**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>DAVID ROGER PROBST<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 682 MDA 2011 |

Appeal from the Judgment of Sentence November 12, 2010
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0001472-2009

BEFORE: MUNDY, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.: Filed: January 16, 2013

Appellant, David Roger Probst, appeals from the November 12, 2010 aggregate judgment of sentence of 25 to 50 years' incarceration plus five years' consecutive probation. The trial court sentenced Appellant following his conviction by a jury of aggravated indecent assault of a child, indecent assault of a child less than 13 years of age, and corruption of a minor.[1] After careful review, we affirm.

We summarize the factual and procedural history as follows. On August 3, 2009, L.H., the nine-year-old victim in this matter, arrived at Appellant's home around 9:00 p.m., where she believed she had arranged

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 3125(b), 3126(A)(7), and 6301(a)(1), respectively.

for an "overnight" with her friends, Appellant's stepdaughters, H.W. and E.W. When she arrived, only Appellant was home with his two infant sons. Appellant invited L.H. in to wait for H.W, E.W., and their mother to return home. While L.H. waited in a chair, Appellant sat on her and put his hand in her pants, inserting a digit into her vagina. L.H. got up and tried to leave, but Appellant said he was sorry and it would not happen again. L.H. resumed waiting on the couch. Later Appellant sat beside her and commenced kissing her, saying he loved her. Appellant stopped when his wife, H.W., E.W., and some other girls returned home. Appellant's wife told L.H. that she was not included in the over-night and escorted her home. L.H. first related the above incidents of sexual abuse to another friend, A.O., two days later. L.H. then told A.O.'s mother and her own mother, and the authorities were contacted.

Following an investigation, Appellant was charged with two counts of failure to comply with registration of sexual offenders requirements,[2] and one count each of aggravated indecent assault of a child, indecent assault of a child under 13 years of age, and corruption of minors. Appellant waived his preliminary hearing in consideration of a tentative plea offer from the Commonwealth. After review, the District Attorney rejected the plea offer.

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[2] 18 Pa.C.S.A. § 4915(a)(1) and (3).

On December 3, 2009, Appellant filed an omnibus pre-trial motion, seeking dismissal of the charges against him. On December 9, 2009, the Commonwealth filed a motion *in limine* to admit certain statements pursuant to 42 Pa.C.S.A. § 5985.1. (permitting certain out-of-court statements from child witnesses describing an offense when various predicate circumstances exist). Specifically, the Commonwealth sought admission of statements L.H. made to her 10-year-old friend A.O., A.O.'s mother, and police investigators. On February 11, 2010, the Commonwealth filed a second motion *in limine*, to admit evidence of Appellant's prior bad acts. Specifically, the Commonwealth sought to submit evidence of Appellant's prior conviction on two counts of indecent assault and related offenses involving an 11-year-old victim, M.P., who was a friend of Appellant's stepdaughters on an over-night visit when the acts occurred. The Commonwealth claimed the evidence was relevant "to show intent, knowledge, lack of mistake, motive and common scheme to molest minor females when they come to his house to stay with his minor girls." Commonwealth's Motion to Admit Bad Acts, 2/11/10, at 1, ¶3.

A hearing on the parties' motions was held on February 24, 2010, before the Honorable Nancy L. Butts, P.J. On March 29, 2010, the trial court granted the Commonwealth's motion to admit certain statements, including L.H.'s statements to A.O., on the condition L.H. testified in person and was subject to cross-examination by Appellant. The trial court denied the Commonwealth's motion to admit bad acts evidence, finding "[the] facts of

the present allegations and the prior bad acts by [Appellant] are undoubtedly not nearly identical as to become the signature of the same perpetrator." Trial Court Order, 3/29/10, at 5, *citing* ***Commonwealth v. Frank***, 577 A.2d 609, 614 (Pa. Super. 1990), *appeal denied*, 584 A.2d 312 (Pa. 1990). In the same order, the trial court granted Appellant's omnibus pretrial motion in part, dismissing counts one and two relating to failure to comply with registration of sexual offenders requirements.

On May 19, 2010, the Commonwealth filed a second motion *in limine* wherein it sought a reconsideration of the trial court's ruling on the admissibility of the previously precluded evidence, and additionally sought a ruling on the admissibility of evidence from A.O. that Appellant and his wife "would frequently tell her they loved her and ask her to call them 'Mom' and 'Dad'." Commonwealth's Notice and Motion to Reconsider Admission of Bad Acts, 5/19/10, at 1, ¶7. A hearing to address the Commonwealth's motion was scheduled for June 16, 2010. However, due to the trial court's schedule, the date for the jury trial in this matter was moved to June 3, 2010, without addressing the issues in the Commonwealth's second motion *in limine*.

