IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-0001197-2020**
	:	
vs.	**:**	
	:	
	:	
ERNEST LORENZO LEONARD,	**:**	
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 August 29, 2023.

By way of background, on August 26, 2020, the Commonwealth filed a criminal complaint against Ernest Lorenzo Leonard ("Leonard"), charging him with two counts of rape of a mentally disabled person, two counts of involuntary deviate sexual intercourse (IDSI), two counts of sexual assault and two counts of aggravated indecent assault.

Leonard's case was scheduled for jury selection on May 15, 2023. On May 11, 2023, Leonard filed a motion to dismiss pursuant to Rule 600. The trial court heard the motion on May 15, 2023, after jury selection and denied the motion in an Opinion and Order entered on May 16, 2023.

A jury trial was held May 17-18, 2023. The jury convicted Leonard of all charges. On August 29, 2023, the court sentenced Leonard to an aggregate sentence of eight (8) years to sixteen (16) years' incarceration in a state correctional institution, consisting of

two consecutive sentences of four (4) to eight (8) years' incarceration for each count of rape of a mentally disabled person.[1] On September 7, 2023, Leonard filed a post sentence motion in which he sought reconsideration of sentence based on the following factors: (1) it had been years since the conduct occurred; (2) Leonard had been a gainfully employed, productive member of society his entire life; (3) Leonard's health was in such a state that he feared he did not have longevity; (4) Leonard could benefit from services available at the county level after serving a county sentence and being placed on county supervision; and (5) nothing had shown that Leonard is averse to rehabilitation. On September 11, 2023, the court summarily denied Leonard's post sentence motion.

Leonard filed a timely appeal. Leonard asserted three issues in his concise statement of errors complained of on appeal:

1. [Leonard] respectfully avers that the evidence submitted at [his] [t]rial was insufficient to meet the Commonwealth's burden of proving [Leonard] guilty beyond a reasonable doubt of two (2) counts of Rape of a Mentally Disabled Person; two (2) counts of Involuntary Deviate Sexual Intercourse; two (2) counts of Sexual Assault; and two (2) counts of Aggravated Indecent Assault.
2. [Leonard] respectfully avers that the sentence entered [by the trial court] of 8-16 years was manifestly excessive and an abuse of discretion given [Leonard's] age and health.
3. [Leonard] respectfully avers that [the trial court] erred by denying [Leonard's] Motion to Dismiss Pursuant to Rule 600, decided on May 16, 2023, and that [Leonard's] case should have been dismissed.

DISCUSSION

1. Sufficiency of the Evidence

Leonard first asserts a sufficiency of the evidence claim. Initially, the court

[1] The court found that the two counts of IDSI merged. The court imposed concurrent sentences of three (3) to six (6) years' incarceration for each count of sexual assault and guilt without further punishment for each count of aggravated indecent assault.

finds that this issue is waived because it has been raised in a boilerplate manner. A concise statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no concise statement at all. ***Commonwealth v. Reeves***, 907 A.2d 1, 2 (Pa. Super. 2006), *appeal denied*, 919 A.2d 956 (Pa. 2007). The court's review and legal analysis can be fatally impaired when the court has to guess at the issues raised. ***Id.*** Thus, if a concise statement is too vague, the court may find waiver. ***Id.***; see also ***Commonwealth v. Hansley***, 24 A.3d 410, 415 (Pa. Super. 2011), *appeal denied*, 32 A.3d 1275 (Pa. 2011). Where an appellant simply declares in boilerplate fashion that the evidence has been insufficient to support a conviction, the issue is waived. ***Commonwealth v. Roche***, 153 A.3d 1063, 1072 (Pa. Super. 2017); ***Commonwealth v. Tyack***, 128 A.3d 254, 260 (Pa. Super. 2015). Instead, an appellant must state the element or elements upon which the evidence was insufficient. ***Roche***, ***id***.

Leonard has not specified the element or elements upon which the evidence was insufficient. Therefore, this claim is waived.

Assuming *arguendo* that the sufficiency claim is not waived, it lacks merit. A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused beyond a reasonable doubt. ***Commonwealth v. Karkaria***, 533 Pa. 412, 625 A.2d 1167, 1170 (1993). When reviewing a sufficiency claim, the court is required to view the evidence in the light most favorable to the Commonwealth as verdict winner, giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. ***Commonwealth v. Watley***, 81 A.3d 108 113 (Pa.

Super. 2013). It is well-settled that credibility is within the exclusive province of the finder of fact, in this case the jury, which is free to believe all, part, or none of the evidence. ***Commonwealth v. Perrin***, 291 A.3d 337, 347 (Pa. 2023)("the credibility of witnesses is within the exclusive province of the trial court, either acting on its own or through a jury"); ***Commonwealth v. Thomas***, 215 A.3d 36, 40 (Pa. 2019)("the jury is free to believe all, part, or none of the evidence"). Furthermore, the testimony of the complainant in a sexual assault prosecution need not be corroborated; the complainant's testimony, if believed by the jury, is sufficient. 18 Pa. C.S.A. §3106("The testimony of the complainant need not be corroborated in prosecutions under this chapter"); ***Commonwealth v. Juray***, 275 A.3d 1037, 1046 (Pa. Super. 2022)(victim's trial testimony alone was sufficient to support each of the guilty verdicts); ***Commonwealth v. Diaz***, 152 A.3d 1040, 1047 (Pa. Super. 2016)(uncorroborated testimony of sexual assault victim, if believed by the trier of fact, is sufficient to convict a defendant, despite contrary evidence from defense witnesses).

At the time of trial, the complainant in this case, A.W., was a thirty-six-year-old woman with Down Syndrome. N.T., 05/17/2023, at 32, 122. A.W. testified that Leonard raped her four times – twice on her recliner in her bedroom in her old house on High Street and twice in Leonard's truck. N.T., 05/17/2023, at 46-47. A.W. testified that Leonard was sitting in the recliner. He put his penis out of his pants and started shaking it like a baby. He put his penis in her butt and it really hurt her. *Id.* at 48. She didn't want to do it; she tried to tell him but he didn't listen to her. *Id*. at 49. She didn't tell anyone because he told her not to tell. *Id.* She wanted to tell, but Leonard's son yelled at her and scared her when she told Leonard's son everything that Leonard did to her. *Id*. A.W. testified that she saw Leonard's

penis; it was hairy, wet, and large. *Id.* at 59-60.

Leonard was an over-the-road truck driver. N.T., 05/17/2023, at 85 (testimony of Dawn Harer). A.W. testified that Leonard's truck had a big steering wheel with a curtain behind it and a bunk bed. N.T., 05/17/2023 at 68 (testimony of A.W.). Leonard had her close the curtains in the truck and she was standing behind it. *Id*. at 49-50. She didn't really want to, but her made her do it. It was on the bed, but he made her have sex; she didn't want to have sex. She said she was not ready to have sex. It made her uncomfortable. She explained that she used to be his friend's daughter. Her adoptive mom was his friend. She then said, "You can't treat your friend's daughter that way. It's not right." *Id*. at 51. She also said that she wanted him to stay away from her. *Id.* at 62.

On cross-examination, she testified that Leonard put his penis in her butt, and she demonstrated by extending her index finger on her left hand, making a circle with her right hand and putting her left index finger in the hole of her right hand. *Id*. at 57. She explained that the finger was like his penis and the hole was your butt hole. *Id*. at 57-58. A.W. stated, "Yeah, four times. He raped me. He really did. He really hurt me." *Id*. at 61. Each time he put his penis in her butt. *Id*. Each time it was in the afternoon. *Id*. at 67. She didn't have any bleeding; it just hurt. *Id.* at 61. When asked if it was hard for the penis to go in, A.W. said it was. *Id*. at 62. Defense counsel then asked, "So you're telling me he had to force the penis in?" *Id*. A.W. replied, "Yeah, he put his penis inside my body. It really hurt me. *Id.* at 62-63. She also testified that Leonard was kissing her neck, her breasts, her stomach, and her private area. *Id*. at 61.

Dr. Richard Dowell, a clinical neuropsychologist, testified regarding his IQ

testing and adaptive living skills testing of A.W. N.T., 05/18/2023, at 55-61. She had a full-scale IQ of 65, which is consistent with a person who is 11 years, 7 months. N.T., 05/18/2023, at 55. Her adaptive living skills age equivalent was 5 years, 2 months. *Id.* at 61. She had difficulty connecting words to communicate ideas and trouble connecting facts to understand intention or concepts. *Id*. at 56. She is unable to live on her own and had difficulty making informed decisions. *Id.* at 57. She does not understand if she makes a choice how it will "pan out" in the future. *Id.* Her Down Syndrome causes a genetically related failure in forming and making connections so that she takes on the characteristics of the coach/caregiver. *Id.* at 58. Her hearing issues also tends to slow her processing down. *Id.* at 59. She has supervision and supports around her like one would see with a five-year old. *Id.* at 61. She can't assign a task and she can't keep it in the context of an overall plan of here are the things I need to get done today. *Id.* at 62. She does not have the capacity to fabricate a story well. *Id*. at 64. If one can't understand the intention of the person beside you, it's very hard to know exactly how to make that work. *Id.* at 65. She can remember things, but she can't organize things conceptually into a matrix. *Id*. at 66. Although Dr. Dowell did not know A.W. well, the "book" on Down Syndrome is that they are people-pleasers; it is what defines them. *Id*. at 68. They "kind of walk through life often happy or smiling and wanting to please the person beside them because that's their connection to the world or their coach." *Id*. Dr. Dowell testified that it was his opinion that A.W. was incapable of consent, which was supported by a number of factors including she had an intellectual disability with a mental age of 11 years, 7 months and an adaptive living skill equivalency of 5 years, 2 months; and the court system has almost universally indicated that

individuals of similar age levels lack the capacity to consent. *Id*. at 69-70.a By extension, A.W. should be viewed as unable to consent.

A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant…who suffers from a mental disability which renders the complainant incapable of consent. 18 Pa. C.S.A. §3121(a)(5). Sexual intercourse includes not only vaginal intercourse, but also includes "intercourse per os or per anus, with some penetration however slight; emission is not required." 18 Pa. C.S.A. §3101.

The jury was instructed that in order to find Leonard guilty there were three elements that the Commonwealth needed to prove beyond a reasonable doubt: (a) Leonard had sexual intercourse with A.W.; (b) at the time of the intercourse, A.W. was suffering from a mental disability that made A.W. incapable of consent; and (c) Leonard knew or recklessly disregarded A.W.'s mental disability, i.e., Leonard consciously disregarded an unjustified risk that A.W. was so mentally disabled as to be unable to understand the nature of sexual intercourse and to exercise reasonable judgment.

The court finds that the Commonwealth presented sufficient evidence to prove beyond a reasonable doubt that Leonard committed rape of a mentally disabled person. A.W. testified that Leonard raped her four times by placing his penis in her butt. This testimony was sufficient to show that Leonard engaged in sexual intercourse per anus with A.W.

A.W. suffers from Down Syndrome. Therefore, she suffers from a mental disability. Dr. Dowell testified how that mental disability affected A.W.'s mental age and adaptive living skill equivalency. He testified that individuals with these capacities lack the ability to consent; therefore, by extension, A.W. should be viewed as unable to consent. The

jury also observed A.W. testify and saw how she had difficulty understanding some questions and concepts. The court finds that the evidence was sufficient to show that A.W. suffers from a mental disability which renders her incapable of consent.

The evidence also showed that Leonard was aware of A.W.'s condition. Leonard lived with A.W. Dawn Harer, who was employed with the Joinder Board in the Intellectual Disabilities Office, testified that Leonard lived with A.W. and her guardian on High Street. Leonard's son, daughter-in-law, and grandchild also resided in the home. N.T., 05/17/2023, at 85. Kathy Hepler, who also was employed with the Joinder Board in the Mental Health/Intellectual Disabilities (MH/ID) office testified that A.W. had lived in the home her entire life because it was her home with her mother. *Id*. at 123. When her mother passed away, the home was in A.W.'s name and her mother's friend, T.J., became A.W.'s guardian. A.W. testified that Leonard was her mother's friend and she used to call him "Uncle Ernie." *Id*. at 50-51.

When viewed in the light most favorable to the Commonwealth as the verdict winner, the evidence was sufficient to prove beyond a reasonable doubt that Leonard committed rape of a mentally disabled person.

A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant who suffers from a mental disability which renders him or her incapable of consent. 18 Pa. C.S.A. §3123. As pertains to this case, deviate sexual intercourse is intercourse per os (mouth) or anus with another human being. In this particular case, IDSI has the same elements as rape of a mentally disabled person. Therefore, the same evidence was sufficient to prove IDSI beyond a reasonable doubt.

The crime of sexual assault is defined as follows:

> Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.

18 Pa. C.S.A. §3124.1. Sexual intercourse and deviate sexual intercourse include intercourse by anus. A.W. testified that Leonard put his penis in her butt on four separate occasions – twice in the recliner in her bedroom on High Street and twice in the truck. A.W suffered from Down Syndrome which rendered her incapable of consent. A.W. not only lacked the capacity to consent, but testified that she did not want to have sex with Leonard and she tried to tell him that but he would not listen. N.T., 05/17/2023, at 49, 51. She also testified that Leonard made her "do it." 47, 49, 51. Therefore, the evidence was sufficient to prove Leonard committed sexual assault.

The evidence also was sufficient to prove Leonard was guilty of aggravated indecent assault. As pertains to this case, a person commits aggravated indecent assault when the person engages in penetration, however slight, of the anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if the complainant suffers from a mental disability which renders him or her incapable of consent. A.W. testified that Leonard put his penis in her butt. A penis is a body part. Leonard did so for his own sexual gratification and not for any medical, hygienic or law enforcement procedure. A.W. suffers from

Down Syndrome which renders her incapable of consent. Therefore, the evidence was sufficient to prove Leonard committed aggravated indecent assault.

2. Sentence

Leonard next asserts that the sentence imposed was manifestly excessive and an abuse of discretion. The court cannot agree.

Sentencing is a matter vested within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. ***Commonwealth v. Rush***, 162 A.3d 530, 544 (Pa. Super. 2017), citing ***Commonwealth v. Crump***, 995 A.2d 1280, 1282 (Pa. Super. 2010); see also ***Commonwealth v. Perry***, 32 A.3d 232, 236 (Pa. 2011). "An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." ***Perry, id*** (internal quotations omitted), citing ***Commonwealth v. Walls***, 926 A.2d 957, 961 (Pa. 2007).

In imposing the sentence, "the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and the community, and the rehabilitative needs of the defendant." 42 Pa. C.S.A. § 9721 (b).

The court is also guided by § 9781 (d) of the Judicial Code, which requires appellate courts in reviewing a sentence to determine from the record whether the court considered: "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the opportunity of the sentencing court to observe the defendant, including any pre-sentence investigation; (3) the findings upon which the sentence

was based; and (4) the guidelines promulgated by the commission." 42 Pa. C.S.A. § 9781 (d). In determining if a sentence is excessive or unduly harsh, great weight must be afforded to the sentencing court's discretion. ***Commonwealth v. Colon***, 102 A.3d 1033, 1043 (Pa. Super. 2014), quoting ***Commonwealth v. Mouzon***, 828 A.2d 1126, 1128 (Pa. Super. 2003)).

Where the sentencing court is informed by a presentence investigation report ("PSI"), it is presumed that the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations and the appropriate sentencing factors. ***Commonwealth v. Harper***, 273 A.3d 1089, 1097-1098 (Pa. Super. 2022); ***Commonwealth v. Hill***, 210 A.3d 1104, 1117 (Pa. Super. 2019). "[W]here the court has been so informed, its discretion should not be disturbed." ***Harper***, 273 A.3d at 1098. "Further, where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code. ***Hill, id*** (citing ***Commonwealth v. Moury***, 992 A.3d 162, 171 (Pa. Super. 2010)).

An allegation of excessiveness due to the imposition of consecutive sentences implicates the discretionary aspects of sentencing. ***Commonwealth v. Mastromarino***, 2 A.3d 581, 585 (Pa. Super. 2010). The imposition of consecutive, rather than concurrent, sentences only raises a substantial question in the most extreme circumstances. ***Moury***, 992 A.2d at 171. Furthermore, a defendant is not entitled to a volume discount for his crimes. ***Commonwealth v. Prisk***, 13 A.3d 526, 533 (Pa. Super. 2011); ***Commonwealth v. Hoag***, 665 A.2d 1212, 1214 (Pa. Super. 1995).

The controlling sentences in this case were the two consecutive four (4) to eight (8) years' incarceration on each count of rape of a mentally disabled person, a felony of

the first degree. The maximum sentence for a felony of the first degree is 20 years. The offense gravity score (OGS) for this offense was 12. Although Leonard had a prior conviction for corruption of minors from 1997, the parties agreed that Leonard's prior record score (PRS) was a zero. Sentencing Transcript, 08/29/2023, at 2. With an OGS of 12 and a PRS of 0, the standard minimum guideline range was 48 months to 66 months. Sentencing Transcript, at 5.

A pre-sentence investigation (PSI) report was prepared. The court discussed the contents of the PSI on the record at the sentencing hearing. Sentencing Transcript, at 3-5. The PSI indicated that Leonard was 64 years old, a United States citizen and a high school graduate. It discussed his family history and noted that he received an honorable discharge from the Marine Corps. He denied the charges and expressed concerns about living the rest of his life in jail.

Leonard's family and friends spoke on his behalf.

Defense counsel argued that due to Leonard's age and health, a state prison sentence would be a death sentence for Leonard. He noted Leonard's role as patriarch and a source of support for his family, as well as his military service. Counsel requested a time-served county parole sentence followed by lengthy probation.

The Commonwealth requested a sentence at the top of the standard range. The Commonwealth acknowledged the positive traits mentioned during the hearing, but also noted the seriousness of the offense, the vulnerability of the victim, and the strong deterrence factor. He argued that a county sentence with consecutive probation would not appropriately vindicate "the people's right to deter criminals from abusing and victimizing people in

general, but mentally disable people more specifically." Sentencing Transcript, at 17.

The court considered the PSI, the statements of family and friends, and the arguments of both attorneys. The court sentenced Leonard at the bottom of the standard range due to his age, his lack of prior record and the likelihood that he would not reoffend. Sentencing Transcript, at 19. Absent those factors, the court likely would have imposed a sentence in the mid to upper portion of the standard guideline range. *Id*. The court specifically stated that a county sentence would depreciate the seriousness of the offense and send the wrong message not only about this type of offense generally, but also with someone who is intellectually disabled. Sentencing Transcript, at 20.

A county sentence also would not have been appropriate because it would have been well below the standard minimum guideline range. To impose a county sentence, the maximum sentence imposed must be less than two years. 42 Pa. C.S.A. §9762(b)(2) (3). The minimum sentence cannot exceed one-half of the maximum sentence. 42 Pa. C.S.A. §9746(b)(1). Therefore, to impose a county sentence, the court would have had to impose a sentence of less than 12 months. A sentence of 12 months would have been inadequate given the seriousness of the offense and the fact that it occurred on multiple occasions. Furthermore, a time-served county sentence would have been highly inappropriate because Leonard had only served approximately 157 days at the time of sentencing. The ramifications from these incidents were significant on the victim. Leonard was a close family friend; so close, in fact, that the victim used to refer to him as "Uncle Ernie." Leonard had access to the victim due to this relationship and abused her trust in him. Moreover, not only was a mentally disabled individual raped on several occasions, but she had to be removed

from her own home and moved into a group home to protect her safety. See N.T., 05/17/2023, at 84-86, 123, 128. In light of all the circumstances, the court would not impose a county sentence.

The sentence imposed was not manifestly excessive or unreasonable. The sentence imposed was at the bottom of the standard range. ***Hill*****,** 210 A.3d at 1117 (Pa. Super. 2019)("where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code"). Consecutive sentences were appropriate because Leonard had anal sex with a mentally disabled individual who was incapable of consent on several occasions. The court has discretion to run sentences consecutively and a defendant is not entitled to a volume discount of having his sentences run concurrently. 42 Pa. C.S.A. §9721(a)(the court may impose sentences consecutively or concurrently); ***Commonwealth v. Zirkle*****,** 107 A.3d 127, 133 (Pa. Super. 2014).

3. Rule 600 motion

The rationale for the court's denial of Leonard's Rule 600 motion can be found in the Opinion and Order entered on May 16, 2023.

DATE: _____ By The Court,

_____
Nancy L. Butts, President Judge

cc: District Attorney
Tyler Calkins, Esquire (APD)
Superior Court (original & 1)

Gary Weber, Esquire
Jerri Rook