NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA v. PAUL CALLAHAN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 621 EDA 2016

Appeal from the Judgment of Sentence February 3, 2016
in the Court of Common Pleas of Bucks County Criminal Division
at No(s): CP-09-CR-0001168-2015

BEFORE: OTT, RANSOM, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED DECEMBER 22, 2017**

Appellant, Paul Callahan, appeals from the judgment of sentence entered in the Bucks County Court of Common Pleas following his jury trial conviction of two counts of rape of a child,[1] one count of involuntary deviate sexual intercourse with a child,[2] two counts of aggravated indecent assault of a child,[3] three counts of indecent assault of a child[4] and unlawful contact with a minor.[5] Appellant contends that the trial court erred by admitting and

* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 3121(c).

[2] 18 Pa.C.S. § 3123(b).

[3] 18 Pa.C.S. § 3125(a)(7).

[4] 18 Pa.C.S. § 3126(a)(7).

[5] 18 Pa.C.S. § 6318 (a)(1).

permitting the Commonwealth to publish certain photographic exhibits and challenges the sufficiency and weight of the evidence underlying his convictions. He also asserts that his trial counsel was ineffective for failing to object to the jury verdict sheet and jury instructions. In addition, he avers that the trial court abused its discretion when imposing maximum consecutive sentences and in finding the evidence was sufficient to support his designation as a sexually violent predator ("SVP"). We affirm in part, reverse the order designating Appellant as an SVP, and remand for further proceedings.

We adopt the facts and procedural history set forth by the trial court's opinion and note that Appellant was convicted of committing various sexual offenses against three minor children, H.S., T.S., and K.S., when they were under 13 years of age. ***See*** Trial Ct. Op., 5/31/16, at 1-8. Regarding the admission of photographs, the Commonwealth sought to admit pictures of K.S.'s vagina and anus taken during a sexual assault nursing assessment in 2011. Appellant objected, and the parties' engaged in the discussion:

> [Appellant's counsel]: First, I am not exactly sure what the relevance is because I don't think anything was found through the pictures, although I think -- I understand there is something that came from a DNA testing, but I don't think the pictures actually show anything, do they?
>
> [The Court]: Tell me the relevance of the actual photographs.
>
> [Commonwealth]: Basically what she had to go through. This is something where this girl is coming in, made to be a liar. This is something the doctor had gone through. It is for medical purposes. It is not child pornography. It is done

> for medical purposes and it is done because of what he did to her. And I believe that should come in this case.
>
> [the Court] Is there any physical evidence that was obtained as a result of this examination?
>
> [Commonwealth] Yes. There was a swab taken from her vaginal -- multiple swabs that were tested and sent to the lab, and a couple that came back positive. And one in particular from her vulva area where I would like her to point out exactly where that swab came from that was consistent with his DNA profile.

N.T. 4/28/15, at 94-95. The Commonwealth thereafter published the photographs by projecting as 8' x 10' images before the jury.

At the end of the trial, the trial court provided the following instruction to the jury regarding the photographs:

> Now, there were photographs that were admitted into evidence for very specific reasons. It was not to inflame your passions.
>
> When those photographs were shown, I specifically instructed you and I will instruct you now that those photographs must not be used in any way to inflame your passions or emotions. This decision is not to be made based on emotion. It's to be based on evidence.
>
> The evidence may not be considered-may be considered for the purposes I allowed it to be introduced, which is that the -- to demonstrate what it was that the witness involved, [K.S.], went through at a young age after she made the complaint she made.
>
> It was also admitted so that you could understand exactly where that swab that was ultimately submitted for DNA was taken, which is relevant to where that DNA came from. Whether it was transferred is relevant to whether or not there is some other explanation for the male DNA at the location where it was found.

> So the location -- I allowed the photograph to establish the location of where the DNA was found in order to assist you in making the determination as to how that DNA, assuming you find there was DNA, but how that swab was taken, where it was taken, and how that DNA if you find DNA was found up where it ended up. You may not be otherwise influenced by those photographs.

