NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JAY KENNETH HARTSOCK, JR., Appellant	: : : : : : : : :	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 604 MDA 2012

Appeal from the Judgment of Sentence entered on February 29, 2012
in the Court of Common Pleas of Lycoming County,
Criminal Division, No. CP-41-CR-0001328-2009

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JAY KENNETH HARTSOCK, JR., Appellant	: : : : : : : : :	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 706 MDA 2012

Appeal from the Judgment of Sentence entered on October 7, 2011
in the Court of Common Pleas of Lycoming County,
Criminal Division, No. CP-41-CR-0001414-2009

BEFORE: MUSMANNO, BENDER and COLVILLE*, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: March 18, 2013

Jay Kenneth Hartsock, Jr. ("Hartsock") appeals from the judgment of sentence imposed after he was convicted of twenty-three counts of sexual abuse of children, and one count of criminal use of a communication facility.[1]

[1] 18 Pa.C.S.A. §§ 6312(d), 7512.

*Retired Senior Judge assigned to the Superior Court.

In a consolidated case, he appeals from his conviction of failure to comply with the registration requirements of sexual offenders.[2] We vacate the judgment of sentence of one count of sexual abuse of children and affirm the other judgments of sentence.

The pertinent facts of this case are set forth in the trial court's Opinion, which we adopt for the purpose of this appeal. ***See*** Trial Court Opinion, 7/3/12, at 1-3.

Hartsock raises the following issues on appeal:

> 1. Whether the [trial] court erred in denying the request for acquittal during trial and post sentence motions which stated that the evidence was insufficient for conviction[?]
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> 2. Whether the verdict issued was against the weight of the evidence since the credibility of the lead witness was in question[?]
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> 3. Whether the [trial] court erred in failing to grant a continuance for an expert witness to be able to testify on behalf of the defense and erred in failing to grant a mistrial after a witness referenced probation officers in connection with the defendant[?]
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> 4. Whether the [trial] court issued a sentence that was manifestly excessive and contrary to the fundamental norms underlying the sentencing process[?]
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> 5. Whether the [trial] court erred in determining [Hartsock] to be a sexually violent predator ["SVP"] due to the lack of communication with [Hartsock] about the circumstances of prior offenses[?]

Brief for Appellant at 5.

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[2] 18 Pa.C.S.A. § 4915. We note that Hartsock has raised no issues in his appellate brief related to this conviction. ***See*** Brief for Appellant at 5.

Hartsock first contends that the evidence was insufficient to support his convictions of sexual abuse of children. He asserts that the identity of the person who viewed the pornographic images was not proved beyond a reasonable doubt because all of the images were found in the "Guest" account on Ila Mae Newton's ("Newton") computer. Hartsock also contends that the evidence did not support his conviction of the twenty-third count of sexual abuse of children because the expert was unable to tell if the female in the image was under the age of 18.

Our standard of review of a challenge to the sufficiency of the evidence is as follows:

> When evaluating a sufficiency claim, our standard is whether, viewing all the evidence and reasonable inferences in the light most favorable to the Commonwealth, the factfinder reasonably could have determined that each element of the crime was established beyond a reasonable doubt. This Court considers all the evidence admitted, without regard to any claim that some of the evidence was wrongly allowed. We do not weigh the evidence or make credibility determinations. Moreover, any doubts concerning a defendant's guilt were to be resolved by the factfinder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from that evidence.

Commonwealth v. Kane, 10 A.3d 327, 332 (Pa. Super. 2010).

The charge of sexual abuse of children of which Hartsock was convicted is defined as follows:

> **(d) Child pornography.**--

> (1) Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

18 Pa.C.S.A. § 6312(d)(1). The act of accessing and viewing child pornography over the internet constitutes "control" of such pornography pursuant to 18 Pa.C.S.A. § 6312. ***Commonwealth v. Diodoro***, 932 A.2d 172, 175 (Pa. Super. 2007).

In the instant case, Dr. Pat Bruno ("Bruno"), a pediatrician, testified on behalf of the Commonwealth as an expert in child abuse, including physical, sexual, and emotional abuse. N.T., 4/12/11, at 96. Dr. Bruno testified that he had been trained to use "Tanner Staging," in which physical and sexual characteristics are examined to determine the age of a child. ***Id***. at 97. The prosecutor showed Dr. Bruno each of the pornographic images taken from Newton's computer, and Dr. Bruno gave his estimate of the age of the individuals depicted therein. ***Id.*** at 98-104. Dr. Bruno testified, within a reasonable degree of medical certainty, that each photograph, except for the last one, depicted a child between the ages of 11-14. ***Id.*** For the last image, Dr. Bruno testified that he could not determine the age of the female depicted therein. ***Id.*** at 104. Dr. Bruno gave no opinion as to the age of the female in that photograph. ***Id.***

Agent Ronald Bachman ("Bachman") of the Williamsport Bureau of Police testified that he had retrieved the photographs that were shown to Dr.

