NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MICHAEL JOHN HUDAK,	:	No. 1544 WDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, May 17, 2012,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0004843-2011

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 09, 2014**

Michael John Hudak appeals, ***nunc pro tunc***, from the judgment of sentence entered on May 17, 2012, following his conviction of rape of a child, aggravated indecent assault of a child, involuntary deviate sexual intercourse with a child, indecent assault of a person less than 13 years of age, and endangering the welfare of a child. Following careful review, we affirm.

The facts of this case are as follows. M.M., the six-year-old victim, lived in Akron, Ohio, with her mother and her mother's boyfriend, Michael Hudak, Jr. ("Michael"); appellant is Michael's father who was 63 years old at the time the crimes occurred. Appellant lived in the Penn Hills neighborhood of Pittsburgh and first met M.M. two weeks before

Thanksgiving 2010. By his own estimation, appellant visited M.M.'s home on approximately six weekends from mid-November 2010 until January 2011.

On January 17, 2011, appellant had an 11:15 a.m. doctor appointment at an office in Monroeville. Appellant had spent the weekend at Michael's home and had to leave Akron around 8:30 a.m. to make his appointment in time. Despite the fact that appellant had only met M.M. a handful of times, he asked Mother if he could take M.M. to Pittsburgh with him, as M.M. had the day off from school due to the Martin Luther King Day holiday. Mother gave appellant permission.

M.M. testified at trial regarding the day she spent with appellant and the sexual abuse that occurred. She explained that on January 17, 2011, she traveled with appellant to the Pittsburgh area. They first stopped at appellant's home to feed the geese, then went to his doctor appointment, to McDonald's, and to a place where she got a toy. (Notes of testimony, 2/13-15/12 at 56-61.) They also went to appellant's house, where she played with toys in the dining room.

At some point, appellant asked M.M. to remove her clothing. She complied, with the exception of taking off her panties. (***Id.*** at 62-63.) M.M. testified that appellant then inserted his penis, which she referred to as his "potty part," into M.M.'s vagina and in her mouth. (***Id.*** at 65-67.) He put his mouth and tongue on her vagina and inserted his fingers into her vagina. (***Id.*** at 66-67.) M.M. testified that the "cream from his potty part" went in

her mouth. (***Id.*** at 68.) M.M. testified that these acts took place in the bedroom and living room of appellant's house. (***Id.*** at 58, 61-68.) At the end of the day, appellant bought M.M. a stuffed animal and drove her back to Ohio.[1]

The Commonwealth's witnesses revealed that two days later, while attending daycare after school, M.M. told her teacher what appellant had done to her. (***Id.*** at 83.) On January 27, 2011, a social worker at the Care Center at Akron's Children's Hospital conducted a forensic interview of M.M., during which she recounted appellant's sexual abuse. (***Id.*** at 86.) Numerous professionals watched on a closed circuit television. (***Id.*** at 87-88.) Diane Abbott, a pediatric nurse, examined M.M. and found her exam to be normal, as there was neither damage nor abnormalities to her hymen or bruising. (***Id.*** at 95, 99, 103.) Abbott testified that "most people have a misconception that the first time there is some sort of penetration, even in a young child, that something breaks or tears and that's just not true." (***Id.*** at 100.)

[1] M.M. could not recall when the two events happened during the day and gave inconsistent answers about how many events happened, when, and where, noting that the event in the bedroom happened either before or after the doctor appointment. (***Id.*** at 76-78.) M.M. was unable to recall what clothing she wore, what clothing appellant had on, when she arrived home, her hospital examination, or her prior testimony at hearings. M.M. admitted that she tells lies and that she tells lies more than she tells the truth. (***Id.*** at 70-71.)

Based on the video interview, the case was referred to the Penn Hills Police Department. (***Id.*** at 88.) Detective Ben Westwood recorded an interview of M.M., an arrest warrant was issued for appellant, and a search warrant was issued for his home. On February 25, 2011, appellant was arrested and transported to the Penn Hills police station. Appellant agreed to speak with the police and denied sexually abusing M.M. Appellant, however, told Detective Westwood that he assumed M.M. had been sexually assaulted in the past, as M.M. had told him that some guy had hurt her and he assumed she meant sexually. (***Id.*** at 108-109.)