N.T., 4/30/15, at 94-95.

All three victims in this case testified at the time of trial. The victims each testified that Appellant engaged in the conduct at issue when they were 13 years old or younger. H.S. testified that Appellant's first sexual contact with her occurred when she was 12 years old. N.T., 4/29/15, at 13. T.S. testified that Appellant first raped her when she was 10 or 11 years old. N.T., 4/28/15, at 196-97. K.S. recounted that Appellant first raped her at age 9. ***Id.*** at 55.

After Appellant was convicted of the above referenced charges, the trial court, on September 2, 2015, sentenced Appellant to an aggregate sentence of 106 to 212 years' imprisonment and designated him as an SVP. After the imposition of sentence, the trial court permitted trial counsel to withdraw, and new counsel was appointed. On December 24, 2015, Appellant filed post-sentence motions. The trial court reconsidered Appellant's sentence and on February 3, 2016, the court imposed an aggregate term of incarceration of 63 1/2 to 127 years. Appellant filed the instant timely appeal, and both the trial court and Appellant complied with Pa.R.A.P. 1925.

Appellant raises the following issues for review:

> A. Did the trial court commit reversible error based on the introduction of enlarged color images of a minor's labia, vagina, and anus projected onto a large screen where the images lacked probable value, were unfairly and highly prejudicial, were distracting and cumulative, lacked forensic value, and there were alternative means of presenting any relevant evidence?
>
> B. Was the verdict based on insufficient evidence regarding the required ages, dates, specified acts, and permissible statutory range?
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> C. Was the verdict against the weight of the evidence regarding the dates, conduct, and date range where Appellant fully cooperated, proclaimed his innocence, and provided consistent innocuous explanations of the questionable forensic evidence.
>
> D. Did the trial court err in denying a new trial where trial counsel was ineffective in failing to object to the patently defective jury instructions and the verdict sheet that expanded criminal culpability to conduct beyond the statutory requirements that the victims must be under 13.
>
> E Did the trial court abuse its discretion in sentencing Appellant to maximum consecutive sentences?
>
> F. Was the finding of Appellant as a sexually violent predator based on insufficient evidence?

Appellant's Brief at 6-7.[6]

In his first issue, Appellant argues that the trial court erred by admitting photographs taken during the sexual assault assessment of K.S. He claims that the photographs, which depicted the child's labia, open vagina, and anus had minimal, if any, probative value. Specifically, he avers that the saliva found on the child's perianal and vulval regions was inconclusive, exculpatory,

[6] We note that we have reordered Appellant's issues for ease of disposition.

or could be explained away by the fact that Appellant cohabitated with the child. He further emphasizes, there was no dispute as to where the child was swabbed during the evaluation, so that the photographs of the child's anatomy were unnecessary. Appellant also contends that even if there was some probative value to the photographs, their inflammatory nature was so prejudicial that the trial court committed reversible error by admitting them. He specifically points out that other, less inflammatory, methods could have been employed to depict the child's anatomy such as the use of a diagram, black and white photographs, or smaller photographs. We agree that the photographs were unduly inflammatory, but conclude that their admission and publication to the jury constitutes harmless error.

When considering the admission of evidence it is axiomatic that:

> [q]uestions regarding the admission of evidence are left to the sound discretion of the trial court, and we, as an appellate court, will not disturb the trial court's rulings regarding the admissibility of evidence absent an abuse of that discretion. 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. Trinidad, 96 A.3d 1031, 1036 (Pa. Super. 2014) (citations and quotation marks omitted).

> Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. "All relevant evidence is admissible, except as otherwise

> provided by law." Pa.R.E. 402. "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E. 403.

Jacobs v. Chatwani, 922 A.2d 950, 963 (Pa. Super. 2007).

