

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-548-2009
vs. :
: CRIMINAL DIVISION
:
:
:
:
GARY SEGRAVES, : 1925(a) Opinion
Appellant

**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 June 30, 2011 and its Opinion and Order of December 11, 2011, which denied Appellant's post sentence motions. The relevant facts follow.

On March 12, 2009, Appellant 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 Segraves 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 Segraves 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 Segraves to be a sexually violent predator (SVP). Immediately following the Megan's Law hearing, the Court sentenced him to an aggregate sentence of 71 to 142 years incarceration in a state correctional facility, followed by five years of consecutive probation.

Segraves filed a timely post sentence motion, which the Court denied on December 11, 2011.

Segraves filed a timely appeal, in which he raises fourteen issues.

Segraves first asserts that his conviction for Endangering the Welfare of a Minor (Count 125) following the September 3, 2010 trial was not supported by sufficient evidence as the Commonwealth could not have established the factual predicate necessary to convict him of this offense when graded as a felony of the third degree. Essentially, Segraves contends that 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 sexual offenses. The Court cannot agree.

The Court previously addressed this issue on pages two through six of its Opinion and Order dated December 11, 2011, which denied Segraves' post sentence motion.

In addition, the Court would rely on the recent case of Commonwealth v. Miller, 35 A.3d 1206 (Pa. 2012). In Miller, the Pennsylvania Supreme Court reiterated its long-standing rule

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.

against interfering with inconsistent verdicts and concluded that inconsistent verdicts are allowed to stand “so long as the evidence is sufficient to support the conviction.” *Id.* at 1208.

Sufficient evidence exists to support Segraves’ conviction. Pursuant to 18 Pa.C.S.A. §4304(a)(1): “[a] parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.” 18 Pa.C.S.A. §4304(a)(1).

The evidence presented at trial showed that Segraves was the victim B.H.’s step-father and he had control over her welfare, not only by taking care of B.H. and her siblings while B.H.’s mother was not at home, but also by not allowing B.H. to go skating or do other activities with her friends unless she succumbed to his sexual advances. B.H. testified at length regarding Segraves’ sexual encounters with her, which began when she was in the sixth grade and continued for nearly two years and progressed from rubbing against her to sexual intercourse. B.H.’s testimony alone would be sufficient to convict Segraves of this charge. Commonwealth v. Castelhun, 889 A.2d 1228, 1232 (Pa. Super. 2005)(the uncorroborated testimony of the complaining witness is sufficient to convict a defendant of sexual offenses). B.H.’s testimony, however, was corroborated by medical testimony regarding the presence of penetrating trauma consistent with sexual abuse.

Segraves also knew that his actions were wrong and harmful to the child. When B.H. told a young relative that Segraves was molesting her and the relative told B.H.’s mother, Segraves told B.H.’s mother that B.H. was just having dreams about him. When Segraves was alone with B.H., however, he promised her that the abuse would stop. The abuse stopped for a few weeks, but then it resumed. Furthermore, B.H. was acting out and

having difficulty in school.

The evidence in this case and the reasonable inferences to be drawn therefrom were sufficient for the jury to find that Segraves knowingly endangered the welfare of B.H.

Segraves next avers that his conviction for Unlawful Contact with a Minor² was not supported by sufficient evidence, as the Commonwealth could not have established that Segraves' contact with the victim was for unlawful purposes. The Court addressed this issue on pages seven and eight of its Opinion and Order dated December 11, 2011.

Segraves also contends that the verdict was against the weight of the evidence, as the victim had a motive to fabricate her accusations. The Court previously addressed this issue on page nine of its Opinion and Order dated December 11, 2011.

Segraves alleges the evidence at trial was insufficient with respect to all charges, in that the Commonwealth failed to produce any evidence, direct or circumstantial, that Segraves in fact sexually molested the victim. Again, the Court cannot agree.

Viewing the evidence in the light most favorable to the Commonwealth as verdict winner, there was ample evidence to support the jury's verdict. B.H. testified extensively regarding Segraves' sexual abuse of her, which progressed from rubbing against her to sexual intercourse. B.H.'s testimony was corroborated by testimony from Dr. Kathleen Lewis that during her physical examination of B.H. she observed evidence of a penetrating trauma consistent with sexual abuse. "It is well-established that 'the uncorroborated testimony of the complaining witness is sufficient to convict a defendant of sexual offenses.'"

² 18 Pa.C.S.A. §6318.

