IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH,	**: No. CR-528-2010**
Appellant	**:**
vs.	**: CRIMINAL**
	:
CHRISTOPHER INGRAM,	**:**
Appellee	**: Rule 1925(a) Opinion**

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 November 13, 2012 Order which, among other things, denied the portion of the Commonwealth's motion in limine which sought to admit the transcripts of certain dependency proceedings at Defendant's trial, and its December 11, 2012 Order which denied the portion of the Commonwealth's motion in limine that sought to introduce into evidence Defendant's prior crimen falsi convictions.

By way of background, Defendant was charged by Information filed on April 29, 2010, with one count of aggravated assault, one count of simple assault and one count of endangering the welfare of children. Defendant is alleged to have knowingly or recklessly caused injuries to his then seven (7) week old infant son. The Commonwealth alleges that the son received multiple metaphyseal fractures to both of his legs, a fracture to his right arm, a fracture to his big toe, multiple bruises to his facial area and a torn frenulum, all while in the care and custody of Defendant, Defendant's then girlfriend or both of them.

By Opinion and Order dated October 5, 2010, the Court granted Defendant's petition for habeas corpus and dismissed the charges. The Commonwealth filed a timely appeal on October 12, 2010.

In a memorandum decision filed on October 24, 2011, the Superior Court vacated the order granting Defendant's petition for habeas corpus and remanded the case for further proceedings consistent with the decision. While the Superior Court agreed with the trial court that the evidence failed to establish that Defendant was alone with the infant when the infant sustained the fractures to his limbs and torn frenulum, the Superior Court concluded that the sole custody inference applied with respect to the bruising to the infant's face and head, and that the Commonwealth established a prima facie case with respect to the crimes charged. Defendant subsequently filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on June 20, 2012. The case was remanded to the trial court on July 16, 2012.

On November 2, 2012, the Commonwealth filed a motion in limine which, among other things, requested that the court admit transcripts of statements made by Defendant during prior dependency proceedings and sought to admit Defendant's prior crimen falsi convictions. The court denied the Commonwealth's motion to admit transcripts on November 13, 2012. The Commonwealth appealed the Court's Order on December 13, 2012. The Court ordered the Commonwealth to file a concise statement of errors on appeal, to which the Commonwealth responded on December 26, 2012.

The Court denied the request to admit crimen falsi convictions on December 11, 2012. The Commonwealth filed a motion for reconsideration on December 18, 2012, which the Court denied on January 4, 2013. The Commonwealth also appealed this decision.

On appeal, the Commonwealth has asserted the following errors in its 1925(b) statements: (1) the trial court erred when the court held that Defendant's voluntary

relinquishment of custody, his agreeing to supervised visits, and his agreeing that the injuries to the child happened while the child was in the care, custody and control of the parents were not admissions of material facts; (2) the trial court erred when it held that even if Defendant's statements and his agreement to certain custody arrangements were admissions of material facts, their probative value would be outweighed by their prejudicial impact; (3) the trial court erred when it held that Defendant's statements and his agreeing to certain custody arrangements would cause the jury to speculate, and to be distracted and confused; and (4) the trial court erred in its denial of the Commonwealth's motion to admit evidence of prior crimen falsi convictions when the court held that the Commonwealth had conceded that such evidence was not admissible at a hearing several years ago and was thus precluded from seeking to admit any evidence concerning Defendant's prior record at trial; the court erred in making this determination even after stating on the record that pursuant to the arguments made by the Commonwealth's attorney, the evidence was admissible against Defendant.

The Commonwealth first asserts that the court erred in finding that the stipulations from the December 16, 2009 and January 13, 2010 dependency proceedings were not admissions of material facts. The court cannot agree.

Dependency proceedings were held on December 16, 2009 and January 13, 2010. The Commonwealth contended that certain stipulations from those proceedings should be admissible at Defendant's criminal trial.

