NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. HAROLD G. POWELL Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 949 WDA 2011

Appeal from the Judgment of Sentence May 27, 2011
In the Court of Common Pleas of Venango County
Criminal Division at No(s): CP-61-CR-0000577-2005

BEFORE: GANTMAN, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, J.: **FILED MAY 29, 2013**

Appellant, Harold G. Powell, appeals from the judgment of sentence entered in the Venango County Court of Common Pleas, following his jury trial convictions for four (4) counts each of criminal attempt, indecent assault, and corruption of minors, three (3) counts of aggravated indecent assault, and one (1) count of endangering the welfare of children.[1] We affirm.

The relevant facts and procedural history of this appeal are as follows.

> The Commonwealth alleged [Appellant] molested four children while caring for them at his residence on various occasions between January 1, 1994 and December 31, 2003. In April 2005, one of the children…reported the

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[1] 18 Pa.C.S.A. §§ 901, 3126, 6301, 3125, 4304, respectively.

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*Former Justice specially assigned to the Superior Court.

> abuse to her mother. Following a multi-agency investigation, police identified the four female victims. As a part of the investigation, police requested an interview with [Appellant] on May 20, 2005 and again on July 11, 2005. During these interviews, [Appellant] waived his ***Miranda***[2] rights and answered the investigators' questions concerning the alleged abuse. [Appellant] also signed a statement admitting unlawful sexual contact with three of the victims.[2]
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> [2] ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
>
> On January 30, 2006, the Commonwealth charged [Appellant] by criminal information with [multiple] counts related to the sexual abuse of the children. On February 3, 2006, [Appellant] filed a pretrial motion to suppress the statements he made to police regarding the sexual abuse allegations. On March 20 and April 19, 2006, the court heard testimony on the motion to suppress.

Commonwealth v. Powell, No. 1516 WDA 2007, unpublished memorandum at 2 (Pa.Super. filed August 22, 2008). Ultimately, the court granted Appellant's suppression motion, and the Commonwealth timely filed a notice of appeal. On August 22, 2008, this Court affirmed the order granting suppression. ***See id.***

On April 1, 2009, Appellant filed a "Motion to Suppress Statements Just Provided to Defense Counsel on 3/31/09." In it, Appellant claimed the Commonwealth had just provided defense counsel with a copy of the

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[2] On July 26, 2005, caseworkers from Venango County Children and Youth Services ("CYS") interviewed Appellant while he was incarcerated at the county prison. During the interview, Appellant made additional inculpatory statements.

statements Appellant made to the CYS workers while incarcerated. Appellant argued that the court must suppress the statements pursuant to ***Commonwealth v. Ramos***, 532 A.2d 465 (Pa.Super. 1987), because the CYS workers failed to administer ***Miranda*** warnings prior to the interview. The court conducted evidentiary hearings on April 27, June 5, and August 31, 2009. On November 4, 2009, the court denied the suppression motion, finding the CYS caseworkers "were acting within their capacity at the time of the interview and were not interviewing [Appellant] at the request or urging of the Commonwealth." (Order, filed 11/4/09, at 1).

On October 12, 2010, the Commonwealth filed notice of its intention to introduce evidence of other crimes or wrongs, pursuant to Pa.R.E. 404(b). Specifically, the Commonwealth sought to introduce evidence that Appellant had sexually abused another minor female, Y.B., at the same time he was abusing the victims at issue. The court received argument on the matter on October 15, 2010. On October 18, 2010, the court permitted the Commonwealth to introduce evidence of the sexual assaults Appellant perpetrated against Y.B.

On October 19, 2010, Appellant filed a motion *in limine*, seeking to introduce evidence of past sexual assaults perpetrated against A.L.[3] and Y.B. by other individuals. Appellant argued the court should permit him "to

[3] A.L. was formerly known as A.P. N.L., A.L.'s sister and another victim in this case, was formerly known as N.P.

cross-examine the victims about these incidents to show a source (other than [Appellant]) for their memories and testimony…." (Motion *In Limine*, filed 10/19/20, at 1). Appellant further argued that such evidence did not amount to "past sexual conduct" under Pennsylvania's Rape Shield Law, 18 Pa.C.S.A. § 3104. After receiving argument on the matter, the court denied Appellant's motion.

