

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
	:	
<b>v.</b>	:	<b>No. 1450-2008</b>
	:	<b>CRIMINAL DIVISION</b>
<b>ADAM WOODRING,</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

On September 12, 2011, the Defendant filed a *Pro Se* Post Conviction Relief Act (PCRA) Petition. Donald Martino, Esq., Court appointed counsel for the Defendant, filed an Amended Motion for Post Conviction Collateral Relief. For the following reasons, the Court finds that the Defendant does not raise a genuine issue concerning any material fact and therefore no purpose would be served by holding any further proceedings.

***Background***

On August 26, 2008, Adam Woodring (Defendant) was charged with four (4) counts of Involuntary Deviate Sexual Intercourse, two (2) counts of Aggravated Indecent Assault, four (4) counts of Indecent Assault, one (1) count of Endangering the Welfare of Children, and two (2) counts of Unlawful Sexual Contact with Minors. On September 22, 2009, a jury trial conducted by this Court resulted in a mistrial because the jury was unable to make a decision on guilt. Defendant's second trial was conducted by Judge Kenneth D. Brown.<sup>1</sup>

On October 27, 2009, Judge Brown entered an Order dismissing Count two, Involuntary Deviate Sexual Intercourse; Count three, Aggravated Indecent Assault; Count nine, Involuntary Deviate Sexual Intercourse; and Count ten, Aggravated Indecent Assault. The second jury trial took place on October 27, 2009 and October 29, 2009. The jury returned a verdict of guilty on

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<sup>1</sup> Judge Brown retired from active judicial service on December 31, 2009.

Count one, Involuntary Deviate Sexual Intercourse; Count four, Indecent Assault; Count five, Indecent Assault; Count six, Endangering Welfare of Child; Count eight, Involuntary Deviate Sexual Intercourse; Count eleven, Indecent Assault; and Count twelve, Indecent Assault.

The Defendant was sentenced to Count one, Involuntary Deviate Sexual Intercourse, to seven (7) to fourteen (14) years. The Defendant was then sentenced on Count nine, Involuntary Deviate Sexual Intercourse, to seven (7) to fourteen (14) years, which was to run consecutive to Count one. Defendant received one (1) to five (5) years each for Count five and Count twelve, Indecent Assault, which both ran concurrently with Count one. For Count six, Endangering the Welfare of a Child, the Defendant received four (4) years of probation to be served consecutively to Counts one and nine. The Defendant received an aggregate sentence of fourteen (14) to twenty-eight (28) years in a State Correctional Institution followed by four (4) years of probation.

Defendant filed Post Sentence Motions, which were denied by Judge Brown on February 19, 2010. On March 10, 2010, Defendant filed a Notice of Appeal with the Superior Court of Pennsylvania, which was denied on January 14, 2011. Defendant filed a timely Post Conviction Relief Act (PCRA) Petition on September 12, 2011. On September 19, 2011, Todd Leta, Esquire was appointed to represent the Defendant. The case was then transferred to Donald Martino, Esquire on May 24, 2012.

### ***Discussion***

The Defendant alleges two (2) issues in his Amended Motion for Post Conviction Collateral Relief: 1) trial counsel was ineffective for failing to call character witnesses or to discuss the importance of calling character witnesses with the Defendant, and 2) trial counsel was ineffective for failure to raise that the sentence imposed under Count nine of the information

was barred by the Double Jeopardy Clause of the United States Constitution and Appellate Counsel was ineffective for failing to raise this issue on appeal. For the following reasons, the Court finds that the Defendant cannot seek relief under the PCRA.

***Trial counsel was ineffective for failing to call character witnesses or to discuss the importance of calling character witnesses with the Defendant***

The Defendant contends that his counsel was ineffective for not calling character witnesses to specifically testify in regards to his truthfulness and non-violent reputation. To make a claim for ineffective assistance of counsel, a defendant must prove the following: (1) an underlying claim of arguable merit; (2) no reasonable basis for counsel's act or omission; and (3) prejudice as a result, that is, a reasonable probability that but for counsel's act or omission, the outcome of the proceeding would have been different. Commonwealth v. Cooper, 941 A.2d 655, 664 (Pa. 2007) (citing Commonwealth v. Carpenter, 725 A.2d 154, 161 (1999)). A failure to satisfy any prong of this test is fatal to the ineffectiveness claim. Cooper, 941 A.2d at 664 (citing Commonwealth v. Sneed, 899 A.2d 1067, 1076 (2006)). Further, Counsel is presumed to have been effective. Id. “To establish ineffectiveness for failure to call a witness, a defendant must prove the witness existed and was available to testify for the defense, counsel knew or should have known the witness existed, the witness was willing to cooperate, and the proffered testimony’s absence denied him a fair trial.” Commonwealth v. Small, 980 A.2d 549 (Pa. 2009); Commonwealth v. Clark, 961 A.2d 80 (Pa. 2008).