Concerning photographic evidence specifically:

> [a] determination of whether photographic evidence alleged to be inflammatory is admissible involves a two-step analysis. First, the court must decide whether a photograph is inflammatory by its very nature. If the photograph is deemed inflammatory, the court must determine whether the essential evidentiary value of the photograph outweighs the likelihood that the photograph will improperly inflame the minds and passions of the jury. The availability of alternative testimonial evidence does not preclude the admission of allegedly inflammatory evidence.

Commonwealth v. Sanchez, 36 A.3d 24, 49 (Pa. 2011) (citations and quotation marks omitted). Further, "[t]he law presumes that the jury will follow the instructions of the court." ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1184 (Pa. 2011) (citations omitted).

Our Supreme Court has stated, "an error can be harmless only if the appellate court is convinced beyond a reasonable doubt that the error is harmless." ***Commonwealth v. Story***, 383 A.2d 155, 162 (Pa. 1978) (footnote omitted). To determine whether an error is harmless, "[t]he uncontradicted evidence of guilt must be so overwhelming, and the prejudicial effect of the improperly admitted evidence [must be] so insignificant by

comparison, that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict." ***Id.*** at 168.

In this case, the trial court concluded that the photographs were relevant. According to the court, the photographs demonstrated the intrusive nature of the examination the victim had to endure and the location from which the swabs were retrieved and established the credibility of the victim. Appellant's defense that male DNA could have been inadvertently present due to the fact that he lived with the child also made the location of the collection of the swabs relevant. Moreover, the court determined that its cautionary instructions effectively ameliorated any prejudicial effect of the graphic images.

We have reviewed the photographs at issue and find the admission of these images of the child's intimate anatomy and the manner of publication to the jury troubling. As noted by Appellant, the relevance of the evidence was limited as the location of the swabbing and the discovery of forensic evidence was not in dispute. Further, K.S.'s endurance of the invasive physical exam, as supportive of her credibility, was somewhat attenuated under the facts of this case. We recognize that the trial court issued limiting instructions, and the jury is presumed to follow the trial court's instructions. Nevertheless, the potential for prejudice from the use of these graphic photographs of a specific child's vagina and anus was significant and

compounded by the projection of the images to an 8' x 10' display before the jury. ***See Chmiel***, 30 A.3d at 1184; ***Sanchez***, 36 A.3d at 48-49.

However, we conclude that the evidence against Appellant was overwhelming. Two other victims testified regarding the similar sexual abuse they suffered from the actions of Appellant. The victim's mother testified regarding two occasions when she observed Appellant appearing to engage in inappropriate sexual behavior with the K.S. Male DNA, compatible with Appellant's DNA profile, was found in the saliva obtained from the child's vulva. Given the totality of the evidence presented against Appellant, we conclude that the actual prejudice caused by the admission of the photographs was insignificant by comparison and that any error did not contribute to the verdict. ***See Story***, 383 A.2d at 162; ***Commonwealth v. Rush***, 605 A.2d 792, 794 (Pa. 1992). Thus, we conclude that any error in the admission of the photographs of the victim was harmless and Appellant's first issue on appeal warrants no relief.

In his second issue, Appellant claims the evidence was insufficient to sustain any of his convictions. Regarding his convictions involving K.S., Appellant argues that K.S.'s account was incredible because she had previously withdrawn her accusation. He further asserts that the physical evidence was inconclusive at best because the DNA testing of the perianal and rectal swabs were inconclusive and the DNA testing of the vulva swab indicated a 1-in-4094 possibility that an unknown Caucasian male could have

contributed to that swab. Concerning H.S., Appellant states that H.S.'s testimony established that most of the behavior complained of happened after she was 13 years old. Also, Appellant contends that the behavior was nothing more than "incidental, jestful, innocent contact or a misunderstanding." Appellant's Brief at 44. In the case of T.S., Appellant argues that the abuse she alleges also exceeded the range of criminal culpability and emphasizes that she characterized her recollections of the event as "dreams" and included details, such as the existence of a swimming pool, which were inconsistent with the evidence.

