IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1190-2000 (00-11,190)**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
ANTHONY GENNARELLI,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's judgment of sentence docketed February 25, 2005 and its Order denying Appellant's post sentence motions entered on August 5, 2005. The relevant facts follow.

On Easter weekend in April 1999, Appellant molested his 5 year old son. The boy indicated that: (1) they watched a pornographic movie; (2) Appellant made him suck on Appellant's "bug"; (3) Appellant made him put his "bug" or pee pee inside Appellant's butt; (4) Appellant made him put a purple thing shaped like a carrot inside Appellant's butt; and (5) Appellant's pee was touching his (the child's) butt. The police arrested Appellant and charged him with involuntary deviate sexual intercourse, indecent assault and corruption of the morals of a minor. A jury trial was held April 18-19, 2001. The jury found Appellant guilty.

The Commonwealth asked for a Megan's law hearing under Megan's Law II. A three-judge panel of the Court found Megan's Law II unconstitutional.[double check this].

The Commonwealth appealed. The Appellate Courts found Megan's Law II constitutional and remanded for a Megan's Law hearing and sentencing.

In February 2005, the Court held hearings to determine whether Appellant was a sexually violent predator under Megan's Law II. The Court found Appellant was a sexually violent predator.

On February 25, 2005, the Court sentenced Appellant to incarceration in a state correctional institution to 5 ½ years to 12 years for involuntary deviate sexual intercourse, a consecutive 6 months to 5 years for corruption of the morals of a minor and a concurrent 1 to 2 years for indecent assault. The aggregate sentence was 6 years to 17 years.

Appellant filed timely post sentence motions, which included allegations that trial counsel was ineffective. The Court held an evidentiary hearing on these motions on April 19, 2005 and denied them by operation of law in an Order docketed August 5, 2005. Appellant filed an appeal.

Appellant first asserts that the verdict was against the weight of the evidence. The Court cannot agree. An allegation that the verdict was against the weight of the evidence is addressed to the sound discretion of the trial court. Commonwealth v. Sullivan, 820 A.2d 795, 805-806 (Pa.Super. 2003). A new trial is awarded only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. Id. at 806. The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience

of the court. Id.

The verdict in this case did not shock the court's conscience. The child victim's testimony was persuasive.

Appellant contends the verdict is against the weight of the evidence because his witnesses established that he did not have the opportunity to engage in the sexual activity described by the child over the Easter weekend and because the charges were initially withdrawn because of concerns over the child's ability to testify in a coherent and understandable fashion. The Court cannot agree. Appellant ignores the testimony of Trooper Beth Wilson that on April 14, 1999 Appellant made a statement to her, in which he admitted there was a period of time on Saturday that he was alone with the child and that Appellant's girlfriend's son was not with them that weekend.[1] N.T., April 18, 2001, at p. 111. Furthermore, it is not surprising nor does it detract from the victim's trial testimony that there were concerns about his ability to testify when the charges were initially filed. At the time of the offenses, the child was five years old.[2] It would be difficult for any five year old or six year old to testify in court in a criminal case, but it would be especially difficult when the crimes are of a sexual nature and the alleged perpetrator is the child's father.

Appellant contends the Court erred in finding the victim was competent to testify. The Court cannot agree. The determination of competency is a matter for the sound discretion of the trial court, which will not be disturbed except for a flagrant abuse of that

1 Appellant's girlfriend's son, Joey Caroccia testified in Appellant's defense. He testified he was with the child and Appellant on Friday and Saturday, but after they left to go to Mr. Fox's on Sunday, he went to his gram's house and then he went to a friend's house to spend the night. N.T., April 19, 2001, at 17-22.
2 The Court believes the incident in question occurred a few weeks before the child's sixth birthday.

discretion. Commonwealth v. R.P.S., 737 A.3d 747, 749 (Pa.Super. 1999). The burden falls on the objecting party to demonstrate incompetence. Commonwealth v. Bishop, 742 A.2d 178, 186 (Pa.Super. 1999); Commonwealth v. McMaster, 446 Pa.Super. 261, 666 A.2d 724, 727 (Pa.Super. 1995). "When the witness is under fourteen years of age, there must be a searching judicial inquiry as to mental capacity, but discretion nonetheless rests in the trial judge to make the ultimate decision as to competency. McMaster, supra.

