NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CLARK EMMANUEL MEAD, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2239 MDA 2012

Appeal from the Judgment of Sentence of September 27, 2012
In the Court of Common Pleas of Schuylkill County
Criminal Division at No(s): CP-54-CR-0000306-2012.

BEFORE: MUNDY, OLSON AND STRASSBURGER,* JJ.

MEMORANDUM BY OLSON, J.: **FILED DECEMBER 13, 2013**

Appellant, Clark Emmanuel Mead, Jr., appeals his judgment of sentence entered on September 27, 2012, as made final by the denial of his post-sentence motion on November 26, 2012. We affirm.

The trial court summarized the background facts of this case in the following manner:

> [Appellant was the boyfriend of the mother of the minor male victims, ZA and IA, with whom he resided along with their mother.] When the mother was at work, the children were left in [Appellant's] care. Eventually, the mother and [Appellant] split up. One month after [Appellant] moved out of the residence, the older of the two boys began to tell his mother what [Appellant] had done, and the mother reported the allegations to the police.
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> The events occurred during the last few months of 2005 and the first half of 2006. ZA was five [years old] at the time. He testified that he, his younger brother, IA, and his half-brother, CM, lived with his mother and [Appellant]. ([Appellant] and the boys' mother are the natural parents of CM, who is younger than

*Retired Senior Judge assigned to the Superior Court.

both complainants). [ZA] testified [that he was] called into [Appellant's] bedroom, where [Appellant] forced him to perform oral sex on [Appellant] and then [Appellant] performed anal sex on ZA. He could not say exactly how often these assaults occurred other than to say it was more than once. Each time, when [Appellant] was done with him, [Appellant] instructed him to return to the bedroom he shared with IA and to send IA to [Appellant]. He testified that the assaults did not occur the same way each time. Sometimes he was only required to put his mouth on [Appellant's] penis; sometimes he was assaulted anally; and sometimes both occurred.

ZA testified that the same things happened to him on occasion when he and [Appellant] were alone in the living room of their residence. He testified that his mother was at work when all of the assaults occurred, and no one else was home except his brothers. He also testified that he did not tell anyone at the time because each time he was assaulted, [Appellant] threatened to hurt him if he told anyone.

IA, who was four [years old] when the events occurred, testified that almost daily while his mother was at work, he would be required to join [Appellant] in the bedroom [Appellant] shared with his mother. No one was home but him and his brothers. He testified that CM was only months old at the time. [During each assault, IA] was required to [perform oral sex on Appellant; then Appellant performed oral sex on IA; and finally, Appellant would perform anal sex on IA.] [IA] also testified that occasionally, when the boys were in the living room watching television with [Appellant], [Appellant] made him perform oral sex on [Appellant] and then watch while ZA was [forced] to do the same. Whenever, he was made to perform oral sex on [Appellant], IA testified that [Appellant] "peed" in his mouth and told him to swallow it; but he always spit it out in the sink. Each time he was assaulted, [Appellant] threatened to hurt him if he told anyone.

[R.G. "Aunt"], the mother's aunt, testified that the mother brought all three boys to live with her near the end of April of 2006. The mother told [Aunt] that the boys had been abused and asked [Aunt] to take them to the county's Children and Youth Agency [("CYA")]. Shortly thereafter[,] the mother abandoned the boys, and [Aunt] was given kinship custody of [ZA, IA, and CM.]

> ZA had been interviewed very briefly by a representative of [CYA]. During this interview, ZA said that he and IA were forced to perform oral sex on [Appellant] while in his bedroom, that stuff came out of [Appellant's] penis into their mouths, and that they had to spit it out into a sink. [ZA] did not mention [] anal sex [during the interview].
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> Both [ZA and IA] were also interviewed by the Children's Resource Center [("CRC")]. ZA told CRC that he was forced to perform oral sex and subjected to anal sex. IA told [] CRC that [Appellant] had only touched him and ZA inappropriately with his hand.
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> [Aunt], who had taken [ZA and IA] for these interviews, testified that IA told her on the way home that he had not told the interviewer everything because he was afraid, but that he was no longer afraid. [Aunt] called [CYA] when they got home, and a couple of days later [IA] was reinterviewed at the local police station.

