NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
CHRISTOPHER L. INGRAM, SR.,	:	
	:	
Appellee	:	No. 2190 MDA 2012

Appeal from the Order Entered November 13, 2012,
In the Court of Common Pleas of Lycoming County,
Criminal Division, at No. CP-41-CR-0000528-2010.

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
CHRISTOPHER L. INGRAM, SR.,	:	
	:	
Appellee	:	No. 55 MDA 2013

Appeal from the Order Entered December 11, 2012,
In the Court of Common Pleas of Lycoming County,
Criminal Division, at No. CP-41-CR-0000528-2010.

BEFORE: SHOGAN, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED DECEMBER 10, 2013**

The Commonwealth appeals from the pretrial orders that denied the Commonwealth's motions *in limine* to admit transcripts and prior convictions of Appellee, Christopher L. Ingram, Sr. In this criminal case, Appellee was charged with aggravated assault, simple assault, and endangering the

welfare of children, in relation to injuries suffered by Appellee's then seven-week-old son ("Child"). In addition, Appellee has filed a motion to quash the Commonwealth's interlocutory appeals. We deny the motion to quash, reverse the trial court's order of November 13, 2012, affirm the trial court's order of December 11, 2012, and remand for further proceedings.

The trial court summarized the procedural history of this case as follows:

> By way of background, Defendant was charged by Information filed on April 29, 2010, with one count of aggravated assault, one count of simple assault and one count of endangering the welfare of children. Defendant is alleged to have knowingly or recklessly caused injuries to his then seven (7) week old infant son. The Commonwealth alleges that the son received multiple metaphyseal fractures to both of his legs, a fracture to his right arm, a fracture to his big toe, multiple bruises to his facial area and a torn frenulum, all while in the care and custody of Defendant, Defendant's then girlfriend [the mother of the infant] or both of them.
>
> By Opinion and Order dated October 5, 2010, the Court granted Defendant's petition for habeas corpus and dismissed the charges. The Commonwealth filed a timely appeal on October 12, 2010.
>
> In a memorandum decision filed on October 24, 2011, the Superior Court vacated the order granting Defendant's petition for habeas corpus and remanded the case for further proceedings consistent with the decision. While the Superior Court agreed with the trial court that the evidence failed to establish that Defendant was alone with the infant when the infant sustained the fractures to his limbs and torn frenulum, the Superior Court concluded that the sole custody inference applied with respect to the bruising to the infant's face and head, and that the Commonwealth established a prima facie case with respect to the crimes charged. Defendant subsequently filed a petition for allowance of appeal to the Pennsylvania Supreme

> Court, which was denied on June 20, 2012. The case was remanded to the trial court on July 16, 2012.
>
> On November 2, 2012, the Commonwealth filed a motion in limine which, among other things, requested that the court admit transcripts of statements made by Defendant during prior dependency proceedings and sought to admit Defendant's prior crimen falsi convictions. The court denied the Commonwealth's motion to admit transcripts on November 13, 2012. The Commonwealth appealed the Court's Order on December 13, 2012. The Court ordered the Commonwealth to file a concise statement of errors on appeal, to which the Commonwealth responded on December 26, 2012.
>
> The Court denied the request to admit crimen falsi convictions on December 11, 2012. The Commonwealth filed a motion for reconsideration on December 18, 2012, which the Court denied on January 4, 2013. The Commonwealth also appealed this decision.

Trial Court Opinion, 4/26/13, at 1-2. This Court *sua sponte* consolidated the appeals for disposition.

Before we address the merits of the Commonwealth's case, we must first consider whether we have jurisdiction to hear this claim. We note that this matter involves interlocutory appeals from pretrial orders. Under Pennsylvania Rule of Appellate Procedure 311(d), in criminal cases the Commonwealth has a right to appeal such interlocutory orders if the Commonwealth certifies that the orders will terminate or substantially handicap the prosecution. ***Commonwealth v. Flamer***, 53 A.3d 82, 86 n.2 (Pa. Super. 2012). Specifically, Rule 311(d) provides as follows:

> In a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth

> certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution.

Pa.R.A.P. 311(d). The rule does not explicitly limit the Commonwealth's right of interlocutory appeal to any particular class of pretrial orders. Rather, it indicates that the Commonwealth may take an appeal as of right "under the circumstances provided by law." ***Id***.

