolidation would unduly prejudice the defendant." *Commonwealth v. Knoble*, 188 A.3d 1199, 1205 (Pa. Super. 2018). The Commonwealth typically may not present evidence that a defendant committed a crime for the purposes of proving they committed another crime as well, but exceptions exists when the evidence of "the other crimes tend to prove: motive; intent; absence of mistake or accident; a common scheme, plan, or design embracing the commission of two or more crimes so related that proof of one tends to prove the others; or the identity of the person committing the charged crime." *Commonwealth v. Taylor*, 445 A.2d 174, 177 (Pa. Super. 1982).

The informations were properly consolidated. Mistake of identity was a large portion of Defendant's defense. The evidence could be submitted to show this is not a mistake of identity through a common scheme, plan or design. Both Day and Miller identified Defendant as the individual that sold them suspected heroin. The two CIs both testified that they both contacted Defendant on the phone using (570) 980-3497, that they received the suspected heroin in bags stamped the same way just a day apart, and the manner in meeting Defendant was similar. Additionally, the stop conducted by Dammer was to retrieve identification of the individual who just sold suspected heroin to Day and during that stop officers verified (267) 778-8088 as the number of the phone on Defendant, which was the number used to set up the controlled buy on that day. The informations would have been admissible at separate trials, there was no danger of jury confusion or failure to separate the charges, and Defendant was not unduly prejudiced by the informations consolidation.

***Whether This Court Erred in Denying Defendant's Motion for New Jury Panel***

Defendant orally raised an objection to the jury array on the record following jury selection and January 16, 2019, and filed a Motion to that effect on January 28, 2019.

Defendant contends that this Court erred in not granting his Motion for New Jury Panel.

> Unless opportunity did not exist prior thereto, a challenge to the array shall be made not later than 5 days before the first day of the week the case is listed for trial of criminal cases for which the jurors have been summoned and not thereafter, and shall be in writing, specifying the facts constituting the ground for the challenge.
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> Pa. R. Crim. P. 625(B)(1).

When a defendant fails to raise a timely objection to a jury array that defendant "has waived any objection he may have had." *Commonwealth v. Jackson*, 486 A.2d 431, 436 (Pa. Super. 1984). Courts have found that an objection is not timely if it is not brought within the proper time period prior to jury selection. *See id.* (untimely when "several prospective jurors had already been questioned"); *Commonwealth v. Brown*, 578 A.2d 461, 467 (Pa. Super. 1990) (untimely when raised on the third day of jury selection). Defendant raised his objection at the conclusion of jury selection and it was therefore untimely and deemed waived.

***Whether This Court Erred by Denying Defendant's Motion for a Mistrial***

Defendant next argues the Court erred in denying his request for a mistrial at the beginning of the second day of the trial. Defendant did so after the Commonwealth supplied them with a page of a police report from Morse that morning. The Commonwealth explained that they were also unaware of the report until Morse provided it to them that morning. The relevant portion from the report at issue reads as follows:

> During the preliminary arraignment on 03/01/17, [Defendant] was very adamant that he was not the person that had delivered to my CI. After the preliminary hearing, I told him he was in the vehicle and he said that he was not. I told him Emily rented the car for him and he said that he did not know Emily. I showed him a picture of her and he abruptly stated that that was his "brother's baby mama." We then went into the holding room at MDJ Fry's office. He continued talking that he did not sell drugs to the CI. He stated that he has never sold "dope" but he has sold marijuana. I stopped him and read him his Miranda Warnings at 1015 hours. He acknowledged his rights and stated he would talk to me. [Defendant] stated that he does know cell phone number 570-

> 980-3497. He stated that he never met the CI and the CI was wrong. The owner of the cell phone is similar looking to him. He identified the owner of that cell phone number as Nadi HACHETT . . . . He stated he would not testify in court to that information and wanted it "off the record."

Defendant claims that the above information was crucial in his defense of mistaken identity and the Commonwealth by not providing it prior to trial committed a *Brady* violation.

Defendant's claim is meritless. The key issue Defendant alleges would have helped his case is the identity of this third individual "Nadi Hachett." "There is no *Brady* violation when [a defendant] knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from non-governmental sources." *Commonwealth v. Paddy*, 15 A.3d 431, 451 (Pa. 2011). The information at issue was proffered by Defendant himself and then put into the police report. Therefore the evidence was clearly available to Defendant as he is the individual who originally presented the name to police. Defendant's Post-Sentence Motion is denied for that reason.