At the December 16, 2009 proceedings, Dr. Paul Bellino testified on direct examination about the child's injuries, but there was insufficient time for cross-examination. The child was already in the custody of the maternal grandmother. Transcript, December 16,

2009, at p. 60. Supervised visitation with the parents would continue, but the visits no longer needed to take place at the Children and Youth Center in the Sharwell Building. Id. at pp. 60-63.

On January 13, 2010, the parties elected not to finish the hearing.[1] Instead, they entered a stipulation. The Dependency Court then noted that there was a basic agreement reached in which the Court would enter an Order finding the infant to be dependent. Further, while the Court would not make any finding that there was any abuse, there was an agreement that while the child was in control and physical custody of one or both of the parents the child suffered the injuries described by Dr. Bellino in his testimony on December 9, 2009. The Dependency Court further advised Defendant that the attorney would be stating the details of the agreement and that when the agreement was finalized on the record, he would enter an Order accepting and approving it.

The Dependency Court further noted that the Children and Youth Agency would be reserving the right to come back at a future time to pursue allegations of physical abuse to the child and to argue that Defendant was legally responsible for that physical abuse. The Court further noted that "an evidentiary hearing as to your responsibility for physically abusing the child is going to be deferred and will not be pursued." Commonwealth's Exhibit 2, p. 9. The Court then asked the Defendant if he understood his rights as explained and his right to counsel to which the Defendant answered "yes, your Honor." Id., p. 10.

A review of the transcript, attached as Exhibit "D" to the Commonwealth's motion is appropriate. At the beginning of the proceedings, the Court asked Attorney Rude if

[1] There are two different transcripts from January 13, 2010. One consisted of 12 pages and was marked as

he would "state the stipulation." Mr. Rude responded as follows: "Your Honor, the stipulation would be that the parents would agree to voluntary services through Children and Youth Services according to the Family Service Plan that was presented to them by Children and Youth Services, dated – the Family Service Plan covering the period of 11-18-2009 to 5-18-2010 (this matter shall be reviewed in three months, however, it should be ordered or scheduled by Court Administration). The parties further stipulate that the current custody arrangement will continue with the following amendments…." Exhibit D, p. 2. The Court interrupted noting that the physical custody of the minor child would remain with the maternal grandmother and grandfather to which Mr. Rude responded "and by agreement of the parties, the paternal grandparents, Lawrence and Sherril Ingram shall also be approved supervisors of visitation of the minor child. The supervision by Sherril Ingram shall take place after written verification of her position, sent to attorney for the child, John Pietrovito, through Kyle Rude, Esquire. I believe that states the basis of the stipulation." Id. at pp. 2-3.

The Court then added: "The provisions of the Order of December 16, 2009 providing that the parents may have supervised contact with the child-- excuse me, that the parents may only have supervised contact with the child will continue in effect, and that at all times that the child is in the physical presence of either of the parents, one or other of the maternal grandparents, Michelle or Michael Croucher or the maternal great aunt, Jennifer Eck, and/or the paternal grandparents, Lawrence and Sherril Ingram, shall be required and such supervising person shall not let the child alone in the presence of either parent. At[sic] the time for supervised contact by the parents may occur at such time, places, and frequency

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Commonwealth's Exhibit 2 and the other consisted of 9 pages and was attached to the Commonwealth's motion

as agreed upon by those providing supervision and caring for the physical custody of the child. The Agency shall be kept advised as to the manner, time, and place of these contacts and frequency thereof. Now, with that addition that I've done, concerning the supervision which brings our December 16th Order into this-- so it makes it clear so we have it in one document, are you satisfied with that?" Mr. Rude responded, "Yes, your Honor."

