NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
NELSON CUEVAS	:	
Appellant	:	No. 930 MDA 2021

Appeal from the Judgment of Sentence Entered December 30, 2020, in the Court of Common Pleas of Lebanon County, Criminal Division at No(s): CP-38-CR-0000069-2019.

BEFORE: PANELLA, P.J., KUNSELMAN, J., and KING, J.

MEMORANDUM BY KUNSELMAN, J.: **FILED: JUNE 13, 2022**

Nelson Cuevas appeals from the judgment of sentence entered against him following his jury trial and conviction for rape of a child, involuntary deviate sexual intercourse with a child (IDSI), indecent assault, and endangering welfare of children.[1] We affirm.

A. Procedural and Factual History

The trial court summarized the history of the case in its opinion addressing Cuevas' post-sentence motions:

> In October of 2018, [Cuevas'] 6-year-old stepdaughter, J.B., reported a "secret" to another family member. The "secret" was that [Cuevas] had performed oral sex upon her, touched her with his "private part," and placed his "private part" inside her

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[1] 18 Pa.C.S.A. §§ 3121(c), 3123(b), 3126(a)(7), and 4304(a)(1).

"thothe" causing her to be "hurted." J.B. stated that she was 5-years of age when these events occurred.

Police were summoned regarding the complaint on October 14, 2018. Angela Farrisi [] of Lebanon County Children and Youth Services agency (hereafter CYS) met with J.B. and other members of her family. As a result of initial information provided by J.B., Farrisi scheduled a formal forensic interview at the Lebanon County Children's Resource Center (CRC). Forensic interviewer Violet Winter conducted an interview with J.B. on October 25, 2018. This interview was videotaped. It was also observed in real time by Detective Matthew Brindley of the Lebanon County Detective Bureau. During the interview, J.B. repeated her report that [Cuevas] sexually abused her.

On October 29, 2018, Farrisi and Detective Brindley interviewed [Cuevas]. [Cuevas] denied raping J.B. but acknowledged that he doubted J.B. would lie. [Cuevas] surmised that J.B. was mistaken and that it was actually her mother's current boyfriend who sexually assaulted the young girl.

[Cuevas] was charged with numerous sexually related offenses on December 13, 2018. Shortly thereafter, the Lebanon County Public Defender's Office was appointed to represent [Cuevas]. Despite being represented, [Cuevas] filed numerous *pro se* pre-trial motions and appeals[, which the trial court denied and this Court quashed].

* * *

A jury trial was conducted as scheduled on July 27, 2020 and July 28, 2020. Following the trial, a Lebanon County jury found [Cuevas] guilty on all but one count lodged against him. Sentencing occurred on December 30, 2020. [The trial court] imposed a sentence of 20 to 40 years in a State Correctional facility. Thereafter, [Cuevas] filed post-sentence motions [on January 11, 2021 and amended post-sentence motions on January 29, 2021].[2]

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[2] The trial court granted Cuevas' motion giving the trial court a 30-day extension to decide Cuevas' post-sentence motions under Pennsylvania Rule of Criminal Procedure 720(B)(3)(b).

Trial Court Opinion, 6/7/21, at 2–8 (capitalization altered). The trial court entered an opinion denying all eleven issues raised in Cuevas' post-sentence motions on June 7, 2021. This appeal followed. Cuevas and the trial court complied with Pennsylvania Rule of Appellate Procedure 1925. Cuevas raises eleven issues:

I. Were the jury's verdicts of guilty as to counts I, II, III, and V not based on sufficient evidence to prove beyond a reasonable doubt that Appellant engaged in sexual contact with the alleged Victim?

II. Did the Magisterial District Court err by allowing the affiant officer to testify to statements that the alleged child victim made during the investigation that the child victim did not testify to at the preliminary hearing over defense counsel's objection?

III. Did the [trial] court err by denying Appellant's pretrial motions?

IV. Did the trial court err by allowing the Commonwealth to recall the alleged child victim at trial on July 28, 2020 to identify the Appellant via a photograph after the alleged child victim failed to identify the Appellant at trial on July 27, 2020?

V. Did the trial court err by allowing the Commonwealth to play the CRC video recorded interview of the alleged child victim and allowing Melida Bello and Angelica Farrisi to testify as to the statements made by the alleged child victim that added to the alleged child victim's testimony?

VI. Were the verdicts against the weight of the evidence because the jury attributed too great a weight to the testimony of the alleged child victim?

VII. Did the trial court err by allowing a witness, B.G., to testify via video at trial[?]

VIII. Did the trial court err and was the Appellant prejudiced by conducting a jury trial while being masked due to COVID-19 restrictions?