The justification for Rule 311(d) is that double jeopardy concerns make such rulings effectively final. ***Commonwealth v. Shearer***, 828 A.2d 383 (Pa. Super. 2003) (*en banc*). The Double Jeopardy Clause of the United States Constitution bars a second prosecution for the same offense following an acquittal or a conviction. ***Id***. at 385. The Court in ***Shearer*** explained that some pretrial "evidentiary rulings are in essence 'final' in the sense that if the defendant is acquitted, appellate review of the trial court's order can never be attained." ***Id***. at 386. The ***Shearer*** Court cited ***Commonwealth v. Bosurgi***, 190 A.2d 304, 308 (Pa. 1963), wherein the Supreme Court explained that, unless the prosecution is afforded the right of appeal after entry of an adverse suppression order, the Commonwealth and the interests of society which it represents will be completely deprived of any opportunity ever to secure an appellate court evaluation of the validity of that pretrial order.

Here, the record reflects that the Commonwealth has filed a certification pursuant to Rule 311(d), indicating that the trial court's orders

prohibiting the introduction of evidence substantially handicap the prosecution of the case. Notice of Appeal, 1/2/13. Therefore, pursuant to Pa.R.A.P. 311(d), this Court has jurisdiction to hear this appeal from the trial court's interlocutory orders, even though the orders did not terminate the prosecution. Accordingly, we deny the motion to quash and now turn to the issues raised on appeal.

The Commonwealth presents the following issues for our review:

> I. Whether the trial court erred by denying the Commonwealth's Motion to Admit *Crimen Falsi* Convictions.
>
> II. Whether the trial court erred by denying the Commonwealth's Motion to Admit Transcripts.

Commonwealth's Brief at 8.

The Commonwealth first argues that the trial court erred in denying its motion *in limine* seeking to admit *crimen falsi* convictions of Appellee. The Commonwealth contends that the trial court improperly concluded that the assistant district attorney's statement, when asked by the trial judge whether she agreed that Appellee's prior criminal convictions were not admissible, "At this point[,] your Honor," amounted to a stipulation which was binding upon the Commonwealth. The Commonwealth asserts that the assistant district attorney was making an equivocal statement that protected the Commonwealth's interests.

A motion *in limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has

been offered. ***Commonwealth v. Freidl***, 834 A.2d 638, 641 (Pa. Super. 2003). The basic requisite for the admissibility of any evidence in a case is that it be competent and relevant. ***Id***. Though relevance has not been precisely or universally defined, the courts of this Commonwealth have repeatedly stated that evidence is admissible if, and only if, it logically or reasonably tends to prove or disprove a material fact in issue, tends to make such a fact more or less probable, or affords the basis for or supports a reasonable inference or presumption regarding the existence of a material fact. ***Id***.

Furthermore, it is well settled that "[t]he admission of evidence is within the sound discretion of the trial court, and will be reversed on appeal only upon a showing that the trial court clearly abused its discretion." ***Commonwealth v. Miles***, 846 A.2d 132, 136 (Pa. Super. 2004) (*en banc*) (citing ***Commonwealth v. Lilliock***, 740 A.2d 237 (Pa. Super. 1999)). Abuse of discretion requires a finding of misapplication of the law, a failure to apply the law, or judgment by the trial court that exhibits bias, ill-will, prejudice, partiality, or was manifestly unreasonable, as reflected by the record. ***Commonwealth v. Montalvo***, 986 A.2d 84, 94 (Pa. 2009).

> In ***[Commonwealth v.] Randall***, [528 A.2d 1326 (Pa. 1987)], th[e] [Supreme] Court held that 'evidence of prior convictions can be introduced for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statement, and the date of

> conviction or the last date of confinement is within ten years of the trial date.' ***Id.***, 528 A.2d at 1329.
>
> This rule of law is embodied in Pa.R.E. 609[.]

Commonwealth v. Rivera, 983 A.2d 1211, 1226 (Pa. 2009) (footnote and emphasis omitted).

