IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1002-2008**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
LARRY RIGGLE,	**:**	
Appellant	**:**	**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 dated August 7, 2009 and its Order dated October 20, 2009, which denied Appellant's post sentence motions. The relevant facts follow.

Appellant was accused of performing various sexual acts on a minor child, M.B. M.B. was born December 9, 1993. M.B. was age 13 at the timeframe in question. Appellant is M.B.'s uncle. The crimes occurred in the approximate timeframe of June 2007 to February 2008.

A jury trial was held on April 28, 2009. The main issues at trial involved the credibility of M.B., who claimed Appellant performed sexual acts on him, and the credibility of Appellant, who denied the allegations.

In June 2007, the Lycoming County Juvenile Probation Office referred M.B. to a program called Pennsylvania Treatment and Healing for help with behavioral and school issues. Cleveland Way oversees the clinical work in this program in the Williamsport area.

On February 20, 2008, Mr. Way asked M.B. why he was having a recurring situation at school. M.B. fell to the floor and began to cry. M.B. told Mr. Way he was

sexually abused by Appellant, his uncle. M.B. told Mr. Way the last occasion something happened was two days prior to the disclosure. N.T., pp. 92-95.

M.B., who was 15 years old at the time of trial, testified that he lives with his mother. Once in a while he would go to his uncle's, the Appellant's home to visit and get some money. N.T., p. 21.

M.B. testified that he was 13 years old when the first sexual incident occurred. He was watching a movie. Appellant was the only person with him. Appellant asked if he could "chew" M.B., which M.B. understood to mean his uncle putting his lips on M.B's penis. M.B. initially said no, but Appellant kept "bugging" him about it. N.T., p. 25. Eventually, Appellant came over. Appellant helped him take his clothes off. N.T. p. 26. Appellant touched M.B's. penis with his mouth and hands. N.T., p. 26. M.B's penis was inside Appellant's mouth. N.T. p. 27. M.B. testified Appellant "sucked me off". N.T., p. 25. M.B. testified Appellant put his mouth on M.B.'s penis "five times". N.T., p. 43.

M.B. testified Appellant also touched him on his "butt". N.T. p. 28. This happened on a different occasion. N.T. , p. 28. Sometimes this was on the outside of his clothes and sometimes on the inside of his clothes. N.T., p. 28. Sometimes Appellant put his hands inside M.B. N.T., p. 29. His hands touched inside and outside his "butt". N.T., p. 29. When asked how far Appellant's hands went inside his butt, M.B. testified "a little". N.T., p. 29. M.B. testified those acts occurred more than five times. N.T., p. 30.

M.B. testified that on some occasions, Appellant used his "dick" and put it inside his butt. N.T., p. 31. When asked how far it went inside, M.B. testified "a little". N.T., p. 32.

M.B. testified Appellant also put objects or "dildos" in his butt. M.B.

described three objects that were caramel, black and purple in color. N.T., p. 32. Appellant tried to put them in his butt. N.T., p. 33. He claimed the object went into his butt "a little". N.T., p. 33.

Appellant also had M.B. use the "dildos" on Appellant. N.T., p. 33. The dildos were kept in the bathroom. M.B. testified that Appellant had M.B. put dildos in Appellant's butt more than 15 times. N.T., p. 42. M.B. testified he observed Appellant use the dildos on himself when he was on the computer or watching television. N.T., p. 43.

M.B. testified that Appellant showed two gay movies to him. N.T., p. 36. The gay movies were usually kept on the shelf behind other movies. N.T., p. 37.

M.B. testified no one else was in the house when his uncle did these things to him. N.T., p. 44.

M.B. testified that when these acts were first going on, he was afraid to tell anyone about it. N.T., p. 35. M.B. testified that he didn't tell anyone about what was happening earlier than February 2008 because he feared people would think differently about him and that they might feel he was "gay". N.T., p. 59.

M.B. acknowledged that he has a pending theft charge again him in the Juvenile Court. N.T., pp. 64-65.

The prosecuting police officer, Detective William Weber, testified he was contacted by Lycoming County Children & Youth on February 21, 2008. N.T., p. 76. On that date, he participated with Rhonda McDonald of Children & Youth in an interview of M.B. N.T., p. 77. He interviewed M.B. several other times. On June 2, 2008, Detective William Weber executed a search warrant at the home of Appellant. N.T., pp. 77, 78. During the search Detective Weber recovered three sex toys or dildos found in a basket in a bathroom on

the first floor. N.T., p. 78. The Detective testified he recovered a purple dildo, a black dildo and a white or caramel colored dildo. N.T., p. 79. He also recovered some "gay porn movies". N.T., p. 79.

