NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. PAUL J. LEIDY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 736 MDA 2012

Appeal from the Judgment of Sentence November 3, 2011
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0001517-2010

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

MEMORANDUM BY OTT, J.: **FILED MAY 23, 2013**

Paul J. Leidy appeals from the judgment of sentence imposed on November 3, 2011, as amended on November 18, 2011, November 28, 2011, and April 13, 2012.[1] On June 20, 2011, a jury convicted Leidy of rape of a child, involuntary deviate sexual intercourse ("IDSI"), statutory sexual assault, aggravated indecent assault, four counts of indecent assault, one count of sexual abuse of children, five counts of corruption of minors, and one count each of possession of a small amount of marijuana for personal

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* Retired Senior Judge assigned to the Superior Court.

[1] Leidy's sentence was made final by the denial, in part, of post-sentence motions on March 28, 2012.

use and possession of drug paraphernalia.[2] The trial court imposed an aggregate sentence of 55 to 140 years' imprisonment. On appeal, Leidy raises the following three arguments: (1) the trial court erred in denying his motion *in limine* to preclude the Commonwealth's expert from testifying at trial; (2) the court erred in finding there was sufficient evidence to convict him of four separate counts of indecent assault and one count of sexual abuse of children; and (3) the court violated his double jeopardy rights by imposing five separate sentences for the corruption of minor convictions and erred in failing to merge the IDSI and statutory sexual assault sentences with the rape of a child sentence.[3] After a thorough review of the record, the parties' briefs, and applicable law, we affirm.

Leidy's convictions stem from the repeated sexual assault of a seven-year-old female victim in September and October of 2009. The victim, her mother, and her infant half-brother had been living in Leidy's one bedroom apartment in State College, Pennsylvania, during this period. While the victim was visiting her grandmother in Frackville, Pennsylvania, she told her grandmother that Leidy had inappropriately touched her. The grandmother

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[2] 18 Pa.C.S. §§ 3121(c), 3123(b), 3122.1, 3125(a)(7), 3126(a)(7), 6312(b), 6301(a)(1), and 35 P.S. §§ 780-113(a)(31)(i) and 780-113(a)(32), respectively.

[3] We have reordered Leidy's issues based on the nature of his arguments.

then informed the victim's mother, who questioned her daughter about the touching.

As a result of the victim's account, the mother called the police on October 5, 2009 and Police Officer Mark Rhodes for the Borough of State College responded to the complaint. Officer Rhodes spoke with the mother and then the victim. The victim said that the incidents occurred while her mother was away from the apartment. The victim told him that in one instance, she was sleeping in Leidy's bedroom when Leidy came into the room and "woke [her] up, he took [her] hand and he placed it on his pee-pee." N.T., 6/20/2011, at 93. She told him to stop and he refused to do so. She told the officer Leidy "kept rubbing [her] hand up and down on his pee-pee" and "he also took her hand and placed her hand on her own pee-pee …. He put his finger in [her] pee-pee." ***Id.*** at 93-94. The officer asked her how many times this had happen and "she was certain this happened five times." ***Id.*** at 94.

Pamela McCloskey, a licensed psychologist, also spoke with the victim on October 27, 2009 and November 10, 2009. The victim indicated the abuse happened "five times, [ten] times … 20 times." ***Id.*** at 164. McCloskey stated that the victim told her, "'[Leidy] touched my pee-pee and I touched his pee-pee. I had to.'" ***Id.*** at 166. The victim also told McCloskey that Leidy "put me on his pee-pee and he made me hump on it." ***Id.*** She indicated that "'[b]oth [the] inside and outside [of her] butt got

wet.'" ***Id.*** at 167. The victim also told the psychologist that Leidy took pictures of her while she was naked, in which he made her put her hands on her hips, her legs, her knees, her bottom, "and on [her] pee-pee." ***Id.*** at 168.

Leidy was arrested and charged with multiple offenses relating to the incidents. Police also searched Leidy's apartment. They discovered drugs and drug paraphernalia in his bedroom but did not find a camera in the apartment. The case proceeded to a one-day jury trial on June 20, 2011.[4] The jury found Leidy guilty of rape of a child, IDSI, statutory sexual assault, aggravated indecent assault, four counts of indecent assault, one count of sexual abuse of children, five counts of corruption of a minor, and one count each of possession of a small amount of marijuana and possession of drug paraphernalia. The jury found him not guilty of one count of indecent assault and four counts of sexual abuse of children.