Appellant was charged with one count of rape of a child, one count of aggravated indecent assault of a child, two counts of involuntary deviate sexual intercourse with a child, one count of indecent assault with a person less than 13 years of age, and one count of endangering the welfare of a child. On October 18, 2011, appellant filed a motion for pre-trial taint hearing related to a government witness and to determine the competency of the child witness. A hearing was held before the Honorable Donna Jo McDaniel on February 13, 2012, and M.M. was found competent to testify and that her testimony had not been tainted.

A jury trial began on February 14, 2012. Appellant testified on his own behalf and denied the allegations. He claimed that M.M. had a "great old time" on her trip to Pittsburgh on January 17, 2011. (***Id.*** at 130.) He stated that she accompanied him to his doctor appointment, and they

arrived at 11:25 a.m. and had to wait for a few hours, during which time M.M. misbehaved. (***Id.*** at 132.) According to appellant, they left the doctor's office around 3:00 or 3:30 p.m. (***Id.*** at 132.) However, Detective Westwood, who had interviewed the office receptionist, offered that they left closer to 12:30 p.m. (***Id.*** at 110-111.) Appellant testified that they went to McDonalds and ate lunch in the car; they also picked up his prescriptions at Walmart. (***Id.*** at 133-134.) Appellant took M.M. on a sight-seeing tour of his old neighborhood, went to the gas station, then M.M. also watched him lift weights at a spa before he made a quick trip to a tanning salon. (***Id.*** at 135.) He detailed that M.M. stayed in the car with the doors locked, which frightened him as he had accidently left the car running. (***Id.***)

Appellant stated that they arrived home around 6:05 p.m., and he made noodles while M.M. played upstairs. (***Id.*** at 136.) They arrived back in Akron around 9:15 p.m. During the ride, appellant told her that she could not come back to Pittsburgh anymore as she had misbehaved at his doctor appointment. (***Id.*** at 139.) M.M. threw a tantrum and yelled and kicked the dashboard. Appellant averred that she called him a "meanie" and stated "I'm going to get you." (***Id.*** at 138-139.)

The defense also called Maria Combs ("Combs") as a character witness; Combs is appellant's girlfriend of 18 years and the mother of his five children. (***Id.*** at 119.) She explained that she moved from Pittsburgh

to Ohio and lived just 15 minutes from M.M. Combs viewed M.M. as a granddaughter and often babysat for M.M. She explained that appellant would visit Akron to visit her and their children. She testified to his good reputation within the community for being a truthful person. (***Id.*** at 124.)

The jury found appellant guilty of all counts. On May 17, 2012, appellant was sentenced to four mandatory minimum terms of 10 to 20 years' imprisonment at the first four counts; the sentences were to be served consecutively. There were no further penalties imposed for the remaining crimes. The aggregate sentence was a period of imprisonment of 40 to 80 years. New counsel was appointed and appellant filed a post-sentence motion on June 15, 2012. Judge McDaniel denied the motion on June 28, 2012. Counsel filed a motion for leave to withdraw, which was granted; and new counsel, Christine M. Sheldon, Esq., was appointed on July 23, 2012.

Following the filing of a petition under the Post Conviction Relief Act, by order dated September 6, 2012, Judge McDaniel reinstated appellant's rights to file a direct appeal. On October 5, 2012, Carrie L. Allman, Esq., filed a notice of appeal on appellant's behalf. Appellant complied with the trial court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion.

Herein, the following issues have been presented for our review:

I. WAS IT ERROR TO DENY DEFENSE QUESTIONING REGARDING BIAS AND MOTIVE TO LIE OF THE MAIN WITNESS, AND IS THE TRIAL COURT'S CLAIM THAT A WITNESS'S REPUTATION FOR TRUTHFULNESS IS NOT PROPER EVIDENCE INCORRECT?

