IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**No: 1472-CR-2009**
v.	:	
	:	**CRIMINAL DIVISION**
DAVID PROBST,	:	**APPEAL**
Defendant	:	

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

David Probst (Defendant) was charged with offenses that include Failure to Comply with Registration of Sexual Offenders Requirements, Aggravated Indecent Assault of a Child, Indecent Assault under thirteen (13) years of age, and Corruption of Minors. On December 8, 2009, the Defendant filed an Omnibus Pre-Trial Motion. The Commonwealth filed a Motion to Admit Certain Statements and a Motion in Limine to Admit Bad Acts on December 16, 2009 and February 12, 2010, respectively. On March 26, 2010, the Court, in an Opinion and Order, granted the Commonwealth's Motion to Admit Certain Statements and denied the Commonwealth's Motion to Admit Bad Acts. In the same Opinion and Order, the Court dismissed charges against the Defendant for Failure to Comply with Registration of Sexual Offenders Requirements, but denied the rest of Defendant's Omnibus Pre-trial Motion. Commonwealth filed a subsequent Motion in Limine to Admit Bad Acts on May 25, 2010, which was never argued before this Court prior to trial.[1]

On June 3, 2010, a jury found the Defendant guilty of Aggravated Indecent Assault of a child, a felony of the first degree; Indecent Assault of a Child under (13) years of age, a felony of the third degree; and Corruption of Minors; a misdemeanor of the first degree. On June 4, 2010,

[1] The subsequent Motion filed by the Commonwealth was scheduled to be heard by the Court on June 16, 2010. The trial date for the case was moved up to June 2, 2010 based on the availability of Senior Judge Kenneth D. Brown to hold the trial in this case.

the Commonwealth gave the Defendant notice that it intended to seek a mandatory sentence under 42 Pa.C.S.A. § 9718.2(a)(1). The Defendant had a prior Megan's Law conviction of Indecent Assault of a child less than 13 years of age, a misdemeanor of the first degree.[2] On November 12, 2010, Judge Kenneth Brown sentenced the Defendant to concurrent terms of imprisonment in a State Correctional Institution of twenty-five (25) to fifty (50) years for Aggravated Indecent Assault and Indecent Assault, with a consecutive five (5) year probationary term for Corruption of a Minor.

On November 19, 2010, the Defendant filed a motion contending that the Court should not have imposed a twenty-five (25) year minimum sentence because the Commonwealth did not provide the Defendant with notice in accordance with 42 Pa.C.S.A. § 9718.2(c). On January 14, 2011, the Court took testimony and argument on the Motion. On March 21, 2011, Judge Brown denied the Defendant's motion indicating that he believed he had the authority to impose a twenty-five (25) year minimum sentence pursuant to 42 Pa.C.S.A. § 9718.2.

The Defendant raises four issues on appeal: (1) the Court committed reversible error when it admitted alleged Bad Acts evidence under Pa.R.E. 404(b), specifically that Defendant purportedly told the complainant that he "loved her," when in a prior opinion the Court precluded the introduction of such evidence at trial; (2) the Court erred in the imposition of a mandatory minimum sentence of twenty-five (25) years where the Court failed to notify Defendant of the applicability of the mandatory sentence pursuant to 42 Pa.C.S.A. § 9718.2(d); (3) the twenty-five (25) year mandatory sentence is grossly disproportionate and constitutes cruel and unusual punishment under the Pennsylvania and United States Constitution; (4) the Court committed reversible error when it failed to conduct any inquiry or make any findings regarding the ten (10) year old complainant's competency to testify at trial.

[2] 18 Pa.C.S. § 3126(a)(7).