Detective Weber interviewed Appellant on February 27, 2008. Appellant denied M.B.'s allegations. However, Appellant could not give him a reason why M.B. would make up allegations again him. He said he got along well with M.B. N.T., p. 82. Appellant denied M.B. was shown pornography in his house, but then acknowledged M.B. may have seen pornography on the computer. N.T., p. 83. The only physical contact admitted by Appellant was occasionally giving M.B. a hug or rubbing his head. N.T., p. 83.

In defense, Appellant testified and denied any acts of sexual abuse of M.B. N.T., pp. 78-132. Appellant acknowledged that M.B. came to his house periodically. N.T., p. 118. Appellant testified that during this timeframe, his ex-sister-in-law and his nephew resided at his home. Their names were Penny Salinas and Tony Salinas. N.T., p. 119. Although Tony Salinas was employed, whenever he was not working he was always at the home, because he didn't have a vehicle. N.T., p. 120. Appellant acknowledged that there were "a couple of times" when M.B. was alone in the house with him. N.T., pp. 120-121. There was an occasion while Appellant was working around the outside of the house when M.B. admitted to him that he was watching "porn" on the computer. N.T., p. 121. Appellant testified that while M.B. was at his house he might have seen the dildos because Appellant was keeping them in the bottom drawer of his computer desk. N.T., p. 122.

Appellant called Penny Salinas Herritt and Antonio Salinas as witnesses on his behalf. Ms. Herritt testified she and her son Tony came to live with Appellant in late June or July 2007. N.T., p. 134. She returned to Texas on July 10, 2007, but came back to

Pennsylvania on July 17, 2007. She stayed until January 6, 2008. N.T., p. 135. Tony stayed in the home of Appellant until November 2007. N.T., p. 136. Tony worked at an auto repair shop and Appellant transported him to and from work. N.T., p. 136. She testified her son never went out but for work. N.T., p. 137. Ms. Herritt was not working while staying with Appellant. N.T., p. 137. While living with Appellant, she only saw M.B. at the house one time. N.T., p. 138. Ms. Herritt did not believe during the timeframe she lived in the home that Appellant could have been alone with M.B. the number of times M.B. testified that he was alone with Appellant. N.T., p. 139.

Likewise, Tony Salinas testified he resided at Appellant's home for the timeframe testified to by his mother. He worked away from the home Monday through Friday and on some Saturdays. N.T., p. 150. He saw M.B. at Appellant's house on two occasions during the time he lived there. N.T., p. 151. Like his mother, Mr. Salinas did not believe M.B. could have been alone with Appellant the number of times as claimed by M.B. N.T., p. 153.

Appellant called two character witnesses who testified that Appellant had a reputation as a truthful person. Appellant also called a number of reputation witnesses who testified that Appellant was known as being trustworthy around children.

The jury found the Appellant guilty of Count 1, Involuntary Deviate Sexual intercourse for placing his mouth on M.B.'s penis; Count 5, Aggravated Indecent Assault, for placing his finger into the anus of M.B.; Count 6, Indecent Assault, for touching M.B's anus with his finger; Count 7, Indecent assault, for touching M.B's anus with his penis; Count 8, Indecent Assault, for touching M.B's. penis with his mouth; Count 10, Corruption of a Minor, for showing M.B. pornographic videos; and Count 15, Indecent Assault, for touching

M.B's. anus with a dildo.

The Appellant was found not guilty of several other counts by the jury and the Court dismissed or the Commonwealth withdrew other counts contained in the Information.

On August 7, 2009, the Court sentenced Appellant to undergo incarceration in a state correctional institution for a term of five to ten years for Count 1, Involuntary Deviate Sexual Intercourse. The Commonwealth requested and the Court applied a five-year mandatory minimum sentence pursuant to 42 Pa.C.S.A. §9718. The Court imposed a consecutive term of incarceration of three to six years for Count 5, Aggravate Indecent Assault. The Court ordered Appellant to serve two consecutive two-year probation terms for Counts 7 and 15, Indecent Assault and a concurrent two-year term of probation for Count 10, Corruption of a Minor. The Court found Count 6 Indecent Assault merged with Count 5 Aggravated Indecent Assault and Count 8 Indecent Assault merged with Count 1 Involuntary Deviate Sexual Intercourse. The aggregate sentence imposed was a term of incarceration in a state correctional institution of eight to fifteen years followed by a consecutive term of four years probation.

The Appellant was not found to be a "sexually violent predator" but the Appellant was advised by the Court of his lifetime Megan's Law registration requirements.

