NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. K.S., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 152 WDA 2012

Appeal from the Judgment of Sentence entered August 10, 2011,
in the Court of Common Pleas of Cambria County,
Criminal Division, at No(s): CP-11-CR-0002228-2009

BEFORE: ALLEN, WECHT, and STRASSBURGER,* JJ.

MEMORANDUM BY ALLEN, J.: Filed: March 4, 2013

K.S. ("Appellant") appeals from the judgment of sentence imposed after he was convicted of two counts of involuntary deviate sexual intercourse ("IDSI") with a child, one count of criminal attempt ("IDSI with a child"), two counts of criminal attempt ("rape of a child"), two counts of aggravated indecent assault, one count of indecent assault, and one count of endangering the welfare of a child.[1] We affirm.

The procedural history may be summarized as follows: On August 11, 2009, the 12-year-old victim and her mother appeared at the Carrolltown Police Station where the victim informed police officers that she had been

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[1] 18 Pa.C.S.A. §§ 3123(b), 901(a), 2121(c), 3125(a), 3126(a)(7) and 4304(a)(1).

* Retired Senior Judge assigned to the Superior Court.

sexually abused by Appellant, her adoptive father, for more than two years, beginning in 2007. Appellant was subsequently arrested and on January 22, 2010, the Commonwealth filed a criminal information charging him with four counts of IDSI with a child, one count of indecent assault, one count of endangering the welfare of a child, one count of rape of a child, and two counts of aggravated indecent assault.

On April 10, 2010, Appellant filed a motion to suppress incriminating statements made to Officers Holtz and Schilling of the Carolltown Police Department after his arrest. Following a suppression hearing on October 21, 2010, the trial court permitted the Commonwealth to introduce Appellant's statements. *See* Trial Court Order, 3/7/11; Commonwealth Exhibit 4; N.T., 3/7/11, at 136-140, 165-170.

On February 4, 2011, the Commonwealth filed a motion to amend the criminal information, which the trial court granted. On March 3, 2011, the Commonwealth amended the criminal information to charge Appellant with two counts of IDSI with a child, two counts of criminal attempt (IDSI with a child), two counts of criminal attempt (rape of a child), two counts of aggravated indecent assault, one count of indecent assault, and one count of endangering the welfare of a child.

A jury trial commenced on March 7, 2011, and on March 8, 2011, the jury returned its verdicts of guilty at all counts except Count 4 (attempted IDSI with a child).

On August 10, 2011, the trial court sentenced Appellant to ten to twenty years of imprisonment at Count 1 (IDSI with a child), a concurrent ten to twenty years at Count 2 (IDSI with a child), a concurrent five to ten years at Count 3 (attempted IDSI with a child), a concurrent five to ten years at Count 5 (attempted rape), a concurrent five to ten years at Count 6 (attempted rape), a concurrent five to ten years at Count 7 (aggravated indecent assault), a consecutive five to ten years at Count 8 (aggravated indecent assault), a concurrent six to twelve months at Count 9 (indecent assault) and a concurrent six to twelve months at Count 10 (endangering the welfare of a child. Appellant was sentenced to an aggregate fifteen to thirty years in prison.

Appellant filed timely post-sentence motions which the trial court denied on December 22, 2011. This timely appeal followed. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises six issues for our review:

I. Was the verdict against the weight of the evidence due to the Appellant showing that the victim had no credibility in her allegations of wrong doing of the Appellant?

II. Whether or not the Trial Court erred by not merging Count 7, Aggravated Indecent Assault, and Count 8, Aggravated Indecent Assault, and Count 10, Endangering Welfare of Children with the sentences imposed to Count 1, Involuntary Deviate Sexual Intercourse?

III. Whether or not the Trial Court erred in allowing the Commonwealth to use Children and Youth records, more specifically, a statement given by the Appellant to the

caseworker, despite the fact said records were not disclosed until right before Jury Selection?

