IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 1977 – 2014
	:	
vs.	:	CRIMINAL DIVISION
	:	
JEG,	:	
Defendant	:	Post-Sentence Motion

OPINION AND ORDER

Before the Court is Defendant's Post-Sentence Motion, filed January 27, 2016. Argument thereon was heard February 11, 2016.

After a jury trial on October 19 and 20, 2015, Defendant was convicted of rape of a child, statutory sexual assault, aggravated indecent assault, unlawful restraint of a minor, incest of a minor, endangering welfare of a child, corruption of a minor and indecent assault of a child based on evidence that Defendant had sexual intercourse with his seven-year-old daughter on at least two occasions in 2013 and 2014 and engaged in conduct of a sexual nature with her on at least two other occasions in that time frame. On January 13, 2016 he was sentenced to an aggregate term of incarceration of eighteen to forty years. In the instant post-sentence motion, he seeks to dismiss the charges of unlawful restraint of a minor, endangering welfare of a child and corruption of a minor, and also asks for a new trial based on allegations of trial court error in denying a mistrial and in admitting certain evidence. Each of these requests will be addressed in turn.

Defendant first argues that the conviction of unlawful restraint of a minor was against the weight of the evidence as "the Commonwealth offered no evidence to support an allegation that [Defendant] placed [the child] in danger of serious bodily injury", which is an element of the crime, as follows:

§ 2902. Unlawful restraint

…

(c) Unlawful restraint of minor where offender is victim's parent. --

If the victim is a person under 18 years of age, a parent of the victim commits a felony of the second degree if he knowingly:

(1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; ...

18 Pa.C.S. § 2902(c)(1). The Commonwealth argues that the evidence that Defendant's body weight on top of the victim's body during the intercourse caused the victim to not be able to breathe and thus exposed her to the risk of suffocation, was sufficient to support the charge. The court agrees. The victim testified that "I couldn't scream or anything like that when he was on top of me because he was so heavy, and he was going like this on my mouth. And I could barely breathe", and that Defendant "would get on top of me and do this, like cover my nose so I can't scream or breathe or anything, then I pass out, and when he did this a little bit later I wake up from him doing this". N.T. March 23, 2015 at p.56-58. She also stated in an interview, a videotape of which was shown to the jury, that she couldn't breathe because her father was hurting her, and she couldn't scream because she couldn't breathe.[1] The evidence that the Defendant's restraint of the victim with his body weight and by covering her mouth caused her to pass out is clearly sufficient to support a finding that there was an "actual danger of harm". *See* Commonwealth v. Schilling, 431 A.2d 1088, 1092 (Pa. Super. 1981)(applying to the crime of unlawful restraint the

[1] The hearing on March 23, 2015 was held to address the child's competency to testify at trial, and a transcript of that hearing was introduced into evidence at trial as Defendant's Exhibit 3. The videotape of the interview was shown to the jury and then marked and introduced into evidence as Commonwealth's Exhibit 7.

holding of Commonwealth v. Trowbridge, 395 A.2d 1337 (Pa. Super. 1978) that "mere apparent ability to inflict harm is not enough" and that "an actual danger of harm must be shown".) In light of this evidence, and considering that there was no evidence of any other facts which were "so clearly of greater weight", the court concludes that the verdict was not against the weight of the evidence. *See* Commonwealth v. Widmer, 744 A.2d 745, 752 (Pa. 1994)(in addressing a claim that the verdict is against the weight of the evidence, the trial judge must "determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice").

Next, Defendant argues that the convictions of endangering the welfare of a child and corruption of a minor were against the weight of the evidence as the Commonwealth's evidence "demonstrated there was no continuity of conduct or repetitive pattern of behavior". Defendant is correct that both charges require a showing of a "course of conduct", as follows:

> § 4304. Endangering welfare of children.
>
> (a) Offense defined.
>
> (1) A parent, guardian or other person supervising the welfare of a child under 18 years of age, … commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.
>
> …
>
> (b) Grading. --
>
> An offense under this section constitutes a misdemeanor of the first degree. However, where there is a *course of conduct* of endangering

the welfare of a child, the offense constitutes a felony of the third degree.

