IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0001190-2018**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
NICOLE MANEVAL,	:	
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 the judgment of sentence pronounced on August 13, 2021.

In March 2018, P.B. ("Victim") was four years old and attending daycare. While at daycare on or about March 13, 2018, Victim spilled milk on her shirt and employees of the daycare had to change her shirt. No marks or bruises were present on Victim's upper body at that time. When Victim returned to daycare on March 14, 2018, employees noticed marks on Victim's neck, so they checked her body. The employees noticed a number of marks or bruises on Victim's body, including a bruise on her back with noticeable a zigzag pattern that looked like a shoe print.

CYS and law enforcement authorities investigated the matter. On March 13-14, 2018, Victim was in the care, custody and control of Father and his paramour, Nicole Maneval ("Appellant"). Victim had not been in the custody of Mother since Friday, March 9, 2018.

On March 16, 2018, law enforcement officers executed a search warrant at Father's and Appellant's residence. In the main bedroom, they found a pair of women's

boots with a zigzag pattern that was consistent with the bruise on Victim's back.

On June 4, 2018, Appellant was charged with aggravated assault of a child less than six years of age, a felony of the second degree; simple assault, a misdemeanor of the first degree; and endangering the welfare of children (EWOC), a misdemeanor of the first degree.[1] On August 24, 2020, upon motion of the Commonwealth, the court increased the grading of EWOC to a felony of the third degree.[2]

On September 21, 2020, Appellant waived her right to a jury trial. Appellant's nonjury trial proceeded on November 2, 2020 and January 22, 2021 before the Honorable Marc F. Lovecchio. It was scheduled to conclude on April 7, 2021 with additional testimony and closing arguments. However, no additional testimony was taken and the parties agreed with the approval of the court to submit written closing arguments no later than April 16, 2021. On April 23, 2021, Judge Lovecchio found Appellant guilty of all of the charges.

On August 13, 2021, Appellant was sentenced to eight months to 24 months less one day of incarceration in the Lycoming County Prison followed by three years' probation under the supervision of the Lycoming County Adult Probation Office.

On August 23, 2021, Appellant filed a post sentence motion in which she asserted that the verdict was against the weight of the evidence. Following an argument held on October 15, 2021, Judge Lovecchio denied Appellant's post sentence motion.[3]

On November 10, 2021, Appellant filed a notice of appeal. On November 15,

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[1] 18 Pa. C.S.A.§§ 2702(a)(8), 2701(a)(1), and 4303(a)(1), respectively.
[2] Pursuant to 18 Pa. C.S.A. §4303(b)(2), the grading of EWOC was increased one grade because, at the time of the commission of the offense, the child was under six years of age.
[3] The undersigned is authoring this Opinion because Judge Lovecchio retired from the bench at the close of business on November 2, 2021, and he returned to private practice.

2021, the court directed Appellant to file a concise statement of errors complained of on appeal. On December 3, 2021, Appellant filed her concise statement, in which she asserted the following four issues:

1. Whether the Trial Court erred in denying Appellant's Post Sentence Motion For A New Trial because the Trial Court's verdict of guilty on all counts was against the weight of the evidence, manifestly unreasonable, and so contrary to the evidence as to shock one's sense of justice since certain facts were so clearly of greater weight that to ignore them or to give them equal weight with all other facts is to deny justice.

2. Whether the evidence presented at Trial was insufficient to support Appellant's convictions for Aggravated Assault, 18 Pa. C.S.A. §2702(a)(8) and Simple Assault, 18 Pa. C.S.A. §2701(a)(1) since the Commonwealth failed to prove, beyond a reasonable doubt, that Appellant acted with the requisite *mens rea* and intentionally, knowingly, or recklessly caused or attempted to cause bodily injury to the Complaining Witness.

3. Whether the evidence presented at Trial was insufficient to support Appellant's convictions for Aggravated Assault, 18 Pa. C.S.A. §2702(a)(8) and Simple Assault, 18 Pa. C.S.A. §2701(a)(1) since the Commonwealth failed to prove beyond a reasonable doubt that Appellant caused bodily injury to the Complaining Witness.

