IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**Nos. 1450-2008**
	:	**CRIMINAL DIVISION**
ADAM WOODRING,	**:**	**APPEAL**
Defendant	**:**	

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

The Defendant appeals Senior Judge Kenneth D. Brown[1]'s judgment of sentence entered February 12, 2010 and the post-sentence motion summarily denied on February 19, 2010. This Court notes that a Notice of Appeal was timely filed on March 10, 2010, and that the Defendant's Concise Statement of Matters Complained of on Appeal was then filed on March 29, 2010. Defendant asserts seven issues on appeal: (1) The trial court erred by denying the Motion to Dismiss pursuant to Rule 600 where more than 365 days elapsed before Mr. Woodring was brought to trial, where Mr. Woodring was ready for trial and the Commonwealth failed to exercise due diligence in bringing him to trial; (2) the trial court erred by admitting the testimony of the alleged victim at trial where the twelve year old victim's competency to testify was never determined by the Court; (3) the trial court erred by admitting the statements under the Tender Years Act where, among other things, the evidence was insufficient to establish a sufficient indicia of reliability and the notice by the Commonwealth was defective where it failed to identify witness Steven Rice; (4) the trial court erred when it instructed the jury on the charge of Involuntary Deviate Sexual Intercourse ("IDSI") as the greater charge before consideration of the

[1] Judge Brown retired from active judicial service on 12/31/2009.

lesser charge of Indecent Assault where such instruction was coercive in favor of a conviction of IDSI; (5) the trial court committed reversible error by failing to declare a mistrial sua sponte based upon the cumulative effect of the continual prejudicial closing argument of the prosecution; (6) the trial court erred in the imposition of sentence where it improperly sentenced Mr Woodring upon an erroneous prior record score where his prior convictions for Forgery were improperly graded as a felony of the second degree as opposed to the correct felony of the third degree; (7) a new trial is warranted where the verdict was against the weight of the evidence, where among other things, there was approximately a five year delay in reporting the alleged crime, the lack of details regarding the alleged incidents, the lack of physical/medical evidence, the inconsistent accounts by the victim, the alleged victim's lies to the authorities about his own illegal conduct, and his motive to fabricate.

Background Facts

A jury trial was held on this case on October 27, 2009 before Judge Kenneth D. Brown. Transcripts from the jury trial proceeding reveal that in the fall of 2007, the victim in this case, C.H., began to get into trouble at school. C.H. began to see a counselor after he got into trouble at school. Shortly after C.H. started to see the counselor, C.H. was alleged to have molested another child. Initially, C.H. denied the allegations that he molested another child. However, in December of 2007, C.H. admitted that he did molest the other child and that he himself was molested by the Defendant, Adam Woodring (Woodring). C.H. testified at the jury trial that Woodring had C.H. suck his penis and that Woodring put his penis in C.H.'s butt. C.H. testified that at his house in South Williamsport his sister cut herself and C.H. went upstairs to get her a bandage. Woodring then told C.H. that he needed to talk to C.H. C.H. went into Woodring's

room and Woodring told C.H. to pull C.H.'s pants down. Woodring then pulled down his own pants and told C.H. to suck his penis and C.H. complied. After a little while, Woodring told C.H. to lay on the bed and C.H. again complied. Woodring then put his penis in C.H.'s butt. C.H. testified that Woodring's penis was hard, that it went beyond his teeth in his mouth and that when Woodring put his penis in C.H.'s butt, it hurt. C.H. testified that at his home in Williamsport, C.H. was in his room when Woodring told him to go into the bathroom. Woodring then told C.H. to pull down his pants and Woodring pulled down his own pants as well. Woodring then told C.H. suck his penis and C.H. complied. Woodring then told C.H. to bend over and Woodring put his penis in C.H.'s butt. C.H. testified that it hurt when Woodring put his penis in C.H.'s butt. C.H. testified that the events with Woodring happened when C.H. was five years old. C.H. clarified at trial that he is not sure at which house, South Williamsport or Williamsport, Woodring abused him first. However, C.H.'s testimony was clear that at each location, Woodring had C.H. suck Woodring's penis and Woodring put his penis into C.H.'s butt.