Commonwealth v. Castelhun, 889 A.2d 1228, 1232 (Pa. Super. 2005)(citations omitted).

Here, the victim's testimony was corroborated by medical evidence. Therefore, the evidence clearly was sufficient to support the jury's verdict.

Segraves next claims the Court abused its discretion by imposing an unduly harsh and manifestly excessive sentence, by imposing an aggregate sentence of 71 to 142 years of incarceration. The Court addressed this issue on pages nine through eleven of its Opinion and Order dated December 11, 2011.

Segraves also asserts that the Court erred in denying his request to reconsider its finding which designated him as a sexually violent predator (SVP) under Megan's Law. This issue was also addressed in Opinion and Order dated December 11, 2011, at pages eleven through fourteen.

Segraves contends the Court abused its discretion by denying his motion for a mistrial prior to the commencement of trial, and after the Commonwealth dismissed the remaining charge against his co-defendant, as Segraves was unfairly prejudiced during jury selection. Segraves' co-defendant, his wife Melissa, was charged with endangering the welfare of a child through a course of conduct, a felony of the third degree, and corruption of a minor, a misdemeanor of the first degree, based upon her failure to take adequate measures to protect B.H. from Segraves' sexual assaults, despite being told by a relative that Segraves was molesting B.H. Both Segraves and his co-defendant defended the charges by claiming that B.H. was lying so that she could get out of their house and live with her biological father and that the sexual abuse never happened. The jury in the first trial convicted both of endangering the welfare of a child through a course of conduct, but the jury could not reach a unanimous verdict on any of the other charges.

At the second jury selection held on or about January 11, 2011,³ the Commonwealth was still proceeding against both Segraves and his wife. The Court gave each defendant five peremptory challenges and gave the Commonwealth ten peremptory challenges. By the beginning of trial on January 19, 2011, the Commonwealth elected not to proceed to trial on the remaining misdemeanor charge against Segraves' wife. Segraves did not object to the Commonwealth dropping the charges, but shortly after the Court granted the Commonwealth's oral motion to nol pros that charge, Segraves moved for a mistrial, which the Court denied. N.T., January 19, 2011, at pp. 4-11.

It is well settled that the review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. 'An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will ... discretion is abused.

Commonwealth v. Chamberlain, 30 A.3d 381, 422 (Pa. 2011)(citations omitted).

The Court does not believe it abused its discretion when it denied Segraves' request for a mistrial. Segraves' counsel conceded that Segraves and his wife shared a community of interest. N.T., January 19, 2011, at p. 9. The Court also observed that counsel for both defendants were conferring with each other to some extent during jury selection. Although Segraves would have had two more peremptory challenges and the Commonwealth would have had three less if the Commonwealth had dropped the remaining charge against

³ In Lycoming County, all jury selections occur during a three day period approximately one week prior to the start of the trial term. For the January 2011 trial term, jury selections were held January 11-13, 2011.

Segraves' co-defendant prior to jury selection, defense counsel did not point to any juror that he would have stricken that co-defendant's counsel did not strike. Furthermore, there was no evidence that the Commonwealth's purpose for dropping the charge was to deprive Segraves of two peremptory challenges. Instead, it appeared that immediately prior to trial commencing, the prosecutor came to the realization that there was little point in making the trial more complex by presenting its case against the co-defendant a second time on a misdemeanor charge when the prosecutor had already obtained a felony conviction for endangering the welfare of a child through a course of conduct. See N.T., January 19, 2011, at p. 11. In light of the logic of the prosecutor's position, the lack of an objection by Segraves when the Commonwealth moved to nol pros the corruption charges against his co-defendant, and the fact that Segraves did not specify any juror that he would have stricken that co-defendant's counsel did not strike, the Court found a mistrial was neither necessary nor appropriate in this case. Moreover, one could make the argument that, since there was a community of interest between Segraves and his wife, he received the benefit of a total of ten peremptory challenges, when the defense otherwise would have had only seven peremptory challenges.

Along similar lines, Segraves avers that the Court erred by denying him the ability to reference that the charges against the co-defendant were dropped on the eve of trial and therefore denied Segraves of fully presenting a defense.