II. WAS THE VERDICT RENDERED CONTRARY TO THE WEIGHT OF THE EVIDENCE PRESENTED AND SHOULD A NEW TRIAL BE AWARDED?

III. WAS THE IMPOSITION OF A SENTENCE OF 40-80 YEARS OF INCARCERATION, IMPOSED ON A 60 YEAR OLD MAN, MANIFESTLY EXCESSIVE, UNREASONABLE, AND AN ABUSE OF DISCRETION?

Appellant's brief at 6.[2]

Appellant first argues that the trial court erred in restricting his questioning of defense character witness Combs regarding M.M.'s past lies or threats of false allegations. No relief is due.

The admission of evidence is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. ***Commonwealth v. Delbridge***, 859 A.2d 1254, 1257 (Pa. 2004). "An abuse of discretion is not merely an error of judgment; rather, discretion is abused when 'the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record.'" ***Commonwealth v. Busanet***, 817 A.2d 1060, 1076 (Pa. 2002).

[2] We note that appellant has abandoned other claims raised in his Rule 1925(b) statement.

Appellant claims that the court erred in precluding him from questioning Combs as to M.M.'s reputation for truthfulness and also as to a specific instance in which M.M. allegedly told Combs that if she did not give her ice cream, M.M. would tell people that Combs had hurt her. (Appellant's brief at 20.)

Pennsylvania Rule of Evidence 608 provides in pertinent part:

> **(a) Reputation Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. Opinion testimony about the witness's character for truthfulness or untruthfulness is not admissible.
>
> **(b) Specific Instances of Conduct.** Except as provided in Rule 609 (relating to evidence of conviction of crime),
>
> (1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,
>
> (2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but

> extrinsic evidence thereof is not admissible.

Pa.R.E. 608. "Pa.R.E. 608 codifies the long established rule limiting the type of evidence admissible to challenge a witness's credibility, to evidence of the witness's general reputation for truthfulness or untruthfulness." ***Commonwealth v. Minich***, 4 A.3d 1063, 1069 (Pa.Super. 2010) (citations omitted).

In ***Commonwealth v. Butler***, 621 A.2d 630 (Pa.Super. 1993), this court reversed the judgment of sentence imposed following a defendant's conviction for indecent assault and related offenses, and remanded for a new trial. At trial, the defendant attempted to elicit testimony from a witness that the complainant had a reputation for being untruthful. The trial court refused to allow the testimony. This court analyzed the issue as follows:

> The ruling of the trial court was incorrect. In deference to the trial court, there may have been some misunderstanding that the defense was attempting to introduce one individual's opinion as to the victim's capacity for deceit. That sort of testimony would properly be excluded. ***See Commonwealth v. Smith***, 389 Pa.Super. 626, 567 A.2d 1080 (1989), ***allocatur denied***, 527 Pa. 623, 592 A.2d 44 (1990). Nevertheless, it seems obvious to us that the defense was trying to introduce general reputation evidence for truth and veracity, and that is a valid line of attack. ***Commonwealth v. Smith***, ***supra***. ***See also Commonwealth v. Hansell***, 185 Pa.Super. 443, 137 A.2d 816 (1958). Therefore, we must reverse the judgment of sentence and remand for a new trial.

Butler, 621 A.2d at 632.

We agree with the Commonwealth that based upon the proffer made by defense counsel at trial, which was limited only to a specific instance of the victim's alleged threatened fabrication, it is clear that such testimony was properly precluded. Appellant presented the testimony of Combs, as a character witness. During direct examination, defense counsel sought to introduce evidence of the victim's reputation in the community for truthfulness or untruthfulness through Combs. Appellant established that Combs knew the victim as she babysat for her, three of Combs' children attended school with the victim, and her oldest son lived with the victim and her mother. (Notes of testimony, 2/13-15/12 at 121-123.) M.M. lived in Akron, Ohio, and Combs lived in Barberton, Ohio, which Combs averred was about 15 minutes away. (***Id.*** at 120.)