Testimony from the witnesses at the jury trial revealed that C.H. shared the details of the sexual abuse to multiple people. C.H. shared the details of the abuse to: Christina Hamilton, his mother; Justine Felix, his father's girlfriend; Patricia Dersham, his counselor; Ann Fagley, a case worker for Children and Youth of Lycoming County; Steven Rice, a counselor at Behavior Specialists, Inc. C.H. was consistent in the facts that he shared with each witness. C.H. told each of the witnesses that on two occasions, once in South Williamsport and once in Williamsport, Woodring had C.H. suck Woodring's penis and Woodring put his penis in C.H.'s butt.

Discussion

The trial court erred by denying the Motion to Dismiss pursuant to Rule 600 where more than 365 days elapsed before Mr. Woodring was brought to trial, where Mr. Woodring was ready for trial and the Commonwealth failed to exercise due diligence in bringing him to trial

The Defendant contends in his Statement of Matters Complained of on Appeal that the trial court erred by denying the Motion to Dismiss pursuant to Rule 600 where more than 365 days elapsed before Mr. Woodring was brought to trial, where Mr. Woodring was ready for trial and the Commonwealth failed to exercise due diligence in bringing him to trial. Rule 600 of the Pennsylvania Rules of Criminal Procedure provides the defendant the assurance of a prompt trial. Pa. R. Crim. P. 600 (A)(3) states that trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.

The complaint against the Defendant in this case was filed August 6, 2008 and the Defendant posted bail on September 5, 2008. Therefore, Pa. R. Crim. P. 600(A)(3) applies in this case and the Rule 600 time period ran from August 6, 2008 through August 6, 2009. A hearing on the Defendant's Rule 600 Motion was held on August 31, 2009 before the Honorable Nancy L. Butts. Transcripts from the proceedings on the Rule 600 Motion reveal that the Defendant's case was removed from the February 10, 2009 pre-trial list and rescheduled for the April 8, 2009 because the court schedule was filled with cases that had earlier Rule 600 dates. The District Attorney's Office later requested that the case be removed from the April pre-trial list and placed on the May 13, 2009 trial list. Shortly thereafter, the Commonwealth again requested a continuance and the case moved to the July 22, 2009 pre-trial list, as a Commonwealth witness was unavailable during the June trial term. Trial on this case was again

delayed and the case did not make it to trial before the August 19, 2009 pre-trials. Trial was delayed because a Commonwealth witness was unavailable August 17 through August 24, 2009, and there was no room on the trial schedule to put this case after August 24, 2009, as this was to be a two day trial.

Pa. R. Crim. P. 600 states "If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain." "The administrative mandate of Rule 1100 [now Rule 600] certainly was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth." Commonwealth v. Nichols, 442 A.2d 337 (Pa. Super. 1982). This case did not go to trial between the dates of February 10, 2009 to April 8, 2009 because the court schedule was filled with other cases that had earlier Rule 600 time periods. This Court concludes that the delay for trial from February 10, 2009 to April 8, 2009, was due to circumstances beyond the control of the Commonwealth and that the delay was not the result of the Commonwealth's lack of due diligence. Based on the foregoing, this Court believes that its Order of August 31, 2009, should be affirmed.

The trial court erred by admitting the testimony of the alleged victim at trial where the twelve year old victim's competency to testify was never determined by the Court

The Defendant alleges that the trial court erred by admitting the testimony of the alleged victim at trial where the twelve year old victim's competency to testify was never determined by the Court. Pennsylvania Rule of Evidence 601 provides:

> Rule 601. Competency
>
> (a) General Rule. Every person is competent to be a witness except as otherwise provided by statute or in these Rules.
>
> (b) Disqualification for Specific Defects. A person is incompetent to testify if the Court finds that because of a mental condition or immaturity the person:
>
> (1) is, or was, at any relevant time, incapable of perceiving accurately;
>
> (2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
>
> (3) has an impaired memory; or
>
> (4) does not sufficiently understand the duty to tell the truth.

"In general, the testimony of any person, regardless of [her] mental condition, is competent evidence, unless it contributes nothing at all because the victim is wholly untrustworthy. Thus, in Pennsylvania, [a witness is] presumed competent to testify, and it is incumbent upon the party challenging the testimony to establish incompetence." Commonwealth v. Boich, 982 A.2d 102 (Pa. Super. 2009) (Citing Commonwealth v. Anderson, 552 A.2d 1064, 1067 (Pa. Super. 1988), *appeal denied*, 571 A.2d 379 (1989). "Above all, given the general presumption of competency of all witnesses, a court ought not to order a competency investigation, unless the court has actually observed the witness testify and still has doubts about the witness' competency." Boich at 109-110. (Citing Anderson). "The presumption of competence also applies to child witnesses." Boich at 110. (Citing Anderson).

