IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 347-2011**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
WARREN LOCKE,	**:**	
Appellant	**:**	**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 judgment of sentence dated September 28, 2012 and its Opinion and Order dated December 11, 2012, which denied Appellant's post sentence motions. The relevant facts follow.

In December 2010 and early January 2011, Appellant, who was a church deacon, was mentoring a twelve year old boy, J.H. While J.H. was visiting relatives in Philadelphia on January 10, 2011, he was caught attempting to sexually molest his three year old cousin. When his aunt was disciplining him for his actions directed toward his cousin, J.H. revealed that he had been sexually abused by Appellant. The abuse included Appellant fondling J.H.'s penis, Appellant directing J.H. to place his penis in Appellant's anus, and Appellant placing his penis in J.H.'s mouth.

On January 26, 2011, Appellant was charged with three counts of rape of a child, three counts of statutory sexual assault, three counts of involuntary deviate sexual intercourse with a child, four counts of indecent assault with a person less than 13 years of age, four counts of unlawful contact with a minor, four counts of corruption of a minor, and

endangering the welfare of a child.

A jury trial was held April 24-25, 2012. The jury convicted Appellant of all the charges.

On September 28, 2012, the Court imposed an aggregate sentence of 20-40 years of incarceration in a state correctional institution followed by an additional 10 years of probation, consisting of 10 to 20 years on Count 1, rape of a child; a consecutive 10 to 20 years on Count 7, rape of a child; a consecutive seven year period of probation on Count 19, indecent assault of a child, and a consecutive three year period of probation on Count 20, unlawful contact with a minor. The remaining counts either merged for sentencing purposes or the court imposed guilt without further punishment.

On October 8, 2012, Appellant filed a timely post sentence motion in which he challenged: the sufficiency of the evidence for Count 20, unlawful contact with a minor; the court's instruction to the jury regarding prompt complaints; and the court's ruling permitting the Commonwealth to present prior consistent statements by J.H. on redirect examination that, according to Appellant, were "outside the scope of cross and direct examination." The court denied Appellant's post sentence motion in its Opinion and Order dated December 11, 2012, and Appellant filed a timely notice of appeal.

The first issued raised by Appellant is that the evidence presented at trial was insufficient with respect to all charges, in that the Commonwealth failed to produce any evidence that he in fact sexually molested the victim.[1] The court cannot agree.

[1] Appellant was convicted of rape of a child, statutory sexual assault, involuntary deviate sexual intercourse with a child, indecent assault with a complainant less than 13 years of age, unlawful contact with a minor, corruption of a minor, and endangering the welfare of a child. The court, however, only sentenced Appellant on three counts of rape of a child, one count of indecent assault with a complainant less than 13 years of age, and one

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. ***Commonwealth v. Davido***, 582 Pa. 52, 868 A.2d 431, 435 (Pa. 2005); ***Commonwealth v. Murphy***, 577 Pa. 275, 844 A.2d 1228, 1233 (Pa. 2004).

In December 2010 and January 2011, J.H. was twelve years old and Appellant was 54 years old. N.T., April 24, 2012, at 37; N.T., April 25, 2012 at 16. During this time period, Appellant sexually abused J.H. on four different occasions.

The first time was in December 2010 before Christmas when the church was conducting their angel tree program. Appellant had taken the name of a girl from the angel tree and asked J.H. if he wanted to go to K-Mart to purchase a gift and some wrapping paper. J.H. asked his mom if he could go with Appellant and she said yes. J.H. went to K-Mart with Appellant, Appellant purchased a gift and wrapping paper, and they went back to Appellant's apartment to wrap the gift and watch a movie. The television with a DVD player was in Appellant's bedroom. J.H. was lying on his back on the bed, wearing jeans and a shirt. Appellant unbuttoned J.H.'s pants and he rubbed J.H.'s penis with his hands. Appellant said that if J.H. told anyone he would just deny it. Appellant then dropped J.H. back off at the church. N.T., April 24, 2012, at 46-50, 74.

Both J.H.'s mother and his aunt confirmed that Appellant was alone with J.H. around December 19, 2010 when the church had the angel tree program. Id. at 162, 171-72.

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count of unlawful contact with a minor. The remaining convictions either merged or the court did not impose any further punishment. Therefore, the court will only address the sufficiency of the evidence for the counts on

Even Appellant testified that on Sunday, December 19, 2010 when the church was having the angel tree program, he took J.H. to K-Mart, bought a gift for a young lady, and then they went back to Appellant's apartment and wrapped the gift; he simply denied that anything else occurred. N.T., April 25, 2012, at 44-46.