Bruno at trial from the computer seized from Newton's residence. ***Id.*** at 120. The record shows that Agent Bachman seized twenty-three images from that computer. ***See id.*** at 122-33.

The record shows that Dr. Bruno was unable to conclude that the last of the photographs shown to him included a depiction of a minor child under the age of 18. ***See id.*** at 104. Therefore, the evidence was insufficient, for that reason, to support one of Hartsock's twenty-three convictions of sexual abuse of children. Accordingly, we vacate Hartsock's conviction and sentence at Count twenty-three, the last charge of sexual abuse of children against Hartsock.

We note that the trial court's sentences for counts six through twenty-three of sexual abuse of children were imposed to run concurrently with each other and concurrent with the sentences imposed at Counts 1 through 5. Therefore, we conclude that it is unnecessary to remand for re-sentencing with regard to this conviction. ***See Commonwealth v. Lomax***, 8 A.3d 1264, 1268-69 (Pa. Super. 2010) (holding that, when this Court can vacate a sentence without disturbing the overall sentencing scheme, there is no need to remand for re-sentencing).

With regard to Hartsock's issue of whether the Commonwealth established that he was the person who had accessed the child pornography images, the record shows that Agent Bachman testified that he did a full forensic examination on the computer seized from Newton's home on August

17, 2009, and obtained from the computer the images that Dr. Bruno had identified as child pornography. N.T., 4/12/11, at 120. All of the child pornography images were accessed on June 18, 2009. ***Id.*** at 123-33. Bachman further testified that, by investigating the internet history on Newton's computer, he was able to obtain information that implicated "someone." ***Id.*** at 134.

Bachman testified that none of the photos of child pornography that were shown to the jury in this case came from the "Ila" account. N.T., 4/13/11, at 10. Bachman stated that all of those child pornography photos came from the "guest" account. ***Id.***; ***see also*** N.T., 4/12/11, at 123. Bachman further testified that, when he conducted a search of the internet history, it revealed that a "fling" account was accessed from the "guest" account on June 1, 2009. N.T., 4/13/11, at 11, 15. Upon further investigation, Bachman located a "fling" account with the name of "GentleJay007," which included a photo of Hartsock. ***Id.*** at 16. Bachman further testified that, during his search of the computer's internet history, he did not locate a "fling" account for Newton. ***Id.*** at 11.

The above testimony connected Hartsock to the "guest" account, from which the child pornography images at issue were taken. We conclude that the Commonwealth proffered sufficient evidence establishing Hartsock's identity as the person who viewed the child pornography images on Newton's computer.

Next, Hartsock contends that the verdict was against the weight of the evidence. Hartsock alleges that Newton was not a credible witness, and that her testimony and that of Agent Bachman demonstrated that it was just as likely that Newton viewed the child pornography images as did Hartsock.

Our standard of review of a weight of the evidence claim is as follows:

> The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses. As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. Our appellate courts have repeatedly emphasized that "[o]ne of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence."
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> Furthermore,
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> > 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. Rabold, 920 A.2d 857, 860-61 (Pa. Super. 2007) (citations omitted).

Here, the trial court denied Hartsock's post-sentence Motion raising a challenge to the weight of the evidence. ***See*** Trial Court Opinion, 7/3/12, at 11-12. After reviewing the record, we conclude that the trial court did not

abuse its discretion in denying Hartsock's post-sentence Motion with regard to this issue, and we adopt the trial court's Opinion as to this claim. ***See id.***

We add the following. Hartsock argues that Agent Bachman's testimony, *i.e.*, that the website "Teeniesxxx.com" depicted "young girls naked" and was viewed on August 5, 2009, demonstrated that it was Newton who had viewed the child pornography images. Brief for Appellant at 15-16; ***see also*** N.T., 4/12/11, at 156. This argument ignores Agent Bachman's later testimony stating that, when he used the term "young girls," he was referring to "young girls, over 18 and up." N.T., 4/13/11, at 9. Agent Bachman further testified that the above-mentioned website did not contain child pornography involving children under the age of 18. ***Id***. at 9-10. Agent Bachman stated that he viewed "items of an adult sexual nature" in the "Ila" account, but did not view any images "of an illegal nature," or involving child pornography, on the "Ila" account. ***Id.*** at 10. We also find no merit, based on our review of the record, to Hartsock's claim that "the evidence did not substantially show that the time shown on the images was correct…." Brief for Appellant at 16. Thus, we conclude that Hartsock is not entitled to relief on his argument that the verdict was against the weight of the evidence.

