IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 41-CR-1079-2008**
	:	**41-CR-110-2009**
	:	**41-CR-844-2009**
	:	**41-CR-896-2009**
	:	**41-CR-1606-2009**
	:	**41-CR-1632-2009**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
GREGORY A. BARTO,	**:**	
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 September 30, 2010. The relevant facts follow.

CR-1079-2008 and 896-2009

In case 1079-2008, the jury found Appellant guilty of indecent assault, corruption of a minor, and terroristic threats with respect to victim S.H. In case 896-2009, Appellant was found guilty of raping S.H. All the charges involving S. H. arose from an incident that occurred on June 8, 2008.

S.H. testified that she was at her boyfriend's graduation party. Appellant and his wife arrived later in the evening in a black Corvette. Appellant offered to take S.H. for a ride in his Corvette and S.H. accepted the offer. Appellant told S. H. that he was taking her for a ride around the block, but instead he took her to his business and his trailer behind his business.

During the ride, Appellant rubbed S.H.'s thighs. When they got to his business, Appellant told S. H. he wanted to give her a tour. S.H. told Appellant that she didn't want a tour of his business; she wanted to go back to the party. Appellant pulled on S.H.'s shoulder to get her out of the vehicle. S.H. got out, because she did not want to make Appellant angry. As they walked upstairs, Appellant grabbed S.H.'s butt. S.H. told him to stop, but Appellant said "no, I won't stop." Appellant took S.H. into the office and asked S.H. if she wanted to watch pornography. S.H. said no. Appellant then took S.H. into a room that had a pool table and asked her if she wanted to play pool. Again, S.H. said no. Appellant then pushed S.H. onto the pool table, pulled her shorts off and raped her, despite her telling him to stop.

Appellant then took S.H. downstairs and opened the door to a room that smelled like tires. Appellant told S.H. to go ahead into the room. S.H. said no, so Appellant pushed her inside the room. Appellant then pushed her against the door and reached under her shirt. S.H. kept pushing Appellant's hands away. Then he pushed her shorts down and raped her again. When he was finished, he said okay we can go now and they got into the car, but instead of returning to the party, Appellant backed up and went to his trailer.

Appellant said he was going to let the dog out and give her a tour of his trailer. Appellant pulled S.H. out of the car and she fell on her side onto the gravel and bruised her hip. Once they were inside the residence, Appellant asked S.H. if she wanted to get in the hot tub. S.H. said no and told Appellant she had to use the bathroom. S.H. intended to go out the back door where the dog was, but when she opened the door, the dog came in and Appellant grabbed her from behind and threw her onto the bed.

Appellant asked S.H. if she liked to smoke or do any drugs. S.H. said no, but

Appellant went to the dresser and got cocaine out anyway. He cut it up, made it into lines and told S.H. to try it. When she said no, Appellant pushed her head onto the drugs and held it there until she breathed in some of the cocaine. Appellant also asked S.H. if she wanted to watch pornography. S.H. said no. Appellant told her that he had a bunch of his own pornography. He then pulled out a box, put a tape in and told S.H. she was really going to like it. The tape depicted a girl giving Appellant a "blow job" in the presence of another man. S.H. asked Appellant if his pregnant wife was going to wonder where he was; Appellant didn't care. He began rubbing her thighs again and putting his hands up her shirt. He told S.H. to lay down. When she didn't, he pushed her down and pulled her shorts off. Appellant then said: "I don't know why you don't just want it. Other girls your age like it. Don't you find me attractive? You're going to like it; just calm down." S.H. said no. Appellant then asked S.H. if she wanted to make a video and they could go get his wife to videotape them. Appellant then raped her again. When he was finished, he got up like nothing was wrong and put his pants on.

S.H. asked if they could go back to the party now. Appellant asked her if she was going to tell and she said no. Appellant finally drove her back to the party. S.H. ran up to her boyfriend and told him what happened. According to S.H., her boyfriend pushed her and called her a slut then got in the car with Appellant and left. S.H. was visibly upset. A neighbor who was at the party took S.H. to her house to try to calm her down and find out what was wrong. When her boyfriend returned, he took her back to his house and he and his mother had her take a shower in an effort to calm her down, even though she said he wanted to go home and needed to go to the hospital.