The second incident happened a week to ten days later. Appellant came to J.H.'s aunt's house to borrow some movies. J.H. and his mother were there. Appellant asked J.H. if he wanted to come over and watch movies with him. J.H. asked his mother if he could go and she said yes. Once at Appellant's apartment, they went into the bedroom to watch a movie. In the middle of the movie, Appellant told J.H. to take his clothes off. J.H. removed his clothing and Appellant also undressed. Appellant kissed J.H.'s neck, put his tongue in his ear, and rubbed J.H.'s penis with his hand. Then Appellant laid on his stomach and told J.H. to put his penis in Appellant's butt, which J.H. did. J.H. testified that Appellant did not get an erection; his penis was soft and shriveled. Afterward, they put their clothes back on and Appellant took J.H. back to his aunt's house. N.T., April 24, 2012, at 50-51, 55.

Both J.H.'s aunt and his mother testified that J.H. spent time alone with Appellant on December 29, 2010, while they were at volunteer training for the Grace Shelter. J.H.'s mother testified that Appellant knew they had training that day and when he came over to get movies, both Appellant and J.H. inquired whether J.H. could go watch the movies with Appellant. Id. at 154, 162, 182.

The third incident occurred in early January about two weeks after the second incident. J.H. was at church and Appellant asked him to go over to his house. They watched

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which a sentence was imposed.

a movie together. As with the second incident, Appellant told J.H. to take his clothes off, which J.H. did. Then Appellant removed his own clothing. He kissed J.H.'s neck, put his tongue in his ear and put his finger inside J.H.'s butt. J.H. said "stop," but Appellant didn't stop; he just told J.H. not to tell. Appellant had J.H. get cocoa butter lotion off of his dresser and use it when he had J.H. put his penis in Appellant's butt. Appellant was lying on his stomach and then he got on his hands and knees. Id. at 57-58.

J.H.'s mother testified that she had to take her other son to Geisinger in Danville to have surgery on January 4, 2011. Appellant was at the church. J.H.'s mother pulled up to the church and asked Appellant if J.H. could stay with him at the church and help him clean up until they got back or until J.H.'s uncle got home. When they got back, Appellant told them that he had taken J.H. to his apartment. Id. at 170-71, 180.

Although she could not recall the exact date in early January that this occurred, J.H.'s aunt confirmed that Appellant was asked to watch J.H. while they took J.H.'s younger brother to Geisinger for surgery. Id. at 153-54.

Appellant admitted that he was alone with J.H. at his apartment on January 4, 2011. He claimed, however, that he called J.H.'s aunt to return some movies and ask if he could borrow some more, because his cable was cut off. She said to come on over. As Appellant was going through the movies, J.H. kept asking if he could go with him. After his mother and aunt agreed, Appellant took J.H. to his apartment. Once they got there, Appellant received a phone call from J.H.'s mother that they had an orientation for the Saving Grace shelter. Appellant told them that the movie was about over. J.H.'s mother said J.H.'s uncle would be at the house. Appellant and J.H. watched the rest of the movie and

about an hour later Appellant took J.H. back home. N.T., April 25, 2012, at 47-48.

The fourth incident occurred a few days after the third incident. J.H. had been suspended from school. Appellant asked J.H.'s mother if J.H. could spend Sunday night at his house. Appellant asked J.H. to bring his bible and told J.H. the house rules in the presence of his mother before they left. Those rules were he could not be loud and when Appellant said its lights out, he means lights out. J.H. took his bible, a sleeping bag, some clothes and a movie with him. After they left J.H.'s house, J.H. asked Appellant if he said those things about the house rules because he didn't want J.H.'s mother to know they were doing sexual things, and Appellant said, "Yes." N.T., April 24, 2012, at 59-62.

When they first arrived at Appellant's apartment, they read "Honor thy mother and thy father" from the book of Exodus. Then they went into the bedroom and started watching a movie. Before the movie was over, Appellant told J.H. to take his clothes off and Appellant also disrobed. Appellant rubbed J.H.'s penis with his hand, kissed his neck, and licked his ear. Appellant placed his finger in J.H.'s butt and put his tongue there as well. Appellant also made J.H. put his penis in Appellant's butt. When J.H. was lying on his back, Appellant put his knees at J.H.'s shoulders, and then Appellant held his own penis and put it in J.H.'s mouth for a few seconds. Appellant did not have an erection and he did not ejaculate. They both put their underwear back on and slept in the bed. Id. at 62-67.

J.H.'s mother testified that J.H. spent the night at Appellant's on January 9, 2011. Appellant offered to keep him overnight and drop him off at J.H.'s aunt's house in the morning. J.H.'s mother explained that J.H. had been suspended from school and she asked Appellant to find out why he'd been suspended. Appellant told her to have J.H. bring his

bible and they would talk, pray and go over some scripture. Id. at 173-174.