IV. Whether or not the Trial Court violated Rule 614 of the Pennsylvania Rules of Criminal Procedure when it conducted a two-page cross-examin[ation] [of] Brandi Yeckley, bolstering her testimony and thus removing the Trial Court as an impartial arbiter?

V. Whether or not the Trial Court erred by allowing the Commonwealth to amend the Criminal Information the day of Jury Selection?

VI. Whether or not the Trial Court erred in failing to suppress [Appellant's] statement to the police?

Appellant's Brief at 12.

In his first issue, Appellant claims that the verdict was against the weight of the evidence because he presented evidence demonstrating that the victim had no credibility. Appellant's brief at 22-24. In particular, Appellant asserts that the victim's story changed over time, and the victim's recollections of the dates of the abuse were inconsistent. *Id*. Our standard of review of a challenge to the weight of the evidence is as follows:

> Our scope of review for such a claim is very narrow. The determination of whether to grant a new trial because the verdict is against the weight of the evidence rests within the discretion of the trial court, and we will not disturb that decision absent an abuse of discretion. Where issues of credibility and weight of the evidence are concerned, it is not the function of the appellate court to substitute its judgment based on a cold record for that of the trial court. The weight to be accorded conflicting evidence is exclusively for the fact finder, whose findings will not be disturbed on appeal if they are supported by the record. A claim that the evidence presented at trial was contradictory and unable to support the verdict requires the

> grant of a new trial only when the verdict is so contrary to the evidence as to shock one's sense of justice.

Commonwealth v. Knox, 50 A.3d 732, 737-738 (Pa. Super. 2012) (citations omitted).

Appellant argues that the testimony of the victim was not credible because of inconsistencies between her statements to police officers, and her testimony at trial. Appellant's Brief at 22-24. Appellant cites inconsistencies such as whether the shower curtain, through which Appellant watched the victim, was "see-through", as well as discrepancies in the victim's descriptions of the explicit details of the abuse, e.g., the precise movements of Appellant's hands and genetalia on the victim's body, and the sounds that Appellant made during the abuse. *Id*. Appellant contends that because the Commonwealth relied exclusively on the testimony of the victim, which, he argues, was inconsistent and incredible, the verdict was against the weight of the evidence and he is therefore entitled to a new trial. *Id*. We disagree.

> The testimony of a sexual assault victim standing alone is sufficient weight to support a conviction. Furthermore, in reviewing a weight of the evidence claim we look to see if the verdict was so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative. The decision whether to grant a new trial is within the trial court's discretion, and we review that decision under an abuse of discretion standard. Furthermore, since issues of credibility are left to the trier of fact, the trial court, sitting as fact finder, [is] free to accept all, part, or none of a witness's testimony.

Commonwealth v. Strutt, 624 A.2d 162, 164 (Pa. Super. 1993) (citations and internal quotations omitted). Here, the jury as fact finder did not find any of the slight variations in the victim's testimony to affect her credibility. The trial court did not find that verdict was so contrary to the evidence as to shock its sense of justice, and upon careful review of the record, we do not find any abuse of discretion in that determination.

In his second issue, Appellant argues that the trial court erred by not merging Counts 7 and 8 (aggravated indecent assault) and Count 10 (endangering the welfare of a child) with the sentence imposed at Count 1 (IDSI with a child). Appellant's Brief at 24-26. The trial court explained that aggravated indecent assault and endangering the welfare of a child did not merge with IDSI with a child because each crime was supported by separate facts. Trial Court Opinion, 2/14/12, at 2. After reviewing the record, we agree with the trial court.

42 Pa.C.S.A. § 9765, pertaining to merger of sentences, provides:

> 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.