On August 14, 2009, Appellant filed a Post Sentence Motion, seeking arrest of judgment or a new trial. The Court heard argument on Appellant's Post Sentence Motion on October 20, 2009. Appellant, in his motion in arrest of judgment, argued that two of the indecent assault counts (Counts 7 and 15) should be dismissed, because the jury found Appellant not guilty of the involuntary deviate sexual intercourse counts based on the same conduct. In his motion for new trial, Appellant again asserted the inconsistency of these

indecent assault verdicts and he claimed the guilty verdicts on these counts were against the weight of the evidence. The Court denied the Post Sentence Motion in an Order of October 20, 2009.

Appellant filed an appeal to the Pennsylvania Superior Court. In his Concise Statement of Matters Complained of on Appeal, the Appellant again asserts the inconsistent verdict issue. Appellant also contends that there was insufficient evidence to support the convictions.

Discussion of Issues

Appellant asserts the lower court erred in denying Appellant's motion for arrest of judgment where there was insufficient evidence to support a conviction. The Court cannot agree.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that can be drawn from the evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the fact-finder to have found every element of the crime beyond a reasonable doubt. ***Commonwealth v. Davido***, 582 Pa. 52, 60, 868 A.2d 431, 435 (Pa. 2005); ***Commonwealth v. Murphy***, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004). A verdict may rest on the uncorroborated testimony of the victim of a sex crime. See 18 Pa.C.S. §3106; Pa.SSJI 4.13B; ***Commonwealth v. Crum***, 380 Pa. Super. 280, 288, 551 A.2d 584, 588 (Pa. Super. 1988); ***Commonwealth v. Beach***, 267 Pa. Super. 303, 306, 406 A.2d 1052, 1054 (Pa. Super. 1979).

Appellant was convicted and separately sentences on five different counts. Appellant was charged with involuntary deviate sexual intercourse under 18 Pa.C.S. §3123(a)(7), which states:

> A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant: …(7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

The definition of deviate sexual intercourse includes sexual intercourse by means of the mouth or the anus. See 18 Pa.C.S. §3101. The slightest penetration is sufficient.

Count 1 in this case was based on Appellant performing oral sex on M.B. Appellant was a 49 year old adult male at the time of the incident and M.B. was a 13 year old boy. N.T., p. 22, 82. Since Appellant and M.B. are both males, they could not be considered married in this Commonwealth. 23 Pa.C.S. §1704. M.B. testified he was alone with Appellant and they were watching a movie, when Appellant asked M.B. if he could "chew" M.B. M.B. initially said no, but Appellant kept "bugging" him about it. N.T., p. 25. Eventually, Appellant came over and helped him take his clothes off. N.T. p. 26. Appellant touched M.B's. penis with his mouth and hands. N.T., p. 26. M.B's penis was inside Appellant's mouth. N.T. p. 27. M.B. testified Appellant "sucked me off". N.T., p. 25. M.B. testified Appellant put his mouth on M.B.'s penis "five times". N.T., p. 43. This testimony was sufficient to establish the crime of involuntary deviate sexual intercourse as alleged in Count 1.

The jury also convicted Appellant of count 5, aggravated indecent assault. As charged in this case, aggravated indecent assault was based on Appellant's finger penetrating M.B.'s anus. Section 3125 of the Crimes Code defines aggravated indecent assault as follows:

> a person who engages in penetration, however slight, of the genitals or anus of a complainant with part of the person's body for any

> purposes other than a good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if: (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

As previously discussed, Appellant was 49 years old, M.B. was 13 years old, and they were not married. M.B. testified that Appellant was feeling up on him and sometimes he would put his hands or fingers inside his butt. M.B. testified that this occurred more than five times. N.T., pp. 28-30. When asked how far inside, M.B. said "a little." N.T., p. 29. M.B.'s testimony clearly shows that Appellant penetrated M.B.'s anus with a part of his body for other than medical, hygienic or law enforcement procedures. Therefore, the Commonwealth presented sufficient evidence to prove aggravated indecent assault beyond a reasonable doubt.

Appellant was charged with multiple counts of indecent assault.

> A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come in contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and …. (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

18 Pa.C.S. §3126(a)(8). Indecent contact is "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 Pa.C.S. §3101.

In count 7, the jury convicted Appellant based on Appellant's penis touching M.B.'s anus. The Court finds there sufficient evidence was presented to support this conviction. M.B. testified that Appellant put his "dick" inside his butt. N.T., p. 31. It went

in a little and he didn't keep it in there very long. N.T., p. 32. It was not disputed that M.B. was less than 16, Appellant was more than four years older than M.B. and they were not married.