The court in Commonwealth v. Gill, 22 Pa. D. & C.3d 742, 744 (Pa. Dist & Cnty 1981) notes that "the recent trend in case law has for a more liberal attitude towards a finding of competency with the resulting effect of allowing the jury the opportunity to determine if the child's testimony is competent." The Gill Court stated further that "every determination of competency must be individual and that the facts presented in other cases dealing with competency of a witness cannot be controlling in a subsequent case." Gill at 745-746. (See Commonwealth v. Payton, 392 A.2d 723 (Pa. Super. 1978). This Court notes that the Gill Court thought a seven year old victim's testimony competent based on the victim's demeanor, alertness, thoughtfulness and sincerity. Gill at 745. Based on the Gill Court's aforementioned observations, the court determined that the victim "was reasonably competent to testify and it was the function of the jury to evaluate her testimony to determine whether it was worthy of belief." Gill at 745.

The victim in this case was presumed competent to testify. The Defendant did not provide evidence establishing the victim's incompetence. Therefore, this Court believes that the trial court was correct in its decision to allow the alleged victim in this case to testify

The trial court erred by admitting the statements under the Tender Years Act where, among other things, the evidence was insufficient to establish a sufficient indicia of reliability and the notice by the Commonwealth was defective where it failed to identify witness Steven Rice

The Defendant contends that the trial court erred by admitting the statements under the Tender Years Act where, among other things, the evidence was insufficient to establish a sufficient indicia of reliability and the notice of the Commonwealth was defective where it failed to identify witness Steven Rice.

The Defendant states that the evidence was insufficient to establish sufficient indicia of reliability in order to admit statements under the Tender Years Act. 42 Pa. C. S. 5985.1 provides:

> 5985.1 Admissibility of certain statements
>
> (a) GENERAL RULE.-- An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
>
> (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) the child either:
>
> (i) testifies at the proceeding; or
>
> (ii) is unavailable as a witness.

To determine whether or not the content and circumstances of a statement provides sufficient indicia of reliability, courts should consider: (1) the spontaneity and consistent repetition of the statement(s); (2) the mental state of the declarant; (3) the use of terminology unexpected of a child of similar age; (4) the lack of motive to fabricate. Commonwealth v. Hunzer, 868 A.2d 498, 510 (Pa. Super. 2005) Commonwealth v. Hanawalt, 615 A.2d 432, 438 (Pa. Super. 1992). A Tender Years Hearing was held in this case on August 31, 2009 and September 8, 2009, in front of the Honorable Nancy L. Butts. Witnesses at the Tender Years Hearing included Justine Felix, Josh Eck, Steven Rice, and Ann Fagley. Testimony taken from the witnesses revealed that the child victim made the same account of abuse to each of the witnesses. The witnesses' testimony further revealed that the child victim's statement to each of the witnesses was

spontaneous and not coerced. Therefore, there was adequate evidence to establish sufficient indicia of reliability and the witnesses statements were properly allowed into evidence under 42 Pa. C. S. 5985.1.

The Defendant also alleges that the notice was defective where the Commonwealth failed to identify Steven Rice. 42 Pa. C. S. 5985.1(b) states:

> (b) NOTICE REQUIRED.-- A statement otherwise admissible under subsection (a) shall not be received into evidence unless the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

This Court acknowledges that the Notice provided to the Defendant, dated July 15, 2009, which advised the Defendant of the Commonwealth's intention to offer statements into evidence, did not identify Steven Rice. However, during the Tender Years Act Hearing, the Commonwealth corrected the Notice to include the statement of Steven Rice instead of Mike Armstrong. N.T. 09/08/2009 P. 23-24. Defense Counsel did not object to the amendment of the Notice and the Court stated that the Motion would be amended. The statements of Steven Rice were intended to be admitted into evidence at the jury trial for this case held on September 21, 2009. This Court believes that the amendment of the Notice to include Steven Rice, made at the Tender Years Act Hearing on September 8, 2009, provided the Defendant with notification of the intent to offer Steven Rice's statement. Therefore, the Commonwealth's Notice provided notification of the particulars of said statement sufficiently in advance of the proceeding at which the Commonwealth intended to offer the statement into evidence.