First, this Court will determine whether the Defendant could have used character testimony to establish truthfulness. After doing so, the Court will consider testimony to establish non-violent character. A defendant in a criminal case may introduce evidence of his reputation for truthfulness in two circumstances. First, the accused may introduce evidence of his truthful

character if the trait of truthfulness is relevant to the crime with which he has been charged. Pa.R.E. 404(a); Commonwealth v. Lemanski, 529 A.2d 1085, 1096 (Pa. Super. 1987); Commonwealth v. Thomas, 127 A. 427, 428 (Pa. 1925). Second, the accused may introduce evidence of his truthful character if his reputation for truthfulness has first been attacked by the prosecution. Pa.R.E. 608(a)(2); Commonwealth v. Gwynn, 723 A.2d 143 151 (Pa. 1998).

One's character for truthfulness refers not to suggestions of particular instances of honesty or dishonesty, but rather to one's general reputation in the community for telling the truth. Thus, where the prosecution has merely introduced evidence denying or contradicting the facts to which the defendant testified, but has not assailed the defendant's community reputation for truthfulness generally, evidence of the defendant's alleged reputation for truthfulness is not admissible. Similarly, cross-examination of the defendant that challenges the veracity of his testimony in the particular case, but does not touch upon his general reputation in the community for being truthful, does not open the door to the introduction of good character evidence concerning reputation for truthfulness.

Commonwealth v. Fulton, 830 A.2d 567, 573 (Pa. 2003) (citations omitted).

In Fulton, the Commonwealth tried to establish through live testimony that the victims' version of events was more believable than the defendant's. Id. The Commonwealth, however, did not attack the defendant's general reputation in the community for telling the truth. Therefore, the Commonwealth did not open the door for the defendant to introduce reputation evidence of his truthful character.

Here, the Defendant was charged with the following crimes: Involuntary Deviate Sexual Intercourse; Aggravated Indecent Assault; Indecent Assault; Endangering the Welfare of Children; and Unlawful Sexual Contact with Minors. The trait of truthfulness is not an element nor relevant to any of these crimes.<sup>2</sup> See Commonwealth v. Minich, 4 A.3d 1063, 1072-73 (Pa.

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<sup>2</sup> Commonwealth v. Pressel, 168 A.2d 779, 780 (Pa. Super. 1961) (finding that truthfulness is not pertinent to burglary and larceny); Commonwealth v. Schwenk, 777 A.2d 1149 (Pa. Super. 2001) (determining that truthfulness is not pertinent to aggravated assault and resisting arrest); Commonwealth v. Lemanski, 529 A.2d 1085, 1096 (Pa. Super 2001) (ruling that manufacturing and/or possessing of drugs is not pertinent to truthfulness).

Super. 2010) (finding that truthfulness is not pertinent to various sex offenses including Involuntary Deviate Sexual Intercourse of a person less than 13 years of age and Indecent Assault of a person less than 13 years of age). Therefore, the Defendant can only introduce reputation evidence of truthful character under the Pennsylvania Rules of Evidence if the Commonwealth introduced it first. During the trial this Court can find no indication that the Commonwealth introduced testimony on the Defendant's general reputation in the community for being untruthful. The Commonwealth, merely, challenged the veracity of the defense counsel's account to show that other witness accounts were more believable.<sup>3</sup> In fact, the Defendant never testified. Thus, the Court finds the Defendant was not entitled to character witnesses in the matter of truthfulness.

Now the Court must determine whether the Defendant could have called character witnesses to show the Defendant's reputation as a non-violent person. "In a criminal case, evidence of a *pertinent trait of character* of the accused is admissible when offered by the accused, or by the prosecution to rebut the same." Pa.R.E. 404(a)(1) (emphasis added). Personal violence is shown in cases of assault, carrying concealed weapons, homicide, rape, or train wrecking. Commonwealth v. Stefanowicz, 179 A. 770, 771 (Pa. 1935). In those cases, peaceableness and quietness are pertinent traits of character that may be established through character witnesses. Id. A conviction of the crime must be dependent on there being force or

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<sup>3</sup> One of the statements the Defendant contends questioned his reputation in the community is by Agent William Weber of the Williamsport police Department which was, "You know, through the whole interview with Mr. Woodring I'd asked – you know, go over the allegations with him and explained to him why was Cody so consistent and credible? And why didn't he say he did – a lot more happened, and that sort of thing, and Mr. Woodring never really gave me an answer other than to say he didn't do it." Trial Transcript, 10/27/09, p.203. The other statement was "Okay, based on my – you've done what I call corroborate almost everything Cody says. Okay, where you guys lived at the time, your discipline, things you did, you've corroborated almost everything that Chrissie has said about your behavior, every single thing. The only thing that you deny is this: the inappropriate touching of Cody. It's the only thing that's different." Id. at 212-13.

some form of violence. Id. If the conviction was only dependent on the age of the child then peaceable and quiet character evidence is excluded. Id.

Here, the Defendant was charged and convicted of Involuntary Deviate Sexual Intercourse. A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant:

(1) by forcible compulsion; (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3) who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring; (4) where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance; (5) who suffers from a mental disability which renders him or her incapable of consent; or (6) (deleted by amendment). (7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.

18 Pa.C.S. § 3132. The Information of the charges filed on September 26, 2008 indicates that 18 Pa.C.S. § 3132(a)(6) was the charge, however, this section was deleted in 2002.<sup>4</sup> As indicated by the jury instructions given by Judge Brown, it appears that 18 Pa.C.S. § 3132(a)(7) was the intended subsection that the Defendant was charged and convicted of.<sup>5</sup> The only issue for the jury was whether there was deviate sexual intercourse and not whether there was forcible compulsion or threat of forcible compulsion. Deviate Sexual Intercourse is “sexual intercourse per os or per anus between human beings . . . .” 18 Pa.C.S. § 3101. Therefore, violence or force was not an element of the crime and character evidence of non-violence was not admissible under Pa.R.E. 404(a)(1).

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<sup>4</sup> 2002 Pa. ALS 226. Section (6) stated “who is less than 13 years of age.” 18 Pa.C.S.A. § 3132(a)(6)

<sup>5</sup> The jury instruction states “And what we have done below each count on the form, we have a little explanation to key you in to what the count refers to. So, for instance, the first count on the form, involuntary deviate sexual intercourse, oral sex at the south Williamsport address, and, again, even being a little more specific, the allegation of the commonwealth there is that the Defendant's penis entered the mouth of the victim in the case.” Trial Transcript, 10/28/09, p 45.

Moreover, the remaining charges brought before the jury also did not have force or violence as an element of the crime. For all of the Indecent Assault charges, the Defendant was charged under 18 Pa.C.S. § 3126(a)(7), which states that “[a] person is guilty of indecent assault if the person had indecent contact with the complainant, causes the complainant to have indecent contact with the person . . . and: (7) the complainant is less than 13 years of age.” Indecent contact is defined as “[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person.” 18 Pa.C.S. § 3101. Finally, Defendant was charged and convicted of Endangering Welfare of Children. “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. § 4304(a)(1). Because violence or force was not pertinent to any of the Defendant’s charges, the Defendant was not entitled to bring character evidence of a non-violent reputation. As a result, the Defendant was not denied a fair trial because character evidence of truthfulness and non-violence were not admissible at trial.

***Trial counsel was ineffective for failure to raise that the sentence imposed under Count 9 of the Information was barred by the Double Jeopardy Clause of the United States Constitution and appellate counsel was ineffective for failing to raise this issue on appeal***

The Defendant contends that Count nine was dismissed and by the Defendant being sentenced on Count nine the Double Jeopardy Clause of the U.S. Constitution was violated. Count nine was dismissed in an Order dated October 27, 2009 following the first day of trial. The Defendant was found guilty of Count one, Count four, Count five, Count six, Count eight, Count eleven, and Count twelve. Both Counts eight and Count nine were charges of Involuntary Deviate Sexual Intercourse. In the Sentencing Order dated February 12, 2010, the Defendant

was not sentenced at all on Count eight but rather to Count nine. It appears to this Court that the reference to Count nine by Judge Brown was merely a clerical error. Defendant was found guilty and sentenced only on two counts of Involuntary Deviate Sexual Intercourse, four counts of Indecent Assault, and one count of Endangering Welfare of Child. The Defendant was not prejudiced by the incorrect count number on the Sentencing Order. Therefore, this Court finds that the Defendant is not entitled to relief and that the issue lacks merit.



**ORDER**

**AND NOW**, this \_\_\_\_\_ day of August, 2012, the Defendant and his attorney are notified that it is the intention of the Court to dismiss the Defendant's PCRA petition because it does not raise a genuine issue concerning any material fact. The Court will dismiss Defendant's claim unless Defendant files an objection to that dismissal within twenty days (20) of today's date.

By the Court,

Nancy L. Butts, President Judge

xc: Ken Osokow, Esq.  
Donald Martino, Esq.