When reviewing a challenge to the sufficiency of the evidence,

> [t]he standard we apply . . . is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [trier] of fact[,] while passing upon credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Talbert, 129 A.3d 536, 542-43 (Pa. Super. 2015), *appeal denied*, 138 A.3d 4 (Pa. 2016) (citation omitted). Further, it is well settled that a victim's uncorroborated testimony is sufficient to sustain a jury's verdict. ***Commonwealth v. Gonzalez*** 109 A.3d 711, 721 (Pa. Super. 2015).

The following statutory definitions are relevant. Rape of a child:

> **(c) Rape of a child.-**A person commits the offense of rape of a child, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age.

18 Pa.C.S. § 3121(c).

Involuntary deviate sexual intercourse with a child:

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

18 Pa.C.S. § 3123(b).

Aggravated indecent assault of a person less than thirteen years of age:

> **(a) Offenses defined.-**Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if:
>
> * * *
>
> (7) the complainant is less than 13 years of age . . . .

18 Pa.C.S. § 3125(a)(7).

Indecent assault of a person less than thirteen years of age:

> **(a) Offense defined.—**A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact 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:
>
> * * *
>
> (7) the complainant is less than 13 years of age . . . .

18 Pa.C.S. § 3126(a)(7).

Unlawful contact with a Minor:

> **(a) Offense defined.—**A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:
>
> (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).

18 Pa.C.S. § 6318(a)(1).

In the case *sub judice*, the testimony of the victims alone was sufficient to sustain Appellant's convictions. ***See Gonzalez***, 109 A.3d at 721. K.S., Appellant's youngest victim, specifically testified that when she was nine years old and home sick, Appellant told her to get undressed and put his mouth on her vagina and then put his penis in her vagina. K.S. went on testify about continual similar incidents of sexual abuse occurring when she was 9, 10, and 11 years old. Likewise, T.S. testified that Appellant raped her on multiple

occasions prior to her turning thirteen. H.S. also testified that Appellant touched her vagina when she was only twelve years old.

Thus, Appellant's argument that the evidence was insufficient because of the age of the victims at the time of the alleged acts must fail because the victim's testimony alone established that Appellant committed the relevant acts when they were under thirteen years old. ***See id***. Further, Appellant's contentions that the victims' testimony was incredible and that the physical evidence was too inconclusive to identify him as the perpetrator concern the credibility and weight of the evidence, which were matters within the sole purview of the fact finder. ***See Talbert***, 129 A.3d 536, 542-43. Therefore, Appellant's second issue on appeal lacks merit.

In his third issue, Appellant argues that his convictions were against the weight of the evidence. Specifically, Appellant points to inconsistencies in the victim's testimony, coupled with the inconclusive physical evidence, as reasons why his convictions were rendered counter to the weight of the evidence. He also emphasizes his own cooperation with authorities and his continual assertion that he is innocent of any inappropriate sexual conduct.

The principles governing a challenge to the weight of the evidence are well settled.

> A verdict is against the weight of the evidence "only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice." A weight of the evidence claim is primarily directed to the discretion of the judge who presided at trial, who only possesses "narrow authority" to upset a jury verdict on a weight of the evidence claim.

> Assessing the credibility of witnesses at trial is within the sole discretion of the fact-finder. A trial judge cannot grant a new trial merely because of some conflict in testimony or because the judge would reach a different conclusion on the same facts, but should only do so in extraordinary circumstances, "when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." . . .

Commonwealth v. Blakeney, 946 A.2d 645, 652-53 (Pa. 2008) (citations omitted). An appellate court reviews the exercise of discretion by the trial court, "not . . . the underlying question of whether the verdict is against the weight of the evidence." ***Commonwealth v. Clay***, 64 A.3d 1049, 1055 (Pa. 2013) (citation and emphasis omitted).