The victim testified that Appellant engaged in a multitude of separate acts of sexual abuse spanning more than two years, including acts that

would constitute aggravated indecent assault, distinct from acts constituting involuntary deviate sexual intercourse, and distinct from acts tending to endanger the welfare of a child. *See* N.T., 3/7/11, at 45-59; ***See also Commonwealth v. Yeomans***, 24 A.3d 1044, 1050 (Pa. Super. 2011) (when determining whether a defendant committed a single act, such that multiple criminal convictions should be merged for sentencing, the proper focus is … whether "the actor commits multiple criminal acts beyond that which is necessary to establish the bare elements of the additional crime"). Because Appellant committed multiple, separate criminal acts, the offenses of aggravated indecent assault and endangering the welfare of a child did not merge with IDSI with a child for sentencing purposes. Appellant's claim is therefore meritless.

In his third issue, Appellant claims the trial court erred in allowing the Commonwealth to introduce records from Children and Youth Services ("CYS"), which contained incriminating statements given by Appellant to a CYS caseworker. In particular, Appellant takes issue with a statement contained in the CYS records in which Appellant confessed to CYS caseworker Brandi Yeckley that he inappropriately touched the victim. Appellant's Brief at 26-28. Appellant asserts that the CYS records were made available shortly before jury selection, giving Appellant's counsel a "short period of time" to review them. *Id*. at 27. Appellant argues that due to the late release of the CYS records in violation of the rules of discovery, in

particular Pa.R.Crim.P. 573(B), the trial court should have delayed trial to permit Appellant's counsel to properly review the CYS records, and that the trial court's failure to do so constitutes reversible error. *Id*.

Our review of the record indicates that on February 24, 2011, Appellant's counsel filed a Petition to Disclose the Children and Youth Records. On March 1, 2011, the trial court entered an order directing CYS to forward all of the victim's records to the trial court. On Thursday, March 3, 2011, the day of jury selection, the trial court received from CYS the confidential records pertaining to the victim. The trial court made the CYS records available to both the Commonwealth and Appellant's counsel that same day. On March 7, 2011, Appellant's counsel, having reviewed the CYS records, filed a motion *in limine* seeking to suppress a typed summary of incriminating statements made by Appellant to Ms. Yeckley, on the basis that the Commonwealth had not previously provided that information to Appellant's counsel. N.T., 3/7/11, at 6-14. The trial court denied Appellant's motion. We find no abuse of discretion in the trial court's determination. We note that the trial court explained, and the record supports, that the CYS records in question were in the exclusive possession of CYS and could only be obtained by trial court order. *See* N.T., 3/7/11, at 6-14; Trial Court Opinion, 2/14/12, at 3-4; 23 Pa.C.S.A. § 6339 and § 6440 (Child Protective Services Law). Thus, the Commonwealth could not be found to have committed a discovery violation for failing to timely disclose

documents that were not in its possession. *Id*. Moreover, the trial court promptly provided the CYS records to Appellant as soon as they were available. Further, the trial court determined that the CYS records containing Appellant's statements to Ms. Yeckley had in fact been released to Appellant's counsel in January, 2011, in a related case involving similar crimes against the same victim by a different defendant. N.T., 3/7/11, at 6-14; Trial Court Opinion, 2/14/12, at 3-4.

Finally, Appellant is not entitled to relief because "[a] defendant seeking relief from a discovery violation must demonstrate prejudice. A violation of discovery does not automatically entitle appellant to a new trial. Rather, an appellant must demonstrate how a more timely disclosure would have affected his trial strategy or how he was otherwise prejudiced by the alleged late disclosure." ***Commonwealth v. Causey***, 833 A.2d 165, 171 (Pa. Super. 2003). Here, the record indicates that on March 3, 2011, the trial court received the CYS records and provided them to Appellant four days prior to the commencement of trial. Appellant thus had an opportunity to call witnesses to contradict the statements contained in the CYS records, or to testify concerning the statements that he allegedly made about inappropriately touching the victim. Moreover, the CYS records containing Appellant's statements to Brandi Yeckley were cumulative of other evidence presented by the Commonwealth, including verbal and written statements made by Appellant to Officers Travis Shilling and Craig Holtz of the Patterson