> A child witness is competent to testify if he possesses: '(1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that he is called to testify about and (3) a consciousness of the duty to speak the truth.

Bishop, 742 A.2d at 186 (quoting McMaster).

The Court conducted a competency hearing on the record. N.T., April 18, 2001, at pp. 4-24. The victim was aware of his duty to speak the truth. He knew the difference between the truth and a lie and explained the difference by stating: "The truth it did happen and a lie it didn't happen." Id. at p.6. He also indicated it was wrong to tell a lie and you might get in trouble or you might get sent to your room if you told a lie. Id. The victim also demonstrated that he remembered the events in question and had the ability to communicate what he remembered. Id. at pp. 7-8. The Court found: (1) that he was responsive to the questions asked of him; (2) he showed a capacity to observe and remember when he talked about the events; (3) he could distinguish between fantasy and reality; and (4) he understood it was wrong to tell a lie and there would be some punishment associated with telling a lie. Id. at pp. 21-23. The record clearly shows the child victim was competent.

Appellant next contends trial counsel was ineffective for failing to request a

mistrial or cautionary instruction when the prosecutor questioned Kimberly Sherwood about incidents "other than or in addition to the incident here", indicating Appellant had engaged in unrelated criminal conduct or bad acts.

Appellant's trial counsel's strategy was that the allegations against Appellant were made up by Ms. Sherwood because she did not like Appellant and wanted to get Appellant out of the child's life. In response to defense questioning, the Commonwealth wanted to bring out the reasons why Ms. Sherwood was opposed to increased visitation, which were suspicions of abuse of the child prior to this incident and Ms. Sherwood's contention that Appellant raped her. See N.T., April 18, 2001, at pp. 70-73, 79-80. The Court wanted to let the Commonwealth explain why Ms. Sherwood disliked Appellant and opposed him having visitation with the child, but it did not want the Commonwealth to get into the prior allegations. As a result, the following exchange took place during the Commonwealth's redirect examination of Ms. Sherwood:

> Q And is it true the reason you opposed additional visitation and you didn't want Mr. Gennarelli to have contact with your child was that you were concerned for his safety?
>
> A Yes.
>
> Mr. Rymsza: Objection Judge.
>
> The Court: Overruled.
>
> Mr. Dinges:
>
> Q And isn't it true that concern was based upon incidents other than or in addition to the incident here?
>
> Mr. Rymsza: Objection.
>
> The Court: I think that certainly is implied from her answer. Sustained for that reason.
>
> Mr. Dinges: I have no further questions Your Honor.

N.T., April 18, 2001, at p. 74.

In order to prevail on a claim of ineffective assistance of counsel, Appellant

must prove the following: (1) the claim is of arguable merit; (2) counsel did not have a rational or strategic reason for his action or failure to act; and (3) prejudice – i.e., but for counsel's act or omission the result of the proceeding likely would have been different. Commonwealth v. Pierce, 567 Pa. 186, 203, 786 A.2d 203, 213 (Pa. 2001).

The Court does not believe Appellant satisfied his burden. Trial counsel had a rational or strategic reason for not requesting a mistrial or a cautionary instruction. Mr. Rymsza testified that the question was not answered, he did not want to draw more attention to the question, he didn't think he would get a mistrial, and the jury didn't necessarily have to infer criminal activity. N.T., April 19, 2005, at pp. 14-15, 33-35.

The Court also does not believe Appellant was prejudiced. Even if Mr. Rymsza had requested a mistrial, the Court would not have granted it. First, the question does not necessarily infer prior criminal conduct. Ms. Sherwood could have been concerned for the child's safety for any number of reasons, such as Ms. Sherwood didn't think Appellant properly supervised the child when he was in his custody or Ms. Sherwood was opposed to corporal punishment. Second, the objection was sustained and the question was never answered. Questions are not evidence, the answers are. Furthermore, the Court instructed the jury at the close of the case that the jury should not be concerned with objections and rulings made by the Court and that if the Court sustained an objection, the jury should disregard the matter and not allow it to take any part in its deliberations. N.T., April 19, 2001 at p. 107. "A jury is presumed to follow the court's instructions." Commonwealth v. Stokes, 576 Pa. 299, 306, 839 A.2d 226, 230 (Pa. 2003).