> [Leidy] was sentenced on November 3, 2011, to undergo imprisonment in a state correctional institution for not less than 20 years nor more than 40 years for Rape of a Child; a consecutive period of incarceration of not less than 20 years nor more than 40 years for [IDSI]; a consecutive period of

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[4] The victim testified at Leidy's trial. It is apparent from her limited testimony that she had a difficult time recounting the abuse, of which she testified to one incident of abuse. N.T., 6/20/2011, at 75-79. The Commonwealth introduced her prior statements and illustrations to McCloskey into evidence and the victim agreed that these were her statements. ***Id.*** at 66-68. The victim also testified that she told Officer Rhodes what happened and it was the truth. ***Id.*** at 66. Both Officer Rhodes and McCloskey both testified to what the victim told them.

> incarceration of not less than [one] years nor more than [five] years for Statutory Sexual Assault; a consecutive period of incarceration of not less than 5 years nor more than 10 years for Aggravated Indecent Assault; 3 consecutive periods of incarceration, each not less than 1 year nor more than 5 years, for Indecent Assault; a consecutive period of incarceration of not less than 1 year nor more than 5 years for Sexual Abuse of Children; 5 consecutive periods of incarceration, each not less than 1 year nor more than 5 years, for Corruption of Minors; a concurrent period of incarceration of not less than 15 days nor more than 30 days for possession of a Small Amount of Marijuana for Personal Use; and a concurrent period of incarceration of not less than 1 month nor more than 10 months for Possession of Drug Paraphernalia.

Trial Court Opinion, 3/28/2012, at 1-2. On November 28, 2011, the court entered an amended order, modifying the rape of a child sentence to state: "Count 5, Indecent Assault, shall merge with Count 1, Rape." Second Amended Order, 11/28/2011, at 2.[5]

Leidy filed post-sentence motions on November 10, 2010, alleging: (1) the sentence imposed was illegal as violative of his protections against double jeopardy and the merger doctrine; (2) the court erred in ordering Leidy to submit to a DNA sample, fingerprints, and a photograph, and to pay the costs of these submissions with respect to the five corruption of minors and two drug offenses;[6] (3) the court erred in denying his motion *in limine*

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[5] The court had previously entered an amended order on November 18, 2011, stating that the rape of the child sentence merged with the indecent assault sentence. The court corrected this error in the second amended order on November 28, 2011.

[6] Counts 15-19 and 22-23, respectively.

to preclude Dr. Pat Bruno, the examining physician, from testifying because the Commonwealth did not provide a report containing the basis of his expert opinion; and (4) the court erred in revoking his bail and committing him to a correctional facility. ***See*** Post-Sentence Motion, 11/10/2011, at 1-8.[7] A hearing was held on January 12, 2012.

On March 28, 2012, the trial court entered an order, granting Leidy's motions in part and denying in part. With respect to Leidy's motion to modify sentence, the court granted in part and denied in part.[8] With respect to the denial in part of Leidy's motions, the court specifically determined, in pertinent part: (1) it did not err in failing to merge Leidy's sentences for rape of a child, IDSI, sexual assault, and aggravated assault based on evidence that Leidy subjected the victim to penetration on multiple occasions; (2) it did not violate Leidy's double jeopardy rights by imposing five separate sentences for corruption of minors because Leidy committed

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[7] In Leidy's memorandum in support of post-sentence motions, he included a sufficiency challenge to his convictions for one count of sexual abuse of children, four separate counts of indecent assault, and five counts of corruption of minors. ***See*** Memorandum in Support of Post-Sentence Motion, 1/20/2012, at 11-14.

[8] With regard to granting the motion in part, the court found that (1) it erred in ordering Leidy to submit and pay for DNA samples on the five corruption of minors and two drug offenses where the applicable statute, 44 Pa.C.S. § 2316, provided that in order for the penal requirement to be imposed, the crime must be a felony and here, the convictions, at issue, were misdemeanors and not graded as felonies; and (2) it erred in imposing parole conditions in the case because it only had the authority to make recommendations with regard to parole.

multiple acts that fell within the definition of the crime; (3) it did not err in finding there was sufficient evidence to convict Leidy of sexual abuse of children, four separate counts of indecent assault, and five counts of corruption of minors based on the record; (4) and it did not err in denying Leidy's motion *in limine* to preclude Dr. Bruno from testifying at trial where the Commonwealth provided Leidy with the medical report, which included a statement regarding the meaning of the lack of physical evidence and Leidy conducted a detailed cross-examination based on a study, which he argued contradicted Dr. Bruno's opinion. ***See*** Trial Court Opinion, 3/28/2012, at 2-9.