The case proceeded with the jury trial on June 3-4, 2010, before the Honorable Kenneth D. Brown, S.J. At the start of the trial, the Commonwealth did not seek a ruling on its outstanding motion. During the trial, the Commonwealth called as witnesses L.H., L.H.'s mother, N.H., and A.O. The Commonwealth questioned A.O. on the statements made to her by

L.H., as ruled admissible by the March 29, 2010 order. During that questioning, the Commonwealth asked A.O. whether Appellant ever told her he loved her. Appellant objected, citing the trial court's March 29, 2010 order, and the Commonwealth responded, noting its second motion *in limine* remained unresolved. After lengthy discussion at sidebar, the trial court overruled Appellant's objection. Appellant did not present any testimony or witnesses at trial.

At the conclusion of the trial, on June 4, 2010, the jury convicted Appellant of all counts. The trial court ordered a Pennsylvania Sexual Assessment Board evaluation and scheduled sentencing for August 27, 2010. Also on June 4, 2010, the Commonwealth filed a notice of its intention to seek a mandatory sentence under 42 Pa.C.S.A. § 9718.2. Subsequently, the trial court continued sentencing to November 12, 2010.

At sentencing, the trial court determined that Appellant had a prior predicate offense and sentenced him, in accordance with 42 Pa.C.S.A. § 9718.2, to a mandatory term of 25 to 50 years' incarceration on count 3, aggravated indecent assault. The trial court imposed an identical concurrent sentence at count 4, indecent assault and a consecutive term of five years' probation at count 5, corruption of minors. The trial court also determined Appellant to be a sexually violent predator.

On November 19, 2010, Appellant filed a post-sentence motion.[3] The trial court held a hearing and argument on the motion on January 14, 2011. On March 21, 2011, the trial court issued an order and opinion, denying Appellant's post-sentence motions.[4] On April 19, 2011, Appellant filed a timely notice of appeal.[5]

On appeal, Appellant raises the following questions for our consideration.

> I. Whether the trial court committed reversible error when it admitted alleged bad acts evidence under Pa. R. Evid. 404(b), specifically that Mr. Probst purportedly told the

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[3] Although the trial court docket reflects the filing of a post-sentence motion on November 19, 2010, there is no copy of the motion in the record certified to this Court. The trial court's March 21, 2011 opinion and order denying Appellant's post-sentence motion indicated "[t]he sole issue raised … is that the [trial court] should not have imposed a 25-year minimum sentence, because the Commonwealth did not provide [Appellant] with notice in accordance with 42 Pa.C.S.A. § 9718.2(d) …." Trial Court Opinion, 3/21/11, at 2.

[4] The trial court's order would normally be due 120 days from the date the post-sentence motion was filed. Pa.R.Crim.P. 720(3)(a). Instantly, the 120th day fell on a Saturday. Therefore, the trial court's order, filed 122 days after the date the post-sentence motion was filed is deemed timely. ***See*** 1 Pa.C.S.A. § 1908.

[5] On October 5, 2011, this Court granted Appellant's counsel permission to withdraw and directed the trial court to appoint new counsel. Current counsel was appointed on October 25, 2011, and was afforded an extension to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. He complied and the trial court filed its 1925(a) opinion on June 19, 2012. Therein, President Judge Nancy L. Butts referenced the March 21, 2011 opinion by Senior Judge Kenneth D. Brown as containing the trial court's reasoning relative to Appellant's issues II and III.

> complainant that he "loved her," when in a prior opinion the court precluded the introduction of such evidence at trial?
>
> II. Whether the trial court erred in the imposition of a mandatory minimum sentence of 25 years where the trial court failed to notify Mr. Probst of the applicability of the mandatory sentence pursuant to 42 Pa.C.S.A. 9718.2(d)?
>
> III. Whether the 25 year mandatory sentence is grossly disproportionate and constitutes cruel and unusual punishment under the Pennsylvania and United States Constitutions?
>
> IV. Whether the trial court committed reversible error when it failed to conduct any inquiry or make any finding regarding the 10 year old complainant's competency to testify at trial?

Appellant's Brief at 8.