Segraves' counsel wanted to make an argument that the Commonwealth dropped the corruption charge against the co-defendant because the Commonwealth did not believe it could prove the case beyond a reasonable doubt. N.T., January 19, 2011, at pp. 14-15. The Commonwealth, however, had already indicated that the reason it dropped the

corruption charges was that the charge was a misdemeanor and the Commonwealth already had a conviction for felony endangering. Id. at p. 11. If the Court permitted Segraves to refer to the fact that the charge against the co-defendant was dropped, the Commonwealth wanted to counter that argument by informing the jury that the co-defendant had been convicted of a felony endangering charge at another trial.

The Court found that the disposition of the co-defendant's corruption charge was not relevant to Segraves' trial. Moreover, it would be misleading and patently unfair to allow Segraves to argue that the charges were dropped because the Commonwealth did not believe it could prove the charge beyond a reasonable doubt when that was not accurate and to allow the Commonwealth to state the true reason would result in references to not only the co-defendant's conviction, but also the prior trial, which potentially would be unfair and prejudicial to Segraves. The Court weighed its options and decided that the fairest thing to all parties would be to instruct the jury that the co-defendant was not present, the reason she was not present was irrelevant to Segraves' case and the jury should not take any adverse inference against either party as a result of it. N.T., January 19, 2011, at pp. 14-17, 23.

Segraves alleges the Court erred by denying his motion to dismiss Juror Number Eleven, when that juror admitted knowing the victim and other witnesses from high school, thereby denying him of a fair and impartial jury.

This allegation is not entirely accurate. The juror did not know the victim and other witnesses from high school. The juror knew a friend of the victim named Amber Poust, who was present in the courtroom but was not a witness. Ashley Eyer, the victim's step-mother, was a Commonwealth witness whose name the juror was familiar with from high school, but the juror could not put a face with that name and did not really know her, because

she was not part of Ms. Eyer's clique. Juror Number Eleven also indicated she could judge Ms. Eyer's testimony the same as everybody else's. N.T., January 19, 2011, at pp. 51-57. Based on the juror's answers and demeanor, the Court denied Segraves' motion. Id. at 57-58.

In Commonwealth v. Koehler, 558 Pa. 334, 737 A.2d 225, 238 (1999), the Pennsylvania Supreme Court stated: "A challenge for cause should be granted when the juror has such a close relationship, familial, financial, or situational with the parties, counsel, victims or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by her or her conduct or answers to questions."

Here, as in Koehler, the juror's relationship to the witness was attenuated and the juror testified credibly that her familiarity with the witness would not affect her ability to act impartially. The juror had no relationship with the victim. Therefore, the Court did not abuse its discretion by refusing to remove Juror Number Eleven from the jury.

Segraves next contends the Court erred by permitting the Commonwealth to admit a prior consistent statement of the victim and allowing her to read it into the record. The Court cannot agree.

The admission of evidence is within the sound discretion of the trial court. Commonwealth v. Briggs, 608 Pa. 430, 12 A.3d 291, 336 (2011). Prior consistent statements may be admitted to corroborate or rehabilitate the testimony of a witness who has been impeached, expressly or impliedly, as having fabricated her testimony. Commonwealth v. Hunzer, 868 A.2d 498, 512 (Pa. Super. 2005); Commonwealth v. Willis, 380 Pa. Super. 555, 552 A.2d 682, 692 (1988). Prior consistent statements may also be considered relevant when the witness' status is such that his or her testimony may be called into question. Willis, 552

A.2d at 691-92. As the Willis court noted, jurors are likely to suspect that the testimony of child victims of sexual assault “may be distorted by fantasy, exaggeration, suggestion, or decay of the original memory of the event. Prior consistent statements may therefore be admitted to corroborate even unimpeached testimony of child witnesses, at the trial court’s discretion, because such statements were made at a time when the memory was fresher and there was less opportunity for the child witness to be effected [sic] by the decaying impact of time and suggestion.” Willis, 552 A.2d at 692.

The theory of the defense was that the victim made up her story about the sexual abuse, so that she would be removed from her mother’s home and be able to live with her biological father. See N.T., January 19, 2011, at p. 62. Not only did defense counsel reference its theory in its opening statement, but he also extensively cross-examined the victim about her restrictions at her mother’s house and her desire to live with her biological father.

The victim was also a minor. She was between eleven and thirteen years old when she was sexually abused by Segraves, and she was sixteen years old when she testified at the second trial. She gave her prior written statement to Trooper Barnhart in February 2008, approximately two weeks after the last incident of sexual abuse. The second trial was held January 19-20, 2011.