The Court then directed the Agency's attorney to make any additions to the stipulation. The Agency attorney responded: "We would note that the goal would be reunification with the parents. We would also note that any findings of aggravated circumstances will be deferred by agreement of the parties. And, I believe, Mr. Rude had said this right off the bat, but there is a finding of dependency based upon, as the Court had noted at the outset of the statement, that there were injuries to the child while the child was in the custody, care, and control of the parents, and that it is the basis for the dependency." Exhibit D, p. 4. The Court then added that the injuries were identified by Dr. Bellino at the last hearing. The Agency attorney responded, "Yes, your Honor. We're also asking for a CASA to be appointed and for approval of the Family Service Plan as noted by Mr. Rude. The only-- if I may at this point venture into another area your Honor?" Id.

After a discussion that was held off the record, the Court then responded, "It's my understanding then with the clarification by Mr. Taylor that our finding of dependency is such as to require the parents to comply with their obligations under the Family Service Plan. They would not be voluntary participants in it in that Mr. Rude's use of the word as he described was that they are voluntarily agreeing to the finding of the dependency. Id., p.5.

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in limine as Exhibit D.

Shortly thereafter, the Court addressed Defendant, stating as follows: "you've heard the statement, sir, do you understand it?" Defendant responded, "Yes, your Honor." Id. The Court then asked Defendant if he was willing that it be entered as an Order of Court and Defendant answered, "Yes." Id. at pp. 5-6).

Further discussions were held with respect to an acknowledgement of the child's injuries by a relative and the proceedings were then concluded following the entry of an Order by the Court.

The Commonwealth contends, based upon the aforesaid transcripts, that the jury in this case was entitled to hear as an admission by Defendant that: the infant suffered the injuries as described by Dr. Bellino; the injuries occurred while the child was in the custody, care and control of Defendant and Ms. Croucher, or either one of them; Defendant agreed to a finding of dependency; Defendant agreed to only supervised contact with the child; Defendant agreed that the child would not be left alone in the presence of Defendant; a Court Appointed Special Advocate (CASA) would be appointed; and Defendant was required to comply with a Family Service Plan. The Commonwealth argues that these admissions are relevant in determining whether Defendant violated a duty of care, thus endangering the welfare of the child.

The Court disagrees for numerous reasons.

Obviously, a defendant's out-of-court statement or admission may be used against him at trial as an exception to the hearsay rule. Commonwealth v. Edwards, 588 Pa. 151, 903 A.2d 1139, 1157-1158 (Pa. 2006).

While there does not appear to be any authority mandating that a statement or admission must be against the party's interest or even based on personal knowledge, to constitute an admission it must still represent a clear and unambiguous statement of material fact. See Dible v. Vegley, 417 Pa. Super. 302, 612 A.2d 493, 499 (1992).

In this particular instance, it is difficult if not impossible to determine what material fact or facts Defendant made or admitted. Defendant was asked if he "heard the statement and did he understand it." Defendant answered, "Yes, your Honor." It is certainly unclear to what statement the Court was referring and if Defendant was indicating only that he heard the statement, only that he understood it or perhaps both. Indeed, prior to the Court asking Defendant the question, statements were made by Mr. Rude, the attorney for Children and Youth, the Court, and even the attorney for the child. Further, the Court asked Defendant if he was willing that it be entered as a Court Order to which the Defendant responded "yes." Again, it is unclear as to what the Court was referring and more importantly to what Defendant was assenting.

The contention by the Commonwealth that these statements by Defendant constitute admissions that Defendant violated a duty of care, thus endangering the welfare of his child begs logic. Given the lengthy and convoluted way the stipulation was placed on the record, it is entirely possible that, in order to be able to see his child more frequently and outside the presence of Children and Youth staff, [2] Defendant was only admitting in hindsight

[2] Contrary to the Commonwealth's assertions, Defendant was not voluntarily relinquishing his child to Children and Youth Services. At the time the stipulation was entered, the child had been placed in the custody of the maternal grandmother and Defendant could only see his son at the Children and Youth headquarters in the Sharwell Building. See Commonwealth's Exhibit C (transcript dated December 16, 2009) at pp. 2, 60-63. Although Defendant still could only have supervised visitations with the child, by entering the stipulation Defendant and his family members were getting more opportunities to see the child, not less.

that the child suffered the injuries described by Dr. Bellino when the child was in the care and control of Ms. Croucher. In fact, it appears to the court that, more than anything else, the stipulation was a means for both sides to avoid a hearing and essentially preserve the status quo of supervised visitations pending resolution of the criminal charges.