The trial court erred when it instructed the jury on the charge of Involuntary Deviate Sexual Intercourse ("IDSI") as the greater charge before consideration of the lesser charge of Indecent Assault where such instruction was coercive in favor of a conviction of IDSI

The Defendant contends that the trial court erred when it instructed the jury on the charge of Involuntary Deviate Sexual Intercourse ("IDSI") as the greater charge before consideration of the lesser charge of Indecent Assault where such instruction was coercive in favor of a conviction of IDSI. Pa. R. Crim. P. 647(B) Request for Instructions, Charge to the Jury, and Preliminary Instructions, provides that "No portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury."

Transcripts of the jury trial before Judge Kenneth D. Brown on October 28, 2009, reveal that Judge Brown did indeed instruct the jury on the charge of IDSI before the lesser charge of Indecent Assault. The Court notes that Judge Brown also stated to the jury:

> If you want to discuss a different count first, that is perfectly fine. Whatever you think is the best way for you to proceed with deliberations is fine, but what I will do in going over the form is follow the order here; and as I had said to you a little bit earlier, we had broken up the form with the charges pertaining to South Williamsport and then the charge pertaining to Williamsport.

N.T. 10/28/2009 P. 23. However, more relevant to the Defendant's assertion that the Court's instruction on IDSI before Indecent Assault was coercive in favor of a conviction of IDSI is the fact that the Defense Counsel made no objection to the Court's instructions to the jury before the jury retired to deliberate. The jury trial transcript reveals that after Judge Brown instructed the jury, he gave the Defense Counsel an opportunity to object to the charges given.

> THE COURT: Counsel, before I dismiss the two alternate jurors, is there anything that's been misstated or overlooked?...
>
> ….

THE COURT: Mr. Cronin?

MR. CRONIN: Nothing, your Honor.

N.T. 10/28/2009 P. 51. Soon after Judge Brown instructed the jury, the jury trial transcripts reveal that the Jury retired to deliberate. N.T. 10/28/2009 P. 53. According to the jury trial transcripts, at no time after Judge Brown's charge to the jury did the Defense Counsel raise an objection to any of the charges given. The Defense Counsel's failure to raise an objection to the charge before the jury retired bars consideration of this issue on appeal. See Commonwealth v. Piper, 328 A.2d 845, 846 (1974). Furthermore, the Defendant has failed to show or point to anything specific that reveals how Judge Brown's jury instructions were coercive in any way. Also, this Court notes that traditionally, if a defendant is charged with more than one crime, the more severe charges are listed in the information first. Based on the foregoing and in accordance with Pa. R. Crim. P. 647(B), no portion of Judge Brown's charges can be assigned as error.

The trial court committed reversible error by failing to declare a mistrial sua sponte based upon the cumulative effect of the continual prejudicial closing argument of the prosecution

The Defendant contends that the trial court committed reversible error by failing to declare a mistrial sua sponte based upon the cumulative effect of the continual prejudicial closing argument of the prosecution. Pa. R. Crim. P. 605(B) states that when an issue at trial is prejudicial to the Defendant, the trial court may declare a mistrial only for reasons of manifest necessity. "Whether to grant a mistrial is a decision that lies within the sound discretion of the trial judge." Commonwealth v. Henderson, Pa. Dist. & Cnty. LEXIS 186 (Pa. Dist. & Cnty. 2007). See Commonwealth v. Messersmith, 860 A.2d 1078 (Pa. Super. 2004), *appeal denied*, 878 A.2d 863 (Pa. 2005). "Ordinarily, a mistrial should not be granted unless the defendant was

deprived of a fair trial." Henderson at 24. See Messersmith. "The decision whether to grant a mistrial will not be reversed on appeal absent abuse of discretion." Henderson at 24. See Commonwealth v. Bruner, 564 A.2d 1277 (Pa. Super. 1989).

The Defendant in this case argues that a mistrial was warranted because of the statements made by the Prosecution during closing argument. However, "Comments by the district attorney do not constitute reversible error unless the unavoidable effect of such comments is to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant such that they are unable to weigh the evidence objectively and render a true verdict." Henderson at 24-25. See Commonwealth v. Guilford, 861 A.2d 365 (Pa. Super. 2004).

