

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

WOODROW WILSON KEEFER JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1492 MDA 2012

Appeal from the Judgment of Sentence March 20, 2012
In the Court of Common Pleas of Fulton County
Criminal Division at No(s): CP-29-CR-0000191-2010

BEFORE: PANELLA, J., SHOGAN, J., and COLVILLE, J.*

MEMORANDUM BY PANELLA, J.

Filed: April 25, 2013

Appellant, Woodrow Wilson Keefer, Jr., appeals from the judgment of sentence entered March 20, 2012, by the Honorable Carol L. Van Horn, Court of Common Pleas of Fulton County.¹ We affirm.

This case arose out of Keefer's repeated sexual assault of his four young grandsons. At trial, the Commonwealth presented the testimony of JBH, age 17, and TJK, age 24. A third grandson, TAH, was precluded from testifying on motion by the defense, due to the hypnotic refreshing of his memory prior to trial. A fourth grandson, NRC, testified for the defense that he had no recollection of any assault perpetrated by Keefer. On December

* Retired Senior Judge assigned to the Superior Court.

¹ Although Keefer purports to appeal from the order denying his post-trial motions, his appeal properly lies from the judgment of sentence. We have amended the caption accordingly.

16, 2011, a jury convicted Keefer of three counts each of rape of a person less than 13 years old,² involuntary deviate sexual intercourse with a child,³ unlawful contact with a minor,⁴ and incest,⁵ seven counts of indecent assault of a person less than 13 years old,⁶ and two counts of indecent exposure.⁷ The trial court sentenced Keefer on March 20, 2012, and denied post-trial motions on July 19, 2012. This timely appeal followed.

On appeal, Keefer raises the following issues for our review:

1. Whether the evidence presented by the Commonwealth at trial was sufficient to sustain the verdicts of the jury where the Commonwealth did not, among other things, establish the dates of the offenses with any reasonable certainty.
2. Whether the verdicts of the jury were against the weight of the evidence where only one of the alleged victims testified regarding the alleged incidents of sexual misconduct, and that witness gave prior inconsistent statements to law enforcement regarding the incidents and his testimony at trial was uncorroborated and contradicted by another of the grandchildren alleged to have been present during the incidents.
3. Whether the trial court abused its discretion in admitting evidence in the form of testimony regarding [Keefer's] alleged ordering of pornography that was not related to the charges at issue at trial, and which was highly prejudicial to [Keefer]?

Appellant's Brief, at 4.

² 18 PA. CONS. STAT. ANN. § 3121(a)(6).

³ 18 PA. CONS. STAT. ANN. § 3123(a)(6).

⁴ 18 PA. CONS. STAT. ANN. § 6318(a)(1).

⁵ 18 PA. CONS. STAT. ANN. § 4302.

⁶ 18 PA. CONS. STAT. ANN. § 3126(a)(7).

⁷ 18 PA. CONS. STAT. ANN. § 3127.

Keefer first argues that the evidence is insufficient to support his convictions because the Commonwealth failed to establish with any certainty the dates on which the offenses occurred. Appellant's Brief, at 9. He cites the Pennsylvania Supreme Court's decision in *Commonwealth v. Devlin*, 333 A.2d 888 (Pa. 1975), for the proposition that due process requires that the Commonwealth prove the commission of the offenses charged upon a date fixed with reasonable certainty.

It is well-established that "the Commonwealth must be afforded broad latitude when attempting to fix the date of offenses which involve a continuous course of criminal conduct." *Commonwealth v. G.D.M., Sr.*, 926 A.2d 984, 990 (Pa. Super. 2007), *appeal denied*, 596 Pa. 715, 944 A.2d 756 (2008).

It is true that the date of the commission of the offense must be fixed with reasonable certainty. Nevertheless, this rule has been somewhat relaxed when the victim is a child. In *Commonwealth v. Groff*, [548 A.2d 1247 (Pa. Super. 1988),] this Court stated that when a young child is a victim of crime, it is often impossible to ascertain the exact date when the crime occurred. **He or she may only have a vague sense of the days of the week, the months of the year, and the year itself.** If such children are to be protected by the criminal justice system, a certain degree of imprecision concerning times and dates must be tolerated.

Commonwealth v. G.P., 765 A.2d 363, 369 (Pa. Super. 2000) (citation omitted).