Moreover, even if the statements qualify as admissions, it does not necessarily make them admissible. Evidence is admissible only if it is relevant. Pa. R.E. 402; Kersey v. Jefferson, 791 A.2d 419, 425 (Pa. Super. 2002); Commonwealth v. Schwenk, 777 A.2d 1149, 1156 (Pa. Super. 2000), appeal denied, 567 Pa. 740, 788 A.2d 375 (2001). "Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact." Commonwealth v. Williams, 58 A.3d 796, 800 (Pa. Super. 2012), citing Commonwealth v. Fransen, 42 A.3d 1100, 1106 (Pa. Super. 2012).

The "stipulation" did not tend to establish, make more or less probable, or even support a reasonable inference or presumption that Defendant attempted to cause, or intentionally, knowingly or recklessly caused serious bodily injury or bodily injury to his son. It also did not tend to establish, make more or less probable or support a reasonable inference or presumption that Defendant, being a parent of the child, knowingly endangered the welfare child by violating a duty of care, protection or support. What is particularly relevant to this inquiry is that during the January 13, 2010 proceeding, the Dependency Court specifically advised Defendant and he agreed that the agreement was entered without any finding of any aggravating circumstance, without any finding that there was any abuse and without any finding as to whether one or both of the parents were legally responsible for any physical

abuse. Commonwealth's Exhibit 2, pp. 8-9. Moreover, in light of these statements by the Dependency Court, which were made prior to Defendant agreeing to the "stipulation," it would be patently unfair to permit the Commonwealth to introduce the "stipulation" and utilize it as if Defendant admitted that he either caused the injuries or that the child's mother caused the injuries and Defendant failed to protect the child.

Even if the evidence is relevant it may be excluded if its probative value is outweighed by its potential prejudice. Williams, supra. Unfair prejudice is defined as a "tendency to suggest a decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Sprague v. Walter, 441 Pa. Super. 1, 39, 656 a.2d 890, 909 (1995), appeal denied, 543 Pa. 695, 670 A.2d 142 (1996).

The Court does not hesitate in concluding that admissibility of the statements by Defendant, which are marginally probative at best, would be substantially outweighed by the danger of unfair prejudice. Instead of deciding whether Defendant actually caused the child's injuries or whether he failed to seek appropriate medical attention for injuries caused by Ms. Croucher, the jury could easily assume that he committed the misconduct by agreeing that the child was dependent, agreeing that all visits would be supervised, agreeing to a Family Service Plan and agreeing to a Court Appointed Special Advocate.

Finally, the Court has the discretion to deny the admissibility of the statements, despite their alleged relevancy, if it would cause the jury speculate, to be distracted or confused. The Court finds that all of these risks would be high if the alleged admissions were admitted. Instead of focusing on whether the Commonwealth has proven its each and every element of the charges beyond a reasonable doubt, the jury would be distracted trying to

figure out why Defendant would have agreed to a finding of dependency, to follow a Family Service Plan and to supervised visits if he never did anything. The jury would speculate as to why Defendant did not fight the dependency claim, because they would not understand the different burden of proof and the practical problems involved with such. Moreover, the jury would be confused trying to differentiate the meaning of what Defendant actually admitted versus what the Commonwealth claims he admitted.

In the final analysis, the Court contends that its ruling denying the Commonwealth's motion in limine and precluding the evidence is not only soundly based on the law but appropriately prevents the Commonwealth from trying to obtain a conviction in matters clearly unrelated and extremely prejudicial to Defendant.

The Commonwealth also contends that the court erred in denying the portion of its motion in limine which sought to introduce Defendant's prior crimen falsi convictions. Again, the court cannot agree.