Trial Court Opinion, 11/26/12, at 1-4.

Based upon the foregoing events, the McAdoo Police Department, on December 21, 2011, filed a criminal complaint that charged Appellant with six counts of involuntary deviate sexual intercourse with a child, six counts of indecent assault, two counts of corruption of minors, and two counts of endangering the welfare of a child. Following a preliminary hearing convened on February 23, 2012, the district magistrate bound all charges over to the Schuylkill County Court of Common Pleas.

At the conclusion of trial on June 5, 2012, a jury found Appellant guilty of six counts of involuntary deviate sexual intercourse with a child, six

counts of indecent assault (person less than 13 years of age), two counts of corruption of minors, and two counts of endangering the welfare of a child.[1] Thereafter, on September 27, 2012, the trial court sentenced Appellant to 27½ - 54 years' imprisonment in a state correctional facility.[2] Appellant filed a motion for post-sentence relief on October 8, 2012 alleging that the jury's verdict was against the weight of the evidence. The trial court denied Appellant's motion on November 26, 2012. Appellant filed a timely notice of appeal on December 24, 2012.[3]

In his brief, Appellant raises the following issues for our review:

> Did the trial court err by granting the Commonwealth's pre-trial motion to exclude evidence concerning a [CYA] investigation?
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> Did the trial court err in allowing testimony of the minor child victims when their competency had not been sufficiently established?
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> Did the trial court err by allowing into evidence photographs of the minor child victims showing them at [four and five years old], and further err by allowing the photographs to be provided to the jury during their deliberations?
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> Did the trial court err by sustaining [the] Commonwealth's objection to defense counsel's attempt to use prior taped statements of the minor child victims to impeach their credibility during cross-examination?

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[1] 18 Pa.C.S.A. §§ 3123(B), 3126(A)(7), 6301(A)(1), and 4304(A)(1), respectively.

[2] In addition, the trial court classified Appellant as a sexually violent predator pursuant to Megan's Law.

[3] The requirements of Pa.R.A.P. 1925 have been satisfied in this case.

> Was the evidence at trial sufficient to support [Appellant's] conviction[s]?
>
> Did the trial court err by denying [Appellant's] [p]ost[-]sentence [m]otion?

Appellant's Brief at 3-9.[4]

In his first issue, Appellant challenges the trial court's order granting the Commonwealth's motion *in limine* to exclude evidence relating to a 2006 hearing before an administrative law judge. The issue arose as follows. In 2006, CYA interviewed the minor victims and issued a finding that abuse was indicated. Appellant challenged the finding before an administrative law judge. Because the victims failed to appear for the hearing, Appellant's challenge was sustained and the finding was expunged. On May 25, 2012, the Commonwealth moved *in limine* to exclude evidence regarding the CYA investigation, the subsequent finding of indicated abuse, and Appellant's ensuing appeal.

On June 1, 2012, the trial court held a hearing in chambers to address the Commonwealth's motion. Counsel for Appellant argued that the victims' failure to appear was relevant in assessing their credibility because "[it represented] an opportunity for them to put forth their case to make their allegations, and they chose not to take it, and I think the lack of coming

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[4] We have re-ordered Appellant's claims to facilitate a more logical discussion of the issues.

forth with allegations when you have an opportunity to make them is relevant." N.T., 6/1/12, at 2. Counsel conceded, however, that he had no evidence that the minor victims, or more importantly an adult charged with their care, had any notice of the administrative law hearing. ***Id*.** at 4. For this reason, and because the court found the victims' failure to appear at the administrative proceeding too tenuous and collateral to be probative of their credibility, the court granted the Commonwealth's motion. ***Id*.** at 8. Appellant repeats counsel's prior contentions in this appeal and alleges that the trial court abused its discretion in granting the Commonwealth's motion *in limine*. ***See*** Appellant's Brief at 15-16.