Appellant also asserts trial counsel was ineffective in his cross-examination of Ms. Sherwood by eliciting testimony from her that Appellant "did something" to her in the

past causing her to be concerned for the safety of her child, thereby indicating that Appellant had engaged in unrelated criminal activity. During trial counsel's questioning of Ms. Sherwood, the following exchange took place:

> Q But isn't it true that from 1993 to 1995, you have already testified he [Appellant] had no contact with him [the child], correct?
> A Yes.
> Q So for you then to be opposed to visitation in 1995, since he had no contact with him there was no basis for you to be concerned about your child's safety, correct?
> A It's for what he did to me.
> Q To you?
> A Yes.

N.T., April 18, 2001, at 78-79. The Court does not believe counsel was ineffective. This line of questioning fit the defense theory of the case that Ms. Sherwood had told the child all the things to which he testified and planted them in his memory because she didn't like Appellant or wanted to get back at him for things that happened between her and Appellant. Therefore, the Court believes counsel had a strategic basis for asking these questions. The Court also does not believe that Ms. Sherwood's statement that Appellant "did something" to her necessarily implies criminal activity.

Appellant claims counsel was ineffective for failing to present the testimony of Appellant and Rick Thompson to rebut the inference created by Ms. Sherwood when she said Appellant did something to her in the past. Again, the Court believes there was a rational or strategic basis for counsel's decision. Counsel did not want to litigate whether Appellant raped Ms. Sherwood in this trial and did not want to open the door to an allegation of rape. N.T., April 19, 2005, at 20. The defense wanted to show Ms. Sherwood harbored hostility towards Appellant or was biased against him. The reason why she was hostile toward him really wasn't relevant from the defense standpoint. Furthermore, if trial counsel

had called Appellant and Mr. Thompson to rebut Ms. Sherwood's testimony, Appellant would now be claiming that counsel was ineffective because he introduced evidence that opened the door to specific allegations of prior criminal activity.

Appellant next alleges he is entitled to a new trial because trial counsel was ineffective in failing to object to the testimony of Beth Wilson and Lanny Reed regarding statements made to them by the child on the grounds of hearsay. Appellant cannot meet any of the elements for ineffective assistance of counsel. The Court does not believe this issue is of arguable merit, because the statements were not being offered as substantive evidence or the truth of the matter asserted. Instead, the statements were offered for credibility purposes as prior consistent statements to rehabilitate the victim after the defense attacked the child's credibility with statements the defense believed were inconsistent. Counsel also had a valid reason for not objecting to the statements. Trial counsel testified that he did not object to the statements because he believed they were admissible as prior consistent statements. N.T., April 19, 2005, at 21. The Court believes the statements were admissible under Rule 613 of the Pennsylvania Rules of Evidence.

> "Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of: (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation."

Pa.R.E. 613(C); see also Commonwealth v. Harris, 578 Pa. 377, 852 A.2d 1168 (Pa. 2004); Commonwealth v. Hunzer, 868 A.2d 498, 511-512 (Pa.Super. 2005), appeal denied 880 A.2d 1237 (Pa. 2005); Commonwealth v. O'Drain, 829 A.2d 316 (Pa.Super. 2003). Defense

counsel cross-examined the victim and Lanny Reed about prior statements the child made, which, according to defense counsel, were inconsistent with his trial testimony. N.T., April 18, 2001, at 101-107, 138-141. Trooper Wilson testified to consistent statements the child made to her after the child was cross-examined regarding allegedly prior inconsistent statements and the court instructed the jury that these statements could only be used in evaluating the child's credibility. N.T., April 18, 2001, at 118-119. County Detective Lanny Reed testified regarding the child's prior consistent statements after defense counsel cross-examined Detective Reed about inconsistencies in the child's statements. N.T., April 18, 2001, at 138-141. Even if trial counsel had objected, the Court would have overruled the objection and permitted the testimony of Trooper Wilson and Detective Reed. Thus, Appellant also cannot prove prejudice.