The Court committed reversible error when it admitted alleged Bad Acts evidence under Pa.R.E. 404(b), specifically that Defendant purportedly told the complainant that he "loved her," when in a prior opinion the Court precluded the introduction of such evidence at trial

The Defendant contends that Judge Brown erred when he admitted alleged Bad Acts evidence under Pa.R.E. 404(b) when the Court already precluded the introduction of such evidence prior to trial. On February 12, 2010, the Commonwealth filed a Motion in Limine to Admit Bad Acts. This motion requested that Defendant's prior act of sexually abusing another eleven (11) year old while she was "staying over night" at the Defendant's residence with Defendant's minor daughters be admitted in Court under Pa.R.E. 404(b). This Court denied this motion on March 26, 2010. As noted, this Court stated that while the age and sex of each victim were similar, the circumstances surrounding each incident were distinguishable, and precluded the Commonwealth's use of the evidence at trial.

On May 25, 2010, the Commonwealth filed another Motion in Limine to Admit Bad Acts, which was never argued before the trial commenced on June 2, 2010. In this Motion, the Commonwealth sets out more facts than were given in the prior Motion and argued that Defendant's prior statements to young girls that he "loved" them was a common plan under Pa.R.E. 404(b). Here, the Commonwealth stated that: (1) all three incidents involved white females between the ages of 9-11; (2) all three incidents involved friends of the Defendant's step-daughter; (3) the Defendant targeted individuals that were alone or while everyone else was sleeping; (4) Defendant told the girls that he "loved" them; and (5) two of the incidents took place in the living room of the Defendant's residence.

At trial, Defendant never objected to the Complainant, L.H., testifying that Defendant stated that he "loved her." N.T., June 2, 2010, p 22. Further, Defense Counsel elicited such testimony in his cross examination. Id. at 42. Defense Counsel, however, did object when the

Commonwealth asked the witness, A.O., "Did he tell you that he loved you?" During sidebar, the Court determined that this issue was not raised in the first Motion in Limine filed by the Commonwealth. Further, the Court determined that the information about the Defendant telling A.O. that he "loved her" was admissible. Id. at 95-100.

First, the Court must determine whether this issue was raised and denied in Commonwealth's first Motion in Limine. The first Motion dealt entirely with the admission of circumstances and evidence that resulted in Defendant's prior conviction of Indecent Assault of a child less than thirteen (13) years of age. In that case, the Victim spent the night at Defendant's home with the Defendant's step-daughter. Defendant came downstairs during the night, laid next to the victim, and then proceeded to sexually assault the eleven (11) year old female. Here, the Commonwealth sought information on the Defendant telling other girls that he "loved" them, which the Defendant also told to the Victim in this case. The issue was not covered in this Court's Opinion dated March 26, 2010, and therefore the Court properly ruled on the issue.

Second, the Court must determine whether it should have allowed the evidence at trial. "Admissibility of evidence is a matter addressed to the sound discretion of the trial court, and an appellate court may reverse only upon a showing that the trial court abused its discretion." Commonwealth v. Smith, 635 A.2d 1086, 1089 (Pa. Super. 1993). "[A] discretionary ruling cannot be overturned simply because a reviewing court disagrees with the trial court's conclusion. Commonwealth v. Cohen, 605 A.2d 1212, 1218 (citing In re Semeraro, 515 A.2d 880, 882 (Pa. 1986)).

Here, the testimony of thirteen (13) year old A.O., which stated that the Defendant and his wife asked A.O. to call them "mom" and "dad" and that they told A.O. they "loved her,"

provided some corroboration that the Defendant told L.H. that he "loved her." L.H.'s credibility was the key to the case and the defense stressed the fact that L.H. did not tell the police that the Defendant told her he "loved her."

While this testimony had relevance to the credibility of L.H., it provided no prejudicial harm to the Defendant. See Cross Examination by trial counsel, N.T. p 100-01. Defense Counsel on cross of A.O. had her acknowledge that the Defendant and his wife did not say this as she got older and that nothing inappropriate even happened to her while she was at the Defendant's home. See N.T. p 100-01. Clearly, there was no prejudice to the Defendant. Further, even if the admission of this evidence is viewed as error it is obviously harmless error in light of the short nature of the reference and the witness assurance that nothing inappropriate happened to her.