"The decision to admit or exclude evidence is committed to the trial court's sound discretion, and its evidentiary rulings will only be reversed upon a showing that it abused that discretion." ***Commonwealth v. Wright***, 2013 WL 5827195 at *13 (Pa. 2013). Under Pa.R.E. 607(b), "the credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these Rules." Pa.R.E. 607(b). Rule 401 explains that "evidence is relevant if: a) it has any tendency to make a fact more or less probable than it would be without the evidence; and b) the fact is of consequence in determining the action." Pa.R.E. 401. "Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason,

experience, scientific principles and the other testimony offered in the case." ***Id*.** cmt.

In this case, the trial court found that the victims' failure to appear at the administrative hearing was not probative of their credibility, or lack thereof. There was no evidence that either the victims, or their guardian, had notice of the proceeding. Moreover, in the trial court's view, there was no proof that the victims failed to appear before the administrative law judge because they previously had made false allegations. As the trial court noted in its Rule 1925(a) opinion, "the children had no control over their appearance or non-appearance." Trial Court Opinion, 1/30/13 at 3. We agree with the trial court's conclusions and discern no abuse of discretion. Thus, Appellant's first claim fails.

In his second issue, Appellant asserts that the trial court erred in determining the competency of the minor victims to testify in this matter. Specifically, Appellant argues that, "in light of the fact that the events in question occurred six to seven years prior to trial, [the court's] line of inquiry to determine competency of [the minor child witnesses was] woefully inadequate." Appellant's Brief at 19. Appellant's thus concludes that "[t]he questioning of the trial court of the minor children therefore amounts to an abuse of discretion by the trial court and constitutes reversible error." ***Id*.** at 19-20.

Our Supreme Court has previously described the trial court's obligation to assess the competency of children under the age of fourteen to testify in a judicial proceeding.

> Although competency of a witness is generally presumed, Pennsylvania law requires that a child witness be examined for competency. As we have recently reiterated, this Court historically has required that witnesses under the age of fourteen be subject to judicial inquiry into their testimonial capacity. A competency hearing of a minor witness is directed to the mental capacity of that witness to perceive the nature of the events about which he or she is called to testify, to understand questions about that subject matter, to communicate about the subject at issue, to recall information, to distinguish fact from fantasy, and to tell the truth. In Pennsylvania, competency is a threshold legal issue, to be decided by the trial court.

Commonwealth v. Hutchison, 25 A.3d 277, 289-290 (Pa. 2011) (internal citations and quotations omitted); ***see also*** Pa.R.E. 601.

Although Appellant challenges the adequacy of the trial court's inquiry into the victims' competency to testify, he does not specify how the court's inquiry was lacking. Here, the court conducted a competency hearing before the jury was brought in to the courtroom because both victims were under the age of fourteen. Trial Court Opinion, 1/30/13, at 3. At this hearing, the trial court inquired into the victims' ability to recall past events and their understanding of the need to tell the truth. N.T., 6/4/12, at 4-7. At the conclusion of the trial court's questioning, Appellant's counsel advised that he had no additional questions for the victims. ***Id.*** at 7. Moreover, at a prior in-chambers proceeding, counsel confided that he had seen the victims testify on several occasions and he was confident that they would be found

competent to testify. N.T., 6/1/12, at 9-10. In addition, counsel stated that he had no evidence that the victims' testimony had been tainted. ***Id.***; ***Commonwealth v. Delbridge***, 855 A.2d 27 (Pa. 2003) (because of children's susceptibility to suggestions and fantasy, a child witness can be rendered incompetent to testify where unduly suggestive interview techniques corrupt child's memory and impair his ability to testify truthfully). Under these circumstances, we are satisfied that Appellant's competency challenge merits no relief.

Appellant's next claim alleges that the trial court erred in admitting school photographs of the victims and in permitting the jury to take those photographs into its deliberations. During the Commonwealth's case-in-chief, Aunt offered testimony regarding photographs of the minor victims. One photograph depicted ZA at age five and the other depicted IA at age four. Over the objection of defense counsel, the court admitted both photographs into evidence and sent them out with the jury during its deliberations. On appeal, Appellant maintains that, because the ages of the victims were not in dispute, the photographs possessed no probative value. Alternatively, Appellant asserts that, even if the photographs had marginal probative value, that value was easily outweighed by the danger of unfair prejudice.