Appellant also contends he is entitled to a new trial because the Court erred by allowing Detective Reed to testify over objection that the victim's statements were "consistent," thereby allowing the witness to vouch for the credibility of the victim. During redirect examination of Detective Reed, the prosecutor asked him if the victim was consistent with the core facts. N.T., April 18, 2001, at 144. Defense counsel objected, but the Court overruled the objection. Id. Detective Reed testified that the child was consistent with the core facts, but there were inconsistencies regarding minor things. Id. at 145. Defense counsel then conducted further cross-examination of Detective Reed about inconsistencies that defense counsel did not perceive as minor. Id. at 145-147. The Court does not believe Detective Reed's testimony that the child was consistent with the core facts constitutes "vouching" for the credibility of the child. Detective Reed never testified that the child was telling the truth or that he believed the child was telling the truth. Prior consistent statements

are only one factor in determining credibility along with numerous other factors including, but not limited to, the witness' demeanor; the witness' ability to see, hear or know things about which he testified; the witness' ability to remember; and the witness' bias, prejudice or motive. The Court instructed the jury that they were the sole judges of the credibility of witnesses and that the prior statements of the child could only be considered to judge the credibility and weight to be given to the child's trial testimony. N.T., April 19, 2001, at 109-112. The law presumes that the jury follows the Court's instructions.

Appellant next asserts that trial counsel was ineffective for failing to introduce evidence at trial that the child testified at the preliminary hearing that the "toy" which he inserted into his father's rectum did not "make noise." Whether the object made noise or not was irrelevant to Appellant's guilt of the underlying charges; the operative facts were Appellant made the child put a foreign object in Appellant's rectum for sexual gratification. If the child in his trial testimony stated that the object did not make noise, then the statement could have been relevant in determining the child's credibility. In his trial testimony, however, the child described pushing a purple object shaped like a carrot in and out of his father's butt; he did not make any statements during his trial testimony about whether or not the object made noise. Even assuming that trial counsel should have introduced the child's preliminary hearing statement, the Court does not believe the introduction of that statement would change the outcome of this case, because trial counsel cross-examined the child, Trooper Wilson and Detective Reed about other alleged inconsistencies in the child's statements, see N.T., April 18, 2001, at 101-107, 122-124, 139-141, and whether the object made noise or not is a minor detail that the jury might not expect a small child to remember.

Appellant alleges trial counsel was ineffective for failing to object to an

improper closing argument made by the prosecuting attorney. The Court cannot agree. Trial counsel testified that he did not object to the comments because he thought the prosecutor was arguing the evidence and he did not think the comments were objectionable. N.T., April 19, 2005, at pp. 22-24, 26. Comments made by the prosecutor to the jury during closing arguments are not a basis for granting a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused that would prevent them from properly weighing the evidence and rendering a true verdict. Commonwealth v. Cox, 863 A.2d 536, 547 (Pa. 2004); Commonwealth v. Johnson, 576 Pa. 23, 49, 838 A.2d 663, 679 (Pa. 2003); Commonwealth v. Weiss, 565 Pa. 504, 521-522, 776 A.2d 958, 968 (Pa. 2001); Commonwealth v. Pierce, 567 Pa. 186, 206, 786 A.2d 203, 215 (Pa. 2001). Any alleged improper comments must be examined in the context in which they were made. Weiss, 565 Pa. at 522, 776 A.2d at 968; Commonwealth v. Stolzfus, 462 Pa. 43, 61, 337 Pa. 873, 882 (Pa. 1975). "[A] prosecutor's remark concerning the credibility of a witness does not constitute reversible error where it is 'motivated by, and was commensurate with the prior attacks upon the credibility of" the Commonwealth's witnesses." Commonwealth v. Gwaltney, 497 Pa. 5050, 513, 442 A.2d 236, 240 (Pa. 1982), quoting Stoltzfus, supra. Here, the prosecutor's remarks were made in response to defense counsel's closing argument. Defense counsel argued the victim should not be believed because his statements were inconsistent, the charges were originally withdrawn and he did not become a viable witness until after he spoke with his mother and the police several times. N.T., April 19, 2001, at 85-87. Defense counsel also noted that the victim's mother hated Appellant and that was a motive for fabricating these charges. Id. at 92. In response to defense counsel's arguments, the prosecutor argued in favor of the

credibility of the child and against the credibility of Appellant with logical force and vigor as well as oratorical flair. Therefore, the Court finds trial counsel was justified in not objecting to the prosecutor' closing arguments. Moreover, even if trial counsel had objected, the Court would have overruled the objection.