At the relevant time,[1] Rule 609 provided, in pertinent part, as follows:

> **Rule 609. Impeachment by evidence of conviction of crime**
>
> **(a) General rule.** For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, shall be admitted if it involved dishonesty or false statement.
>
> **(b) Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

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[1] We note that during the pendency of this appeal, the Pennsylvania Rules of Evidence have been rescinded and replaced, effective March 18, 2013. However, as set forth in the explanatory comments to the new rules, they now "closely follow the format, language, and style of the amended Federal Rules of Evidence. The goal of the Pennsylvania Supreme Court's rescission and replacement of the Pennsylvania Rules of Evidence was . . . to make its rules more easily understood and to make the format and terminology more consistent, but to leave the substantive content unchanged." ***See*** Explanatory Comments preceding the Pennsylvania Rules of Evidence, at ¶ 2.

Pa.R.E. 609(a) and (b).

We have reviewed the briefs filed on behalf of the parties, the applicable law, the certified record before us, and the thorough opinion of the trial court. It is our conclusion that the trial court's opinion adequately addresses this claim by the Commonwealth and concludes that it lacks merit. We set forth the detailed reasoning of the trial court as follows, and adopt its discussion as our own:

> The Commonwealth also contends that the court erred in denying the portion of its motion in limine which sought to introduce Defendant's prior crimen falsi convictions. Again, the court cannot agree.
>
> As part of his omnibus pretrial motion, Defendant filed a motion in limine seeking to preclude the Commonwealth from introducing his prior criminal record into evidence. Defendant's Omnibus Motion for Pre-trial Relief, page 8, paragraphs 31-33. The basis for this motion was some or all of the convictions were barred by Pa.R.E. 609(b), Commonwealth v. Randall, 515 Pa 410, 528 A.2d 1326 (1987), and Commonwealth v. Jackson, 526 Pa. 294, 585 A.2d 1061 (1991). During the hearing and argument on this motion, the Commonwealth conceded that it couldn't bring in anything regarding the Defendant's prior criminal record. Transcript, June 22, 2010, at pp. 47-49.
>
> The Commonwealth contended that the Court misconstrued the transcript and that it was only conceding that it would not utilize Defendant's prior criminal convictions as prior bad acts evidence under Rule 404(b). It is the Commonwealth's argument, though, that misconstrues the transcript.
>
> There were two motions in limine related to Defendant's prior criminal history. The motion in limine that began on page six of Defendant's omnibus motion related to a statement Defendant made during the investigation to the effect that he would be the "prime suspect" because of his prior criminal history. The motion in limine on page 8 sought to preclude the

Commonwealth from using Defendant's criminal convictions under Pa.R.E. 609. In response to defense counsel's argument on the "prime suspect" motion in limine, the attorney for the Commonwealth stated:

> In the interest of brevity, I of course cannot get any bad acts in of the Defendant, the fact that he was addicted to Percocet or that his criminal record was the reason they were looking at him.
>
> Your Honor, I would just correct Defense on the issue--I mean as I read the testimony by Dr. Molino [sic] at Geisinger, the Defendant said 'I guess that makes me prime suspect number one.' Absolutely zero about his criminal record or anything else. So to the extent that the Court wants to look at that record in deciding that issue, I think you will find that's the case.

Transcript, June 22, 2010, p. 47, lines 8-20. The Court then sought to clarify whether the Commonwealth was just conceding it would not utilize Defendant's prior criminal history with respect to the "prime suspect" motion in limine or whether it was also conceding the motion in limine that claimed the convictions were barred under Pa.R.E. 609(b). The rest of the discussion relevant to this issue is as follows:

> THE COURT: Alright, let me just backtrack somewhat. So if we look at the Defendant's motion in limine, you will agree that you can't bring in anything regarding the Defendant's criminal record, prior criminal convictions. None of them are admissible under our rules of evidence or otherwise at this point.
>
> MS. KILGUS: At this point Your Honor.
>
> THE COURT: Okay.
>
> MS. KILGUS: And also with regard to his consultation, whether or not, why he got an attorney, we can't talk about that.
>
> THE COURT: Right.