In his first issue, Appellant alleges the trial court erred in admitting, over Appellant's objection, evidence of Appellant's alleged prior bad acts. Appellant's Brief at 13. Specifically, Appellant faults the trial court for permitting "[t]he testimony of A.O. at trial, whereupon she stated that [Appellant] told her that 'he loved her.'" ***Id.*** at 15. Appellant claims that testimony was "clearly inadmissible" due to a prior ruling by Judge Butts, precluding prior bad act evidence. ***Id.***

> In reviewing a challenge to the admissibility of evidence, our standard of review is limited:
>
> The admissibility of evidence is within the sound discretion of the trial court, wherein lies the duty to balance the evidentiary value of each piece of evidence against the dangers of unfair prejudice, inflaming the passions of the jury, or confusing the jury. We will not reverse a trial court's decision

> concerning admissibility of evidence absent an abuse of the trial court's discretion.

***Commonwealth v. Estepp***, 17 A.3d 939, 945 (Pa. Super. 2011) (citation omitted), *appeal dismissed as improvidently granted*, 54 A.3d 22 (Pa. 2012).

> As an initial matter, [a] party complaining, on appeal, of the admission of evidence in the court below will be confined to the specific objection there made. If counsel states the grounds for an objection, then all other unspecified grounds are waived and cannot be raised for the first time on appeal.

***Commonwealth v. Bedford***, 50 A.3d 707, 713-714 (Pa. Super. 2012) (*en banc*) (internal quotation marks and citations omitted).

The complained of testimony was elicited by the Assistant District Attorney's direct examination of A.O.

> Q Did you know [Appellant] and his wife?
>
> A Yes.
>
> Q Had you ever been to their house?
>
> A Yes, I have been.
>
> Q Did [Appellant] ever ask you to call him Dad?
>
> A Yes, he did.
>
> Q Did he tell you that he loved you?
>
> [Appellant's Counsel]: Objection, Your Honor, we're trying to – we're getting into – [the Assistant District Attorney] filed a motion for this and now she is going to have a mistrial is what is going to happen. This is part of her motion –

> THE COURT: I assume this was heard previously?
>
> [Appellant's Counsel]: Yes.
>
> [Assistant District Attorney]: No, it wasn't.
>
> [Appellant's Counsel]: This is her motion, Your Honor.
>
> [Assistant District Attorney]: May we approach, Your Honor?

N.T., 6/3/10, at 95.

At sidebar, it was clarified that the precise information sought to be elicited was not subject to Judge Butts' prior ruling but was raised in the Commonwealth's motion to reconsider, which had not been heard or ruled on by the trial court. Appellant's attorney then objected to the tactic of the Assistant District Attorney in failing to seek a ruling on the motion prior to asking the offending question in front of the jury, arguing further that the prejudicial impact of the evidence outweighed any probative value.

> THE COURT: Is it agreed that this was not ruled upon by Judge Butts or is there a dispute between counsel about that?
>
> [Appellant's Counsel]: No, the Judge ruled that there wouldn't be any bad acts then [the Assistant District Attorney] filed this to allow it to come in about calling the mom and dad, … Your Honor, that's the thing about trying to sneak this stuff in this way. You filed the motion if you want to hear the motion we can argue the motion.
>
> …

> [Appellant's Counsel]: A motion was filed to allow evidence in and [the Assistant District Attorney] says she doesn't want to argue the motion before the trial starts and then try and get it in without having the Judge hear the motion I think that's inappropriate. We should have the motion on whether or not this is allowed to come in or not because [A.O.] would testify [Appellant] and his wife, [G.P], would ask her to call them mom and dad and first of all, it's more prejudicial than probative because nothing happened to this little girl at all. It's purely to prejudice the Jury.
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> ...
>
> [Appellant's Counsel]: This does not go to prove or disprove whether anything happened in this house or not. It's completely irrelevant and prejudicial to try and make it look like he's predatorial in some way.

***Id.*** at 96-97, 99. Appellant's attorney also objected on the ground that A.O.'s information about Appellant and his wife's statements that they loved her, and their requests to call them mom and dad when visiting their daughters, was not included in any discovery.

> [Appellant's Counsel]: This is the exact language in the motion. I have nothing my discovery regarding any statements from this witness calling them mom or dad or love you, any of this. There is nothing in the discovery.
>
> ...
>
> [Appellant's Counsel]: ... but this isn't part of any of my discovery at all, so I am objecting as well that I've never been provided any of those statements about this witness about calling her mom or dad or about love or anything like that.

***Id.*** at 98.

Accordingly, Appellant's contention on appeal that the admissibility of A.O.'s statements was previously "precluded in a prior opinion of the [trial] court" is incorrect. Further, Appellant does not now pursue the stated grounds for his objection at trial that the information was not contained in discovery or that the Assistant District Attorney improperly failed to seek a ruling on the Commonwealth's second motion *in limine* prior to eliciting the subject testimony. In his brief, Appellant clearly confuses A.O. with M.P., the victim from Appellant's prior conviction, and thus confuses the Commonwealth's two motions. Appellant's Brief at 14. The proffered evidence from M.P. was precluded by Judge Butts' March 29, 2010 order and did not come in at trial. The proffered evidence from A.O. was not ruled on by the trial court prior to the Assistant District Attorney's question. As a result of this confusion, Appellant provides no cogent argument about the relevance or prejudice of A.O.'s testimony in a pertinent context and we deem the issue waived.[6] ***See Commonwealth v. Johnson***, 985 A.2d 915,

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[6] Absent waiver, while we may also question the relevance of the objected to statements from A.O., we agree with the trial court that "even if the admission of this evidence is viewed as error it is obviously harmless error in light of the short nature of the reference and the witness assurance that nothing inappropriate happened to her." Trial Court Opinion, 6/19/12, at 5. The trial court limited the questions as follows.

> THE COURT: I would permit you to ask whether he and you can certainly clarify, whether he and his wife, made statements that they loved her and I'm going to limit you to do that.

*(Footnote Continued Next Page)*

924 (Pa. 2009) (stating, "where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived"), *cert. denied*, ***Johnson v. Pennsylvania***, 131 S. Ct. 250 (2010).

In his second issue, Appellant claims the trial court erred in imposing a mandatory 25-year minimum sentence pursuant to 42 Pa.C.S.A. § 9718.2.

*(Footnote Continued)* ––––––––––––––––––––––

N.T., 6/3/10, at 99. Judge Brown does not appear to have deemed A.O.'s statements as describing Appellant's prior bad acts but as countering Appellant's attack on L.H.'s credibility. The Assistant District Attorney followed up with the following questions.

> BY [Assistant District Attorney]:
>
> Q [A.O.], [Appellant] and his wife, did they ask you to call them mom and dad?
>
> A Yes they did.
>
> Q. Did they say anything else?
>
> A. They also told me that they loved me.
>
> Q. How often did that occur?
>
> A. When I was younger it occurred many times.

***Id.*** at 100. Defense counsel on cross-examination, established that A.O. was never subjected to any inappropriate conduct by Appellant or in Appellant's home. The Assistant District Attorney did not argue A.O.'s testimony in this regard in her closing remarks and no jury instruction on prior bad act evidence was sought.

Appellant's Brief at 17. Appellant claims that the notice requirements of the act were not met, precluding imposition of the mandatory minimum sentence. ***Id.***

Our standard of review in addressing a challenge to the imposition of a mandatory sentence is clear.

> [W]e hold that where a sentencing court is required to impose a mandatory minimum sentence, and that mandatory minimum sentence affects a trial court's traditional sentencing authority or the General Assembly's intent in fashioning punishment for criminal conduct, a defendant's challenge thereto sounds in legality of sentence and is therefore nonwaivable.

***Commonwealth v. Foster***, 17 A.3d 332, 345 (Pa. 2011).

> The determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary. If no statutory authorization exists for a particular sentence, that sentence is illegal and subject to correction. An illegal sentence must be vacated.

***Commonwealth v. Hughes***, 986 A.2d 159, 160-161 (Pa. Super. 2009) (internal quotation marks and citations omitted), *appeal denied*, 15 A.3d 489 (Pa. 2011).

The relevant portions of the subject sentencing provision are as follows.

> **§ 9718.2. Sentences for sex offenders**
>
> **(a) Mandatory sentence.--**
>
> (1) Any person who is convicted in any court of this

Commonwealth of an offense set forth in section 9795.1(a) or (b) (relating to registration) shall, if at the time of the commission of the current offense the person had previously been convicted of an offense set forth in section 9795.1(a) or (b) or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction, be sentenced to a minimum sentence of at least 25 years of total confinement, notwithstanding any other provision of this title or other statute to the contrary. …

…

**(b) Mandatory maximum.--**An offender sentenced to a mandatory minimum sentence under this section shall be sentenced to a maximum sentence equal to twice the mandatory minimum sentence, notwithstanding 18 Pa.C.S. § 1103 (relating to sentence of imprisonment for felony) or any other provision of this title or other statute to the contrary.