Rape of a child occurs when a person "engages in sexual intercourse with a complainant who is less than 13 years of age." 18 Pa.C.S.A. §3121(c). In addition to its ordinary meaning, sexual intercourse includes intercourse per os (mouth) or anus, with some penetration however slight. 18 Pa.C.S.A. §3101.

The testimony presented at trial, when viewed in the light most favorable to the Commonwealth as the verdict winner, established that Appellant committed the offense of rape of a child. J.H. was a twelve year old boy in December 2010 and January 2011. On three separate occasions –January 9, 2011, January 4, 2011 and December 29, 2010 – Appellant directed J.H. to place his penis in Appellant's anus. On January 9, 2011, Appellant also placed his penis in J.H.'s mouth. This evidence was sufficient to establish Appellant engaged in sexual intercourse with a complainant who was less than 13 years of age to support his convictions of rape of a child in counts 1, 7, and 13.

Indecent assault with a complainant less than 13 years of age occurs if a person has indecent contact with the complainant, causes the complainant to have indecent contact with the person, or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or in the complainant, and the complainant is less than 13 years of age. 18 Pa.C.S.A. §3127(a)(7). "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.A. §3101.

A person commits unlawful contact with a minor if he is intentionally in

contact with a minor for the purpose of engaging in any of the sexual offenses in Chapter 31 of the Crimes Code and either the person initiating the contact or the person being contacted is within this Commonwealth. 18 Pa.C.S.A. §6318(a)(1). Contact is defined as "[d]irect or indirect contact or communication by any means, method, or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system." 18 Pa.C.S. §6318(c).

J.H.'s testimony concerning the first incident, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to support Appellant's convictions for count 19, indecent assault, and count 20 unlawful contact with a minor. Clearly, rubbing a twelve year old boy's penis constitutes indecent contact with a complainant who was less than 13 years of age. Furthermore, based on all the facts and circumstances of this case, a jury could reasonably conclude that Appellant, in person, asked J.H. to go to K-Mart with him to purchase a gift for a little girl and then go back to his apartment to wrap it and watch a movie so that he could get J.H. alone and have sexual contact with him.

Appellant's claim that the evidence was insufficient because the Commonwealth failed to produce any evidence that he in fact sexually molested the victim, ignores the fact that the victim's testimony alone is sufficient evidence to sustain Appellant's convictions; corroborating evidence is not necessary. 18 Pa.C.S. §3106; ***Commonwealth v. Trippett***, 932 A.2d 188, 194 (Pa. Super. 2007); ***Commonwealth v. Filer***, 846 A.2d 139,141-

42 (Pa. Super. 2004).

Appellant also contends the evidence was insufficient to uphold his conviction for Count 20, unlawful contact with a minor, because Appellant did not say anything to the victim before he allegedly sexually assaulted him. The court cannot agree for two reasons.

First, there was oral communication between Appellant and the victim. Appellant asked the victim to go to K-Mart with him. As previously noted, based on all the facts and circumstances of this case, a reasonable jury could conclude that the purpose of the invitation was to entice the minor to be alone with Appellant, eventually at his residence, so that he could sexually assault the minor.

Secondly, even if there was 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 Appellant 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 Appellant in Appellant's car to Kmart, would not have traveled with Appellant from Kmart to Appellant's residence, would not have entered the residence from Appellant's vehicle, would not have eventually gone to Appellant's bedroom to help wrap presents and would certainly not have been in Appellant's bedroom watching movies absent some contact or communication by Appellant, either verbal or physical. In order to engage in the assault, it is reasonable to infer that Appellant directed the minor, either verbally or non-verbally, to first

travel with him and then to eventually be alone with Appellant in the bedroom where the minor was sexually assaulted. See, for example, Commonwealth v. Velez, 51 A.3d 260 (Pa. Super. 2012).

Appellant next avers that the trial court "abused its discretion by failing to read jury instruction §4.13(a) – prompt complaint in its full language and was therefore erroneous." Contrary to what Appellant 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 the 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 the delay which enables to 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 Appellant's contention. The charge adequately stated the law and in no way prejudiced Appellant. While the court did not read the suggested standard jury charge verbatim, the charge given was the same in all important details to the suggested standard jury instruction. See N.T., April 25, 2012, at p. 160; SSJI 4.13A. Indeed, the only changes the court made to the standard charge was that it removed the language that the jury must find that the offense occurred without the victim's consent, because a child under 13 years old is incapable of giving consent to engage in sexual acts,[2] and it did not reference the fourth incident in the prompt complaint instruction because the incident occurred on January 9, 2011 when he stayed overnight at Appellant's apartment and he disclosed Appellant's abuse the next day. If anything, the court gave Appellant the benefit of the doubt by giving the instruction at all, because there is case law that questions the propriety of giving a prompt complaint instruction when the victim is a minor who may not appreciate the offensive nature of the conduct. See Commonwealth v. Snoke, 535 Pa. 295, 580 A.2d 295, 297-99 (1990);

[2] See 18 Pa.C.S.A. §311(c); Commonwealth v. Velez, 51 A.3d 260, 265-66 (Pa. Super. 2012).

