

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : NO.: CR-347-2011
vs. :
WARREN LOCKE, :
Defendant : Post Sentence Motions

OPINION AND ORDER

Before the Court is Defendant's Post Sentence Motion which includes a Motion for Judgment of Acquittal and separate Motions for a New Trial. The Post Sentence Motion encompassing the three separate Motions was filed on October 8, 2012.

On September 28, 2012, Defendant was sentenced to an aggregate term of incarceration in a State Correctional Institution, the minimum of which was twenty (20) years and the maximum of which was forty (40) years. Defendant was sentenced on twenty-two (22) different counts including Rape of a Child, Statutory Sexual Assault, Involuntary Deviate Sexual Intercourse with a Child, Indecent Assault of a Child, Unlawful Contact with a Minor and Corruption of Minors. Defendant was convicted of these counts following a jury trial.

Defendant's Motion for Judgment of Acquittal attacks the jury's guilty verdict with respect to Count 20, Unlawful Contact with a Minor. Defendant argues that there was no evidence presented that any communication was exchanged between the Defendant and victim and as a result, the Court should direct an acquittal with respect to that count.

The conviction on this Count arises out of an incident that occurred on or

about December 19, 2010 when Defendant assaulted the minor victim by fondling the minor victim's penis.

Diana Harrison, the victim's mother testified that on the date in question while coming out of church services, Defendant indicated to her that he was going to Kmart and that the child asked if he could go as well. As a result, Ms. Harrison allowed her son to go with Defendant.

The minor victim testified that Defendant advised him that he was going to Kmart and asked if the minor victim wanted to go with him. (Transcript, p. 14). They traveled to Kmart together after which they traveled to Defendant's house. (Transcript, p. 14). It is a reasonable inference that Defendant communicated to the minor that after Kmart they would be going to Defendant's apartment, because the minor asked his mother if they could go to Defendant's apartment after Kmart. (Transcript, p. 15). It is important to note that the minor was a passenger in a vehicle being driven by Defendant both to Kmart and then to Defendant's house. Once in the house, Defendant and the minor went to Defendant's bedroom where they wrapped presents and watched a movie. (Transcript, pp. 14-16). It was while watching the movie that the minor was assaulted by Defendant. Defendant unbuttoned the minor's pants and warned him that if he "told," Defendant would just deny it. (Transcript, pp. 17, 47).

Defendant contends that because there was no communicative message, the Commonwealth did not prove beyond a reasonable doubt that Defendant unlawfully communicated with the minor for purposes of engaging in the prohibited sex acts. The Court

cannot agree for two reasons.

First, there was in fact oral communication between Defendant and the minor as testified to by the minor child. Obviously, the purpose of the communication was to entice the minor to be alone with Defendant, eventually at Defendant's residence, in order that the minor could be sexually assaulted.

Secondly, even if there is insufficient evidence to demonstrate oral communication, the statute prohibits "contact" with a minor. 18 Pa. C.S.A. § 6318 (a). While the contact must be different than the physical touching element of the indecent assault, Commonwealth v. Evans, 901 A.2d 528, 537 (Pa. Super. 2006), there is more than sufficient evidence that Defendant had unlawful contact with the minor beyond the contact necessary to commit the offense of indecent assault.

The minor would not have known about Kmart, would not have traveled with Defendant in Defendant's car to Kmart, would not have traveled with Defendant from Kmart to Defendant's residence, would not have entered the residence from Defendant's vehicle, would not have eventually gone to Defendant's bedroom to help wrap presents and would certainly not have been in Defendant's bedroom watching movies absent contact by Defendant, either verbal or physical. In order to engage in the assault, it is reasonable to infer that Defendant directed the minor, either verbally or non-verbally, to first travel with him and to eventually be alone with Defendant in Defendant's bedroom where he was positioned to be sexually assaulted. See, for example, Commonwealth v. Velez, 51 A.3d 260 (Pa. Super. 2012).

Accordingly, Defendant's Motion for a Judgment of Acquittal with respect to Count 20, Unlawful Contact with a Minor, shall be denied.

With respect to Defendant's Motions for a New Trial, Defendant first complains that the Court erred in failing to give the standard jury instruction regarding prompt complaints. Specifically, Defendant argues that the language of the Court's instruction was not read in its entirety as set forth in the standard jury instructions.

Contrary to what Defendant argues, however, the Court is not bound to read the jury instruction as it is set forth in the standard jury instructions. "The trial court has broad discretion in phrasing its instructions, and may choose its own wording as long as the law is clearly, adequately, and accurately presented to the jury for its consideration." Commonwealth v. Koehler, 36 A.3d 121, 157 (Pa. 2012) (citations omitted). Further, it "is only when 'the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue' that error in the charge will be found to be a sufficient basis for the award of a new trial." Blicha v. Jacks, 864 A.2d 1214, 1219 (Pa. Super. 2004). (citations omitted). The charge will be found adequate unless "the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error." Id.

A jury may consider evidence of a lack of prompt complaint in cases involving sexual offenses. 18 Pa. C.S. § 3105. The common law has long recognized that the victim of a sexual assault naturally would be expected to complain of assault at the first available opportunity. Commonwealth v. Snoke, 525 Pa. 295, 300, 580 A.2d 295, 297 (1990)

(citations omitted).