S.H. went home the next day and her mom took her to the police station. S.H.

initially just told the police that Appellant touched her and threatened her. She was too scared and embarrassed at that time to tell them about the rape and the cocaine until almost a year later.

110-2009

In case 110-2009, the jury found Appellant guilty of attempted corruption of a minor. N.W. testified that in the summer of 2007 or 2008 when she was fifteen years old she went to Barto's Tire and Auto Center to try sell ads for the football program to benefit the varsity cheerleading squad of which she was a member. Appellant offered her a job working "under the table" washing cars. A week or two later she reported for work.

When she reported for work, Appellant told her she'd be washing cars and sweeping at the business, mowing the grass, and cleaning the house. When he gave her a tour of the residence, he led her to the bedroom and told her he liked to mix work and play. He told N.W. that he liked to watch pornography and she could watch it too. He also told her that he liked to do drugs and he could get her anything she wanted. N.W. left at the end of the day and never went back.

844-2009

In case 844-2009 Appellant was found guilty of sexual exploitation of children and three counts of sexual abuse of children related to his and his wife's sexual activities with fifteen year old A.W., which were videotaped for future viewing and display for others to view.

A.W. testified that in July and August of 2000 when she was fifteen years old she worked for Barto's tires. She testified that she washed cars and cleaned. After working there for a few days, Appellant asked her if she wanted to smoke some pot and she said okay.

She smoked pot and drank with Appellant and his wife often. One day she walked into work and there was pornography on the computer.

When asked how the sex started, A.W. testified that they were partying and Appellant and his wife had sex in front of her and asked her to join in. All of them then engaged in sexual acts. A.W. did not recall the details because she was drunk, but the videos proved that Appellant and his wife engaged in sexual acts with her. A.W. further testified that the video camera was on and she was told to "watch ourselves" on a television in the bedroom while the acts were occurring.

On another occasion, Appellant told A.W. and his wife to go out back and tan. They went outside and began to rub lotion on one another. One thing led to another and ultimately they went inside the trailer and performed oral sex on each other.

A.W. testified that the sex acts occurred probably once a week and included both vaginal intercourse and oral sex. She also indicated that in addition to routinely smoking pot, she also was given ecstasy on one occasion and cocaine three times. Eventually, A.W. just quit showing up for work to get out of the situation. She testified that Appellant and his wife came looking for her. The whole situation freaked out A.W. She changed her home phone number and cancelled her cellular phone.

The videotape was introduced into evidence and played for the jury. Although A.W. was fifteen at the time, she looked like she was only twelve or thirteen.

1606-2009

In case 1606-2009, Appellant was found guilty of corruption of a minor and multiple counts of possession of a small amount of marijuana for distribution but not for sale. The victim in this case was T.H. , who was seventeen years old when the crimes occurred in

2003 and 2004.

T.H. testified that around Christmas in 2003 she and a friend stopped at Barto's tires so her friend could look at a car. Appellant came out and started talking to them. He asked T.H. if she was working anywhere and offered her a job cleaning up around the shop and maybe the house too.

A couple of days later, T.H. started to work at Barto's Tires. On her first day, after she did a little bit of cleaning around the shop, Appellant asked her to come to the house and help with the laundry. T.H. went over there and Appellant turned on pornography and started asking her personal question, such as "Are you a virgin?" and "Do you like to have sex with girls?" Appellant then asked if he could touch T.H.'s "boobs," but she said no. Appellant gave her marijuana almost every day she worked for him.

About two weeks later, Appellant and his wife had T.H. over to their house after work. Appellant's wife performed oral sex on Appellant in front of T.H. After that Appellant started asking T.H. to give him oral sex.

Two months after T.H. began working at Barto's Tires, they all started having dinner together. Appellant and his wife would invite T.H. to dinner about once a week and after dinner they would all have sex together. Many times sex toys were used. Either T.H. or Appellant's wife would perform oral sex on Appellant and Appellant would have anal sex with both of them. T.H. testified oral sex occurred once or twice a day. Anal sex occurred about once a week. When T.H. found a boy she was interested in and wanted to stop, Appellant paid her $20 for oral sex and $30 for anal sex. The sexual acts occurred for approximately ten months until T.H. quit working at Barto's Tires.

T.H. testified that pornography was on the television every time she was at the

house. She further testified that Appellant and his wife were aware of her age, because her date of birth was on work papers that they signed for the School to Work Program. When she quit, she told the teacher in charge of the Program that she quit because inappropriate things were going on.

