NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ERIC SHAW, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 151 WDA 2012

Appeal from the Judgment of Sentence of August 10, 2011
In the Court of Common Pleas of Cambria County
Criminal Division at No(s): CP-11-CR-0000329-2010

BEFORE: BENDER, J., MUNDY, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, J. FILED: May 24, 2013

Appellant, Eric Shaw, appeals from the judgment of sentence of an aggregate term of 10 years' and 9 months' to 23 years' incarceration imposed following his conviction for multiple sexual offenses and related crimes he committed against his minor cousin[1] over the course of two years. After careful review, we affirm.

We begin with an overview of the facts adduced a trial. Beginning in 2007, Appellant, then eighteen years old, began babysitting for his three minor cousins. The victim, the youngest of the cousins, testified that, over

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* Retired Senior Judge assigned to the Superior Court.

[1] Although they are cousins, the victim was adopted and, therefore, not related to Appellant by blood.

the course of the following two years, Appellant and her two brothers sexually molested her approximately twenty times. When the abuse began, the victim was ten years old and her brothers were thirteen and fifteen years old.

While Appellant was babysitting the trio at their home, the victim recalled observing Appellant viewing pornography on their computer. N.T., 1/26/11, at 19. After this incident, the abuse escalated. On one occasion, the victim, her two brothers, and Appellant went into one of the brothers' rooms. Appellant told the brothers to hold the victim down by her ankles and wrists while Appellant pulled her pants and underwear down, positioned himself on top of her, and tried "to put his penis inside [her]." ***Id***. at 21 – 22. The victim was able to see Appellant's erect penis. ***Id***. at 22. While this was going on, the victim was "squirming [her] hips as much as [she] can so he couldn't get his penis inside of [her]." ***Id***. Nevertheless, she "felt a pressure inside [her] vagina because it was hurting." ***Id***. She said the pressure was caused by Appellant's penis. ***Id***. On other occasions, Appellant would rub the victim's breasts with his hands, and insert his fingers into her vagina. ***Id***. at 24. He also would place his mouth on her breasts and perform oral sex on her. ***Id***. at 26. On other occasions, Appellant would rub his penis between the victim's breasts. ***Id***. at 27.

The brothers' participation was not limited to restraining the victim. Appellant would tell the brothers to "have sex with [her], suck on [her]

boobs, [and] lick [her] vagina." ***Id***. at 23. The brothers complied with Appellant's instructions. ***Id***. at 23 – 24. Sometimes, the victim would "get up and run" but her brothers and Appellant would capture her, "put [her] back on the bed and hold [her] down again." ***Id***. at 26. On some occasions, while the victim was being restrained by her brothers, Appellant would masturbate and ejaculate on her. ***Id***. at 27.

Although the victim could not recall the specific dates of these incidents, she testified that these and similar assaults occurred "about 20 times." ***Id***. at 28. She said she did not report the abuse at first because she "was scared and [she] loved [her] family." ***Id***. at 30. She was "afraid [she] would get taken away from [her] family" if she reported the abuse, a threat reinforced by her brothers. ***Id.*** at 30 – 32. Eventually, when Appellant went overseas to serve in the military, the abuse stopped. ***Id***. at 31. Once Appellant was no longer a threat to her, the victim reported the abuse first to her relatives, and then, ultimately, to police.

By amended criminal information filed January 25, 2011, the first day of trial, the Commonwealth charged Appellant with twelve offenses: two counts of involuntary deviate sexual intercourse (IDSI) with a child, 18 Pa.C.S. § 3123(b) (counts 1 and 2); two counts of rape of a child, 18 Pa.C.S. § 3121(c) (counts 3 and 4); two counts of aggravated indecent assault (AIA), 18 Pa.C.S. § 3125 (counts 5 and 6); indecent assault (IA), 18 Pa.C.S. § 3126(a)(7) (count 7); two counts of unlawful restraint, 18 Pa.C.S. §

2902(a)(2) (counts 8 and 9); endangering welfare of children (EWOC), 18 Pa.C.S. § 4304(a)(1) (count 10); and two counts of corruption of minors, 18 Pa.C.S. § 6301(a)(1) (counts 11 and 12). The jury found Appellant not guilty of both rape offenses, but guilty of the remaining ten offenses. On August 10, 2011, Appellant was sentenced to an aggregate term of 10 years' and 9 months' to 23 years' incarceration.[2]