Next, Hartsock contends that the trial court erred by failing to grant a continuance in order to allow the defense expert to testify. Hartsock did not raise this claim in his Rule 1925(b) Concise Statement. Therefore, Hartsock

has waived this claim. ***See Commonwealth v. Fulton***, 921 A.2d 1239, 1243 (Pa. Super. 2007) (holding that issues not included in an appellant's Rule 1925(b) concise statement are waived for purposes of appeal).[3]

Hartsock also contends that the trial court erred in failing to grant a mistrial when evidence was presented regarding a probation officer coming to Newton's house. Again, Hartsock did not raise this claim in his Rule 1925(b) Concise Statement. Therefore, Hartsock has waived this claim. ***See Fulton***, 921 A.2d at 1243.[4]

Next, Hartsock contends that the sentence imposed was excessive and contrary to the fundamental norms underlying the sentencing process. Hartsock's claim challenges the discretionary aspects of his sentence.

There is no automatic right to appeal from the discretionary aspects of a sentence. ***Commonwealth v. Mastromarino***, 2 A.3d 581, 585-86 (Pa. Super. 2010).

> To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code[.]

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[3] Even if the claim was properly preserved, we conclude that the trial court properly addressed this claim. ***See*** Trial Court Opinion, 7/3/12, at 8-9; ***see also*** N.T., 4/8/11, at 11-21.

[4] Even if this claim was properly preserved, we conclude that the trial court properly addressed this claim. ***See*** Trial Court Opinion, 7/3/12, at 9-11.

> A substantial question will be found where an appellant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Sentencing Code or is contrary to the fundamental norms which underlie the sentencing process. At a minimum, the Rule 2119(f) statement must articulate what particular provision of the code is violated, what fundamental norms the sentence violates, and the manner in which it violates that norm.

Id. (citations omitted).

In the instant case, Hartsock has fulfilled the first three requirements with regard to his discretionary aspects of sentencing claim. However, Hartsock's Rule 2119(f) statement does not "articulate what particular provision of the code [was] violated, what fundamental norms the sentence violates, [or] the manner in which it violates that norm." ***See Mastromarino***, 2 A.3d at 585-86. Therefore, Hartsock is not entitled to further review of his discretionary aspects of sentencing claim. ***See Commonwealth v. Trippett***, 932 A.2d 188, 202-03 (Pa. Super. 2007) (holding that, where an appellant, in his Rule 2119(f) statement, merely states that his sentence is excessive, and does not set forth the specific provision of the Sentencing Code or the fundamental norm that was violated, the appellant has failed to raise a substantial question that his sentence was excessive and is not entitled to review of the discretionary aspects of his sentence).[5]

[5] Moreover, we find no abuse of discretion in the trial court's ruling on this issue. ***See*** Trial Court Opinion, 7/3/12, at 12-14.

Next, Hartsock contends that the trial court erred in determining that he was an SVP. Hartsock argues that the Commonwealth's expert in this area, C. Townsend Velkoff ("Velkoff"), conducted his assessment without meeting with Hartsock. On this basis, he contends that the trial court erred in determining that he was an SVP.

On appeal from an SVP determination, "[t]he appellate task requires construing the evidence in the light most favorable to the party which prevailed before the factfinder …." ***Commonwealth v. Meals***, 912 A.2d 213, 222-23 (Pa. 2006). "The task of the Superior Court is one of review, and not of weighing and assessing evidence in the first instance." ***Id.***

In the instant case, Velkoff testified that Hartsock was given an opportunity to participate in the evaluation, but he did not participate. N.T., 10/7/11, at 5-6. Thus, Hartsock's claim that the assessment is invalid because Velkoff did not interview him is disingenuous and lacks merit. Further, the record supports the trial court's conclusion that Hartsock is an SVP. We adopt the trial court's well-reasoned Opinion with regard to this issue. ***See*** Trial Court Opinion, 7/3/12, at 14-17.

Judgment of sentence vacated as to one count of sexual abuse of children in accordance with this Memorandum; judgment of sentence as to all other convictions affirmed.

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COMMONWEALTH OF PA,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 1414-2009
	:	
JAY HARTSOCK,	:	
Defendant	:	1925(a) OPINION

Date: July 3, 2012

OPINION IN SUPPORT OF THE ORDER OF APRIL 13, 2011 AND OCTOBER 7, 2011, IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Jay Hartsock has appealed this Court's sentence imposed pursuant to his criminal jury trial in which he was found guilty on April 13, 2011. This Court sentenced Mr. Hartsock to imprisonment in a State Correctional Institution for an aggregate sentence of 35 to 70 years. This sentence was imposed on October 7, 2011 for twenty-three (23) counts of violating 18 Pa. C. S. § 6312 (d) Sexual Abuse of Children; one count of violating 18 Pa. C.S. § 7512 Criminal Use of a Communication Facility. For Count 1, Sexual Abuse of Children, Mr. Hartsock received the mandatory minimum sentence of 25 years pursuant to 42 Pa. C.S. § 9718.2[1]. For Counts 2 through 5, Sexual Abuse of Children, Mr. Hartsock received a sentence of two and a half (2 ½) to five (5) years each count. Counts 1 through 5 run consecutively to each other. As for Counts 6 through 23, Sexual Abuse of Children, Mr. Hartsock received a sentence of two and a half (2 ½) to five (5) years each count. However, Counts 6 through 23 run concurrently with Counts 1 through 5. Lastly, for Count 24, Criminal Use of a Communication

[1] 42 Pa. C.S. § 9718.2 states that anyone who has a previous conviction of an offense set forth in section 9795.1(a) shall receive a minimum sentence of at least 25 years. A violation of 18 Pa. C.S. § 6312 is a qualifying violation and Mr. Hartsock had previously been convicted of violating § 6312 in July of 2003.

