IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	NO. 176-2008
	:	
MARK BENNETT,	:	
Defendant	:	1925(a) OPINION

Date: October 2, 2009

OPINION IN SUPPORT OF THE ORDERS OF SEPTEMBER 16, 2008, APRIL 20, 2009 AND MAY 18, 2009 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Mark Bennett, by a Notice of Appeal filed June 8, 2009, has appealed this Court's orders entering a jury's verdict on September 16, 2008, imposing sentence on April 20, 2009, and denying post-sentence motions on May 18, 2009, in relation to his conviction and sentencing for 73 counts of Sexual Abuse of Children under 18 Pa.C.S. § 6312(d), Possession of Child Pornography. In his Statement of Matters Complained of on Appeal filed June 8, 2009 Mr. Bennett asserts that errors were made in rulings on pre-trial motions, jury selection, not entering judgment of acquittal during trial and post-trial, his being found to be a sexually violent predator and the imposition of consecutive standard range sentences for each count. Contrary to his assertions of innocence and error, Mr. Bennett's possession of copious amounts of child pornography involving multiple child victims justified his conviction by the jury of each count. These offenses, taken together with his prior sexual offenses against children, his failure to follow sexual offender registration requirements, his lack of remorse, and his lack of intent to change his ways as a sexually violent predator made Mr. Bennett deserving of receiving a sentence which has the effect of incarcerating him for the remainder of his life.

I. HISTORY OF THE CASE

The evidence introduced at Mr. Bennett's jury trial held September 15, 2008 and September 16, 2008 established that Mr. Bennett possessed 85 pictures of young girls ages 5 to 17 in various stages of undress and a sexually explicit video of a young boy on two CD's which had been found in his residence in April 2007 by his paramour with whom he lived, Ms. Karen Luttrell. (see Exhibit Nos. 87 & 88).

Mr. Bennett, had lived with Ms. Luttrell for approximately four years as of April 23, 2007 at 732 Lakeview Drive, Penn Township, Lycoming County, for approximately the previous year. N.T., 9/15/08, pp.68-69. The significant events related to this case started to occur during the week of April 23, 2007. On that date, Ms. Luttrell and Mr. Bennett discussed that police wanted to talk to him about a "computer-related incident," another crime alleged to have occurred on April 21, 2007. ***Id.*** at 70.[1] Ms. Luttrell then observed that Mr. Bennett had dismantled his computer. ***Id.*** at 74. He also apparently attempted to destroy his hard drive and the computer components as Ms. Luttrell found them in their burner barrel three days later.

[1] This "computer related incident" was the manner in which another incident of child sexual offenses committed by Mr. Bennett was referred to in the presence of the jury. The specifics of this other crime was set forth in Mr. Bennett's "Brief in Support/Opposition of Motion In Limine filed June 23, 2008, at page 2: "On April 21, 2007, Bennett showed a seventeen year old male two websites on his computer at his 717 Lakeview Drive residence. The websites depicted adult men and women nude and/or engaged in sexual acts. The two websites were www.hotchick.com and www.webcamnow.com. When Bennett was showing the juvenile these websites, he placed his hand on the male's leg near his hip. Bennett was charged with Obscene and Other Sexual Materials and Performances, 18 Pa.C.S. § 5903, Corruption of Minors, 18 Pa.C.S. § 5903, and Harassment, 18 Pa.C.S. § 2709(a)(1). On June 18, 2007, Bennett entered a guilty plea to the Obscene and Other Sexual Materials and Performances and Corruption of Minors offenses."

The following day, April 24, 2007, Mr. Bennett and Ms. Luttrell went shopping to enable Mr. Bennett to purchase a new hard drive for his computer. ***Id.*** at 71. During this excursion, Mr. Bennett discussed with Ms. Luttrell relocating their residence to Mexico. ***Id.*** at 72-73. Mr. Bennett discussed fleeing to Mexico with Ms. Luttrell on two other occasions between that date and the time of his arrest. ***Id.*** at 77-78.

On April 25, 2007, Ms. Luttrell accompanied Mr. Bennett to the State Police Barracks in anticipation of Mr. Bennett being interviewed relating to the "computer related incident," however, the interview did not take place. Ms. Luttrell and Mr. Bennett returned to the State Police Barracks the following day, April 26, 2007 at which time he was arrested for the "computer related incident." ***Id.*** at 73. Later, on the day of Mr. Bennett's arrest, Ms. Luttrell found the burned computer parts in her burner barrel after being prompted to look in the barrel by a neighbor. The neighbor told Ms. Luttrell he had seen a burning of some significance. Ms. Luttrell could think of no explanation for such a fire and, therefore, looked in the barrel. ***Id.*** at 73-74. On April 28, 2007, Ms. Luttrell turned these parts over to the State Police. ***Id.*** at 74. The items received by the Police from Ms. Luttrell included a burnt computer hard drive, a mass of CD's and floppy disks that were burnt and melted together, a burnt Penthouse Magazine, and 5 VHS tapes of pornography. ***Id.*** at 52. As Mr. Bennett's computer, in the home he and Ms. Luttrell shared, had been torn apart, Ms. Luttrell assumed these computer parts were from Mr. Bennett's computer. ***Id.*** at 74. The CD's and pornography items Ms. Luttrell had discovered did not belong to her, and no other person occupied the home except her and Mr. Bennett. ***Id.*** at 71, 75, 76, 79. Subsequently, in a conversation between Ms.

