IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 97-10,393**
	:	
	:	
vs.	**:**	**CRIMINAL**
	:	
LAWRENCE KNIGHT,	**:**	
Defendant	**:**	**PCRA**

OPINION AND ORDER

This matter came before the Court on the defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts are as follows: On February 10, 1997, the defendant was charged with statutory sexual assault, involuntary deviate sexual intercourse, indecent assault, and corruption of minors relating to his contacts with J.B and corruption of minors with respect to his contacts A.K. The defendant filed a petition for writ of habeas corpus and a motion to suppress evidence. The Honorable William S. Kieser denied both requests.

On November 20, 1997, the defendant filed a motion to sever the charge involving A.K. from the charges involving J.B. On December 10, 1997, however, the defense withdrew the severance motion.

On February 11-13, 1998, a jury trial was held, and the jury found the defendant guilty of all charges. On May 21, 1998, the Court held a sentencing hearing. In accordance with Pennsylvania's Megan's law, the Court found the defendant was a sexually violent predator and sentenced him to a maximum of life imprisonment on his

conviction of involuntary deviate sexual intercourse.

The defendant appealed his convictions and sentence on June 19, 1998. In his concise statement of matter complained of on appeal, the defendant raised four issues: (1) the Court erred in denying the defendant's Motion to Suppress; (2) the Court erred in finding the defendant was a sexually violent predator; (3) Megan's Law, as was in effect at the time sentencing, was unconstitutional; and (4) the testimony of the prosecution witnesses was so inconsistent that the verdict was against the weight of the evidence. In a memorandum Opinion dated July 29, 1999, the Pennsylvania Superior Court vacated the defendant's sentence because Pennsylvania's Megan's Law was unconstitutional, but upheld the Court's denial of the defendant's Motion to Suppress.[1] The record was returned to Lycoming County on or about September 27, 1999.

In accordance with the remand from the Pennsylvania Superior Court, the Court re-sentenced the defendant on October 7, 1999. The Court imposed an aggregate sentence of incarceration in a state correctional institution for a minimum of six (6) years and a maximum of twenty-five (25) years plus fifteen (15) years consecutive probation. The defendant did not appeal this sentence.

On July 20, 2000, the defendant filed a PCRA petition. The Court held an argument with counsel on this PCRA petition on October 20, 2000. After argument, the Court gave the defendant an additional thirty (30) days to file an amended petition. The defendant filed an amended petition of November 9, 2000. The Court held an argument on the amended petition of December 8, 2000. Because the amended

---

1 Apparently, the defense did not pursue the allegation that the verdict was against the weight of the evidence.

petition sought an evidentiary hearing but did not include any affidavits or certifications of the intended witnesses that would comply with 42 Pa.C.S. Section 9545(d), the Court gave the defense additional time to submit such certifications/affidavits.

Initially, the Court was going to deny the PCRA petition without a hearing. However, on September 4, 2001, the Court granted the defendant an evidentiary hearing on whether counsel was ineffective for failing to call Delores Way as a witness. The Court granted the hearing because it was not clear from Ms. Way's certifications whether any or all of her testimony was hearsay. It also was not clear what information from Ms. Way was conveyed or forwarded to trial counsel.

The Court scheduled the evidentiary hearing for October 16, 2001. The Court continued this hearing, because trial counsel was unavailable to be called as a witness as he was in a hearing in another county. This matter was rescheduled for November 21, 2001, but again was continued.

On December 21, 2001, the Court took the testimony of Dolores Way. There was insufficient time to take the testimony of the defendant and trial counsel, though, so the remainder of the hearing was rescheduled for January 4, 2002. The hearing could not be held on January 4, 2002 because defense counsel's wife was having a baby. Therefore, this matter was rescheduled to January 28, 2002. On January 28, 2002, the Court took the testimony of the defendant and trial counsel, W. Jeffrey Yates.

The first issue raised in the defendant's amended PCRA petition is that the prosecutor removed photographs depicting a tattoo on the defendant's groin from the courtroom. The defense claims this evidence would have impeached the credibility

of the victims. This contention is without merit. The victims' testimony was impeached by evidence regarding the tattoo on the defendant's groin. J.B. testified that she did not remember any tattoos other than on one of the defendant's forearms. N.T., February 11, 1998 at p. 39. A.K. did not remember any tattoos on the defendant. N.T., February 4, 1998 at p. 77. The defendant testified regarding the tattoos on his body and specifically noted that he had a heart tattoo on his groin area. N.T., February 12-13, 1998 at pp. 250-253. The defense then introduced two photographs of the tattoo on the defendant's groin and published them to the jury. N.T., February 12-13, 1998 at pp. 252-253. The photographs were marked as Defendant's Exhibit #l and #2 and were retained by the court reporter. To address this issue, the Court retrieved the photographs from the court reporter. One photograph is a close-up of the defendant's groin area with his privates covered by a brown hand towel. The other photograph is of almost all of the defendant's right side from his head to his thigh. In both photos there is a small heart tattoo that appears to be blue in color and about the size of a nickel. Therefore, the record belies the defendant's contention. Moreover, there would be no prejudice to the defendant even if the allegation were true because the victims were questioned about the tattoo and the photographs were published to the jury.

The defendant next contends the prosecutor used improper terminology to refer to the defendant, which terminology would have prejudiced the jury. In cross-examining defense witness Mary Button, the prosecutor asked the witness "You certainly wouldn't want anybody to say that you're the kind of Mother that would allow her minor child to spend time with an accused child molester, would you?" Defense counsel objected to the phrasing of the question and the Court had the prosecutor

rephrase the question. N.T., February 12-13, 1998, at pp. 100-101. The prosecutor rephrased the question to ask if the witness was aware that the defendant was accused of committing sexual acts with a minor. The witness replied in the affirmative. The prosecutor then asked, "That's what most commonly is referred to a child molester, correct?" Defense counsel again objected to the phrasing of the question and the Court told the prosecutor move on to her next question. N.T., February 12- 13, 1998, at p. 101. The Court does not believe these two instances of referring to the defendant as child molester or an accused child molester justifies a new trial in this case. In reviewing challenges of prosecutorial misconduct, the Pennsylvania Supreme Court has stated:

> Every unwise or irrelevant remark made in the course of a trial by a judge, a witness, or counsel does not compel the grant of a new trial. Rather the focus is on what if any effects the comments "would be to prejudice the jury, forming in their minds fixed bias and hostility towards the defendant so that they could not weigh the evidence objectively and render a true verdict.

Commonwealth v. Faulkner, 528 Pa. 57, 595 A.2d 28, 39 (1991) (citations omitted). Further, whether comments are prejudicial towards the defendant is a decision entrusted to the trial court. Id. Since there were only two references among hundreds of pages of testimony and the Court had the prosecutor rephrase her questions without using the term "child molester", the Court does not believe these references prejudiced the jury. Moreover, the defendant admitted to having sexual contacts with A.K. in his trial testimony (N.T. February 12-13, 1998, at pp. 236-237, 267-248) and he admitted to sexual contacts with J.B. during his sentencing hearing (N.T., May 21, 1998, at p. 94). Therefore, the Court finds the jury rendered a true verdict and any alleged misconduct

did not affect the outcome of the trial.

The defendant also contends the prosecutor misled the Court to believe Dolores Way was a relative of the victim and on that basis as well as other unspecified "impertinent and spurious allegations" the Court precluded Ms. Way from testifying. The Court did not preclude Ms. Way from testifying. In fact, the Court indicated it was willing to give the defense some leeway to show Diane Kemp coached J.B. The only reservation expressed by the Court was whether the defense could call Diane Kemp simply to impeach her with the testimony of Ms. Way. N.T., February 12-13, 1998, at pp. 39-52.

The defendant next asserts the prosecutor referred to an incident in final arguments that had been precluded by the Court in a previous ruling. The Court does not know to what the defendant is referring. At one of the arguments, defense counsel mentioned an incident from out-of-state (perhaps from South Carolina), but there is no such reference in the prosecutor's closing argument.

The defense also contends the prosecutor made unfounded assertions during cross-examination of the defendant's wife, which were not substantiated and were prejudicial to the defendant. The prosecutor asked Mrs. Knight if she made a statement to Ken Bartron that her husband had an addiction to the babysitter and Mrs. Knight denied making such a statement. N.T., February 12-13, 1998, at p. 198. The prosecutor also asked Mrs. Knight if, when she received a subpoena from the Commonwealth, she told the prosecutor's staff that she would perjure herself before she would say anything against her husband. N.T. February 12-13, 1998, at p. 199. Again, Mrs. Knight denied making such a statement. The Court does not believe either

question was unfairly prejudicial to the defendant. A.K. was the babysitter of the defendant's children and the defendant admitted to his wife and Agent Gilson that he had a sexual relationship with her. N.T., February 12-13, 1998, at pp. 7-9, 194, 201, 236-237, 246-248. Since the defendant admitted to having an affair with the babysitter, (A.K.), the prosecutor's question would not have been prejudicial. Additionally, Mrs. Knight was questioned on re-direct examination and she explained that she simply told him she needed time off from work because of what she was going through. N.T., February 12-13, 1998 at pp. 203-204. With respect to any statements to staff of the District Attorney's office, Mrs. Knight indicated on re-direct examination that she spoke to a woman in the District Attorney's office when she received the subpoena and told the woman that she would not testify against the defendant. N.T., February 12-13, 1998, at p. 206. In light of the facts of this case and Mrs. Knight's testimony on re-direct examination, the Court does not believe the prosecutor's assertions during cross-examination of Mrs. Knight prejudiced the jury.