On April 13, 2012 and April 18, 2012, the court entered amended orders with respect to the five corruption of minors and two drug offenses to reflect that Leidy was not required to provide and pay for DNA samples for those offenses. This timely appeal followed.[9]

In Leidy's first argument, he claims he is entitled to a new trial because the court erred in denying his motion *in limine* to preclude the Commonwealth's expert, Dr. Bruno, from testifying "without preparing a report providing the basis of his findings." Leidy's Brief at 48. Leidy states

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[9] On April 19, 2012, the trial court ordered Leidy to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Leidy filed a concise statement on April 25, 2012. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 27, 2012, which relied on the March 28, 2012 opinion that disposed of Leidy's post-sentence motions.

that pursuant to Pennsylvania Rule of Criminal Procedure 573, he requested the trial court to "direct the Commonwealth to have its expert prepare a report of his conclusions and the foundations upon which it is based," and the court erroneously declined to grant him relief "because the issue had not previously been before the court." ***Id.*** Leidy complains that the reason for the delay in the request resulted from his counsel being under the impression that Dr. Bruno was intended to testify only as a fact witness and not an expert. Moreover, he states counsel was only provided with a medical record regarding this expert that showed an examination of the victim and that Dr. Bruno found no signs of trauma. Leidy concludes the "Commonwealth's machinations in hiding the fact that it had an expert opinion contravened its obligation of good faith in its compliance with a discovery request. Commonwealth v. Long, 753 A.2d 272 (Pa. Super. 2000)." Leidy's Brief at 49.

Our standard of review is well-settled:

> When ruling on a trial court's decision to grant or deny a motion *in limine*, we apply an evidentiary abuse of discretion standard of review. The admission of evidence is committed to the sound discretion of the trial court, and a trial court's ruling regarding the admission of evidence will not be disturbed on appeal "unless that ruling reflects 'manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous.'"

Commonwealth v. Minich, 4 A.3d 1063 (Pa. Super. 2010) (citations omitted).

Rule 573(B) governs discretionary disclosure of pretrial discovery and provides, in pertinent part:

> (B) Disclosure by the Commonwealth.
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> . . .
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> (2) *Discretionary With the Court.*
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> . . .
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> (b) If an expert whom the attorney for the Commonwealth intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare, and that the attorney for the Commonwealth disclose, a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.

Pa.R.Crim.P. 573(B)(2)(b).[10]

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[10] A comment to Rule 573 states:

> Pursuant to paragraph[] (B)(2)(b) ..., the trial judge has discretion, upon motion, to order an expert who is expected to testify at trial to prepare a report. However, these provisions are not intended to require a prepared report in every case. The judge should determine, on a case-by-case basis, whether a report should be prepared. For example, a prepared report ordinarily would not be necessary when the expert is known to the parties and testifies about the same subject on a regular basis. On the other hand, a report might be necessary if the expert is not known to the parties or is going to testify about a new or controversial technique.

Pa.R.Crim.P. 573, comment.

A review of the record reveals the following: Leidy filed a motion *in limine* on June 14, 2011, six days before trial, which requested, in pertinent part, that the trial court preclude the expert opinion from Dr. Bruno related to his examination of the victim on December 1, 2009, in which he did not find any physical evidence related to sexual abuse of this child. ***See*** Motion *in Limine*, 6/14/2011, at 5-7. In its June 17, 2011 order, the court denied Leidy's request to preclude Dr. Bruno's expert opinion, stating:

> [Leidy] does not allege the Commonwealth did not provide a report, but maintains the report did not provide the grounds for Dr. Bruno's opinion. As this matter has not previously been before the Court, the Court will not now preclude the Commonwealth from presenting Dr. Bruno's opinion. Expert opinions concerning whether the absence of physical evidence is conclusive of whether abuse occurred have been held admissible by our Supreme Court. *See generally* ***Commw. v. Minerd***, 562 Pa. 46, 753 A.2d 225 (2000).

Opinion and Order, 6/14/2011, at 4.

At trial, Dr. Bruno was asked by the Commonwealth about his examination of the victim, and, in response to which he stated: "The findings on [the victim] were normal. I didn't find anything that related to sexual abuse of this child." N.T., 6/20/2011, at 107. When asked to explain this finding, Dr. Bruno testified:

> It's what I expected to find. Ninety percent of the time when we do exams like this we don't find anything. Tissues heal. It had been months since the alleged last incident, several months. Tissues heal. They heal without scarring. And, as I said, research -- the literature states 90 percent of the time, even if something happened, you're not going to find anything.

Id. at 107-108. In addition to time, he stated that another reason for the lack of physical evidence is that an abuser will find ways to receive sexual gratification without physically harming the victim. ***Id.*** at 109.[11]

Defense counsel vigorously cross-examined Dr. Bruno regarding his report and a lack of explanation for findings in the document. ***Id.*** at 112-128. Defense counsel also questioned Dr. Bruno about the particular study that he relied on, as well as another study that counsel believed contradicted Dr. Bruno's findings. ***Id.*** at 120-125.