Appellant now raises the following claims on appeal:

> I. Whether or not the Court erred by not merging Count [5], Aggravated Indecent Assault; Count [6], Aggravated Indecent Assault[;] Count [7], Indecent Assault[;] Count [10], Endangering Welfare[;] Count[] [11], Corruption of Minors; and Count[] [12], Corruption of Minors with the sentences imposed to [sic] Counts [1] & [2], relating to [IDSI]?
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> II. Whether or not the Trial Court erred in prohibiting Page 23 of the Children & Youth Report, which was Court's Exhibit 1[], being referenced by the defense?
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> III. Whether or not the Trial Court erred when he stopped cross-examination of the juvenile co-defendant/accomplice, [J.S.], so that the Court could warn

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[2] Appellant was sentenced at each count as follows:

1. 10 – 20 years' incarceration
2. 10 – 20 years' incarceration concurrent to count 1.
5. 5 – 10 years' incarceration concurrent to count 1.
6. 5 – 10 years' incarceration concurrent to count 1.
7. No further sentence imposed.
8. 1 – 12 months' incarceration concurrent to count 1.
9. 1 – 12 months' incarceration concurrent to count 1.
10. 3 – 12 months' incarceration consecutive to count 1.
11. 3 – 12 months' incarceration consecutive to count 10.
12. 3 – 12 months' incarceration consecutive to count 11.

> the juvenile that if he lied, he would be committing perjury, which would be a felony of the 3rd degree, he could receive a seven (7) year term of imprisonment and up to a $50,000.00 fine?
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> IV. Whether or not the Trial Court erred in not reading Pennsylvania Suggested Standard Criminal Jury Instruction 4.01-Accomplice Testimony as written instead first telling the jury that they must decide whether [J.S.], the juvenile accomplice was acting as a puppet of the Appellant or an accomplice before they could find that the special instructions could fly?
>
> V. Whether or not the Trial Court erred in allowing the Commonwealth to amend the information after the close of testimony to exclude dates for which the Appellant was not in the United States?
>
> VI. Whether or not the Trial Court erred in its response to a jury question, "Is the mouth considered a sexual organ?"?

Appellant's Brief, at 14 – 15. We will address Appellant's claims *ad seriatim*.

Merger

Appellant's first claim asserts that his sentences for AIA, IA, EWOC, and corruption of minors should have merged with his IDSI sentences. Appellant bases his claim on the premise that his convictions for AIA, IA, EWOC, and corruption of minors each arose out of one of the two criminal acts that laid the basis for his IDSI convictions. This is, in fact, more than a single claim of error.

We first note that "merger is a nonwaivable challenge to the legality of the sentence." ***Commonwealth v. Robinson***, 931 A.2d 15, 24 (Pa. Super. 2007). As such, "[t]he issue is a pure question of law, allowing for plenary review." ***Id***.

The legislature has provided that:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S. § 9765.

"The statute's mandate is clear. It prohibits merger unless two distinct facts are present: 1) the crimes arise from a single criminal act; ***and*** 2) all of the statutory elements of one of the offenses are included in the statutory elements of the other." ***Commonwealth v. Baldwin***, 985 A.2d 830, 833 (Pa. 2009) (emphasis added).

The first aspect of Appellant's merger claim is that his sentences for AIA should have merged with his sentences for IDSI. Appellant asserts that two IDSI and two AIA offenses arose out of the same two criminal acts, rather than from four separate criminal acts.

Appellant's IDSI convictions were charged under subsection (b) of the IDSI statute, which reads:

> **(b) Involuntary deviate sexual intercourse with a child.--**A person commits involuntary deviate sexual intercourse with a child, a felony of the first degree, when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.

18 Pa.C.S. § 3123(b).

The phrase "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. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.

18 Pa.C.S. § 3101.

"Sexual intercourse" is also defined in § 3101. "In addition to its ordinary meaning," sexual intercourse "includes intercourse per os or per anus, with some penetration however slight; emission is not required." ***Id***.