**(c) Proof of sentencing.--**The provisions of this section shall not be an element of the crime, and **notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing.** The applicability of this section shall be determined at sentencing. The sentencing court, prior to imposing sentence on an offender under subsection (a), shall have a complete record of the previous convictions of the offender, copies of which shall be furnished to the offender. If the offender or the attorney for the Commonwealth contests the accuracy of the record, the court shall schedule a hearing and direct the offender and the attorney for the Commonwealth to submit evidence regarding the previous convictions of the offender. The court shall then determine, by a preponderance of the evidence, the previous convictions of the offender and, if this section is applicable, shall impose sentence in accordance with

> this section. Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the offender shall have the right to petition the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.
>
> **(d) Authority of court in sentencing.--Notice of the application of this section shall be provided to the defendant before trial.** If the notice is given, there shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsections (a) and (b) or to place the offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.
>
> ...

42 Pa.C.S.A. § 9718.2 (emphasis added).[7]

Instantly Appellant does not contest that he was convicted of a qualifying offense or that he had a prior conviction of a qualifying offense. He further concedes that the Commonwealth gave proper and timely notice of its intention to proceed under Section 9718.2(c). Instead, he claims, "the [trial] court failed to provide him notice as required under subsection (d)

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[7] The legislature has amended 42 Pa.C.S.A. § 9718.2 effective December 20, 2012, eliminating the pretrial notice requirement from subsection (d).

prior to trial." The trial court viewed the respective notice requirements contained in subsection (c) and (d) as "apparent inconsistencies or conflicts in the statute." Trial Court Opinion, 3/21/11, at 4. After the hearing on Appellant's post-sentence motion, the trial court determined that the Commonwealth had complied with the notice requirement of subsection (c) of the act but that it "could not conclude that the notice requirements of [subsection] (d) were met in this case." ***Id.*** at 6.

We have discovered no published appellate opinions construing the notice requirement of subsection (d) of the Act.[8] Our task therefore is to apply the principles of statutory construction to discern the Legislature's intended meaning of the provision. For that task, we are guided by the precepts of the Statutory Construction Act of 1972. 1 Pa.C.S.A. §§ 1501 *et seq.* These include the following.

> **§ 1921. Legislative intent controls**
>
> (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the

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[8] Our Supreme Court has certified this precise issue in its grant of an allowance of appeal from this Court's memorandum decision in ***Commonwealth v. Steckley***, 32 A.3d 835 (Pa. Super. 2011) (unpublished memorandum). The question was certified as follows.

> (1) Whether the Superior Court erred in affirming the trial court's imposition of a mandatory minimum given a failure to notify the Defendant/Appellant of the applicability of said mandatory minimum sentence pursuant to 42 Pa.C.S.A. § 9718.2(d)?

***Commonwealth v. Steckley***, 41 A.3d 855, 855 (Pa. 2012).

> intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
>
> (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

1 Pa.C.S.A. § 1921(a), (b). Only where the language is not explicit, do we consider a number of other factors. ***Id.*** at § 1921(c).

> In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:
>
> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.
>
> (2) That the General Assembly intends the entire statute to be effective and certain.

1 Pa.C.S.A. § 1922. We also note that titles and headings do not control but may aid in construction of a statute's meaning. ***Id.*** at § 1924. Finally, penal provisions shall be strictly construed. ***Id.*** at § 1928(b)(1).

We disagree with the trial court that the notice requirements contained in subsection (c) and subsection (d) of the statute are in conflict. The notice requirement in subsection (c) is specifically addressed to the Commonwealth and refers to notice of the Commonwealth's **intention** to seek imposition of the mandatory sentence. The purpose for this notice is to afford a defendant adequate opportunity to contest the factual predicates for imposition of the mandatory sentence, including the validity of the record of any prior conviction. This determination is made by the trial court at the

time of sentencing. Further, the Commonwealth's intention to seek the imposition of the mandatory sentence is not possible until there is a current conviction on a predicate offense. Therefore, notice after conviction and before sentencing is directed.