18 Pa.C.S. Section 4303 (emphasis added).

§ 6301. Corruption of minors.

(a) Offense defined.

(1) (i) …

(ii) Whoever, being of the age of 18 years and upwards, by *any course of conduct* in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, … commits a felony of the third degree.

18 Pa.C.S. Section 6301(a)(1)(ii) (emphasis added). Defendant argues that the victim testified that Defendant sexually abused her on only two occasions, about a year apart in time, and that such does not show a "continuity of conduct" such as is necessary to find a course of conduct.

The phrase "course of conduct" was analyzed by the Superior Court in Commonwealth v. Kelly, 102 A.3d 1025 (Pa. Super. 2014). After taking note of the definition of the phrase in other sections of the Crimes Code,[2] and language in the Certified Public Accountant Law which "unmistakably distinguish[es] between multiple and single acts",[3] the Court concluded that in the corruption of minors statute, the phrase "imposes a requirement of multiple acts over time, in

[2] E.g., in Section 2709(f) (which defines the crime of harassment) and Section 2709.1(f) (which defines the crime of stalking), the phrase is defined to mean "[a] pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct".

[3] "In any prosecution or proceeding under this act, evidence of the commission of a single act prohibited by this act shall be sufficient to justify an injunction or a conviction without evidence of a general course of conduct." 63 P.S. Section 9.15.

the same manner in which the term is used in the harassment, stalking and EWOC statutes." Id. at 1031. Since those statutes specify that a "pattern" means "more than one act", the Superior Court's use of the term "multiple" in Kelly must also mean "more than one". This court therefore has no trouble finding that the Commonwealth's evidence in this case meets the requirement of showing a course of conduct, even if Defendant is correct that only two incidents of abuse were shown. In fact, however, the victim testified to two other incidents of abuse which, even though not involving intercourse, did involve conduct of a sexual nature and therefore evidenced a "continuity of conduct." [4] Therefore, Defendant's convictions of endangering the welfare of a child and corruption of a minor were not against the weight of the evidence.

Defendant's first request for a new trial is based on remarks made by the prosecutor during her opening statement and the court's denial of his request for a mistrial immediately following those remarks. Specifically, the prosecutor said to the jury

> Finally, she'll tell you that when she had had enough, because it was really bothering her, she went to her mom, her mom J. She went to her mother while her mother was cooking breakfast, and she said I don't want daddy sleeping with me anymore. Why not? Because daddy is touching me. You'll hear that J immediately threw the Defendant out of the house. You'll hear that she got a PFA. The defendant eventually was arrested.
>
> Now, you're going to see the interview with Trooper Havens of when the defendant was arrested; and you're going to hear he doesn't exactly come out and admit what happened because he can't

[4] The victim testified that on one occasion between the two incidents of intercourse Defendant got into the bathtub with her and tried to force her to "sit on his man-bug", and also that on another occasion he rubbed lotion on "the outside of my ladybug" and "inside my butt". N.T., October 19, 2015, at p. 36 and 48, respectively.

> bring himself to say what he did to his daughter. You're not going to hear the words I did such and such from him.
>
> But you're going to have to listen to the words carefully, and you will realize the words he does say exactly convey that message. Not only those words, but the words that he said to Children & Youth worker ES when she called him on the phone to talk to him about the allegations, the words that he said to Sheriff's Deputy BR when he served the PFA to the Defendant, and the words and notes that he left behind for the children after he moved out and they came back to the home that were found by her mother.

N.T., October 19, 2015 at p. 12-13. Defendant contends the reference twice to the PFA caused "irreversible damage" because it led the jury to "believe a prior court or even a prior jury had already determined JG committed these offenses". The court does not agree.