The AIA statute, as applied in this case, defines that offense as follows:

> **(a) Offenses defined.--**Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or 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:
>
> * * * *
>
> (7) the complainant is less than 13 years of age;

18 Pa.C.S. § 3125(a)(7).

Regardless of whether there are hypothetical scenarios wherein the offenses of IDSI and AIA merge, depending on which element from each statute is charged, the trial court concluded that the IDSI and AIA convictions in this case "were supported by separate facts." Trial Court Opinion (TCO), 2/14/12, at 2. The victim testified that Appellant sexually abused her on approximately twenty separate occasions. The abuse that

occurred consisted of multiple and varying sexual acts, including, but not limited to, performing oral sex on the victim, forcing the victim to perform oral sex on Appellant, digitally penetrating the victim's genitals, and the penetration of the victim's genitals by Appellant's penis. Several of these acts satisfy the elements of both IDSI and AIA as they were applied in this case, however, our review of the record in this case supports the trial court's conclusion that there was ample evidence that each conviction for IDSI and AIA addressed a different criminal act. Accordingly, we conclude that Appellant's IDSI and AIA convictions do not merge.

Appellant also alleges that his conviction for IA should have merged IDSI convictions. The IA statute defines the offense as follows:

> **(a) Offense defined.--**A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact[3] with the person or intentionally *causes the complainant to come into contact with seminal fluid*, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:
>
> (1) the person does so without the complainant's consent; [or]
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> * * * *
>
> (2) the person does so by forcible compulsion; [or]
>
> * * * *
>
> (7) the complainant is less than 13 years of age;

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[3] Indecent contact is defined as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 Pa.C.S. § 3101.

18 Pa. § 3126 (emphasis added).

The victim testified that on at least one occasion Appellant ejaculated onto her while her brothers held her down. N.T., 1/26/11, at 27. This criminal act, causing the victim to "*come into contact with seminal fluid,*" is an act that can substantiate a conviction for IA but is not itself sufficient to support an IDSI conviction. Accordingly, we conclude that Appellant's IA and IDSI convictions do not merge.

The final aspect of Appellant's merger claim is that his EWOC and corruption of minors conviction should have merged with his IDSI convictions. The EWOC statute provides, in pertinent part, as follows:

> **(a) Offense defined.--**
>
> (1) A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.
>
> * * * *
>
> (3) As used in this subsection, the term "person supervising the welfare of a child" means a person other than a parent or guardian that provides care, education, training or control of a child.

18 Pa.C.S. § 4304.

Corruption of minors is defined by statute as follows:

> **(a) Offense defined.--**
>
> (1) (i) Except as provided in subparagraph (ii), whoever, being of the age of 18 years and upwards, by any act 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 any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.
>
> (ii) Whoever, being of the age of 18 years and upwards, by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 commits a felony of the third degree.
>
> (2) Any person who knowingly aids, abets, entices or encourages a minor younger than 18 years of age to commit truancy commits a summary offense. Any person who violates this paragraph within one year of the date of a first conviction under this section commits a misdemeanor of the third degree. A conviction under this paragraph shall not, however, constitute a prohibition under section 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).

18 Pa.C.S. § 6301.

There were any number of facts adduced at trial that would fulfill the elements of the EWOC statute independent of those facts supporting the IDSI convictions. For instance, evidence that Appellant encouraged and directed the victim's brothers to restrain and engage in sexual acts with their sister was sufficient to support the EWOC conviction. This is also true of Appellant's corruption of minors convictions. The victim testified that her siblings and Appellant restrained and sexually abused her on approximately twenty occasions, largely at Appellant's direction, demonstrating that there were at least two criminal acts upon which to base Appellant's two corruption of minors convictions independent of those acts that supported his IDSI convictions. In any event, by examination of their elements, both EWOC and corruption of minors are clearly not lesser included offenses of

IDSI. The EWOC and corruption of minors statutes each contain elements not present in the IDSI statute, and the IDSI statute contains elements not included in either the EWOC and corruption of minors statutes. Accordingly, we conclude that Appellant's IDSI, EWOC, and corruption of minors convictions do not merge.

Hearsay / Protected Source Evidence

Appellant next claims that the trial court erred "in prohibiting Page 23 of the Children & Youth Report, which was Court's Exhibit 1[], being referenced by the defense." Appellant's Brief, at 29. Page 23 of that report indicated that a reporting source had told Children and Youth Services that the victim was being raped by her brothers for a year and a half, but the reporting source did not mention Appellant's involvement. Appellant claims this evidence was probative and exculpatory and, therefore, the trial court should have admitted it.

> Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's decision absent a clear abuse of discretion. Abuse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Commonwealth v. Bishop, 936 A.2d 1136, 1143 (Pa. Super. 2007) (internal citations omitted).

The trial court indicates the primary reasons the defense was disallowed from admitting this evidence were because the statement on

Page 23 involved multiple levels of hearsay, and because revelation of the statement would reveal the identity of a confidential source in violation of 23 Pa.C.S. § 6340(c)[4] and 55 Pa.Code § 3490.94(a). TCO, at 4. The source of the information contained on page 23 of the report was not the victim, nor was it someone to whom the victim had made the "exculpatory" statement. Rather, the source was reporting what he or she had learned from a sibling who had spoken with the victim. Including an additional level of hearsay provided by Children and Youth Services, there were at least three levels of hearsay to contend with if the statement on Page 23 of the report were to be admitted.

Appellant fails to develop any argument concerning the three levels of hearsay, and instead focuses exclusively on his argument that information that could be used to identify the reporting source could have been redacted. Even if 23 Pa.C.S. § 6340(c) and 55 Pa.Code § 3490.94(a) could be satisfied by redaction as Appellant suggests, the statement is still hearsay. Because Appellant has failed to develop any argument concerning

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[4] Rule 6340(c) states:

> [T]he release of data that would identify the person who made a report of suspected child abuse or the person who cooperated in a subsequent investigation is prohibited unless the secretary finds that the release will not be detrimental to the safety of that person. Law enforcement officials shall treat all reporting sources as confidential informants.

23 Pa.C.S. § 6340(c).

why the statement was admissible despite containing at least three levels of hearsay, he has waived the claim. ***See Harris v. Toys "R" Us-Penn, Inc.***, 880 A.2d 1270, 1279 (Pa. Super. 2005) (failure to develop an argument with citation to, and analysis of, relevant authority waives that issue on review).

Even if we were to review Appellant's claim as an argument that the statement in question constitutes an exculpatory exception to the hearsay rule, he would still not be entitled to relief. It is true that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." ***Chambers v. Mississippi***, 410 U.S. 284, 302, (1973). However, as this Court discussed in ***Commonwealth v. Tielsch***, 934 A.2d 81, 90 - 91 (Pa. Super. 2007), the exculpatory exception applied in ***Chambers*** only applies when circumstances support the reliability of the hearsay statement. ***See also Green v. Georgia***, 442 U.S. 95, 97 (1979) (holding that the confession of Green's co-conspirator to a third party was admissible during the penalty phase of Green's murder trial because "evidence corroborating the confession was ample[.]").

Here, Appellant sought to utilize the hearsay statement as exculpatory evidence. However, the statement is only indirectly exculpatory in that it expressly implicates the victim's brothers but does not mention Appellant's participation in the reported sexual abuse. Even if we accept the statement as exculpatory, implicating the Due Process Clause of the Fourteenth

Amendment by its exclusion, there is nothing of record that would corroborate the exculpatory nature of the statement as was present in ***Chambers*** and ***Green***. Absent such corroboration, we conclude that the trial court did not abuse its discretion in disallowing the hearsay statement to be entered into evidence.

Trial Court's Perjury Warning

Appellant next claims that the trial court erred when it stopped the cross-examination of the victim's elder brother to warn him regarding the penalties for perjury. The brother testified on direct examination that "he did not do or did not remember doing anything bad to" the victim. TCO, at 5. Furthermore, "[h]e denied recalling his Mirandized statement to police that he had participated in tying [the victim] up and committing sexual crimes." ***Id***. Yet, he "admitted that he was adjudicated [delinquent for] rape of a child, unlawful restraint[,] and indecent assault[.]" ***Id***. He then repeated his denials during cross-examination.

As the trial court explained:

> The Court then called a recess during [the brother's] cross-examination and called for public defenders to come to the Courtroom on [his] behalf ***as requested by defense counsel***. [Before] reconvening … the jury,[5] the Court stated to [him] that his answers on cross-examination were "in direct contrast to

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[5] The TCO states "upon reconvening the jury," however, a review of the notes of testimony clearly indicates that the jury was not present when the trial court made this statement to the victim's brother. N.T., 1/26/11, at 178 – 81.