The jury trial transcript of October 28, 2009, reveals that the Defense Counsel raised two specific objections during the Prosecution's closing argument. The first objection by the Defense Counsel was that the Prosecution's argument improperly placed the burden of proof on the Defendant. N.T. 10/28/2009 P. 22-23. The court in Henderson addressed the issue of dealing with a prosecutor's erroneous statements and concluded that the mere fact that the prosecution makes erroneous statements does not necessitate a mistrial. See Commonwealth v. Wiggins, 328 A.2d 520 (Pa. Super. 1974). The Henderson Court reasoned that "Where the trial court accurately and comprehensively charges a jury on the applicable principles of law, the error need not require the judicial termination of an otherwise unblemished prosecution." In this case, Judge Brown, immediately after the Defense Counsel's objection, stated that:

> THE COURT: Okay. There is obviously no burden on the defense, and we will certainly cover that in the instructions. This is argument from both counsel. You'll also be instructed you can accept it or reject it, but it is simply argument….

N.T. 10/28/2009 P. 23. Thereafter, the Court did instruct the jury of the Commonwealth's burden to prove the Defendant guilty beyond a reasonable doubt. N.T. 10/28/2009 P. 32. As the

Defendant's allegations of prejudice relate to the Prosecution's statements about the burden of proof in this instance, this Court finds that Judge Brown's jury instructions effectively eliminated the need for the declaration of a mistrial.

The Defense Counsel also raised an objection at the time the Prosecution discussed forensic evidence in their closing argument. N.T. 10/28/2009 P. 23-24. However, the jury trial transcript reveals that the Defense Counsel stated that he was objecting to statements about expert testimony. N.T. 10/28/2009 P. 23-24. Since the Prosecution was discussing forensic evidence at the time of the Defense Counsel's second objection, the Court will assume that the Defense Counsel's objection related to the statements about forensic evidence and not to expert testimony. The court in Commonwealth v. Judy, 978 A.2d 1015, 1020 (Pa. Super. 2009) stated "In determining whether the prosecutor engaged in misconduct, we must keep in mind that comments made by a prosecutor must be examined within the context of defense counsel's conduct. It is well settled that the prosecutor may fairly respond to points made in the defense closing." The Defense Counsel in this case specifically discussed forensic evidence in their closing argument, stating:

> I asked Christina, who came out, and she said she wasn't of the strongest mind. I asked her about physical evidence even. I said, was there any underwear with semen? Was there any underwear with blood? Were there any shirts with throw up? All the answers were no. There was no physical evidence, and there is questionable testimony….

N.T. 10/28/2009 P. 10. Therefore, the statements made by the Prosecution relating to forensic evidence were proper as such statements were made in response to the Defense Counsel's closing argument.

Since the Defendant's assertion relates to the cumulative effect of the continual prejudicial closing argument of the Prosecution, the Court will also look to the permissible scope

of prosecutorial closing arguments in general. The court in Judy points out that Pennsylvania follows Section 3.5-8 of the American Bar Association Standards, which provides:

> Argument to the jury.
>
> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

The Judy Court stated further that prosecutors are given wide latitude in their closing arguments and that such arguments are fair provided that they are supported by the evidence or inferences that can reasonably be deduced from the evidence. See Commonwealth v. Holley, 945 A.2d 241, 250 (Pa. Super. 2008). After a review of the Prosecution's closing argument, this Court does not believe that such statements went outside the wide latitude provided by the American Bar Association Standards. Nor does this Court believe that the effect of the Prosecution's statements during closing argument was to "prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant such that they are unable to weigh the evidence objectively and render a true verdict." Henderson at 24-25. See Guilford. This being so, the Court believes that the Defendant's assertion that the Prosecution's closing argument was prejudicial is without merit.

The trial court erred in the imposition of sentence where it improperly sentenced Mr. Woodring upon an erroneous prior record score where his prior convictions for Forgery were improperly graded as a felony of the second degree as opposed to the correct felony of the third degree

The Defendant contends that the trial court erred in the imposition of sentence where it improperly sentenced Mr. Woodring upon an erroneous prior record score where his prior convictions for Forgery were improperly graded as a felony of the second degree as opposed to the correct felony of the third degree. A Sentencing Hearing was held before now Senior Judge Kenneth D. Brown on February 12, 2010. At the Sentencing Hearing, Defense Counsel argued that in 1998, the Defendant pled guilty to two charges of Forgery involving bank checks. N.T. 02/12/2010 P. 13. Defense Counsel argued that the Forgery charges were graded as Felony three's by mistake instead of Felony two's. N.T. 02/12/2010 P. 13. Judge Brown noted at the Sentencing Hearing that although it seemed in error that the Defendant was previously charged with Felony three's instead of Felony two's, the sentencing guidelines required that Judge Brown calculate the Defendant's prior record score based on the previous charge of Felony three's. N.T. 02/12/2010 P. 37. 204 Pa. Code §303.8(e) of the Sentencing Guidelines provides that "A prior conviction or adjudication of delinquency for an offense which was misgraded is scored as a conviction for the current equivalent Pennsylvania offense." Following the Sentencing Guidelines, Judge Brown's calculation of the Defendant's prior record score included the charge of two Felony three Forgery offenses. Therefore, the Defendant's prior record score equaled a five. The evidence demonstrates to this Court that Judge Brown followed the requirements set forth in the Sentencing Guidelines to calculate the Defendant's prior record score.