Luttrell and Mr. Bennett at the Lycoming County Prison, Mr. Bennett accused Ms. Luttrell of turning him into the police by turning over the CD's stating "you rolled me over." ***Id.*** at 80.

On Sunday, April 29, 2007, Ms. Luttrell discovered six CD's in a crock pot in her kitchen when she decided to use the crock pot to make soup. ***Id.*** at 74. There was writing, which Ms. Luttrell recognized as being that of Mr. Bennett, on three of the CD's labeling them "X-Rated Videos," "Adult Cartoons," and something like "Group Pictures." ***Id.*** at 74, 77. Ms. Luttrell looked at the two CD's and determined that they contained child pornography. ***Id.*** at 74.

On Monday, April 30, 2007, Ms. Luttrell summoned State Police to her home due to a suspected burglary and, at that time, turned the six CD's over to the Pennsylvania State Police. ***Id.*** at 79. The CD's were eventually delivered to State Police Trooper Trusal, a computer crime investigator. ***Id.*** at 56.

In carrying out his investigation, Trooper Trusal examined the CD's on his computer. As to one of the unmarked CD's he found thousands of "files" 85 of which were pictures of nude or partially unclad young females he believed to be child pornography (Commonwealth's Exhibit No. 87). ***Id.*** at 101, 102. On the CD that had been marked as "XXX videos" there were several files including one movie file with Trooper Trusal finding that the movie file similarly constituted depictions of child pornography (Exhibit No. 88). ***Ibid.*** The 85 child pornography pictures were placed on the CD in three sessions on the computer that created the disc in 2005 and the video CD also was created in three sessions in 2007. ***Id.*** at 104. Trooper Trusal also examined Ms. Luttrell's computer hard drive, in her home, and he found no evidence of any active or deleted file containing child pornography (which would have

appeared had the computer been used to generate the pornography found on the discs). ***Id.*** at 105-107.

The prosecution subsequently had the 85 photographs or images on the CD and CD video examined by Dr. Pat Bruno of Geisinger Medical Center and Medical Director of the Child's Advocacy Center in Northumberland, Pennsylvania. Dr. Bruno had been involved in over 4000 cases of child sexual abuse and who, based upon his expertise, was able to offer an opinion as to whether or not the children depicted in the pornographic images were less than 18 years of age. Some of the specific physical characteristics Dr. Bruno's opinion was based upon were genitalia, pubic hair, auxiliary hair, breast tissue, nipples, areola, facial and muscular structures, as well as the children's obvious general physical characteristics. As related in Dr. Bruno's testimony, he established each picture was of a child less than the age of 18, with many children being in the 13 year age range but several depicted children were as young as age 5 and 6. (Exhibit 19), N.T., 9/15/08, pp. 144; generally, see, N.T., 9/15/08, pp. 137-156 as to ages of the children in the pornographic depictions. Specific examples as to the nature of the depictions of individuals shown on the CD's (as explained in some detail through the testimony of Dr. Bruno which reviewed each of the depictions individually before the jury) included the following:

- *Exhibits 3 – 5, 40, 44 – 51, 55:* The children depicted in various pornographic poses are less than 13 years of age.
- *Exhibit 40*: Shows a penis penetrating a less than 13 year old child's vagina.

- *Exhibit 19:* The children are only 5 or 6 years old, with their legs straddled upright in the air framing their smiling faces with their hands placed on themselves using their fingers to spread their vaginas.
- *Exhibits 28 and 41:* The same child age 8 or 9, certainly under age 11, posed sexually with her legs spread and wearing adult harlot type make-up on her face.
- *Exhibits 29 to 37:* Depict the same child, 12 or 13 years of age in various stages of nudity and sexual poses wearing child-like hair bands fashioning the child's hair into pig tails.
- *Exhibit 38:* Depicts two children, one eight or nine years old and the other under 11, engaged sexually together.
- *Exhibit 53:* A very young child, obviously under 18, smiling behind an erect penis presented in the child's face.
- *Exhibit 54:* Two very young children, obviously under eighteen, one of whom is mouthing the tip of an erect penis with the other child watching.
- *Exhibit 86:* The video, includes an obviously under age 18 male child engaging in sexual acts.

II. PROCEDURAL HISTORY

On December 13, 2007, Trooper Marcia Barnhart filed charges against Mr. Bennett for 86 counts of Possession of Child Pornography, 18 Pa.C.S. § 6312(d)(1). A preliminary hearing was held before DMJ Roger McRae on January 17, 2008, at which the Commonwealth was represented by Mary Kilgus, Esquire and Mr. Bennett was represented by Nicole Spring,

Esquire, of the Public Defender's Office. Mr. Bennett was held for court on all charges with an arraignment being scheduled for February 11, 2008.

The Commonwealth filed a Motion in Limine on June 16, 2009, and on June 20, 2008, Christian Kalaus, Esquire, of the Public Defender's Office, filed a Motion in Limine on behalf of Mr. Bennett. Both Motions primarily addressed introducing at trial evidence of Mr. Bennett's prior history of sex crimes. On June 23, 2008, argument was held (without record) on both motions before the Honorable Judge Richard A. Gray. Judge Gray filed an Opinion and Order on June 25, 2008 addressing both motions. Judge Gray set forth the contentions of each Motion in Limine in that Opinion as follows:

> On June 16, 2008 the Commonwealth filed Motions in Limine requesting pre-trial rulings on the admissibility of Defendant's prior bad acts. Specifically, the Commonwealth seeks to introduce the Defendant's 2007 guilty plea to the offenses of Obscene and Other Sexual Materials and Performances, 18 Pa.C.S. § 5903, and Corruption of Minors, 18 Pa.C.S. § 6301 relating to an incident of April 21, 2007 in which the Defendant showed adult internet pornographic videos to a 12-year-old boy. The Commonwealth also seeks to introduce the Defendant's status as a sex offender in Oregon, and 2007 guilty plea to the offense of Failure to Register, 18 Pa.C.S. § 4915. The Commonwealth is also seeking the admission of statements made by the Defendant in April, 2007 to his ex-girlfriend, Karen Luttrell, regarding his desire to flee the area, and evidence that the Defendant was seen burning a computer and compact discs.
>
> The Defendant has also filed Motions in Limine. Defendant's Motions in Limine relate to the preclusion of the Defendant's previous guilty plea to the offenses of Obsence (sic) and Other Sexual Materials and Performances, 18 Pa.C.S. § 5903, Corruption of Minors, 18 Pa.C.S. § 6301, and Failure to Register, 18 Pa.C.S. § 4915 and Defendant's status as a sex offender in Oregon, the opposite ruling sought by the Commonwealth. Defendant also seeks to preclude evidence of pornographic cartoons or drawings depicting individuals, possibly children, engaged in sexual activity and seeks to preclude a letter written by Defendant to Karen Luttrell, his former girlfriend

which discusses his sex offender status in Oregon and his intention to write a book regarding how he became a sex offender.[2]

Mr. Bennett's motion was granted regarding the preclusion of prior bad acts, pornographic cartoons/drawings and Mr. Bennett's letter from prison to his ex-girlfriend, Karen Luttrell. The Commonwealth's motion was granted in part and denied in part. The portion seeking the introduction of prior bad acts was denied. The introduction of statements made by Mr. Bennett to his ex-girlfriend, Karen Luttrell, and evidence regarding Mr. Bennett's destruction of a computer and compact discs was granted.

Judge Gray, by a separate order of June 23, 2008, ordered that Dr. Bruno prepare an expert report regarding his testimony at trial and required the Commonwealth to disclose said report to Defense counsel.

On June 26, 2008, the Commonwealth filed a Motion to Clarify Preclusion of Evidence. On July 2, 2008, an argument was held and Judge Richard A. Gray ordered that the Commonwealth's evidence showing that Mr. Bennett was questioned by police on April 21, 2007 was to be admissible at trial only as a "computer-related matter."

On August 27, 2008 a jury was selected before Judge Richard A. Gray. During the course of jury proceedings, Mr. Bennett made a Motion to Strike Juror No. 18 for cause following her two responses to questioning which resulted in her stating that the matters addressed would not affect her ability to be fair and impartial. Juror No. 18 indicated that she was the type of person who in watching a movie would have difficulty in "not breaking down

[2] Defendant's Motion in Limine also seeks Preclusion of Expert Medical Testimony at Trial. This issue was dealt with under a separate Order entered by the Court on June 23, 2008.

in tears." N.T., 8/27/08, pp. 2-3. In response to defense questioning, Juror No. 18 said that this could have an emotional reaction or impact upon fellow jurors. ***Id.*** at 3, 4. The juror in response of questioning by the Court indicated that she could still be a fair and impartial juror and denied defendant's challenge for cause. ***Id.*** at 4.

On Friday, September 12, 2008, the Commonwealth filed a Motion in Limine to Admit Redacted Letters. This motion was served on defense counsel 30 minutes prior to the start of the jury trial on September 15, 2008. See, N.T., 9/15/08, p.7. The Commonwealth sought to introduce redacted portions of additional letters sent by Mr. Bennett to Ms. Luttrell. The investigating officers of the Pennsylvania State Police had received these letters from Ms. Luttrell in May 2008, but had only recently advised defense counsel of their intent to use them at trial.. ***Id.*** at 9. Following an on the record argument (***Id.*** at 11-16 and ***Id.*** at 119-126) this Court, for the reasons stated of record (***Id.*** at 126, 130), issued an order denying the Commonwealth's Motion in Limine.

At the commencement of trial, Mr. Bennett also made an oral motion seeking to suppress a statement allegedly made by Mr. Bennett to the state police on December 28, 2007, two days after his arrest on these charges, at a time he was in custody. ***Id.*** at 16, 17. The Commonwealth had first disclosed the existence of these statements to defense counsel on September 2, 2008.

Following argument on the record (***Id.*** at 17-19, 123-126) this Court, for the reasons noted on the record (***Id.*** at 126-130), issued an order granting Mr. Bennett's Motion to Suppress the statements he made to the police on December 28, 2007. ***Id.*** at 130, 131.

On September 15, 2008 and September 16, 2008 a jury trial was held before this Court. At the conclusion of the Commonwealth's evidence on September 15, 2008, Mr. Bennett made a "demurrer" to many of the nude depictions which had been presented by the Commonwealth. N.T., 9/15/08, p. 188. A total of 85 depictions of individual photographs had been presented to the jury (Exhibits 1-85), of the 85 individual portraits, 35 different children were involved and 1 video (Exhibit 86), of which one minor child was the subject of the depiction in the video.