As this Court has previously stated:

> In determining the admissibility of expert testimony on matters related to sexual assaults, our courts have distinguished between testimony regarding physical facts and testimony regarding the behavior of victims. Generally, the conduct or behavior of victims has been held not to be a proper subject for expert testimony because such testimony tends to encroach upon the jury's function of evaluating witness credibility. ***See***, ***e.g.***, ***Commonwealth v. Emge***, 381 Pa. Super. 139, 144, 553 A.2d 74, 76 (1988). Testimony regarding physical facts, however, has been held to be admissible.

Commonwealth v. Johnson, 690 A.2d 274 (Pa. Super. 1997) (*en banc*). "Without such an explanation, jurors may improperly draw a negative inference against the Commonwealth, based upon a layperson's untutored

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[11] Relatedly, the doctor stated, "And kids don't know for sure what 'in' means, okay? 'In' might mean to them rubbing between the labia or rubbing between the buttocks. 'In' might not necessarily mean straight in." ***Id.*** at 109.

assumptions, and rely upon that inference in rendering a verdict." ***Minerd***, 753 A.2d at 231.

Here, the trial court concluded the Commonwealth did not violate the discovery rule, stating:

> In the present case, the Commonwealth provided [Leidy] with the medical report it had in its possession. Dr. Bruno's statement regarding the meaning of the lack of physical evidence was included in that report. No further report was prepared by Dr. Bruno. At trial, [Leidy] was given the option of taking a break before cross-examining Dr. Bruno in order to better prepare based on Dr. Bruno's specific direct testimony. [Leidy] conducted a detailed cross examination based on a study he believed contradicted Dr. Bruno's opinion.

Trial Court Opinion, 3/28/2012, at 9.

Upon review of the record at hand, we agree. Dr. Bruno's explanation of why there was no physical evidence of abuse with respect to the victim was part-and-parcel of his examination. Leidy's victim alleged that the sexual abuse occurred several months earlier. Given that there were several months between the abuse and physical examination, Dr. Bruno's testimony was relevant to explaining the likelihood of finding physical evidence of sexual abuse in the case of a child victim. His testimony did not touch upon the conduct or behavior of the victim in such a way that bolstered the victim's credibility. Furthermore, Leidy was given the opportunity to cross-examine and question Dr. Bruno about the possible alternative findings in lack of physical evidence cases. Therefore, we conclude the trial court did not abuse its discretion in denying Leidy's motion *in limine* to preclude the

Commonwealth's expert, Dr. Bruno, from testifying without preparing a report providing the basis of his findings. Accordingly, Leidy's first argument fails.

Next, Leidy claims there was insufficient evidence to convict him of the four counts of indecent assault and one count of sexual abuse of children.

> In reviewing a sufficiency of the evidence claim, our standard of review is well settled. We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.

Commonwealth v. Mollett, 5 A.3d 291, 313 (Pa. Super. 2010) (citations omitted).

With respect to the indecent assault convictions, he argues that because the jury specifically found there was a continuing course of conduct, it also found there was only one criminal act committed. Therefore, he claims the evidence only supported one conviction. He relies on ***Commonwealth v. Andrews***, 768 A.2d 309 (Pa. 2001) to support his contention.

Leidy was convicted under Section 3126(a)(7), which is defined as:

> (a) *Offense defined.* -- A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:

. . .

(7) the complainant is less than 13 years of age[.]

18 Pa.C.S. § 3126(a)(7). Indecent contact is defined as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 Pa.C.S. § 3101.

Here, the trial court determined there was sufficient evidence to support the multiple convictions for indecent content, stating: "In the present case, the evidence that [Leidy] made [the victim] touch his genitals on multiple occasions establishes a pattern, but also supports a conclusion that [Leidy] formed the intent to arouse or gratify his sexual desire on multiple, separate occasions." Trial Court Opinion, 3/28/2012, at 6.

We agree with the trial court's determination. We note that Leidy's argument conflates the requirements for grading the offense with the elements of the crime for indecent assault. The requirement of "course of conduct" must be proven for grading purposes under Subsection 3126(b)(3)(ii).[12] At trial, the trial court submitted the question of whether

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[12] Subsection 3126(b)(3)(ii) states, in pertinent part:

> (3) An offense under subsection (a)(7) is a misdemeanor of the first degree unless any of the following apply, in which case it is a felony of the third degree:
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> . . .