1632-2009

In case 1632-2009, Appellant was found guilty of multiple counts of possession of a small amount of marijuana for distribution but not for sale, possession with intent to deliver cocaine, corruption of a minor and one count of conspiracy to deliver cocaine.

In November or December 2003, when she was seventeen years old, N.B. began working at Barto's Tire and Auto Center as a detailer, who washed, vacuumed, and shampooed vehicles. A few days after she started work, Appellant invited her to his trailer, which was right next to the business. Pornography was on the television. Appellant and his wife began to engage in sexual activities in front of N.B., and they invited her to join in, which she did. While N.B. was a minor, Appellant engaged in oral sex, vaginal sex, and anal sex with N.B. He also provided her with marijuana and showed her pornographic videotapes. In 2007-2008, Appellant gave N.B. cocaine and they got high. When N.B. needed extra money, Appellant offered her $20 for oral sex and $200 to make sexual videotapes. She made at least three videotapes, but these likely occurred after she was 18 years old.

Appellant filed a notice of appeal on October 25, 2010. In his statement of errors complained of on appeal, Appellant raises three issues: (1) the Court erred in consolidating the charges of multiple female complainants into a single trial, as the evidence

of each would not have been admissible at trial for the other cases and Appellant was unfairly prejudiced by the joinder; (2) the Court erred in permitting evidence from N.W. that Appellant mentioned having been in jail previously; and (3) the Court erred in precluding questioning of witness S.H. that her boyfriend was jealous, which prevented Appellant from seeking to expose a bias or motive to testify falsely and deprived him of the right of confrontation.

In his first issue, Appellant asserts his cases should not have been consolidated for trial. The undersigned did not rule on the Commonwealth's motion to consolidate; this motion was handled by the Honorable Nancy L. Butts. The reasons for Judge Butts' ruling can be found in the Opinion and Order entered March 29, 2010 at pages 6-7. The Court notes, however, that separate informations may be joined and tried together if "the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or the offenses charges are based on the same act or transaction." Pa.R.Cr.P. 582. The Court believes Judge Butts properly joined Appellant's cases for trial. The offenses involve Appellant getting teenage girls to his business and residence, offering them drugs or getting them to ingest drugs, offering to show or actually showing them pornography, and performing sexual acts on them. The Court finds that the evidence of the offenses was admissible to show a common plan, scheme or design. See Commonwealth v. Aikens, 990 A.2d 1181, 1165-1186 (Pa. Super. 2010); Commonwealth v. O'Brien, 836 A.2d 966, 968-971 (Pa. Super. 2003); Commonwealth v. Luktisch, 680 A.2d 977, 978-879 (Pa. Super. 1996).

Appellant next asserts that the Court erred in permitting evidence from N.W. that Appellant mentioned having been in jail previously. The Court would not construe its

ruling as permitting the evidence. Instead, the Court denied counsel's request for a mistrial and offered to give the jury a curative instruction, which counsel refused.

N.W. testified that, during the summer when she was a fifteen year old varsity cheerleader, she went to Barto Tire and Auto Center to try to sell Appellant an ad for the program. Appellant offered her a job to wash cars. She accepted Appellant's offer and reported for work a week or two later. Appellant told her the different things she would be doing at Barto Tire and Auto Center. He also told her she would have to mow the grass and clean his residence, so he took her next door and gave her a tour of the house. As he took her around and told her the things she would be doing, he led her back to the bedroom and told her he liked to mix work with play. He stated he liked to watch porn and told N.W. that she could watch it too. He also said he liked to do drugs, and he could get her any type of drugs that she wanted. He also told her she would have to do odd jobs at his car wash business, so he drove her to the car wash in his Corvette. On the way there, he was driving really fast, like a hundred miles an hour, and then he would slam on the brakes. N.W. mentioned that they were driving by her house, and Appellant turned around and took a different road to get to the car wash.

When they arrived at the car wash, Appellant told N.W. that he was tired, because he and his wife had sexual relations the night before. Appellant also kept calling N.W. "sexy."