In light of the foregoing, the victim’s prior consistent statement was relevant and admissible to corroborate her testimony, to rebut the defense theory of fabrication, and to show that the victim remained consistent from the moment she reported the abuse to the police throughout the proceedings.

Segraves next asserts that the Court erred in denying his request to admit

videos, which depicted the victim's interaction with him at various holidays, thereby denying him the opportunity to fully present his defense.

The admission of evidence is within the sound discretion of the trial court, which will not be reversed absent an abuse of discretion. Commonwealth v. Baumhammers, 599 Pa. 1, 960 A.2d 59, 84 (2008). "Discretion is abused when the course pursued represents not merely an error of judgment, but where judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is the result of partiality, prejudice, bias or ill will." Id. at 86, quoting Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 753 (2000).

Segraves wanted to introduce two portions of home video. The first video was from December 2007 and depicted the victim receiving a gift from Segraves while she sat on his lap and he had his arm around her. The other video was from October 2007 and depicted the entire family together. It looked like the family was sitting for a photo of some kind. The victim was standing with one hand on Segraves' shoulder and Segraves had his arm around her, while he was also holding one of the other children. The Commonwealth objected to the introduction of this evidence. The Court sustained the objection, finding that the evidence was cumulative of photographs the defense had already admitted into evidence (see Defendant's Exhibits 4, 5, and 6; N.T., January 19, 2011 at pp. 131-136); the evidence was only minimally relevant; and it was somewhat prejudicial because it depicted Segraves interacting with his biological children as well, and his relationship with them wasn't at issue. N.T., January 20, 2011, at pp. 75-77.

Segraves also claims the Court erred by precluding him from presenting character witnesses to testify to his truthfulness.

“Character evidence of the defendant’s truthfulness is admissible only if: (1) the character trait of truthfulness is implicated by the elements of the charged offenses; or (2) the defendant’s character for truthfulness was attacked by evidence of bad reputation.” Commonwealth v. Minich, 4 A.3d 1063, 1070 (Pa. Super. 2010), citing Commonwealth v. Constant, 925 A.2d 810, 822-23 (Pa. Super. 2007); see also Commonwealth v. Fulton, 574 Pa. 282, 830 A.2d 567, 572-73 (2003)(plurality).

Segraves wanted to present witnesses who would testify to his reputation for truthfulness, and the Commonwealth objected and cited Commonwealth v. Fisher, 764 A.2d 82 (Pa. Super. 2000). N.T., January 20, 2011, at pp. 8-10. The Court indicated that such evidence would only be admissible if truthfulness was a trait of the particular crimes at issue or if the Commonwealth attacked his reputation by presenting witnesses who would testify regarding Segraves’ bad reputation for truthfulness. The Court referred to Commonwealth v. Boyd, 448 Pa. Super. 589, 672 A.2d 810 (Pa. Super. 1996). The Court deferred its ruling to give defense counsel an opportunity to review these cases. After Segraves testified, the Court sustained the Commonwealth’s objection. N.T., January 20, 2011, at p. 77.

Segraves was not charged with perjury, false swearing or any other crime of dishonesty or false statement. The Commonwealth also did not introduce any evidence that Segraves had a reputation in the community for dishonesty. Therefore, evidence regarding Segraves’ character for truthfulness was neither relevant nor admissible.

Segraves next avers the Court erred in permitting the testimony of Denise Gorini, because it was irrelevant.

Ms. Gorini’s testimony was very short. Ms. Gorini testified that she was the outreach caseworker for the East Lycoming School District, which includes Hughesville

High School. She testified about the victim's reaction when she told the victim that she had received a subpoena for trial. Ms. Gorini testified that the victim became very upset and began to cry. The victim remained in Ms. Gorini's office for about an hour and a half until school let out for the day. N.T., January 20, 2011, at pp. 96-97.

The Commonwealth called Ms. Gorini in order to rebut the arguments of the defense that the victim fabricated her claims of sexual abuse and she was simply putting on a show for the jury. The Court found this evidence was relevant to show that the victim wouldn't be reacting in such a manner if this was a just some story she fabricated. The Court permitted Ms. Gorini's testimony for this limited purpose. N.T., January 20, 2011, at pp. 93-95.