IX. Is the Tender Years Statute unconstitutional in violation of [] both the Pennsylvania Constitution and the United States Constitution?

X. Did the [trial] court err by denying Appellant's December 29, 2020 motion for extraordinary relief filed pursuant to Pa.R.Crim.P. 704(B)?

XI. Did the [trial] court err by denying Appellant's December 29, 2020 motion objecting to sentencing via video and requesting that Appellant be physically present during his sentencing hearing?

Cuevas' Brief at 4–6 (some capitalization omitted).

B. Analysis

Cuevas' brief is underdeveloped. For the most part, Cuevas repeats the same succinct summaries of his positions that he included in his brief in support of his post-sentence motions. He includes few citations to pertinent cases or other authorities. ***See*** Pa.R.A.P. 2119. Nevertheless, we will address the arguments presented in the interest of justice.

I. The evidence was sufficient to convict Cuevas.

Cuevas first claims that the Commonwealth failed to provide sufficient evidence that he engaged in sexual acts with J.B. to support all four of his convictions.

> When reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, were sufficient to prove every element of the offense beyond a reasonable doubt. The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. It is within the province of the fact-finder to determine the weight to accord each witness' testimony and to

> believe all, part or none of the evidence. The Commonwealth may sustain its burden by proving every element of the crime by means of wholly circumstantial evidence. As an appellate court, we may not re-weigh[] the evidence and substitute our judgment for that of the fact-finder.

Commonwealth v. Snyder, 251 A.3d 782, 787–88 (Pa. Super. 2021) (quoting ***Commonwealth v. Steele***, 234 A.3d 840, 845 (Pa. Super. 2020). "[T]he uncorroborated testimony of the complaining witness is sufficient to convict a defendant of sexual offenses." ***Commonwealth v. Cramer***, 195 A.3d 594, 602 (Pa. Super. 2018) (citing ***Commonwealth v. Castelhun***, 889 A.2d 1228, 1232 (Pa. Super. 2005); ***accord*** 18 Pa.C.S.A. § 3106 (providing that in prosecutions for sexual offenses, "[t]he testimony of a complainant need not be corroborated").

J.B. testified that Cuevas touched her "thothe" with his "dick," referring to female and male sexual organs. N.T. Trial, 7/27/20, at 27–33, 35–36 (referencing Exhibits 6 and 7, marked diagrams of a girl and a boy). She testified that "[i]t hurt." ***Id.*** at 31. She also testified that Cuevas licked her "thothe" with his tongue. ***Id.*** at 34–35, 39.

CYS caseworker Angelica Farrisi testified that during her initial contact with J.B., J.B. said that Cuevas had touched her chest and "thothe" with his hands. N.T. Trial, 7/28/20, at 35. Ms. Farrisi reported that J.B. also said that Cuevas' "dick went inside of her and that it hurt a lot." ***Id.*** Ellen Dyer, a Certified Registered Nurse Practitioner who works for the Children's Resource Center, explained that a prepubescent girl typically feels pain when her vagina is penetrated, including penetration of the labia. ***Id.*** at 101–04.

We analyze whether this evidence supported Cuevas' convictions at Counts I, II, III, and V. Viewed in a light most favorable to the Commonwealth, this evidence was sufficient for the jury to conclude that Cuevas engaged in prohibited sexual conduct with J.B.

First, rape requires proof that Cuevas engaged in "sexual intercourse" with J.B. 18 Pa.C.S.A. §§ 3101, 3121(c). J.B.'s testimony that Cuevas touched her "thothe" with his "dick," which "hurt," and her statement to Ms. Farrisi that Cuevas' "dick went inside of her" are sufficient to prove that Cuevas engaged in "sexual intercourse." As Nurse Dyer explained, J.B.'s description of pain is consistent with some penetration of her vaginal area. N.T. Trial, 7/28/20, at 103–04; ***see also Commonwealth v. Ortiz***, 457 A.2d 559, 560–61 (Pa. Super. 1983) (holding that entrance into the labia is "penetration, however slight," under Section 3101's definition).

Second, for IDSI, J.B.'s testimony that Cuevas licked her "thothe" is sufficient to prove that Cuevas engaged in "deviate sexual intercourse." 18 Pa.C.S.A. §§ 3101, 3123(b); ***In the Interest of J.R.***, 648 A.2d 28, 33 (Pa. Super. 1994) (finding that licking the vaginal area is deviate sexual intercourse and noting "that 'actual' penetration of the vagina is not necessary").