Appellant asserts trial counsel was ineffective in failing to object to the Court's instruction to the jury that Appellant could be convicted on involuntary deviate sexual intercourse (IDSI) solely based on a finding that Appellant had the victim place a vibrator in Appellant's anus or rectum. The Court instructed the jury on the elements of IDSI and the Commonwealth's theories of the three different acts which would constitute IDSI: (1) Appellant placed his penis in the child's mouth; (2) Appellant had the child place a vibrator in Appellant's rectum or anus; and (3) Appellant had the child place his penis in Appellant's rectum. N.T., April 19, 2001, at 114-115. The Court then clarified for the jury that the Commonwealth did not have to prove all three theories to obtain a conviction for IDSI; any one of those acts could be the basis of a finding of guilt on that charge. N.T., April 19, 2001, at 121. The jury charge was accurate. The Commonwealth only had to prove one of the acts for the jury to find Appellant guilty. Appellant argues that the child placing a vibrator into Appellant's rectum cannot constitute IDSI; therefore, the jury charge that act alone could suffice is erroneous. The Court believes it is Appellant's premise that is erroneous. Deviate sexual intercourse is defined as follows: "Sexual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures." 18 Pa.C.S.A. §3101. The child testified that Appellant had him push a "purple

carrot" in and out of Appellant's butt. It is clear that the "purple carrot" was a foreign object that penetrated Appellant's anus. Appellant appears to contend that since the object did not penetrate the victim, the conduct does not constitute IDSI. The Pennsylvania Superior Court, however, has found that IDSI "may involve the penetration of the body of the victim or that of the perpetrator." Commonwealth v. L.N., 787 A.2d 1064, 1070 n.6 (Pa.Super. 2001); see also Commonwealth v. Bruner, 364 Pa.Super. 156, 527 A.2d 575 (1987)(Superior Court reverses lower court's granting of judgment of acquittal in case where defendant unzipped his five-year old nephew's pants and sucked on his penis).

Appellant also alleges trial counsel was ineffective in failing to present the testimony of Trooper Troy Hickman and Children and Youth caseworker Rhonda McDonald to testify about statements the child made to them that were allegedly inconsistent with his trial testimony and inconsistent with other statements he made to Trooper Wilson and Detective Reed. The Court believes these issues are waived. Appellant's counsel initially gave the Court a highlighted copy of Trooper Hickman's report and Rhonda McDonald's case notes or report. However, this was the only marked copy that Appellant had. Appellant's counsel attempted to make copies so all the parties and the Court would know what statements counsel believed were inconsistent. The highlighting, however, did not come out on the photocopies. Appellant's counsel suggested submitting a short letter to direct the Court's attention to what he believed was inconsistent. N.T., April 19, 2005, at 4-5. The Court entered an Order giving Appellant's counsel seven days to submit a letter outlining the reasons why the statements the child made to Trooper Heckman and Ms. McDonald could be a basis for ineffectiveness of counsel. See Order dated April 19, 2005 and docketed May 3, 2005. Counsel never submitted anything to the Court. Therefore, these

issues are waived.

Appellant claims the charges of corruption of the morals of a minor and indecent assault merge into the crime of involuntary deviate sexual intercourse. The child testified that Appellant had him watch a grownup movie in which a man had his pants down at his feet and a girl was bobbing up and down on him. N.T., April 18, 2001, at 84-85. He also testified that he was sucking on Appellant's bug (pee pee), that his butt was touching Appellant's pee pee, his pee pee went inside Appellant's butt, and Appellant had him push an object that looked like a "purple carrot" in and out of Appellant's butt. Id. at 86. There are separate acts to support each of Appellant's convictions. Having the child watch a pornographic movie formed a basis for the corruption of a minor conviction. Appellant's pee pee touching the child's butt formed a basis for the indecent assault conviction. Any one of the remaining acts would form the basis for the involuntary deviate sexual intercourse conviction. Since these convictions are based on separate acts, the convictions do not merge for sentencing purposes. Commonwealth v. Snyder, 870 A.2d 336, 349-350 (Pa.Super. 2005); see also Commonwealth v. Hitchcock, 523 Pa. 248, 565 A.2d 1159 (Pa. 1989); Commonwealth v. Sayko, 511 Pa. 610, 515 A.2d 894 (Pa. 1985); Commonwealth v. Fisher, 787 A.2d 992, 996 (Pa.Super. 2001).