In count 15, the allegation was that Appellant put dildos or sex toys in contact with M.B.'s anus. Again, the age and lack of marriage elements were undisputed. M.B. testified that Appellant tried to put objects in his butt. N.T., p. 32. He described three objects' they were caramel, black and purple in color. N.T., p. 32. The police conducted a search of Appellant's home. During the search, they found rubber sex toys that were white or caramel, purple and black in color. N.T., pp. 77-79. From all the evidence presented, it is clear that the purpose of all the sexual contact was to arouse or gratify Appellant's sexual desire. This evidence was sufficient to sustain the conviction for indecent assault alleged in count 15.

Appellant also was charged, in count 10, with corruption of the morals of a minor for showing M.B. gay pornographic movies. Corruption of a minor occurs when a person 18 years of age or older commits an act that corrupts or tends to corrupt the morals of any minor less than 18 years of age. See 18 Pa. C.S. §6301. M.B. testified that Appellant showed him two gay movies. N.T., pp. 36-37. M.B. testified that Appellant kept these movies on the shelf hidden behind Appellant's other movies. When the police searched Appellant's residence, they recovered some gay porn movies from a shelf next to the television. N.T., pp. 79-80. This evidence was sufficient to support the jury's guilty verdict for corruption of a minor.

Appellant contends his convictions of indecent assault in counts 7 and 15 are not supported by sufficient evidence because the jury acquitted Appellant of involuntary deviate sexual intercourse based upon the same conduct and the same testimony. The Court

cannot agree. The jury could find Appellant guilty of these counts without finding Appellant guilty of involuntary deviate sexual intercourse (IDSI). To find Appellant guilty of IDSI, the jury was required to find that Appellant's penis penetrated M.B.'s anus or that Appellant inserted a sex toy into M.B.'s anus, however slightly. To find Appellant guilty of indecent assault, the jury only needed to find that Appellant's penis and the sex toys touched or came in contact with Appellant's anus. In his testimony on these charges, M.B. sometimes qualified his testimony by describing the touching as both outside and inside, saying Appellant's penis or the sex toy went in a little, but not far, or by saying Appellant tried to put his penis or the sex toy inside his butt. Given these qualifications, the jury could reasonably finds that Appellant's penis and the sex toys touched or came in contact with M.B.'s anus, but did not penetrate.

Appellant also contends the lower court erred in denying Appellant's motion for a new trial where the jury delivered an inconsistent verdict that was against the weight of the evidence. This contention goes to the alleged inconsistency between the jury's acquittal of Appellant on counts 2 and 13, as compared to the convictions on counts 7 and 15. As previously discussed, the Court does not believe the jury's verdicts were inconsistent.

Even if the verdicts were inconsistent, Appellant would not be entitled to relief. In ***Commonwealth v. Miller***, 441 Pa. Super. 320, 657 A.2d 946 (1995), the Court stated:

> Consistency in verdicts in criminal cases is not necessary. This Court has stated, "When an acquittal on one count in an indictment is inconsistent with a conviction on a second count, the Court looks upon the acquittal as no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity." Thus, this Court will not disturb the guilty verdict on the basis of an apparent inconsistency as long as there is evidence to support the verdict.

Id. at 325-26, 657 A.2d at 948, quoting ***Commonwealth v. Swan***, 431 Pa. Super. 125, 635 A.3d 1103(1994)(internal citations omitted).

Appellant also asserts the verdict was against the weight of the evidence. An allegation that the verdict is 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 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 conscience of the Court. This case, in essence, came down to a credibility battle between the victim and Appellant. The jury was free to believe all, some or none of each of the witness' testimony. The jury apparently chose to believe the testimony of the victim, which was its prerogative. This did not shock the conscience of the Court. The victim's testimony regarding the sex toys and the pornographic movies was corroborated to some extent by the objects and movies the police found when they searched Appellant's home pursuant to a search warrant. Although Appellant presented testimony from individuals who resided with him that M.B. was not at Appellant's residence as frequently as M.B. stated in his testimony, these individuals had jobs, so there were times when they were not present that Appellant could have been alone with M.B.

For the foregoing reasons, the Court does not believe Appellant is entitled to a judgment of acquittal or a new trial on the issues he has raised in this appeal.

DATE: _____ By The Court,

_____
Kenneth D. Brown, Senior Judge

cc: A. Melissa (Rosenkilde) Kalaus, Esquire (ADA)
William Miele, Esquire (PD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)