IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-547-2009**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
MELISSA A. SEGRAVES,	**:**	
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 March 23, 2011. The relevant facts follow.

On March 12, 2009, Appellant was arrested and charged with endangering the welfare of a child through a course of conduct,[1] a felony of the third degree, and corruption of a minor, [2] a misdemeanor of the first degree, arising out of her failure to take measures to protect her daughter, B.H., from sexual abuse by her husband, Gary Segraves. Gary Segraves also was arrested and charged with these offenses, as well as numerous sexual offenses under Chapter 31 of the Crimes Code, 18 Pa.C.S. Ch. 31.

The cases were consolidated for trial. A jury trial was held August 31, 2010 through September 3, 2010. The jury found Appellant and her husband guilty of endangering the welfare of a child through a course of conduct, but the jury could not reach a verdict on the remaining charges.

A second jury trial was scheduled for January 19-21, 2011 on the remaining

[1] 18 Pa.C.S. §4304.

charges. Immediately prior to the start of the trial, the Commonwealth chose to dismiss the corruption charge against Appellant. The jury trial proceeded as scheduled against Appellant's husband, who was convicted of all the charges.

On March 23, 2011, the court imposed a split sentence that required Appellant to serve 8 to 23 ½ months incarceration at the Lycoming County Prison followed by an additional 5-year term of probation.

Appellant filed a notice of appeal on April 18, 2011.

The first issue raised by Appellant in this appeal is whether the evidence at trial was insufficient as a matter of law to support the verdict of guilty on endangering the welfare of a child given the fact that the jury was unable to return a verdict on the allegations of sexual abuse against co-defendant, Gary Segraves. The court finds that ample evidence was presented to support the jury's verdict.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. Murphy, 577 Pa. 275, 844 A.2d 1228, 1233 (Pa. 2004). Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt. Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610, 618 (Pa. 1989)(citations omitted).

A person is guilty of endangering the welfare of a child if she, as a parent,

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[2] 18 Pa.C.S. §6301.

guardian, or other person supervising the child's welfare, "knowingly endangers the welfare of the child by violating a duty of care, protection or support." 18 Pa.C.S. §4303; Commonwealth v. Retkofsky, 860 A.2d 1098, 1099 (Pa. Super. 2004). The Pennsylvania Appellate Courts have adopted the following three-prong standard to determine if the Commonwealth presented sufficient evidence to show the intent element: (1) the accused must be aware of her duty to protect the child; (2) the accused must be aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and (3) the accused either must have failed to act or must have taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare. Commonwealth v. Cardwell, 357 Pa. Super. 38, 515 A.2d 311, 315 (Pa. Super. 1986); see also Commonwealth v. Smith, 956 A2.d 1029, 1038 (Pa. Super. 2008); Commonwealth v. Retkofsky, 860 A.2d 1098, 1099-1100 (Pa. Super. 2004).

Appellant was well aware of her duty to protect B.H.; she admitted in her own testimony that a good mother would not allow her husband to have sex with her daughter. N.T., September 3, 2010, at pp. 42-43.

About a year after the abuse started, B.H. told her Aunt Kendra, who is several years younger than B.H., that Gary was touching her. Ultimately, this report got back to Appellant, who spoke to Kendra and then B.H. N.T., August 31, 2010, at p. 60; N..T., September 1, 2010, at pp. 85-87; 94-96

B.H. told Appellant that Gary was having sex with her. Appellant didn't believe B.H. and just kept asking her what kind of sex Gary was having with her. Appellant called Gary and told him to come home. When Appellant told Gary what B.H. said, Gary indicated B.H. was having one of "those dreams." Appellant indicated she had some of those

dreams, and then she told Gary and B.H. to go for a walk. During the walk, Gary said he wouldn't do it again. Not long thereafter, however, Gary resumed his sexual activities with B.H. N.T., August 31, 2010, at pp. 61-63.

B.H. also testified that Gary rubbed her back and shoulders a lot and he slapped her butt. Appellant saw Gary rubbing B.H.'s back and told him to stop it. N.T.. August 31, 2010, at pp. 64-65.

In February 2008, when B.H. reported Gary's abuse to school officials and the police and was placed in the home of her biological father, Appellant went to the home of Brenda Metzger and asked her what B.H. had told Ms. Metzger's daughter. During this conversation, Appellant told Ms. Metzger that Gary had been rubbing B.H.'s back and giving her back massages and she didn't think it was appropriate. N.T., September 1, 2010, at pp. 162-163, 165.