> MS. KILGUS: I would agree to that.
>
> THE COURT: **Alright. So you'd agree to what—you agree on the motions in limine set forth on pages eight, nine and ten?**
>
> MS. KILGUS: **Correct.**
>
> THE COURT: The only one we are arguing really arguing about at this point then is the motion in limine set forth on page six. And I guess that the Commonwealth's position is that--well okay.
>
> MR. LAPPAS: I think we are going to have to cite to the preliminary hearing record.
>
> THE COURT: I think you're going to have to cite to exactly the statement that you contend, because it is different, at least in the Court's opinion, it is different to say, "I guess that makes me prime suspect number one," versus, "I guess I have an arrest record and that makes me prime suspect number one."
>
> MR. LAPPAS: I understand. Just so the record is clear, the motion for writ of habeas corpus is obviously under contention, we will brief that.
>
> THE COURT: The motion to sever. As is the motion in limine to exclude statements.
>
> MR. LAPPAS: The rest of them are—
>
> THE COURT: Conceded by the Commonwealth.

Transcript, June 22, 2010, at pp. 47-49(emphasis added). Neither Defendant's motion in limine nor the Court's inquiries limited the discussion to 404(b) evidence. When Ms. Kilgus commented about bad acts, she was discussing the "prime suspect" motion in limine; not the motion in limine under Rule 609(b) on page 8 of Defendant's omnibus motion. Although the motion in limine on page 8 did not specifically utilize the word impeachment, it referenced Rule 609 (which is entitled "Impeachment by evidence of conviction of crime"), as

well as case law concerning the admissibility of convictions that are more than 10 years old. Therefore, the Court rejected the Commonwealth's contention that it was only conceding it would not use Defendant's convictions as prior bad acts evidence under Rule 404(b).

Equity also did not favor allowing the Commonwealth to renege on its concession. For over two years, Defendant believed that the Commonwealth did not intend to introduce his prior criminal history at trial for any purpose whatsoever. Prior to the pre-trial conference, which was held on or about October 30, 2012, Defendant had no idea that his ability to testify in his own defense might be hampered by the introduction of his prior criminal record for impeachment purposes. In this case, the introduction of prior convictions for impeachment could radically alter Defendant's trial strategies and tactics. When the Commonwealth filed its motion in limine on November 2, 2012, it was less than two weeks until jury selection.[3]

> [3] Jury selection was scheduled for either November 13, 2012 or November 15, 2012. The Court believes jury selection was originally scheduled for November 13, but there was some scheduling problem and it was moved to November 15.

The court also did not rule that the convictions would have been admissible if the Commonwealth hadn't conceded the issue. Instead, the court indicated that it was inclined to rule in the Commonwealth's favor and it tended to agree with the Commonwealth. Transcript, November 13, 2012, at p. 31. This issue, though, was more complex than the Commonwealth made it seem.

On January 24, 2000, Defendant entered a guilty plea to multiple charges, including seven counts of burglary under 99-11745 (which in CPCMS would be CP-41-CR-1745-1999) and twenty-one counts of burglary and four counts of theft under 99-11746 (which in CPCMS would be CP-41-CR-1746-1999).[4] On June 29, 2001, Defendant was re-sentenced to an aggregate sentence of 18 to 36 months of incarceration, consisting of three consecutive 6 to 12 month sentences for three counts of burglary under 99-11745, followed by five years of probation for burglary under 99-11746. Defendant received concurrent

sentences on the remaining convictions. Defendant also received credit for time served from October 28, 1999 to December 9, 1999 and from March 21, 2000 onward.

> [4] Defendant was originally sentenced on March 21, 2000, but he filed a Post Conviction Relief Act (PCRA) petition, which resulted in Defendant being re-sentenced on June 29, 2001.

On July 28, 2004, Defendant was brought before the Honorable Nancy L. Butts for a preliminary probation violation hearing under 99-11746. Bail was set at $10,000. Defendant was unable to post bail until August 18, 2004, so he was incarcerated in the Lycoming County Prison from at least July 28, 2004 through August 18, 2004. At his final probation violation hearing on November 3, 2004, Defendant's original sentence was revoked, but he was resentenced to another five years of probation.

The Commonwealth argues that [] all of the crimen falsi convictions in both cases are per se admissible because ten uninterrupted years have not elapsed since Defendant's release from confinement. The Court cannot agree.

* * *

When the Commonwealth filed its motion on November 2, 2012, it was clearly more than 10 years from the date of Defendant's convictions. According to the Commonwealth's motion, Defendant was released from confinement under 99-11745 "no later than his max date which would have been approximately January 2003." Commonwealth's motion in limine, page 9, paragraph 7. This, however, does not indicate when Defendant was actually released from confinement. Inmates frequently get paroled. If the Commonwealth's calculations regarding Defendant's max date are correct, Defendant would have been eligible for parole and could have been released from confinement as early as June of 2001. The Commonwealth did not present any evidence to show when Defendant was actually released from confinement.