> the statement you previously gave and likewise seemed to be in contrast to the responses you gave to [the prosecutor] in some respects. Further, they were in conflict with the in-court admission you made in juvenile court."

TCO, at 5 (quoting from N.T., 1/26/11, at 179) (emphasis added).

Appellant contends the trial court's action violated Pa.R.E. 614(b). Rule 614 provides as follows:

> **(a) Calling**. Consistent with its function as an impartial arbiter, the court, with notice to the parties, may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
>
> **(b) Examining**. Where the interest of justice so requires, the court may examine a witness regardless of who calls the witness.
>
> **(c) Objections**. A party may object to the court's calling or examining a witness when given notice that the witness will be called or when the witness is examined. When requested to do so, the court must give the objecting party an opportunity to make objections out of the presence of the jury.

Pa.R.E. 614.

Our review of the record demonstrates that defense counsel for Appellant never objected to the warning issued to the witness by the court. N.T., 1/26/11, 177 - 81. This is despite the fact that the trial court asked the attorneys present immediately following the warning if there were "[a]ny questions by anyone or any statement anyone wants to make?" to which Appellant's counsel answered, "No, Your Honor." ***Id***. at 180. Accordingly, we hold that Appellant's allegation of error has been waived. ***See Commonwealth v. Bruce***, 916 A.2d 657, 671 (Pa. Super. 2007) (holding

that a "failure to offer a timely and specific objection results in waiver of" the claim).

Corrupted Source Jury Instruction

Appellant also contends that the trial court improperly issued the corrupted source jury charge by instructing the jury that, before applying the special rules for evaluating a corrupted source, it must first determine whether the witness, the victim's brother, was a puppet or an accomplice. The trial court found that, "read as a whole, the accomplice instruction was appropriate." TCO, at 7.

The applicable standard of review for a claim that a jury instruction was improperly issued is well-settled:

> When reviewing a challenge to a part of a jury instruction, the Court must review the jury charge as a whole to determine if it is fair and complete. A trial court has broad discretion in phrasing its charge and can choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.

Commonwealth v. Hawkins, 701 A.2d 492, 511 (Pa. 1997) (internal citations omitted).

> It is well established that in any case where an accomplice implicates the defendant, the judge should tell the jury that the accomplice is a corrupt and polluted source whose testimony should be viewed with great caution. ***Commonwealth v. Turner***, 367 Pa. 403, 80 A.2d 708 (1951); ***Commonwealth v. Bubna***, 357 Pa. 51, 53 A.2d 104 (1942). For an accomplice charge to be required, the facts need not require the inference that the witness was in fact an accomplice; they need only permit such an inference. ***Commonwealth v. Sisak***, 436 Pa.

> 262, 259 A.2d 428 (1969). If the evidence is sufficient to present a jury question with respect to whether the prosecution's witness was an accomplice, the defendant is entitled to an instruction as to the weight to be given to that witness's testimony. ***Commonwealth v. Mouzon***, 456 Pa. 230, 318 A.2d 703 (1974). ***See also Commonwealth v. Bricker***, 525 Pa. 362, 581 A.2d 147 (1990); ***Commonwealth v. Upshur***, 488 Pa. 27, 410 A.2d 810 (1980); and ***Commonwealth v. Thomas***, 479 Pa. 34, 387 A.2d 820 (1978).

Commonwealth v. Chmiel, 639 A.2d 9, 13 (Pa. 1994).

The following variation was added to the jury instruction regarding the special rules for evaluating the testimony of a corrupted source:

> Now, even though there are some contentions here and the testimony of some witnesses depicted [the victim's brother] more as a puppet than an accomplice, you have to decide – you have to consider all the factors in determining whether [he] was in fact an accomplice, to include age, relative positions of power, the conduct and any other factor that you think is relevant.
>
> You have to decide whether [the victim's brother] was an accomplice in the commission of the crime as charged. If after considering all the evidence you find that he was an accomplice, then apply these special rules to evaluating his testimony. Otherwise, ignore these rules. Use this test to determine whether he was an accomplice. Again, [an] accomplice is a person who knowingly and voluntarily cooperates with or aids another in a commission of a crime.

N.T., 1/27/11, at 145.