As part of his omnibus pretrial motion, Defendant filed a motion in limine seeking to preclude the Commonwealth from introducing his prior criminal record into evidence. Defendant's Omnibus Motion for Pre-trial Relief, page 8, paragraphs 31-33. The basis for this motion was some or all of the convictions were barred by Pa.R.E. 609(b), Commonwealth v. Randall, 515 Pa. 410, 528 A.2d 1326 (1987), and Commonwealth v. Jackson, 526 Pa. 294, 585 A.2d 1061 (1991). During the hearing and argument on this motion, the Commonwealth conceded that it couldn't bring in anything regarding the Defendant's prior criminal record. Transcript, June 22, 2010, at pp. 47-49.

The Commonwealth contended that the Court misconstrued the transcript and that it was only conceding that it would not utilize Defendant's prior criminal convictions as prior bad acts evidence under Rule 404(b). It is the Commonwealth's argument, though, that misconstrues the transcript.

There were two motions in limine related to Defendant's prior criminal history. The motion in limine that began on page six of Defendant's omnibus motion related to a statement Defendant made during the investigation to the effect that he would be the "prime suspect" because of his prior criminal history. The motion in limine on page 8 sought to preclude the Commonwealth from using Defendant's criminal convictions under Pa.R.E. 609. In response to defense counsel's argument on the "prime suspect" motion in limine, the attorney for the Commonwealth stated:

> In the interest of brevity, I of course cannot get any bad acts in of the Defendant, the fact that he was addicted to Percocet or that his criminal record was the reason they were looking at him.
>
> Your Honor, I would just correct Defense on the issue—I mean as I read the testimony by Dr. Molino [sic] at Geisinger, the Defendant said 'I guess that makes me prime suspect number one.' Absolutely zero about his criminal record or anything else. So to the extent that the Court wants to look at that record in deciding that issue, I think you will find that's the case.

Transcript, June 22, 2010, p. 47, lines 8-20. The Court then sought to clarify whether the Commonwealth was just conceding it would not utilize Defendant's prior criminal history with respect to the "prime suspect" motion in limine or whether it was also conceding the motion in limine that claimed the convictions were barred under Pa.R.E. 609(b). The rest of the discussion relevant to this issue is as follows:

> THE COURT: Alright, let me just backtrack somewhat. So if we look at the Defendant's motion in limine, you will agree that you can't

bring in anything regarding the Defendant's criminal record, prior criminal convictions. None of them are admissible under our rules of evidence or otherwise at this point.

MS. KILGUS: At this point Your Honor.

THE COURT: Okay.

MS. KILGUS: And also with regard to his consultation, whether or not, why he got an attorney, we can't talk about that.

THE COURT: Right.

MS. KILGUS: I would agree to that.

THE COURT: Alright. **So you'd agree to what—you agree on the motions in limine set forth on pages eight, nine and ten?**

MS. KILGUS: **Correct.**

THE COURT: The only one we are arguing really arguing about at this point then is the motion in limine set forth on page six. And I guess that the Commonwealth's position is that--well okay.

MR. LAPPAS: I think we are going to have to cite to the preliminary hearing record.

THE COURT: I think you're going to have to cite to exactly the statement that you contend, because it is different, at least in the Court's opinion, it is different to say, "I guess that makes me prime suspect number one," versus, "I guess I have an arrest record and that makes me prime suspect number one."

MR. LAPPAS: I understand. Just so the record is clear, the motion for writ of habeas corpus is obviously under contention, we will brief that.

THE COURT: The motion to sever. As is the motion in limine to exclude statements.

MR. LAPPAS: The rest of them are—

THE COURT: Conceded by the Commonwealth.