4. Whether the evidence presented at Trial was insufficient to support Appellant's conviction for Endangering the Welfare of a Child, 18 Pa. C.S.A. §4304(a), since the Commonwealth failed to prove, beyond a reasonable doubt, that Appellant acted with the requisite *mens rea* and knowingly endangered the welfare of the Complaining Witness by violating a duty of care, protection or support.

Weight of the Evidence

Appellant first contends that the verdict was against the weight of the evidence. The court cannot agree.

"One of the least assailable reasons for granting or denying a new trial is

the lower court's determination that the verdict was or was not against the weight of the evidence and that new process was or was not dictated by the interests of justice." *Commonwealth v. Morales*, 91 A.3d 80, 91 (Pa. 2014). A claim that the verdict was against the weight of the evidence concedes that there was sufficient evidence to support the verdict but seeks a new trial on the ground that the evidence was so one-sided or so weighted in favor of acquittal that a guilty verdict shocks one's sense of justice. *Commonwealth v. Lyons*, 79 A.3d 1053, 1067 (Pa. 2013). The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of witnesses. *Commonwealth v. Champney*, 832 A.2d 403, 444 (Pa. 2003). A new trial should not be granted because of a mere conflict in testimony or because the judge on the same facts would have arrived at a different conclusion. *Commonwealth v. Brown*, 648 A.2d 1177, 1189-1190 (Pa. 1994). Rather, a new trial should be awarded only when the verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. *Id*. A verdict shocks the conscience when the figure of Justice totters on her pedestal or when the verdict causes the trial judge to lose his breath temporarily and causes him to almost fall from the bench. *Commonwealth v. Akhmedov*, 216 A.3d 317, 326 (Pa. Super. 2019).

"On review, an appellate court does not substitute its judgment for the finder of fact and consider the underlying question of whether the verdict is against the weight of the evidence, but, rather, determines only whether the trial court abused its discretion in making its determination." *Lyons*, supra. "An abuse of discretion is not

merely an error of judgment but is rather the overriding or misapplication of the law, the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." *Commonwealth v. Rogers*, 259 A.3d 539, 541 (Pa. Super. 2021), quoting *Commonwealth v. Santos*, 176 A.3d 877, 882 (Pa. Super. 2017).

In her post-sentence motion, Appellant contended that the verdict was against the weight of the evidence based on the following: (1) Victim's testimony was influenced or tainted by Mother; (2) Victim's accounts regarding how the incident took place were inconsistent; (3) Victim was unable to articulate any details regarding the incident; (4) Father testified that nothing happened at their residence on the night in question; and (5) Appellant presented evidence of her good character. The trial court did not agree.

Numerous items of evidence and the reasonable inferences from the evidence corroborated Victim's testimony. Victim did not have any bruising or marks on her body when she was at daycare on March 13, 2018. The next day, however, she had a shoe print bruise on her back. From the time Victim left the daycare on March 13 until she returned on March 14, she was in the custody and control of Appellant and Father.

The bruise on Victim's back was a shoe or boot print with a zigzag pattern. One would expect such an injury to be caused by someone either stepping on Victim or hitting her with a shoe or boot. Victim testified that Appellant stepped on her back. As Victim aptly noted in one of her statements, she could not step on her own back.

While Victim may have had a wreck with her bicycle the weekend before the incident, common sense dictates that type of incident would not have resulted in a shoe print bruise being visible on Victim's back on March 14, 2018 but not on March 13. A bicycle wreck may cause scrapes and bruises, but not ones in the shape and pattern of a shoe or boot print. Furthermore, one would expect bruises from any weekend incident, including any wrestling with Appellant's five-year old and eight-year old nephews, to be visible within a day or two.

Victim had not seen Mother since the Friday before the daycare employees discovered the shoe print bruise on Victim's body, i.e., Mother and Father exchanged custody of Victim on March 9, 2018; therefore, Mother could not have bruised Victim's back in an effort to get revenge on Appellant.

The bruise on Victim's back had a zigzag pattern. The police discovered and seized a pair of boots from Appellant's residence. The tread pattern on Appellant's boots were consistent with or similar to the pattern of the shoe print on Victim's back. Appellant testified that Father's feet were much larger than hers were. Although Appellant's expert witness, Mark Songer, testified that pattern or print was common and one could not say with any degree of scientific certainty that Appellant's boot caused the injury on Victim's back, there was nothing at all exclusionary. Mr. Songer, a document examiner, reviewed photographs of the boot tread and the bruise. The court viewed the photographs as well as the actual boots. The actual boots provide a more accurate view of the pattern than the photographs.