The defendant next claims the prosecutor failed to produce Agent Gilson's notes of his interviews, which would have provided exculpatory evidence demonstrating the defendant never admitted to having sex with the alleged victims. This alleged misconduct would not have changed the outcome of this case. First, the substance of Agent Gilson's notes was put into his report, which the defense received in discovery. Second, the Court does not even know if the notes are still in existence. Frequently, once a law enforcement officer makes his report, his handwritten notes are discarded. Finally, the defendant did admit to having sex with the victims. The defendant admitted to his relationship with A.K. to his wife and to Agent Gilson and

acknowledged these admissions in his trial testimony. N.T., February 12-13, 1998, at pp. 7-9, 194, 201, 236-237, 246-248. Agent Gilson also testified that the defendant admitted to various sexual contacts with J.B. N.T., February 12-13, 1998, at pp. 10-13. Although the defendant claimed Agent Gilson was mistaken and he only admitted to a relationship with A.K. at trial, the defendant admitted to his sexual relationship with J.B. at sentencing. N.T., May 21, 1998, at p. 94.

The defendant contends his trial counsel was ineffective for failing to request a mistrial and the Court erred in failing to grant a mistrial when the jury was prejudiced by overhearing and discussing the conversations of the tipstaves. During a break one of the tipstaves entered the juror's lounge and made a statement that someone was going upstairs to the District Attorney's office to another tipstave. When this comment was made, two jurors were nearby. The second tipstave believed she heard one juror, Mr. Miller, say something to another juror to the effect that they were going to the District Attorney's office to make a deal. N.T., February 12-13, 1998, at pp. 122-133. Mr. Miller was brought into chambers so counsel could examin him about this incident. Mr. Miller indicated he did overhear one of the tipstaves say "they" were going upstairs to the District Attorney's office. Mr. Miller assumed "they" referred to the individuals and attorneys involved in this criminal case. Mr. Miller denied making any statement to another juror that "they" were making a deal. Mr. Miller further indicated that overhearing the statement would not affect his ability to be fair and impartial to either the Commonwealth or the defense. To be on the safe side, everyone agreed to excuse Mr. Miller as a juror.

The other juror who was nearby, Mr. Weller, also was brought into

Chambers. Mr. Waller indicated a gentleman (one of the tipstaves) stuck his head in the door and said something, but Mr. Weller wasn't really listening or paying attention to what he said. Mr. Weller indicated there was nothing that would interfere with his ability to be a fair and impartial juror. N.T., February 12-13, 1998, at pp. 138-141. Both counsel agreed there was no reason to remove Mr. Weller.

Base on these facts, there was no reason for trial counsel to request a mistrial. Mr. Miller and Mr. Weller were the only jurors nearby when this statement was made. Mr. Miller heard the statement and was removed as a juror as a precautionary measure. Mr. Weller did not know what was said and was not in any way prejudiced by the comment by one of the tipstaves. He further indicated he could be a fair and impartial juror.

Even if trial counsel had requested a mistrial, the Court would not have granted this request. It is within the discretion of the trial court to determine whether a defendant has been prejudiced by impropriety or misconduct to the extent that a mistrial is warranted. Commonwealth v. Brown, 567 Pa. 272, 786 A.2d 96, 971 (2001). There is nothing in the record to show the jury was tainted by the comment by one of the tipstaves. In fact, the record establishes the jurors that rendered the verdict in this case did not know the substance of any such comment. Therefore, a mistrial was not warranted.