(Footnote Continued Next Page)

Leidy committed a course of conduct of indecent assault to the jury pursuant to the mandates of ***Apprendi v. New Jersey***, 530 U.S. 466 (2000).[13] ***See*** Verdict, 6/21/2011, at 1-2. The jury specifically found Leidy was guilty of committing a course of conduct with respect to four counts of indecent assault. ***See id.*** Consequently, the crimes were graded as third-degree felonies for sentencing purposes. The jury's finding regarding "course of conduct" does not negate its determination that it found Leidy guilty of four separate counts of indecent assault.

Turning to the issue of whether there was sufficient evidence to support Leidy's four convictions for indecent assault, we note that "[i]f . . . the actor commits multiple criminal acts beyond that which is necessary to establish the bare elements of the additional crime, then the actor will be guilty of multiple crimes. . . ." ***Commonwealth v. Belsar***, 676 A.2d 632, 634 (Pa. 1996), *quoting* ***Commonwealth v. Weakland***, 521 Pa. 353, 364, 555 A.2d 1228, 1233 (1989), *abrogated on other grounds*, ***Commonwealth v. Anderson***, 538 Pa. 574, 650 A.2d 20 (1994)). "When a criminal act has

(Footnote Continued) ———————————

> (ii) There has been a course of conduct of indecent assault by the person.

18 Pa.C.S. § 3126(b)(3)(ii).

[13] ***Apprendi***, ***supra***, held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum sentence must be submitted to a jury and proven beyond a reasonable doubt.

been committed, broken off, and then resumed, at least two crimes have occurred and sentences may be imposed for each." ***Id.*** at 351-52, 676 A.2d at 634. Moreover, "[c]ase law has established that the Commonwealth must be afforded broad latitude when attempting to fix the date of offenses which involve a continuous course of criminal conduct." ***Commonwealth v. G.D.M.***, 926 A.2d 984, 990 (Pa. Super. 2007) (quotation omitted).[14, 15] Based on the testimony of the victim, Officer Rhodes, and McCloskey, we conclude there was sufficient evidence to support a finding that on multiple

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[14] In ***G.D.M.***, the six-year-old victim alleged that the defendant sexually abused him over a seven-month-period. He identified three different occasions on which he was abused and revealed to an investigating detective that there were several more incidents. On appeal, this Court agreed with the trial court that under the circumstances, due process concerns were satisfied "where the victim, as here, can at least fix the times when an ongoing course of molestation commenced and when it ceased." ***Id.*** at 990. Furthermore, the Court stated,

> A six-year-old child cannot be expected to remember each and every date upon which he was victimized, especially where those events are numerous and occur over an extended period of time. Unlike adults, the lives of children, especially pre-school children or those who have only started school, do not revolve around the calendar, except to the extent that they may be aware of their birthday or Christmas, or the day a favorite television show airs. To require young children to provide such detail would be to give child predators free rein. Instantly, we find that the dates of the incidents were proven with sufficient specificity to satisfy due process.

Id.

[15] ***See also Commonwealth v. Dunkle***, 602 A.2d 830, 838 (Pa. 1992) (the jury, sitting as the fact-finder, determines the credibility of a child's recollection of sexual abuse).

occasions during a two month period, Leidy caused the victim to have indecent contact with him for the purpose of arousing sexual desire in him. Therefore, Leidy's argument with respect to his four indecent assault convictions warrants no relief.[16]

With regard to Leidy's sexual abuse of children conviction, he states that he was convicted under Subsection 6312(b) of the Pennsylvania Crimes Code, which has an element of photographing or filming or depicting the image of a child on a computer. He complains that since the police did not find the camera with which he allegedly took pictures of the victim, his conviction cannot stand because the evidence presented did not "constitute

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[16] As noted above, Leidy relies on ***Andrews***, ***supra***, to support his argument that he should have only been convicted of one count based on the "course of conduct" finding. We find ***Andrews*** is instructive in the present matter. In ***Andrews***, the defendant was charged with a co-conspirator in participating jointly in a continuing series of robberies of a 26-hour-period. The jury convicted him of five counts of robbery, two counts of criminal conspiracy, and two counts of possessing an instrument of crime ("PIC"). He claimed his sentences for conspiracy and PIC violated the merger doctrine and due process principles because the Commonwealth prosecuted the crimes as "one continuing transaction." ***Id.*** at 312. The Pennsylvania Supreme Court determined the defendant's claim was a sufficiency argument, rather than a legality claim, and that there was sufficient evidence to support the multiple convictions because the crimes were the product of separate agreements that involved different victims and were carried out at different apartment buildings. ***Id.*** at 316-318.

Unlike ***Andrews***, Leidy's use of the "course of conduct" finding is misplaced as it goes to the grading of the offense and not an element of the crime. Moreover, like the defendant ***Andrews***, the evidence, here, established Leidy committed distinct and separate acts of indecent assault while engaging a continuous course of conduct.

the creation of an image by photography or electronic means to meet the statute's requirements absent some evidence that the device used actually worked or had film in it." Leidy's Brief at 47.

