NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RICARDO PEREZ-TOLEDO Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 738 MDA 2013

Appeal from the Judgment of Sentence March 15, 2013
In the Court of Common Pleas of Luzerne County
Criminal Division at No(s): CP-40-CR-0001329-2011

BEFORE: BENDER, P.J.E., MUNDY, J., and JENKINS, J.

MEMORANDUM BY MUNDY, J.: **FILED JUNE 06, 2014**

Appellant, Ricardo Perez-Toledo, appeals from the March 15, 2013 aggregate judgment of sentence of 22 to 44 years' imprisonment imposed after a jury found him guilty of rape of a child, and two counts each of involuntary deviate sexual intercourse with a child and indecent assault.[1] After careful review, we affirm the judgment of sentence.

The trial court summarized the relevant facts and procedural history of this case as follows.

> On June 28, 2011, the Luzerne County District Attorney filed a [c]riminal [i]nformation charging [Appellant] with [r]ape of a [c]hild and related offenses. [These charges stemmed from Appellant's repeated sexual assault of a minor female victim,

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[1] 18 Pa.C.S.A. §§ 3121(c), 3123(b), and 3126(a)(7), respectively.

> S.R-S. (hereinafter, "the victim"), over a five-year period from January 2005 to December 2010, during which S.R-S. was between six and 11 years old. The victim disclosed these assaults to her school guidance counselor, who subsequently alerted police.] [Appellant] pleaded not guilty and a jury trial commenced on October 16, 2012. [At trial, the victim testified in a manner inconsistent with her testimony during the April 27, 2011 preliminary hearing.] On October 18, 2012, the jury returned verdicts of guilty on all counts. A Pre-Sentence Investigation (PSI) was ordered to be completed by the Luzerne County Adult Probation and Parole Department, and a sentencing date was scheduled.
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> A sentencing hearing commenced on March 15, 2013, when [Appellant] stipulated to a determination by the Sexual Offenders Assessment Board (SOAB) that he be classified as a sexually violent predator. Upon consideration of the submissions of counsel, the SOAB Report, and a review of the PSI, [the trial court] sentenced [Appellant] to an aggregate term of incarceration of [] 22 to [] 44 years[']' in a state correctional institution.

Trial Court Opinion, 11/27/13, at 1-2 (citation to notes of testimony and footnotes omitted).[2]

The record reflects that although Appellant was advised of his post-sentence rights at the March 15, 2013 sentencing hearing, he did not file

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[2] The trial court's November 27, 2013 opinion does not contain pagination. For the ease of our discussion, we have assigned each page a corresponding number.

any post-sentence motions. ***See*** N.T., 3/15/13, at 15-16. On April 15, 2013, Appellant filed a timely notice of appeal.[3]

On appeal, Appellant raises the following 11 issues for our review.

> [A.] Whether the [trial c]ourt erred in denying [Appellant]'s motion to dismiss under [Pa.R.Crim.P.] 600 in that trial commenced more than 365 days after the initiation of the case and there was not sufficient excludable time?
>
> [B.] Whether the [trial c]ourt erred in not appointing an attorney to [the victim] as requested by [Appellant] where [she] made inconsistent statements that could subject [her] to perjury or other charges []?
>
> [C.] Whether the [trial c]ourt erred in admitting the testimony of Michel[l]e Planutis as to statements of the [victim] [], where such statements constituted inadmissible hearsay and were also admitted in violation of the [Appellant]'s right of confrontation under the U.S. and Pennsylvania Constitutions and related case law?
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> [D.] Whether the [trial c]ourt erred in admitting the testimony of Jackie Silveri as to statements of the [victim] [], where such statements constituted inadmissible hearsay and were also admitted in violation of the [Appellant]'s right of confrontation under the U.S. and

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[3] We note that Appellant's notice of appeal was timely filed, as weekends are excluded from the computation of time. **See** 1 Pa.C.S.A. § 1908 (providing that when the last day of a calculated period of time falls on a Saturday or Sunday, such day shall be omitted from the computation). Additionally, Appellant and the trial court have complied with Pa.R.A.P. 1925.

Pennsylvania Constitutions and related case law?

[E.] Whether the [trial c]ourt erred in admitting the testimony of minor child S.C. as to statements of the [victim] [], where such statements constituted inadmissible hearsay and were also admitted in violation of the [Appellant]'s right of confrontation under the U.S. and Pennsylvania Constitutions and related case law?

[F.] Whether the [trial c]ourt erred in admitting the testimony of Dr. Gary Lawrence as to statements of the [victim] where such statements constituted inadmissible hearsay and were also admitted in violation of [Appellant]'s right of confrontation under the U.S. and Pennsylvania Constitutions and related case law?

[G.] Whether the [trial c]ourt erred in admitting and permitting a portion of the preliminary hearing transcript to be read to the Jury [], where such statements constituted inadmissible hearsay and were also admitted in violation of [Appellant]'s right of confrontation under the U.S. and Pennsylvania Constitutions and related case law?

[H.] Whether the [trial c]ourt erred in instructing the jury that the testimony read by Detective Zipovski could constitute truth of the matter asserted[, s]pecifically because there was no analysis or showing that this could be admitted for the truth of the matter asserted under Pa.R.E. 804 or any other rule of [e]vidence or relevant case law?

[I.] Whether the [trial c]ourt erred in giving the flight instruction to the jury, where there was not a legally sufficient basis to give that instruction as there was no evidence

> [Appellant] knew of the charges and [Appellant] was returning to the jurisdiction?
>
> [J.] Whether the evidence was sufficient to support a verdict as to all convictions as no substantive evidence of guilt was provided at the time of trial, and evidence that suggested that a crime had occurred was only admitted as inadmissible hearsay and/or hearsay that was not for the truth of the matter asserted?
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> [K.] Whether the verdicts were against the weight of the evidence?

Appellant's Brief at 4-6 (citations to notes of testimony omitted).

For the ease of our discussion, we have elected to address Appellant's claims in a slightly different order than presented in his appellate brief. Moreover, to the extent some of Appellant's claims are interrelated, we will address those claims concurrently.

In Issue A, Appellant argues the trial court erred in denying his Rule 600 motion because his "trial commenced more than 365 days after the initiation of the case and there was not sufficient excludable time…." ***Id.*** at 11. For the reasons that follow, we conclude that Appellant has waived this claim.

Generally, "[w]hen reviewing a trial court's decision in a Rule 600 case, an appellate court will reverse only if the trial court abused its discretion." ***Commonwealth v. Bradford***, 46 A.3d 693, 700 (Pa. 2012).

> Judicial discretion requires action in conformity with law, upon facts and circumstances judicially before the court, after [a] hearing and due consideration. An abuse of discretion is not merely

> an error of judgment, but if in reaching a conclusion 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, discretion is abused.
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> The proper scope of review … is limited to the evidence on the record of the Rule 600 evidentiary hearing, and the findings of the trial court. An appellate court must view the facts in the light most favorable to the prevailing party.
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> …
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> So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule 600 must be construed in a manner consistent with society's right to punish and deter crime. In considering these matters …, courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well.

Commonwealth v. Peterson, 19 A.3d 1131, 1134 (Pa. Super. 2011) (*en banc*) (citations omitted), *affirmed*, 44 A.3d 655 (Pa. 2012).

In the instant matter, our review of the record reveals that at no time during the pendency of this case did Appellant's trial counsel[4] file a motion to dismiss the charges pursuant to Rule 600. ***See*** Pa.R.Crim.P (600)(D)(1) (stating, "[w]hen a defendant has not been brought to trial within the time periods set forth in paragraph (A), at any time before trial, the defendant's

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[4] Appellant was represented at trial by Charles G. Ross, Jr., Esquire (Attorney Ross).

attorney, or the defendant if unrepresented, may file a written motion requesting that the charges be dismissed with prejudice on the ground that this rule has been violated…[]"). Appellant acknowledges this fact in his brief, and concedes that he is precluded from arguing, "[i]n good faith, … that this issue was properly presented" for appellate review. ***See*** Appellant's Brief at 8, 11-12. It is well settled that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Accordingly, we agree with the trial court that Appellant has waived his Rule 600 claim. ***See*** Trial Court Opinion, 11/27/13, at 3 (stating, "[Appellant never filed a motion … requesting dismissal of charges pursuant to Rule 600. Accordingly, there is no reviewable issue for appeal[]").

In Issue B, Appellant argues that the trial court abused its discretion by failing to appoint counsel for [the victim] during the trial, "where the [victim] made inconsistent statements that could subject [her] to perjury or other charges…." Appellant's Brief at 12. The victim, it should be noted, testified inconsistently with her testimony at the April 27, 2011 preliminary hearing, and was questioned further by the Commonwealth after denying at trial that Appellant had committed the crimes in question. ***See*** N.T, 10/17-18/12, at 33-48.

Our review of the record reveals that Appellant has failed to properly develop this claim for appellate review. Notably, the argument section for

Issue B in Appellant's brief contains nearly three pages of boilerplate law, without supporting analysis or discussion. Appellant's Brief at 12-15. Appellant has failed to cite any relevant authority in support of his claim that the trial court was required to appoint counsel for the victim, and, in fact, concedes in his appellate brief that he has found no case law in this regard. ***Id.*** at 16. Furthermore, Appellant cites no authority for the proposition that he possesses standing to assert the privileges afforded by the Fifth Amendment on behalf of another individual.

This Court has long recognized that we will not consider issues where Appellant fails to cite to any legal authority or otherwise develop the issue. ***Commonwealth v. McLaurin***, 45 A.3d 1131, 1139 (Pa. Super. 2012), *appeal denied*, 65 A.3d 413 (Pa. 2013).

> In an appellate brief, parties must provide an argument as to each question, which should include a discussion and citation of pertinent authorities. Pa.R.A.P. 2119(a), 42 Pa.C.S.A. This Court is neither obliged, nor even particularly equipped, to develop an argument for a party. To do so places the Court in the conflicting roles of advocate and neutral arbiter. When an appellant fails to develop his issue in an argument and fails to cite any legal authority, the issue is waived.

Commonwealth v. B.D.G., 959 A.2d 362, 371-372 (Pa. Super. 2008) (*en banc*) (some citations omitted). Accordingly, we conclude that Appellant has waived this claim. ***See also Commonwealth v. Briggs***, 12 A.3d 291, 341 (Pa. 2011) (holding that arguments which are undeveloped and lack

citation to relevant authority are waived), *cert. denied*, ***Briggs v. Pennsylvania***, 132 S.Ct. 267 (2011).

In Issue G, Appellant argues the trial court erred in allowing the victim's preliminary hearing testimony to be read into evidence by Hazelton Police Detective Kenneth Zipovski. Appellant's Brief at 25, *referencing* N.T., 10/17-18/12, at 80-84. Appellant maintains, *inter alia*, that said testimony "constituted inadmissible hearsay…." Appellant's Brief at 25.

In reviewing a trial court's ruling on the admissibility of evidence, our standard of review is one of deference. Questions concerning the admissibility of evidence are within "the sound discretion of the trial court, and its discretion will not be reversed absent a clear abuse of discretion." ***Commonwealth v. Selenski***, 18 A.3d 1229, 1232 (Pa. Super. 2011) (citation omitted). "[I]f in reaching a conclusion the trial court over-rides [sic] or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error." ***Commonwealth v. Weakley***, 972 A.2d 1182, 1188 (Pa. Super. 2009) (citation omitted), *appeal denied*, 986 A.2d 150 (Pa. 2009).

Herein, our review of the record reveals that Appellant waived his challenge to Detective Zipovski's recitation of the victim's testimony from the preliminary hearing transcript by expressly stipulating during the jury trial that the victim's statements during the preliminary hearing could be admitted as substantive evidence. Specifically, Appellant's trial counsel,

Attorney Ross, stated the following regarding the Commonwealth's examination of the victim.

> [Attorney Ross]: Your Honor, as the Court is aware, the Commonwealth is going to proceed with her witnesses and they are going to be testifying as to prior inconsistent statements. **It is the position of the defense that the only statements -- excuse me. The only statement or recording that can be introduced as substantive evidence is the preliminary hearing transcript, because at the time, the [victim] was under oath and defense counsel was allowed to cross-examine her.**

N.T., 10/17-18/12, at 38-39 (emphasis added). Accordingly, we conclude that Appellant has waived his challenge to Detective Zipovski's recitation of the victim's testimony.

We now turn to Appellant's contentions that the trial court abused its discretion in various instructions it gave to the jury. Specifically, in Issue H, Appellant argues that "the [trial c]ourt erred in instructing the jury that the [victim's] testimony read by Detective Zipovski" could be considered by them as proof of the truth of said testimony. Appellant's Brief at 25, *referencing* N.T., 10/17-18/12, at 90. In Issue I, Appellant further contends the trial court erred in instructing the jury on flight, "where there was not a legally sufficient basis to give that instruction as there was no evidence [Appellant] knew of the charges and [Appellant] was returning to the jurisdiction…." Appellant's Brief at 30. For the foregoing reasons, we disagree.

Our standard of review in addressing challenges to jury instructions is an abuse of discretion. ***Commonwealth v. Leber***, 802 A.2d 648, 651 (Pa. Super. 2002). "[A] trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration." ***Commonwealth v. Williams***, 959 A.2d 1272, 1286 (Pa. Super. 2008) (citation omitted), *affirmed*, 9 A.3d 613 (Pa. 2010). "[W]hen evaluating the propriety of jury instructions, this Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper." ***Id.*** We will not find an abuse of the trial court's discretion unless "the instruction under review contained fundamental error, misled, or confused the jury[,]" or Appellant suffered prejudice. ***Commonwealth v. McRae***, 5 A.3d 425, 430-431 (Pa. Super. 2010) (citation omitted), *appeal denied*, 23 A.3d 1045 (Pa. 2011).

Our review of the record reveals that Appellant waived his challenge to the aforementioned jury instruction on Detective Zipovski's testimony by failing to make formal and specific objections to the trial court's instruction **at the time** they were given. ***See e.g. Commonwealth v. Moury***, 992 A.2d 162, 179 (Pa. Super. 2010) (holding, *inter alia*, that the appellant waived his challenge to the trial court's jury instruction on accomplice liability by failing to "object when the [trial] court charged the jury or when the court responded to the jury's question regarding accomplice liability[]").

In the instant matter, the trial court instructed the jury on Detective Zipovski's recitation of the victim's preliminary hearing testimony as follows.

> With regard to the testimony of [Detective] Zipovski – and I am strictly talking about the testimony proved by him in regards to testimony that was given at an April 27, 2011 preliminary hearing before the Magistrate District Judge Zola. You may, if you choose, regard this evidence as proof of the truth of anything that the witness said in the earlier statement. You may also consider this evidence to help you judge the credibility and weight of the testimony given by the witness at this trial.

N.T., 10/17-18/12, at 89-90. Appellant did not object to the trial court's instruction. ***See id.***

Additionally, during the course of the trial court's discussion with the parties about whether a flight instruction was warranted, Appellant objected to the trial court's decision to instruct the jury in this fashion on the grounds that, "[t]here [was] no evidence of flight. [Appellant] came back." N.T., 10/17-18/12, at 137. The trial court overruled this objection, concluding that the standard flight instruction was applicable to this case. ***Id.*** Thereafter, the trial court gave the following instruction to the jury on flight.

> There was evidence presented at the trial, including the testimony from Detective Zipovski, that tended to show that [Appellant] either fled from police or hid from police[,] leaving the area to go elsewhere. [Appellant] maintained, as you heard, that he did so because of the illness of his mother and so forth. The credibility, weight and effect of this evidence is for you to decide.
>
> Generally speaking, when a crime has been committed and a person thinks he or she is or may

> be accused of committing it, and he or she flees or conceals himself or herself, such flight or concealment is a circumstance tending to prove the person is conscious of guilt. Such flight or concealment does not necessarily show consciousness of guilt in every case.
>
> A person may flee or hide for some other motive and may do so even though innocent. Whether the evidence of flight or concealment in this case should be looked at as tending to prove guilt, depends upon the facts and circumstances of this case, and especially upon motives that may have prompted the flight or concealment. You may not find [Appellant] guilty solely on the basis of evidence of flight or concealment.

Id. at 171-172.

We note that Appellant's claim that there was an insufficient factual basis to support said instruction is belied by the record. The evidence adduced at trial supports the inference that Appellant immediately fled the county after learning he was wanted in connection with the sexual assault of the victim. The record reveals Appellant abruptly fled the county on December 21, 2010, the day after the victim reported the sexual assault to her school guidance counselor, and did so without informing his employer. ***See*** N.T., 10/17-18/12, at 47, 71-73, 122-124. Additionally, the trial court's flight instructions, when viewed as a whole, "clearly, adequately, and accurately" reflected the applicable law. ***Williams***, ***supra***; ***see also Commonwealth v. Housman***, 986 A.2d 822, 831 (Pa. 2009), (indicating flight may constitute circumstantial evidence of consciousness of guilt), *cert.*

denied, 131 S. Ct. 199 (2010). Accordingly, for all the foregoing reasons, Appellant's claim in Issue I must fail.

In Issue J, Appellant argues, albeit without any citation whatsoever to the certified record, that there was insufficient evidence to sustain his convictions for rape of a child, involuntary deviate sexual intercourse with a child, and indecent assault. Appellant's Brief at 33-34.

When addressing a sufficiency of the evidence claim, we must "review the evidence admitted during the trial along with any reasonable inferences that may be drawn from that evidence in the light most favorable to the Commonwealth." ***Commonwealth v. Crawford***, 24 A.3d 396, 404 (Pa. Super. 2011) (citation omitted). "Any doubts concerning an appellant's guilt [are] to be resolved by the trier of fact unless the evidence was so weak and inconclusive that no probability of fact could be drawn therefrom." ***Commonwealth v. West***, 937 A.2d 516, 523 (Pa. Super. 2007), *appeal denied,* 947 A.2d 737 (Pa. 2008). Moreover, "[t]he Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." ***Commonwealth v. Perez***, 931 A.2d 703, 707 (Pa. Super. 2007) (citations omitted). "[T]he trier of fact, in passing upon the credibility of the witnesses, is free to believe all, part, or none of the evidence." ***Commonwealth v. Rivera***, 983 A.2d 1211, 1220 (Pa. 2009) (citation and

internal quotation marks omitted), *cert. denied*, ***Rivera v. Pennsylvania***, 560 U.S. 909 (2010).

Upon careful review, we conclude that Appellant has waived his sufficiency claim by failing to specify in his Rule 1925(b) statement the elements of the offenses that the Commonwealth failed to prove beyond a reasonable doubt. Generally, a person will be found guilty of rape "when the person engages in sexual intercourse with a complainant … [b]y threat of forcible compulsion that would prevent resistance by a person of reasonable resolution." 18 Pa.C.S.A. § 3121(a)(2). A person will be found guilty of the rape of a child, in turn, when said intercourse occurs "with a complainant who is less than 13 years of age." ***Id.*** § 3121(c).

Likewise, a person commits the crime of involuntary deviate sexual intercourse "when the person engages in deviate sexual intercourse with a complainant … by forcible compulsion…." ***Id.*** § 3123(1). Involuntary deviate sexual intercourse with a child, in turn, involves the commission of "deviate sexual intercourse with a complainant who is less than 13 years of age." ***Id.*** § 3123(b). Read in relevant part, a person will be found guilty of the crime of indecent assault,

> if the person has indecent contact with the complainant, causes the complainant to have indecent contact 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 … the complainant is less than 13 years of age….

Id. § 3126(a)(7).

In the instant matter, Appellant's Rule 1925(b) statement includes no reference to the individual elements of the crimes for which he was convicted, but rather, merely states that the evidence was insufficient to support his convictions because, *inter alia*, "no substantive evidence of guilt was provided at the time of trial…." Appellant's Rule 1925(b) Statement, 8/9/13, at 2, ¶ 10.

This Court has repeatedly recognized that,

> [i]n order to preserve a challenge to the sufficiency of the evidence on appeal, **an appellant's Rule 1925(b) statement must state with specificity the element or elements upon which the appellant alleges that the evidence was insufficient**. Such specificity is of particular importance in cases where, as here, the appellant was convicted of multiple crimes each of which contains numerous elements that the Commonwealth must prove beyond a reasonable doubt.

Commonwealth v. Garland, 63 A.3d 339, 344 (Pa. Super. 2013) (internal quotation marks and citations omitted; emphasis added).

Based on the foregoing, we conclude Appellant's sufficiency claim is waived for failure to comply with Rule 1925(b). ***See id.*** (concluding that Garland's bald Rule 1925(b) statement that "[t]he evidence was legally insufficient to support the convictions[]" was non-compliant with Rule 1925(b), and could not be addressed by this Court). The trial court, in turn,

echoed this reasoning in its Rule 1925(a) opinion. ***See*** Trial Court Opinion, 11/27/13, at 15.[5]

In Issue K, Appellant argues, again without any citation to the certified record, that the verdict was against the weight of the evidence. Appellant's Brief at 34-35. This Court has long recognized that "[a] true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed." ***Commonwealth v. Lewis***, 911 A.2d 558, 566 (Pa. Super. 2006) (citation omitted). Where the trial court has ruled on a weight claim, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, "[our] review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim." ***Commonwealth v. Tharp***, 830 A.2d 519, 528 (Pa. 2003), *cert. denied*, ***Tharp v. Pennsylvania***, 541 U.S. 1045 (2004).

In the instant matter, Appellant's weight of the evidence argument, following citation to pertinent case law, is comprised of the following.

> Appellant contends that when in a case as here, the alleged victim denies that any criminal conduct occurred and the entirety of the evidence

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[5] We further note that, even if Appellant had properly complied with Rule 1925(b), his sufficiency claim would nonetheless be waived for failure to comply with Pa.R.A.P. 2119. As noted, the argument section for Issue J in Appellant's brief does not contain a single reference to the certified record or any citation to case law, in violation of Rule 2119(b) and (c).

> against a defendant is hearsay evidence, the verdict is against the weight of the evidence.
>
> The Appellate Court of Pennsylvania should require a minimum standard of evidentiary proof. It is shocking to believe that a jury could find [] Appellant guilty of all the counts in this case where there has been no direct evidence or testimony.

Appellant's Brief at 35.[6] For the reasons that follow, we conclude that Appellant's weight claim is meritless.

It is well established that this Court is precluded from reweighing the evidence and substituting our credibility determination for that of the fact-finder. ***See Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003) (citations omitted) (stating, "[t]he weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses[]"), *cert. denied*, ***Champney v. Pennsylvania***, 542 U.S. 939 (2004). Additionally, "the evidence at trial need not preclude every possibility of innocence, and the fact-finder is free to resolve any doubts regarding a defendant's guilt unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be

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[6] We note that Appellant raised this issue during sentencing, albeit briefly. ***See*** N.T., 3/15/13, at 7 (stating, "I would note for the record that the alleged victim recanted her testimony while on the stand. She specifically said that [Appellant] did not do this, did not do anything to her[]"); Pa.R.Crim.P. 607(A)(1) (stating that a weight of the evidence claim shall be raised "orally, on the record, at any time before sentencing[]").

drawn from the combined circumstances." ***Commonwealth v. Emler***, 903 A.2d 1273, 1276 (Pa. Super. 2006).

Instantly, the trial court rejected Appellant's weight claim, concluding that, "there was more than enough evidence presented to enable the jury to find [Appellant] guilty of the crimes charged." Trial Court Opinion, 11/27/13, at 16. The jury, in turn, found the testimony of the Commonwealth's witnesses credible, and elected not to believe Appellant's version of the events. As noted, we are precluded from reweighing the evidence and substituting our judgment for that of the fact-finder. ***Champney***, ***supra***. Accordingly, we decline to disturb these credibility determinations on appeal.

We now turn to Appellant's remaining claims, Issues C, D, E, and F, which Appellant argues concurrently in his appellate brief. ***See*** Appellant's Brief at 18. Appellant first challenges the admission of the testimony of Michelle Planutis, Jackie Silveri, S.C., and Dr. Gary Lawrence,[7] concerning statements the victim made to them, into evidence. ***Id.*** This testimony, Appellant avers, was impermissible hearsay, and was improperly admitted

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[7] The record reflects that Michelle Planutis is the guidance counselor at Hazelton Elementary Middle School where the victim attended. N.T., 10/17-18/12, at 48. Jackie Silveri is a caseworker for the Luzerne County Children and Youth Services who investigated the victim's case. ***Id.*** at 56-58. S.C. is a minor female who attended Hazelton Elementary Middle School with the victim and described herself as the victim's "best friend[]." ***Id.*** at 63-64. Dr. Gary Lawrence is a pediatrician who examined the victim. ***Id.*** at 92, 94.

by the trial court under the Tender Years exception to the hearsay rule. ***Id.*** at 19-24.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). The Tender Years exception to the hearsay rule governs hearsay statements made by a child 12 years of age or younger and provides, in pertinent part, as follows.

> **§ 5985.1. Admissibility of certain statements**
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> **(a) General rule.--**An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. [Ch.] … 27 (relating to assault) …, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
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> (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) the child either:
>
> (i) testifies at the proceeding; or
>
> (ii) is unavailable as a witness.

42 Pa.C.S.A. § 5985.1(a). This Court has long recognized that "[t]he tender years exception allows for the admission of a child's out-of-court statement because of the fragile nature of young victims …." ***Commonwealth v.***

Lukowich, 875 A.2d 1169, 1172 (Pa. Super. 2005), *appeal denied*, 885 A.2d 41 (Pa. 2005).

Instantly, the record reveals that prior to trial, the Commonwealth gave notice of its intent to introduce statements made by the victim, pursuant to the Tender Years exception to the hearsay rule. ***See*** "Notice of Commonwealth's Intent to Proceed Pursuant to 42 Pa.C.S.A. § 5985.1," 10/1/12. The trial court held a hearing on October 15, 2012, at the conclusion of which it noted that, "there is sufficient indicia of reliability that the [trial c]ourt would find that those statements would be admissible at trial…." N.T., 10/15/12, at 10. That same day, the trial court entered an order granting the Commonwealth's request to present testimony pursuant to the Tender Years exception to the hearsay rule. ***See*** Trial Court Order, 10/15/12.

Upon review, we conclude that Appellant has waived his challenge to the trial court's admission of said testimony pursuant to the Tender Years exception to the hearsay rule. Specifically, the record reveals that during the October 15, 2012 hearing, Appellant's counsel, Attorney Ross, conceded that S.C.'s testimony was admissible under the Tender Years exception. ***See*** N.T., 10/15/12, at 9. Our review of the trial transcript further reveals that at no point did Appellant object to the testimony of the aforementioned witnesses on the basis that it was inadmissible under the Tender Years exception to the hearsay rule. ***See*** N.T., 10/17-18/12, at 48-61, 63-65, 91-

101. "In order for a claim of error to be preserved for appellate review, a party must make a timely and specific objection before the trial court at the appropriate stage of the proceedings; the failure to do so will result in waiver of the issue." ***Commonwealth v. Olsen***, 82 A.3d 1041, 1050 (Pa. Super. 2013) (citation omitted). Accordingly, Appellant's claim that the trial court abused its discretion in allowing the victim's hearsay statements to be presented to the jury pursuant to the Tender Years exception must fail.

Secondly, to the extent Appellant argues, albeit parenthetically, in Issues C, D, E, F, and G that the trial court violated his constitutional right to confrontation by allowing Planutis, Silveri, S.C., Dr. Lawrence, and Detective Zipovski to testify, we conclude he has again waived these claims by failing to preserve them at trial. ***See*** Appellant's Brief at 18, 25.

The Confrontation Clause in the Sixth Amendment to the United States Constitution applies to both federal and state prosecutions and provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him…." U.S. Const. amend. IV.[8] In

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[8] We note that the Confrontation Clause applies to the states through application of the Fourteenth Amendment to the United States Constitution. ***Pointer v. Texas***, 380 U.S. 400, 403–406 (1965). Appellant makes no specific reference to his confrontation rights under Article I, Section 9 of the Pennsylvania Constitution. Accordingly, our discussion will be limited to Appellant's confrontation rights under the Confrontation Clause in the Sixth Amendment. ***See Commonwealth v. Laney***, 729 A.2d 598, 601 n.1 (Pa. Super. 1999) (stating, "[w]here a defendant … offers us no more than the nominal invocation of the state constitution, analysis of the federal
(Footnote Continued Next Page)

Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits the use of testimonial statements obtained by police officers against a criminal defendant, unless the defendant had a prior opportunity to cross-examine the unavailable declarant. ***Id.*** at 51-52, 68. ***Crawford*** divests the Confrontation Clause from state hearsay and evidence rules.[9] Since ***Crawford***, the Supreme Court has instructed the lower federal and state courts that statements "are testimonial when … the primary purpose of the [statement] is to establish or prove past events potentially relevant to later criminal prosecution." ***Michigan v. Bryant***, 131 S. Ct. 1143, 1154 (2011).

> To be sure, the Confrontation Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands not that evidence be reliable but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

(Footnote Continued) ———————————

constitution is appropriate and sufficient to resolve his claim[]" (citation omitted)), *appeal denied*, 751 A.2d 187 (Pa. 2000).

[9] Prior to ***Crawford***, the controlling case in this area was ***Ohio v. Roberts***, 448 U.S. 56 (1980). In ***Roberts***, the Court held that the Confrontation Clause permitted the use of hearsay testimony of an unavailable declarant at trial if it fell into a "firmly rooted hearsay exception" or if the statement bore "particularized guarantees of trustworthiness." ***Id.*** at 66.

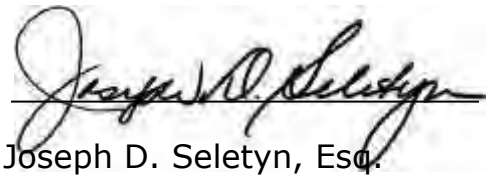
Commonwealth v. Holton, 906 A.2d 1246, 1252-1253 (Pa. Super. 2006) (citation omitted), *appeal denied*, 918 A.2d 743 (Pa. 2007).

As noted above, it is a defendant's burden to object to the admission of evidence and specifically state the grounds for said objections. ***See Olsen***, ***supra***; Pa.R.E. 103(a)(1)(b) (stating, "[a] party may claim error in a ruling to admit or exclude evidence only [upon] … mak[ing] a timely objection_[and] … stat[ing] the specific ground[]"). In this case, Appellant did not object at trial on the basis of the Confrontation Clause and ***Crawford***. Although Appellant did mention the Confrontation Clause at the October 15, 2012 hearing as to some of the witnesses, this was before the victim recanted on the stand at trial, and the other witnesses' statements as to S.R.'s previous statements became the core of the Commonwealth's case. ***See Commonwealth v. Hood***, 872 A.2d 175, 184 (Pa. Super. 2005) (finding waiver where the defendant "failed to object to the Commonwealth's introduction of the out-of-court statements as a violation of his right to confront his accusers[]"). Based on these considerations, we conclude Appellant has waived these claims for failure to object on the basis of the Confrontation Clause. ***See Olsen***, ***supra***; ***Hood***, ***supra***.

For all the foregoing reasons, we conclude that Appellant is not entitled to relief in the instant appeal. Accordingly, we affirm the March 15, 2013 judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/6/2014