Borough Police Department on August 11, 2009, in which Appellant admitted to inappropriately touching the victim. N.T., 3/7/11, at 139, 168; Commonwealth Exhibit 4. Finally, Appellant fails to demonstrate how a more timely disclosure of the CYS records would have affected his trial strategy or how he was otherwise prejudiced by the alleged late disclosure.[2] We conclude that Appellant was not unduly prejudiced, and Appellant's assertion that he is entitled to a new trial on this basis fails. ***See Commonwealth v. Boring***, 684 A.2d 561, 567 (Pa. Super. 1996) (where the Commonwealth disclosed incriminating statements made by a defendant to a police officer the day before trial, defendant's challenge to the late disclosure failed; defendant's statements were disclosed prior to opening statements and several days before defendant presented his case-in-chief, giving defendant the opportunity to call witnesses to contradict the testimony or to testify himself concerning his alleged statements).

In his fourth issue, Appellant asserts that the trial court committed reversible error when it interrogated the Commonwealth's witness, Brandi

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[2] On March 7, 2011, prior to the commencement of trial, the trial court informed both the Commonwealth and Appellant's counsel that additional records from CYS had just been delivered. The trial court then provided the additional CYS records to both the Commonwealth and Appellant's counsel to review for twenty minutes before trial commenced. N.T., 3/7/11, at 9-14. Appellant's counsel objected, asserting before the trial court, and on appeal before this Court, that it had insufficient time to review those records. However, Appellant has failed to specify which contents of the additional records were objectionable, or how the late disclosure prejudiced him or affected his trial strategy. Therefore, this claim fails.

Yeckley. Appellant claims that the trial court's questioning "bolstered the credibility of the victim," and violated the trial court's function as an impartial arbiter. Appellant's Brief at 29. We disagree.

Pa.R.E. 614(b) pertaining to interrogation of witnesses by the trial court provides: "Where the interest of justice so requires, the court may interrogate witnesses, whether called by itself or by a party." In examining a trial court's interrogation of a witness, our Supreme Court has explained: "While a trial judge should normally leave questioning of witnesses to counsel, justice may require that a trial judge ask questions when absurd, ambiguous, or frivolous testimony is given or testimony is in need of further elucidation. To properly evaluate the questioning conducted by the trial court, we must consider it in context." ***Commonwealth v. Carson***, 913 A.2d 220, 249 (Pa. 2006) (citations omitted).

Here, the Commonwealth and Appellant's counsel questioned Ms. Yeckley about statements made to her by the victim. Following direct and cross-examination, the trial court noted that Ms. Yeckley's account of the victim's statements was disjointed, in that it skipped "back and forth," "go[ing] from allegations relating to one [incident of abuse], to the second [incident of abuse], back to the first and to the third and so on." N.T, 3/7/11, at 221-223. The trial court then proceeded to ask Ms. Yeckley ten questions pertaining to the chronology of the victim's statements. *Id*.

Appellant's counsel objected, and the trial court provided the following rationale for its questioning of Ms. Yeckley:

> [A]n objection was made to my examining one of the witnesses, and I merely wanted to comment on Pennsylvania Rule of Evidence 614. That rule addresses predominantly calling of a witness by the court but also the examination of a witness by the [trial court], and the direction in that rule is that the court … should examine if it appears that the testimony of the witness was not complete.
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> And, frankly, I realize the reason [why] the questioning by the defense of Ms. Yeckley was as it was, but various sentences in her report were skipped, and what I did merely was to have her recite the entire -- or I referred [to] the entire summary of her interview with [the victim]. On reflection, a better way would probably have been to merely have her read that into the record, but what I did was nothing more than to complete the record.
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> And, specifically, there was comment about the seeing through the shower. But the passage about pulling the shower curtain aside was skipped, and that's what [the trial court] had her address.

N.T., 3/8/11, at 4.