Third, for indecent assault, J.B.'s statements to Ms. Farrisi that Cuevas touched her chest and "thothe" with his hands, as well as J.B.'s trial testimony above, are sufficient to prove that Cuevas engaged in "indecent contact." 18 Pa.C.S.A. §§ 3101, 3126(a)(7); ***J.R.***, 648 A.2d at 34 (finding

undressing a child and licking her vaginal area to be sufficient for indecent assault); ***Commonwealth v. Gilliam***, 249 A.3d 257, 268 (Pa. Super. 2021) (citing ***Commonwealth v. Evans***, 901 A.2d 528, 533 (Pa. Super. 2006)) (observing that touching another person's intimate parts is sufficient to show the purpose of arousing sexual desire).

Finally, the evidence was sufficient for a jury to find that Cuevas knowingly violated a duty of care to J.B. by sexually abusing her, thereby committing the crime of endangering welfare of children. ***Commonwealth v. Bryant***, 57 A.3d 191, 197–99 (Pa. Super. 2012) (following ***Commonwealth v. Trippett***, 932 A.2d 188 (Pa. Super. 2007), and ***Commonwealth v. Vining***, 744 A.2d 310 (Pa. Super. 1999)).

II. The jury trial cured any defect at the preliminary hearing.

Cuevas next claims that the Magisterial District Court erred by admitting hearsay statements at the preliminary hearing. Cuevas' Brief at 14–17 (citing ***Commonwealth v. McClelland***, 233 A.3d 717, 736 (Pa. 2020), and Pa.R.Crim.P. 542(E)). The trial court found that because a jury convicted Cuevas, any defect in the preliminary hearing is immaterial. Trial Court Opinion, 6/7/21, at 15–17. We agree with the trial court that Cuevas is not entitled to relief on this issue. ***Commonwealth v. Rivera***, 255 A.3d 497, 503–04 (Pa. Super. 2021) (holding that submitting the case to the jury cured any evidentiary defect at the preliminary hearing).

III. The trial court's pretrial rulings were within its discretion.

Cuevas claims that the trial court erred in denying his pretrial motions. Cuevas' Brief at 17. On April 23, 2019, Cuevas filed: (1) a petition for pretrial *habeas corpus* relief, (2) a motion to challenge J.B.'s competence based on taint, and (3) a motion to quash the criminal information. On December 23, 2019, the Commonwealth moved to present testimony under the Tender Years Hearsay Act and for J.B. to testify by a contemporaneous alternative method. The trial court heard these matters on January 24, 2020 and entered an order addressing them on February 7, 2020.

We review the trial court's resolution of these motions for an abuse of discretion. ***See Commonwealth v. Delbridge***, 859 A.2d 1254, 1257 (Pa. 2004) (competency); ***Commonwealth v. Renninger***, 269 A.3d 548, 556 (Pa. Super. 2022) (quashal of information); ***Commonwealth v. Hudson-Greenly***, 247 A.3d 21, 23–24 (contemporaneous alternative method); ***Commonwealth v. Strafford***, 194 A.3d 168, 173 (Pa. Super. 2018) (Tender Years Hearsay Act); ***see also McClelland***, 233 A.3d at 732 (stating that pretrial *habeas corpus* rulings are ordinarily reviewed for abuse of discretion and questions of law *de novo*).

The trial court explained, in ruling on Cuevas' post-sentence motions:

> In his brief, [Cuevas] submitted a three[-]sentence argument as to why this Court erred regarding his Pre-Trial Motions. Two of these sentences contained procedural background information. The third sentence states: "Cuevas asserts that [the trial court] erred by denying his Pre-Trial Motions and allowing the Commonwealth to proceed pursuant to the Tender Years Statute." No basis for the purported error was included.

> Initially, we conclude that [Cuevas'] argument regarding his Pre-Trial Motions is insufficiently specific. Submitting a broad proclamation that "[the trial court] erred" without providing details as to how or why does not pass procedural muster. For this [c]ourt to meaningfully entertain a Post-Sentence Motion, much more is required. As a general rule, an issue is deemed to be abandoned "where it has been identified on appeal but not properly developed in a brief." ***Commonwealth v. Montalvo***, 641 A.2d 1176, 1184 (Pa[.] Super. 1994).
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> With the above being said, we also wish to briefly address the primary Pre-Trial issue that was raised by [Cuevas]. That issue pertained to the time of the criminal event alleged by the Commonwealth. The Commonwealth's initial Criminal Information was quite broad in terms of identifying when the alleged sexual assault occurred. [Cuevas] argued that the timeframe set forth initially in the Criminal Information was unduly broad and did not afford him with sufficient notice of a time frame. The Court was sympathetic to [Cuevas'] complaint and we advised the prosecutor of such when we met at a Status Conference. Perhaps because of this, the Commonwealth re-doubled its efforts to identify a timeframe within which the crime occurred. At the time of the Pre-Trial Hearing, the Commonwealth proffered that the criminal event occurred within a six[-]month window between January and June of 2017. We found this to be sufficient. [Cuevas] disagrees.
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> The requirement that the Commonwealth identify the time of a criminal event has been referred to as a so-called "Devlin Claim." Such a claim is named after the Pennsylvania Supreme Court case of ***Commonwealth v. Devlin***, 333 A.2d 888 (Pa. 1975), in which Pennsylvania's highest Court set forth a requirement that the Commonwealth must identify the time of a criminal act with "reasonable certainty" so that the defendant has notice of what it is he is charged with doing. However, ***Devlin*** recognized that "leeway" must be provided based upon "the nature of the crime and the age and condition of the victim." ***Id.*** at [] 892. In ***Devlin***, a fourteen [] month window of time was held to be insufficiently specific so as to violate the defendant's due process rights. In discussing the "leeway" that must be afforded, the Supreme Court cited a dissenting Opinion by Judge Spaeth of the Pennsylvania Superior Court. [***Id.*** at 892 n.3.] That dissenting Opinion stated:

> I do not wish to imply that when dealing with a victim who is a young child or who has no greater mental and emotional capacity than a young child the Commonwealth must always prove the actual date of the crime. . . . Rather, [the] fact that the victim is emotionally young and confused should be weighed against the right of the defendant to know for what period of time he may be called upon to account for his behavior. The fact that the victim cannot set a date for the crime should not necessarily be fatal to the Commonwealth's case, thus making the assailant virtually immune from prosecution.
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> [***Commonwealth v. Devlin***, 310 A.2d 310, 312 (Pa. Super 1973) (Spaeth, J., dissenting)]; ***see also Commonwealth v. Groff***, 548 A.2d 1237[, 1241] (Pa. Super. 1988) ("[T]he Commonwealth must be allowed a reasonable measure of flexibility when faced with the special difficulties involved in ascertaining the date of an assault upon a young child.").
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> In this case, J.B. was five [] years of age when the events in question occurred. Understandably, she could not remember a specific date. Using circumstantial evidence, the Commonwealth was able to narrow down the date of the crime to a six[-]month window between January and June of 2017. Given all of the circumstances presented to this Court, we believed that such a time frame was reasonable and it afforded [Cuevas] with sufficient notice of what was alleged against him. Today, we stand by that belief.

Trial Court Opinion, 6/7/21, at 17–19.

On appeal, Cuevas repeats the same three-sentence argument that the trial court found to be insufficiently specific. ***See Commonwealth v. Delvalle***, 74 A.3d 1081, 1086–87 (Pa. Super. 2013) (citing Pa.R.A.P. 2119(a)) (finding waiver based on a three-sentence argument lacking case citations or factual development). Cuevas does not suggest how the trial court abused its discretion. Rather, it appears that the trial court acted within its discretion by holding a hearing and compelling the Commonwealth

to narrow the date range of the offenses. Furthermore, the trial court ruled that J.B. would testify live in open court, in the presence of the parties and the jury. We therefore deny relief on this issue.

IV. Allowing the Commonwealth to recall J.B. was not error.

Cuevas asserts that he is entitled to a new trial because J.B. first testified that Cuevas was not in the courtroom, and the next day the trial court allowed the Commonwealth to recall J.B., who then identified Cuevas by photograph. Cuevas' Brief at 18; ***see*** N.T., Trial, 7/27/20, at 39–40; N.T., Trial, 7/28/20, at 7–9.

We review a trial court's decision on recalling a witness for "a 'very gross abuse of discretion.'" ***Commonwealth v. Crosby***, 297 A.2d 114, 116–17 (Pa. 1972) (finding no such abuse in preventing a defendant from being recalled to change his testimony); ***see also Commonwealth v. Chambers***, 685 A.2d 96, 109 (Pa. 1996) (finding no abuse of discretion in allowing the Commonwealth to recall a witness after its case-in-chief). This reflects the court's authority "to regulate the order for the presentation of evidence." ***Commonwealth v. Martinez***, 446 A.2d 899, 903 (Pa. 1982) (citing ***Commonwealth v. Koch***, 288 A.2d 791 (Pa. 1972)) (finding no abuse of discretion in allowing the Commonwealth to recall a witness to rebut the defendant's testimony).