On October 25, 2010, a jury convicted Appellant of four counts each of criminal attempt, indecent assault, and corruption of minors, three counts of aggravated indecent assault, and one count of endangering the welfare of children. On May 27, 2011, the court sentenced Appellant to an aggregate term of sixteen and one-half (16½) to thirty-three (33) years' imprisonment. Appellant did not file post-sentence motions.

Appellant timely filed a notice of appeal on June 10, 2011. That same day, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on June 16, 2011.

Appellant raises two issues for our review:

> IS THE TRIAL COURT'S FAILURE TO SUPPRESS STATEMENTS MADE TO [CYS] WORKERS AT THE VENANGO COUNTY JAIL WITHOUT THE BENEFIT OF ***MIRANDA*** WARNINGS OR COUNSEL PRESENT A DIRECT VIOLATION OF ***COMMONWEALTH V. RAMOS***…?
>
> DID THE TRIAL COURT [ERR] IN REFUSING TO ALLOW THE DEFENSE TO INTRODUCE EVIDENCE THAT A WITNESS WHO, AT TIME OF TRIAL, WAS 18 YEARS OF AGE AND WAS TESTIFYING TO ABUSE WHEN 5 YEARS OLD HAD

> SUFFERED OTHER ABUSE AND THEREFORE HAD MEMORY ISSUES AND CONFUSION?

(Appellant's Brief at 2).

In his first issue, Appellant asserts the police and CYS conducted a joint investigation into the victims' sexual abuse allegations. Appellant contends CYS caseworkers interviewed him while he was incarcerated in the county prison, after he had applied for and received appointed counsel. Appellant maintains the CYS caseworkers acted in an "official capacity" during the interview, asking questions related to the ongoing criminal investigation. Under these circumstances, Appellant argues ***Ramos*** mandated ***Miranda*** warnings before CYS conducted the interview. Appellant acknowledges ***Commonwealth v. Saranchak***, 581 Pa. 490, 866 A.2d 292 (2005), where our Supreme Court determined that a CYS caseworker need not provide ***Miranda*** warnings to an incarcerated defendant if the interview concerns the plight of the defendant's children. Appellant insists, however, he was not a caretaker for any children at the time of his interview, which the CYS caseworkers conducted for the sole purpose of obtaining information to forward to police. Appellant concludes the court should have suppressed the statements he made to the CYS caseworkers. We agree.

We review the denial of a suppression motion subject to the following principles:

> Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by

> the record and whether the legal conclusions drawn from those facts are correct.
>
> > [W]e may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Williams, 941 A.2d 14, 26-27 (Pa.Super. 2008) (*en banc*) (internal citations and quotation marks omitted).

"The threshold requirements necessitating ***Miranda*** warnings are custodial interrogation and government involvement." ***Ramos, supra*** at 467. "Statements made during custodial interrogation are presumptively involuntary, unless the accused is first advised of…***Miranda*** rights." ***Commonwealth v. Gonzalez***, 979 A.2d 879, 887 (Pa.Super. 2009).

> Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [his] freedom of action in any significant way. The ***Miranda*** safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. Thus, [i]nterrogation occurs where the police should know that their words or actions are reasonably likely to elicit an incriminating response from the suspect. In evaluating whether ***Miranda*** warnings were necessary, a court must consider the totality of the circumstances….

Id. at 887-88 (internal citations and quotation marks omitted).

"Under certain circumstances, individuals who are not law enforcement personnel…possess the status of law enforcement for purposes of custodial

interrogation." ***Commonwealth v. Heggins***, 809 A.2d 908, 914 (Pa.Super. 2002), *appeal denied*, 573 Pa. 703, 827 A.2d 430 (2003). ***See also Commonwealth v. Chacko***, 500 Pa. 571, 459 A.2d 311 (1983) (concluding court should have suppressed inmate's inculpatory statement made to prison director without ***Miranda*** warnings; prison director's questioning was likely to elicit incriminatory response; particular office of individual who performs custodial interrogation is inconsequential). "Civil investigators may conduct custodial interrogation requiring ***Miranda*** warnings." ***Heggins, supra*** at 914 (citing ***Ramos, supra***).

> In [***Ramos, supra***], a [CYS] caseworker interviewed the defendant while he was being held on child molestation charges at a county jail. The caseworker informed the defendant that his investigation was civil, not criminal, in nature. The defendant subsequently confessed to the molestation, which the caseworker reported to the police. This Court held that the suppression of the confession was proper, because the confession was elicited during custodial interrogation without ***Miranda*** warnings having been given. This Court reasoned that CYS is not only a treatment agency, but is the investigating arm of the statewide system of Child Protective Services.

Heggins, supra at 914-15 (internal citation and quotation marks omitted). In analyzing ***Ramos***, our Supreme Court emphasized, "[T]he CYS caseworker was investigating charges relating to the sexual abuse of a child for which [the defendant] was awaiting trial. Thus, the caseworker there was very much analogous to a police officer investigating a crime." ***Saranchak, supra*** at 507, 866 A.2d at 302 (internal citation omitted). ***Compare Commonwealth v. Nester***, 551 Pa. 157, 709 A.2d 879 (1998)

(explaining defendant was not in custody when he confessed to CYS caseworker, Commonwealth had yet to file charges against defendant, and ***Miranda*** warnings were not required).

Instantly, the suppression hearing transcripts reveal that police arrested Appellant on July 11, 2005, for the charges at issue. Appellant applied for counsel, and the court appointed a public defender to represent Appellant on July 15, 2005. Following the appointment of counsel, Appellant remained incarcerated at the county prison. At the same time, CYS caseworkers Cynthia Gariepy and Tammy Shettler received a report that Appellant allegedly sexually abused minors under his care. Upon receiving the report, Ms. Gariepy's responsibilities included investigating the abuse allegations and interviewing the alleged perpetrator. Significantly, Ms. Gariepy explained that CYS works with law enforcement to determine who will interview the alleged perpetrator:

> Not every [abuse case] is referred to law enforcement. There are those…that under regulation must be referred to law enforcement. Those ones then are usually—there is a protocol in scheduling the child interview and at that time we make the decision with law enforcement who is going to interview the alleged perpetrator. We are usually involved together in the interviews on some level, ….

(***See*** N.T. Suppression Hearing, 4/27/09, at 13.) Ms. Gariepy elaborated that CYS is required to notify law enforcement of any allegations of sexual abuse CYS receives.

Ms. Gariepy and Ms. Shettler met with Appellant at the county prison

on July 26, 2005. The meeting occurred in a prison interview room, with corrections officers standing outside the door. Ms. Gariepy stated that the purpose of the meeting was "[t]o alert him to the allegations that we had received and to…do an interview." (***Id.*** at 14). Ms. Gariepy admitted that Appellant did not receive ***Miranda*** warnings at any point during the interview. Ms. Gariepy also described the post-interview procedure:

> [COUNSEL]: Now when you finished this interview on July 26th of 2005, did you talk to [the investigating police officer] after this?
>
> [WITNESS]: I don't remember. I was supervising the case so my caseworker would have probably done most of the contacts.
>
> [COUNSEL]: What is the protocol?
>
> [WITNESS]: Likely they would have [spoken] to any—whoever the law enforcement officer was involved was probably contacted. I just don't know who that was.

(***See*** N.T. Suppression Hearing, 6/5/09, at 18.)