In this case, the trial court aptly concluded that the jury's verdicts were not contrary to the weight of the evidence "as to shock one's sense of justice and make a new trial imperative." Trial Ct. Op. at 14; ***see also Blakeney***, 946 A.2d at 652-53. We agree.

The testimony regarding Appellant's continual sexual abuse, and the corroborating testimony of the victims' mother that she had caught Appellant twice in suspected inappropriate encounters with the victims, was ample evidentiary support for the trial court's decision. Further, as noted by the trial court, the physical evidence did not exculpate Appellant, but was inconclusive. Thus, we hold that the trial court did not abuse its discretion in determining that the verdicts were not contrary to the weight of the evidence. ***See Clay***, 64 A.3d at 1055. Therefore, Appellant's third issue warrants no relief.

Turning to Appellant's fourth issue, he contends that his trial counsel was ineffective for failing to object to the trial court's jury instructions and verdict slips that included a time range for the crimes charged which extended beyond when each respective victim turned thirteen years of age. Therefore, according to Appellant, he was convicted based upon a time period which was statutorily and constitutionally impermissible because the crimes he was charged with required the victim to be under thirteen years old. Appellant asserts that he is entitled to immediate review and relief on this claim. We disagree.

As a prefatory matter, in ***Commonwealth v. Harris***, 114 A.3d 1 (Pa. Super. 2015), this Court explained:

> Our Supreme Court determined that, absent certain circumstances, "claims of ineffective assistance of counsel are to be deferred to [Post-Conviction Relief Act[7] ("PCRA")] review; trial courts should not entertain claims of ineffectiveness upon post-verdict motions; and such claims should not be reviewed upon direct appeal." [***Commonwealth v. Holmes***, 79 A.3d 562, 576 (Pa. 2013)[8] (footnote omitted).]
>
> The ***Holmes*** Court noted two exceptions to the general rule of deferring ineffective assistance of counsel claims until PCRA review. First, "there may be an extraordinary case where the trial court, in the exercise of its discretion, determines that a claim (or claims) of ineffectiveness is both meritorious and **apparent from the record** so that

[7] 42 Pa.C.S. §§ 9541-9546.

[8] This Court in ***Holmes*** reaffirmed the principle stated in ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002) that a claim of ineffective assistance of counsel should be deferred to PCRA review. ***Holmes***, 79 A.3d at 563 (citing ***Grant***, 813 A.2d at 738).

> immediate consideration or relief is warranted." ***Id.*** at 577 (emphasis added). Second, our Supreme Court determined that in cases where "prolix" claims of ineffectiveness are raised, "unitary review, if permitted at all, should only proceed where accompanied by a knowing, voluntary, and express waiver of PCRA review." ***Id.*** at 578.

Id. at 5-6.

It is well settled that to prevail on an ineffective assistance of counsel claim, a "petitioner must plead and prove (1) the legal claim underlying the ineffectiveness claim has arguable merit; (2) counsel's action or inaction lacked any reasonable basis designed to effectuate petitioner's interest; and (3) counsel's action or inaction resulted in prejudice to petitioner." ***Commonwealth v. Mason***, 130 A.3d 601, 618 (Pa. 2015) (citation omitted).

In the instant case, the trial court concluded that Appellant's claim of trial counsel's ineffectiveness should not be considered on direct appeal:

> Pursuant to the holding in ***Holmes***, this [c]ourt cannot entertain this claim of ineffective assistance of counsel since this [c]ourt cannot conclude that the claim is "both meritorious and apparent from the record so that immediate consideration and relief is warranted." The jury was specifically instructed that in order to return a verdict of guilt they must unanimously find beyond a reasonable doubt that the victim was less than thirteen years old at the time the sexual contact occurred. The "jury is presumed to have followed the trial court's instructions." The fact that crimes were alleged to have occurred at some time (or times) between two points in time did not alter the fact that the jury was required to determine that, at the time the sexual contact occurred, each victim was less than thirteen years old.