It is within a trial court's discretion to permit a witness to be recalled "to correct mistakes or effect a just result." ***Commonwealth v. Johnson***,

396 A.2d 726, 730 (Pa. Super. 1978). For example, in ***Johnson***, a Commonwealth witness testified on cross-examination that he had never been known as "Stokes." ***Id.*** After other witnesses contradicted this and the defense rested, the Commonwealth recalled him, where he said that he thought the defense attorney said "Stukes or Strokes or something like that." ***Id.*** We found no abuse of discretion and no prejudice:

> While it is of course within the purview of the jury to determine the credibility of witnesses, it appears to us that by recalling the witness and reviewing the prior inconsistencies, the matter was placed afresh before the jury who might easily construe the excuse advanced as at best evasive. The recall could thus quite conceivably be viewed as beneficial to appellant's attempt to discredit the witness.

Id. (citation omitted).

Here, we find no abuse of discretion. The trial court noted that Cuevas' attorney was "sitting directly between" J.B. and Cuevas when J.B. testified. N.T., Trial, 7/28/20, at 6. Cuevas' counsel could and did elicit on cross-examination that the prosecutor had prepared J.B. for the identification. ***Id.*** at 6, 8–9. The jury observed J.B. testify on both occasions in the Commonwealth's case-in-chief, from which it was in the best position to evaluate her testimony. ***See Johnson***, ***supra***. Therefore, Cuevas is not entitled to relief on this issue.

V. The trial court properly admitted J.B.'s prior statements.

Cuevas next claims that the trial court erred in admitting evidence pursuant to the Tender Years Hearsay Act, 42 Pa.C.S.A. § 5985.1. Cuevas'

Brief at 18–19. He asserts that this evidence about whether his tongue penetrated J.B.'s vagina improperly added to J.B.'s trial testimony. ***Id.*** The Act provides for the admissibility of certain out-of-court statements if, as relevant here, "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." 42 Pa.C.S.A. § 5985.1(a)(1)(i).

> Pursuant to the Tender Years Hearsay Act, a trial court must consider the totality of the circumstances when determining whether a child's out-of-court statement is trustworthy. ***Commonwealth v. Lyons***, 833 A.2d 245, 253 (Pa. Super. 2003). The statute requires "indicia of reliability" which "include, *inter alia*, the spontaneity of the statements, consistency in repetition, the mental state of the declarant, use of terms unexpected in children of that age, and the lack of a motive to fabricate." ***Strafford***, 194 A.3d at 173 (citation and internal quotation marks omitted).

In the Interest of D.C., 263 A.3d 326, 335 (Pa. Super. 2021). We review for abuse of discretion. ***Strafford***, 194 A.3d at 173.

Here, the trial court conducted a pretrial hearing and preliminarily determined that this evidence would be admissible. Order, 2/7/20, at 6–7. The court ruled that J.B. would be required to testify in open court. ***Id.*** Following J.B.'s testimony on the first day of trial, the trial court made its ultimate evidentiary ruling based on the probative value and unfair prejudice of this evidence. N.T. Trial, 7/27/20, at 54–56. We find no abuse of discretion. Furthermore, to the extent that Cuevas specifically contests the admission of evidence that his tongue penetrated J.B.'s vagina, we note that the Commonwealth was not required to prove this fact to establish that

Cuevas engaged in deviate sexual intercourse. ***J.R.***, 648 A.2d at 33. Therefore, we conclude that Cuevas is not entitled to relief on this issue.

VI. The verdict was not against the weight of the evidence.

Cuevas claims that he should get a new trial because the jury placed too much weight on J.B.'s inculpatory testimony. Cuevas' Brief at 19–20.

> A claim alleging the verdict was against the weight of the evidence is addressed to the discretion of the trial court. Accordingly, an appellate court reviews the exercise of the trial court's discretion; it does not answer for itself whether the verdict was against the weight of the evidence. It is well-settled that the jury is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses, and a new trial based on a weight of the evidence claim is only warranted where the jury's verdict is so contrary to the evidence that it shocks one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion.

Commonwealth v. James, 268 A.3d 461, 468 (Pa. Super. 2021) (quoting ***Commonwealth v. Houser***, 18 A.3d 1128, 1135–36 (Pa. 2011) (brackets omitted).

Here, the trial court rejected Cuevas' weight-of-the-evidence claim:

> The only direct evidence that [Cuevas] committed the crimes with which he was charged came from the mouth of J.B. Fortunately, the jury was able to observe J.B. as she testified in Court. The jury was also able to observe J.B.'s demeanor [on video] as she provided information to Violet Witter of the CRC. The jury obviously believed J.B., and it was entirely within their province to render this decision about credibility.

Trial Court Opinion, 6/7/21, at 14. The trial court did not find that the verdict shocked its conscience. We find no abuse of discretion. Therefore, this claim fails.