Keefer additionally challenges the weight of the evidence to support his convictions, alleging that the victim's testimony was inconsistent and

contradicted by the testimony of another victim. Appellant's Brief, at 10. Keefer preserved this issue by raising it in his post-sentence motion filed on March 30, 2012. Our standard of review is well-settled:

The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses.

As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. A verdict is said to be contrary to the evidence such that it shocks one's sense of justice when "the figure of Justice totters on her pedestal, or when "the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience."

Furthermore,

where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Cruz, 919 A.2d 279, 281-82 (Pa. Super. 2007) (citations omitted).

Lastly, Keefer argues that the trial court abused its discretion when it admitted testimony from Keefer's daughters that pornography had been purchased at the Keefer home. Appellant's Brief, at 12. We note that

the admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. Evidence, even if relevant, may be excluded if its probative value is outweighed by the potential prejudice.

Commonwealth v. Fransen, 42 A.3d 1100, 1106 (Pa. Super. 2012) (internal citations omitted). “‘Unfair prejudice’ supporting exclusion of relevant evidence means a tendency to suggest decision on an improper basis or divert the jury’s attention away from its duty of weighing the evidence impartially.” ***Commonwealth v. Wright***, 599 Pa. 270, 325, 961 A.2d 119, 151 (2008). “The function of the trial court is to balance the alleged prejudicial effect of the evidence against its probative value and it is not for an appellate court to usurp that function.” ***Commonwealth v. Parker***, 882 A.2d 488, 492 (Pa. Super. 2005), ***aff’d on other grounds***, 591 Pa. 526, 919 A.2d 943 (2007). The law “does not require a court to sanitize a trial to eliminate all unpleasant facts from the jury’s consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged.” ***Commonwealth v. Page***, 965 A.2d 1212, 1220 (Pa. Super. 2009), (citing ***Commonwealth v. Dillon***, 592 Pa. 351, 366, 925 A.2d 131, 141 (2007)).

With our standards of review in mind, and after examining the briefs of the parties, the ruling of the trial court, as well as the applicable law, we find that Judge Van Horn's ruling is supported by the record and free of legal error. We further find that the trial court ably and methodically addressed Keefer's issues raised on appeal. Accordingly, we affirm on the basis of Judge Van Horn's thorough and well-written opinion. **See** Trial Court Opinion, filed 9/13/12.

Judgment of sentence affirmed. Jurisdiction relinquished.

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL
DISTRICT OF PENNSYLVANIA - FULTON COUNTY BRANCH

Commonwealth of Pennsylvania,	:	Criminal Action
	:	
v.	:	No. 191 of 2010
	:	
Woodrow Wilson Keefer, Jr.	:	
Defendant	:	Honorable Carol L. Van Horn

STATEMENT OF THE CASE

The Defendant, Woodrow Wilson Keefer, Jr., stands convicted after trial by jury of three (3) counts of Rape¹, three (3) counts of Involuntary Deviate Sexual Intercourse (IDSI) with a Child², three (3) counts of Unlawful Contact with Minor³, three (3) counts of Incest⁴, seven (7) counts of Indecent Assault⁵, and two (2) counts of Indecent Exposure^{6 7}. The charges arose from the repeated sexual abuse by the Defendant of his four (4) grandsons when they were small children. At trial, which occurred December 15 and 16, 2011, the Commonwealth presented testimony from J.B.H., then seventeen (17), and T.J.K., then twenty four (24). A third grandson, T.A.H., was precluded by the Court from testifying upon the motion of the Defendant, due to the hypnotic refreshing of his memory prior to trial. (See Opinion and Order of Court, May 31, 2011.) N.R.C., a fourth grandson who J.B.H. maintained had also been subjected to abuse, testified for the defense, stating he had no recollection of any victimization at the hands of Keefer. The Defendant and his wife, Beverly Keefer, also testified for the defense.

¹ 18 Pa. C.S. § 3121(c).

² 18 Pa. C.S. § 3123(b).

³ 18 Pa. C.S. § 6318 (a)(1).

⁴ 18 Pa. C.S. § 4302(b).

⁵ 18 Pa. C.S. § 3126 (a)(7).

⁶ 18 Pa. C.S. § 3127 (a).

⁷ The Court notes that some of the offenses as listed on the Criminal Information, as well as on the verdict slip, contain inaccurate statutory references. For example, Counts 4-6 on the Information are cited as 18 Pa. C.S. § 3121(a)(6), as are Counts 1-3 on the verdict slip, which has been deleted. The crime of engaging in sexual intercourse with a complainant who was less than 13 years of age has been renamed Rape of a Child, and is now listed at 18 Pa. C.S. § 3121 (c).

As often occurs in such matters, the charges created a wedge in the family of the Defendant, with some of his children supporting the victims, and others supporting Keefer. Indeed, the family has a troubled history, having endured a similar trial in juvenile court in 2005, after J.B.H. disclosed he had been sexually abused by N.C. At that time, no one but the children were aware that this abuse had occurred in the presence of the Defendant, at his behest. The above captioned matter is the result of full disclosure by J.B.H. and his cousins regarding what happened to them.

Following the conviction and sentencing, the Defendant filed post-trial motions on March 30, 2012. By Order dated April 3, 2012, the Court required briefs on the motions, setting argument for June 12, 2012. Argument occurred as scheduled, and the matter is now ripe for decision, rendered in this Opinion and Order of Court.

DISCUSSION

I. Sufficiency of the Evidence

The Defendant first challenges the sufficiency of the evidence to sustain the convictions, arguing the evidence was insufficient by reason of the Commonwealth's failure to establish the dates of the offenses with reasonable certainty. The standard of review regarding the sufficiency of the evidence is well established:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.

Commonwealth v. Reynolds, 835 A.2d 720, 725-26 (Pa. Super. Ct. 2003). A challenge to the sufficiency of the evidence is a question of law. *See id.* at 726. The court may not substitute its

judgment for that of the fact-finder. *See Commonwealth v. Mack*, 850 A.2d 690, 693 (Pa. Super. Ct. 2004). Rather, doubts regarding guilt must be resolved by the jury 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.*

The facts and circumstances established by the Commonwealth need not preclude all possibility of innocence. *See id.* Further, the elements of an offense may be found by means of wholly circumstantial evidence. *See id.* The court must review the entire record, and “all evidence actually received must be considered.” *Id.* The trier of fact, in passing upon the credibility of witnesses, is free to believe all, part or none of the evidence. *See id.* As a result, the uncorroborated testimony of a victim, if believed, is sufficient to convict a defendant. *See id.* Finally, appellate courts have established that “it is the function of the jury to evaluate evidence adduced at trial” so that if “the verdict is based on substantial, if conflicting evidence, it is conclusive on appeal.” *Reynolds*, 835 A.2d at 726 (citations omitted).

Keefer maintains the evidence is insufficient to sustain his convictions as the dates of the offenses were not established with any certainty. The criminal complaint states the crimes occurred on “various dates on or between” January 1, 1999, and December 31, 2004. (Police Crim. Compl. at 1 of 13.) Indeed, due process requires the prosecution to fix the date on which the commission of an offense occurred with reasonable certainty. *See Commonwealth v. Devlin*, 333 A.2d 888, 890-91 (Pa. 1975); *Commonwealth v. Brooks*, 7 A.3d 852, 857-58 (Pa. Super. Ct. 2010). The reason for the requirement is the Defendant may be severely impaired in preparation of a defense when faced with an open-ended period of time. *See Devlin*, 333 A.2d at 891. A defendant must be advised of the date when an offense is alleged to have been committed in order to provide him with sufficient notice to meet the charges against him. *See Brooks*, 7 A.3d

at 858. However, the requirement of specificity in the date of the offense remains a fluid concept, the leeway varying with the “nature of the crime and the age and condition of the victim, balanced against the rights of the accused.” *Devlin*, 333 A.2d at 892. Additionally, the Commonwealth is afforded “broad latitude” when attempting to fix the dates of offenses involving a continuing course of conduct. *Commonwealth v. G.D.M., Sr.*, 926 A.2d 984, 990 (Pa. Super. Ct. 2007). This principle has been described as “especially true” where the matter involves sexual offenses against a minor victim. *Brooks*, 7 A.3d at 858.

Instantly, J.B.H. testified to repeated incidents of abuse, ten (10) of which he could recall, occurring in a shed behind his grandfather’s home, and in the woods surrounding the residence. (See Transcript of Proceedings, Day 1, Thursday, December 15, 2011 [hereinafter T.P. 12/15/11], at 27-29.) He testified he was about five (5) years old when the incidents of abuse began involving all four grandsons in these locations. (See *id.* at 29:15-18.) The instances when all four were together at their grandparents’ home were rare, making precision in the dates of the offenses more difficult. (See *id.* at 44-45.) Additionally, J.B.H. described how Keefer would take him and N.C. into the woods, and force them to engage in sexual behavior with one another while Defendant observed, again testifying he was between the ages of five (5) and seven (7) at the time. (See *id.* at 31-34.) The incidents of abuse ceased when the children were no longer permitted to be together at their grandparents’ home, after J.B.H. informed his parents in early 2005 that he had been sexually victimized by N.C. (See *id.* at 31, 33.) Both the Defendant and his wife testified they were aware of the time period when the sexual offenses were alleged to have been perpetrated, and confirmed the children were not together at their residence after the allegations were made against N.C. (See, e.g., *id.* at 114:25-115:18.)

In his brief and in argument, the Defendant cites three (3) cases in support of his assertion the temporal period proven by the Commonwealth is too uncertain to sustain the conviction. In *McClucas*, the defendant was convicted of various offenses arising from the sexual abuse of his biological daughter "on or about March 1979 through April 1984." *Commonwealth v. McClucas*, 516 A.2d 68, 69 (Pa. Super. Ct. 1986). Despite the defendant's argument that the "lack of chronological specificity" prevented an adequate defense, the Superior Court, stating that time was not of the essence in the charged crimes, concluded:

[W]e do not believe that it would serve the ends of justice to permit a person to rape and otherwise sexually abuse his child with impunity simply because the child failed to record in a daily diary the unfortunate details of her childhood . . . [T]he facts of the instant case preclude a definitive enumeration of events . . . [W]e must necessarily conclude that the offenses in the instant case, were not susceptible to being dated within a reasonable degree of certainty. Inasmuch as the crimes, in toto, occurred over a period of time, we are not prepared to say that the lack of chronological specificity seriously encroached upon appellant's ability to defend himself.

Id. at 70-71 (citations and quotations omitted).

Similarly, in *Commonwealth v. Brooks*, the defendant appealed his conviction for charges arising from the sexual exploitation of his biological son and the daughter of his paramour. *See Commonwealth v. Brooks*, 7 A.3d 852, 855 (Pa. Super. Ct. 2010). The Superior Court endorsed the conclusion of the trial court that on balancing the nature of the crimes and the age and conditions of the victims against the rights of the defendant, the victims were of such young age, and the crimes so continuous, the Commonwealth was permitted broad leeway in proving when the crimes were committed. *See id.* at 858-59. Further, the trial court concluded that the Commonwealth did, in fact, sufficiently establish the crimes occurred between May and August of 2001. *See id.* at 859. One victim testified the abuse occurred when it was warm outside, she

was wearing shorts, and her mother was absent from the apartment. *See id.* Finally, in *G.D.M.*, where the offenses occurred repeatedly over a seven month span, the victim identified three (3) specific instances of abuse, and recalled the abuse began with his entry into Kindergarten and terminated due to the arrest of the defendant. *See Commonwealth v. G.D.M., Sr.*, 926 A.2d 984 (Pa. Super. Ct. 2007). The Superior Court found the dates were sufficiently specific to satisfy due process. *See id.*

Instantly, the exact dates of the instances of abuse are similarly not of the essence to the crime. Additionally, the Court does not believe that any prejudice accrued to the defense by reason of the lack of chronological specificity. J.B.H. testified the abuse began when he was around five (5) years old, and continued until his disclosure to his parents regarding N.C. The Defendant and his wife were both aware of the temporal period to which the victim referred, confirming the grandchildren were brought together to their grandparents' home occasionally during this time, but that following the disclosure, they were not allowed to be present as a group. J.B.H. was a very young child when the abuse occurred, and the Court does not expect such a victim to possess a clear recollection of the dates and times such traumatizing experiences occurred.

Further, while the Court found his testimony extremely credible, J.B.H. was obviously traumatized by the abuse perpetrated by both his grandfather and by N.C., receiving counseling since his initial disclosure. It was clear he had difficulty taking the stand and telling his story. Additionally, the lack of specificity was brought to the attention of the jury by defense counsel, who questioned J.B.H. regarding the details and chronology of one instance of abuse, eliciting testimony that he simply could not recollect many of the facts surrounding the incident. (*See*

T.P., 12/15/11, at 44-45.) Despite the able cross-examination, the jury obviously found the victim credible even in light of the nebulous chronology. As the *G.D.M.* Court stated:

Unlike adults, the lives of children, especially pre-school children or those who have only started school, do not revolve around the calendar, except to the extent that they may be aware of their birthday or Christmas, or the day a favorite television show airs. To require young children to provide such detail would be to give child predators free rein. Instantly, we find that the dates of the incidents were proven with sufficient specificity to satisfy due process.

G.D.M., Sr., 926 A.2d at 990. J.B.H. has been repeatedly sexually victimized, beginning at a very young age. In balancing his age and condition against the rights of the Defendant, the Court finds the evidence was sufficient to satisfy due process. The dates provided were sufficiently specific to sustain the conviction.

II. Weight of the Evidence

The Defendant requests a judgment of acquittal on the charges against him, arguing the verdict is against the weight of the evidence because only one victim testified, the victim gave prior inconsistent statements to law enforcement, and his testimony was “contradicted” by another victim.⁸ A verdict is against the weight of the evidence where it is “so contrary to the evidence as to shock one’s sense of justice and make the award of a new trial imperative.”

Commonwealth v. Hudson, 955 A.2d 1031, 1035 (Pa. Super. Ct. 2008). The Commonwealth has accurately set forth the standard of review, quoting *Commonwealth v. Diggs*:

⁸ The Commonwealth correctly points out the defense has conflated the relief and standards associated with the questions of sufficiency and weight of the evidence. The Superior Court has stated a “motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence.” *Commonwealth v. Moreno*, 14 A.3d 133 (Pa. Super. Ct. 2011). Additionally, under Pa. R. Crim. P. 607, a challenge to the weight of the evidence must be raised in a motion for a new trial, but is raised by the Defendant as a Motion for Judgment of Acquittal. See Pa. R. Crim. P. 607(A). Even if the verdict was against the weight of the evidence, the Defendant would be entitled to a new trial, not to acquittal on the charges.

A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court. An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. The trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice.

949 A.2d 873, 879-80 (Pa. 2008). The role of the trial court is to determine "that notwithstanding the evidence, 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." *Commonwealth v. Rivera*, 983 A.2d 1211 (Pa. 2009). Additionally:

It is well-settled that our Court cannot substitute its judgment for that of a jury on issues of credibility. The jury is free to believe all, part, or none of the testimony presented. Further, [t]his Court has long-recognized that the uncorroborated testimony of a sexual assault victim, if believed by the trier of fact, is sufficient to convict a defendant.

Commonwealth v. Trippett, 932 A.2d 188, 194 (Pa. Super. Ct. 2007) (citations and quotations omitted). If the jury believed the testimony of the grandson who testified, that belief is sufficient to support the conviction. Any inconsistency in the testimony is for the jury to resolve, and review of the jury's credibility determinations is not for the trial court to undertake.

Case law also exists for the proposition that inconsistent evidence does not necessarily equate to exculpatory evidence, and further that the determination of whether an inconsistency renders the victim incredible is for the jury. The Superior Court has stated:

Where an appellant argues that physical evidence is 'inconsistent' with a victim's testimony, but that evidence does not necessarily exculpate him, the fact-finder may entertain a defendant's alternative theory and reasonably reject it. In such instances, we will not substitute the fact-finder's judgment with our own.

Commonwealth v. Burns, 988 A.2d 684 (Pa. Super. Ct. 2009). The jury heard the testimony of the victims and found them credible. It is not for the Court to second guess this determination. Additionally, as the Commonwealth points out, the testimony of N.C. did not contradict that of the other victims. N.C. did not testify the Defendant did not sexually abuse him. Rather, N.C. testified he *did not recall* being abused. (*See, e.g.*, T.P. 12/15/11, at 87-90.) Additionally, N.C. testified on cross examination that he was not alleging his cousins had fabricated the incidents:

Q: And the answers that you gave to Attorney Evans today, when he asked you about these allegations, I noticed that you said each time, I don't remember; is that correct?

A: Yes.

Q: You're not here saying that your cousins are making this up, are you?

A: No.

Q: You're simply saying that you don't remember?

A: Correct.

(*See id.* at 95:1-9.)

Finally, a new trial should not be granted "because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion."

Commonwealth v. Widmer, 744 A.2d 745, 751-52 (Pa. 2000). The fact-finder weighed the evidence presented, evaluated the testimony of the witnesses, and made a determination thereupon. It was entitled to believe J.B.H. and to find the Defendant incredible. Additionally, the testimony of N.C. was not directly contradictory to that of J.B.H., nor was it of such weight that failure to give it credence amounts to a denial of justice. N.C. testified, somewhat conspicuously, not that he was not abused by the Defendant, but instead that he did not recall any

abuse. He did not testify that his cousins were fabricating the incidents. The verdict does not shock the conscience, and is not against the weight of the evidence.

III. Evidence of Purchase of Pornography

Requesting a new trial, the Defendant maintains the Court erred in allowing rebuttal evidence in the form of the testimony of two of his daughters, regarding a cable bill showing pornography had been ordered at the Keefer home. The admissibility of evidence is a matter within the discretion of the trial court, such that only a showing of abuse of discretion and resulting prejudice will create reversible error. *See Commonwealth v. Fischere*, ---- A.3d ----, 2012 WL 1662098 (Pa. Super. Ct. 2012). For evidence to be admissible, it must be both competent and relevant. *See American Future Systems, Inc. v. BBB*, 872 A.2d 1202, 1212 (Pa. Super. Ct. 2005). Evidence is relevant where it tends to prove or disprove a material fact, and competent if it is material to the issues to be determined at trial. *See id.* A witnesses' credibility "may be impeached by any evidence relevant to that issue." *Id.* at 1213 (citing Pa. R.E. 607).

At trial, the issue of purchase of pornography first arose during the cross-examination of J.B.H:

Q; And you recall April of 2009, when he brought you to his house and you wanted him to get you food from McDonalds, right?

A: I don't recall

...

Q: You don't recall when he stepped out, you don't recall ordering pornography on his television so there was a pornographic show that was – that you ordered and watched on his television?

A: No.

Q: You don't recall when he got the bill, approaching your mom and you and you coming to his house and paying the bill? Do you recall that?

A: Yes.

...

Q: There was one other incident later that spring where that same thing happened – isn't that right – where you ordered pornography on your grandfather's television without him knowing it and you or your mom paid the bill; isn't that right?

A: I didn't order it.

Q: Did you or your mom pay the bill?

A: I believe so.

(T.P., 12/15/11, at 42:3-43:11.) On redirect, J.B.H. testified again that he had no knowledge of who ordered the pornography, but that he did not. (*See id.* at 50:2-7.) On re-cross-examination, the defense again questioned J.B.H. regarding the pornography:

Q: I just want to make sure it's clear there were two incidents with pornography ordered at your grandfather's house; isn't that right?

A: Yes.

Q: The one you admit you did; isn't that right?

A: No.

Q: The one where you came and paid the bill?

A: We paid the bill on both of them because he said that I had purchased both of them.

Q: So now you're saying that you didn't order either one of them?

A: No.

Q: But you paid for both of them?

A: Yes.

(*Id.* at 51:22-52:13.) As the foregoing demonstrates, the defense sought to impeach the credibility of the victim by showing he had surreptitiously purchased pornography at his grandfather's home, calling into question both his general truthfulness as well as his accusation against Keefer. The Defendant sought to show the jury both that his grandson had a tendency to act out sexually, that he had sought to raise questions about his grandfather's sexual conduct in the past, and that he was untruthful when confronted with his actions.

The defense again raised the issue of pornography in the direct examination of Beverly Keefer, who testified on her husband's behalf. After testifying that following her husband's arrest, the police searched the Defendant's home, presumably looking for pornographic videos, the questioning continued:

Q: Do you have pornography in your house?

A: No.

Q: I want to take you – well, let me ask you this: Do you have cable television or satellite television?

A: Satellite. We have Dish.

Q: Is it regular that you – that you or anyone orders movies, particularly pornographic movies at your house?

A: No.

Q: Can you recall any incident when pornographic movies were ordered at your house?

A: Yes, there was two times.

...

Q: Do you know who ordered those movies?

A: Yes. Our grandson [J.B.H.].

Q: Did he pay for those movies?

A: Yes he did.

...

Q: Aside from those two incidents that you just described, this pornography, any other time that you're aware of ordered at your house?

A: No.

(*Id.* at 104:14-106:5.) On cross-examination, Mrs. Keefer again affirmed that pornography was never ordered in her home except by J.B.H. (*See id.* at 118:5-19.) Here again, the defense sought to discredit the credibility of the victim, and to demonstrate his tendency to misbehave by engaging in sexually inappropriate conduct.

The Defendant himself, testifying in his own defense, echoed his wife's testimony regarding the victim, and unequivocally denied ever ordering pornography himself:

Q: During one of [the times J.B.H.'s mother wanted the Defendant to pick him up], was pornography ordered at your home?

A: Yes, sir.

Q: Can you tell me about that?

A: I got the cable bill, and I looked on it. My wife and I looked together at bills. And she sits at one end of the table, and I sit at the other. I looked over the bill. I said, This is not right. Something is wrong here. So I went to the -- where I can see an itemized list. And there was an extra charge on it. So I called the cable company about it.

Q: What did you -- after you called the cable company about it, then what did you do?

A: Then we talked to [J.B.H.'s mother] about [J.B.H.] or about being pornography ordered while [J.B.H.] was there.

...

A: Then they paid for the bill. [J.B.H.] paid for the bill.

...

A: [J.B.H.] [s]aid I just wanted to hurt you because you took [N.C.'s] side instead of mine.

(*Id.* at 134:23-135:25.)

Thus, the issue of who ordered the pornography implicated the credibility of the victim, and therefore the believability of his entire testimony. The defense sought to impeach J.B.H.'s credibility by alleging he purchased pornography, admitted it to his grandparents, but lied about it in Court. The Defendant sought to demonstrate both that J.B.H. had acted sexually inappropriate in the past, and had attempted to hurt his grandfather thereby on prior occasions. On cross-examination, the prosecution queried Keefer regarding the pornography issue testified to on direct:

Q: Mr. Keefer, did you ever download pornographic shows or movies or material on that television set yourself?

A: No, sir.

Q: Never in your life?

A: No, sir.

Q: And the only times that pornographic material was ever purchased was the time that you say Jacob did it?

A: Yes, sir. To the best of my knowledge, yes, sir.

Q: Well, you went over the bills, right?

A: I went over the bills. And I paid the bills, yes. So yes, sir.

Q: I want to be clear, this isn't one of those, Oh, I don't recall episodes?

A: No, it's not I don't recall. I said yes, sir, clearly.

(*Id.* at 142:4-18.) As the forgoing demonstrates, the Defendant unequivocally denied ordering pornography in his home, ever. Impeaching the credibility of the victim, and bolstering the

Defendant's credibility in asserting the accusations against him were false, the defense clearly opened the door to discussion of who had purchased pornography at the Defendant's home. Additionally, the Defendant placed his own credibility into question by raising the issue, testifying clearly that at no time had he ever purchased pornography himself, in contrast to the testimony of J.B.H. who denied having purchased the adult videos despite having been forced to pay for them.

On rebuttal, following the close of the defense case, the prosecution called W.G. and M.H., two of the Defendant's daughters. Both testified to stopping at their parents' residence after church in 1997 or 1998, prior to the Defendant and his wife returning home. (*See id.* at 146.) W.G. and M.H. testified a Dish bill was lying on the table, containing itemized lists of extra charges, and that the bill contained charges for pornographic materials, which shocked the sisters and their mother when she was made aware of it. (*See id.* at 145-48, 152-54.) It is the testimony of his daughters regarding viewing the Dish bill to which the Defendant objects.

Even evidence which is inadmissible in the prosecution's case in chief may be admissible to impeach the accused's credibility. The evidence regarding the purchase of pornography is irrelevant to the crimes charged, and would be impermissibly prejudicial as part of the prosecution's case in chief. However, after the Defendant and his wife both unequivocally denied ever ordering adult videos or having knowledge of such materials being purchased except by J.B.H., the evidence clearly became relevant for impeachment purposes.

In *Ratti*, the Superior Court explained the introduction of impeachment evidence on rebuttal:

Generally, the admission of rebuttal evidence is a matter within the sound discretion of the trial court. Rebuttal evidence is proper where it is offered to discredit testimony of an opponent's witness. Our Supreme Court has previously opined "where the evidence

proposed goes to the impeachment of his opponent's witness, it is admissible as a matter of right." Furthermore, in order to constitute proper impeachment evidence the rebuttal witness' version of the facts must differ from that of the witness allegedly being impeached.

Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 706-707 (Pa. Super. Ct. 2000) (citations omitted). Here, the Defendant asserted he did not purchase the pornography paid for by J.B.H., and further, that he had never purchased pornography. The testimony of his daughters on rebuttal discredited these assertions, their version of the facts being the opposite of the Defendants: that he had indeed purchased pornography in the past. The evidence was clearly proper on rebuttal as impeachment evidence going to the veracity of the Defendant's prior testimony. As the Supreme Court stated in *Harris*:

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.... Having voluntarily taken the stand, (defendant) was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

Harris v. New York, 401 U.S. 222, 225 (1971).

In *Commonwealth v. Days*, the Defendant told the jury he could not have committed the crime because he could not go to the location where it was committed, as he would be arrested just for trying to see his children by their mother. *Commonwealth v. Days*, 284 A.2d 817 (Pa. Super. Ct. 2001). The Superior Court characterized his testimony as an attempt to "victimize as well as alibi himself," and allowed contradictory evidence which revealed the truth about the reasons for his arrests at the residence. *See id.* Even the evidence of prior crimes was admissible, as the Defendant could not insulate himself from being discredited simply because the proof involved other crimes.

Here, the Defendant's use of pornography was not relevant initially, but became so after he testified that his grandson had ordered pornography on his television, and that he himself had never, ever, purchased an adult video. The Defendant further testified that J.B.H. admitted the video was purchased to hurt his grandfather due to a grudge against him. As in *Days*, Keefer sought to both victimize and to alibi himself. Because the Defendant opened the door, the prosecution could then introduce evidence to impeach his statement. Indeed, "if the accused himself opens the door to what otherwise might be objectionable testimony" then "the Commonwealth may probe further to determine the veracity of the trial statement." *Commonwealth v. Whiting*, 517 A.2d 1327, 1331 n.2 (Pa. Super. 1986).

Nor does the Court credit the assertion that the absence of the paper Dish bill rendered the testimony impermissible. First, no objection on such ground was made at time of trial, so that the issue is waived. Second, the evidence was not "integral to proving the central issue at trial," such that an original writing would be required to be admitted into evidence as proof of its contents. *Commonwealth v. Fisher*, 764 A.2d 82, 88 (Pa. Super. Ct. 2000) (citing Pa. R.E. 1004(4)). Finally, under Rule of Evidence 1004(1), where originals have been lost or destroyed, other evidence of the contents of a writing is permissible, so long as the proponent of the evidence did not destroy the documents in bad faith. *See* Pa. R.E. 1004(1). There is nothing to indicate such bad faith here, and indeed, the daughters were never in possession of the bill to destroy it. The Court additionally notes that the defense questioned the daughters in detail regarding their motive to fabricate such evidence. The jury chose to believe the daughters' testimony, as is their prerogative as the finder of fact.

CONCLUSION

Despite the broad timeframe set forth in the criminal complaint, the Court finds the Commonwealth fixed the dates of the commission of the offenses with sufficient specificity, in light of the age and condition of the victims, to satisfy the due process rights of the Defendant. Additionally, the Court does not believe the convictions go against the weight of the evidence. Inconsistent testimony is for the jury to resolve, not for the Court to second-guess. Finally, there was no abuse of discretion in admitting testimony regarding the Dish bill revealing the Defendant purchased pornography in the past. Because Keefer opened the door to the issue, the Commonwealth was free to probe his credibility on such point. The attached Order of Court denies the relief requested by the Defendant.

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL
DISTRICT OF PENNSYLVANIA - FULTON COUNTY BRANCH

Commonwealth of Pennsylvania, : Criminal Action
: :
v. : No. 191 of 2010
: :
Woodrow Wilson Keefer, Jr. :
Defendant : Honorable Carol L. Van Horn

ORDER OF COURT

AND NOW this 19th day of July, 2012, upon review of the Defendant's Post-Sentence Motions, the Commonwealth's Answer, the legal memoranda and arguments submitted by the parties, and the Court having held hearing and conducted a review of the applicable law,

IT IS HEREBY ORDERED THAT the Motions are DENIED.

Pursuant to the requirements of Pa. R. Crim. P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.

By the Court,

Carol L. Van Horn
J.

Copies:

Travis L. Kendall, Esq., Fulton County District Attorney
✓ Jeffrey S. Evans, Esq., Attorney for Defendant

FULTON COUNTY
PENNSYLVANIA
FILED
JUL 23 2012
8:33am
PROTHONOTARY, CLERK OF COURTS,
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REGISTER OF WILLS, RECORDER OF DEEDS