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Facility, Mr. Hartsock received a state incarceration sentence of 12 months to 24 months. Count 24 runs concurrently to the sentences imposed in Counts 1 through 23.

Additionally, Mr. Hartsock has appealed this Court's October 7, 2011 finding that Mr. Hartsock is a Sexually Violent Predator (hereinafter SVP) as defined by the statute.

Mr. Hartsock's Concise Statement of Matters Complained of on Appeal, filed May 3, 2012, raises the five following issues: a) the Defendant's convictions for Sexual Abuse of Children and Criminal Use of a Communication Facility following the April 13, 2011 trial were not supported by sufficient evidence; b) the cumulative affect of the errors at trial and during pretrial motions denied the Defendant a fair adjudication of his guilt; c) the verdict was against the weight of the evidence; d) Defendant's sentence is inconsistent with the provisions of the Sentencing Code and contrary to the fundamental norms underlying the sentencing process; and e) the Court erred in determining the Defendant to be a sexually violent predator. Mr. Hartsock's appeal should be denied and the verdict and sentence affirmed.

I. FACTS AND PROCEDURAL HISTORY

During a jury trial of ***Commonwealth v. Hartsock*** the following facts were determined to have occurred.

Mr. Hartsock and Ila Mae Newton were in a dating relationship. On June 3, 2009 the couple along with Ms. Newton's 2 minor children, ages 2 years old and 3 years old, moved into an apartment together. Located in the apartment in the dining room area was a computer that had internet access[2]. Ms. Newton set up various user accounts on the computer; there was an account

[2] It should be noted that the internet was hooked up approximately one week after moving into the apartment.

for Ms. Newton, an account for Mr. Hartsock, a guest account, and an account called "girls.[3]" No one else besides Ms. Newton, Mr. Hartsock and the neighbor girls used the computer during this time. Ms. Newton was set up as the administrator of the computer and had the ability to access accounts and view activity. Mr. Hartsock had been spending a lot of time on the computer. When asked about his computer use Mr. Hartsock replied that he was looking for employment. On July 9, 2009 Ms. Newton decided to check the history on the computer. She found a Google search for child pornography. Upon finding the search she packed a bag for her children, went with her children to her Mother-in-law's house, and called the police. Ultimately a search warrant was obtained and the computer was seized.

Officer Ronald Bachman, an agent with the Williamsport Bureau of Police, a certified computer digital media evidence collections specialist and a Court certified expert in computer forensic examination ran a program called Encase on the computer. The program extracted pictures from the hard drive of the computer. The pictures were found on the guest account and some were under the "girls" user name. Of the pictures retrieved twenty-three (23) of them contained pictures of girls under the age of majority. Dr. Pat Bruno a court certified expert in the joint fields of pediatrics and physical and sexual abuse of children testified to the maturity level and age range of picture to a reasonable degree of medical certainty. In addition to the pictures retrieved the computer search history also contained searches for child pornography such as 'young girls sex', 'young girl se' and 'nubiles'.

[3] The daughters of the upstairs neighbor would come downstairs to use the computer. It was testified to that their

II. DISCUSSION

The verdict of April 13, 2011 should be upheld for the following reasons: there was no error by the trial court; and after hearing, seeing and evaluating the evidence a jury of Mr. Hartsock's peers acting as the fact finders found Mr. Hartsock to be guilty of all counts. The October 7, 2011 Court determination that Mr. Hartsock meets the statutory criteria of a SVP should be upheld as the Commonwealth met their burden and there was no Court error. Additionally, the Court imposed sentence of October 7, 2011 should be upheld as it was within the standard range of the sentencing guidelines and in the sound discretion of the Court. There was no error made.

A. Sufficiency of the Evidence

A claim challenging the sufficiency of the evidence is a question of law. ***Commonwealth v. Sullivan***, 820 A.2d 795, 805 (Pa. Super. 2003). When reviewing a challenge to the sufficiency of the evidence, the following standard of review is employed:

> 'The standard we apply when reviewing the sufficiency of the 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 fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record

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computer use was always monitored by either their mother or Ms. Newton. N.T. April 12, 2011, p. 45, 46.