Trial Ct. Op. at 16 (citations omitted). The trial court concluded that Appellant's claim of ineffectiveness did not warrant immediate review under ***Holmes*** and further suggested that Appellant's claim lacked merit.

We concur in part with the reasoning of the trial court. In this case, there were discrepancies in the charges, the verdict sheet, and the trial court's instruction. However, the court initially declined to consider Appellant's ineffectiveness claim on direct appeal because it was not apparent from the record that he suffered prejudice. No additional hearings were held on the claim of ineffectiveness. Thus, we agree with the trial court to the extent that it concluded that Appellant's ineffective assistance of counsel claim cannot be considered on direct appeal because Appellant did not establish that his claim was meritorious from the face of the record. ***See Harris***, 114 A.3d at 5-6. Therefore, we affirm the trial court's exercise of discretion to the extent that it found Appellant's ineffectiveness claim was not so meritorious that immediate consideration on post-sentence motions or on direct appeal was required.[9]

In his fifth issue, Appellant contends that the trial court abused its discretion by sentencing him to maximum consecutive sentences resulting in a "grossly disproportionate sentence" constituting "cruel and unusual

[9] Because we affirm the trial court's exercise of discretion in declining to proceed to a full consideration of Appellant's claim of ineffectiveness, the trial court's further contention that Appellant's claim lacks merit is dicta and shall not be construed as litigation of the merits of Appellant's ineffectiveness claim.

punishment." Appellant's Brief at 52. He specifically argues the trial court improperly considered that Appellant had committed multiple acts of abuse and failed to provide reasoning for the "unduly harsh nature" of the sentence. ***Id.*** at 54. We do not agree.

Appellant's argument represents a challenge to the discretionary aspects of his sentence. This Court has stated that

> [c]hallenges to the discretionary aspects of sentencing do not entitle an appellant to appellate review as of right. Prior to reaching the merits of a discretionary sentencing issue:
>
> > [W]e conduct a four part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa. Super. 2006) (some citations omitted).

A claim of excessiveness can raise a substantial question as to the appropriateness of a sentence under the Sentencing Code, even if the sentence is within the statutory limits. ***Commonwealth v. Mouzon***, 812 A.2d 617, 624 (Pa. 2002). However, bald allegations of excessiveness do not raise a substantial question. ***Id.*** at 627.

> Generally, Pennsylvania law "affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same

> time or to sentences already imposed. Any challenge to the exercise of this discretion ordinarily does not raise a substantial question." ***Commonwealth v. Pass***, 914 A.2d 442, 446–47 (Pa. Super. 2006). ***See also Commonwealth v. Hoag***, [ ] 665 A.2d 1212, 1214 (Pa. Super. 1995) (stating **appellant is not entitled to "volume discount" for his crimes** by having all sentences run concurrently). ***But see Commonwealth v. Dodge***, 957 A.2d 1198 (Pa. Super. 2008) [ ] (holding consecutive, standard range sentences on thirty-seven counts of theft-related offenses for aggregate sentence of 58 ½ to 124 years' imprisonment constituted virtual life sentence and, thus, was so manifestly excessive as to raise substantial question).

Commonwealth v. Prisk, 13 A.3d 526, 533 (Pa. Super. 2011) (emphases added).

In addition, we note our standard of review concerning sentencing matters:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Sheller, 961 A.2d 187, 190 (Pa. Super. 2008) (citation omitted).

When reviewing the reasonableness of a sentence, an appellate court should consider four factors: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the opportunity of the sentencing court to observe the defendant, including any pre-sentence

investigation; (3) the findings upon which the sentence was based; and (4) the guidelines promulgated by the commission. 42 Pa.C.S. § 9781(d)(1)-(4). A sentence may be found unreasonable if it fails to properly account for these four statutory factors, or if it "was imposed without express or implicit consideration by the sentencing court of the general standards applicable to sentencing[.]" ***Commonwealth v. Walls***, 926 A.2d 957, 964 (Pa. 2007). These general standards mandate that a sentencing court impose a sentence "consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S. § 9721(b).