Appellant argues that the trial court's variation on the corrupted source jury charge was "clearly an error" because "[i]t is not up to the jury to decide whether or not [the victim's brother] was a puppet or an accomplice. The only decision [for the jury] whether or not he was an

accomplice and if he is an accomplice, then, [the jury] must follow these certain rules." Appellant's Brief, at 33.

The Commonwealth contends, however, that the corrupted source doctrine did not even apply in this case because the witness in question "took great lengths to protect [Appellant], his cousin." Commonwealth's Brief, at 8 – 9. The Commonwealth argues that the victim's brother "only implicated [Appellant] with extensive cross-examination after various statements denying [Appellant's] guilt." ***Id***. at 9. The Commonwealth compares his testimony to that of a defense witness, and argues that the corrupted source doctrine does not apply to a witness testifying on a defendant's behalf. ***See Commonwealth v. Russell***, 383 A.2d 866, 869 (Pa. 1978) (holding that "it is unreasonable to infer, and improper for the court to charge, that because [a] defense witness stood convicted of the crime in question, his testimony must be viewed 'with disfavor' and accepted only with 'caution and care.'"). The Commonwealth also contends that the corrupted source jury charge "pertains only to the uncorroborated testimony of an accomplice." Appellant's Brief, at 9 (quoting ***Commonwealth v. Johnson***, 416 A.2d 1065, 1068 (Pa. Super. 1979)). The Commonwealth contends that because the victim corroborated her brother's testimony, "if there was error in the charge it was harmless as the charge was unwarranted *ab initio*." ***Id***.

We disagree with the Commonwealth that the witness in this instance can be characterized as a defense witness. Despite his reluctance to incriminate his cousin, he did, in fact, testify during redirect-examination that he, his younger brother, and Appellant sexually abused the victim. N.T., 1/26/11, at 187 – 191. Nevertheless, we do agree with the Commonwealth that the corrupted source jury charge was unwarranted because the accomplice witness's testimony was corroborated by the victim.

In ***Commonwealth v. Johnson***, 416 A.2d 1065 (Pa. Super. 1979), the judge refused to give a corrupted source jury charge despite the fact that two of the defendant's accomplices had testified against him. However, a third witness testified, corroborating the testimony of the accomplices, and "the testimony of the accomplices corroborated each other[.]" ***Id***. at 1068. The ***Johnson*** Court held that the corrupted source jury charge "pertains only to the uncorroborated testimony of an accomplice." ***Id***.

It is well-established that the corrupted source jury charge should be liberally applied, as the failure of the Commonwealth to charge a witness as an accomplice will not itself defeat the necessity of the charge. Hence, it has been routinely held that when the facts of a case *could* support a reasonable inference that a witness acted as an accomplice, the jury should be instructed to receive the accomplice's testimony with caution. ***See Sisak***, 259 A.2d at 431. However, the caveat to the liberal application of the corrupted source jury charge, as it is expressed in ***Johnson***, is as old as

the charge itself. ***See Commonwealth v. Simon***, 44 Pa. Super. 538, 543 (1910) (holding "the testimony of accomplices should be corroborated and if not, then the jury should be advised that it is unsafe to convict on such uncorroborated testimony"). Nevertheless, if the corroborating testimony arises exclusively from testimony of other accomplices or co-conspirators, the charge should still be given. ***See id.*** ("if two or more accomplices are produced as witnesses, they are not deemed to corroborate each other").

In this case, the victim's testimony corroborated that of the witness in question, her brother. Thus, it would not have been in error had the trial court refused to give the cautionary instruction. ***See Johnson***, ***supra***; ***Simon***, ***supra***. Accordingly, we conclude that the court's misstatement of the criteria for application of the instruction[6] was harmless error because Appellant was not entitled to the cautionary instruction *ab initio*.

Commonwealth's Amendment to the Criminal Information

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[6] The trial court's formulation of the instruction was erroneous because it created a false dichotomy between an accomplice and a "puppet," which is not a recognized legal term. Regardless of the relevance of such a distinction with respect to the degree of the witness's culpability for the sexual abuse, it is not a distinction that undermines the purpose of issuing a corrupted source instruction. The instruction is warranted when the witness has the incentives to pass blame on the defendant and downplay his own responsibility, incentives that still exist regardless of whether the witness is a puppet or a partner to the illegal endeavor. The existence of corroborating testimony by a non-accomplice, however, does counteract the credibility concerns that arise out of the inculpatory testimony of accomplices.