A delay in reporting that was either unreasonable or unexplained may raise a question as to the complainant's sincerity. Commonwealth v. Lane, 521 Pa. 390, 397, 555 A.2d 1246, 1250 (Pa. 1989). While the delay in reporting the abuse may be relevant, the Commonwealth is entitled to have the victim explain the circumstances surrounding the incident of sexual abuse and the reasons for delay which enable the factfinder to more accurately assess the victim's credibility. See Commonwealth v. Dillon, 592 Pa. 351, 363, 925 A.2d 131, 139 (2006).

In applying the above-referenced standards, the Court disagrees with Defendant's contention. The charge adequately stated the law and in no way prejudiced Defendant. Indeed, while the charge was not exact, it was the same in all important details to the suggested standard jury instruction. (Transcript, p. 203; SSJI 4.13A). Accordingly, Defendant's Motion for a New Trial on this ground will be denied.¹

Defendant's final assertion of error alleges that the Court erred in permitting the Commonwealth to present prior consistent statements on redirect examination of the minor as they were "outside the scope of cross and direct examination." Furthermore, Defendant alleges that the evidence was not relevant in that there were "no allegations of fabrication."

The Court permitted the evidence of the minor's prior consistent statements to be introduced under Pa. R.E. 613 (c) (1) which allows the introduction of prior consistent

¹ The Court notes that Defendant did specifically object to the jury instruction. If not, Defendant's present claim of error would have been deemed waived. Commonwealth v. Flor, 606 Pa. 384, 998 A.2d 606, 625 (2010)

statements to rebut an express or implied charge of “fabrication, bias, improper influence or motive, or faulty memory.” Normally, evidence of a prior consistent statement is rebuttal evidence, to be introduced after a witness has testified and then accused as stated in Rule 613 (c) (1). However, in cases involving sexual assault, the Commonwealth is permitted to present in its case in chief, evidence of a prompt complaint by the victim because the victim’s testimony is automatically vulnerable to attack by the Defendant as a recent fabrication in the absence of evidence of a hue and cry on his part. Commonwealth v. Dillon, 863 A.2d 597, 602 (Pa. Super. 2004); Commonwealth v. Bryson, 860 A.2d 1101, 1104 (Pa. Super. 2004).

While the defense may not have cross-examined the minor with respect to the prior statements, the areas raised through cross-examination could certainly cause the jury to infer that the recollection of the minor was influenced by other factors. On the whole, the minor was extensively cross-examined with respect to his ability to remember the incident and the details of such. See Commonwealth v. Paolello, 542 Pa. 47, 73, 665 A.2d 439, 452 (1995); Commonwealth v. McEachin, 371 Pa. Super. 188, 537 A.2d 883, 890-91, appeal denied, 520 Pa. 603; 553 A.2d 965 (1988).

As well, defense counsel sought to convey the impression that the minor testified to obtain favorable treatment as a result of being in trouble generally and of being immediately accused of committing the offense himself against his younger cousin. (Transcript, pp. 38-41). The minor was also extensively cross-examined about never previously telling anyone about the abuse, specifics that he did not relate to others during the

(failure to object to jury instructions results in waiver of any claim of error pertaining to such instructions).

investigation, whether he was telling the truth in general, and his prior testimony.

(Transcript, pp. 42-45, 48, 53-54, 58). Clearly, the minor's credibility and motives were in issue. See, for example, Commonwealth v. Gaddy, 468 Pa. 303, 362 A.2d 217 (1976).

The fact that the specific prior consistent statements may have been permitted without being testified to during cross-examination is also without merit. "[W]here the defense is centered upon attacking a witness's credibility consistent with a basis that would permit introduction of a prior consistent statement to rehabilitate, the trial court is afforded discretion to allow anticipatory admission of a prior statement." Commonwealth v. Wilson, 580 Pa. 439, 456-57, 861 A.2d 919, 930 (2004). Moreover, not only does the Court have broad discretion in the interest of justice to permit areas of inquiry beyond those set forth in cross-examination, but "matters affecting credibility" may always be addressed. See Pa. R.E. 611 (b); Commonwealth v. Green, 525 Pa. 424, 454, 581 A.2d 544, 559 (1990) (Because witness may be cross-examined as to conduct generally or specifically which may tend to discredit him, it follows that the "truth of his testimony" may be reestablished on redirect); Commonwealth v. Brown, 462 Pa. 578, 591, 342 A.2d 84, 91 (1975).

Accordingly, Defendant's Motion for a New Trial on this ground will also be denied.

ORDER

AND NOW, this ____ day of December, 2012, following an argument and

review of the relevant transcript, the Court **DENIES** Defendant's Post Sentence Motion. The Court notes that further argument on this matter was scheduled for January 22, 2013. Upon stipulation of counsel for the parties, said argument is cancelled. The court reporter is directed to provide the requested transcripts to counsel for both parties.

By The Court,

Marc F. Lovecchio, Judge

cc: DA (AMK)
PD (WM)
Gary Weber, Lycoming Reporter
Work File