Upon review of the record, we find no merit to Appellant's claim. The trial court's questioning of Ms. Yeckley, in an attempt to clarify and complete the chronology of her testimony for the benefit of the jury, did not constitute reversible error. ***See Commonwealth v. Stamm***, 429 A.2d 4, 7-8 (Pa. Super. 1981) ("While the practice of a judge in entering the case as an advocate is disapproved, nonetheless it remains the trial court's inherent right to question a witness so as to clarify existing facts and elicit new information where necessary.").

In his fifth issue, Appellant argues that the trial court erred by allowing the Commonwealth to amend the criminal information on the day of jury selection, four days prior to the commencement of trial. Appellant's Brief at 29-31. Pa.R.Crim.P. 564 provides that a trial court may permit amendment of an information 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. "[T]he purpose of Rule 564 is to ensure that a defendant is fully apprised of the charges, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed." ***Commonwealth v. Sinclair***, 897 A.2d 1218, 1221 (Pa. Super. 2006). Where the crimes specified in the original information involve the same basic elements and arose out of the same factual situation as the crimes specified in the amended information, the defendant is deemed to have been placed on notice regarding his alleged criminal conduct and no prejudice to defendant results. ***Commonwealth v. Picchianti***, 600 A.2d 597, 599 (Pa. Super. 1991). "[I]f there is no showing of prejudice, amendment of an information to add an additional charge is proper even on the day of trial. Finally, the mere possibility amendment of

an information may result in a more severe penalty due to the addition of charges is not, of itself, prejudice." ***Id***.

> Since the purpose of the information is to apprise the defendant of the charges against him so that he may have a fair opportunity to prepare a defense, our Supreme Court has stated that following an amendment, relief is warranted only when the variance between the original and the new charges prejudices an appellant by, for example, rendering defenses which might have been raised against the original charges ineffective with respect to the substituted charges. 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.

Sinclair, 897 A.2d at 1222. ***See also Commonwealth v. Mentzer***, 18 A.3d 1200, 1203 (Pa. Super. 2011).

In this case, following a preliminary hearing at which the victim testified, the Commonwealth amended the criminal information to remove two counts of IDSI with a child and replace them with two counts of criminal attempt (IDSI with a child). Additionally, the amended criminal information removed the count of rape of a child and replaced it with two counts of criminal attempt (rape of a child). All other charges remained the same. Finally, the amended information altered the dates of the alleged crimes. While the original information indicated that the crimes occurred between

May 1, 2007 and June 30, 2009, the amended criminal information changed the dates to May 1, 2007 and August 11, 2009, a difference of forty-three days. These amendments to the information were based on the victim's testimony at the preliminary hearing. *See* Motion to Amend Criminal Information, 2/24/11.

We conclude that in permitting the amendment of the information to substitute the crimes of IDSI with a child and rape of a child, with the lesser offenses of attempted IDSI with a child and attempted rape of a child, the trial court did not abuse its discretion. Appellant was not denied a fair opportunity to prepare a defense. The amendment to the criminal information did not change the factual scenario on which the charges were based, or add new facts previously unknown to Appellant. Appellant neither asserts that a change in defense strategy was necessitated by the amendment, nor that his defense strategy would have differed if the amended criminal information had been filed in a more timely manner. ***See Commonwealth v. Small***, 741 A.2d 666 (Pa. 1999) (upholding amendment to criminal information to include a charge of attempted rape after the rape charge was dismissed).

Additionally, for the reasons explained above, and in light of the continuing nature of the crimes charged, we find no merit to Appellant's assertion that the change of dates in the criminal information constituted reversible error. Appellant possessed the necessary information upon which

to develop a defense, and suffered no prejudice as a result of the addition of forty-three days to the time frame in which the abuse was alleged to have occurred. His assertion that a new trial is warranted on this basis fails. ***See Commonwealth v. J.F.***, 800 A.2d 942, 645 (Pa. Super. 2002) (upholding amendment of criminal information changing the dates of the majority of charges against defendant); ***Commonwealth v. Luktisch***, 680 A.2d 877, 880 (Pa. Super. 1996) (the Commonwealth must be allowed a reasonable measure of flexibility when faced with the special difficulties involved in ascertaining the date of an assault upon a young child); ***Commonwealth v. Thomas,*** 477 A.2d 501, 507 (Pa. Super. 1984) (where Commonwealth amended criminal information after preliminary hearing at which the victim testified, the defendant had proper notice of the charges filed against him from both the original complaint and the preliminary hearing).