In relevant part, Pa.R.E. 403 states:

> The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair

> prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Pa.R.E. 403. The comment to Rule 403 defines "unfair prejudice" to mean "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." ***Id.*** at cmt.

The trial court offered the following reasons for admitting the photographs and permitting the jury to take the evidence into the deliberation room:

> The victims were four and five years old at the time of the offenses. [Appellant] argues that the court erred in allowing the Commonwealth to present school photo[graphs] of the victims taken during the same period. The Commonwealth wanted to show the jury the size and physical maturity of the boys at th[e] time of the offense, since they were six years older at the time of trial. [Appellant] also claims error in allowing their photo[graphs] to go out with the jury.
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> The assaults were alleged to have occurred over a span of approximately eleven months before one of the children told anyone. The photo[graphs] gave the jury an understanding of the size and maturity of the children at the time. That was relevant to how they could feel intimidated by [Appellant]. There was no prejudice to [Appellant] by allowing the jury to see the appearance of the victims at the time of the assaults.

Trial Court Opinion, 1/30/13, at 2. We concur with the trial court's assessments and therefore deny relief on Appellant's claim that the trial court erred in admitting the school photographs of the child victims.

Appellant's next issue alleges that the trial court erred in sustaining the Commonwealth's objection to defense counsel's attempt to use a prior

taped statement to impeach ZA's credibility during cross-examination. At trial, ZA acknowledged discussing Appellant's assaults in September 2011 when he was interviewed at the CRC in Harrisburg. On cross-examination, counsel for Appellant asked ZA about his CRC interview. ZA responded that he recalled giving a statement during his interview at the CRC, but he did not recall what he said. When Appellant's counsel sought to play a videotape of ZA's CRC interview, the trial court prohibited this effort and ruled that, although counsel could show the video to the jury, he could not do so during cross-examination of ZA. Ultimately, the trial court permitted defense counsel to play the video for the jury. In addition, the jury was instructed that, in evaluating the credibility of the witness, it could consider inconsistencies between the victim's statements at the CRC interview and his testimony at trial. As "[i]t is well[-]settled the trial court has the discretion to determine the scope and limits of cross-examination and that this Court cannot reverse those findings absent a clear abuse of discretion or an error of law," ***Commonwealth v. Washington***, 63 A.2d 797, 805 (Pa. Super. 2013), we fail to discern reversible error in the present circumstances. Hence, this claim fails.

Appellant next asserts that the trial court erred in sustaining the Commonwealth's objection to trial counsel's effort to refresh a defense witness' recollection with a letter regarding a 2006 interview with one of the minor victims. At trial, Appellant called Dale Osenbach, a child protective

services investigator who was employed by Schuykill County CYA in 2006. Mr. Osenbach accompanied the victims to interviews at the CRC in Harrisburg where he witnessed their statements. During direct examination, counsel sought to elicit Mr. Osenbach's recollection as to statements made by one of the victims during a CRC interview on April 20, 2006. Because Mr. Osenbach could not recall the victim's statements, defense counsel sought to refresh his recollection by referring to a letter Mr. Osenbach authored on May 3, 2006 which summarized the victims' statements for the Pennsylvania State Police. The trial court sustained the Commonwealth's objection to defense counsel's effort. The court reasoned that, because Mr. Osenbach's letter was written 13 days after the victim's CRC interview, it was insufficiently reliable to refresh the witness' recollection. ***See*** Trial Court Opinion, 1/30/13, at 6.

Under Pa.R.E. 612, a witness may use a writing or other item to refresh his recollection for the purpose of testifying. Pa.R.E. 612(a). If a witness uses a writing to refresh his memory while testifying, an adverse party is entitled to inspect the writing, to cross-examine the witness about it, and to introduce any portion that relates to the witness' testimony. Pa.R.E. 612(b)(1). Relying on Rule 612, Appellant claims that "[s]o long as the Commonwealth is provided with a copy of the writing, the right to refresh using the writing is absolute[]" and the trial court committed reversible error. Appellant's Brief at 25.

