IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-548-2009**
vs.	**:**	
	:	**Opinion and Order Re:**
GARY SEGRAVES,	**:**	**Defendant's Post Sentence Motion**
Defendant	**:**	

OPINION AND ORDER

This matter came before the Court on Defendant's Post Sentence Motion. The relevant facts follow.

On March 12, 2009, Defendant Gary Segraves was arrested and charged with endangering the welfare of a child, unlawful contact with a minor, corruption of a minor and a multitude of sexual offenses arising out of his performing sexual acts against his step-daughter, B.H., who was between the ages of 11 and 13, from approximately January 2006 until January 2008.

A jury trial was held August 31-September 3, 2010. The jury found Defendant guilty of endangering the welfare of a child, but the jury was unable to reach a unanimous verdict on the remaining charges.

A second jury trial was held January 19-21, 2011. The jury found Defendant guilty of six counts of rape by forcible compulsion, twelve counts of rape of a child under 13, three counts of involuntary deviate sexual intercourse, seven counts of aggravated indecent assault of a child, one count of unlawful contact with a minor, eighteen counts of statutory sexual assault, one count of corruption of a minor and twenty-five counts of indecent

assault.[1]

After conducting a Megan's Law hearing on June 30, 2011, the Court found Defendant to be a sexually violent predator (SVP). Immediately following the Megan's Law hearing, the Court sentenced Defendant to an aggregate sentence of 71 to 142 years incarceration in a state correctional facility, followed by five years of consecutive probation.

Defendant filed a timely post sentence motion, in which he requests the following relief: a judgment of acquittal on the offenses of endangering the welfare of a child and unlawful contact with a minor; a new trial on the basis that the verdict was against the weight of the evidence; reconsideration of sentence; and reconsideration of the SVP designation.

Defendant first asserts that he is entitled to a judgment of acquittal on endangering the welfare of a child, which was graded as a felony of the third degree based on a course of conduct. Essentially, Defendant contends the evidence was insufficient as a matter of law in light of the fact that the jury failed to reach a unanimous verdict with respect to the underlying sex crimes. The Court cannot agree.

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.

[1] Despite the fact that the victim testified that she was subject to sexual contact with Defendant two to three times per month for approximately two years, the Commonwealth, in an effort to streamline the case, did not pursue every count charged in the original criminal complaint.

Davido, 582 Pa. 52, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. Murphy, 577 Pa. 275, 844 A.2d 1228, 1233 (Pa. 2004).

A person is guilty of endangering the welfare of a child if he, as a parent, 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 his 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).

Defendant was B.H.'s step-father. There was no dispute that he had a duty of care, protection or support. B.H. testified that Defendant had sexual intercourse with her two to three time per month and performed oral sex on her on a handful of occasions. Certainly, having sex with one's stepdaughter when she is between the ages of 11 and 13 is a circumstance that could threaten the child's physical or psychological welfare and is an action that cannot reasonably be expected to protect her welfare. In fact, Dr. Kathleen Lewis

testified she observed a cleft in the child's hymen that would have been caused by a painful, penetrating vaginal injury. Furthermore, there was evidence that B.H. also began having problems in school during this time frame.

Defendant seems to assert that since the first jury did not find him guilty of any of the sex crimes, it must not have found B.H.'s testimony credible. There are two flaws with Appellant's contention. First, his argument treats the first jury's verdict as if there was a specific finding that he did not commit the underlying sexual offenses, which is not the case. The jury may not have reached a verdict on the underlying sexual offenses for any number of reasons that had nothing to do with whether Defendant 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 Defendant 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 a 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 Defendant 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 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 that 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, given the fact the jury was unable to return a verdict on the allegations of sexual abuse against Defendant, must fail.

Defendant next asserts he is entitled to a judgment of acquittal on the charge of unlawful contact with a minor, because he had lawful, non-sexual contact with B.H. as her stepfather since she was two years old; therefore Defendant did not initiate contact with B.H.

for the purpose of engaging in unlawful sexual contact. The Court again cannot agree.

A person commits the offense of unlawful contact with a minor if he is intentionally in contact with a minor for the purpose of engaging in any of the sexual offenses enumerated in Chapter 31 of the Crimes Code. 18 Pa.C.S.A. §6318(a)(1). The statute defines "contacts" as "[d]irect or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system." 18 Pa.C.S.A. §6318(c). There is nothing in the statute that requires a defendant's initial contact with the minor to be for the purpose of engaging in unlawful sexual contact. To accept Defendant's argument would mean that only individuals who were strangers to the victim could be prosecuted for unlawful contact with a minor. Unfortunately, many of the perpetrators of sexual assaults on children are not strangers to the child, but individuals who already have a relationship with the child or are in a position of trust or authority, such as family members, family friends, teachers, coaches, and clergy.