Victim was only around four people between the time she left daycare at approximately 4:00 p.m. on March 13 and returned to daycare early in the morning

(around 6:30 a.m.) on March 14. Those people were Father, Appellant, Appellant's son and Appellant's mother.

Appellant's mother testified that Victim, Appellant and Father arrived at her residence between 7:00 and 7:30 p.m. and left at approximately 9:00 p.m. on March 13. They came to her residence to pick up Appellant's son. Victim sat on the lap of Appellant's mother and then got down and played with the dogs. Appellant's mother did not observe any marks or bruises on Victim.

Victim consistently told her therapist and her mother that Appellant caused the bruise on her back. Victim's therapist testified that she was not concerned if Victim may have told a CYS worker that Appellant had kicked her instead of stepped on her. The therapist noted that it would not be uncommon for a child to use those terms interchangeably; the two terms would mean the same thing to a child, as "they don't have that detail." N.T., 01/21/2021, at 18, 25-26.

Victim was four years old when the incident happened and seven years old when she was testifying in court. It can be difficult for an adult to remember details of an event nearly three years later. Given Victim's age and the delay between the incident and her trial testimony, Victim's inability to articulate details at trial was not surprising.

Given the totality of the circumstances, the trial court did not commit an abuse of discretion when it determined that the verdict was not against the weight of the evidence.

Appellant next asserts that the evidence was insufficient to sustain the verdict on three different grounds.

When analyzing the sufficiency of the evidence, the court must consider the evidence introduced at trial and all reasonable inferences derived therefrom in the light most favorable to the Commonwealth as verdict winner. *Commonwealth v. Smith*, 234 A.3d 576, 581 (Pa. 2020); *Commonwealth v. Frein*, 206 A.3d 1049, 1063 (Pa. 2019). The trier of fact, while passing on the credibility of witnesses, is free to believe all, part, or none of the evidence. *Frein*, supra.

First, Appellant asserts that the Commonwealth failed to prove beyond a reasonable doubt that Appellant acted with the requisite *mens rea* with respect to aggravated assault and simple assault. More specifically, Appellant contends that the Commonwealth failed to prove beyond a reasonable doubt that Appellant intentionally, knowingly or recklessly caused or attempted to cause bodily injury to Victim.

Victim testified that Appellant stepped on her back on purpose. N.T., 11/02/2020, at 95-96, 100-101. Victim was positive Appellant stepped on her back; she felt it. *Id*. at 127-128. When asked how she knew it was on purpose, Victim replied, "Because people don't just step on your back on accident." *Id*. at 134.

At trial, the Commonwealth played the interview of Victim at the Children's Advocacy Center (CAC) by forensic interviewer, Ashley Domiano, on March 23, 2018. Commonwealth's Exhibit 14. Victim stated that Nikki stepped on her in the middle of her back. When asked how it felt, Victim stated, "It hurt." Victim stated that no one else was there, "only me and Nikki." Victim stated that Father was at the gas station and Appellant's son was at his Gram's and Pap's.[4] Victim also stated

[4] Victim's testimony that Appellant's son was at his gram's and pap's was corroborated by the testimony of Appellant's mother who testified that Father, Appellant and Victim came to her house to pick up Appellant's son.

that Appellant was mad.

Victim's therapist testified about what Victim told her about the incident. Specifically, "[Victim] was watching TV and Nikki stepped on her back, and [Victim] cried out, you know, stop, it hurts, that sort of thing, and she said that Nikki just kept her foot on her back and pressed down hard and it hurt." N.T., 01/22/2021, at 6. Victim was consistent that she was stepped on and she never said that anybody other than Nikki did it. *Id.* at 7.