After the interview, the caseworkers prepared the following summary of Appellant's statements:

> [The caseworkers] went to jail to meet with [Appellant]. [Ms. Shettler] gave him the perp letter. [Ms. Shettler] asked him if he knew why [the caseworkers] were there. He said probably b/c of those kids. [Ms. Shettler] asked what kids. He said the ones that say he touched them. [Ms. Shettler] said [the caseworkers] were there b/c he admitted to touching [A.L.] and [N.L.] during his polygraph. He said he [used] to help [A.L.] wash up so he probably did touch her. He stated he was mad b/c this was supposed to have happened years ago and his wife is bringing this stuff up now to get him in trouble. [Ms. Gariepy] told him that this was based on his own

admission. He said they had him very confused when they were giving him the polygraph. He said his wife used to babysit and there would be about 28 kids in the house at once. He said he couldn't keep them all straight. [The caseworkers] said he admitted to touching [N.L.] and [A.L.]. He said there was a case where he had her covered up on his lap. [Ms. Gariepy] said yeah. He said that is why he was in here, and those other kids. [The caseworkers] asked if his wife would ever leave and have him babysit the [children]. He said yeah, he didn't mind babysitting the kids. [Ms. Shettler] asked him if [A.L.] and [N.L.] lived with them for a while. He thought for a while and said, "I think they were, yeah." He said that's when he had to start wearing clothes to bed like pants and stuff. He stated that [A.L.] liked to sleep with him in his room. He said they put two beds in the room, one for him and one for [A.L.]. [Ms. Gariepy] asked him if he would've touched [A.L.] He said he probably did when he was asleep and she would crawl up on him and he would move around. [Ms. Gariepy] asked him if he remembers touching [N.L.] like that. He thought for a while and said he may have. [Ms. Gariepy] asked him if he helped [N.L.] wash up like he did [A.L.] He said no. [Ms. Gariepy] asked if [N.L.] took a shower or bath. He said they only had a bath. He stated that he may have poured water over her head to rinse her off, but he didn't help her. He said he would walk by the door and watch her take her bath, but he didn't help.

* * *

[Ms. Gariepy] asked if [B.C.] was his [child]. He said not biological. [Ms. Gariepy] asked him if he ever touched [B.C.] He stated, "She says I did." [Ms. Gariepy] said, "You didn't answer my question, did you touch her?" He said he may have when he was putting her to bed and tucking her in. [Ms. Gariepy] asked him if he knew what she meant by "touch." He said "sexually." [Ms. Gariepy] said, "Yes, did you ever touch [B.C.] sexually when you were putting her to bed?" He said, "Probably, unintentionally."

* * *

(***See*** Suppression Motion, filed 4/1/09, at attachment.)

Here, the CYS caseworkers interviewed Appellant about certain offenses while he was incarcerated in the country prison with related criminal charges pending. Ms. Gariepy's testimony demonstrated that CYS and law enforcement participated in a joint investigation of Appellant's conduct. Like the CYS caseworker in ***Ramos***, the actions of Ms. Gariepy and Ms. Shettler were analogous to a police officer investigating the crime. We emphasize Ms. Gariepy's testimony that CYS consulted with law enforcement regarding which entity would interview the alleged perpetrator, and CYS maintained contact with law enforcement following the interview. Under the applicable standard of review and relevant case law, we conclude the CYS caseworkers should have given ***Miranda*** warnings to Appellant prior to the interview. ***See Ramos, supra***. ***Compare Saranchak, supra*** (explaining CYS caseworker interviewed defendant, who was incarcerated for murder, concerning placement of defendant's children in foster care; caseworker did not know details of criminal case against defendant; caseworker asked purely conversational question for purpose other than soliciting information about crime at issue).

Our inquiry, however, does not end here. "[A]n appellate court has the ability to affirm a valid judgment or verdict for any reason appearing as of record." ***Commonwealth v. Allshouse***, ___ Pa. ___, ___, 36 A.3d 163, 182 (2012).

> [T]he doctrine of harmless error is a technique of appellate review designed to advance judicial economy by obviating the necessity for a retrial where the appellate court is convinced that a trial error was harmless beyond a reasonable doubt. Its purpose is premised on the well-settled proposition that [a] defendant is entitled to a fair trial but not a perfect one.
>
> [The appellate court] may affirm a judgment based on harmless error even if such an argument is not raised by the parties.