> must be evaluated and all evidence actually received must be considered. 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. Gray, 867 A.2d 560, 567 (Pa. Super. 2005) (***quoting Commonwealth v. Nahavandian***, 849 A.2d 1221, 1229-30 (Pa. Super. 2004)). Direct and circumstantial evidence receive equal weight when assessing the sufficiency of the evidence. ***Commonwealth v. Grekis***, 601 A.2d 1275, 1280 (Pa. Super. 1992). Whether it is direct, circumstantial, or a combination of both, what is required of the evidence is that it taken as a whole links the accused to the crime beyond a reasonable doubt. ***Commonwealth v. Robinson***, 864 A.2d 460, 478 (Pa. 2004). In Mr. Hartsock's case, there was more than sufficient evidence to prove that Mr. Hartsock conducted internet searches for child pornography and knowingly viewed and possessed photographs of underage children. The evidence is both direct and circumstantial. The totality of the circumstances must be considered.

Mr. Hartsock had been spending a lot of time on the computer. So much time that Ms. Newton decided to check the computer's history to see what Mr. Hartsock had been doing online. Ms. Newton found Google searches for child pornography. N.T. April 12, 2011, p. 51. Ms. Newton was so alarmed by the searches that she packed up her kids, went to her mother-in-law's house, and called the police. N.T. April 12, 2011, p. 51. Ultimately pornographic images were found on the computer, N.T. April 12, 2011, p. 120; a Court certified expert in pediatrics and physical and sexual abuse of children testified with a reasonable degree of medical certainty that the twenty-three (23) pictures found were of girls under the age of majority. N.T. April 12, 2011, p. 99-104. Agent Bachman testified that in addition to the pictures retrieved from the computer there were internet searches. N.T. April 12, 2011, p. 120, 137-139.

§ 6312. Sexual abuse of children.
(d) *Child pornography.*
(1) Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act
commits an offense.
(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

To find a violation of § 6312 (d) the prosecution must prove three elements 1) there must be a depiction of an actual child engaged in a prohibited sexual act or simulation of such act; 2) the child must be under the age of 18; and 3) the defendant must have knowingly possessed or controlled the depiction. ***Commonwealth v. Koehler***, 914 A.2d 427, 436 (Pa. Super. 2006). Prohibited sexual act is defined by statute as including but not being limited to "lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." ***18 Pa. C.S. § 6312 (g)***. The pictures in this case contained nudity and genitals not for educational or medical purposes but for the purpose of sexual stimulation. The first element is met. As for the second element, an expert in ages testified to the fact that these pictures contained images of girls between the ages of 11 to 13 years old. N.T. April 12, 2011, p. 104. Lastly, accessing the internet and viewing child pornography over the internet constitutes knowingly possessed or controlled. ***Koehler*** at 438. Mr. Hartsock had access to the computer and the internet at the time the pictures were viewed and the searches were conducted. There was sufficient evidence to sustain a conviction for a violation of 18 Pa. C.S. 6312 (d). The prosecution met the burden of proving the three elements

of the crime. The jury found that Mr. Hartsock knowingly possessed pictures of minor children in prohibited sexual acts. Therefore, the convictions for the twenty-three (23) counts of violating 18 Pa. C.S. § 6312 (d) should be upheld.

Criminal Use of a Communication Facility

> 18 Pa. C.S. § 7512. Criminal use of communication facility.
> (a) *Offense defined.* --A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.
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> (b) *Penalty.* --A person who violates this section shall, upon conviction, be sentenced to pay a fine of not more than $ 15,000 or to imprisonment for not more than seven years, or both.
>
> (c) *Definition.* --As used in this section, the term "communication facility" means a public or private instrumentality used or useful in the transmission of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part, including, but not limited to, telephone, wire, radio, electromagnetic, photoelectronic or photo-optical systems or the mail.

"Under the plain language of the statute, one essential element of the crime is that the person must use the communication to bring about a felony." ***Commonwealth v. Rose***, 2008 PA. Super. 249, 960 A.2d 149, 156 (Pa. Super. 2008) (citing ***Commonwealth v. Crabill***, 2007 PA. Super. 161, 926 A.2d 488 (Pa. Super. 2007)). A computer connected to the internet constitutes a "communication facility" as defined by 18 Pa. C.S. § 7512 (c). ***Id.***

In this case after hearing all of the evidence the jury found that Mr. Hartsock was guilty of a felony, child pornography, and that he accessed and or viewed the child pornography

through a computer using the internet. The evidence supports the verdict of guilty for Criminal Use of a Communication Facility.

B. Cumulative Affect of Errors at Trial and During Pretrial Motions Denied Defendant a Fair Adjudication of His Guilt

The Court first notes that the above referenced error is not in compliance with ***Pennsylvania Rules of Appellate Procedure*** 1925(b)(4)(ii) which states: "[t]he Statement shall *concisely identify each ruling or error* that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." (emphasis added). It is the Court's belief that this issue is too broad and should be deemed as waived due to Mr. Hartsock's failure to concisely identify the error that is complained of. To locate and analyze each objection and motion that was raised during and prior to the two day trial would be grueling and burdensome for the Court; it is the job of the appellant to concisely identify the issues to be addressed. ***Id.***