Under 99-11746, all the sentences of confinement were for terms of 6 to 12 months or less and were to be served

concurrently to case 99-11745. Therefore, Defendant maxed out on all of those sentences on or about March 21, 2001.[5] On two counts of burglary, Defendant was sentenced to five years of probation. This probationary sentence was to be served consecutively to case 99-11745. Although Defendant was charged with a probation violation, he was not re-sentenced to confinement, but another five year term of probation.

> [5] Although Defendant was not re-sentenced until June 29, 2001, his original sentencing date was March 21, 2000 and he was continuously incarcerated as a result of that sentencing hearing, which is the reason why he was entitled to credit from March 21, 2000 onward.

The Commonwealth argues that because Defendant did not post bail on his [] probation violation until August 18, 2004 and he was incarcerated in the Lycoming County Prison for about three weeks that all of the convictions under case 99-11746 are per se admissible. The Court cannot agree.

As previously noted, all the convictions except the two burglary convictions for which Defendant received a probationary sentence maxed out in 2001. At most, if the Commonwealth prevailed on its argument, the Court would only have permitted the Commonwealth to utilize the burglary convictions for Count 103 and Count 108 under 99-11746. When the Court examined the Commonwealth's argument in more detail, however, it had some concerns with the Commonwealth's position. Defendant was never sentenced to confinement for those burglary counts; he simply failed to make bail. If the Commonwealth prevailed in its position, it would result in disparate treatment of individuals based solely on their economic station in life. In other words, criminal convictions would be admissible for a longer period of time against the poor who are unable to post bail on their pending probation or parole violations, but not the wealthy. Furthermore, if the Commonwealth's position is taken to its logical extreme, a defendant who failed to post bail but prevailed at the probation or parole violation hearing would be subject to an extended period of admissibility of his crimen falsi convictions.

Nevertheless, if the Commonwealth had not conceded the issue when it was raised in Defendant's omnibus pre-trial motion and had not waited until after the pre-trial conference to let anyone know that it wanted to change its position, the Court was inclined to permit the Commonwealth to introduce evidence that Defendant had been convicted of burglaries in 2001 without referring to the number of convictions or the fact that they were felonies, based on the Commonwealth's alternative argument that under the facts and circumstances of this case their probative value outweighed their prejudicial effect.

The prior convictions clearly reflect upon the veracity of Defendant. If the Commonwealth did not refer to the number of the convictions or their felony grading, the convictions would provide a legitimate reason for discrediting him as an untruthful person without having a tendency to smear the character of Defendant or suggest a propensity to commit the crimes for which he stands charged. Although Defendant was only 18 or 19 years old when he committed his prior offenses, the Court does not think this fact would render the convictions inadmissible. Given the age of the convictions, the Court believes the jury would realize that Defendant was a young adult when he committed those offenses. Furthermore, the Commonwealth's case is based on circumstantial evidence. The child was too young when the injuries were caused to ever be able to identify his attacker or testify as to what happened, and the Commonwealth has no direct evidence or eyewitness testimony to show exactly when the injuries occurred or who caused them. Therefore, if Defendant testifies at trial, his credibility will be a significant issue. The Commonwealth only has limited alternatives to attack Defendant's credibility. If Dr. Bellino testifies consistent with his testimony at the preliminary hearing, he will testify that the child's injuries were not the result of accidental causes and that the bruising could not have been caused by a dog sitting on the child's head, but this evidence does not address the question of who caused the child's injuries.

If the Commonwealth hadn't conceded Defendant's motion to preclude this evidence and it had raised the issue in a timely manner, the Court would have been inclined to allow some limited evidence regarding Defendant's prior criminal convictions. When the Commonwealth filed its motion, however, it had been nearly three years since the filing of the charges, it

> was after the pre-trial conference, and jury selection was less than two weeks away. Under these circumstances, the Court does not believe it abused its discretion in denying the Commonwealth's motion in limine with respect to Defendant's prior criminal convictions.