VII. Allowing B.G. to testify by video did not violate Cuevas' confrontation rights.

Cuevas next contests the trial court's ruling that B.G., the older child to whom J.B. first reported her abuse, could testify via video. Cuevas' Brief at 20–21. He argues that this method of presenting B.G.'s testimony violated his constitutional confrontation rights. ***Id.***

> The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." Article 1, Section 9 of the Pennsylvania Constitution provides: "In all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him . . . ."[fn2] With regard to the Confrontation Clause, the Pennsylvania Constitution provides a criminal defendant with the same protection as the Sixth Amendment; thus, we will address Appellant's challenges under each Constitution simultaneously.
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> [footnote 2] The Pennsylvania Constitution previously required "face to face" confrontation, and under such provision, the use of videoconferencing as a means to present testimony was found to be unconstitutional. ***See Commonwealth v. Ludwig***, 527 Pa. 472, 594 A.2d 281 (1991). The Pennsylvania Constitution was amended in 2003, removing the "face to face" language.

Commonwealth v. Atkinson, 987 A.2d 743, 745 & n.2 (Pa. Super. 2009) (citation and footnote omitted).

Here, the trial court explained:

> On the second day of trial, the Commonwealth planned to call [B.G.] to testify. The young lady awoke on the day of her

testimony with a fever. The Court discussed the issue with both counsel and stated:

> I mean in today--in this day and age of COVID, I am going to bend over backwards to both sides to allow witnesses to be presented when these issues arise. And if she has a fever, that is a classic symptom of COVID. And I don't want her in here infecting anyone else. So one way or another, I will permit her testimony by alternative means.
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> The same thing would go, [defense counsel], if your client has witnesses that he wishes to present. The same thing would apply.

N.T., Trial, 7/28/20, at 5.

When B.G. testified, she did so by a computer video app. [The trial court] stated to the jury in advance of her testimony:

> Ladies and gentlemen, this morning early we were notified that a witness, [B.G.], has come down with a fever. We don't know whether that is related to COVID-19. She will obviously need to be tested. But out of an over abundance of caution, we instructed [B.G.] not to come in to provide testimony. However, she is a witness who has information and we are going to permit the Commonwealth to present her information via Skype or Zoom, or one of those applications that we didn't know anything about before February.
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> In any event, you are going to see her through a computer[,] and there are television screens to your right, my left on which her face will appear. You must consider this testimony the same as you would testimony presented live in court. And again, her face is visible so you will see not only what she is saying but how she is saying it.

N.T. Trial, 7/28/20, at 59.

It is true that every Defendant enjoys a constitutional right to confront witnesses who provide information at a jury trial. However, the right of face-to-face confrontation is not absolute. In ***Atkinson***, the Court ruled that the right to face-to-face confrontation "must occasionally give way to considerations of public policy and the necessities [of a situation.]" 987 A.2d at

> 747–48 (quoting ***Maryland v. Craig***, 497 U.S. 836, 849 (1990)). In this case, B.G. became ill during a pandemic and this Court did not want to risk having her come in person inside a courtroom. However, technology existed so that both [Cuevas] and the jury could actually see B.G. as she testified. Given everything, the Court did not err by taking advantage of that technology.

Trial Court Opinion, 6/7/21, at 35 (citations and formatting altered).

We find no error in the trial court's reasoning. In ***Atkinson***, we assessed whether receiving testimony by video violated a defendant's constitutional confrontation rights under ***Craig***: "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." ***Atkinson***, 987 A.2d at 748 (quoting ***Craig***, 497 U.S. at 850). We surveyed cases holding that protection "from physical danger or suffering" is an important public policy that supports the use of video to receive live testimony from a witness who is ill. ***Id.*** at 748–50 (quoting ***Horn v. Quarterman***, 508 F.3d 306, 319–20 (5th Cir. 2007)).

Here, B.G. became ill during a pandemic the morning she was set to testify in court. Allowing B.G. to testify through video furthered the public policy of protecting the trial participants from exposure to disease. Cuevas and the jury could see and hear B.G., B.G. was subject to cross-examination, and the trial court instructed the jury to consider her testimony the same as if she were testifying in person. Based on the ***Craig*** test, we discern no constitutional violation.

VIII. Cuevas has not shown that the trial court erred by requiring masks.

In his eighth issue, Cuevas challenges the trial court's mask requirement. Cuevas' Brief, at 22. He argues that the jury was unable to assess witnesses' demeanor and credibility, specifically J.B.'s. ***Id.*** The trial court required all trial participants to wear masks, except for witnesses who were testifying and counsel who were delivering opening statements and closing arguments. Trial Court Opinion, 6/7/21, at 30, 35. The court noted that Cuevas, who did not testify at trial, failed to explain how wearing a mask prejudiced him. ***Id.*** at 35. We observe further that because the witnesses who testified did not wear masks, the jurors could observe their faces to assess their demeanor and credibility.[3] Therefore, Cuevas has not demonstrated that the trial court erred by requiring masks.