However, the Court will address two of Mr. Hartsock's motions that were ultimately denied. The first motion is Mr. Hartsock's motion for a continuance. On April 8, 2011 a hearing was held regarding Mr. Hartsock's Emergency Motion for Continuance and Motion for Funds for Expert. The April 8, 2011 Order contains the Court's reasoning for not granting the continuance. Briefly Mr. Hartsock was not prejudiced by the continuance being denied. In his argument counsel for Mr. Hartsock pointed to information that had been received on March 9, 2011, almost one month prior, that they had failed to look at until four (4) days prior to the trial and then requested a continuance in order to procure an expert. In addition, on January 27, 2011 counsel for Mr. Hartsock requested a continuance of the February 2, 2011 trial in part based on

the complexity of the case regarding computer knowledge. That continuance was granted. In the interest of justice the Court cannot continue to grant continuances based on the same issue. Mr. Hartsock and his counsel were given adequate time to prepare for trial when the first continuance was granted and Mr. Hartsock was not prejudiced by the denial of the continuance. There was no abuse of discretion and the Court's Order of April 8, 2011 should be upheld.

The second motion that may be at issue is the denial of Mr. Hartsock's motion for mistrial.

> A motion for a mistrial is within the discretion of the trial court. [A] mistrial [upon motion by one of the parties] is required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial trial. It is within the trial court's discretion to determine whether a defendant was prejudiced by the incident that is the basis of a motion for a mistrial. On appeal, our standard of review is whether the trial court abused that discretion.
>
> An abuse of discretion is more than an error of judgment. On appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised by the trial court was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Hudson, 2008 Pa. Super 195, 955 A.2d 1031, 1034 (Pa. Super 2008) (quoting ***Commonwealth v. Tejeda***, 2003 Pa. Super 378, 834 A.2d 619, 623 (Pa. Super. 2003). By itself a passing reference to past criminal contact is insufficient to establish improper prejudice. ***Id.*** (citing ***Commonwealth v. Padilla***, 923 A.2d 1189, 1194 (Pa. Super. 2007), appeal denied, 934 A.2d 1277 (2007)). Whether prejudice has accrued is a fact specific inquiry. ***Id.***

In Mr. Hartsock's case no prejudice occurred. On April 8, 2011 at a hearing on Mr. Hartsock's Motion in Limine the Court ordered that there was to be no reference to Mr. Hartsock

being on probation or having a probation officer. N.T. April 8, 2011, p. 10-11. During direct examination of Ms. Newton the following occurred:

> Q: Did you find anything?
> A: At first no, but then I opened a Google searches and I found Google searches for child pornography.
> Q: When you found that what did you do?
> A: I packed a bag for my kids and I took them to my mother-in-law's and called the police.
> Q: So after – do you remember how long it was after you found that that you would have called the police?
> A: It was about 20, 25 minutes.
> Q: Was anyone home at the time when you found it?
> A: In my home?
> Q: Yes.
> A: Just me and my children.
> Q: At some point I'm assuming the police would have come over?
> A: A police officer met me at my mother-in-law's, took a report, and after that it was – as far as I know they were probation or parole officers that came to my home.

N.T. April 12, 2011, p. 51-52. At that point counsel for Mr. Hartsock broke into the testimony and requested to approach; in chambers counsel for Mr. Hartsock moved for a mistrial based on mention of probation or parole officers. ***Id.*** at 53. The Court found that the statement did not indicate whose probation or parole officer it was and denied the motion for mistrial. ***Id.*** at 54.

The denial of Mr. Hartsock's Motion for Mistrial does not constitute an error or abuse in discretion. This case is analogous to ***Commonwealth v. Hudson***, in that case there was a motion in limine that precluded mention of Hudson's prior convictions during direct examination the witness made mention of Hudson having to see his probation or parole officer. 2008 Pa. Super 195, 955 A.2d 1031, 1034 (Pa. Super 2008). The Court issued corrective jury instructions. ***Id.*** at 1036. On appeal the Court held that mention of the probation officer did not rise to the level of a mistrial because the comment was inadvertent and not foreseeable. ***Id.*** The same is true in this

case. Ms. Newton's comments were inadvertent and unforeseeable; this was not a case of the prosecution trying to sneak things onto the record. And while there was a mention of probation or parole officers it was never identified as to why the probation or parole officers were there or who they were there for. The comment did not prejudice Mr. Hartsock nor did it rise to the level of declaring a mistrial. The Court did not abuse it's discretion in denying the motion for mistrial. The Court's ruling should be upheld.

C. Weight of the Evidence

"A true weight of the evidence challenge 'concedes that sufficient evidence exists to sustain the verdict' but questions which evidence is to be believed." ***Commonwealth v. Galindes,*** 786 A.2d 1004, 1013 (Pa. Super. 2001) (***quoting Armbruster v. Horowitz,*** 744 A.2d 285, 286 (Pa. Super. 1999)). It is the function of the jury as the finder of fact to determine the credibility of the witnesses and to believe all, part or none of the evidence presented. ***Commonwealth v. Champney***, 832 A.2d 403, 408 (2003) (***citing Commonwealth v. Johnson,*** 668 A.2d 97, 101 (1995)). A verdict should be reversed and a new trial granted only in truly extraordinary circumstances, *i.e.,* "when the jury's verdict is *so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.*" ***Abruster***, 813 A.2d 703 (emphasis in original). *See also* ***Commonwealth v. Murray***, 408 Pa. Super. 435, 597 A.2d 111 (1991). Without specific evidence detailing an "extraordinary circumstance," a jury's finding of fact as to the credibility of witnesses must not be disturbed on appeal.