"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. Brooker, 103 A.3d 325 (Pa. Super. 2014). Here, the court issued the following cautionary instruction:

"Ladies and gentlemen, during her opening statement Ms. K mentioned to you that there was a PFA. A PFA is what they call a Protection From Abuse Act. It is a civil proceeding and perhaps has nothing to do with this case directly, and no negative inference can be taken against Mr. G as a result of the PFA. And you are instructed that you are to give that no weight other than the fact that it was one of the things in the succession of events that occurred with respect to the actions of Mr. G's wife." As it turns out, the Commonwealth did not subsequently

introduce any evidence of the PFA, but elicited from the victim's mother only that she "told him to get out" and that she left the house with the children and returned only after Defendant was no longer staying there. N.T., October 19, 2015, at p. 119-120.[5] Thus, in light of the court's prior instruction to the jury that the statements and arguments of counsel are not evidence, the court believes the jury did not consider the matter at all, let alone give it undue weight. The statement was insignificant in the context of a consideration of all of the evidence, and clearly did not deprive the defendant of a fair trial.

Finally, Defendant's second request for a new trial is based on his contention that the court erred in ruling admissible as substantive evidence the child's statements to an interviewer during the previously mentioned interview, at the Children's Advocacy Center. A hearing on the issue was held at the Commonwealth's request, in response to its motion to admit the statements under 42 Pa.C.S. Section 5985.1, on October 13, 2015.

Section 5985.1 provides, in relevant part, as follows:

§ 5985.1. Admissibility of certain statements.

(a) General rule. --

> An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. … 31 (relating to sexual offenses), …, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

[5] The Commonwealth elicited from the referenced Sheriff's Deputy that Defendant made certain statements when he was served with "civil paperwork". N.T. October 19, 2015, at p. 200-201.

(1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

(i) testifies at the proceeding; or

(ii) is unavailable as a witness.

42 Pa.C.S. Section 5985.1. Here the child testified at trial and thus the only issue presented by the motion was whether there were sufficient indicia of reliability. To make that determination, in accordance with Commonwealth v. Walter, 93 A.3d 442 (Pa. 2014), the court considered (1) the spontaneity of the statements, (2) consistency in repetition, (3) the mental state of the declarant, (4) use of terms unexpected of children of that age and (5) the lack of a motive to fabricate.

The interview was conducted by SM in a room at the Children's Advocacy Center and was videotaped, although it appears that the child was unaware that she was being taped. Ms. M usually asked rather general questions like, "is someone worried that something has happened with you?", "what kinds of things happened?", do you remember what happened?", and "tell me about that". And when she did ask a more specific question, such as (in response to the child stating "he was touching me"), "who was touching you?", she never suggested an answer. While the statements were not spontaneous in the sense of being blurted out for no apparent reason, they were given in response to such vague prompts that the court finds spontaneity sufficient to support reliability.

The child was consistent in repetition. While she obviously had difficulty with the concept of time, for example stating that her daddy had been away for a long time even though the facts document that it had been only nine days, her story did not change, so to speak. While she has stated at other times, in court hearings, that more things happened than she talked about in the interview, at that interview she told Ms. M that she knew other things had happened but could not remember what they were. Her statement was thus consistent with even other statements given subsequently.

The child's mental state during the interview was calm; her demeanor was very matter-of fact and she was not emotional. While she expressed hesitation to say certain things out loud or at all, preferring to write them down (the word "sex" and two "swear words"), this did not seem to upset her. She described other events (which have been described by others and thus provide a basis to conclude they are accurate) with clarity and accuracy and thus indicated that her mental state was clear and unaffected.

The child used terms expected to be used by children her age, such as "ladybug" and "manbug" rather than correct anatomical terms. This suggests that she was describing the events in her own words and that she had not been coached.

Finally, there was no evidence of any motive to fabricate.

Therefore, the court believes it correctly admitted the interview as substantive evidence under Section 5985.1, and Defendant is not entitled to a new trial on that basis.

ORDER

AND NOW, this 22nd day of February 2016, for the foregoing reasons, Defendant's Post-Sentence Motion is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
Donald Martino, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson