NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
PAUL DEPAOLI,	:	
Appellant	:	
	:	No. 1720 EDA 2015

Appeal from the Judgment of Sentence February 19, 2015
In the Court of Common Pleas of Monroe County
Criminal Division No(s): CP-45-CR-0001772-2013

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PAUL DEPAOLI,	:	
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	:	No. 1721 EDA 2015

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In the Court of Common Pleas of Monroe County
Criminal Division No(s): CP-45-CR-0001773-2013

BEFORE: BENDER, P.J.E., DUBOW, J., and STEVENS, P.J.E. *

MEMORANDUM BY DUBOW, J.: **FILED DECEMBER 14, 2016**

In this consolidated appeal, Appellant, Paul DePaoli, appeals from two Judgments of Sentence entered on February 19, 2015, in the Court of

* Former Justice specially assigned to the Superior Court.

Common Pleas of Monroe County following his convictions of Rape of a Child[1] and related offenses. After careful review, we affirm.

The relevant factual and procedural history is as follows. Prior to June 2012, Appellant's daughter, R.D., and M.K. were close friends. R.D. and M.K. would often play together at R.D.'s house. On June 12, 2012, M.K., who was approximately three years old, disclosed to her mother that Appellant placed a chocolate stick in her mouth and moved it back and forth. Over the next few days, M.K. disclosed to her mother that Appellant put his thumb in her mouth and Appellant played an activity with M.K. where Appellant took M.K. into his bedroom, put a blindfold on her, and put his hairy thumb and chocolate twizzlers in her mouth. M.K. began counseling sessions and disclosed the same information to her counselor, adding that Appellant squirted salty, gross, and yucky water into her mouth. After the counselor taught her about anatomy, M.K. recounted the same story using the word penis instead of hairy thumb. M.K. recounted the same story to her teacher.

In June of 2013, R.D., who was approximately four years old, disclosed to a family friend that when her mother would leave the house, Appellant would put his penis in her mouth.

Appellant's defense was that on one occasion he was taking a shower with R.D. and he felt her mouth go on his penis. He testified that he did not

[1] 18 Pa.C.S. § 3121(c).

cause that to happen and told R.D., "you shouldn't do that type of thing[.]" N.T. Trial, 10/23/14, at 73. Moreover, he told his wife about it. ***Id.***

In July of 2013, Appellant was arrested and charged in two separate indictments. On August 13, 2013, the Commonwealth gave notice that the two cases would be joined pursuant to Pa.R.Crim.P. 582(b)(1). Appellant did not object to joinder.

On October 11, 2013, the Commonwealth filed a Motion to Permit Testimony by Contemporaneous Alternative Method and a Motion for *In Camera* Hearing to determine the admissibility of statements that M.K. made to others under the Tender Years Hearsay Act, 42 Pa.C.S. § 5985.1. After an *in camera* hearing on March 28, 2014, the trial court granted both motions on July 28, 2014.

On October 23, 2015, after a consolidated trial, a jury found Appellant guilty of numerous sexually based offenses regarding the two minor victims. Appellant was convicted of Rape of a Child, two counts of Involuntary Deviate Sexual Intercourse with a Child, Incest, two counts of Endangering the Welfare of a Child, two counts of Unlawful Contact with a Minor, Indecent Exposure, two counts of Corruption of a Minor, and two counts of Indecent Assault of a Child.[2] On February 19, 2015, after a hearing, the trial court

[2] 18 Pa.C.S. § 3121(c); 18 Pa.C.S. § 3123(b); 18 Pa.C.S. § 4302(a); 18 Pa.C.S. § 4304(a)(1); 18 Pa.C.S. § 6318(a)(1); 18 Pa.C.S. § 3127(a); 18 Pa.C.S. § 6301(a)(1)(ii); 18 Pa.C.S. § 3126(a)(7), respectively. The jury

found Appellant to be a Sexually Violent Predator ("SVP") and sentenced Appellant to an aggregate term of 23¼ to 48 years' incarceration.[3]

After the denial of his Post-Sentence Motion, Appellant filed a timely Notice of Appeal on June 12, 2015. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant raises the following issues on appeal:

1. Did the court err in finding M.K. to be a competent witness?

2. Did the court err in allowing the introduction of Tender Years material as it related to the statements of M.K., specifically, but not exclusively, the testimony of Jeanette Rayola and Samantha Burkhardt?

3. Did the [c]ourt err in joining 1772-CR-2013 and 1883-CR-2013 for trial or in failing to grant severance of the two cases for trial?

4. Did the lower court err in failing to instruct the jury about the *mens rea* and *actus reus* issues relating to the voluntariness of the contact between [Appellant] and R.D. in the shower?

5. Did the court err in concluding that [Appellant] was a sexually violent predator pursuant to Megan's law?

6. Did the court err in sentencing [Appellant] in excess of the "Mandatory Minimum" in direct contradiction to the Court's express finding that such minimums are constitutionally infirm?

7. Was the jury's verdict against the weight of the evidence?

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found Appellant guilty of Rape of a Child, Incest, and Indecent Exposure regarding victim R.D.

[3] The trial court sentenced Appellant to an aggregate term of 11½ to 24 years' incarceration for the docket concerning victim M.K. and an aggregate term of 11¾ to 24 years' incarceration for the docket concerning victim R.D. The trial court ordered Appellant to serve the sentences consecutively.

8. Did the court's allowance of the tender years material and M.K.'s closed-circuit testimony violate [Appellant]'s right to confront the witnesses against him under the U.S. and Pennsylvania constitution?[4]

Appellant's Brief at 5-6 (reordered for ease of disposition).

Appellant first avers that the trial court erred in finding M.K. to be a competent witness. The determination of whether a child is competent to testify is within the sound discretion of the trial court, and we will not interfere with the trial court's ruling "absent a manifest abuse of discretion." ***Commonwealth v. Hunzer***, 868 A.2d 498, 507 (Pa. Super. 2005).

There is a presumption that a witness is competent, and "the burden falls on the objecting party to demonstrate incompetency." ***Id.***; ***see*** Pa.R.E. 601. For witnesses under fourteen years of age, "there must be a searching judicial inquiry as to mental capacity, but discretion nonetheless resides in the trial judge to make the ultimate decision as to competency." ***Hunzer, supra*** at 507 (quotation and citation omitted). To determine whether a child is competent to testify, the trial court must examine whether the child has: "(1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of

[4] Appellant concedes that "[w]ith the recent United States Supreme Court Case ***Ohio v. Clark***, [135 S.Ct. 2173 (2015)] this assignment of error has been resolved in the Commonwealth's favor." Appellant's Brief at 17. Accordingly, we will not address this issue.

remembering what it is that she is called to testify about[,] and (3) a consciousness of the duty to speak the truth." ***Id.*** (quotation and citation omitted).

The Honorable Jonathan Mark, sitting as the trial court, has authored a comprehensive and well-reasoned Opinion, citing to the record and relevant case law in addressing Appellant's first claim on appeal. After a careful review of the parties' arguments and the record, we affirm this issue on the basis of the trial court's Opinion, that found during the competency hearing M.K. demonstrated to the court that she could answer questions appropriately by: (1) stating that Appellant did something to her that she does not like to talk about; (2) stating that she knew the difference between a truth and a lie; and (3) stating that she understood that she had to tell the truth in court. ***See*** Trial Court Opinion, filed 9/4/15, at 2-4.

Appellant next avers that the trial court erred in allowing the introduction of "M.K.'s hearsay statements through Jeanette Rayola and Samantha Burkhardt pursuant to the tender years exception." Appellant's Brief at 14.

When we review a trial court's ruling on the admissibility of evidence, "our standard of review is one of deference." ***Commonwealth v. Charlton***, 902 A.2d 554, 559 (Pa. Super. 2006). We will not reverse the trial court's decision unless there is a clear abuse of discretion. ***Id.*** The tender years exception to the rule against hearsay provides, *inter alia*, "that a hearsay

statement of a child sexual abuse victim under the age of twelve is admissible provided the evidence is relevant and the time, content and circumstances of the statement provide sufficient indicia of reliability." ***Id.*** at 559–60.

The trial court opined:

> In short, at the time she made the challenged statements, M.K. was under 12 years of age. The statements were unquestionably relevant to the crimes charged. The facts amply demonstrate that the time, content, and circumstances of the statements provided sufficient indicia of reliability. In this regard, the statements were spontaneously made to a parent who acted appropriately and to a treating therapist who spoke with M.K. for therapeutic reasons rather than investigatory purposes. Further, M.K. used age-appropriate language and was consistent in repeating the statements. Additionally, no motive to fabricate was advanced. Finally, M.K. testified during the trial. Under these circumstances it is clear that all requirements of the [Tender Years Hearsay Act] were satisfied.

Trial Ct. Op., filed 9/4/15, at 14. The record supports the trial court's findings and, thus, we find no abuse of discretion.

Appellant next avers that the trial court erred in joining the docket regarding victim M.K. with the docket regarding victim R.D. We find this issue to be waived.

The Commonwealth properly gave notice of the joinder of these separate cases for trial pursuant to Pa.R.Crim.P. 582(b). The comment to Rule 583, pertaining to severance of offenses, provides that "any request for severance must ordinarily be made in the omnibus pretrial motion or it is

considered waived[.]" Pa.R.Crim.P. 583 cmt.; ***see also*** Pa.R.Crim.P. 578 (entitled "Omnibus Pretrial Motion for Relief).

Appellant did not object to joinder or file a motion to sever. In fact, the first motion that Appellant filed objecting to the joinder was in his Post-Sentence Motion. The "failure to make a timely and specific objection before the trial court at the appropriate stage of the proceedings will result in waiver of the issue." ***Commonwealth v. Houck,*** 102 A.3d 443, 451 (Pa. Super. 2014); ***see*** Pa.R.A.P. 302(a). Accordingly, because Appellant failed to preserve this issue for appellate review by raising it in an Omnibus Pre-Trial Motion or offering any objection at trial, the issue is waived.

Appellant's fifth claim of error is that the trial court failed "to instruct the jury as to the *mens rea* and *actus reus* of the crimes related to [Appellant]'s contact with R.D. in the shower." Appellant's Brief at 18.

This Court's standard of review in assessing a trial court's jury instructions is well settled:

> When 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. We further note that, it is an unquestionable maxim of law in this Commonwealth that 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. Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.

Commonwealth v. Antidormi, 84 A.3d 736, 754 (Pa. Super. 2014) (quotation and citations omitted).

Appellant argues that "it is a fundamental law that any penetration by the actor must be the result of a voluntary act." Appellant's Brief at 19. Further, "the Court failed to instruct the jury that, despite admission by [Appellant] that his penis was in his daughter's mouth, if the jury found that the [Appellant] did not intentionally and voluntarily place it there, it cannot constitute rape or involuntary deviate sexual intercourse." Appellant's Brief at 19. Appellant fails to provide any case law to support this position.

The trial court states, "this allegation, which effectively contends that we should have molded the jury instructions to comport with [Appellant]'s theory of the case, lacks merit." Trial Ct. Op., filed 10/18/16, at 7. We agree. A review of the record supports the trial court's finding that the jury instructions accurately reflected the law and that it properly instructed the jury on the elements of these crimes. ***Id.*** at 9. Accordingly, we find no abuse of discretion.

Appellant's sixth claim of error is that the trial court erred in finding Appellant to be a SVP. Appellant's Brief at 19.

Appellant's challenge to the sufficiency of the evidence to support the trial court's classification of Appellant as a SVP presents a question of law, therefore our standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Meals***, 912 A.2d 213, 218 (Pa. 2006). The standard of proof governing the determination of SVP status is clear and convincing evidence, which "requires evidence that is so clear, direct,

weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." ***Id.*** at 219 (quotation and citation omitted). When reviewing the sufficiency of evidence, we must consider the evidence in the light most favorable to the Commonwealth, the prevailing party in the instant case. ***Id.*** at 218.

The procedure for "determining SVP status is statutorily-mandated and well-defined." ***Commonwealth v. Dixon***, 907 A.2d 533, 535 (Pa. Super. 2006). Section 9799.24 mandates that a trial court order every individual convicted of a sexually violent offense to be assessed by the Sexual Offender Assessment Board ("SOAB") prior to sentencing to determine whether that individual qualifies as a SVP. 42 Pa.C.S. § 9799.24(a). A SVP is someone who has been convicted of one of the statute's enumerated offenses and suffers from "a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses." 42 Pa.C.S. § 9799.12; ***see Dixon***, ***supra*** at 537. The term "predatory" is further defined as "[a]n act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained or promoted, in whole or in part, in order to facilitate or support victimization." 42 Pa.C.S. § 9799.12.

The statutorily-mandated assessment must include, but is not limited to, an examination of the following to determine whether the individual qualifies as a SVP:

(1) Facts of the current offense, including:

(i) Whether the offense involved multiple victims.

(ii) Whether the individual exceeded the means necessary to achieve the offense.

(iii) The nature of the sexual contact with the victim.

(iv) Relationship of the individual to the victim.

(v) Age of the victim.

(vi) Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.

(vii) The mental capacity of the victim.

(2) Prior offense history, including:

(i) The individual's prior criminal record.

(ii) Whether the individual completed any prior sentences.

(iii) Whether the individual participated in available programs for sexual offenders.

(3) Characteristics of the individual, including:

(i) Age.

(ii) Use of illegal drugs.

(iii) Any mental illness, mental disability or mental abnormality.

(iv) Behavioral characteristics that contribute to the individual's conduct.

(4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense.

42 Pa.C.S. § 9799.24(b).

The Honorable Jonathan Mark, sitting as the trial court, has authored a comprehensive and well-reasoned Opinion, citing to the record and relevant case law in addressing Appellant's sixth claim on appeal. After a careful review of the parties' arguments and the record, we affirm this issue on the basis of the trial court's Opinion that found the following: (1) the SOAB evaluator, Dr. Muscari, determined to a reasonable degree of medical certainty that Appellant met the criteria for SVP; (2) Dr. Muscari's uncontradicted testimony was credible and her report, diagnoses, and conclusions were fully supported by both the facts and the law; and (3) there was sufficient evidence to establish that Appellant was an SVP. ***See*** Trial Ct. Op., filed 10/18/16, at 10-14.

Appellant next avers that the trial court erred in sentencing Appellant "in excess of the 'mandatory minimum,' though the court correctly found that such minimums are constitutionally infirm." Appellant's Brief at 21.

As an initial matter, this Court will address only those issues properly presented and developed in an appellant's brief as required by our Rules of Appellate Procedure, Pa.R.A.P. 2101-2119. Appellate arguments which fail to comply with the rules may be considered waived, and arguments which are not appropriately developed are waived. ***Lackner v. Glossner*****,** 892 A.2d 21, 29 (Pa. Super. 2006). Arguments that are not properly developed

"include those where the party has failed to cite any authority in support of a contention." ***Id.*** at 29-30.

Appellant challenges the discretionary aspects of his sentence, but fails to develop this issue properly. Appellant failed to cite pertinent authority, failed to reference the record, and failed to give any synopsis of the evidence as required by Pa.R.A.P. 2119(b); (c); and (d), respectively.[5] "This Court will not act as counsel and will not develop arguments on behalf of an appellant." ***Commonwealth v. Kane****,* 10 A.3d 327, 331 (Pa. Super. 2010) (citation and quotation marks omitted). Accordingly, we conclude that Appellant waived this issue for failing to develop it as required by our rules of appellate procedure.

Appellant's final claim of error is that the jury's verdict was against the weight of the evidence. Appellant's Brief at 6. This claim lacks merit.

This Court's 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) (citations omitted). A verdict is not contrary to the weight of the evidence simply because conflicting testimony was presented or because the judge on the same facts would have arrived at

[5] Appellant also failed to "set forth in a separate section of the brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of [the] sentence" as required by Pa.R.A.P. 2119(f), which compels waiver if the opposing party objects. ***Commonwealth v. Brougher***, 978 A.2d 373, 375 (Pa. Super. 2009). However, as the Commonwealth did not object to the statement's absence, we will not find waiver on this ground. ***See id.***

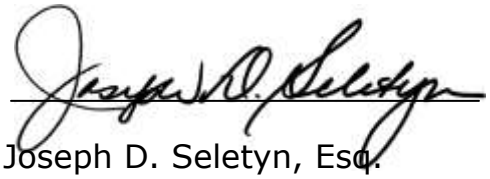
a different conclusion than the factfinder. ***Id.*** Rather, a new trial is warranted only when "the jury's verdict is so contrary to the evidence that it shocks one's sense of justice[.]" ***Id.*** (internal quotation marks, citations, and emphasis omitted). This Court will "give the gravest consideration to the findings and reasons advanced by the trial judge" because the trial judge had the opportunity to hear and see the evidence presented during trial. ***Commonwealth v. Widmer***, 744 A.2d 745, 753 (Pa. 2000). Finally, "[o]ne 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." ***Id.*** (citation omitted).

Here, the trial court stated that the verdict was not against the weight of the evidence because both victims testified that Appellant stuck his penis in their mouths; several other witnesses testified about statements made by the child victims that were consistent with their testimony; and Appellant testified that his penis went into R.D.'s mouth "accidentally[.]" Trial Ct. Op., filed 10/18/16, at 23-24. A review of the record supports the trial court's conclusions. Given the evidence presented, the trial court did not abuse its discretion in denying Appellant's claim that the verdict was against the weight of the evidence.

The parties are instructed to attach a copy of the trial court's Opinions dated September 4, 2015 and October 18, 2016 to all future filings.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/14/2016