NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KEVIN B. JOHNSON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 42 WDA 2013

Appeal from the Judgment of Sentence of August 31, 2012
In the Court of Common Pleas of Butler County
Criminal Division at No(s): CP-10-CR-0000721-2008

BEFORE: PANELLA, OLSON AND MUSMANNO, JJ.

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

Appellant, Kevin B. Johnson, appeals from the judgment of sentence entered on August 31, 2012, following his jury conviction for 20 sexual offenses with a minor. We affirm.

We briefly summarize the facts and procedural history of this case as follows. On February 20, 2008, police arrested Appellant and charged him with 48 crimes regarding alleged improper sexual activity with two juvenile male students at Seneca Valley High School. Appellant was employed as a junior Reserve Officers' Training Corps (ROTC) instructor. On August 29, 2008, Appellant filed a motion to sever the causes of action into two separate proceedings related to each of the two students allegedly involved, R.M. and J.M. On November 5, 2008, the trial court denied the motion to sever. The case proceeded to a jury trial, following which the jury acquitted

Appellant of all charges related to R.M., but convicted him of 20 crimes[1] related to J.W. The trial court sentenced Appellant on August 31, 2012 to an aggregate term of incarceration of 135 to 270 months. This timely appeal resulted.[2]

On appeal, Appellant raises the following issues for our review:

> I. Whether the trial court erred in denying [Appellant's] motion to sever where the Commonwealth's evidence consisted of allegations involving two distinct individuals involved in separate transactions and requiring alternate defense theories.
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> II. Whether the trial court erred by allowing hearsay testimony under the prompt complaint statute but then refusing defense counsel's request for a prompt complaint charge where no complaint was made to the authorities until well after the last alleged incident.
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> III. Whether the trial court denied [Appellant] a fair trial by allowing a testifying officer and the prosecutor to repeatedly refer to a complaining witness as "one of the victims" and a "victim."

Appellant's Brief at 3.

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[1] Two counts of indecent assault, four counts of unlawful contact with a minor, four counts of corruption of minors, four counts of endangering the welfare of a child, three counts of indecent exposure, involuntary deviate sexual intercourse, and statutory sexual assault.

[2] Appellant filed a timely notice of appeal. The trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied timely. The trial court filed an opinion pursuant to Pa.R.A.P. 1925(a) on April 9, 2013.

In his first issue presented, Appellant maintains that the trial court erred in failing to sever the charges into two separate trials, one for each complainant. Appellant asserts "[t]he sole connection between the charges relating to J.W. and the charges relating to R.M. is that they were both students at Seneca Valley High School." ***Id.*** at 12-13. He contends that "[o]ne child[, J.W.,] alleged a consensual sexual relationship with [Appellant], while the other[, R.M.,] alleged that [Appellant] forced himself upon him." ***Id.*** at 13. Appellant further argues:

> There was also a high risk that the evidence was not capable of separation by the jury to avoid confusion, and that the jury would cumulate the evidence and infer that [Appellant] is guilty based on propensity alone. Child abuse crimes are highly charged and emotional. The allegations are strongly inflammatory, and the Commonwealth's differing theories required differing responses from [Appellant]. Indeed, if [Appellant's] defense to J.W.'s charges would be that he had consensual sex with J.W., but that J.W. was old enough to consent, thus making the acts not criminal, it would be unduly prejudicial to his denial of any forcible attempts to have contact with R.M. The jury would likely believe that [Appellant] engaged in the acts alleged by R.M. because he admitted to certain legal conduct with J.W. These differing responses may be confused by the jury as inconsistent, thereby creating a false image of [Appellant's] defense as lacking credibility. There was a significant chance that the jury would erroneously conclude that [Appellant] used force on J.W., due to R.M.'s allegations of force.

Id.

Our standard of review is as follows:

> [A] motion for severance is addressed to the sound discretion of the trial court, and ... its decision will not be disturbed absent a manifest abuse of discretion. The critical

> consideration is whether [the] appellant was prejudiced by the trial court's decision not to sever. [The a]ppellant bears the burden of establishing such prejudice.

Commonwealth v. Dozzo, 991 A.2d 898, 901 (Pa. Super. 2010), *citing* ***Commonwealth v. Melendez-Rodriguez***, 856 A.2d 1278, 1282 (Pa. Super. 2004) (*en banc*).

Joinder and severance of criminal matters are governed by Pa.R.Crim.P. 582 and Pa.R.Crim.P. 583, respectively.[3] Our Supreme Court has established the following test for severance matters:

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[3] Pennsylvania Rule of Criminal Procedure 582, provides, in pertinent part:

> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> > (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
> >
> > (b) the offenses charged are based on the same act or transaction.
>
> (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

Pa.R.Crim.P. 582(A)(1) and (2).

Pennsylvania Rule of Criminal Procedure 583 provides:

> The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears

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> Where the defendant moves to sever offenses not based on the same act or transaction...the court must therefore determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

Id. at 902, *quoting* ***Commonwealth v. Collins***, 703 A.2d 418, 422 (Pa. 1997).[4]

Here, the trial court stated:

> Th[e] [severance] issue is without merit, especially in light of the fact that the jury did not convict [Appellant] on any of the counts related to [R.M.] (Counts 1 – 24), but did convict [Appellant] on a majority of the counts related to [J.W.]. The verdicts indicate that the jury clearly distinguished, evaluated and analyzed the evidence related to each victim. Therefore, [Appellant] was not prejudiced, and this issue fails.

Trial Court Opinion, 4/9/2013, at 2.