Appellant next told N.W. that he "grew drugs in the one room in his car wash and that's why he went to jail before." N.T., May 5, 2010 (Vol. II), at p. 149. At this point in N.W.'s testimony, Appellant's attorney asked to approach the bench for a sidebar conference. Co-defendant's counsel noted that this information was not in any of the

discovery materials. The prosecuting attorney said the information was not in the witness's written statement and she was not aware of this information before the witness said it in open court. Appellant's attorney and co-defendant's attorney both said, "It's a mistrial." Vol II at p. 150. Co-defendant's attorney argued that the jury now knew that Appellant previously had gone to jail because he grew drugs and that could not be cured, especially where the current charges involved drug charges and corruption of minors charges based, at least in part, on providing or offering drugs to the girls. Appellant's counsel neither objected nor asked the Court to strike the portion of N.W.'s testimony that Appellant stated he grew drugs and that's why he went to jail before. The Court took a recess so that counsel could make further arguments and so that the Court could do some research. Ultimately, the Court denied the request for a mistrial, because the statement could be construed in different manners, including boasting; it was not intentionally elicited; and it was a passing and isolated reference. Given all these factors, the Court believed the situation could be rectified by giving the jury a curative instruction. Vol. II at pp. 158-159. Appellant's counsel, however, did not want a curative instruction. Vol. II at p. 161.

In light of counsel's refusal of a curative instruction and his failure to object and move to strike the testimony, the Court believes the only issue preserved in the record is whether the Court erred in denying the request for a mistrial. See Pa.R.E. 103(a)("Error may not be predicated upon a ruling that admits or excludes evidence unless…[i]n case the ruling is one admitting evidence, a timely objection, motion to strike or motion in limine appears of record….); Pa.R.App.P. 302(a)("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal); Commonwealth v. Santiago, 980 A.2d 659, 666 n.6 (Pa. Super. 2009)(A new and different theory of relief may not be advanced for the first time

on appeal); Commonwealth v. Hay, 80 Pa. Super. 503, 506 (1923)("If the question is not objected to and the answer is not responsive to the question, or is incompetent, the proper practice is to move to strike it out, and if the court refuses to do so, take an exception. If that course is not pursued, the right to objection and exception must be regarded as waived"). Unfortunately, Appellant has not claimed in his concise statement of errors on appeal that the Court erred in denying his trial attorney's request for a mistrial. Therefore, although the mistrial issue is preserved in the record, the Superior Court may consider it waived for purposes of appeal. Commonwealth v. Robinson, 931 A.2d 15, 25-26 (Pa. Super. 2007) (any issue not contained in statement of errors complained of on appeal is waived).

In the event the Appellate Courts construe Appellant's second issue as including a claim that the Court erred in denying counsel's request for a mistrial, the Court will explain why it denied counsel's request.

Whether to grant a mistrial is a matter within the discretion of the trial court. Commonwealth v. Boczkowski, 577 Pa. 421, 454, 846 A.2d 75, 94 (2004). An abuse of discretion will not be found "unless the record discloses that the judgment exercised by the trial court was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." Commonwealth v. Hudson, 955 A.2d 1031, 1034 (Pa. Super. 2008), quoting Commonwealth v. Tejeda, 834 A.2d 619, 623 (Pa. Super. 2003). In reviewing a trial court's denial of a mistrial, the Appellate Courts consider the nature of the reference and whether or not the Commonwealth intentionally elicited the testimony. Commonwealth v. Powell, 598 Pa. 224, 249, 956 A.2d 406, 421 (2008). A mistrial is an extreme remedy that is appropriate only when an incident is of such a nature that its unavoidable effect is to deprive the defendant of a fair and impartial trial. Id. A mere passing reference to prior criminal activity is

insufficient to establish improper prejudice by itself. Hudson, supra.

The Court found that the testimony in question was an inadvertent, passing reference to Appellant's prior criminal activity. It is clear from the record in this case that the Commonwealth did not intentionally elicit this statement. The Commonwealth was not even aware that Appellant had made such a statement to the witness until the witness testified to it during trial. In light of these factors, the Court felt the passing reference could be negated by giving the jury a curative instruction. The Court did not offer any specific language for a curative instruction, though, because Appellant's counsel indicated in no uncertain terms that he did not want a curative instruction. Believing this was a strategic or tactical decision by Appellant's counsel to avoid further highlighting or drawing the jury's attention to the comment, the Court did not give a curative instruction.