The Commonwealth also presented evidence from Dr. Kathleen Lewis, who did a physical examination of B.H. Dr. Lewis testified that B.H. had a cleft in her hymenal ring that was very deep- almost to the base of the vagina, which indicated the presence of penetrating trauma. N.T., September 1, 2010, at p. 252. Even in cases where a perpetrator admits vaginal penetration, changes to the hymenal ring are only seen about 5% of the time. Id. at 259. A cleft of the degree sustained by B.H. is almost exclusively caused by a penetrating vaginal injury or, in rare case, a severe injury to the pelvis such as being run over by a motor vehicle. Id. at 260. Riding a bicycle or riding a horse would not cause this degree of injury, unless the individual fell on a bike pipe without a seat or a horse stepped on the individual's pelvis. Id. at 262.

Despite being told that Gary was having sex with B.H. and seeing Gary

inappropriately rubbing B.H.'s back, Appellant did nothing to protect B.H. from Gary's sexual advances other than tell Gary to stop rubbing B.H.'s back. Instead of taking her child to a medical provider to see if there was any physical evidence to support the allegations, calling the authorities, or even taking measures to ensure that Gary would not be alone with B.H., Appellant turned a blind eye to the plight of her daughter.

After B.H. disclosed to school officials and the police, Appellant still was only concerned with Gary and his welfare. Appellant contacted B.H.'s boyfriends to see if B.H. ever had sex with them. N.T., September 1, 2010, at pp. 177-178, 182-183. She also contacted a school official who knew Gary to see if he would be a character witness for him. N.T., September 1, 2010, at p. 208; N.T., September 3, 2010, at p.35.

What did she do for B.H.? She became irate that the school contacted the authorities and B.H.'s father. N.T., September 1, 2010, at p. 207. She also got irritated when Ashley Eyer, the girlfriend of B.H.'s biological father, merely asked for some of B.H.'s clothes after B.H. began living at her father's residence. N.T., September 3, 2010, at pp. 25-27 Furthermore, Ms. Eyer noted that the garbage bags full of clothes that Appellant provided contained very few undergarments, raising an inference that undergarments were intentionally withheld due to their potential evidentiary value. N.T., September 1, 2010, at pp. 80-82. This inference was strengthened by Appellant's testimony that "at that point I knew she wasn't coming home so there was no sense not sending all of 'em." N.T., September 3, 2010, at p. 53.

This evidence, viewed in the light most favorable to the Commonwealth, shows that Appellant was aware of her duty to protect B.H. and was aware that Gary was engaging in inappropriate sexual activities with B.H., but failed to take actions to protect her

daughter from Gary's sexual advances. Therefore, the evidence was sufficient to support the jury's verdict for endangering the welfare of a child.

Appellant also asserts the jury's verdict was against the weight of the evidence. "A challenge to the weight of the evidence concedes that the evidence was sufficient to sustain the verdict." Commonwealth v. Manley, 985 A.2d 256, 261 (Pa. Super. 2009); see also Commonwealth v. Moreno, 14 A.3d 133, 136 (Pa. Super. 2011). A new trial will not be ordered because of conflicting testimony, but is awarded only when "the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." Commonwealth v. Bennett, 827 A2.d 469, 481 (Pa. Super. 2003); Commonwealth v. Sullivan, 820 A.2d 795, 806 (Pa. Super. 2003) (citation omitted). The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. Sullivan, supra.

The jury's verdict did not shock the court's conscience. Although Appellant presented a vigorous defense based on a theory that B.H. was lying because she wanted to live with her father, who was more lenient, B.H.'s testimony was corroborated to a large extent by Dr. Lewis' physical examination that showed a traumatic penetrating injury to the child's hymenal ring and the testimony of B.H.'s former boyfriends, who stated they did not have sex with B.H.

Moreover, there were aspects of Appellant's testimony that did not ring true. For example, Appellant admitted that she told Gary to stop rubbing B.H.'s back; however she claimed she did that not because it was anything sexual or inappropriate but because B.H. was being obnoxious and constantly asking for backrubs. N.T., September 3, 2010, at pp.

13-14. If this were the case, it would make more sense to tell B.H. to stop being obnoxious and to stop asking for backrubs than to tell Gary to stop, especially since it appears that this incident occurred after a family member told Appellant that B.H. said Gary was molesting her. Appellant also spoke to the school official about being a character witness for Gary, even though Gary had not been charged criminally yet. Id. at 35-36. Finally, Appellant testified that she loved B.H. and if she had any inkling that something was going on she would have driven B.H. to the police barracks herself and would have left Gary. Id. at pp. 38-39. Yet, Appellant was very irate that the school contacted the authorities and called B.H.'s father, and she was irritated that she received a second call from Ashley Eyer about getting some more of B.H.'s clothing.