Commonwealth v. Thomas, 904 A.2d 964, 970-71 (Pa. Super. 2006).

Appellant next asserts that the court abused its discretion by permitting the Commonwealth to present prior consistent statements on re-direct examination of the victim, as it was outside the scope of cross and direct examination.

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 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 Appellant 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 victim was influenced by other factors. On the whole, the victim 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 victim testified to obtain favorable treatment as a result of being in trouble generally and of being immediately accused of committing a sexual offense himself against his younger cousin. N.T., April 24, 2012, at 72-74. The victim was also extensively cross-examined about never previously telling anyone about the abuse, specifics that he did not relate to others during the investigation, whether he was telling the truth in general, and his prior testimony. Id. at 75-78, 80-81, 86-91, 8-103, 106-111. Clearly, the victim'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). Therefore, the court does not believe it abused its discretion when it permitted the Commonwealth to introduce evidence of the victim's prior consistent statements on re-direct examination.

Finally, Appellant contends that the sentence imposed was manifestly excessive. Appellant did not raise this challenge to the discretionary aspects of his sentence in his post sentence motions; therefore, he may not have properly preserved this issue for appeal. Commonwealth v. Cook, 941 A.2d 7, 11 (Pa. Super. 2007). Furthermore, since Appellant has not specified how or why his sentence is excessive, the court is somewhat at a loss as how to address this issue. Nevertheless, the court will attempt to discuss the applicable sentencing standards and explain why the sentence imposed was appropriate in this case.

"Imposition of a sentence is vested in the discretion of the sentencing court and will not be disturbed absent a manifest abuse of discretion." Commonwealth v. Smith, 543 Pa. 566, 673 A.2d 893, 895 (1996). An abuse of discretion is more than a mere error in judgment; it will only be found when the record discloses that the judgment exercised by the trial court was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will. Id.

In imposing a sentence, a court shall follow "the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S.A. §9721(b). The court also has the discretion to impose concurrent or consecutive sentences. 42 Pa.C.S.A. §9721(a); Commonwealth v. Prisk, 13 A.3d 526, 533 (Pa. Super. 2011).

The court imposed an aggregate sentence of incarceration in a state correctional institution for 20 to 40 years followed by an additional ten years of probation.

This aggregate sentence was comprised of two consecutive 10 to 20 year sentences for rape of a child, a consecutive seven year period of probation for indecent assault of a complainant less than 13 years of age, and a consecutive three year period of probation for unlawful contact with a minor.

The Commonwealth gave Appellant notice of its intention to invoke the mandatory sentencing provisions pursuant to 42 Pa.C.S.A. §9718, which requires a ten year mandatory minimum sentence for each count of rape of a child. Although the court could have imposed a maximum sentence of up to 40 years of incarceration on each of the rape of child convictions pursuant to 18 Pa.C.S.A. §3121(e)(1), the court had to impose a maximum sentence of at least 20 years because the minimum sentence cannot exceed one-half the maximum sentence. 42 Pa.C.S.A. §9756(b)(1).

The court considered Appellant's characteristics and his rehabilitative needs, including but not limited to his age, his military service, and his lack of a prior criminal record.

The court also considered the nature and seriousness of the offenses and their impact on the child. Although Appellant and his family did not want to accept the jury's verdict, the jury found that Appellant sexually abused a twelve year old boy on multiple occasions. The abuse included oral sex and multiple instances of anal sex. The abuse had a significant impact on the child's life. The child tried to engage in similar sexual conduct with his three or four year old cousin. At the sentencing hearing, the child's family members testified that the child was angry and depressed and undergoing counseling as a result of Appellant's conduct. Remarkably, the child's family members did not seek vengeance.

Although they were angry and hurt that Appellant had violated their friendship and trust, they also wanted to someday find it in their hearts to forgive Appellant and they wanted Appellant to get the help he needs.

The court objectively weighed these competing considerations and sought to strike a fair balance between them. The court did not want to impose a sentence that would prohibit Appellant from becoming eligible for parole during his lifetime, but the court also did not want to give Appellant a volume discount or diminish the seriousness of the offenses or their impact on the victim. N.T., September 28, 2012, at 32-36. The court found that a 20 to 40 year period of incarceration followed by an additional ten year period of supervision was a fair sentence that appropriately balanced all the facts and circumstances of this case.

DATE: _____ By the Court,

_____
Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
Kirsten Gardner, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)