This Court treated the demurrer as a Motion for Judgment of Acquittal under Pa.R.Crim.P. 606(A)(1), with Mr. Bennett challenging the sufficiency of the evidence on the basis that many of the depictions did not portray a sexual act and/or the evidence did not establish that the person portrayed was under the age of 18. Mr. Bennett specifically challenged the following counts (the depiction in question having an exhibit number correlating to the count of the same number): 1, 6, 7, 8, 9, 10, 12, 15, 16, 17, 20, 21, 22, 24, 25, 26, 27, 29, 30, 31, 34, 35, 40, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 55, 57, 5, 59, 60, 61, 69, 71, 72, 79, 80, 81, 82, 83, 84. ***Id.*** at 188-191. See also, ***Id.*** at 193, 194, 214. The Court granted judgment of acquittal as to counts 6, 7 and 26. ***Id.*** at 194, 204. In ruling on several of the challenged counts the Court determined that a series of depictions which involved the same child could be considered as one count in order to determine whether or not the effect of the depictions was such as to constitute a depiction of nudity depicted for the purpose of sexual stimulation or gratification of the viewer and/or to determine age. The Court combined those specific series of depictions of the same child under a single count, specifically as follows: Counts 15, 16, and 17 were combined under Count 15; Counts 20 and 21 were combined under Count 20; Counts 29 and 30 were combined under Count 30; Counts 34 and 35 were combined under Count 35;

Count 44 and 46-49 were combined under Count 45. ***Id.*** at 214. In other respects the Court, after spending a significant amount of time reviewing the individual depictions and considering the arguments of counsel, denied Mr. Bennett's motion to dismiss the remaining challenged counts. ***Id.*** at 193-198 and 202-214. In doing so, the Court reasoned as to some of the depictions of the same child, whether or not the nudity depicted was for the purposes of sexual gratification was dependant upon the context in which the depiction was viewed. Considering the depictions of the same child being on the same CD, the Court determined that in the minds of reasonable men and women of the jury "the purpose of sexual stimulation or gratification" (defined as an element of prohibited possession of nudity, 18 Pa. C.S. §6312(a)), could be found to lie in the series of nude or partially nude photographs. For example, see Court's discussion ***Id.*** at 195-197. The Court also determined that, regardless of its own opinion as to all but the three dismissed counts, the issues concerning both age determinations and whether the nude depictions were possessed for the purpose of sexual gratification was an issue for the jury. ***Id.*** at 205-208.

After the Court's ruling on Mr. Bennett's Motion for Judgment of Acquittal, the following morning, prior to the commencement of proceedings, Mr. Bennett proffered to enter a plea of guilty. Upon colloquy by this Court, instead of entering a plea of guilty, Mr. Bennett asserted his innocence of the charges denying that he possessed and viewed some of the alleged child pornography and that he did not know the pictures depicted children under the age of 18. His guilty plea was rejected by the Court and trial resumed.

Mr. Bennett, counseled by his attorney, chose not to testify. N.T., 9/16/08, p. 13-14.

The jury found Mr. Bennett guilty of all 73 counts of Sexual Abuse of Children submitted to them.

On September 17, 2008, the Commonwealth filed a Motion to Amend Charges Subsequent to Conviction. The basis of this motion was that, pursuant to 18 Pa.C.S. § 6312(d)(2), the first of the 73 counts of Sexual Abuse of Children was graded as a felony of the third degree, but the 2nd through the 73rd Counts should be considered as felonies of the second degree. Initially all 86 counts had been charged as felonies of the third degree. By an order of February 10, 2009, based upon the controlling case law authority of ***Commonwealth vs. Jarowecki***, 923 A.2d 425 (Pa. Super 2007), the Court entered an order granting the Commonwealth's motion. For sentencing purposes, therefore, Defendant was sentenced with Count 1 being a felony of the third degree and the remaining counts being felonies of the second degree.

At the time of entering the jury's verdict on September 16, 2008, the Court directed that a Pre Sentence Investigation and an assessment by the Sexual Offender's Assessment Board be done to determine if Mr. Bennett should be deemed a sexually violent predator. Sentencing had originally been scheduled for February 10, 2009. Prior to the February 10, 2009 sentencing date a report had been received from the Board indicating a finding that Mr. Bennett was not a sexually violent predator, Both the Commonwealth and Mr. Bennett requested a continuance in order to submit new information and authority to the Sexual Offender's Assessment Board. , On February 10, 2009, the Commonwealth asserted that the Board had not received full information as to Mr. Bennett's prior record and factual details of his prior sexual offenses and that the opinion was based upon erroneous assumptions. It appeared to the Court based upon

Mr. Bennett's acknowledgments as to his prior history of which note was taken on February 10, 2009 that it was appropriate to grant the continuance in order to allow the Sexual Offender's Assessment Board an opportunity to reevaluate its determination.

Subsequently, the Board issued an opinion which expressed that Mr. Bennett was a sexually violent predator. The Commonwealth then requested a hearing for determination as to whether Mr. Bennett was a sexually violent predator. That hearing was held in conjunction with the sentencing hearing on April 20, 2009. During the hearing process the Court determined that Mr. Bennett was a sexually violent predator for the reasons stated on the record. N.T., 4/20/09, pp. 37-39.

The Court then proceeded with the sentencing hearing. The Court first denied Defendant's objection to grading the counts subsequent to Count 1, as felonies of the second degree. **Id**., at 40-41. An order was entered to confirm the ruling.