Transcript, June 22, 2010, at pp. 47-49(emphasis added). Neither Defendant's motion in limine nor the Court's inquiries limited the discussion to 404(b) evidence. When Ms. Kilgus commented about bad acts, she was discussing the "prime suspect" motion in limine; not the motion in limine under Rule 609(b) on page 8 of Defendant's omnibus motion. Although the motion in limine on page 8 did not specifically utilize the word impeachment, it referenced Rule 609 (which is entitled "Impeachment by evidence of conviction of crime"), as well as case

law concerning the admissibility of convictions that are more than 10 years old. Therefore, the Court rejected the Commonwealth's contention that it was only conceding it would not use Defendant's convictions as prior bad acts evidence under Rule 404(b).

Equity also did not favor allowing the Commonwealth to renege on its concession. For over two years, Defendant believed that the Commonwealth did not intend to introduce his prior criminal history at trial for any purpose whatsoever. Prior to the pre-trial conference, which was held on or about October 30, 2012, Defendant had no idea that his ability to testify in his own defense might be hampered by the introduction of his prior criminal record for impeachment purposes. In this case, the introduction of prior convictions for impeachment could radically alter Defendant's trial strategies and tactics. When the Commonwealth filed its motion in limine on November 2, 2012, it was less than two weeks until jury selection.[3]

The court also did not rule that the convictions would have been admissible if the Commonwealth hadn't conceded the issue. Instead, the court indicated that it was inclined to rule in the Commonwealth's favor and it tended to agree with the Commonwealth. Transcript, November 13, 2012, at p. 31. This issue, though, was more complex than the Commonwealth made it seem.

On January 24, 2000, Defendant entered a guilty plea to multiple charges, including seven counts of burglary under 99-11745 (which in CPCMS would be CP-41-CR-1745-1999) and twenty-one counts of burglary and four counts of theft under 99-11746

[3] Jury selection was scheduled for either November 13, 2012 or November 15, 2012. The Court believes jury

(which in CPCMS would be CP-41-CR-1746-1999).[4] On June 29, 2001, Defendant was re-sentenced to an aggregate sentence of 18 to 36 months of incarceration, consisting of three consecutive 6 to 12 month sentences for three counts of burglary under 99-11745, followed by five years of probation for burglary under 99-11746. Defendant received concurrent sentences on the remaining convictions. Defendant also received credit for time served from October 28, 1999 to December 9, 1999 and from March 21, 2000 onward.

On July 28, 2004, Defendant was brought before the Honorable Nancy L. Butts for a preliminary probation violation hearing under 99-11746. Bail was set at $10,000. Defendant was unable to post bail until August 18, 2004, so he was incarcerated in the Lycoming County Prison from at least July 28, 2004 through August 18, 2004. At his final probation violation hearing on November 3, 2004, Defendant's original sentence was revoked, but he was resentenced to another five years of probation.

The Commonwealth argues that the all of the crimen falsi convictions in both cases are per se admissible because ten uninterrupted years have not elapsed since Defendant's release from confinement. The Court cannot agree.

At the time the Court ruled on the Commonwealth's motion, Rule 609 of the Pennsylvania Rules of Evidence stated in relevant part:

> **(a) General rule.** For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, shall be admitted if it involved dishonesty or false statement.

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selection was originally scheduled for November 13, but there was some scheduling problem and it was moved to November 15.

[4] Defendant was originally sentenced on March 21, 2000, but he filed a Post Conviction Relief Act (PCRA) petition, which resulted in Defendant being re-sentenced on June 29, 2001.

> **(b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Pa.R.E. 609(a) and (b).

When the Commonwealth filed its motion on November 2, 2012, it was clearly more than 10 years from the date of Defendant's convictions. According to the Commonwealth's motion, Defendant was released from confinement under 99-11745 "no later than his max date which would have been approximately January 2003." Commonwealth's motion in limine, page 9, paragraph 7. This, however, does not indicate when Defendant was actually released from confinement. Inmates frequently get paroled. If the Commonwealth's calculations regarding Defendant's max date are correct, Defendant would have been eligible for parole and could have been released from confinement as early as June of 2001. The Commonwealth did not present any evidence to show when Defendant was actually released from confinement.