***Whether the Court's Sentence was Unreasonable and Excessive***

Defendant was sentenced on March 19, 2019. Defendant received an aggregate sentence of ten and a half years to twenty-one years in state prison. Defendant was determined to have a prior record score (PRS) of five. *See* 204 N.T. 3/19/19, at 8-9. Under CR 411-2017 for the delivery of 1.42 grams of heroin and fentanyl Defendant was sentenced to thirty-six to seventy-two months. Delivery of heroin and fentanyl over one gram is an ungraded felony, which carries an offense gravity score (OGS) of seven. 204 Pa. Code § 303.15.[11] Based on Defendant's OGS and PRS of five the standard range is twenty-four to thirty months with an aggravated and mitigated range of plus or minus six months. 204 Pa. Code § 303.16(a). Under

[11] Defendant committed offenses prior to the enactment of current offense gravity score section, and therefore Defendant is not affected by the enhancement for fentanyl laced controlled substances.

CR 580-2017 for the delivery of .55 grams of cocaine and fentanyl, .47 grams of heroin and fentanyl, and .2 grams of heroin, Defendant was sentenced to twenty-four to forty-eight months on each count. All three deliveries are an ungraded felonies, which carry an offense gravity score (OGS) of six. 204 Pa. Code § 303.15. Based on Defendant's OGS and PRS of five the standard range for each count is twenty-one to twenty-seven months with an aggravated and mitigated range of plus or minus six months. 204 Pa. Code § 303.16(a). Under CR 597-2017 for Endangering the Welfare of a Child, Defendant was sentenced to eighteen to thirty-six months. Endangering the Welfare of a Child is a misdemeanor of the first degree, which carries an offense gravity score (OGS) of five. 204 Pa. Code § 303.15. Based on Defendant's OGS and PRS of five the standard range is twelve to eighteen months with an aggravated and mitigated range of plus or minus three months. 204 Pa. Code § 303.16(a). All above counts were ordered to run consecutive to one another. [12]

"All numbers in sentence recommendations suggest months of minimum confinement." 204 Pa. Code § 303.9(e). Sentencing has been found to be within the sound discretion of the trial court judge. *Commonwealth v. Allen*, 24 A.3d 1058, 1065 (Pa. Super. 2011). The Court had the benefit of a presentence investigation report prior to sentencing and considered all relevant factors in fashioning its sentence. With the exception of Defendant's sentence under CR 411-2017, his minimum sentences are within his recommended standard range. Therefore those sentences are not unreasonable and/or excessive. *See Commonwealth v. Raven*, 97 A.3d 1244, 1254-55 (Pa. Super. 2014) (sentencing a defendant within the standard range after considering all evidence at sentencing is not unreasonable or excessive). As for

[12] Remainder of Defendant's charges either were ordered to run concurrent to one another, merged for purposes of sentencing, or Defendant was given a fine, which does not affect the aggregate sentence and therefore is not at issue.

Defendant's sentence under CR 411-2017, this Court sentenced Defendant to a minimum of thirty-six months, the permissible aggravated minimum range. "A sentencing court may consider any legal factor in determining that a sentence in the aggravated range should be imposed" and must demonstrate that reason on the record. *Commonwealth v. Bowen*, 975 A.2d 1120, 1122 (Pa. Super. 2009). This Court on the record stated the reason for its aggravated sentence. Defendant has refused to be accountable and take responsibility for his actions. N.T. 3/19/19, at 14-15. Defendant has continued this pattern of drug dealing for approximately twenty years. *Id.* at 15. Lastly, the Court considered the fact that the heroin delivered was laced with fentanyl, which although his offenses occurred prior to the enhanced offense gravity scores, this Court still took into consideration in reaching its conclusion on an appropriate sentence. *Id.*

Defendant also challenges this Court's imposition of his sentence consecutively, as opposed to concurrently. It is well established it is within the sound discretion of the sentencing court whether to make sentences consecutive or concurrent under 42 Pa. C.S. § 9721(a). *Commonwealth v. Pass*, 914 A.2d 442, 446-47 (Pa. Super. 2006). The Court agrees with the Commonwealth's position that if it were to make Defendant's sentences concurrent it would diminish the seriousness of each offense.

**ORDER**

**AND NOW**, this 25th day of June, 2019, based on the foregoing opinion, Defendant's Motion for Post Sentence Relief is hereby **DENIED.**

Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of entry; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the

right to appeal *in forma pauperis* and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

BY THE COURT,

_____
Nancy L. Butts, P.J.

cc: Ryan Gardner, Esq.
DA (NI)
NLB/kp