In determining its sentence, the Court gave consideration to the significant factors referenced in the Pre Sentence Investigation, Mr. Bennett's statements, his past record of sexual offenses including sexual offenses against children, his conviction for failure to register as a sexual offender, that he expressed no remorse and that his overall statements were to the effect that he intended to continue acting in a manner that led to him being found to be a sexually violent offender. The sentence imposed effectively gave Mr. Bennett a life sentence. Specifically, as to Count 1, felony of the third degree, Mr. Bennett was sentenced to a term of 15 months to 7 years (statutory maximum). Underneath the remaining counts, Mr. Bennett was sentenced to a minimum term of two years and a maximum term of four years. In total he was directed to pay a fine in the amount of $40,000.00. The sentences were made consecutive with

the exception that the sentences relating to the counts that involved the same child as the victim of the sexual abuse were made concurrent

Mr. Bennett filed a Post-Sentence Motion on April 30, 2009, which this Court denied relying upon its reasoning as previously stated on the record or in prior orders by an order dated May 18, 2009 and filed May 21, 2009.

On May 29, 2009, Mr. Bennett, through Ms. Spring as counsel, filed a Notice of Appeal to the Superior Court. On June 1, 2009, this court issued an order pursuant to Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Mr. Bennett file a Concise Statement of Matters Complained of on Appeal within fourteen days of the order. On June 8, 2009, Mr. Bennett filed his Concise Statement of Matters Complained of on Appeal.

In his Statement of Matters, Mr. Bennett raises the following nine issues:

(a) Whether the trial court erred by denying his challenge for cause to prospective juror #18, Nina Thurber.

(b) Whether the trial court erred by denying his demurer *(sic)* to original count number 1, 42, 52, 82, 83, and 84 and that the verdict was against the weight of the evidence as to those charges because those particular photos did not depict sexual activity nor total nudity and were not lewd.

(c) Whether the pre-trial motions court erred by granting the Commonwealth's Motion in Limine to admit evidence that the defendant destroyed his computer and discs as consciousness of guilt.

(d) Whether the evidence was insufficient to convict him of the specific counts as specified in subparagraph b above.

(e) Whether the trial court erred by finding him to be an SVP based on the conflicting opinions and testimony of C. Townsend Velkoff.

(f) Whether the Court abused its discretion when imposing sentence which in essence incarcerates the Defendant for life.

(g) Whether the trial court erred by determining that each count after the first count of sexual abuse of children should be graded as a felony of the second degree.

(h) Whether the aggregate sentence was manifestly excessive.

(i) Whether the trial court erred by imposing a $40,000.00 fine when incarcerating him for life.

Issues (a) and (c) of Mr. Bennett's Statement of Matters deal with issues that were before the Honorable Judge Richard A. Gray during the jury selection and pre-trial motions. Regarding issue (a), which asserts error in Judge Gray's failure to grant Defendant's challenges for cause to Juror No. 18, this Court will rely on the transcript previously summarized and the ruling articulated on the record at Mr. Bennett's jury selection proceeding. N.T., 8/27/08, pp. 3, 4. Although Judge Gray did not at that time articulate his reasoning it is clear the juror offered no statement that could be argued as an expression the juror could not be a fair and impartial juror. Regarding issue (c), this court will rely on Judge Gray's reasoning and ruling contained in his Opinion and Order filed on June 25, 2008 and the Order filed on July 2, 2008. As to issue (g) the grading of the counts after count 1 as felonies of the second degree on the basis they constitute subsequent convictions is controlled by ***Commonwealth v. Jarowecki***, 923 A.2d 425 (Pa. Super. 2007), as previously discussed. Therefore, issues (b), (d), (e), (f), (h), and (i) of the matters complained of on appeal, issues presented during the jury trial and sentencing, will be the only matters discussed in this 1925(a) Opinion.

III. DISCUSSION

The pornographic depictions possessed by Mr. Bennett justified the jury's finding that he had committed 73 violations of the crime known as Sexual Abuse of Children as provided under § 6312 of the Pennsylvania Crimes Code.

The relevant portions of § 6312, Sexual Abuse of Children, are as follows:

> (a) DEFINITION.-- As used in this section, "prohibited sexual act" means sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction….
> (d) POSSESSION OF CHILD PORNOGRAPHY.-- (1) Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense. (2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.
> (e) EVIDENCE OF AGE.-- In the event a person involved in a prohibited sexual act is alleged to be a child under the age of 18 years, competent expert testimony shall be sufficient to establish the age of said person…" 18 Pa.C.S. § 6312

This Court did not Err in Refusing to Grant a Motion for Judgment of Acquittal, the Verdict was not Against the Weight of the Evidence and the Evidence was Sufficient to Support a Conviction as to Original Counts 1, 42, 52, 82, 83, and 84.

In Section (b) of his Statement of Matters Complained of on Appeal, Mr. Bennett asserts that the depictions of child pornography related to counts 1, 42, 52, 82, 83, and 84 do not as a matter of law constitute child pornography under § 6312 of the Crimes Code and that this Court should have granted a judgment of acquittal (sic demurer) as to those counts.

Mr. Bennett was originally charged with 86 counts of Sexual Abuse of Children. The 86 counts consisted of a separate count for each of 85 different computer disc depictions and one

movie file of child pornography. Prior to submission to the jury, the Court granted a Motion for Judgment of Acquittal as to counts 6, 7, and 26. The Court also consolidated into a single count, multiple depictions of the same child as to five of the victims. Our reasoning, as stated above, was our finding that in order to satisfy the crime's element of possessing nude images for the purpose of sexual stimulation or gratification the series of nudity depictions of the same child in those five instances should be considered together; hence, they constituted one offense. N.T., 9/15/2008, pp. 193-194, 195-198, 202-207. This Court strongly cautioned the jury that these legal rulings were in no way to cause them to make an inference as to whether they or the remaining counts constituted a depiction of a prohibited sexual act so as to constitute child pornography. N.T., 9/16/08, p. 16. Mr. Bennett has not objected to the combination of these counts.