Under 99-11746, all the sentences of confinement were for terms of 6 to 12 months or less and were to be served concurrently to case 99-11745. Therefore, Defendant maxed out on all of those sentences on or about March 21, 2001.[5] On two counts of burglary, Defendant was sentenced to five years of probation. This probationary sentence was to be

[5] Although Defendant was not re-sentenced until June 29, 2001, his original sentencing date was March 21, 2000 and he was continuously incarcerated as a result of that sentencing hearing, which is the reason why he was

served consecutively to case 99-11745. Although Defendant was charged with a probation violation, he was not re-sentenced to confinement, but another five year term of probation.

The Commonwealth argues that because Defendant did not post bail on his a probation violation until August 18, 2004 and he was incarcerated in the Lycoming County Prison for about three weeks that all of the convictions under case 99-11746 are per se admissible. The Court cannot agree.

As previously noted, all the convictions except the two burglary convictions for which Defendant received a probationary sentence maxed out in 2001. At most, if the Commonwealth prevailed on its argument, the Court would only have permitted the Commonwealth to utilize the burglary convictions for Count 103 and Count 108 under 99-11746. When the Court examined the Commonwealth's argument in more detail, however, it had some concerns with the Commonwealth's position. Defendant was never sentenced to confinement for those burglary counts; he simply failed to make bail. If the Commonwealth prevailed in its position, it would result in disparate treatment of individuals based solely on their economic station in life. In other words, criminal convictions would be admissible for a longer period of time against the poor who are unable to post bail on their pending probation or parole violations, but not the wealthy. Furthermore, if the Commonwealth's position is taken to its logical extreme, a defendant who failed to post bail but prevailed at the probation or parole violation hearing would be subject to an extended period of admissibility of his crimen falsi convictions.

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entitled to credit from March 21, 2000 onward.

Nevertheless, if the Commonwealth had not conceded the issue when it was raised in Defendant's omnibus pre-trial motion and had not waited until after the pre-trial conference to let anyone know that it wanted to change its position, the Court was inclined to permit the Commonwealth to introduce evidence that Defendant had been convicted of burglaries in 2001 without referring to the number of convictions or the fact that they were felonies, based on the Commonwealth's alternative argument that under the facts and circumstances of this case their probative value outweighed their prejudicial effect.

The prior convictions clearly reflect upon the veracity of Defendant. If the Commonwealth did not refer to the number of the convictions or their felony grading, the convictions would provide a legitimate reason for discrediting him as an untruthful person without having a tendency to smear the character of Defendant or suggest a propensity to commit the crimes for which he stands charged. Although Defendant was only 18 or 19 years old when he committed his prior offenses, the Court does not think this fact would render the convictions inadmissible. Given the age of the convictions, the Court believes the jury would realize that Defendant was a young adult when he committed those offenses. Furthermore, the Commonwealth's case is based on circumstantial evidence. The child was too young when the injuries were caused to ever be able to identify his attacker or testify as to what happened, and the Commonwealth has no direct evidence or eyewitness testimony to show exactly when the injuries occurred or who caused them. Therefore, if Defendant testifies at trial, his credibility will be a significant issue. The Commonwealth only has limited alternatives to attack Defendant's credibility. If Dr. Bellino testifies consistent with his testimony at the preliminary hearing, he will testify that the child's injuries were not the result of accidental

causes and that the bruising could not have been caused by a dog sitting on the child's head, but this evidence does not address the question of who caused the child's injuries.

If the Commonwealth hadn't conceded Defendant's motion to preclude this evidence and it had raised the issue in a timely manner, the Court would have been inclined to allow some limited evidence regarding Defendant's prior criminal convictions. When the Commonwealth filed its motion, however, it had been nearly three years since the filing of the charges, it was after the pre-trial conference, and jury selection was less than two weeks away. Under these circumstances, the Court does not believe it abused its discretion in denying the Commonwealth's motion in limine with respect to Defendant's prior criminal convictions.

By The Court,

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Marc F. Lovecchio, Judge

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