Mother testified that on March 14, 2018 she received a call from CYS worker Elizabeth Spaguolo that CYS had opened a case on Victim, because she had multiple bruises on her body. Mother picked up Victim from the daycare and took her to the emergency room for an evaluation of her injuries. Ms. Spagnuolo met them at the hospital. That day, Victim told Mother that she did not know how she was injured. Victim had difficulty with going to sleep at night. Mother started a routine of reading bedtime books with her. On Friday, March 16, 2018, they were reading Victim's favorite book. Mother saw the bruises on Victim's chest. A tear came to Mother's eye and dripped. Victim asked, "Mommy, what's wrong?" Mother told Victim that she was sad because she saw the bruises on her chest. Mother said she was sorry that there were bruises on Victim's chest and made a comment that she knew Victim couldn't do that to herself. Victim then said, "I didn't hurt myself. I can't step on my back with shoes" or something along the line of she can't hurt herself with shoes on her back. On Sunday, March 18, 2018, Victim told Mother that she remembered. Mother asked her what she remembered. Victim stated she remembered who hurt her. Victim proceeded to tell Mother that Appellant hurt her. Victim stated that Appellant throws her on the

ground, kicks her, hits her and is mean to her. N.T., 1/22/2021, at 48. On the March 22, 2018, Victim disclosed that Appellant stepped on Victim's back with her shoe and hurt her. *Id*. at 49.

Based on this evidence, the trier of fact could find that Appellant intentionally, knowingly or recklessly stepped on Victim's back.

Second, Appellant contends that the evidence was insufficient to sustain the verdicts for aggravated assault and simple assault because the Commonwealth failed to prove beyond a reasonable doubt that Appellant caused bodily injury to Victim. The court cannot agree.

Bodily injury is defined as "[i]mpairment of physical condition or substantial pain." 18 Pa. C.S.A. §2301. The existence of substantial pain may be inferred from the circumstances surrounding the use of physical force even in the absence of a significant injury. *Commonwealth v. Ogin*, 540 A.2d 549, 552 (Pa. Super. 1988)(en banc).

Here, Victim testified that Appellant stepped on her back on purpose. This conduct resulted in a bruise on the child's back in the shape of the heel of a shoe or boot. The wavy pattern consistent with Appellant's boot was apparent in the bruise. Furthermore, although Victim testified at trial that it didn't hurt, the trial occurred nearly three years after the incident. Shortly after the incident, Victim told Mother, Ms. Domiano, and her counselor that Appellant stepped on her back and it hurt.

The evidence was sufficient to support a finding that Appellant intentionally or knowingly stepped on Victim's back, which hurt and caused a shoe print bruise in the middle of Victim's back.

The court finds that the evidence was sufficient to establish that Victim suffered bodily injury. *In re M.H.*, 758 A.3d 1249 (Pa. Super. 2000)(grabbing and shoving teacher's aide, resulting in bruises on the aide's arm, constituted bodily injury).

Finally, Appellant contends that the evidence was insufficient to support her conviction for EWOC because the Commonwealth failed to prove beyond a reasonable doubt that Appellant acted with the requisite *mens rea* and knowingly endangered the welfare of Victim by violating a duty of care, protection or support. Again, the court cannot agree.

"A parent, guardian or other person supervising the welfare of a child under 18 years of age…commits an offense if [she] knowingly endangers the welfare of the child by violating a duty of care, protection or support." 18 Pa. C.S.A. §4304(a)(1).

Adult persons who voluntarily reside with a minor child and violate a duty of care, protection and support are contemplated within the scope of the EWOC statute. *Commonwealth v. Brown,* 721 A.2d 1105, 1107 (Pa. Super. 1998); see also *Commonwealth v. Trippett*, 932 A.2d 188, 195 (Pa. Super. 2007)("The plain language of the statute does not indicate a person need only be a parent or guardian of a child before they can be charged and convicted under section 4304.")

The evidence presented at trial established that Appellant, who resided in the same household as Victim, intentionally stepped on Victim's back, causing pain and a bruise on the 4-year old's back in the shape of a shoe or boot print. The evidence also established that Appellant fed, clothed and bathed Victim. Appellant was engaged to Father. Father and Victim lived with Appellant in her residence. Appellant acted as Victim's stepmother. In fact, prior to the incident, Victim called Appellant "mama

Nikki." Therefore, Appellant had a duty of care, protection and support with respect to Victim and intentionally or knowingly stepping on Victim's back violated that duty.

DATE: _____ By The Court,

_____
Nancy L. Butts, President Judge

cc: Matthew Welickovitch, Esquire (ADA)
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