Trial Court Opinion, 4/26/13, at 11-19 (footnotes in original). Accordingly, having discerned no abuse of discretion by the trial court with regard to this issue, we affirm the trial court's order denying the Commonwealth's motion *in limine* pertaining to Appellee's prior convictions.

Moreover, to the extent that the Commonwealth now argues to this Court that its motion *in limine* should be deemed a motion to vacate its prior stipulation with regard to the admissibility of Appellee's prior convictions, and further requests a remand to the trial court to hold a hearing regarding whether the assistant district attorney was aware that she entered into the stipulation, we note that such points were never raised before the trial court. It is undisputed that claims not raised before the trial court are waived.

Pursuant to Pennsylvania Rule of Appellate Procedure 302, "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). We have long held that "[a] claim which has not been raised before the trial court cannot be raised for the first time on appeal." ***Commonwealth v. Lopata***, 754 A.2d 685, 689 (Pa. Super. 2000). ***See Commonwealth v. Ryan***, 909 A.2d 839, 845 (Pa. Super. 2006) (noting that "[a] theory of error different from that presented to the trial jurist is waived on appeal, even if both theories support the same basic

allegation of error which gives rise to the claim for relief."). Thus, only claims properly presented in the trial court are preserved for appeal. Here, we are constrained to conclude that such arguments and requests by the Commonwealth are waived because the Commonwealth failed to present them to the trial court in the first instance.

We next consider the Commonwealth's second issue, that the trial court erred in denying the Commonwealth's motion *in limine* seeking to admit transcripts from dependency hearings. Specifically, the Commonwealth contends that during a hearing regarding the dependency of Child, Appellee and Child's mother stipulated, by adoption, to the fact that the physical injuries suffered by Child occurred while Child was in the care of Appellee and Child's mother. The Commonwealth asserts that the stipulation was reduced to a court order and that the hearing transcript should be admissible at Appellee's criminal trial. Essentially, the Commonwealth argues that Appellee's acceptance of the stipulation, although hearsay, was admissible. We are constrained to agree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pennsylvania Rule of Evidence 801(c). ***Commonwealth v. Smith***, 586 A.2d 957, 963 (Pa. Super. 1991). Hearsay testimony is *per se* inadmissible in this Commonwealth, except as provided

in the Pennsylvania Rules of Evidence, by other rules prescribed by the Pennsylvania Supreme Court, or by statute. Pa.R.E. 802.

The admission by party-opponent exception to the hearsay rule is addressed in Pennsylvania Rule of Evidence 803(25), which provided, in relevant part prior to its amendment, as follows:

> The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> **(25) Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth.

Pa.R.E. 803(25). The Comment to Rule 803(25) offered the following additional information:

> B. Adoptive admission. Pa.R.E. 803(25)(B) is consistent with Pennsylvania law. ***See Commonwealth v. Cheeks***, 239 A.2d 793 (Pa. 1968) (party expressly adopted statement); ***Commonwealth v. Coccioletti***, 425 A.2d 387 (Pa. 1981) (party impliedly adopted statement by failing to deny truth of a statement that party would be expected to deny under circumstances).

Pa.R.E. 803(25)(B), Cmt. ***See also Commonwealth v. Ferguson***, 516 A.2d 1200 (Pa. Super. 1986) (holding that a party's testimony in another proceeding may be admitted as a party admission). Moreover, our Supreme Court has explained that the statements of a criminal defendant are "not barred by the hearsay rule because a defendant's out-of-court statements

fall within the party admission exception to the hearsay rule." ***Commonwealth v. Laich***, 777 A.2d 1057, 1060 (Pa. 2001).

Our review of the record reflects the following. On December 16, 2009, a hearing was held on a dependency petition filed by Children and Youth in the interests of Child and a transcript of the proceedings was produced. Appellee and Child's mother were both represented by counsel at the hearing. The dependency allegations were based upon the allegation that Child suffered physical abuse, and that Appellee and Child's mother were responsible for that abuse either by acts of commission or omission. N.T., 12/16/09, at 2.

On January 13, 2010, another dependency hearing was held, and a transcript of the proceedings was also produced. At the second hearing, a finding of dependency was entered in which both Appellee and Child's mother agreed to relinquish physical custody of Child for an indeterminate period of time. Under the terms of the stipulation, the parents were allowed only supervised contact with Child. Also added to the stipulation was a finding "that there were injuries to the child while the child was in the custody, care, and control of the parents," and those injuries were the basis for the dependency. N.T., 1/13/10, at 4. The stipulation specified that the injuries to Child were identified by Dr. Paul Bellino in the previous hearing on December 16, 2009.