The Court also notes this testimony was a fair response to the testimony that the defense presented from Janet Sellard, a home economics teacher in the Montgomery School District. The defense called Ms. Sellard to testify that how the victim would confide in her about how she did not like the Montgomery School District, and wanted to go to Hughesville. They also talked about child care responsibilities and how the victim wanted to be doing things like a typical teenager instead of helping her step-father with her younger siblings when her mom was at work. Finally, Ms. Sellard testified that, despite believing she had a close relationship with the victim and having some discussions about the victim's step-father, the victim never said told her that Segraves was molesting her or even said anything derogatory about him.

Segraves final issue on appeal is that the Court abused its discretion by denying his second motion for a mistrial as a result of statements made by the prosecutor during closing arguments.

The Court believes neither it nor the Appellate Courts can properly address this claim, because Segraves did not have the court reporters transcribe both parties' closing arguments in this case. The only portion of the closing arguments that was transcribed was the sidebar conference at the end of the prosecutor's closing arguments where defense counsel objected and moved for a mistrial and the Court denied the motion. N.T., January 20, 2011, at pp. 106-107. Without the transcript of both parties' closing arguments, it is difficult to determine if defense counsel's objection was timely or whether the prosecutor's argument was fair comment or response to defense counsel's closing argument. Nevertheless, the Court will endeavor to address this issue based on the sidebar and its recollection of the arguments.

The Court's recollection is defense counsel argued that the penetrating trauma that Dr. Lewis observed in her examination of the victim could have been caused by the victim having sex with a boyfriend. In response to that argument, the prosecutor made some comment to the effect of where is the proof that she had sex with anybody else or no one came into court and said that they had sex with the victim. Defense counsel did not object at the time this type of comment was made, but waited until the prosecutor completed her closing argument, and then objected and requested a mistrial.

Initially, the Court notes that the combination of waiting until the end of the prosecutor's closing argument and the failure to have the closing arguments of both counsel transcribed might result in a waiver of this issue. Waiting until the end of the prosecutor's closing argument does not result in waiver, so long as two conditions are met: (1) there is no factual dispute over the content of the prosecutor's argument; and (2) counsel objects immediately after closing argument with sufficient specificity to give the court the

opportunity to correct the prejudicial effect of the improper argument. Commonwealth v. Rose, 960 A.2d 149, 155 (Pa. Super. 2008), citing Commonwealth v. Adkins, 468 Pa. 465, 364 A.2d 287, 291 (1976). Since there is no transcript of the prosecutor's closing argument, the Court cannot say that Segraves has met the first condition.

Even if this issue has been properly preserved for appeal, the Court does not believe a mistrial was necessary or appropriate under the facts and circumstances of this case.

It is well-settled that the review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. 'An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will...discretion is abused.' A trial court may grant a mistrial only 'where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict.' A mistrial is not necessary where cautionary instructions are adequate to overcome prejudice.

Commonwealth v. Chamberlain, 30 A.3d 381, 422 (Pa. 2011)(citations omitted).

Furthermore, not every unwise, intemperate or improper remark by a prosecutor justifies the grant of a mistrial or a new trial. Commonwealth v. Chmiel, 30 A.3d 1111, 1181 (Pa. 2011).

A prosecutor may make fair comment on the admitted evidence and may provide fair rebuttal to defense arguments. Even an otherwise improper comment may be appropriate if it is in fair response to defense counsel's remarks. Any challenge to a prosecutor's comment must be evaluated in the context in which the comment was made.

Id., citing Commonwealth v. Cox, 603 Pa. 223, 983 A.2d 666, 687 (Pa. 2009).

"Prosecutorial misconduct does not occur unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true

verdict.” Rose, supra., citing Commonwealth v. Chmiel, 585 Pa. 547, 889 A.2d 501, 542-44 (2005), cert. denied, 549 U.S. 848, 127 S.Ct. 101 (2006).

A mistrial was not warranted in this case for several reasons. First, it appears that the prosecutor’s arguments were a fair response to defense counsel’s closing argument. Second, the Court believes the prosecutor indicated she did not mean to imply that the defendant had any burden of proof when she made the argument. Finally, the Court, in its charge to the jury, instructed the jurors that: the defendant is presumed innocent; the accused does not have to prove anything; the Commonwealth always has the burden to prove each element of the crime charged beyond a reasonable doubt; the speeches of counsel are not evidence; and the jury’s finding must have a solid basis in the evidence. N.T., January 20, 2011, at pp. 108, 110, 112-113. Moreover, the prosecutor’s comments were not designed to encourage bias or hostility toward Segraves, but to implore the jury to base its verdict on the evidence presented in the courtroom.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
Kirsten Gardner, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)