Appellant's next claim posits that the trial court erred by permitting the Commonwealth to amend the criminal information, to exclude dates during which Appellant was stationed in Japan. The Commonwealth moved to amend the information to change the end dates from June 1, 2009, to July 28, 2008, reflecting the fact that it was not possible for Appellant to have committed a crime during the excluded timeframe since he was located in Japan during that time.

The Rules of Criminal Procedure provide that:

> The court may allow an information to be amended when there is a defect in form, the description of the offense(s), the description of any person or any property, ***or the date charged***, provided the information as amended does not charge an additional or different offense. ***Upon amendment, the court may grant such postponement of trial or other relief as is necessary in the interests of justice.***

Pa.R.Crim.P. 564 (emphasis added).

> Factors that we must consider in determining whether a defendant was prejudiced by an amendment include: (1) whether the amendment changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether the entire factual scenario was developed during a preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; and (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

Commonwealth v. Sinclair, 897 A.2d 1218, 1223 (Pa. Super. 2006).

Here, Appellant's trial counsel objected when the Commonwealth requested the amendment, arguing that the late timing of the amendment was prejudicial. N.T., 1/27/11, at 78. However, counsel did not request a

postponement of the trial to alleviate the alleged prejudice, nor did he specifically articulate the nature of the prejudice alleged. Defense counsel only stated that he "want[ed] to be certain that [the amendment] would not preclude [defense counsel] from arguing the issue of the date in [his] closing." ***Id***. at 79. In response, the trial court addressed this concern, stating:

> What I'm going to do is I will permit counsel to argue that … I'm going to permit the defendant to argue that the --- there wasn't certainty and that he may well even raise the issue that he raised with Officer Holtz, that is, the issue of ability to formulate a defense.

Id. at 80 – 81.

Thus, Appellant was permitted to argue to the jury during his closing argument both that the late amendment reflected uncertainty in the Commonwealth's case, and that that uncertainty hindered his ability to present a defense. Appellant did not assert any objection to this course of action, renew his objection to the prejudice caused by the amendment despite the latitude offered by the trial court, or request a continuance. Accordingly, we conclude that Appellant's issue, as presented in his brief, has effectively been waived. Relief had already been provided by the trial court to the alleged prejudice endured as a result of the late amendment at the time the objection was made, and Appellant failed to lodge any objections as to the sufficiency of the afforded relief.

Furthermore, even if we were to conclude that the issue was preserved, we would still find the error harmless. Considering the ***Sinclair*** factors listed above, it is clear that whatever prejudice resulted from the amendment was negligible. First, the amendment did not alter the substance of the charges. Appellant had always been charged for conduct that occurred over a two year period, and there was never certainty in the Commonwealth's case regarding specific dates on which the sexual abuse occurred. Second, the victim, although unsure about the particular dates on which Appellant sexually abused her, specifically testified that the sexual abuse stopped when Appellant left the country to serve in the military. N.T., 1/26/11, at 31. Third, the amendment did not add new facts unknown to Appellant – indeed, it was the Appellant, and not the Commonwealth, who had superior knowledge regarding when Appellant left the country. Fourth, there is little reason to believe that the Appellant's defense strategy was substantially altered, particularly considering the latitude offered by the trial court to the defense in presenting its closing argument. Finally, there is no evidence of record that would suggest additional preparation was necessary and, in any event, Appellant never requested a postponement of the trial to conduct such preparation. Accordingly, even if Appellant had not waived this claim of error, we would nonetheless conclude that the error was harmless.

Trial Court's Response to the Jury's Question

In his final claim, Appellant asserts that the trial court misstated the law when it answered a question from the jury. During their deliberations, the jury presented the following written question to the trial court: "#3 Is the mouth considered an [sic] sexual organ[?]" Trial Court Exhibit #2, 1/27/11. The court provided the following written response: "[i]f your question is as to Counts # 3 and 4, the answer is no[.]" ***Id***. Appellant objected to the form of written response, arguing that the response should have been a simple "no." N.T., 1/27/11, at 166.