Contrastingly, the notice provision of subsection (d) of the statute is not addressed to a particular party or entity. Notice may be from the Commonwealth, defense counsel, or the trial court. Further, the purpose of the pre-trial notice is not to afford a defendant the opportunity to prepare a defense to the application of the mandatory minimum, but to insure that decisions made by a defendant prior to trial are knowing, intelligent and voluntary. Thus, for example, a defendant who waives a preliminary hearing or enters into a plea agreement without being advised of his potential exposure to section 9718.2 may be entitled to relief on the ground the decision was not a fully informed one. Subsection (d) makes clear that if a defendant is advised of the potential applicability of the 25-year mandatory minimum sentence when making his pretrial decisions the trial court has no discretion not to impose that sentence if otherwise applicable.

We disagree with Appellant that a failure to provide him with a pretrial notice of the applicability of section 9718.2 precludes the trial court from imposing the mandatory sentence. Indeed, the trial court had no discretion to do otherwise. Appellant's remedy, if any, would be in connection with the validity of his pretrial decisions, made in ignorance of the potential

application of the Act. In this regard, Appellant suggests that, absent proper pretrial notice under subsection (d), his decision **not** to accept a plea agreement offer was not knowing, intelligent and voluntary. Appellant's Brief at 18-19.

From the testimony at the post-trial motion hearing, the trial court determined that an Assistant District Attorney had made an initial plea offer to Appellant to plead guilty to "a felony three failure to register and no-contest plea [to] an amended count of indecent assault graded as a misdemeanor of the first degree." Trial Court Opinion, 3/21/11, at 2-3. The felony charge carried a mandatory two-year sentence. The District Attorney rejected the offer, insisting on a plea to the aggravated indecent assault charge, which carried a five-year mandatory sentence. ***Id.*** at 3. Appellant rejected that plea offer, which was never reduced to writing. ***Id.*** Appellant testified that had he had proper notice under subsection (d), he would have accepted a plea agreement to the five-year mandatory. ***Id.*** However, he acknowledged that he maintained his innocence of the indecent assault charges. ***Id.*** The trial court further noted, "[t]here was no evidence presented that the Commonwealth was ever willing to offer [Appellant] a five-year mandatory sentence in exchange for a no-contest plea to aggravated indecent assault." ***Id.***

As noted, the purpose of the subsection (d) notice is to protect a defendant from waiving rights in ignorance of his exposure to a potential 25-

year mandatory minimum sentence. Appellant has provided no authority for the proposition that he has a right to accept a plea offer from the Commonwealth. Appellant in this case did not waive his rights. Rather he asserted all his rights in proceeding to a jury trial. For these reasons, we conclude Appellant's second issue is without merit. We also conclude that the trial court committed no error or abuse of discretion in determining that the mandatory minimum sentence required by section 9718.2 applied in this case.

Appellant next argues the mandatory sentence of 25 to 50 years' incarceration as applied to him in this case is unconstitutionally cruel and unusual punishment, in contravention of the Eighth Amendment to the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution. Appellant's Brief at 21. Such a claim implicates the legality of Appellant's sentence. ***Commonwealth v. Yasipour***, 957 A.2d 734, 740, n.3 (Pa. Super. 2008), *appeal denied*, 980 A.2d 111 (Pa. 2009).

> In reviewing the constitutionality of a duly enacted statute, we are mindful of the following considerations:
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> The Pennsylvania Supreme Court has consistently held that enactments of the General Assembly enjoy a strong presumption of constitutionality. All doubts are to be resolved in favor of sustaining the constitutionality of the legislation. [N]othing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void. In other words, we are obliged to exercise every reasonable

> attempt to vindicate the constitutionality of a statute and uphold its provisions. The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases. Moreover, one of the most firmly established principles of our law is that the challenging party has a heavy burden of proving an act unconstitutional. In order for an act to be declared unconstitutional, the challenging party must prove the act clearly, palpably and plainly violates the constitution. Finally, we note that:
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> > The power of judicial review must not be used as a means by which the courts might substitute its judgment as to public policy for that of the legislature. The role of the judiciary is not to question the wisdom of the action of [the] legislative body, but only to see that it passes constitutional muster.

***Commonwealth v. Barnett***, 50 A.3d 176, 196-197 (Pa. Super. 2012), *quoting* ***Commonwealth v. Smith****,* 732 A.2d 1226, 1235–1236 (Pa. Super. 1999), *affirmed*, 836 A.2d 5 (2003) (internal quotation marks and citations omitted).

"The Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendment of the United States Constitution … the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution." ***Yasipour***, ***supra*** at 743. Appellant has not offered a distinct analysis under the Pennsylvania Constitution, so we address this claim under the Eighth Amendment to the United States Constitution. ***See Barnett***, ***supra*** at 197.