We agree. In light of the fact that the jury acquitted Appellant of all charges related to R.M., there was no confusion of evidence. Moreover, while Appellant argues that he was potentially forced to employ different and

(Footnote Continued)

> that any party may be prejudiced by offenses or defendants being tried together.

Pa.R.Crim.P. 583.

[4] Appellant is silent as to whether the evidence of each of the offenses would be admissible in a separate trial for the other. Thus, we need not address this aspect of Appellant's severance claim.

opposing defenses with regard to the individual victims, at trial he testified that he did not engage in sexual activity with either complainant. Appellant bore the burden of proving prejudice in denying his request for severance and he did not. Based upon our standard of review, the trial court did not manifestly abuse its discretion and Appellant's first issue fails.

Next, Appellant argues the trial court erred in denying his request for a prompt complaint charge. Appellant's Brief at 14. Appellant claims "there was a substantial delay in the complaining witnesses' reporting their allegations to the authorities." ***Id.*** at 15. As such, Appellant maintains that the trial court erred in denying his request for a jury instruction pursuant to 18 Pa.C.S.A. § 3105. ***Id.*** Appellant contends that the trial court compounded the error by admitting the hearsay testimony of Michael Rill.[5] ***Id.*** Rill testified that R.M. immediately told Rill that Appellant sexually abused R.M. after an alleged incident at school. ***Id.***

Based upon our review of the record, we cannot reach this issue. While Appellant argues on appeal that a prompt complaint charge was required for both complainants, at trial he only requested the charge with

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[5] While Appellant argued that Rill's testimony constituted hearsay before the trial court, on appeal he concedes that "[u]pon review, it appears that Rill's testimony was admissible on the Commonwealth's case in chief under an exception to the hearsay rule relating to prompt complaint of [] alleged sex crimes to other persons." Appellant's Brief at 14. Hence, we need only examine whether the trial court erred by denying Appellant's request for a prompt complaint instruction.

regard to R.M. ***See*** N.T., 12/13/2011, at 3-7; N.T. 12/15/2011, at 2-3. As such, Appellant's claim regarding a prompt complaint charge in relation to J.W. is waived. ***See Commonwealth v. Charleston***, 16 A.3d 505, 527 (Pa. Super. 2011) ("A specific and timely objection must be made to preserve a challenge to a particular jury instruction. Failure to do so results in waiver."). Moreover, as previously noted, Appellant was acquitted of all charges related to R.M. Hence, there is no judicial remedy available to Appellant regarding an alleged failure to issue a prompt complaint charge with regard to R.M. and the issue is moot. ***In re D.A.***, 801 A.2d 614, 616 (Pa. Super. 2002) ("An issue before a court is moot if in ruling upon the issue the court cannot enter an order that has any legal force or effect."). According, Appellant's second issue is waived or otherwise moot.

In his last issue presented, Appellant asserts the trial court deprived him of a fair trial by allowing a police witness and the Commonwealth to refer to the complaining witnesses as "victims" several times throughout trial. Appellant's Brief at 16. He argues "the remarks fixed bias and hostility toward [him] and precluded objective weighing of evidence." ***Id.***

"Every unwise or irrelevant remark made in the course of a trial by a judge, a witness, or counsel does not compel the granting of a new trial." ***Commonwealth v. Faulkner***, 528 Pa. 57, 77, 595 A.2d 28, 39 (1991). Rather, the focus is on what, if any, effects the comments had on the jury. ***Id.*** In examining a claim regarding improper trial comments, our standard of review is whether the trial court abused its discretion. ***Commonwealth***

v. Noel, 53 A.3d 848, 858 (Pa. Super. 2012) (citation omitted). A defendant is not entitled to relief "unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict." ***Id.*** When considering such a claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one, because not every inappropriate remark constitutes reversible error. ***Id.***

In this case, Appellant points to four instances where either the prosecutor or a police witness referred to the complainants as victims. The first two instances occurred when the investigating officer testified that "one of the victims" pointed out specific evidence for collection. N.T., 11/12/2011, at 58. The trial court immediately issued the following cautionary jury instruction:

> [Defense counsel] made an objection in this case to the use of the term victim. This is a problem that we run into sometimes in cases. As I said to you in my preliminary instructions, the defendant is presumed to be innocent and shall remain so throughout the trial. The connotation of the word victim indicates to some that a determination of guilt has been made. I'm not going to get into an issue in this case whenever somebody might inadvertently use the phrase victim, but for the purposes of today, in the police vernacular they are used to referring to people who they come into contact with in crimes as this as victims.
>
> You are the ones that will ultimately decide whether or not the defendant is guilty or not guilty of these charges. And whether the police or some of the other witnesses refer to

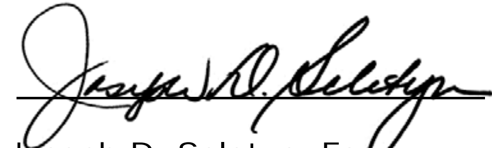
> people as victims, you are not to take any type of negative connotation of guilt whenever we use those phrases.

Id. at 59. The Commonwealth used the term victim twice afterwards – once in a question to the testifying officer and again when the Commonwealth was asked to repeat the question. ***Id.*** at 68-69.

We find no abuse of discretion. The trial court issued a cautionary instruction on the presumption of innocence. The law presumes that the jury will follow the instructions of the court. ***Commonwealth v. Philistin***, 53 A.3d 1, 18 (Pa. 2012). Moreover, all references to the complainants as victims was fleeting and did not fix jury bias to deprive Appellant of a fair trial. Given Appellant's acquittal of all charges related to R.M., we discern the jury was able to weigh the evidence objectively. Appellant's final issue is without merit.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013