IX. The Tender Years Hearsay Act did not render the trial judge biased to unconstitutionally deprive Cuevas of a fair trial.

Cuevas next claims that he is entitled to a new trial because the Tender Years Hearsay Act violates the right to a fair trial under the United States and Pennsylvania Constitutions. Cuevas' Brief, at 22–23. He asserts that when a trial court assesses if the time, content, and circumstances of a child witness's statement provide sufficient indicia of reliability, 42 Pa.C.S.A.

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[3] This Court has also held in an unpublished decision that witnesses wearing masks while testifying did not violate a defendant's constitutional rights. ***Commonwealth v. Padilla***, 2021 WL 5926030, at *6 n.6 (Pa. Super. Dec. 15, 2021) (unpublished memorandum).

§ 5985.1(a)(1)(i), the trial court effectively prejudges the truth of that statement. This, he alleges, causes the trial court to be implicitly biased with respect to the truthfulness of the child witness's statements, creating apparent and actual bias at trial.

The Commonwealth indicates that we have previously found the Tender Years Hearsay Act to comply with constitutional confrontation requirements. Commonwealth's Brief, at 31–33. Specifically:

> When reviewing a challenge to the constitutionality of a statute:
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> > Initially, we note that a statute is presumed constitutional when it is lawfully enacted and will only be considered unconstitutional if it clearly, palpably and plainly violates the constitution. Furthermore, a party challenging the constitutionality of an act of the General Assembly has a "heavy burden" of persuasion to sustain his claim.
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> ***Commonwealth v. Hanawalt***, 615 A.2d 432 (Pa. Super. 1992) (internal citations omitted).
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> This Court has previously addressed the constitutionality of the Tender Years Statute as it relates to the Confrontation Clause. In ***Hanawalt***, ***supra***, this Court noted that the Confrontation Clause of the Sixth Amendment to the United States Constitution does bar the admission of some evidence otherwise admissible under an exception to the hearsay rule. Likewise, the Pennsylvania Constitution provides that in all criminal prosecutions, the accused has a right to meet the witness "face to face." ***Id.*** Thus, when a witness is unavailable, her out of court statement must either fall within a firmly rooted hearsay exception or be supported by particularized guarantees of trustworthiness to satisfy the "*indicia* of reliability" standard and comport with the Confrontation Clause. ***Id.*** (citing ***Idaho v. Wright***, 497 U.S. 805 (1990)). Firmly rooted exceptions to the hearsay rule do not violate the confrontation clause's mandate of reliability because the truth of the declarant's statement is so

> clear from the surrounding circumstances that the test of cross-examination would add little to its reliability. ***Id.*** at 435.
>
> The Tender Years Statute, however, is too recent to be considered a firmly rooted exception to the hearsay rule. ***Id.*** Evidence admitted under the Tender Years Statute must therefore be proven admissible by "particularized guarantees of trustworthiness" as adduced from the totality of the circumstances surrounding the out-of-court statement made by the child victim. ***Id.*** Because the Tender Years Statute mirrors this language in its requirement that "the time, content and circumstances of the statement provide sufficient *indicia* of reliability," the statute fulfills these mandates. ***Id.*** Accordingly, this Court held that the Tender Years Statute is constitutional insofar as it does not violate Appellant's right to confront the witnesses against him under either the Sixth Amendment of the U.S. Constitution or Article I, Section 9 of the Pennsylvania Constitution. ***Id.***

Commonwealth v. Lyons, 833 A.2d 245, 252–53 (Pa. Super. 2003) (citations altered).

As illustrated in ***Lyons***, the Constitution forbids admission of an out-of-court statement unless that statement has sufficient indicia of reliability. The procedure of the Tender Years Hearsay Act, which safeguards against unreliable evidence, exists to ensure this constitutional requirement. It would be absurd to conclude that this constitutionally based mandate somehow unconstitutionally instills bias in the trial judge. Therefore, we reject Cuevas' constitutional challenge to the effect of this procedure under the Tender Years Hearsay Act.

Furthermore, Cuevas has not indicated any manifestations of implicit, apparent, or actual bias on the part of the trial judge, nor has he explained how the judge's alleged bias prejudiced him. The trial court ruled that J.B.'s

statements would only be admissible after J.B. testified in open court, subject to cross-examination, that her statements were truthful. Order, 2/7/20, at 4–5. During trial, the trial court instructed the jurors that they were the sole judges of facts and credibility. N.T., 7/27/20, at 10; N.T., 7/28/20, at 181–182. The trial court instructed that the Commonwealth always has the burden of proof. N.T., 7/28/20, at 179. Additionally, the trial court instructed that the judge has a duty to be impartial and that the jurors could not infer anything from the manner in which the judge ruled or gave instructions. ***Id.*** at 173. Therefore, we conclude that Cuevas is not entitled to relief on this issue.

