

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ANDRE HARDEE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1051 EDA 2011

Appeal from the Judgment of Sentence March 3, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0000447-2008
CP-51-CR-0002319-2008

BEFORE: LAZARUS, J., OLSON, J., and FITZGERALD, J.*

MEMORANDUM BY LAZARUS, J.

FILED MAY 30, 2013

Andre Hardee appeals from his judgment of sentence entered in the Court of Common Pleas of Philadelphia County following his convictions of rape¹, attempted rape², involuntary deviate sexual intercourse³, and multiple counts of corruption of the morals of a minor⁴. Hardee challenges the weight and sufficiency of the evidence, as well as various trial court rulings.

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 3121.

² 18 Pa.C.S.A. § 901, 3121.

³ 18 Pa.C.S.A. § 3123(b).

⁴ 18 Pa.C.S.A. § 6301.

After our review, we conclude no relief is due and we affirm on the opinion authored by the Honorable Willis W. Berry.

Hardee lived in Philadelphia with his three minor cousins, their mother (his aunt) and their grandmother for two years. During those two years, Hardee repeatedly sexually assaulted his young cousins. After the children's mother died, the children were placed in foster care. It was during their foster placement that the children reported the incidents to their foster parents.

Following trial, the court determined Hardee was a sexually violent predator under Megan's Law and sentenced him to an aggregate term of 20 to 40 years' incarceration. Hardee filed post-sentence motions, which were denied after a hearing. On appeal, Hardee raises the following issues for our review:

1. Whether the evidence was sufficient to sustain a verdict of guilt?
2. Whether the verdict was against the weight of credible evidence?
3. Whether the court erred in permitting evidence where there was no crime charged to support it and such evidence constituted a prior bad act?
4. Whether the court erred in permitting the evidence of a third party's criminal record to be admitted?
5. Whether the court erred in not granting a mistrial after the opening statement and after the closing statement where the prosecutor utilized prejudicial language and inadmissible evidence?
6. Whether the court erred in allowing testimony that was speculative, prejudicial and inflammatory in nature?

After our review of the parties' briefs, the record, and the relevant law, we conclude that the trial court opinion properly disposes of Hardee's issues on appeal. Therefore, we rely upon Judge Berry's decision to affirm Hardee's judgment of sentence. We instruct the parties to attach that decision, with all references to the victims redacted, in the event of further proceedings in this matter.

Judgment of sentence affirmed.

FITZGERALD, J., Concur in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 5/30/2013

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMM. OF PENNSYLVANIA

v.

ANDRE HARDEE

C.P. #51-CR-0000447-2008

C.P. #51-CR-0002319-2008

1051 EDA 2011

FILED

JUL 11 2012

Criminal Appeals Unit
First Judicial District of PA

OPINION

BERRY, J.

July 10, 2012

PROCEDURAL HISTORY

Appellant was originally before this court, sitting with a jury, from June 7-9, 2010, and found guilty of the following: in CP #000447, Appellant was convicted of Involuntary Deviate Sexual Intercourse (IDSI) and Corruption of the Morals of a Minor (CMOM) against complainant K██████ H██████. Appellant was also convicted of Rape and Corruption of the Morals of a Minor against complainant K██████ H██████, in CP #0002319, Appellant was found guilty of attempted Rape and Corruption of the Morals of a Minor against complainant K██████ H██████.

Appellant was found to be a sexually violent predator, and sentenced on March 4, 2011 to the following: for CP #000447, ten (10) to twenty (20) years for the IDSI conviction, and two and a half (2 ½) to five (5) years for the CMOM conviction, concurrent to the IDSI conviction; ten (10) to twenty (20) years for the Rape conviction, consecutive to the IDSI conviction, and two and a half (2 ½) to five (5) years for the CMOM conviction, concurrent to the IDSI conviction.

For CP#0002319, Appellant was sentenced to two and a half (2 ½) to five (5) years for

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conviction, concurrent to CP#000447. In aggregate, Appellant was sentenced to twenty (20) to forty (40) years. Appellant filed a timely post-sentence motion which was denied after a hearing on April 6, 2011.

This timely appeal follows.

FACTS

Appellant's (b. 9/13/77) convictions stem from his conduct with complainants K█████, K█████, and K█████ H█████. Appellant is the cousin of all three siblings and lived with them at 815 North Lex Street, along with their mother J█████ H█████ (his aunt) and grandmother in the city and county of Philadelphia. Appellant sexually assaulted all three siblings on various occasions over roughly two years while he lived under their roof.

K█████ H█████ (b. 2/8/91), the oldest sibling, testified that he remembered Appellant living in their basement for a short time, and moved out just before their Grandmother moved out in 1998. K█████ remembered two occasions on which Appellant touched him sexually. Although he could not remember specifically when they happened, he remembered being roughly four or five years old when Appellant first touched him (N.T. 6/7/10 p. 59).

The first time Appellant touched him, K█████ remembered that it "was dark" (N.T. at 62) and he was watching television from the couch in the first-floor living room, Appellant came up from his basement bedroom and sat on the couch next to him. He started touching the boy's penis and butt, then pulled K█████'s pants and underwear down, and sat K█████ on his lap. Appellant then positioned K█████ onto the couch on his hands and knees, exposed himself and began to sodomize K█████. K█████ could not remember how long this went on for, only that it

hurt, and he said "Ouch." (N.T. at 67). He could not remember what made Appellant stop, only that when he got up from the sofa and put on his clothes to run upstairs, Appellant pulled him by the arm and told him "don't tell." (N.T. at 68).

K█████ could not remember how old he was the second time Appellant touched him; only that it happened while Appellant was still living with them. This time, K█████ ventured downstairs after hearing Appellant playing video games. Appellant was alone in the basement sitting in front of the television in a large reclining chair. (N.T. at 70)

K█████ climbed onto Appellant's knee and asked if he could play video games with him. As K█████ played the video games, Appellant started touching him. Appellant put his hands in K█████'s pants and began fondling his penis. Appellant then pulled K█████'s pants down and unbuttoned his own pants, exposing himself. Appellant repositioned K█████'s body by first standing the boy up straight up over his knee, then lowered him onto his penis and began to sodomize him before K█████ said "ouch" grabbed his clothes and ran upstairs (N.T. at 71-74).

K█████ ran into the kitchen where his grandmother was, but did not tell her what happened in the basement. K█████ did not tell anyone about the incidents until 2006, when he told his therapist.

K█████ H█████ (b. 1/19/96), the third oldest sibling, testified that Appellant touched her "more than once" while she lived at 815 North Lex Street (N.T. at 153). She could not remember specifically how old she was when it happened, only that Appellant was not living there at the time, and it was after 1998, the year her grandmother moved out of the house and moved from Philadelphia to Syracuse, New York, but before the year they all moved to South Philadelphia.

K█████ testified that the first incident with Appellant happened in the living room while she was watching TV. Appellant came in and showed her his penis, then laid her on her back, pulled her pants down and penetrated her vaginally. She tried to get away, but he used the advantage of his weight to keep her pinned down. He stopped abruptly when they heard someone coming down the stairs. (N.T. 6/7/10 at 163-65) K█████ testified she told no one but her sister K█████ about the incident for fear of what Appellant might do to their mother. (N.T. 6/7/10 at 165-66)

In her earlier statements to police and at the preliminary hearing, however, K█████ testified that Appellant only put his penis on her vagina, not in it. When specifically asked at the preliminary hearing "Did it ever go in?" She answered "No" (N.T. at 189). Similarly, her statement to police, in response to the question, "Did his private part go in or on your vagina?" K█████ answered "On" (N.T. at 193).

At trial, K█████ testified about another occasion when Appellant came into her bedroom in the middle of the night while she and her sister K█████ were sleeping and pulled her pajama bottoms and underwear off. Appellant put his hand over her mouth, unbuckled his own pants and penetrated her vaginally with his penis. (N.T. at 160-162) K█████ testified that she tried to move, but Appellant used his weight to pin her down and keep her from getting away.

K█████ Hunter, (b.12/25/93) the second oldest sibling, remembered living at 815 North Lex Street from age six to ten (app. 1999 -2003) with her mother, grandmother, K█████, and K█████ until they all moved to South Philadelphia with her mother's (then) boyfriend, Demetrius Hunter (N.T. 6/8/10 pp.8-10). She only remembered Appellant living at Lex Street for roughly one year, but she remembered it was while her grandmother was still living with

them, and that he moved out after her grandmother in 1998.

K[REDACTED] testified that she was six years old when Appellant first assaulted her, and the assaults continued until she was seven years old. The first time Appellant touched her was at night while she slept in her bed (N.T. 6/8/10 at 17). She was sleeping in the bottom bunk next to her sister K[REDACTED], and K[REDACTED] was sleeping in the top bunk. She remembered waking up to Appellant covering her mouth with his hand. Appellant pulled her nightgown up and pulled out his penis, then climbed into the bed, climbed onto her and penetrated her vaginally with his penis. He continued to penetrate her until her sister woke up and looked at her (N.T. 6/8/10 at 19-22). He then got up, put his penis back into his pants and left the room (Id. at 22). K[REDACTED] put her clothes back on, ran to her mother's room and told her what happened, then came back to her room and sat on her bed for the rest of the night. Id.

K[REDACTED] remembered another occasion which occurred in the kitchen during the day. Appellant sat her on top of the kitchen table, pulled her pants and underwear down, and penetrated her vaginally with his penis. He abruptly stopped when he heard their grandmother coming down the stairs and into the kitchen. When her grandmother asked Appellant what he was doing, K[REDACTED] ran out of the room.

K[REDACTED] testified that Appellant assaulted her five different times while he lived there, but she could not remember each instance specifically because they "seemed to blur together" (N.T. at 16). She remembered being assaulted in her bedroom, the kitchen, and in the living room, but could not remember specific details of those assaults.

During their time at Lex Street, K[REDACTED] remembered another cousin, C[REDACTED] H[REDACTED] living with them at Lex Street. C[REDACTED] was three years older than her brother K[REDACTED], and

shared a bedroom with him for the duration of his stay.

C██████████, H██████████ (b. 10/13/85) pled guilty to indecent exposure and corrupting the morals of a minor as to K██████████ H██████████, and was sentenced to a term of six (6) to twenty-three (23) months incarceration followed by eight years probation. He testified that he lived with his three younger cousins at 815 North Lex Street from 1998 to 2000, and he sexually assaulted K██████████ when he was "12 or 13 years old" (N.T. 6/7/10 p. 207). He testified specifically to one instance where their mother (J██████████) was not home. He came home, locked the door and went upstairs, when he was stopped by Appellant just outside of his room. Appellant was in K██████████'s room, and told him "come here little nigger" (N.T. at 209). C██████████ went into the room, and Appellant told him to "come fuck this girl, come fuck the little cousin" (Id. at 209). He saw K██████████ lying on the bed in her pajamas, crying, and Appellant told him to "do what I told you to do or I'll beat you up, I'll give you body shots." (Id. at 211) He told C██████████ to pull her pants down, and C██████████ pulled K██████████'s pajama pants down, laid on top of her and started "grinding on her" rubbing his penis on her vagina (Id. at 211). While he did this Appellant walked over to K██████████ and held his hand over her mouth so no one would hear her scream (Id. at 212). C██████████ testified that he grinded on K██████████ for roughly five to ten seconds, the duration of which she spent crying, screaming, and squirming attempting to get away from both of them. He also testified that he never personally witnessed any other sexual contact between Appellant and the siblings.

After moving with Demetrius Hunter to South Philadelphia, J██████████ H██████████ passed away in 2004, leaving the siblings with their step-father. He soon began to physically and sexually abuse them, and they were eventually removed from the home by the Department of Human

Services, separated and eventually placed in foster homes. It was during their foster placement, that the children began reporting the incidents to their foster parents, who in turn reported to DHS and the police.

At trial, it was stipulated that Demetrius Hunter was convicted of rape, endangering the welfare of a child, and corrupting the morals of a minor with respect to his molestation of ~~Kathleen H.~~ Hunter was also convicted of aggravated assault, endangering the welfare of a child, and corrupting the morals of a minor with respect to a physical assault involving ~~Kathleen Hardee~~.

ISSUES

In response to this Court's Order for a Statement of Matters Complained of on Appeal, Appellant avers the following:

1. The verdict was against the evidence.
2. The verdict was against the weight of the credible evidence where all three complainant's testimony varied considerably with their prior testimony, prior statements made to the police, and statements made to the Department of Human Services, and physical evidence was lacking.
3. The Court erred in denying dismissal where the testimony was from young children and was obviously tainted and prepared by the Commonwealth. Case in point where one victim alleged during the preliminary hearing that there was no penetration thus changing the charge to attempted rape where at the trial, the victim stated that the Defendant raped her and penetrated her.
4. Imposition of an aggregate sentence of 20 to 40 years of incarceration was unconstitutionally disproportionate, irrational and violates due process, equal protection and the cruel and unusual punishment clauses of the Pennsylvania and United States Constitutions.
5. The Court erred in permitting the Commonwealth witness, ~~Kathleen Hardee~~ to testify that defendant, Andre Hardee instructed a co-defendant to have sex with her in that there was no conspiracy or other crime charged in connection with the incident and it constituted a prior bad act which was inadmissible, inflammatory and prejudicial to the defense.
6. The Court erred in not excluding the evidence of Demetrius Hunter's criminal record. Counsel was forced to either permit all or none of the evidence regarding Hunter's abuse of the children. Since counsel needed to cross examine the children regarding their lies to cover for their father, she had no choice but to permit otherwise inadmissible evidence before the jury.

7. The Court erred in denying a mistrial where in the opening statement to the jury, the Commonwealth indicated that since the other co-defendants pleaded guilty, that this defendant is guilty and that he should be found guilty.
8. The Court erred in permitting K. Hardee to testify to an incident involving a gun where there was no gun charge, the testimony varied from previous testimony and statements, and the prejudice outweighed the probative value of the evidence.
9. The Court erred in permitting K. Hardee to testify that she speculated that if she would tell her mother what happened, Defendant would "shoot her, stab her in the back or do something bad to her." The statement was speculative, prejudicial and inflammatory.
10. The Court erred in permitting the record of Demetrius Hunter to come into evidence where the Commonwealth proffered evidence that K. Hardee would testify that she was raped by Hunter after she told Hunter that she was raped by Defendant Andre Hardee. K. Hardee's testimony was actually that she did not discuss what happened with Andre Hardee and Courtney Hardee with Demetrius Hunter (N.T. 6/8/10 at 37).
11. The Court erred in not striking and instructing the jury to disregard the Commonwealth's statements in its closing argument that they should "respect the children and their dignity" in making their verdict.
12. The Court erred in refusing to dismiss the charges based upon the statute of limitations.
13. The Court erred on the re-charge of the jury on the charge of Corruption of the Morals of a Minor in that the second charge was inaccurate and tended to confuse the jury thus resulting in an improper verdict.

DISCUSSION

I. The Standard of Review - Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a criminal conviction, a court must determine whether the evidence, and all reasonable inferences deducible from that, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offense beyond a reasonable doubt. Commonwealth v. Ratsamy, 934 A.2d 1233, 1237 (Pa. 2007). Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. Id. Moreover, applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Id. The

trier of fact, while passing upon the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence. Id.

1. The evidence was sufficient to establish support the convictions for IDSI, Rape, attempted Rape and CMOM, where the jury found Commonwealth's witnesses to be credible and was free to believe all, some or none of the evidence presented.

Appellant's convictions were properly supported by the evidence where the jury, sitting as fact finder heard testimony from the complaining witnesses, found it wholly credibly and believable, and judged it accordingly. A person commits IDSI with a child when that person "engages in deviate sexual intercourse with a complainant who is under thirteen years old. 18 P.S. § 3123(b). Deviate Sexual Intercourse is defined as "sexual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal" 18 P.S. § 3101.

The jury heard testimony from ~~Khalid Haidar~~ that Appellant sodomized him on two separate occasions, when he was 5 or 6 years old, and on one of those occasions attempted to keep him from telling anyone.

A person commits Rape when they "engage in sexual intercourse with another not their spouse either: a) by forcible compulsion; or b) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" 18 P.S. §3121. A person commits the offense of rape of a child, a felony of the first degree, when the person "engages in sexual intercourse with a complainant who is less than 13 years of age" 18 P.S. §3121 (c). Sexual Intercourse is an element of Rape and is defined in §3101 as "intercourse per os or per anus, with some penetration however slight; emission is not required."

Under 18 P.S. §6301 (2009), "Whoever, being of the age of 18 years and upwards, by any

course of conduct corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of a crime... commits a misdemeanor of the first degree." In this case, the alleged crimes were those being charged – Rape, attempted Rape, and IDSI.

The jury heard testimony from K[REDACTED] H[REDACTED] that Appellant penetrated her vaginally on at least two occasions against her will when she was six years old. K[REDACTED] H[REDACTED] testified that she was roughly six or seven when Appellant penetrated her vaginally with his penis, in the kitchen before he was abruptly interrupted by their grandmother. Although K[REDACTED]'s testimony conflicted with her prior statements that he only placed his penis on her vagina, the jury, sitting as fact-finder was free to believe all, some or none of the evidence presented. Even if they did not believe that Appellant actually penetrated K[REDACTED] vaginally, they could have reasonably believed her testimony that he intended to rape her and that his act was interrupted by his grandmother's intervention. Appellant's convictions were therefore supported by the weight and sufficiency of the evidence.

2. The Court did not err in permitting the testimony of young children where they were deemed competent to testify.

The general rule in Pennsylvania is that every person is presumed competent to be a witness. Pa. R. Evid. 601(a). Appellant contends that the Court erred in permitting their testimony where in one instance, trial testimony differed from pre-trial testimony. Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption. A decision on the necessity of a competency hearing is addressed to the discretion of the trial court. Commonwealth v. Washington, 554 Pa. 559, 722 A.2d 643,

646 (Pa. 1998)

A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. A competency hearing is not concerned with credibility. Credibility involves an assessment of whether or not what the witness says is true; this is a question for the fact finder. Washington, 722 A.2d at 646. An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation. See Commonwealth v. Rolison, 473 Pa. 261, 374 A.2d 509 (Pa. 1977), cert. denied, 434 U.S. 871, 54 L. Ed. 2d 150, 98 S. Ct. 215 (1977) (allegation that witness is insane will trigger competency hearing). In this case, Appellant did not demonstrate that a witness's memory was tainted to any degree that would warrant an investigation into witness competency. Appellant failed to even raise the issue of competency at trial. Mere speculation and conjecture now are not enough to disturb this Court's finding that the complaining witnesses were competent at the time of trial, and where Appellant failed to make a timely objection at trial, that issue is now waived on appeal.

3. The Court properly sentenced Appellant under the sentencing guidelines.

Generally, the imposition of sentence is a matter vested within the sound discretion of the trial court. Commonwealth v. Smith, 543 Pa. 566, 673 A.2d 893 (1996). To constitute an abuse of discretion, the sentence must either exceed statutory limits or be manifestly excessive. Commonwealth v. Ellis, 700 A.2d 948 (Pa. Super. 1997). Review of the discretionary aspects of

sentence is not automatic; Appellant must state a substantial question that the sentence was not appropriate under the Sentencing Code to warrant review. An argument that the sentence is excessive when it falls within statutory limits also fails to raise a substantial question.

Commonwealth v. Nixon, 718 A.2d 311 (Pa. Super. 1998)

Appellant was given concurrent, guideline sentences of ten to twenty years for each Rape conviction, and a consecutive ten to twenty year sentence for the IDSI conviction. All other sentences ran concurrent. Appellant was properly sentenced under the Sentencing guidelines. Appellant had a prior record score of five and the Rape conviction carried an offense gravity score of fourteen, the IDSI conviction carried an offense gravity score of twelve, the Attempted Rape conviction carried an offense gravity score of thirteen, and the CMOM conviction carried an offense gravity score of five. Based upon the sentencing guidelines, Appellant was facing a minimum of sixteen to thirty-two years. Under 18 P.S. §3123(d)(1), Appellant was facing a maximum sentence of up to forty years if convicted of IDSI alone. Thus, Appellant's contention that his sentence was somehow disproportionate in light of this fact rings rather disingenuous.

4. The Court did not err in permitting ~~Kenneth H.~~'s testimony where, in fact, ~~Courtney H.~~ testified from personal knowledge, and the testimony was both relevant and probative.

Appellant incorrectly transposes ~~Courtney H.~~'s trial testimony of his participation with Appellant in ~~Kenneth H.~~'s sexual assault with that of ~~Kenneth H.~~'s trial testimony. In either regard, his argument is without merit. Pennsylvania Rule of Evidence 404 states that character evidence is not admissible to establish an individual's propensity or character for such conduct, however, such evidence may be admissible in special circumstances where the evidence is

relevant for some other legitimate purpose, such as motive, and not merely to prejudice the defendant by showing him to be a person of bad character. Commonwealth v. Mayhue, 639 A.2d 421, 434 (1994). In this case, the testimony presented was not representative of character evidence but substantive evidence that was properly admitted under Pennsylvania Rule of Evidence 401, which defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Commonwealth v. Owens, 929 A.2d 1187, 1190 (Pa. Super. 2007). ~~Complainant's~~ testimony of their sexual assault of K~~imberly~~h was relevant for the legitimate purpose of demonstrating how Appellant acted in accordance with 18 P.S. §6301 by holding his hands over K~~imberly~~h's mouth so she wouldn't scream while she was being sexually assaulted. Appellant's argument again is without merit.

5. The Court did not err in permitting the evidence of Demetrius Hunter's criminal record where it was relevant and permissible.

Appellant contends that Demetrius Hunter's criminal record was inadmissible. Appellant's contention is without merit whereby he opened the door upon cross-examination of the Complaining witnesses and impeached their credibility with evidence that they lied about the abuse committed by their stepfather. Hunter's record was clearly probative in that it tended to prove that the siblings were telling the truth about the abuse they received from their stepfather, and was probative in determining their credibility with respect to their allegations against Appellant. As already stated, credibility was left solely to the province of the fact-finder.

6. The Court did not err in denying a mistrial where the motion for mistrial was meritless.

Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, "forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a true verdict." Commonwealth v. Bronshtein, 691 A.2d 907, 917 (1997), citing Commonwealth v. Sam, 635 A.2d 603, 608 (1993), cert. denied, 511 U.S. 1115, 128 L. Ed. 2d 678, 114 S. Ct. 2123 (1994). Appellant argues that the Commonwealth's opening statements that the co-defendants pled guilty prejudicially inferred Appellant's guilt by association, and that he should be punished for not pleading guilty. There was no evidence that the jury agreed with that assessment. Further, this Court curatively instructed the jury that lawyers' statements "do not constitute any evidence in the case...It is the witness' answers which provide the evidence for you. So you shouldn't speculate or guess that something may be true merely because one of the lawyers asks a question which assumes or suggests that something may be true." (N.T. 6/7/10 at 28-29) This Court found the jury to be cognizant and reticent of its instructions throughout the entire trial – and saw no indication before the start of the evidence that the jury would not perform according to the oath it swore. Appellant's motion for dismissal was properly denied.

7. The Court did not err in permitting K█████'s testimony involving an incident with a gun, where the testimony was not unduly prejudicial to Appellant.

Before K█████ testified about an incident involving Appellant handing him a gun, Appellant objected on the basis of prejudice. At side bar, the Commonwealth informed the Court that the scope of testimony was going to be that Appellant used the gun to threaten K█████ into keeping quiet about the assaults. However, K█████ testified that he only saw the gun twice, once when Appellant put it into a desk drawer, and the other time when Appellant let him hold it, then told

him to point it at himself. Although the probative value of this testimony was questionable, it did not rise to the level of undue prejudice that warranted its immediate exclusion. Similarly, Appellant has provided no basis as to how it unduly prejudiced him at trial. As such, the objection as properly denied, and Appellant's issue is without merit on appeal.

8. The Court properly permitted Demetrius Hunter's record into evidence despite the proffer by Commonwealth as to what ~~Kenneth H. Hunter~~ would testify to, because Appellant already opened the door regarding all three witnesses' credibility on cross-examination.

~~Kenneth H. Hunter~~ testified that she never told Demetrius Hunter about the sexual abuse from either Andre or ~~Courtney Hunter~~. She testified that after her mother died in 2004, Hunter became more abusive, and eventually began raping her too. (N.T. 6/8/10 at 34-36) On cross, Appellant attempted to impeach her credibility by questioning her about whether the physical abuse she witnessed by Hunter against her sister actually occurred. As stated previously, when Appellant opened the door on cross-examination, Hunter's record pertaining to his abuse of these three children became probative and relevant to the facts of this case.

Appellant's argument that the Court improperly admitted the record is without merit.

9. The Court did not err in permitting Commonwealth's closing arguments where they were within the scope of argument and the Court properly instructed the jury that Commonwealth's arguments were not evidence to be considered in making their findings.

Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds a fixed bias and

hostility toward the defendant such that they could not weigh the evidence objectively and render a true verdict." Commonwealth v. Bronshtein, 547 Pa. 460, 482, 691 A.2d 907, 917 (1997), citing Commonwealth v. Sam, 535 Pa. 350, 362, 635 A.2d 603, 608 (1993), cert. denied, 511 U.S. 1115, 128 L. Ed. 2d 678, 114 S. Ct. 2123 (1994)

The Commonwealth stated in closing:

"I ask that find him guilty of all these charges. I ask that you respect the character and the dignity of those three kids who came in here and did something that was really not cool for them and was really hard for them to do. They did it so you can deliver justice. And justice in this case is guilty. Thank you." (N.T. 6/8/10 at p.89)

This Court finds nothing in that statement so unavoidable in its effect on the jury that they would have disregarded the Court's own final instructions to use the law and their own common sense, to disregard the lawyer's arguments as evidence, and to consider only the evidence presented in the courtroom and by stipulation. (N.T. 6/8/10 at 101) Appellant has not demonstrated how the jury was prejudiced by Commonwealth's closing in light of the facts presented and the Court's own curative instructions. As such, Appellant's argument is without merit.

10. The Court did not err in dismissing charges where the statute of limitations had not run.

For major sexual offenses the statute of limitations is generally twelve years under 42 P.S. §5552. There exists an exception for sexual offenses committed against minors, however, where the statute is tolled until the complainant reaches the age of majority. The crimes of rape, IDSI and Corruption of the morals of a minor are all enumerated exceptions under the statute. At the time of trial in 2010, only K█████, 19, had reached the age of majority. All three of the children

were well within the tolling period for the statute of limitations. Appellant's argument is therefore without merit.

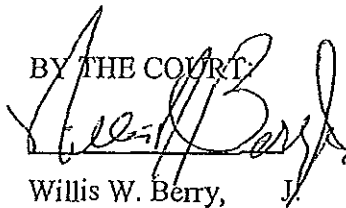
11. The Court did not err in re-instructing the jury with respect to the charge or Corruption of Minors.

In Commonwealth v. Lambert, 226 Pa. Super 41, 313 A.2d 300 (1973), the Superior Court held that where a defendant was charged with Corrupting the morals of a minor as to specific conduct, the trial court erred in not properly instructing the jury that the corrupting had to be done by the act of sexual intercourse. A general instruction was insufficient. In this case, the Court corrected its earlier, general CMOM instruction, with one that properly instructed the jury to find that Appellant corrupted morals through the specific acts of conduct he was charged with. When Appellant objected and stated to the Court "you don't have to have that particular conduct to corrupt a minor" (N.T. 6/8/10 at 133) he was in fact, stating the exact opposite of precedent. Appellant contends that the change improperly confused the jury. On the contrary, this Court's instruction clarified precisely what conduct needed to be proven to convict under the Corruption of Morals statute. Appellant's argument that the Court erred in clarifying its earlier instruction are therefore without merit.

CONCLUSION

For the reasons stated above, this Court's judgment should be AFFIRMED.

BY THE COURT:



Willis W. Berry, J.