Upon the Commonwealth's objection, defense counsel then explained that appellant wished to attack the character of the victim for truthfulness with a specific instance in which she had allegedly threatened to lie. (***Id.*** at 122.) The trial court specifically disallowed the defense to have a witness testify as to the six-year-old victim's reputation in the community for not being honest. (***Id.*** at 123-124.) We find no error as all of the information provided to the trial court was based on a specific instance of conduct and a personal opinion and, thus, inadmissible. The defense was attempting to introduce one individual's opinion as to the victim's capacity for deceit rather than the victim's general reputation for truth or veracity. ***Butler***, ***supra***. As

the trial court noted, the defense was permitted to cross-examine M.M. regarding her admission that she has lied. (***See*** trial court opinion, 5/13/13 at 10.)

We now turn to appellant's second contention: that the trial court erred in refusing to allow Combs to testify as to a specific instance in which M.M. allegedly told Combs that if she did not give her ice cream, M.M. would tell people that Combs had hurt her. Again, we find no relief is due.

We agree with the Commonwealth that ***Minich***, ***supra***, is dispositive. In ***Minich***, the defendant was charged with multiple crimes related to his sexual abuse of two minor boys. The defendant sought to use evidence of specific instances of dishonest conduct by one of the victims to impeach his truthfulness. The court held that when an "accused seeks to offer character evidence for purposes of attacking or supporting the credibility of a victim who testifies, the admissibility of such evidence is governed by Pa.R.E. 608[[3]] and proof of specific incidents of conduct by either cross-examination or extrinsic evidence is prohibited." ***Id.*** at 1072. The ***Minich*** panel found that the trial court erred in permitting the defense to introduce evidence of particular instances in which the minor victim had lied

[3] Rule 608 codifies the long-established rule limiting the type of evidence admissible to challenge a witness' credibility to evidence of the witness' general reputation for truthfulness or untruthfulness. Pa.R.E. 608(a). The courts recognize that evidence of bad conduct has limited probative value and injects collateral issues into the trial. ***Commonwealth v. Taylor***, 381 A.2d 418 (Pa. 1977).

about matters not specifically related to the defendant's sexual abuse. ***Id.*** at 1072-1073.

Appellant wished to attack M.M.'s character for truthfulness with an instance in which M.M. had allegedly threatened to lie. Pursuant to ***Minich*** and Rule 608(b)(1), the introduction of such evidence is to be specifically precluded. The defense was permitted to cross-examine M.M. regarding her admission that she lies, but the defense may not use a character witness to offer negative testimony about the victim about matters not specifically related to the defendant's sexual abuse. (Trial court opinion, 5/13/13 at 10.) Appellant's claim lacks merit.

Appellant's second claim challenges the verdicts as against the weight of the evidence.[4] He avers that the victim's testimony was not credible.

> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.
>
> This does not mean that the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the

[4] Appellant properly preserved this claim in his post-sentence motion.

> evidence is unfettered. In describing the limits of a trial court's discretion, we have explained[,] [t]he term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused where the course pursued represents not merely an error of judgment, but 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. Clay, 64 A.3d 1049, 1055 (Pa. 2013) (emphasis omitted) (citations omitted).

We cannot find that Judge McDaniel abused her discretion in denying appellant's weight of the evidence claim. M.M., who was seven years of age at the time of trial, was found to be a competent witness. She claimed that on January 17, 2011, appellant drove her to his home and asked her to remove her clothing. He inserted his penis in her vagina and also in her mouth. M.M. testified that appellant put his mouth and tongue on her vagina and inserted his fingers into her vagina. Appellant ejaculated into her mouth during oral sex. M.M. also recounted the specifics of this abuse during a forensic interview conducted at Akron's Children's Hospital ten days after the incident. Appellant testified at trial and denied the allegations claiming that the victim was lying.

As the trial court stated in its Rule 1925(a) opinion, "Although [M.M.'s] testimony had some minor inconsistencies due in all likelihood to her very young age, it cannot be said under any analysis that her testimony was 'so unreliable and/or contradictory as to make any verdict based thereon pure conjecture[.]'" (Trial court opinion, 5/13/13 at 11.) The trial court found the jury's verdict was appropriate and "not shocking." (***Id.*** at 12.) Nothing indicates the trial court acted manifestly unreasonably, failed to apply the law, or ruled out of partiality, prejudice, bias, or ill-will in denying appellant's challenge to the weight of the evidence. Additionally, it was within the province of the jury as fact-finder to reconcile inconsistent testimony, and to believe all, part, or none of the evidence, assigning to it whatever weight it deemed appropriate. ***Commonwealth v. Manchas***, 633 A.2d 618, 624 (Pa.Super. 1993), ***appeal denied***, 651 A.2d 535 (Pa. 1994). No relief is due.