Mr. Bennett also has not challenged the sufficiency of the evidence establishing that:

1) The CD's containing the child pornography were items that he possessed;

2) The children depicted in the pornography are under the age of 18.

Instead he argues the depictions do not constitute child pornography, only as to six of the 73 counts.

Mr. Bennett protests that these six depictions do not depict sexual activity, do not depict total nudity, are not lewd and do not depict nudity for sexual stimulation or gratification. At the time of his "demur," this Court articulated that the element of "prohibited sexual act" in the statute includes pictures or depictions of the genitals of any individual in a lewd way, or nudity, if that nudity was for the purpose of sexual stimulation or gratification of any person who might view the depiction.

A Motion for Judgment of Acquittal, referenced by Mr. Bennett as a "demur," is to be granted when there is not sufficient evidence at trial that the conduct in question can result in a conviction for the charged offense, in which case there is no basis for the Court to submit the charge to the jury. The Court did give close attention to Mr. Bennett's oral motions for demurrer. As stated above, Mr. Bennett was acquitted as to counts 6, 7, and 26. As to counts 1, 42, 52, 82, 83, and 84, there was no question that child nudity was depicted we did, however, find that it was such a depiction of child nudity that the jury should decide whether, as a matter of fact, the pictures depicted prohibited child pornography, the possession of which amounted to Mr. Bennett's sexual abuse of children.

As to Count 1, although Mr. Bennett's Defense Attorney argued that Exhibit 1 does not depict anything sexually explicit as the depiction is merely of a topless female without having any genitals exposed, this Court agreed with the Commonwealth that the count should be submitted to the jury. N.T., 9/15/2008, 189, 193. The District Attorney argued, and this Court accepted, at least to the point of submission to the jury, that the depiction was "nudity depicted for the purpose of sexual stimulation or gratification of any viewer based on the garment that the child is wearing, the nature in which the child is posed, the fact that the child is kneeling on a bed and smiling at the camera… that this picture is sufficient for the charge." ***Id***. 192. The garment the child is wearing is a white lace garter that is mostly see through and the child is posed on white linens that have the appearance of being tossed about. Exhibit No. 1.

As to Count 42, the District Attorney argued that "the manner of toplessness, the way [the child is] grabbing the garment in the disrobing posture" makes the picture child pornography as it is designed to raise sexual stimulation in its viewer. N.T., 9/15/2008, pp.

204-205. Exhibit No. 42. Mr. Bennett's Defense Attorney postured that the picture was not lewd because, although the child was topless, the picture did not depict the child's genitals. N.T., 9/15/2008, p. 205. Exhibit No. 42. This Court reasoned that as a matter of law the jury could reasonably find that the picture amounted to child pornography under § 6312(d) of the crime of Sexual Abuse of Children:

> What I'm looking for is whether standing alone or in combination [, referring to the original counts combined to form one count for submission to the jury,] it amounts to introduction of evidence as would relate to, I guess, a reasonable man standard. And I'm trying to approach this in the very most open and appropriate way that I can given the nature of the subject matter because I recognize that there would be some individuals who would say any picture of any nudity of a person under 18 qualifies. But I don't think that that is the law. And I'm trying to apply the legal standards as I understand it. And here I think there is a sufficient suggestion of a sexual stimulation under 42 in the nature of the posing with the nudity of the breasts that is depicted that it satisfies that requirement.

N.T., 9/15/2008, pp. 205-206.

In this case, Count 42 was in a series of photographs, all of the same girl and in the same setting, in various stages of nudity arguably with a series of poses which accentuate her nudity and are suggestive of sexual "come hither" notation. Taken together, the picture is designed to be lewd and to raise sexual stimulation in its viewer.

Count 52 depicts a child whose breasts are exposed, but who's nipples and genitalia are not; Mr. Bennett's Defense Attorney argued at trial the picture was not lewd but instead "could be hanging in anyone's house as art." N.T., 9/15/2008, p. 208. Exhibit No. 52. The Court reasoned that Count 52 ought to be submitted to the jury for their determination as to whether it was nudity for the purposes of sexual stimulation. In particular, we noted that in the picture the child wore high heels and that the demure of the child along with the positioning of the flower

was provocative such that demurrer in regard to this count was not appropriate. N.T., 9/15/2008, p. 208. Exhibit No. 52. In addition, the child in this picture is wearing garters, fishnet stockings, typically associated in our society with prostitution, and heavy make-up on her face. Exhibit No. 52.

Count 82 depicts a child posing in a chaise lounge chair; Mr. Bennett's Defense Attorney argued that the picture was akin to the drawing that Jack did of Rose, the two main characters in the film Titanic. N.T., 9/15/2008, p. 211. Exhibit No. 82. The District Attorney argued that the picture was nudity for the purposes of sexual stimulation and was lewd in that the girl's pose, the look on her face, and the exposition of her genitalia combined to make the picture child pornography according to § 6312(d). N.T., 9/15/2008, p. 211. Exhibit No. 82. This Court opined that "82 may be very tough to convince me beyond a reasonable doubt as to lewdness on the aspect of it, but I am not prepared to say that the jury as reasonable men and women could not find that it is lewd beyond a reasonable doubt." N.T., 9/15/2008, p. 212. Exhibit No. 82.