In the instant case, the trial court responded to Appellant's initial challenge to the discretionary aspects of his sentence by vacating the original sentence of 106 to 212 years and imposing a new aggregate sentence of 63½ to 127 years. Yet, in his brief, Appellant still presents arguments regarding his original sentence.[10] Therefore, Appellant's claim may be deemed moot.

Assuming *arguendo* that Appellant's arguments are also intended to apply to his actual sentence and his claims of excessive sentence constitute a substantial question, we conclude that his current sentence is not excessive and the trial court properly provided ample reasoning for the sentence imposed. First, as noted by the trial court, the court imposed standard range

[10] We note that Appellant's brief also does not include a Pa.R.A.P. 2119(f) statement but we decline to find waiver as the Commonwealth did not object. ***Commonwealth v. Brougher***, 978 A.2d 373, 375 (Pa. Super. 2009).

sentences for the criminal convictions in regard to both T.S. and K.S., even though Appellant sexually abused and raped both minors on multiple occasions. Further, while admittedly exceeding the aggravated range for the crimes committed against H.S., the trial court aptly explained:

> In the instant case, a sentence of 3 ½ to 7 years for the crimes committed against H.S. cannot be deemed "unreasonable." [Appellant] regularly slapped H.S. on the buttocks. He also spoke to her about male and female genitalia and exposed himself to her. When she was 12 years old, [Appellant] began to put his hand down her pants and touch her vagina. In imposing sentence, [the trial court] considered all of the factors set forth in the Sentencing Code including the protection of the public, the gravity of the offense, the history, character, condition and rehabilitative needs of [Appellant] and the sentencing guidelines and properly concluded that a sentence exceeding the aggravated range of the sentence guidelines was required. Given the ongoing nature of the abuse, [the trial court] believes that [Appellant's] sentence is "reasonable" within the meaning of 42 Pa.C.S. § 9781(c).

Trial Ct. Op. at 30-31.

Furthermore, the trial court set forth its reasoning for the consecutive nature of Appellant's sentence as well as Appellant's propensity to reoffend:

> Here, each individual child within that household underwent prolonged sexual abuse at the hands of [Appellant]. It was in recognition of that fact that consecutive sentences were imposed. To allow [Appellant] to serve his sentences for the abuse of these three children at the same time would not only minimize the severity of the offenses he committed, it would devalue the individuality of each child and the trauma each experienced and continues to experience.
>
> … In the instant case, [Appellant] not only sexually exploited and abused three children, he was responsible for the care, protection and support of those children. Additionally, there was a significant need in this case for [the trial court] to

> protect the community. . . . The likelihood that [Appellant] will reoffend is extremely high based on the number of victims, his course of conduct and the fact that he continued to engage in that conduct even after he was caught abusing one of the children.

Id. at 31-32.

Based on this reasoning, we conclude that the trial court carefully studied all relevant factors and imposed a sentence that was "consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S. § 9721(b). Therefore, Appellant's fifth issue also lacks merit.

In his sixth and final issue, Appellant contends that the evidence was insufficient to sustain his SVP classification. He asserts that the testimony of Dr. Eric Weinstein, of the Sexual Offender Assessment Board ("SOAB"), was ambiguous and did not support the determination that he suffers from a pedophilic disorder. We conclude that relief is due on a separate basis.