The crime of sexual abuse of children is defined, in pertinent part, as:

> (b) Photographing, videotaping, depicting on computer or filming sexual acts. --Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.

18 Pa.C.S. § 6312(b). "Prohibited sexual act" is defined as "Sexual intercourse. . ., masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, 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." ***Id.***

In determining there was sufficient evidence to support the conviction, the trial court explained:

> Notably, it is the act of taking the photographs and not the possession of such photographs that is addressed by this provision. There is no requirement that the Commonwealth produce the camera or photographs associated with the act. The Court believes the record, especially [the victim]'s detailed statements regarding the color of the camera and the way [Leidy] made her touch her nude body to pose for pictures, is sufficient to support this conviction.

Trial Court Opinion, 3/28/2012, at 4-5.

We agree. Possession of the photograph is not element of the crime under Subsection 6312(b).[17] At trial, the Commonwealth presented evidence based on statements made by the victim to McCloskey, in which the victim told the psychologist that Leidy took pictures of her while she was naked, in which he made her put her hands on her hips, her legs, her knees, her bottom, "and on [her] pee-pee." N.T., 6/20/2011, at 168. Furthermore, on cross-examination, the victim testified the camera Leidy used was "red" and described the incident as "I started dropping my towel and then [Leidy] started taking pictures." ***Id.*** at 88. Based on the totality of the circumstances, we agree with the trial court that there was sufficient evidence to convict Leidy of the crime of sexual abuse of children. Accordingly, his sufficiency claim fails.

Lastly, Leidy raises the following two legality of sentencing arguments: (1) the court erred by failing to merge his sentences for IDSI and statutory sexual assault with his rape of a child sentence;[18] and (2) the court violated his double jeopardy protections by imposing five separate sentences for his

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[17] Subsection 6312(b) is distinguishable from its counterpart, Subsection 6312(d), which addresses the crime of possession of child pornography. The Pennsylvania Legislature clearly intended two distinct crimes, one for committing the illegal act of taking the pictures and one for possessing the pictures.

[18] In his post-sentence motion, Leidy also argued that his aggravated indecent assault sentence merged with the rape of a child sentence. However, in his appellate brief, he withdrew this argument and therefore, we need not address it further. ***See*** Leidy's Brief at 40 n.1.

corruption of a minor convictions. We will address these claims separately.

With regard to Leidy's merger argument, he first contends the IDSI conviction should be merged with the rape offense for sentencing purposes. He relies on ***Commonwealth v. Lee***, 638 A.2d 1006 (Pa. Super. 1994), for the principle that rape and IDSI should merge when the evidence is based on a single penetration. Leidy's Brief at 42. Second, he states the court should have merged the statutory sexual assault with the rape offense for sentencing purposes because there is no difference in elements between the offenses. Moreover, Leidy argues the former offense "merely provides for a prosecution when the child is slightly older," in which statutory sexual assault requires the victim be under the age of 16 and rape of a child requires the victim be under the age of 13. ***Id.*** at 43. While Leidy "concedes that the testimony graphically described penile and digital penetration," his merger claim largely centers on the contention that the Commonwealth could not establish he committed multiple sexual offenses of the same crime because the Commonwealth did not demonstrate that the alleged abuse continued "over a period of weeks." ***Id.*** at 40 (footnote omitted).

> A claim that the trial court imposed an illegal sentence by failing to merge sentences is a question of law. Accordingly, our standard of review is plenary. The Pennsylvania legislature passed a statute governing merger, which states:
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> > No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the

> statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

Commonwealth v. Schmohl, 975 A.2d 1144, 1149 (Pa. Super. 2009), *quoting* 42 Pa.C.S. § 9765. "The statute's mandate is clear. It prohibits merger unless two distinct facts are present: 1) the crimes arise from a single criminal act; and 2) all of the statutory elements of one of the offenses are included in the statutory elements of the other." ***Commonwealth v. Baldwin***, 985 A.2d 830, 833 (Pa. 2009). Moreover, the Pennsylvania Supreme Court "has explained that the merger doctrine is generally a rule of statutory construction designed to determine whether the Legislature intended for the punishment of one offense to encompass that for another offense arising from the same criminal act or transaction." ***Commonwealth v. Davidson***, 938 A.2d 198, 217 (Pa. 2007) (quotation and quotation marks omitted).