Id. (internal citations and quotation marks omitted). Moreover, "the U.S. Supreme Court in ***Arizona v. Fulminante***, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) 'made clear that the erroneous admission of a confession can be constitutionally harmless….'" ***Commonwealth v. Snyder***, 60 A.3d 165, 173 (Pa.Super. 2013) (quoting ***Commonwealth v. Henry***, 599 A.2d 1321, 1326 (Pa.Super. 1991)).

Instantly, the Commonwealth presented overwhelming and otherwise properly admitted evidence of Appellant's guilt. B.C., who was 20 years old at the time of trial, testified that she and her mother moved into Appellant's residence when she was two years old.[4] B.C.'s mother and Appellant also acted as primary caregivers for two other minor females, A.L. and N.L., who lived at the residence for a few years and shared a bedroom with B.C. B.C. stated that Appellant began molesting her when she was approximately three years old. Appellant would touch B.C.'s chest, buttocks, and "private

[4] Appellant is the husband of B.C.'s mother, but he is not B.C.'s biological father.

part" while bathing her, and Appellant insisted on giving B.C. her baths until she was seven years old. (***See*** N.T. Trial, 10/18/10, at 109-128.)

Further, B.C. testified that Appellant would enter her bedroom at night to rub her chest, buttocks, and vagina.[5] Appellant frequently fondled B.C. over her clothing, but B.C. specifically recalled Appellant placing his hands under her underpants on certain occasions. B.C. also described two incidents where Appellant offered her ice cream if she touched his penis. On one occasion, B.C. touched Appellant's penis over his clothing; on the other occasion, B.C. placed her hand directly on Appellant's penis. B.C. explained that she did not tell anyone about the abuse, because Appellant threatened her with spankings. Appellant also told B.C. she "would be taken away" if she told anyone abuse. The abuse ended when B.C. was approximately eight years old. (***Id.*** at 129-139).

N.L., who was twenty-one years old at the time of trial, testified that she moved into Appellant's residence when she was approximately six years old. At that time, N.L.'s mother allowed Appellant and his wife to take custody of N.L. and her younger sister, A.L. N.L. stated that Appellant routinely entered her bedroom at night and penetrated her vagina with his fingers. On one occasion, Appellant forced N.L. to touch his penis.

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[5] B.C. saw Appellant approaching N.L.'s bed on certain occasions. Although B.C. saw Appellant lift the blanket on N.L.'s bed, B.C. covered her eyes before witnessing any abuse.

Appellant warned N.L. not to tell anyone about his behavior. The abuse lasted approximately two years. Ultimately, N.L. was removed from Appellant's residence after A.L. reported the abuse. (***See*** N.T. Trial, 10/19/10, at 89-105.)

A.C., who was ten years old at the time of trial, testified that Appellant and his wife cared for her beginning when she was three years old. Frequently, A.C. stayed at Appellant's residence during the day until her parents finished work. While at the residence, Appellant inappropriately touched A.C. A.C. described the touching as follows:

> [WITNESS]: [Appellant] would…make me go to—when I would go upstairs he would call me in his room for something and then he would shut the door and then he'd touch me in spots that I didn't want to be touched in and then he would tell me not to tell.
>
> [COMMONWEALTH]: Okay, and where are these spots that you didn't want to be touched?
>
> [WITNESS]: In my private areas.
>
> [COMMONWEALTH]: Okay. Did this happen one time or more than one time?
>
> [WITNESS]: More than once.
>
> [COMMONWEALTH]: Okay, and around how old were you when he first had invited you into his room?
>
> [WITNESS]: Maybe five.

(***Id.*** at 236). A.C. elaborated on this testimony, indicating Appellant reached underneath her pants to touch her "private area." Additionally, Appellant forced A.C. to touch his "private area" while it was covered by his

pants. Appellant would end the abuse if A.C. started to scream, but he warned her not tell anyone about their encounters. (***Id.*** at 239-46).