The defendant asserts trial counsel was ineffective for failing to request a mistrial or otherwise bring to the attention of the Court that potential defense witnesses Delores Way and Gordon Myers were tampered with and even threatened. The Court first will address the allegations with respect to Gordon Myers. In his

statement/certification, Mr. Myers states that Mr. Bonnell, the father of one of the victims, approached him and said, "if Mr. Knight was not found guilty, he (Foster Bonnell) would take care of Lawrence H. Knight his own way." Although Mr. Bonnell may have impliedly threatened Mr. Knight, he did not threaten Mr. Myers. Moreover, there is nothing in Mr. Myers' statement to indicate he had any relevant testimony to offer at trial. At best, it appears Mr. Myers may have been a potential character witness for the defendant. However, the defense called several friends and neighbors of the defendant to testify that they did not see any sexual contact between the defendant and J.B. They further testified they did not believe such contact occurred and, therefore, they did not believe the defendant was child molester. Thus, it appears any relevant testimony Mr. Myers could have provided would have been cumulative. Counsel is not ineffective for failing to call a witness whose testimony would be cumulative. Commonwealth v. Whitney, 550 Pa. 618, 708 A.2d 471, 477 (1998); Commonwealth v. Hall, 549 Pa. 269, 300, 701 A.2d 190, 206 (1997).

Assuming arguendo that Mr. Myers' testimony regarding the statements of Mr. Bonnell would have been admissible at trial, it probably would not compel a different result. It is likely the jury would view Mr. Bonnell's alleged statements to Mr. Myers as merely expressions of anger from a father whose fourteen (14) year old daughter's virtue was taken by a married man who was significantly older than his teenage daughter. Moreover, as previously stated, the defendant ultimately admitted to having a sexual relationship with both A.K. and J.B. Therefore, the verdict in this case was not compromised.

With respect to the alleged threatening and intimidation of Dolores Way.

Ms. Way testified at the PCRA hearing on December 20, 2001. At that hearing, Ms. Way indicated Mr. Bonnell said something like "Anybody who interferes with this case" and then he patted his firearm. However, Ms. Way also testified that Mr. Bonnell's statements and actions did not dissuade her from testifying. She was, and still is, ready and willing to testify on the defendant's behalf.

Ms. Way also asserted the police attempted to intimidate her to keep her from testifying for the defendant. The Court would not characterize the statements and actions attributed by Ms. Way to the police as intimidation or threatening Ms. Way indicated that the police said they spoke to the girls and their parents and that the case was cut and dried. The police gave Ms. Way the impression that her testimony was not relevant and she should just stay out of the case. Regardless whether these comments were intimidating, Ms. Way was still willing to testify for the defense.

The defendant asserts trial counsel was ineffective for failing to call Dolores Way as a witness. In order to establish ineffective assistance of counsel, the defendant must show: (1) his claims is of arguable merit; (2) counsel had no reasonable basis for the course of action chosen; and (3) prejudice, i.e., but for counsel's act or omission the verdict would have been different. Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203, 213 (2001); Commonwealth v. Miller, 560 Pa. 500, 746 A.2d 592, 598 (2000). When the effectiveness claim involves failure to call a witness, the defendant must show: (1) the existence and availability of the witness; (2) counsel's awareness of, or duty to know of, the witness; (3) the willingness and ability of the witness to cooperate and appear on behalf of the defendant; and (4) the necessity of the proposed testimony in order to avoid prejudice. Commonwealth v. Pierce, 567 Pa.

186, 786 A.2d 203, 214 (2001); Commonwealth v. Gibson, 547 Pa. 71, 100,688 A.2d 1152, 1166 (1997).

The Court finds Ms. Way's testimony was not necessary to avoid prejudice. First, the Court does not believe Ms. Way's testimony would have been admissible at trial. The vast majority of Ms. Way's proposed testimony was hearsay. Defense counsel argues Ms. Way's testimony regarding Diane Kemp's statements that she would "counsel" J.B. and get her to change her story to implicate the defendant would be admissible as substantive evidence because it was a prior inconsistent statement of Diane Kemp. Ms. Kemp was not called as a witness either at trial or during the PCRA hearing. Nevertheless, defense counsel claims trial counsel was ineffective for failing to call Ms. Kemp as a witness and relies on Rule 607 of the Pennsylvania Rules of Evidence. What defense counsel fails to recognize, however, is that the Pennsylvania Rules of Evidence were not in effect at the time of the defendant's trial. The defendant's trial was held February 11-13, 1998. Rule 607 was adopted May 8, 1998 and became effective October 1, 1998. Prior to the passage of Rule 607, a party could not impeach a witness called by that party. See Commonwealth v. White, 447 Pa. 331, 338, 290 A.2d 246, 250 (1972)("The general rule in this jurisdiction is that a party cannot discredit his own witness."); Commonwealth v. Bartley, 395 Pa.Super. 137, 576 A.2d 1082 (1990). Defense counsel is arguing that trial counsel should have called Ms. Kemp as a witness and, when she failed to admit she "coached" J.B.'s testimony, he should have called Ms. Way. This is precisely what the common law rule prohibited. Moreover, even if trial counsel could have called Ms. Kemp and then impeached her with Ms. Way's testimony, Ms. Way's testimony regarding Ms. Kemp's