Appellant claims the mandatory sentence required by Section 9718.2 is cruel and unusual punishment, essentially arguing that it is disproportionate to his particular circumstances. Appellant's Brief at 21. "Here the imposition of a 25 to 50 year state prison sentence, which truly amounts to a life sentence for a 50 year old man, with a low prior record score and good employment history, constitutes cruel and unusual punishment." ***Id.*** Appellant makes no claim that the statute is facially unconstitutional in all its applications and we need not address the constitutionality of the statute as enacted. ***See Barnett***, ***supra*** at 198.

> The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Supreme Court of the United States has long held that "[t]he final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." ***Solem v. Helm***, 463 U.S. 277, 284, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). However, "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences which are grossly disproportionate to the crime." ***Commonwealth v. Hall***, 549 Pa. 269, 701 A.2d 190, 209 (1997) (quoting ***Harmelin v. Michigan***, 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)).

***Barnett***, ***supra*** at 198.

This Court has recently addressed similar claims that the imposition of the mandatory sentence required by Section 9718.2 constituted cruel and unusual punishment as applied to the defendants in ***Barnett***, ***supra***, and

***Commonwealth v. Baker***, 24 A3d 1006 (Pa. Super. 2011).[9] In both cases, we set forth the three-part test derived from ***Solem v. Helm***, 463 U.S. 277 (1983) for assessing whether a punishment is so disproportionate as to run afoul of constitutional constraints.

> [A] court must consider: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals for the commission of the same crime in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.

***Barnett supra*** at 198, *quoting* ***Commonwealth v. Parker***, 718 A.2d 1266, 1268. Additionally, inquiry into the second and third prongs is required only if the first prong is established. ***Id.*** at 199. "[T]he initial inquiry is whether there is an inference of gross disproportionality between the crimes committed and the sentences imposed." ***Id.***, quoting ***Baker***, ***supra*** at 1028-1029.

Instantly, Appellant makes no argument relative to the second or third prong of the ***Solem*** test. Consequently, even if he could establish an inference of disproportionality under the first prong, he cannot meet his heavy burden to show the application of section 9718.2 is unconstitutional in this case. In any event, we disagree with Appellant that the factors he cites

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[9] Our Supreme Court has granted Baker's petition for allowance of appeal on the following question. "Does the 25-year mandatory minimum sentence of imprisonment imposed under 42 Pa.C.S. § 9718.2 violate Article I section 13 of the Pennsylvania Constitution as it is grossly disproportionate to the crime?" ***Commonwealth v. Baker***, 35 A.3d 3 (Pa. 2012).

raise an inference of "gross disproportionality between the crimes committed and the sentences imposed." ***Id.*** Appellant merely cites his age, his prior record score and his employment record as factors demonstrating the excessiveness of the sentence imposed. Appellant's Brief at 21.

We have previously held such factors are insufficient to raise an inference of disproportionality. ***See Barnett***, ***supra*** (holding fact that the jury acquitted on more serious charges, the most serious offense was a third-degree felony, the prior offense was remote in time, the defendant's advanced age, and the fact that the victim had made amends did not support an inference of gross disproportionality). Rather, we agree with the trial court's assessment that the sentence was appropriate to the charge and circumstances of this case.

> The [trial court], however, finds that regardless whether the 25-year minimum was mandatory or discretionary, such a lengthy sentence was appropriate in this case.
>
> First, [Appellant's] conduct in this case was similar to his conduct in [his prior] case. [Appellant's] modus operandi in both cases was to sexually assault a little girl, who came to his residence to have a sleep-over with [Appellant's] step-daughter. The victims were 9 years old and 11 years old and either prepubescent or early pubescent females.
>
> Second, the assessor who conducted an assessment of whether the [Appellant] was a sexually violent predator concluded to a reasonable degree of professional certainty that [Appellant] meets the diagnostic criteria for pedophilia, which is a chronic and life-long condition.

> Third, [Appellant's] conduct had a devastating impact on the victim. The victim's mother wrote either a victim impact statement or a letter to the [trial] court indicating that: the victim is afraid and combative; she suffers from nightmares at least twice per week; she is confused and wonders why this occurred to her; and is undergoing sexual abuse counseling.
>
> Fourth, the Defendant failed to complete sex offender treatment from his prior offense.
>
> Fifth, the Defendant was still under supervision on his convictions in the prior case, and a condition of his supervision was that he avoid contact with minors.
>
> Finally, the Defendant is an opportunistic, sexually violent predator who needs to be incarcerated for a lengthy period of time to protect the public, especially young girls.

