

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH OF PENNSYLVANIA | : | NO. 02-11,351 |
| | : | |
| vs. | : | CRIMINAL DIVISION |
| | : | |
| CODY E. HEFFNER, | : | |
| Defendant | : | |

OPINION IN SUPPORT OF ORDER OF MARCH 9, 2004
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court’s Order of March 9, 2004, which denied his post-sentence motions. By Order dated January 5, 2004, Defendant was sentenced to a period of five to ten years incarceration, following his conviction by a jury of terroristic threats, two counts of involuntary deviate sexual intercourse, and two counts of indecent assault. Several counts of aggravated assault and aggravated assault with a deadly weapon, a charge of unlawful restraint, and two counts of disorderly conduct had been dismissed during the trial; the jury returned a verdict of not guilty on one of two counts of simple assault and was hung on the other, which was then nol prossed by the Commonwealth. In his Statement of Matters Complained of on Appeal, Defendant raises several issues. These will be addressed seriatim.

First, Defendant contends the Court erred in failing to transfer the matter to Juvenile Court. Defendant’s first request for transfer was heard December 9, 2002, and was denied by order dated December 30, 2002. His request for reconsideration was also denied, by Order dated March 26, 2003, which set forth more specifically the Court’s reasoning. During the trial in September 2003, the “qualifying” offenses, two counts of aggravated assault with a deadly weapon, were eliminated from consideration,¹ by Order dated September 18, 2003. Thereafter, Defendant renewed his request for transfer, by petition filed December 22, 2003. That request was also denied. In his post-sentence motion, Defendant again sought review of the Court’s decision to keep him in adult court, and in affirming its prior decision, the Court took the opportunity to further explain its position. Therefore, in response to the instant allegation of

trial court error, the Court will rely on the reasoning set forth in its Orders of December 30, 2002, March 26, 2003, and March 9, 2004.

Next, Defendant contends the Court lacked jurisdiction to hear the case. It is assumed Defendant is referring to his pre-trial motion to dismiss for lack of subject matter jurisdiction, filed September 12, 2003, as well as his post-trial motion to dismiss for lack of subject matter jurisdiction, filed December 22, 2003, both of which were denied. In the pre-trial motion, Defendant argued (1) the instrumentality alleged by the Commonwealth to constitute a deadly weapon was not in fact such, (2) without such factual basis, the counts of aggravated assault with a deadly weapon could not survive, and (3) without such “qualifying offense”, the criminal court did not have jurisdiction over Defendant inasmuch as he was a juvenile. The same argument was presented in Defendant’s post-trial motion, based on elimination of the counts of aggravated assault with a deadly weapon. The Court found that transfer in such circumstances was discretionary, however, 42 Pa.C.S.A. Section 6322(a), and unless the Court exercised its discretion to transfer to juvenile court, the criminal court retained jurisdiction. Since there is no question transfer under Section 6322 is indeed discretionary, the Court assumes Defendant is simply reiterating his argument the Court abused its discretion in failing to approve his request for transfer, and the Court will again rely on the previous explanation for its decision.

Next, Defendant contends “the prosecutor committed misconduct in failing to abide by certain Court rulings, the Bill of Particulars, and Defendant’s motion in limine.” The Court cannot speak to the contention regarding “certain Court rulings” without further explanation. With respect to the Bill of Particulars, the Court assumes Defendant is referring to his objection several times during the trial to testimony regarding events that were alleged to have occurred after August 1, 2001, which objection was overruled. The basis for Defendant’s objection was that any alleged events after August 1, 2001, were outside the time frame described in the Bill of Particulars. The Bill of Particulars alleges the offenses “began when the victim ... was ten years old. They continued to occur for approximately a year and one half and ceased only when the Defendant lost access to the victim.” Defendant argues the evidence must be

1 One count was withdrawn by the Commonwealth, and a defense demurrer to the other count was granted.

restricted to a time period of eighteen months from the victim's tenth birthday. The Court does not read the Bill of Particulars to indicate the alleged offenses began on the victim's tenth birthday, however, but rather, sometime during the year in which he was ten years old. Further the Bill of Particulars indicates the time period is approximate, and gives an ending point of "when the Defendant lost access to the victim." The testimony indicated the victim and his father moved out of the residence shared with Defendant and his Mother in December 2001. Therefore, evidence regarding events alleged to have occurred in October or November 2001 (the cut on the victim's arm) and in August or September 2001 (sexual abuse) fell within the time frame of the Bill of Particulars, and the Commonwealth did not fail to abide by the restrictions placed upon it thereby.

With respect to the contention "the prosecutor committed misconduct in failing to abide by ... Defendant's motion in limine", the Court assumes Defendant is referring to Defendant's request to exclude any reference to abuse of animals by Defendant, and/or Defendant's request the Commonwealth be precluded from asking Defendant on cross-examination whether he smoked marijuana. As far as the reference to abuse of animals, the Court had indicated that unless the alleged abuse of an animal was directly related to the alleged acts of abuse against the victim in this particular case, it was not to be brought up. In response to the Commonwealth's question of her "Why don't you tell us what history you were given regarding [the victim]?", Dr. Lewis, the Commonwealth's expert witness, testified she was given the history that the victim had been subjected to repeated molestation or abuse at the hands of the Defendant, that the victim described certain acts of abuse,² that the victim described the use of sexual objects, that the victim described the Defendant showing him sexually explicit pictures, that he also described physical abuse and physical threats, and that he described the Defendant "physically abusing other things, animals." When defense counsel immediately thereafter raised an objection, the Commonwealth indicated it had no argument with the objection and indeed, moved to strike. In arguing for a mistrial, defense counsel conceded the violation of the Court's prior ruling was not intentional on the Commonwealth's part. The Court does not believe the unfolding of events shows any "prosecutorial misconduct"

² In her testimony, Dr. Lewis actually described the acts of abuse but the Court finds it unnecessary to go into that detail for purposes of discussing the issue at hand.

as alleged by Defendant.