Finally, we turn to appellant's challenge to the discretionary aspects of his sentence. "It is well-settled that, with regard to the discretionary aspects of sentencing, there is no automatic right to appeal." ***Commonwealth v. Austin***, 66 A.3d 798, 807-808 (Pa.Super. 2013).

> Before [this Court may] reach the merits of [a challenge to the discretionary aspects of a sentence], we must engage in a four part analysis to determine: (1) whether the appeal is timely; (2) whether Appellant preserved his issue; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence [see

> Pa.R.A.P. 2119(f)]; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code . . . . [I]f the appeal satisfies each of these four requirements we will then proceed to decide the substantive merits of the case.

Id. (brackets in original).

Instantly, appellant filed a timely notice of appeal and preserved his claim that his sentence was excessive in a post-sentence motion. (Docket #17, 28.) Appellant has also included a Rule 2119(f) statement in his brief. (Appellant's brief at 32-33.) Consequently, we will determine whether appellant has presented a substantial question that his sentence is inappropriate under the Sentencing Code. ***See Austin***, 66 A.3d at 808.

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Id.***

> A substantial question exi[s]ts only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.

Id., citing ***Commonwealth v. Griffin***, 65 A.3d 932, 935 (Pa.Super. 2013).

Appellant argues that the sentence imposed was manifestly unreasonable as the court imposed a ***de facto*** life sentence without considering all the relevant sentencing factors, including his rehabilitative needs. (Appellant's brief at 33.) Appellant avers that "[s]uch a sentence is

unreasonable and inconsistent with the norms underlying the sentencing code[.]"

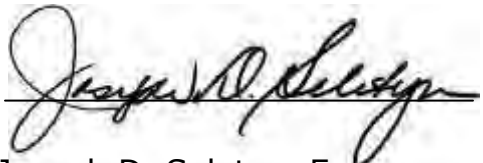
Appellant has not specified which fundamental norm the sentence violates. Nor has he explained the guideline ranges applicable to this case. Appellant has also failed to cite a case supporting his conclusory statement that a substantial question has been raised. Rather, he merely made a bald assertion that, because of his age, the aggregate sentence is the functional equivalent of a life sentence and, therefore, must be deemed excessive. In sum, appellant has not explained why his age at the time he sexually assaulted a six-year-old girl entitles him to a more lenient sentence under the Sentencing Code. Bald allegations of excessiveness do not present a substantial question for purposes of Rule 2119(f). ***Commonwealth v. Reynolds***, 835 A.2d 720, 733 (Pa.Super. 2003). ***See also Commonwealth v. Hanson***, 856 A.2d 1254, 1257-1258 (Pa.Super. 2004) (an argument that the sentencing court failed to adequately consider mitigating factors in favor of a lesser sentence does not present a substantial question appropriate for review). Thus, we find that appellant has failed to present a substantial question for our review.

In any event, while the sentences were imposed consecutively, we note that "[i]n imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." ***Commonwealth v.***

Wright, 832 A.2d 1104, 1107 (Pa.Super. 2003). We also note that Judge McDaniel did not sentence appellant on two of the six counts. Furthermore, the trial court had the benefit of a pre-sentence investigation report and was certainly aware of all relevant information and alleged mitigating factors, including appellant's age. "Our Supreme Court has ruled that where pre-sentence reports exist, the presumption will stand that the sentencing judge was both aware of and appropriately weighed all relevant information contained therein." ***Commonwealth v. Griffin***, 804 A.2d 1, 8 (Pa.Super. 2002), ***appeal denied***, 868 A.2d 1198 (Pa. 2005), ***cert. denied***, 545 U.S. 1148 (2005).

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014