prior inconsistent statements would not be admissible as substantive evidence because Ms. Kemp's statement was not given under oath subject to the penalty of perjury; or a writing signed and adopted by Ms. Kemp or a verbatim contemporaneous recording of an oral statement. Pa.R.Evid. 803.1(1); Commonwealth v. Lively, 530 Pa. 464, 610 A.2d 7 (1992). Therefore, Ms. Kemp's allegedly inconsistent statements to Ms. Way were not admissible as substantive evidence of Ms. Kemp's "coaching" of J.B.

With respect to statement J.B. allegedly made in Ms. Way's presence to the effect she did not have a sexual relationship with the defendant, the Court finds this information was not brought to the attention of trial counsel. At the trial and at the PCRA hearing the focus of Ms. Way's testimony was Ms. Kemp's "coaching" and "counseling" of J.B. J.B.'s alleged statement was mentioned almost as an after thought. Additionally, trial counsel testified that if the witness had told him the victim said the incident never happened, he would have made this information part of his offer of proof and he would have called the witness at trial. The Court finds trial counsel's testimony on this issue credible.

The Court also does not believe Ms. Way's testimony would have changed the outcome of this trial. When Ms. Way testified at the PCRA hearing, she appeared to be a disciple of Mr. Knight's who would not believe he committed the crimes regardless of what evidence was presented. When confronted with the defendant's admissions to sexual relationships with A.K. and J.B., Ms. Way testified she was not aware of any confession, she doubted anything happened with A.K. and she was confident nothing happened with J.B. The Court did not find Ms. Way's

testimony credible and, given the defendant's admissions to relationships with the girls during trial and at sentencing, the Court does not believe Ms. Way's testimony would change the verdict in this case.

The defendant next contends trial counsel was ineffective in failing to object to Agent Gilson's testimony regarding the defendant's confession when Agent Gilson failed to produce his notes and provide them to the defense. This Court cannot agree. Although Agent Gilson took notes during his interview of the defendant, there is nothing in the record to indicate the notes were still in existence after he made his police report. Further, trial counsel had a copy of the police report which contained the defendant's statements at the time counsel questioned Agent Gilson. Finally, the defendant did admit to having sex with the victims. The defendant admitted to his relationship with A.K. to his wife and to Agent Gilson and acknowledged these admissions in his trial testimony. N.T., February 12-13, 1998, at pp. 7-9, 194, 201, 236-237, 246-248. Agent Gilson also testified that the defendant admitted to various sexual contacts with J.B. N.T., February 12-13, 1998, at pp. 10-13. Although the defendant claimed Agent Gilson was mistaken and he only admitted to a relationship with A.K. at trial, the defendant admitted to his sexual relationship with J.B. at sentencing. N.T., May 21, 1998, at p. 94. Therefore, the defendant was not prejudiced by not having a copy of Agent Gilson's notes of his interview with the defendant.

The defendant also claims counsel was ineffective in failing to introduce exculpatory medical evidence. This claim is based on the defendant's assertion that he had a sexually transmitted disease that would have resulted in the girls becoming infected if their stories of sexual contact with the defendant were true. The defendant

has not identified any medical witness to support his claim. Although the defendant might be able to testify that he has or had such a disease, he would need medical testimony to establish that the victims would have become infected if they had sexual relations with the defendant. The defendant did not provide any statement or certification from any medical personnel who would testify at the PCRA hearing. The Post Conviction Relief Act states:

> Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

42 Pa.C.S. 9545(d)(1). Since the defendant failed to comply with Section 9545, there were no witnesses whose testimony would be admissible. Therefore, there was no need for the Court to hold an evidentiary hearing on this issue.

The defendant's final assertion is that the Court erred by admitting his confession, which he asserts was obtained illegally. The defendant is not eligible for relief on this issue as it has been previously raised and litigated in the defendant's direct appeal to the Pennsylvania Superior Court. 42 Pa.C.S. 9543(a)(3); 42 Pa.C.S. 9544(a).

O R D E R

AND NOW, this ___ day of June 2002, for the foregoing reasons, the Court DENIES the defendant's Post Conviction Relief Act (PCRA) petition.

By The Court,

_____
Kenneth D. Brown, J.

cc: Matthew Ziegler, Esquire
Kenneth Osokow, Esquire (ADA)
Lawrence Knight,
Gary Weber, Esquire (Lycoming Reporter)
Work file