> Furthermore, 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. Cruz, 919 A.2d 279, 281 (Pa. Super. 2007) (quoting ***Champney*** at 408).

It is well settled that a weight of the evidence claim is primarily addressed to the discretion of the judge who actually presided at trial. ***Armbruster v. Horowitz***, 813 A.2d 698, 702 (Pa. 2002). On January 11, 2012 the Court presided over Mr. Hartsock's post-sentencing motions, which included a weight of evidence claim. Through Order of Court dated January 17, 2012, the Court ultimately denied Mr. Hartsock's post-sentencing motions.

In Mr. Hartsock's case, the jury's finding of guilt was not so contrary to the evidence as to shock one's sense of justice thereby necessitating a new trial; and the Court did not abuse its discretion in denying Mr. Hartsock's weight of evidence claim. The jury's verdict of guilty was support by the weight of the evidence and should be upheld.

D. Defendant's Sentence is Inconsistent with the Provisions of the Sentencing Code and Contrary to the Fundamental Norms Underlying the Sentencing Process

> "In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference. ***Commonwealth v. Ellis***, 700 A.2d 948, 958 (Pa. Super. 1997).

Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa. Super. 2003) (citing ***Commonwealth v. Ellis***, 700 A.2d 948, 958 (Pa. Super. 1997). In Mr. Hartsock's case there was no abuse of discretion nor is the sentence excessive. Mr. Hartsock was charged, found guilty of and sentenced for twenty-three (23) counts of violating 18 Pa. C. S. § 6312 (d) Sexual Abuse of

Children; one count of violating 18 Pa. C.S. § 7512 Criminal Use of a Communication Facility; and one count of violating 42 Pa. C.S. § 9795 Failure to Comply with registration of Sexual Offenders Requirement. The charges in this case are plentiful and serious.

When fashioning a sentence the Court followed the directive of 42 Pa. C. S. § 9721 (b) " . . . . the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." The sentence of the Court is in compliance with the sentencing guidelines and fell within the standard range.

In his Motion for Reconsideration of Sentence Mr. Hartsock opines that the aggregate sentence of thirty-five (35) to seventy (70) years is excessive because of his age. The sentence is just; when determining his sentence the Court took into consideration many factors including but not limited to the severity of the charges, the protection of the public, Mr. Hartsock's age and prior criminal record. While the Court did impose a mandatory minimum of twenty-five (25) years for Count 1; Sexual Abuse of Children the Court was lenient with Mr. Hartsock by running Counts 6 through 23 concurrently to Counts 1 through 5.[4]

"Imposition of a sentence is vested in the discretion of the sentencing court and will not be disturbed absent a manifest abuse of discretion." ***Commonwealth v. Smith***, 673 A.2d 893, 895 (Pa. 1996) (citing ***Commonwealth v. Plank***, 498 Pa. 144, 145, 445 A.2d 491, 492 (1982)). "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised

[4] If the Court would have decided not to impose the mandatory minimum sentence of 25 years for Count 1 but instead to sentence within the standard range and run each violation of 18 Pa. C.S. § 6312 (d) consecutively, notwithstanding the other charges, Mr. Hartsock's minimum sentence would be in excess of fifty (50) years.

was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will. ***Smith*** at 895 (citing ***Commonwealth v. Lane***, 492 Pa. 544, 549, 424 A.2d 1325, 1328 (1981)). The Court did not take lightly the task of sentencing Mr. Hartsock. The Court considered the totality of the circumstances when sentencing Mr. Hartsock and used its discretion when determining the length of Mr. Hartsock's incarceration and again when determining that specific counts would run concurrent to each other. This is not an abuse of discretion case. The sentence is not 'manifestly unreasonable' and it should be upheld. ***Smith*** at 895.

D. The Court Erred in Determining the Defendant to be a Sexually Violent Predator

> 42 Pa. C.S. § 9792 Sexually violent predator - A person who has been convicted of a sexually violent offense as set forth in section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses. The term includes an individual determined to be a sexually violent predator where the determination occurred in the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico, a foreign nation or by court martial.

In order to be designated a SVP a person must have been convicted of a sexually violent offense and have a mental abnormality or personality disorder that makes them likely to engage in sexually violent offenses. ***Id.*** By statute mental abnormality is defined as:

> [a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

Id. A diagnosis of pedophilia and/or paraphilia-nos (not otherwise specified) has been held to qualify as a mental abnormality. ***Commonwealth v. Morgan***, 2011 PA Super 59. Predatory is defined by 42 Pa. C.S. § 9792 as:

> An act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained or promoted, in whole or in part, in order to facilitate or support victimization.