While this appeal was pending, this Court decided ***Commonwealth v. Butler***, ---A.3d ---, 2017 WL 4914155 (Pa. Super., Oct. 31, 2017). In ***Butler***, the defendant pleaded guilty to statutory sexual assault and corruption of minors, and his conviction for corruption of minors would have carried a fifteen-year registration period. ***Id.***, at *1, *3. However, the court determined that the defendant was an SVP, which increased his "registration exposure" from fifteen years to life. ***Id.*** at *3. The defendant appealed and

asserted that (1) the evidence was insufficient to sustain his designation as an SVP, and (2) the SVP designation violated his constitutional right to protect his reputation under Article I, Section 1 of the Pennsylvania Constitution. ***Id.*** at *2.

Instead of reaching the defendant's issues, the ***Butler*** court concluded *sua sponte* that the defendant's designation as an SVP constituted an illegal sentence. ***Id.*** at *2 (noting that this Court may raise questions regarding the legality of sentence *sua sponte*), *5. The Court reasoned that under the Pennsylvania Supreme Court's recent decision in ***Commonwealth v. Muniz***, 164 A.3d 1189 (Pa. 2017), the registration requirements of the Sexual Offender Registration and Notification Act[11] ("SORNA") must be deemed a criminal punishment. ***Id.*** at *4. The defendant's conviction alone required the imposition of a fifteen-year registration period, but the finding that he was an SVP—*i.e.* that he "suffered from mental abnormality or personality disorder that ma[d]e [him] likely to engage in predatory sexually violent offenses"—subjected him to a lifetime registration requirement. ***Id.*** at *3-*5 (citations omitted). Section 9799.24(e)(3), however, permitted the trial judge to find the defendant to be an SVP by a clear and convincing standard. ***Id.*** at *3 (discussing 42 Pa.C.S. § 9799.24(e)(3)). Therefore, under ***Apprendi v. New Jersey***, 530 U.S. 466 (2000) and ***Alleyne v. United States***, 133 S.Ct. 2151 (2013), which require that facts increasing the range of punishment be found by a jury beyond a reasonable doubt, the trial court's SVP determination

[11] 42 Pa.C.S. §§ 9799.10-9799.41.

unconstitutionally increased the range of punishment that could be imposed on the defendant. ***Id.*** at *4-*5.

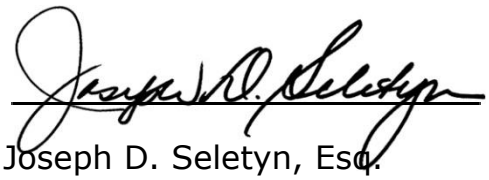
The ***Butler*** Court concluded:

> As the sole statutory mechanism for SVP designation is constitutionally flawed, there is no longer a legitimate path forward for undertaking adjudications pursuant to section 9799.24. As such, trial courts may no longer designate convicted defendants as SVPs, nor may they hold SVP hearings, until our General Assembly enacts a constitutional designation mechanism. ***Cf. Commonwealth v. Hopkins***, . . . 117 A.3d 247, 258-262 ([Pa.] 2015) (finding that trial courts cannot impose mandatory minimum sentences until the General Assembly enacts a statute which provides a constitutional mechanism to determine if the defendant is subject to the mandatory minimum sentence) . . . .
>
> Instead, trial courts must notify a defendant that he or she is required to register for 15 years if he or she is convicted of a Tier I sexual offense, 25 years if he or she is convicted of a Tier II sexual offense, or life if he or she is convicted of a Tier III sexual offense.

Id. at *5-*6 (citing 42 Pa.C.S. § 9799.23).

In accordance with ***Butler***, we conclude that Appellant's designation as an SVP constitutes an illegal sentence and reverse that order. Instantly, Appellant was convicted of *inter alia*, rape of a child, which is a Tier III offense that subjects him to a lifetime registration period. ***See*** 42 Pa.C.S. §§ 9799.14(d)(2), 9799.15(c)(3). We have affirmed that conviction. Therefore, we remand for the trial court for the issuance of an appropriate notice of his registration obligations under 42 Pa.C.S. § 9799.23.

Judgment of sentence affirmed in part and vacated in part. Case remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished.
Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/22/2017