In his sixth and final issue, Appellant argues that the trial court erred in denying his motion to suppress incriminating statements he made to Officers Holtz and Shilling on August 12, 2009, in which he admitted to inappropriately touching the victim. Appellant's Brief at 31-32. Our standard of review of the trial court's denial of Appellant's suppression motion is as follows:

> An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are

> supported by the record and whether the legal conclusions drawn from those facts are correct. [Because] the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Reese, 31 A.3d 708, 721 (Pa. Super. 2011) (citations omitted).

Appellant contends that although he was provided with ***Miranda*** warnings and signed a ***Miranda*** waiver at the beginning of the custodial interrogation with Officers Holtz and Shilling, when he subsequently provided a written confession, ***Miranda*** warnings should have been re-issued. Appellant claims that, in the course of the interrogation, the police officers asked Appellant to provide a voluntary written statement. In response, Appellant asked the police officers "if he had to." N.T., 10/21/10, at 15 (suppression transcript). Appellant argues that this question to the police officers invalidated his prior ***Miranda*** waiver, that the ***Miranda*** warnings had become stale, and that the officers were required to re-issue ***Miranda*** warnings at that juncture. He asserts that his written confession was therefore obtained in violation of his constitutional rights.

"[I]t is the Commonwealth's burden to establish whether [a defendant] knowingly and voluntarily waived his ***Miranda*** rights. In order to do so, the Commonwealth must demonstrate that the proper warnings were given, and

that the accused manifested an understanding of these warnings." ***Commonwealth v. Cohen***, 53 A.3d 882, 885-886 (Pa. Super. 2012).

> In considering whether a defendant has validly waived his ***Miranda*** rights, the trial court engages in a two-pronged analysis: (1) whether the waiver was voluntary, in the sense that [the] defendant's choice was not the end result of governmental pressure[;] and (2) whether the waiver was knowing and intelligent, in the sense that it was made with full comprehension of both the nature of the right being abandoned and the consequence of that choice.

Commonwealth v. Pruitt, 951 A.2d 307, 324-325 (Pa. 2008).

Our review of the record reveals that the police officers provided Appellant with ***Miranda*** warnings at the commencement of the interrogation, and Appellant signed a ***Miranda*** waiver. Nothing in the record indicates that Appellant's waiver of ***Miranda*** was involuntary or the result of governmental pressure. After Appellant verbally confessed to inappropriately touching the victim, the police officers asked him to provide a written statement. At that juncture, Appellant asked the police officers "if he had to." N.T., 10/21/10, at 15 (suppression transcript). In conformity with ***Miranda***, Officer Schilling immediately informed Appellant that "he did not have to" provide a written statement, whereupon Appellant "paused for about a minute or two, and then he proceeded to write out his written statement." *Id*. We conclude that, under these circumstances, Appellant provided his written confession after being properly apprised of his constitutional rights, and after knowingly and voluntarily waiving those rights. Appellant was provided with the proper warnings pursuant to

Miranda, and signed a valid ***Miranda*** waiver. After being again apprised by police officers that he was not required to provide a written statement, Appellant nevertheless, of his own volition, opted to provide such a statement. Appellant's claim that his written confession should have been suppressed lacks merit. ***See also Commonwealth v. Benjamin***, 499 A.2d 337, 341 (Pa. Super. 1985) ("***Miranda*** warnings need not be repeated at every stage of interrogation.").

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.