The Court finds this case is somewhat similar to the case of Commonwealth v. Oliver, 946 A.2d 1111 (Pa. Super. 2008). In Oliver, the appellant, who was the boyfriend of the children's mother, claimed that the evidence was insufficient to sustain the verdict of unlawful contact with a minor, T.C., because there was no evidence that the appellant ever had any inappropriate contact with T.C.

The evidence presented in Oliver showed that when T.C. was eleven or twelve years old she was living with her grandparents, but over the summer months she often stayed at her mother's house on Taylor Street. The appellant, who was in a relationship with T.C.'s mother, occasionally lived at this location. During one of T.C.'s stays, T.C was in her mother's bedroom watching television. T.C.'s mother was asleep, the appellant was reclining in bed, and T.C. was sitting on the edge of the bed. The appellant nudged T.C. in the back with his foot, pulled the covers down below his belly button and pointed to his penis. He then raised his eyebrows and winked at her. T.C. turned and continued to watch television. When appellant again nudged T.C. in the back with his foot, T.C. left the bedroom.

On another occasion, T.C. approached the appellant and asked him for a dollar. The appellant responded "You could have got more money, like you could have got $40 if you would have did [sic] this for me." T.C. looked at Appellant, at which time he added, "You know what I mean, or am I too big for you?"

The Pennsylvania Superior Court found the appellant's words and gestures clearly showed he contacted a minor in this Commonwealth within the purview of 18 Pa.C.S.A. §6318.

Similarly, in the case at bar, the Court believes the evidence presented by the Commonwealth was sufficient to show that Defendant intentionally contacted a minor for the purpose of engaging in sexual offenses. For example, the victim testified that Defendant was controlling and everything had to go through him. If she wanted to do anything, such as talk

on the phone, go to her friend's house or go skating, she had to pay up, i.e., she had to let him do what he wanted sexually. She also indicated Defendant tried to make her touch his penis.

Defendant 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 Defendant denied ever having any kind of sexual contact with B.H. and presented a vigorous defense based on a theory that B.H. was lying because she wanted to live with her father, the jury was not required to believe Defendant's testimony or accept Defendant's theory. Credibility determinations are within the sole province of the jury, who is free to believe all, none or part of the evidence. Apparently the jury believed B.H.'s testimony, which was not surprising or shocking to the Court, because B.H.'s testimony was corroborated by Dr. Lewis' physical

examination that showed a traumatic penetrating injury to the child's hymen.

Next, Defendant claims his sentence was manifestly excessive, because the aggregate sentence of 71 to 142 years incarceration means he has no realistic chance of parole during his natural life. Despite the fact that Defendant likely will spend the rest of his natural life in prison, the Court does not believe the sentence imposed was manifestly excessive under the facts and circumstances of this case.

Defendant sexually abused his stepdaughter at least twice per month when she was between the ages of 11 and 13. Defendant was found guilty of 74 offenses, including 6 counts of rape by forcible compulsion, 12 counts of rape of a child, and 3 counts of involuntary deviate sexual intercourse (IDSI). Due to the age of the victim, each of the rape and IDSI convictions carried a mandatory minimum sentence of 10 years. The Court did not impose a consecutive sentence on each conviction; however, at the same time, the Court did not want to give Defendant a "volume discount" when the sexual abuse occurred several times per month for approximately two years.

The abuse was also devastating to the victim. Since the victim reported the abuse in February 2008, she has been ostracized by her entire family, except her biological father and his girlfriend.

Given the nature of the offenses, their impact on the victim and the need to protect her and the public, the sentence imposed by the Court was appropriate, despite the fact that Defendant was only 36 years old at the time of sentencing and his prior record score was a zero. See Commonwealth v. Prisk, 13 A.3d 526 (Pa. Super. 2011)(Pennsylvania

Superior Court, noting the appellant was not entitled to a "volume discount," rejected the appellant's challenge that his aggregate sentence of 633 years to 1500 years was manifestly excessive where the appellant had systematically sexually abused his stepdaughter on a nearly daily basis over the course of six years, had been convicted of 314 separate offenses and the court did not impose a consecutive sentence on every count).

Finally, Defendant requests that the Court reconsider its ruling that Defendant is a sexually violent predator (SVP) under Pennsylvania's Megan's Law.