Additionally, the Court believes that the evidence is admissible under Pa.R.E. 404(b), which states that:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
> (2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
> (3) Evidence of other crimes, wrongs or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

The Court must examine the details and circumstances of each criminal incident to assure that the evidence reveals criminal conduct which is distinctive and so nearly identical as to become the signature of the same perpetrator. Commonwealth v. G.D.M., 926 A.2d 984 (Pa. Super. 2007). Relevant to finding a common plan is the habits or patterns of action or conduct undertaken by the perpetrator to commit crime, as well as the time, place, and types of victims typically chosen by the perpetrator. Id.

Here, the Commonwealth has used three incidents to show a common plan for the Defendant. First, the Defendant's prior conviction of Indecent Assault of a Minor had evidence that the Defendant told M.P., an eleven (11) year old white female, that he "loved her." Second, Defendant had repeatedly told A.O., a ten (10) year old white female, that he "loved her." Finally, in this case, Defendant told L.H., a nine (9) year old white female, during the sexual assault that he "loved her." All three circumstances involved nine (9) to eleven (11) year old white females and the Defendant telling them he "loved" them. Further, all three girls were friends of the Defendant's step-daughter. The Defendant telling his step-daughter's friends that he "loved" them is distinctive and a signature of the Defendant. Further, the evidence is admissible as showing motive under Pa.R.E. 404(b) because it indicates that Defendant's motive in this case was that he was attracted to young children.

Finally, under Pa.R.E. 404(b) the Court must determine whether the probative value of the evidence outweighs its potential prejudice. Here, Defense Counsel argued that L.M. was lying or was mistaken about the sexual assault. Defense Counsel also questioned L.M. about a prior tape, where she did not say that the Defendant told her that he "loved her." The evidence allowed by the Court showed that the Defendant has engaged in similar distinctive conduct and that it corroborates L.M.'s statements made at trial, which the Defendant tried to discredit. Further, based on the closing arguments made by Defendant's Counsel, Defendant's main argument was to discredit L.M. Therefore, any evidence that would corroborate the story made by L.M. was extremely probative in this case and in this circumstance should have been admissible.

The Court erred in the imposition of a mandatory minimum sentence of twenty-five (25) years where the trial court failed to notify Defendant of the applicability of the mandatory sentence pursuant to 42 Pa.C.S.A. § 9718.2(d)

For purposes of this Opinion, the Court will rely on Judge Brown's Opinion and Order dated March 18, 2011, which found after a hearing, that the Court had authority to impose a twenty-five (25) year minimum sentence pursuant to 42 Pa.C.S.A. § 9718.2.

The twenty-five (25) year mandatory sentence is grossly disproportionate and constitutes cruel and unusual punishment under the Pennsylvania and United States Constitution

For purposes of this Opinion, the Court will rely on Judge Brown's Opinion and Order dated March 18, 2011, which sentenced the Defendant pursuant to 42 Pa.C.S.A. § 9718.2. Specifically, the Statute states that "if at the time of the commission of the current offense the person had previously been convicted of an offense set forth in section 9795.1 (a) or (b) or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction, be *sentenced to a minimum sentence of at least 25 years* of total confinement . . ." (emphasis added).

The Court committed reversible error when it failed to conduct any inquiry or make any findings regarding the ten (10) year old complainant's competency to testify at trial

Defendant alleges that the Court failed to conduct an inquiry on the ten (10) year old complainant's competency to testify at trial. The Court assumes that the Defendant means L.H is the ten (10) year old complainant. Pennsylvania requires an examination of child witnesses for competency. See Pa.R.E. 601(b); Commonwealth v. Washington, 722 A.2d 643, 646 (Pa. 1998). The Supreme Court of Pennsylvania established that when a witness is under the age of fourteen, the trial court must hold a competency hearing. See Roshe v. McCoy, 156 A.2d 307, 310 (Pa. 1959).