Appellee testified at the January 13, 2010 hearing and stated that he was agreeable to the stipulation being entered as a court order. N.T., 1/13/10, at 5-6. Likewise, Child's mother testified and stated that she was agreeable to the stipulation being entered as a court order. ***Id***. at 6-7. Thus, by agreeing to the stipulation, both Appellee and Child's mother admitted that the injuries described by Dr. Bellino happened while Child was under their custody, care, and control.

The transcripts contain adoptive admissions by Appellee pursuant to Pa.R.E. 803(25)(B). Statements made by Appellee in agreement with the stipulation are admissible against him under the party-opponent exception to the hearsay rule. Hence, all statements and/or terms made part of the stipulation are admissible against Appellee because he adopted the stipulation as true. Accordingly, we conclude that the trial court erred in determining otherwise.

Moreover, to the extent that the trial court further reasoned that the admissions in the transcripts lack probative value and that they would only serve to confuse the jury, we conclude that such determinations are in error. Pennsylvania Rule of Evidence 402 provides that generally, "[a]ll relevant evidence is admissible," and "[e]vidence that is not relevant is not admissible." Pa.R.E. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is consequence to the

determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. However, pursuant to Rule 403, prior to its recent amendment, relevant evidence "may be excluded if its probative value is outweighed by the danger of unfair prejudice[.]" Pa.R.E. 403. The comment to Rule 403 defined "unfair prejudice" as "a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403, Cmt.

Thus, in determining whether evidence should be admitted, the trial court must weigh the relevance and probative value of the evidence against the prejudicial effect of that evidence. ***Commonwealth v. Barnes***, 871 A.2d 812, 818 (Pa. Super. 2005). Although relevance has not been precisely or universally defined, the courts of this Commonwealth have repeatedly stated that evidence is admissible if, and only if, the evidence logically or reasonably tends to prove or disprove a material fact in issue, tends to make such a fact more or less probable, or affords the basis for or supports a reasonable inference or presumption regarding the existence of a material fact. ***Freidl***, 834 A.2d at 641.

Additionally, when weighing the potential for prejudice, a trial court may consider how a cautionary jury instruction might ameliorate the prejudicial effect of the proffered evidence. Pa.R.E. 404(b), Cmt.

Furthermore, our Supreme Court has noted previously that "[e]vidence will not be prohibited merely because it is harmful to the defendant." ***Commonwealth v. Dillon***, 925 A.2d 131, 138–139 (Pa. 2007). "[E]xclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." ***Commonwealth v. Owens***, 929 A.2d 1187, 1191 (Pa. Super. 2007) (citing ***Commonwealth v. Broaster***, 863 A.2d 588 (Pa. Super. 2004)).

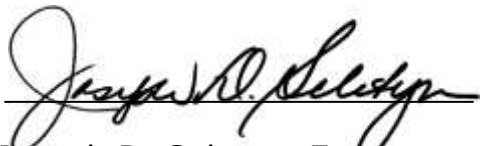
As discussed above, the transcripts and stipulation, which establish that Child suffered his injuries while in the presence of Appellee and Child's mother, was relevant and probative to identify Child's assailant. Accordingly, the evidence is relevant and probative. We disagree with the trial court's determination that the transcripts and stipulation were not admissible. Rather, we conclude that they are relevant and would assist the jury in understanding the facts of this case. Thus, it is our determination that the trial court abused its discretion in failing to accept the transcripts and stipulation into evidence.

Likewise, we discern no circumstance where an innuendo with regard to the transcripts and stipulation could "inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." ***Owens***, 929 A.2d at 1191. We note that the trial court could offer a

cautionary instruction to the jury pertaining to the transcripts and stipulation. Hence, we conclude further that the trial court abused its discretion in reaching a contrary determination.

Appellee's motion to quash is denied. The trial court's order of December 11, 2012, which denied the Commonwealth's motion to admit prior convictions, is affirmed. The trial court's order of November 13, 2012, which denied the Commonwealth's motion to admit transcripts, is reversed. Case remanded for further proceedings. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/10/2013