A far as Defendant's request the Commonwealth be precluded from asking Defendant on cross-examination whether he smoked marijuana, the Court had indicated Defendant could not be asked the general question "do you smoke marijuana?" but could be asked if he had been smoking marijuana with the victim on the day the victim alleges he was burned by Defendant with a pot pipe, and that if Defendant denied all of the allegations, the issue would be revisited.

When the Commonwealth asked Defendant if he smoked marijuana at the time and place alleged by the victim, Defendant answered "No, I did not." When the Commonwealth then asked Defendant if he burned the victim, Defendant answered "No, I did not." The Commonwealth then asked Defendant "Did you ever smoke marijuana –" but was interrupted by defense counsel's objection and an off-the-record discussion was held. The Commonwealth then asked Defendant "Did you ever smoke marijuana?" and defense counsel again objected. The Commonwealth indicated some confusion about the Court's ruling but then re-asked the question, "did you ever smoke marijuana with [the victim]?" Defendant answered "no" and the questioning proceeded to another area. The Court does not find "prosecutorial misconduct" in this line of questioning.

Next, Defendant contends the Court erred in denying his request for a mistrial "based on Dr. Lewis' violation of the Motion in Limine". The Court assumes Defendant is referring to Dr. Lewis' reference to Defendant physically abusing animals, as described above. Immediately following defense counsel's objection, the jury was instructed to disregard the statement. No further mention of the statement or further cautionary instruction was given, so as not to draw too much attention to it. Defendant's motion for mistrial was denied, however, as the statement was considered to be not so prejudicial as to require a new trial, and considering all of the evidence introduced at trial, the Court believes the reference was harmless.

Next, Defendant contends the Court erred in denying his request to dismiss the charges based on lack of specificity in the Information. Defendant contended at trial that the charges should be dismissed because the information did not specify the time and place of each alleged act of sexual assault, and did not specify the particular acts alleged to have constituted the simple assaults. Since Defendant was not convicted of either charge of simple assault, the

Court will address Defendant's argument with respect to the sexual assault charges only, and in that regard notes the following language contained in Rule 560:

Rule 560. Information: Filing, Contents, Function

(A) ...

(B) The information shall be ... valid and sufficient in law if it contains:

...

(3) the date when the offense is alleged to have been committed if the precise date is known, ..., provided that if the precise date is not known or if the offense is a continuing one, an allegation that it was committed on or about any date within the period fixed by the statute of limitations shall be sufficient;

....

Pa.R.Crim.P. Rule 560. Considering this language, Defendant's argument the Commonwealth was required to specify a particular date with respect to each alleged act of sexual assault, is without merit. Further, as noted above, the Bill of Particulars alleges the offenses "began when the victim ... was ten years old. They continued to occur for approximately a year and one half and ceased only when the Defendant lost access to the victim." The Affidavit of Probable Cause contained in the Police Criminal Complaint indicates a report by the victim on January 30, 2002, that he had been sexually assaulted by Defendant on numerous occasions and that the incidents had "taken place for approximately the last year and a half." Thus, although the Information may have failed to specify the period of time during which the offenses were alleged to have been committed, the Court found Defendant to have nevertheless been put on adequate notice regarding the charges against him. See Commonwealth v. Taraschi, 475 A.2d 744 (Pa. Super. 1984)(reference to affidavit in criminal complaint proper in determining sufficiency of notice to defendant), and Commonwealth v. Boyle, 576 A.2d 967 (Pa. Super. 1990)(vacated and remanded on other grounds, 625 A.2d 616 (Pa. 1993))(reference to bill of particulars). Accordingly, the Court believes Defendant's request to dismiss the charges on this basis was properly denied.

Finally, Defendant contends the Court erred in denying his motion for mistrial "based on Dr. Lewis' testimony that the matter was 'suspicious until proven otherwise'." On direct examination, Dr. Lewis testified that an examination for possible sexual assault will result in

one of four findings: (1) very suspicious unless otherwise explained, (2) highly suspicious, but not conclusive, (3) somewhat suspicious and (4) could be suspicious but it may be a lot of other things. She then went on to testify that in her examination of the victim in this case she found the possibility of sexual assault to be “very suspicious unless otherwise explained.” Defense counsel objected to Dr. Lewis being allowed to testify to such a conclusion because such was “not a criminal standard.” The Court immediately instructed the jury that indeed, the doctor’s classification was not a criminal standard, that the criminal standard which was to guide them would be explained later, that Dr. Lewis was merely testifying in medical terms, and that the criminal standard was entirely different. The Court also instructed the jury that although Dr. Lewis said “proven otherwise”, “the fact of the matter is that there is no burden of proof that lies with the defense on a legal standard. ... There is ... no such concept as until proven otherwise.” Defense counsel then moved for a mistrial. The Court believes its instructions to the jury to have sufficiently clarified the matter, however, and does not believe declaration of a mis-trial was warranted.

In conclusion, after review of the entire matter, the Court finds no basis for Defendant’s appeal.

Dated: August 11, 2004

By The Court,

Dudley N. Anderson, Judge

cc: District Attorney
Joseph Nocito, Esq.
Gary L. Weber, Esq.
Hon. Dudley Anderson