Appellant contends the verdict cannot stand, because the jury in the first trial did not convict Gary Segraves of any of the underlying sexual offenses. There are two flaws with Appellant's contention. First, her argument treats the jury's verdict as if there was a specific finding that Gary did not commit the underlying sexual offenses, which is not the case. The first jury may not have reached a verdict on the underlying sexual offenses for any number of reasons that had nothing to do with whether Gary committed sexual offenses against B.H. The Court notes that this was a case where the Commonwealth charged a separate count for each month in which the sexual offense occurred. Perhaps, the jury was convinced beyond a reasonable doubt that the sexual offenses occurred but had questions about the frequency with which or the months within which those offenses occurred. Even if the jury had acquitted Gary of the underlying sexual offenses, it could not be interpreted as a specific finding about any of the evidence. Commonwealth v. Perrotto, 189 Pa. Super. 415, 150 A.2d 396, 399 (Pa. Super. 1959)("An acquittal cannot be interpreted as a

specific finding in relation to some of the evidence.").

Second, Appellant's argument implicitly assumes verdicts in criminal cases must be consistent. It has long been the law of this Commonwealth that "[c]onsistency in a verdict in a criminal case is not necessary." Parrotto, supra. at 397. As the Superior Court explained in Commonwealth v. Frisbie, 889 A.2d 1271 (Pa. Super. 2005),

> Inconsistent verdicts, while often perplexing, are not considered mistakes and do not constitute a basis for reversal. Rather, the rationale for allowing inconsistent verdicts is that it is the jury's sole prerogative to decide on which counts to convict in order to provide a defendant with sufficient punishment. 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 guilty verdicts on the basis of apparent inconsistencies as long as there is sufficient evidence to support the verdict.

889 A.2d at 1273 (citations and internal quotations omitted).

The rules regarding inconsistent verdicts also apply when a jury has convicted on one charge and deadlocked on others. See Commonwealth v. Rakowski, 987 A.2d 1215 (Pa. Super. 2010)(defendant was not entitled to new trial or judgment of acquittal on conviction for DUI with the highest rate of alcohol where the jury deadlocked on DUI-incapable of driving safely and wrote a note asking about the definition of "control" of a motor vehicle).

Even if the first jury had acquitted Gary of all the underlying sexual offenses instead of merely being unable to render a verdict, Appellant would not be entitled to relief. The Superior Court has upheld a variety of convictions where the jury convicted a defendant of one offense but acquitted on other predicate offenses or related offenses. For example, in Commonwealth v. Cassidy, 423 Pa. Super. 1, 620 A.2d 9 (1993), the Superior Court held that

"a defendant may in one trial be convicted of corrupt organization pursuant to18 Pa.C.S.A. §911, and also be acquitted on all predicate offenses underlying the conviction." 620 A.2d at 14.

Perhaps the case most akin to the case at bar is that of Commonwealth v. Miller, 657 A.2d 946 (Pa. Super. 1995). In Miller, the defendant was charged with indecent and assault and corruption of a minor arising out of the defendant's alleged improper rubbing of the eight year old daughter of his girlfriend. The jury found the defendant guilty of corruption but not guilty of indecent assault. The defendant argued that he was entitled to a judgment of acquittal, notwithstanding the verdict, based upon an inconsistent verdict that was not supported by sufficient evidence. The Superior Court rejected the defendant's argument and affirmed his conviction, noting that consistent verdicts are not necessary and the jury's acquittal on one charge cannot be seen as a specific finding in relation to any of the evidence produced. See also Commonwealth v. Anderson, 379 Pa. Super. 589, 550 A.2d 807 (1988)("an acquittal on indecent assault cannot be interpreted to mean as a matter of law that there was insufficient evidence to establish that the underlying acts in fact occurred.").

Just as an acquittal on indecent assault does not mean the evidence was insufficient to establish the underlying acts occurred, a deadlocked jury on a variety of sexual offenses cannot be interpreted to mean that the evidence was insufficient to establish that those sexual acts occurred. Therefore, Appellant's claims that the evidence was insufficient and/or the verdict was against the weight of the evidence given the fact the jury was unable to return a verdict on the allegations of sexual abuse against Gary Segraves must fail.

DATE: _____ By The Court,

_____

Marc F. Lovecchio, Judge

cc: District Attorney
G. Scott Gardner, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)