The attorneys argued similarly with regard to Counts 83 and 84 as they had regarding Count 82. Mr. Bennett's Defense Attorney argued that the pictures constituted art, the child holding a peacock feather up behind her head, and the District Attorney countered that both pictures showed a child posturing completely nude, exposing her genitals and breasts including her nipples, in a fashion that is for the purpose of sexual stimulation. N.T., 9/15/2008, p. 213. Exhibit Nos. 83-84. We concluded similarly as we did regarding Count 82 as well, that the counts should be submitted to the jury because this Court felt the pictures underlying each count could be either determined to be child pornography under § 6312(d) or not, according to the

arguments of counsel and this Court's own interpretation of the pictures, and this was up to the jury as reasonable people to decide. N.T., 9/15/2008, pp. 213-214. Exhibit Nos. 83-84.

A claim challenging the sufficiency of the evidence is a question of law. ***Commonwealth v. Sullivan***, 820 A.2d 795, 805 (Pa. Super. 2003). When reviewing a challenge to the sufficiency of the evidence, the following standard of review is employed:

> whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt… Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the 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. Gray, 867 A.2d 560, 567 (Pa. Super. 2005) (quoting ***Commonwealth v. Nahavandian***, 849 A.2d 1221, 1229-30 (Pa. Super. 2004)). Direct and circumstantial evidence receive equal weight when assessing the sufficiency of the evidence. ***Commonwealth v. Grekis***, 601 A.2d 1275, 1280 (Pa. Super. 1992). Whether it is direct, circumstantial, or a combination of both, what is required of the evidence is that it taken as a whole links the accused to the crime beyond a reasonable doubt. ***Commonwealth v. Robinson***, 864 A.2d 460, 478 (Pa. 2004).

Any doubt the depictions of child nudity constitute child pornography have been resolved by the jury against Mr. Bennett. The verdict should not be disturbed.

Mr. Bennett was Appropriately Found to be a Sexually Violent Predator and Appropriately Sentenced

Mr. Bennett's final contentions have to do with this Court's determinations at Mr. Bennett's sexual offender status and sentencing hearing on April 20, 2009. Mr. Bennett claims that this Court erred by finding him to be a sexually violent predator when the initial report of the Sexual Offender's Assessment Board found he was not. Mr. Bennett claims that his sentence is excessive, as his sentence is virtually a term of life imprisonment.

Mr. Bennett first ignores the undisputed fact that in making its initial report the Board and its evaluation lacked pertinent information about his past sex crime in another state. After the Board's first report was issued the board's evaluation was given further details of Mr. Bennett's prior offense.

In asserting he is not a sexually violent predator, this Court gave due consideration to the information ultimately relied upon by the evaluator who is responsible for the final report of the Board in ruling that Mr. Bennett was a sexually violent predator.

As stated by the expert, Townsend Velkoff, in his initial examination at the April 20, 2009 hearing, Mr. Bennett had sexual contact in another state with a female of the age of 13 having had sex with her from that age, or earlier, through to the time she was about 18 and fathering a child through her. N.T., 4/20/09, p. 10. This conduct combined with the current offense in and of itself was sufficient to allow the evaluator and this Court to conclude that Mr. Bennett had displayed sexual interest in young children for well more than six months and therefore met the critical diagnostic criteria for pedophilia and as a result also suffers a mental abnormality as required for the definition of being a sexually violent predator. ***Id.*** at 10. See also, 42 Pa.C.S. § 9792. Although defense counsel ably cross-examined the evaluator, the

Court found it clear, based upon the acknowledged facts as well as those established by the Commonwealth through the evidence introduced at the hearing, that Mr. Bennett met that stated criteria. The Commonwealth's evidence included a certified conviction that Mr. Bennett pleaded guilty to the rape of a child under the age of 14. ***Id.*** at 37. We more fully discussed our reasons for making the determination that Mr. Bennett was a sexually violent predator on the record. See ***Id.*** at 37-39.

The Court then proceeded to sentencing. See, generally, ***Id.*** at 42-65. The Court made a determination that there were 36 different victims and accepted the defense argument that the conviction as would relate to each victim should be a concurrent sentence, however, the Court felt that each victim in the case needed to be vindicated by making the sentences as to the counts for each victim consecutive to the sentence of all the other victims. ***Id.*** at 49, 54-55, 63. The Court made a determination that in imposing sentence it was important to redress each of the victims and protect the community. Given Mr. Bennett's past conduct as summarized in the sentencing proceedings and forgoing portions of this opinion, we determined that to the best of the Court's ability that it was appropriate for the Court…"(T)o see the best that I am able that you (referring to Mr. Bennett) remain incarcerated and separated from the public for the rest of your life." ***Id.*** at 63. As a result, the rest of the sentence was a formality.

The Court previously determined that as a matter of law, Count 1 should remain graded as a felony of the third degree as originally charged and the remaining counts graded as felonies of the second degree. The Court accepted the defense contention that Mr. Bennett's prior record score was a 3. Applying the appropriate offense gravity scores the standard range minimum sentence is 6 to 16 months for Count 1 and 18 to 24 months for the remaining counts.

Mr. Bennett did receive a standard range sentence under each count. Under Count 1 the sentence was 15 months minimum to a maximum term of 7 years plus a fine of $15,000.00. The 7 years is statutory maximum. Although the statutory maximum for the other remaining offenses is 10 years the Court utilized its discretion to sentence Mr. Bennett to a standard range sentence of 24 months minimum and a maximum of 4 years. A single additional fine under Count 2 was given to Mr. Bennett of $25,000.00. The fines were intended to make sure that any assets or profits that Mr. Bennett may have or would receive, in the future, from whatever source, would be subject to being turned over to the Commonwealth through payment of those fines.