Finally, the Court believes that if it made an error in dealing with the mistrial issue, any such error was harmless under the facts and circumstances of this case. First, the comment related to Appellant allegedly growing marijuana in the past. It did not relate to any other drugs, any crimes of a sexual nature or any improper activities with minors.

Second, the possession with intent to deliver marijuana charges were amended to distributing a small amount of marijuana but not for sale. Since these amended charges carried a maximum sentence of 30 days in jail, a $500 fine or both, Appellant was not entitled to a jury trial on these charges. Instead, the verdict was rendered by the Court, which did not consider N.W.'s comments in rendering its verdict. Furthermore, Appellant did not receive any jail time for those charges; on most, if not all, of these offenses the Court imposed a sentence of guilt without further penalty.

Third, while providing or offering the girls marijuana was part of the

corruption of minors charges, those offenses also encompassed engaging in sexual activity with and showing or offering to show pornography to minors.

Finally, and most importantly, the evidence of Appellant's guilt in these cases was overwhelming. Five unrelated females testified that when they were minors Appellant offered or provided drugs to them, and showed them or offered to show them pornography. Four of these individuals also testified that Appellant engaged in sexual activity with them. This testimony was corroborated by other evidence. There was a videotape that showed Appellant engaged in sexual activity with A.W. A large baggie of marijuana and a small canister of marijuana were found in or on a dresser in Appellant's residence. These items, as well as photographs of where they were found, were introduced into evidence. All sorts of drug paraphernalia also was found in Appellant's residence and introduced into evidence, including but not limited to: a sifter; two bongs; lighters; rolling papers; vials with marijuana seeds; pipe cleaners; pot pipes; roach holders; a mirror with cocaine residue; a small, blue Ziploc baggie measuring approximately 1" by 1"; razor blades; and a straw and glass picture frame that had residue on them.

For all of these reasons, the Court believes any alleged error was harmless.

Appellant's final issue is that the Court erred in precluding questioning of S.H. that her boyfriend was jealous, as this ruling prevented Appellant from seeking to expose bias or a motive to testify falsely and thus deprived him of the right of confrontation as guaranteed by the United States and Pennsylvania Constitutions. The Court does not believe Appellant's confrontation rights were violated in this case.

Appellant's counsel, Mark Zearfaus, cross-examined S.H. first. During his questioning, Mr. Zearfaus never sought to question S.H. about her boyfriend being jealous,

and the Court did not preclude Mr. Zearfaus from asking any questions. N.T., May 6, 2010, at pp. 23-43. The Court did, however, preclude Co-defendant Amber Barto's counsel, George Lepley, from asking such a question. N.T., May 6, 2010, at pp. 47-54. The purported purpose for asking the question was to show S.H. made up her claim that Appellant raped her so her boyfriend would not be jealous. Amber Barto, though, was not charged with rape or any other offenses related to S.H. The Court essentially ruled that the question was not relevant to Mr. Lepley's client and Mr. Lepley could not do Mr. Zearfaus' job for him. N.T., May 6, 2010, at pp. 50-51.

After Mr. Lepley finished his cross-examination, the prosecuting attorney asked a few questions on redirect about whether anybody asked S.H. where she had been and her state of mind when she got back to the graduation party. N.T., May 6, 2010, at p. 57. S.H. indicated some of their mutual friends asked where she was but she didn't answer any of them because he wanted to talk to her boyfriend first. When the prosecuting attorney finished her re-direct, the Court asked Mr. Zearfaus if he had any further questions, but he did not. N.T., May 6, 2010, at p. 58.

Mr. Zearfaus could have asked S.H. if her boyfriend was jealous and whether that was the reason she wanted to talk to her boyfriend first, as S.H.'s answers to the prosecutor's questions arguably would have made such questions within the proper scope of re-cross. At that time, Mr. Zearfaus knew that the only reason the Court precluded Mr. Lepley from asking the question was because it was irrelevant to Mr. Lepley's client and the Court was not going to let Mr. Lepley do Mr. Zearfaus' job for him. At no time, however, did Mr. Zearfaus try to ask S.H. whether her boyfriend was jealous. Since the Court did not preclude Appellant's attorney, Mr. Zearfaus, from asking any questions, Appellant's

confrontation rights were not violated.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire (ADA)
Lance T. Marshall, Esquire
Masorti & Sullivan, PC, 302 S. Burrowes St., State College PA 16801
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)