> There must be (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that [the child] is called to testify about and (3) a consciousness of the duty to speak the truth.

Id. Courts should also make a determination of whether the child victim's testimony is tainted by the inquires of adults. Commonwealth v. Delbridge, 855 A.2d 27, 39-40 (Pa. 2003). "The Determination of competency is a matter for the sound discretion of the trial court, which will not be disturbed absent a clear abuse of that discretion." Commonwealth v. D.J.A., 800 A.2d 965, 970 (Pa. Super. 2002). An abuse of discretion is when the law is overridden or misapplied or the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will. Id.

Here, Judge Butts conducted a preliminary hearing to determine the competency of L.H. on February 24, 2010. N.T., 2/11/2010, p 38-43.

> COURT: Can you tell me what your name is?
>
> LH: Lucy Halpin.
>
> COURT: Can you spell your last name?
>
> LH: H-a-l-p-i-n
>
> COURT: Thank you. And how old are you?
>
> LH: Ten.
>
> . . . .
>
> COURT: All right. Mrs. Kreisher, that's the woman seated here in front of me that I'm pointing to. Can you look at me for a second. Thank you. The woman that I'm pointing to right here that made you put your right hand up—you're nodding your head yes – she asked you if you would tell the truth. Do you understand what that means?
>
> LH: Yes.
>
> COURT: Explain to me what you mean or what you think telling the truth means.

LH: Not to lie.

COURT: What's a lie? Maybe to make it easier on you, give me an example of what a lie is.

LH: I'm eating a candy bar.

COURT: Right this second?

LH: Yes.

COURT: Okay. So we know that that's the truth, right?

LH: No.

COURT: What is it?

LH: It's a lie.

. . . .

COURT: When you testify, when you're telling me things here today, is anybody here in the audience, that's the group of everybody else in the courtroom, giving you any help with the answers that you're going to give.

LH: No.

COURT: Okay. And you know it's important for you to tell me what you know, not what someone has told you?

LH: Yes.

The record is clear that not only did this Court conduct an inquiry on the competency of L.H. but that L.H. was competent to testify at trial. L.H. showed an ability to understand questions and to frame and express intelligent answers. L.H. showed the capacity to have observed the occurrence and to remember the reason why she was there to testify. Finally, L.H. showed that she had a conscious duty to speak the truth, which the Court spent many questions determining. The Court inquired into the competency of L.H. and therefore this issue has no merit.

Even though the Defendant does not appear to be raising an issue on the competency of any other witnesses, the Court will address the competency of A.O. At the time of trial A.O. was thirteen (13) year old. The transcripts show that there was no objection made to A.O. testifying and therefore the issue has been waived. Further, on February 11, 2010, A.O. testified while the Court conducted pre-trial motions. N.T. dated February 11, 2010, p 19-25. At this hearing prior to trial, the Court was able to review the child's capacity to communicate and speak truthfully.

Finally, the Court could have further evaluated the child's testimony at trial and determined that the child was competent. See Commonwealth v. Moore, 980 A.2d 647, (Pa. Super. 2009) (finding that a trial failed to conduct a competency hearing but based off of the child's testimony the child was competent and therefore the Defendant was not prejudiced); Commonwealth v. Harvey, 812 A.2d 1190, 1199 (Pa. 2002) (determining that a trial court failed to conduct a competency hearing but after reviewing the child's testimony the defendant was not prejudiced); Commonwealth v. D.J.A., 800 A.2d 965, 971-72 (Pa. Super. 2002) (concluding that the record showed that a child victim was capable of testifying about the incident in question). Here, A.O.'s testimony leaves no question to her competency and ability to speak truthfully. Therefore, for the three reasons stated above, any issue with the testimony of A.O. lacks merit.

Conclusion

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

DATE: ________________________ By the Court,

Nancy L. Butts, President Judge

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