The standard of proof governing the determination of SVP status is clear and convincing evidence. "The clear and convincing standard requires evidence that is 'so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue.'" ***Commonwealth v. Meals***, 590 PA 110, 120, 912 A.2d 213, 219 (Pa. 2006) (citing ***Commonwealth v. Maldonado,*** 576 PA 101, 838 A.2d 710 (Pa. 2003)). The test is less exacting than beyond a reasonable doubt but more than by a preponderance of the evidence. ***Id.*** "The salient inquiry to be made by the trial court is the identification of the impetus behind the commission of the crime and the extent to which the offender is likely to reoffend." ***Commonwealth v. Price,*** 876 A.2d 988, 995 (Pa. Super 2005) (citing ***Commonwealth v. Plucinski***, 868 A.2d 20, 25 (Pa. Super. 2005).

> The statute specifically details the process by which an individual is determined to be an SVP. After a defendant is convicted of an offense specified in Section 9795.1, such as indecent assault [and aggravated indecent assault in the instant case], the trial court must order the [State Sexual Offenders] Assessment Board to assess the defendant for the appropriateness of an SVP classification. The administrative officer of the Assessment Board then assigns one of its members to conduct the assessment pursuant to Section 9795.4(b).

Commonwealth v. Brooks, 2010 PA Super 185, 7 A.3d 852, 861 (Pa. Super. 2010) (quoting ***Commonwealth v. Haughwout,*** 2003 PA Super 427, 837 A.2d

480, 484-85 (Pa. Super. 2003) (citations omitted)). 42 PA CS § 9795.4 (b) governs assessments:

> Assessments made by the board shall include, but not be limited to, an examination of the following:
>
> (1) Facts of the current offense, including:
> (i) Whether the offense involved multiple victims.
> (ii) Whether the individual exceeded the means necessary to achieve the offense.
> (iii) The nature of the sexual contact with the victim.
> (iv) Relationship of the individual to the victim.
> (v) Age of the victim.
> (vi) Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
> (vii) The mental capacity of the victim.
>
> (2) Prior offense history, including:
> (i) The individual's prior criminal record.
> (ii) Whether the individual completed any prior sentences.
> (iii) Whether the individual participated in available programs for sexual offenders.
>
> (3) Characteristics of the individual, including:
> (i) Age of the individual.
> (ii) Use of illegal drugs by the individual.
> (iii) Any mental illness, mental disability or mental abnormality.
> (iv) Behavioral characteristics that contribute to the individual's conduct.
>
> (4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense.

The issue is whether all of the assessment factors were considered. In this case the Commonwealth presented testimony of C. Townsend Velkoff, a licensed psychologist. After brief testimony on his background, the Court certified Mr. Velkoff as an in the area of determination of SVP. N.T. October 7, 2011, p. 4. Mr. Velkoff was the individual who

completed the assessment; we he conducted his assessment he went through all of the designated factors on the record and explained why he concluded that Mr. Hartsock is a SVP. ***Id.*** at 7-9. Mr. Velkoff also determined that Mr. Hartsock met the mental abnormality criteria for pedophilia. ***Id.*** at 10. The Court found that based on the evidence presented that Mr. Hartsock meets the criteria to be classified a SVP and that he is likely engage in predatory behavior again.

Mr. Hartsock now argues that when Mr. Velkoff preformed the assessment that he utilized only the information provided to him and he did not seek out outside information which is an error. This argument is transparent. Mr. Hartsock had the opportunity himself to participate in the evaluation but declined to do so. N.T. October 7, 2011, p. 6. Mr. Hartsock also had the opportunity to present evidence at the time of the SVP hearing and again he failed to do so.

There was no error when Mr. Hartsock received the SVP designation. This was not Mr. Hartsock's first predatory act and Mr. Hartsock has a mental abnormality which will likely result in future predatory acts. The policy behind the SVP designation is for the protection of children. The assessment and the subsequent Court determination of SVP designation for Mr. Hartsock go to show that Mr. Hartsock is the type of individual that the legislature had in mind when they enacted this law.

The Court's finding that Mr. Hartsock is a SVP was not in error and should be affirmed.

CONCLUSION

Given the overwhelming evidence of Mr. Hartsock's guilt, the jury's verdict of April 13, 2011, the Court's finding that Mr. Hartsock is a Sexually Violent Predator and subsequently the Court's sentence of October 7, 2011 should be affirmed and Mr. Hartsock's appeal dismissed.

BY THE COURT,

Joy Reynolds McCoy, Judge

cc: Superior Court
Robin Buzas, Esquire
Melissa Kalaus, Esquire
Judges
Gary L. Weber, Esquire (Lycoming Reporter)
Jerri Rook, Executive Secretary to Judge McCoy
Francesca Renee Schultz, Esquire (Law Clerk)