"Sexually violent predator" is a term of art defined by statute as a person "who has been convicted of a sexually violent offense as set forth in section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 Pa.C.S.A. §9792. This definition does not require that a person be violent or display violent tendencies. It requires that the individual be convicted of a "**sexually violent offense"** and suffer a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

A "sexually violent offense" is any criminal offense specified in section 9795.1. 42 Pa.C.S.A.§9792. Appellant was convicted of rape, involuntary deviate sexual intercourse, aggravated indecent assault, and unlawful contact with a minor, all of which are offenses listed in 42 Pa.C.S.A. §9795.1.

Mr. Velkoff's testimony established that Defendant suffers from a mental

abnormality or personality disorder – pedophilia- that makes him likely to engage in predatory sexually violent offenses. Mr. Velkoff also noted the factors in this case related to the risk of re-offense, including the fact that the abuse occurred at least twice a month for two years and pedophilia is a lifetime condition, which in this case overrode Defendant's volitional control and society's taboos against having sex with children who are family members. Mr. Velkoff also referenced Defendant's predatory behaviors in this case, such as giving the victim permission to engage in social activities as long as she cooperated with him sexually or by telling the victim she "owed" him sex; calling the victim disparaging names when she was not cooperative; and waiting until his wife was asleep or out of the house to engage in various sex acts with his pre-pubescent/early pubescent stepdaughter.

Defendant contends the Court should not have credited C. Townsend Velkoff's expert testimony and should not have found Defendant to be a sexually violent predator because: some of the information provided for Mr. Velkoff to review was inaccurate; Mr. Velkoff "diagnosed" Defendant as suffering from pedophilia without having spoken to Defendant; Defendant did not show any signs of pedophilia outside the two-year period at issue during trial; Defendant was older than the age range at which sexually deviate behavior typically manifests itself; and Defendant did not engage in sexually deviant behavior with other available minor females. The Court cannot agree.

Any alleged inaccuracies in the information provided to Mr. Velkoff were minor and did not affect his opinion to a reasonable degree of professional certainty that Defendant should be designated an SVP. For example, Mr. Velkoff was not aware that

Defendant's father had died in 2003, but this fact had no bearing on whether Defendant met the criteria to be designated an SVP.

Although Defendant declined to speak to Mr. Velkoff and Mr. Velkoff testified that, as part of counseling, he would not diagnose an individual as a pedophile without speaking to him, these facts are not significant as a matter of law. The Pennsylvania Supreme Court has found that the sexually violent predator assessment need not meet clinical diagnostic norms. See Commonwealth v. Lee, 594 Pa. 266, 935 A.2d 865, 884-885 (Pa. 2007)("our ruling in Dengler in many respects can be read to have blessed as sufficient the 'exhaustive list of factors' Megan's Law II sets forth to guide an SOAB assessor's determination as to whether an offender is an SVP"); Commonwealth v. Dengler, 586 Pa. 54, 890 A.2d 372, 383 (Pa. 2005)("The statute does not require proof of a standard of diagnosis that is commonly found and/or accepted in a mental health diagnostic paradigm").

The fact that there were no signs of pedophilia outside the two year period at issue during trial does not negate the fact that Defendant's sexual interest in his stepdaughter exceeded the six-month period required to meet the criteria for pedophilia.

Contrary to Defendant's assertions, Mr. Velkoff did not acknowledge that sexually deviant behavior typically manifests itself between the ages of 19 and 26. Instead, Mr. Velkoff testified that there was nothing definitive regarding the average age of onset for these types of problems. Although the perpetrator would have to be at least 16 to meet the diagnostic criteria, onset could be at any age from 16 to 85.

Finally, the fact that Defendant did not engage other available minor females

in sexually deviant behavior did not affect Mr. Velkoff's opinion and does not mean he is not a pedophile. The "other available minor females" were Defendant's two biological daughters, who according to Defendant's trial testimony, would have been eight years old and five years old at the time the victim reported the sexual abuse to authorities; therefore they would have been between the ages of 6-8 and 3-5 when Defendant sexually abused B.H. Perhaps the sexual abuse of B.H. was enough. Perhaps Defendant could overcome society's taboos with respect to his stepdaughter, but could not with respect to his own flesh and blood. It could be that Defendant is only interested in females as they are reaching or just entering puberty and his biological daughters were not quite old enough to pique his sexual interests. Everyone has sexual preferences. Just because an individual does not have sex with every minor female with whom he has ever been alone, does not mean the individual is not a pedophile.

O R D E R

AND NOW, this ___ day of December 2011, for the reasons set forth in the foregoing Opinion, the Court DENIES Defendant's Post Sentence Motion.

By The Court,

_____

Marc F. Lovecchio, Judge

cc: A. Melissa Kalaus, Esquire
Public Defender
Gary Weber, Esquire

Work File