A new trial is warranted where the verdict was against the weight of the evidence, where among other things, there was approximately a five year delay in reporting the alleged crime, the lack of details regarding the alleged incidents, the lack of physical/medical evidence, the inconsistent accounts by the victim, the alleged victim's lies to the authorities about his own illegal conduct and his motive to fabricate

The Defendant contends that a new trial is warranted where the verdict was against the weight of the evidence, where among other things, there was approximately a five year delay in reporting the alleged crime, the lack of details regarding the alleged incidents, the lack of physical/medical evidence, the inconsistent accounts by the victim, the alleged victim's lies to the authorities about his own illegal conduct, and his motive to fabricate.

The Defendant alleges that a new trial is warranted where the verdict was against the weight of the evidence as there was approximately a five year delay in reporting the alleged crime. For sexual offenses against a minor, 42 Pa. C. S. § 5552(c)(3) provides for a tolling limitations period until the minor reaches the age of 18 and allows prosecution to commence for "Any sexual offense committed against a minor who is less than 18 years of age any time up to the later of the period of limitation provided by law after the minor has reached 18 years of age or the date the minor reaches 50 years of age." Sexual offenses covered by 42 Pa. C. S. § 5552(c)(3) include 18 Pa. C. S. § 3123 (relating to involuntary deviate sexual intercourse), 18 Pa. C. S. A. 3126 (relating to indecent assault), 18 Pa. C. S. § 4304 (relating to endangering welfare of children), all crimes Woodring was found guilty of committing against C.H.. C.H. was five years old when Woodring committed these crimes against him and C.H. was eleven years old when a complaint was filed against Woodring. Therefore, C.H. was well within the time period allowable for him to file charges against Woodring.

Woodring alleges that a new trial is warranted where the verdict was against the weight of the evidence because of the lack of details regarding the alleged incidents and the inconsistent

accounts by the victim. This Court agrees with Woodring that there were details surrounding the instances of abuse that C.H. was unable to recall: (1) the order of the instances of abuse; (2) how long the instances of abuse lasted. There were even times when C.H.'s testimony at the jury trial proceedings on September 21, 2009, differed from his testimony at the jury trial proceedings on October 27, 2009. The court in Commonwealth v. Louden, 803 A.2d 1181 (2002) stated that:

> It is inherent in cases where sexual abuse of a child is at issue that the victim may be reluctant to bring charges, may be prevented from bringing charges by an abusive parent or guardian, or may be unable to articulate the circumstances surrounding the abuse in the same manner that would be expected of an adult victim. Our legislature has addressed these concerns unique to child sexual abuse cases by, among other measures, tolling the limitations period for prosecution of these crimes until the child reaches eighteen years of age, *see* 42 Pa.C.S. § 5552(c)(3). Underlying this legislative effort is the recognition that prosecution of child sexual abuse charges frequently involves problems with the victim's memory or ability to communicate details of the abuse coherently at trial.

With regard to the testimony of the victim of sexual abuse against a child, the Louden Court concluded that the victim's inability to remember certain details, the confusion in parts of the victim's testimony, and the victim's contradiction of previous statements and preliminary hearing was not so unexpected as to undermine the reliability of the proceedings. Id. at 1185. This Court concludes that, like the victim's testimony in Louden, even though C.H.'s testimony lacked some amount of detail, and even though C.H.'s testimony was inconsistent at times, this is not so unexpected as to undermine the reliability of the proceedings.

Conclusion

As none of the Defendant's contentions appear to have merit, it is respectfully suggested that the Defendant's sentence be affirmed.

Respectfully Submitted,

Dated: _____ Nancy L. Butts, President Judge

xc: Mary Kilgus, Esq.
Edward J. Rymsza, Esq.
Amanda Browning, Esq. (Law Clerk)
Gary L. Weber, Esq. (LLA)