The trial court and each party to this action suggest divergent methods of analyzing this issue. Appellant contends that by specifying counts 3 and 4, the court was effectively telling the jury that the mouth is a sexual organ with respect to all other counts charged. He claims "[t]his confusion seriously prejudiced … Appellant in that he was found not guilty of [c]ounts [3] and [4], however, guilty on all other matters." Appellant's Brief, at 37. Thus, Appellant claims that the trial court abused its discretion by issuing an incorrect statement of the law in response to the jury's question and that the error was not harmless. The Commonwealth, on the other hand, contends that because Appellant's claim "improperly speculates as to the nature of jury deliberations, it should be denied as outside the scope of review." Commonwealth's Brief, at 11. The trial court took an altogether different approach, stating:

> The Court advised the jury that if their question concerned the two counts of rape of a child – of which the [Appellant] was

> acquitted – the answer is "No." Defendant avers "The answer by the Court seems to suggest that on the other counts the answer could be considered yes." Defendant is completely correct and therefore the issue is a nullity. In order to sustain a conviction for [IDSI], the Commonwealth must establish that [the] perpetrator engaged in acts of oral or anal intercourse which involved penetration, however slight; [and a] *person can penetrate by use of mouth or tongue*. [***Commonwealth v. L.N.***, 787 A.2d 1064 (Pa. Super. 2001)].

TCO, at 7 - 8.

Beginning with the trial court's analysis, we cannot affirm on the basis set forth in its opinion. The trial court simply misreads ***L.N.*** when it concludes that a mouth could be considered a "sexual organ." In ***L.N.***, the appellant claimed that licking the victim's penis could not substantiate a conviction for IDSI, arguing that some degree of penetration is required. ***L.N.***, 787 A.2d at 1070. This Court rejected that argument, holding that "the oral contact between the Appellant's tongue with the victim's penis met the penetration requirement." ***Id***.

We acknowledge that the holding in ***L.N.*** can be confusing without close study, as the act of licking a penis does not involve "penetration" within the ordinary meaning of the term. However, the clear intent behind the IDSI statute was to include oral intercourse, which by its ordinary meaning would not necessarily require penetration. Nevertheless, the appellant in ***L.N.*** attempted to argue that oral intercourse without actual penetration was outside the scope of the IDSI statute. To some extent, there is some support for that interpretation given the interplay between the

IDSI statute and the definitions for "deviate sexual intercourse" and "sexual intercourse" as set forth in 18 Pa.C.S. § 3101. Nevertheless, in ***L.N.***, this Court *did not hold* that the mouth, or any organ contained therein, was a "sexual organ." Instead, this Court reasoned as follows:

> To follow explicitly the requirement of penetration in permitting penetration to be lip contact (a kiss) with the sexual organ of another person, the lip being the external part of the mouth, while not permitting tongue contact with the sexual organ of another person, when the tongue is an internal part of the mouth, rises to the level of speciousness. ***Penetration as used in the statute is to assure explicit and indisputable contact between sexual organs and/or the mouth or anus of the parties.***

L.N., 787 A.2d at 1070-71 (emphasis added).

Contrary to the conclusion of the trial court in this instance, the act addressed in ***L.N.*** involved penetration not because the mouth is a "sexual organ," but instead because the victim's sexual organ (his penis) had penetrated the mouth of the appellant in the sense that it came into contact with an internal part of the appellant's mouth, his tongue. Therefore, in this case, there is no legal authority supporting the trial court's conclusion that the definition of "sexual organ" varies between sexual offense statutes and, furthermore, such an interpretation is contrary to the ordinary meaning of the phrase.

That being said, the answer given by the trial court to the jury's inquiry was, on its face, an accurate statement of the law. The mouth is not a "sexual organ" with respect to the charges of rape of child, as it is not a

"sexual organ" at all. We need not, therefore, extend our analysis into speculation regarding whether the jury interpreted the court's response differently with respect to the other offenses charged. Thus, we reject the Commonwealth's position that Appellant's claim is outside our scope of review. Nevertheless, we disagree with Appellant that the instruction was erroneous. On its face, the answer was clear, adequate, and accurate with respect to the rape counts that it specifically addressed. ***Hawkins***, 701 A.2d at 511. Accordingly, we conclude that the trial court did not abuse its discretion when it answered the jury's inquiry.

Judgment of sentence affirmed.

Judgment Entered.

Nicholas V. Cosetti

Deputy Prothonotary

Date: May 24, 2013