Appellant alleges the court improperly utilized an expunged juvenile record in arriving at its determination that Appellant is a sexually violent predator. The facts related to this issue are: On or about February 9, 1982, Appellant had sexual contact with a seven-year old female, who his mother was babysitting. A complaint was filed against Appellant alleging that he digitally penetrated the child's vagina and he kissed her vagina. On March 11, 1982, after a hearing and with an admission by Appellant, the Honorable Thomas C.

Raup adjudicated Appellant delinquent of indecent assault. On April 28, 1982, Appellant was placed on probation. On August 29, 1986, Judge Raup granted a petition to expunge Appellant's juvenile court records so Appellant could enter the military. The Order did not direct the Clerk of Courts or any police agencies to destroy their records of this case, and a copy of the Order was not served upon or provided to the Clerk of Courts or the police agencies involved in that juvenile matter. As a result, the records were never destroyed. When Mr. Townsend Velkoff conducted his evaluation and assessment of Appellant, he reviewed records and documents concerning the juvenile matter and discussed the incident with Appellant.

Initially, the Court notes that Appellant was not entitled to expunction at the time the Order was entered. Once an individual is adjudicated delinquent, his record may only be expunged if he satisfies the provisions of 18 Pa.C.S.A. §9123. Edward M. v. O'Neill, 291 Pa.Super. 531, 436 A.2d 628 (Pa.Super. 1981); see also In Interest of Lowe, 302 Pa.Super. 271, 448 A.2d 632 (Pa.Super. 1982)(Superior Court reversed trial court order granting expungement so defendant could enter the military where defendant was adjudicated delinquent without prejudice to defendant seeking expungement under 18 Pa.C.S. §9123). Section 9123 provided for expungement for an individual adjudicated delinquent if: five years had elapsed since discharge from probation or any other disposition and the individual had not been convicted or adjudicated delinquent of a felony or misdemeanor and no such charges were pending; or the individual was 21 years of age or older and a court orders the expungement. At the time the Order was entered, Appellant was not quite 20 years old and five years had not elapsed from the date of the incident, let alone from the date Appellant was discharged from his probationary sentence.

Regardless of the validity of the expungement order, the Court believes the information concerning Appellant's indecent assault of a female child when he was a juvenile was relevant and admissible evidence for the Megan's Law hearing. A Megan's Law assessment includes, but is not limited to, an examination of the individual's prior offense history and factors that are supported in a sexual offender assessment filed as criteria reasonably related to the risk of re-offense. 42 Pa.C.S.A. §9795.3(b)(2) and (4). The Court does not believe this information is limited to convictions or adjudications. Furthermore, it is the underlying behavior that, to this Court, seems relevant regardless of whether the conviction or adjudication is pardoned or expunged. See Foxworth v. Pa. State Police, 402 F.Supp.2d 523 (E.D. Pa. 2005)(behavior underlying expunged ARD could form basis for state police to refuse admission to cadet program).

Even if the juvenile records[3] could not be considered due to the expungement order, the Commonwealth presented evidence in addition to the juvenile records that Appellant engaged in sexual contact with a minor female in 1982. The Commonwealth called Appellant's mother as a witness and she testified that Appellant admitted he started to insert his finder into the girl's vagina and he stopped. This testimony was admissible as substantive evidence under Rule 803(25) of the Pennsylvania Rules of Evidence, Pa.R.E. 803(25). The Court is permitted to consider a defendant's admission to other sexual offenses when determining whether he or she is a sexually violent predator under Megan's Law. See Commonwealth v. P.L.S., 894 A.2d 120, 128-130 (Pa.Super. 2006)(appellant's admissions to Sexual Offenders Assessment Board investigator of uncharged sexual offenses involving

3 The Court notes that the juvenile records were admitted into evidence by Appellant's counsel, not the Commonwealth. See Defendant's Exhibit 1; N.T., February 2005, at 50.

appellant's niece and nephew considered in determination that appellant was a sexually violent predator and in deciding appropriate sentence).

Appellant's final claim is the Commonwealth failed to present clear and convincing evidence to establish that Appellant is a sexually violent predator. The Court cannot agree. The Court held several hearings in February 2005 to determine whether Appellant is a sexually violent predator. At the end of the hearings and immediately before sentencing Appellant, the Court placed on the record its reasons for finding Appellant is a sexually violent predator. N.T., February 25, 2005, at 147-160. The Court would rely on the evidence presented at the Megan's Law hearings and its statement on the record.

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

cc: Kenneth Osokow, Esquire (ADA)
Peter T. Campana, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)