A defendant commits the offense of rape of a child "when the person engages in sexual intercourse with a complainant who is less than 13 years of age." 18 Pa.C.S. § 3121(c).[19] IDSI with a child is defined as "when the person engages in deviate sexual intercourse with a complainant who is less

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[19] "Sexual intercourse" is defined as "[i]n addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required." 18 Pa.C.S. § 3101.

than 13 years of age." 18 Pa.C.S. § 3123(b).[20] A person commits statutory sexual assault "when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married to each other." 18 Pa.C.S. § 3122.1.[21]

Here, the trial court opined:

> While the Court recognizes that some or all of these charges would likely merge had they stemmed from a single criminal act, that outcome is not supported by the facts of this case.
>
> The record indicates that [Leidy] engaged in multiple sexual acts with the child victim . . . over a period of weeks. Specifically, [the victim]'s account of what transpired, as presented to the jury through her direct testimony and the statements [the victim] made to her psychologist, shows that [Leidy] penetrated [the victim]'s anus with his penis on more than one occasion. The record also shows that [Leidy] penetrated [the victim]'s genitals with his finger, made [the victim] touch his genitals, and made [the victim] touch her own genitals. [The victim] has consistently maintained these sexual acts happened on multiple occasions, and she was able to describe the acts and [Leidy]'s genitals to her psychologist in explicit detail.
>
> "It is well-established that even the uncorroborated testimony of the complaining witness is sufficient to convict a

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[20] "Deviate sexual intercourse" is "[s]exual intercourse per os or per anus between human beings… . The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures." ***Id.***

[21] The statutory sexual assault statute was amended on December 20, 2011 and now requires that the perpetrator be 11 or more years older than the complainant.

> defendant of sexual offenses." ***Commw. v. Bishop***, 1999 PA Super. 292, 742 A.2d 178, 189. Here, the jury found [the victim]'s account credible. Therefore, based on the evidence that [Leidy] subjected [the victim] to anal penetration on multiple occasions, separate sentences for [IDSI], Statutory Sexual Assault, and Rape of a Child are appropriate.

Trial Court Opinion, 3/28/2012, at 3.

We agree with the trial court's well-reasoned determination. The record belies Leidy's argument that the Commonwealth did not prove he sexually abused the victim on more than one occasion.[22] At trial, the victim testified to one incident, in which she and Leidy were in the bedroom, Leidy had taken her pants off and then his pants and underwear. She stated, "[H]e picked me up and then putted [sic] me on him … . And then he lift me up, and then he, like, putted me, like, up and down, up and down." N.T., 6/20/2011, at 76-77. When asked what body part Leidy put her up and down on, the victim indicated that "his private spot" touched "her butt." ***Id.*** at 78-79. Officer Rhodes also testified that the victim told him that in one instance, Leidy "put his finger in [her] pee-pee." ***Id.*** at 94. The officer asked her how many times this had happen and "she was certain this happened five times." ***Id.*** at 94. Furthermore, the testimony of McCloskey also established that the abuse happened multiple times, wherein the victim

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[22] It bears remarking that Leidy does not challenge the sufficiency of his convictions for rape of a child, IDSI, statutory sexual assault. Consequently, he concedes the Commonwealth met its burden of proof with respect to these convictions.

indicated to McCloskey the abuse happened "five times, [ten] times … 20 times." ***Id.*** at 164. McCloskey stated that the victim told her, "'[Leidy] touched my pee-pee and I touched his pee-pee. I had to.'" ***Id.*** at 166. The victim also told McCloskey that Leidy "put me on his pee-pee and he made me hump on it." ***Id.*** She indicated that "'[b]oth [the] inside and outside [of her] butt got wet.'" ***Id.*** at 167.

The victim's own testimony and her statements made to McCloskey, which the jury found credible, demonstrate that Leidy committed these acts on multiple occasions throughout the two month period.[23] Therefore, the evidence supported a finding that the offenses did not arise from a single criminal act. ***See Baldwin***, ***supra***. Accordingly, the court did not err in failing to merge rape, IDSI, and statutory sexual assault for sentencing purposes.

With respect to his double jeopardy sentencing argument, Leidy asserts the court erred in imposing five separate sentences for his corruption of minor convictions. He claims the court should have merged these offenses for sentence purposes because these identical charges cover "the same conduct and same timeframe[.]" Leidy's Brief at 43. Leidy also states "the evidence at trial only described one specific incident" and the victim's description that "something happened" five or more times "offers nothing

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[23] ***See G.D.M.***, ***supra***.

from which one can even infer that the events occurred on different days or [are] otherwise temporally distinct." ***Id.*** at 44.

As Leidy has noted in his brief, under Article 1, Section 10 of the Pennsylvania Constitution and the Fifth Amendment of the United States Constitution, "[n]o person shall, for the same offense, be twice put in jeopardy of life or limb[.]" Pa. Const. Art. I, § 10; ***see also*** USCS Const. Amend. 5.