While we conclude that the trial court erred in precluding counsel's effort to refresh Mr. Osenbach's recollection, we hold that Appellant is not entitled to relief. ***See Commonwealth v. Housman***, 986 A.2d 822, 839 (Pa. 2009) (an erroneous evidentiary ruling does not compel relief where the error is harmless). In this case, Appellant's overall trial strategy was to challenge the credibility of his accusers by pointing to the lack of physical evidence, the inconsistencies in the victims' testimony, and the passage of time since the alleged attacks. Appellant was able to place evidence before the jury which supported these claims and the trial court's refusal to permit Mr. Osenbach to refresh his recollection was not a significant impediment to this strategy. Accordingly, Appellant's claim does not warrant a new trial.

Appellant's next issue alleges that the evidence was insufficient to support his convictions. In advancing his sufficiency challenge, Appellant relies upon the absence of physical evidence, as well as inconsistencies in the record. Specifically, Appellant points out that the Commonwealth offered no physical proof of any attack and that, between 2006 and 2011, ZA's testimony changed in that he began to allege daily assaults and anal rape by Appellant. Appellant's Brief at 13-14. Similarly, Appellant adds that IA first mentioned anal sex at the preliminary hearing and again at trial, although he had never described such conduct previously. ***Id.*** at 14. In view of the absence of physical evidence, the inconsistencies in the victims' testimony, and the elapsed period between the alleged abuse and the time

of trial, Appellant contends that "the evidence as a whole cannot be deemed credible and therefore is insufficient to sustain [A]ppellant's conviction[s]." ***Id*.** at 15.

We address sufficiency challenges under a well-established standard of review:

> The standard we apply in reviewing the sufficiency of evidence 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 factfinder 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 that of 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 a 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. . . . Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Bowen, 55 A.3d 1254, 1260 (Pa. Super. 2012).

As a preliminary matter, we note that Appellant fails to specify which elements of which offenses were unproved at trial. On this basis alone, Appellant has arguably failed to properly develop his sufficiency challenge. ***See Commonwealth v. Manley***, 985 A.2d 256, 262 (Pa. Super. 2009) (appellant waived review of sufficiency challenge where, among other things, argument section of brief did not specify which elements of offenses were unproven), *appeal denied*, 996 A.2d 491 (Pa. 2010). Even if we were to

reach the merits of Appellant's sufficiency challenge, we would conclude, based upon our review of the certified record, the submissions of the parties, and the trial court's opinions, that the evidence was more than sufficient to support Appellant's convictions. Hence, this claim merits no relief.

Appellant's final claim asserts that the trial court erred in failing to grant his post-sentence motion for a new trial, which alleged that the jury's verdict was against the weight of the evidence. In support of this claim, Appellant refers us to the contentions he levels in support of his sufficiency challenge. ***See*** Appellant's Brief at 25. We apply the following principles to Appellant's weight of the evidence claim:

> When the challenge to the weight of the evidence is predicated on the credibility of trial testimony, our review of the trial court's decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, these types of claims are not cognizable on appellate review. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

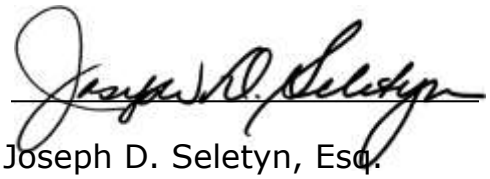
Commonwealth v. Trippett, 932 A.2d 188, 198 (Pa.Super. 2007) (internal quotations and citations omitted).

The trial court considered Appellant's weight of the evidence claim in resolving Appellant's post-trial motion, and deemed the claim to lack merit. ***See*** Trial Court Opinion, 11/26/12, at 4. We discern no abuse of discretion in this determination. The jury's choice to believe the minor victims'

testimony regarding the relevant events was purely within its discretion and will not be disturbed on appeal. Indeed, considering the voluminous evidence presented against Appellant at trial, we agree with the trial court that the verdict in this matter does not shock one's sense of justice. Therefore, we hold that Appellant's weight of the evidence claim is without merit.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013