Trial Court Opinion, 3/21/11, at 7-9. For these reasons, Appellant's challenge to the constitutionality of his sentence is without merit.

Appellant, in his final issue, claims the trial court erred when it "permitted [ten-year-old L.H.] to testify at trial without a through [sic] inquiry and determination as to her competence." Appellant's Brief at 24.

> Although competency of a witness is generally presumed, Pennsylvania law requires that a child witness be examined for competency. ***See Commonwealth v. Delbridge***, 578 Pa. 641, 855 A.2d 27, 39 (2003) (citing ***Rosche v. McCoy***, 397 Pa. 615, 156 A.2d 307, 310 (1959) and Pa.R.E. 601). 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." ***Commonwealth v. Ali***, 10 A.3d 282, 300 n. 11 (Pa.2010). "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." ***Delbridge**, **supra*** at 45. In Pennsylvania, competency is a threshold legal issue, to be decided by the trial court. ***Commonwealth v. Dowling**,* 584 Pa. 396, 883 A.2d 570, 576 (2005).

***Commonwealth v. Hutchinson***, 25 A.3d 277, 289-290 (Pa. 2011) (footnote omitted), *cert. denied*, ***Hutchinson v. Pennsylvania***, 132 S. Ct. 2711 (2012); ***see also*** Pa.R.Evid. 601(b).

A trial court that observes a witness is in a better position than this Court to assess the witness's competency. ***Commonwealth v. Anderson***, 552 A.2d 1064,1067 (Pa. Super. 1988), *appeal denied*, 571 A.2d 379 (Pa. 1989). Accordingly, we will reverse a trial court's determination of the testimonial competency of a child only for a clear abuse of discretion. ***Id.*** at 1067, 1068. A trial court abuses its discretion if it overrides or misapplies the law, exercises manifestly unreasonable judgment, or acts out of partiality, prejudice, bias or ill-will, as shown by the evidence or the record. ***Commonwealth v. D.J.A.***, 800 A.2d 965, 970 (Pa. Super. 2002), *appeal denied*, 857 A.2d 677 (Pa. 2004).

Instantly, Appellant cites to no place in the record where he raised this issue before the trial court. Our review of the record discloses that Appellant never objected to L.H.'s testimony on competency grounds at trial or in pretrial proceedings, never requested a *voir dire* on L.H.'s competency to

testify, and did not raise this issue in any post-trial motions. We have held that the burden falls on the objecting party to establish a witness's incompetency. ***Id.*** at 969.

> If a party is in doubt as to the competency of a witness, he should examine him in that regard, and the court should make a determination thereon preliminarily when the witness is produced. So, ordinarily, the competency of a child is to be determined at the time he is offered as a witness. It is the privilege and right of the objector to have the witness examined on his *voir dire* before he is sworn.

***Commonwealth v. McKinley***, 123 A.2d 735, 737-738 (Pa. Super. 1956), *quoting* 3 Wharton's Criminal Evidence § 740. Further, failure to object as to competency and proceeding with cross-examination of a witness waives any later objection to competency on appeal. ***Id.*** at 737-738; **see also *Commonwealth v. Smith***, 606 A.2d 939, 942-943 (Pa. Super. 1992) (holding defendant's failure to make a timely objection before the trial court relative to the competency of a child witness precludes our review on appeal), *appeal denied*, 620 A.2d 490 (Pa. 1993).

Accordingly, we conclude Appellant has waived this issue on appeal. We also recognize that the trial court did *voir dire* L.H. to determine her competency prior to her testimony at the February 11, 2010 hearing on pre-trial motions. N.T., 2/11/10, at 38-43. The trial court indicated it was "satisfied" and permitted questioning by counsel to commence. ***Id.*** at 43-44. Appellant did not object. As noted above, the time to evaluate a witness's competency is the first time he or she is called upon to testify.

Having determined L.H. to be competent to testify at a pre-trial hearing, the trial court was not required to conduct a second *voir dire* of L.H. at trial absent some intervening cause to question her continuing competency.

For all the foregoing reasons, we conclude Appellant's issues on appeal are either waived or without merit. We discern no error or abuse of discretion by the trial court and accordingly affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

Judge Ott and Judge Strassburger concur in the result.