X. The trial court properly denied Cuevas' motion for extraordinary relief.

Cuevas next challenges the trial court's denial of his motion for extraordinary relief, which was filed immediately prior to sentencing. Some confusion arises from the large volume of documents that Cuevas submitted not signed by his attorney. The trial court reasoned that it denied Cuevas' "request for reconsideration for extraordinary relief" filed the week **after** sentencing because it was not signed by counsel. Trial Court Opinion, 6/7/21, at 39. Here, however, Cuevas challenges the denial of a motion filed by counsel, which incorporated a handwritten document entitled "writ of error *coram nobis*" from Cuevas mailed the week **before** sentencing. In that document, Cuevas asked the trial court to release him, dismiss the

charges against him with prejudice, and sanction the prosecution, all based on a long list of alleged constitutional and procedural violations.

Although the trial court evaluated the wrong document, we nonetheless discern no substantive error in denying relief. Pennsylvania Rule of Criminal Procedure 704(B) provides for only an **oral** motion. "Hence, the plain terms of this Rule do not permit the filing of a written motion for extraordinary relief prior to sentencing." ***Commonwealth v. Fisher***, 764 A.2d 82, 85 (Pa. Super. 2000) (citing ***Commonwealth v. Davis***, 708 A.2d 116, 119 n.2 (Pa. Super. 1998)). Cuevas has not stated how he believes the trial court erred, and no meritorious issues appear in the motion. Therefore, we conclude that the trial court properly denied the motion.

XI. Cuevas has not shown that conducting sentencing by video prejudiced him.

Finally, Cuevas asks to be resentenced because the trial court conducted his sentencing by video, over his objection and contrary to rule. ***See*** Pa.R.Crim.P. 602(A) ("The defendant shall be present at every stage of the trial including . . . the imposition of sentence[.]"). "It is well established that a criminal defendant and his attorney should be present during all aspects of sentencing." ***Commonwealth v. Meo***, 334 A.2d 748, 750 (Pa. Super. 1975), *superseded on other grounds by statute*, 18 Pa.C.S.A. § 5104 (citing ***Commonwealth v. Morales***, 282 A.2d 391 (Pa. 1971)).

Here, the trial court explained that it conducted sentencing by video at the request of the Lebanon County Sheriff not to transport prisoners due to a "spike" in COVID-19 cases.[4] Trial Court Opinion, 6/7/21, at 37–38. The court reasons that Cuevas has not shown prejudice because he received a mandatory minimum sentence. ***Id.*** Additionally, as the Commonwealth observes, Cuevas was able to see and hear the courtroom and participate as though he were physically present. Commonwealth's Brief at 41.

Recognizing the facial violation of Rule 602(A), we nonetheless find the error to be harmless. Previously, where a defendant was not present when the court corrected an illegal sentence, we reasoned that

> we would normally reverse the judgment of sentence to afford the appellant the opportunity to be present at the modification so as to remark upon the proceedings, *as is his right*. However, because the sentence ultimately imposed is the *only* sentence that could have been entered, given the statutory sentencing scheme and the factual context of the appellant's prior record, we see no need to remand and we will affirm the action of the court below.

Commonwealth v. Pastorkovic, 567 A.2d 1089 (Pa. Super. 1989) (citations omitted). Likewise, we see no reason to remand for the trial court to impose an identical sentence in this case. ***Cf. Commonwealth v. Ligon***, 314 A.2d 227, 230 (Pa. 1973) (finding no prejudice from the alleged

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[4] Upon review of applicable orders of court, it appears that Lebanon County did not have an emergency order authorizing the use of advanced communication technology in effect on the day that Cuevas was sentenced.

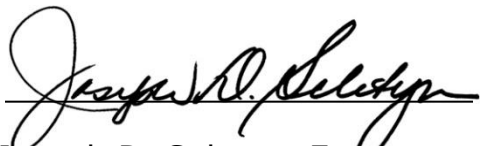
absence of counsel at sentencing where the defendant received a mandatory minimum sentence of life); ***Atkinson***, 987 A.2d at 751–53 (Pa. Super. 2009) (finding harmless error where two-way video violated confrontation clause). Therefore, we conclude that Cuevas is not entitled to relief on this issue.

C. Conclusion

Finding that Cuevas is not entitled to relief, we affirm the judgment of sentence against him.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 06/13/2022