> [The United States Supreme] Court has explained: "[T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. "The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments . . . ." ***Brown v. Ohio***, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). ***See also Missouri v. Hunter***, 459 U.S. at 366 ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."). This analysis reflects the legislature's duty to criminalize each type of conduct it determines is injurious to the state.

Baldwin, 985 A.2d at 836-837.

> The crime of corruption of minors is defined, in pertinent part, as:
>
> (1)(i) . . . [W]hoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, . . . commits a misdemeanor of the first degree.

18 Pa.C.S. § 6301(a)(1)(i).

> In deciding what conduct can be said to corrupt the morals of a minor, "'the common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.'" ***Commonwealth v. Pankraz***, 382 Pa. Super.

> 116, 121, 554 A.2d 974, 977 (1989), quoting ***Commonwealth v. Randall***, 183 Pa. Super. 603, 133 A.2d 276 (1957), *cert. denied*, 355 U.S. 954, 2 L. Ed. 2d 530, 78 S. Ct. 539 (1958). Furthermore, corruption of a minor can involve conduct towards a child in an unlimited number of ways. The purpose of such statutes is basically protective in nature. These statutes are designed to cover a broad range of conduct in order to safeguard the welfare and security of our children. Because of the diverse types of conduct that must be proscribed, such statutes must be drawn broadly. It would be impossible to enumerate every particular act against which our children need be protected.

Commonwealth v. Decker, 698 A.2d 99, 101 (Pa. Super. 1997) (quotations and citations omitted).

Turning to the instant matter, the trial court found the following: "Multiple acts committed by [Leidy] fall within this definition, including but not limited to the repeated, separate sexual offenses against [the victim], making [the victim] pose and touch herself for nude photographs, and having drugs and drug paraphernalia in close proximity to [the victim]." Trial Court Opinion, 3/28/2012, at 4.[24]

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[24] The record reflects that during closing arguments, the Commonwealth described the offense for corruption of minors as follows:

> Corruption of minors, that can be anything. When an adult corrupts the morals of a child or tends to corrupt the morals of a child, in this case it's exactly what he did to her, all the different sexual acts. It could almost be just the drugs, the fact that all those drugs were around there, but it's primarily the sexual acts here.

N.T., 6/20/2011, at 316-317.

(Footnote Continued Next Page)

We agree with the court's determination. Such evidence, as argued by the Commonwealth and indicated by the trial court, establishes that Leidy's conduct fell within the broad language of the statute and would offend the common sense of the community and the sense of decency, propriety, and the morality which most people entertain. ***See Decker***, ***supra***. Moreover, Leidy committed multiple and distinct acts that would constitute separate sentences.[25] Therefore, the trial court did not err or violate his double

(Footnote Continued) ———————————

Additionally, the court instructed the jury with respect to the offense as follows:

> The defendant has been charged with corrupting a minor. To find the defendant guilty of this offense, you must find that each of the following three elements has been proven beyond a reasonable doubt: First, that the defendant was 18 years of age or older at the time of the incident giving rise to the charge; second, that [the victim] was under 18 years of age at that time; and third, that the defendant corrupted or tended to corrupt the morals of [the victim] by his conduct.
>
> If you are satisfied that the elements of corruption of a minor have been proven beyond a reasonable doubt, you should find the defendant guilty. Otherwise, if even one of the elements has not been proven beyond a reasonable doubt, you must find the defendant not guilty.

Id. at 359-360.

[25] Leidy cites to ***Commonwealth v. Robinson***, 931 A.2d 15 (Pa. Super. 2007) and argues that ***Robinson*** is distinguishable from the present matter. In ***Robinson***, the defendant was convicted of three separate counts of corruption of minors. These offenses arose from three separate incidents in the fall of 1997, the summer of 1999, and August of 2000. The defendant argued the court illegally imposed separate sentences because those

(Footnote Continued Next Page)

jeopardy protections by failing to merge his five corruption of minor offenses for sentencing purposes. Accordingly, Leidy's final argument fails and we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 5/23/2013

(Footnote Continued) ———————————

offenses merged. This Court rejected the defendant's argument, stating, "These three incidents, separated by great lengths of time, undeniably constituted three separate criminal acts." ***Id.*** at 24. Leidy contends that ***Robinson*** is distinguishable from his case because the criminal information did not "delineate five different incidents separated by a year, but lumps all the charges into the same three-month timeframe." Leidy's Brief at 44. We disagree. The testimony and evidence presented at trial established that there were five separate incidents. As noted above, the Commonwealth has broad latitude when attempting to fix the date of offenses which involve a continuous course of criminal conduct. ***See G.D.M.***, ***supra***. Accordingly, Leidy's argument is unavailing.