Mr. Bennett's sentence, 71 to 142 years in aggregate, was nothing less than appropriate under the circumstances and is in keeping with the law of Pennsylvania "Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." ***Commonwealth v. Robertson***, 874 A.2d 1200, 1212 (Pa. Super. 2005) (quoting ***Commonwealth v. Reyes*** 2004 PA Super 238, 853 A.2d 1052, 1055 (Pa. Super. 2004). "To prove an abuse of discretion, the defendant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." ***Commonwealth v. Hyland***, 875 A.2d 1175, 1184 (Pa. Super. 2005) (citing ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa. Super. 1999)). There must be a substantial question as to the appropriateness of the sentence. ***Commonwealth v. Kimbrough***, 872 A.2d 1244, 1262 (Pa. Super. 2005); ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005). A substantial question exists "only when the appellant advances a colorable

argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Hyland***, 1184.

The Superior Court has remarked that "the imposition of consecutive rather than concurrent sentences lies within the sound discretion of the sentencing court, and a challenge to the imposition of consecutive sentences simply does not raise a substantial question." ***Commonwealth v. Lloyd***, 878 A.2d 867, 873 (Pa. Super. 2005) (citing ***Commonwealth. v. Graham***, 661 A.2d 1367, 1373 (1995)). However, an earlier Superior Court decision suggests that, if the defendant's aggregate consecutive sentences result in a virtual life sentence, it may raise a substantial question whether the total sentence was "so manifestly excessive as to constitute too severe a punishment." ***Commonwealth v. Dodge***, 859 A.2d 771, 776 (Pa. Super. 2004). See also, ***Commonwealth v. Diaz***, 867 A.2d 1285, 1288 (Pa. Super. 2005). Suffice to say that the determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. ***Hyland***, supra; ***Commonwealth v. Twitty***, 876 A.2d 433 (Pa. Super. 2005).

In ***Commonwealth v. Long***, 466 A.2d 641, Appellant was sentenced to an aggregate sentence of 55 to 122 years pursuant to a guilty plea to ten violations of the Crimes Code, 18 Pa.C.S. § 101 et seq., all of which arose from the repeated sexual attacks upon a young woman. An appeal followed arguing, among other things, that the sentence imposed was excessive. The Superior Court of Pennsylvania upheld the trial court's sentence stating that not only was the sentence imposed within the statutory permissible range, but that the trial court did not abuse its discretion by imposing such a sentence. ***Long***, p. 645-646.

Ordinarily deference should be given to the trial court in determining what is an appropriate sentence as the trial court is better able to weigh the various considerations implicit in each case. ***Id***. 646. In determining whether a sentence is excessive, an appeals court ought not to replace the trial court's judgment with its own unless the trial court's sentence of a defendant demonstrates that the court below clearly abused its discretion. ***Id***. (citing ***Commonwealth v. O'Brien***, 422 A.2d 894 (Pa. Super. 1980); see also ***Commonwealth v. Franklin***, 446 A.2d 1313 (Pa. Super. 1982)).

In ***Long***, the Superior Court deferred to the trial court, determining that the trial court did not abuse its discretion and that the sentence was, thus, not excessive, quoting the trial judge's reasoning on the record for giving Mr. Long an aggregate sentence of 55 to 110 years of incarceration, which concluded: "I think for your own safety and definitely for the safety of society that you have to be incarcerated for as long as possible." (Id. at 46). ***Long***, 345.

In looking at Mr. Bennett, his conduct of committing these crimes against 35 children and this community, his conduct in the past, and the lack of remorse that he has exhibited throughout this entire judicial process, this Court determined that any lesser sentence than that incarcerating him for life would be unjustified. The aggregate of 71 years and 3 months to 147 years of incarceration resulted from applying the standard range sentence with the necessary maximum. On the record at the time of sentencing, after duly fulfilling the procedures for Mr. Bennett to become a life-time registrant under Megan's Law, this Court stated reasons similar to those stated by Judge Dwyer in ***Long***, this Court fully understanding the implication of the sentence it was imposing, that it was virtually a life sentence:

> Accordingly, my sentence will be as to Count 1 a minimum of 15 months and a maximum of seven years. Now, as to the remaining counts…each of the

> victims needs to be appropriately considered as I impose sentence… I do believe that as I protect the community and see to your punishment that to redeem for the victims whatever possible dignity it is that each one of them deserves to be considered in the sentencing. Therefore, again, looking at the overall seriousness of this matter and the repeat nature of the offense, it needs to be a sentence that would be at the standard sentencing range… in this matter… two years minimum. So therefore, for each of the remaining 35 victims… I will impose a sentence of a minimum of two years and a maximum of four years. This means, sir, that the total minimum sentence will be 71 years and the 3 months and that the maximum sentence will be 147 years. It is my intent by imposing this sentence not to run up numbers or to make an absurd type sentence, but to see as I've indicated before some matter redressed to each of the victims and the protection of our community and to see the best that I'm able that you remain incarcerated and separated from the public for the rest of your life.

N.T., 8/20/09, pp. 60-63.

CONCLUSION

Accordingly, this Court believes Mr. Bennett's conviction and sentencing should be upheld.

BY THE COURT,

William S. Kieser, Senior Judge

cc: Nicole Spring, Esquire
Mary Kilgus, Esquire
Judges
Gary L. Weber, Esquire (Lycoming Reporter)
Terra Girolimon