A.L., who was eighteen years old at the time of trial, testified that she and N.L. began living at Appellant's residence when she was approximately four years old. A.L. and N.L. moved into the residence after their biological mother gave up her custody rights. Shortly after A.L. moved in, Appellant began molesting her. A.L. recalled that the first instance of abuse occurred when she was sitting on Appellant's lap to watch television. Appellant placed his hand down A.L.'s pants and touched her vagina. When A.L. asked Appellant what he was doing, Appellant told her, "I'm playing with you, sometimes adults like to play with kids like this. It's ticklish isn't it?" Appellant continued to make a "tickling motion" with his fingers, both in and around A.L.'s vagina. Although A.L. informed Appellant's wife about the incident, Appellant's wife became upset and refused to believe A.L. (***See*** N.T. Trial, 10/21/10, at 67-85.)

Following the first incident, Appellant inappropriately touched A.L. on several other occasions. Appellant continued to touch A.L. in the same manner, using his fingers to penetrate and fondle A.L.'s vagina. The abuse occurred in the bathtub and in A.L.'s bedroom. The abuse ended only after A.L. informed her biological mother about Appellant's behavior. (***Id.*** at 86-94.) Here, the Commonwealth presented ample evidence to support Appellant's convictions. Given this additional evidence, we conclude the

admission of Appellant's statements to the CYS caseworkers was harmless beyond a reasonable doubt. ***See Allshouse, supra***. Thus, Appellant is not entitled to relief on his first claim.

In his second issue, Appellant contends he filed a motion *in limine* to introduce evidence that other individuals sexually abused A.L. and Y.B. before the abuse at issue. Appellant avers the admission of evidence of other instances of abuse was necessary "to show that these other events were a source for information, led to a mistake in memory, caused a merger of memories," and that the incidents of abuse "were transposed in the minds of the victims…." (Appellant's Brief at 9). Appellant argues the evidence was relevant and admissible, and the court's denial of the motion *in limine* effectively prohibited him from presenting his version of events to the jury. Appellant concludes the court erred in denying his motion *in limine*. We disagree.

"Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." ***Commonwealth v. Drumheller***, 570 Pa. 117, 135, 808 A.2d 893, 904 (2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003) (quoting ***Commonwealth v. Stallworth***, 566 Pa. 349, 363, 781 A.2d 110, 117 (2001)).

> Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue

> more or less probable or supports a reasonable inference or presumption regarding a material fact.

Drumheller, supra at 135, 808 A.2d at 904 (quoting ***Stallworth, supra*** at 363, 781 A.2d at 117-18).

Generally, evidence of a victim's past sexual conduct is inadmissible:

> **§ 3104. Evidence of victim's sexual conduct**
>
> **(a) General rule.—**Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S.A. § 3104(a). Nevertheless, our Supreme Court has determined that the Rape Shield Law does not prohibit the admission of evidence demonstrating a victim was the subject of a previous sexual assault:

> To be a victim is not "conduct" of the person victimized. It would be illogical to conclude that the Rape Shield Law intended to prohibit this type of testimony.
>
> However, that determination does not end [the court's] inquiry. Even though the Rape Shield Law [does] not bar [testimony regarding prior sexual abuse], that testimony does not automatically become admissible. The question then becomes whether the testimony is relevant and material under the traditional rules of evidence.

Commonwealth v. Johnson, 536 Pa. 153, 158, 638 A.2d 940, 942 (1994).

Instantly, Appellant sought to introduce evidence of other prior sexual assaults against A.L. and Y.B. To the extent Appellant wanted to use this

evidence to support a theory that the victims might have confused Appellant with some other abuser, A.L. consistently testified that Appellant committed the criminal acts in question. After hearing A.L.'s testimony, the court expressly determined that A.L. was not confusing the acts committed by Appellant with other instances of abuse:

> Okay, I'm inclined to believe [the prosecutor], I don't think there's any conceivable way that this arguably is conflated in the context of her testimony, her demeanor, I've seen her testify and I just—I can't see how it can be an issue [that] she's confusing this with another event. In the context of how she described where it was especially but also how she can identify [Appellant], the business about the acrimony with his wife and the business about telling her sister but not wanting to tell his wife so she wouldn't create another acrimonious situation. I just don't think it gets us anywhere….

(***See*** N.T. Trial, 10/21/10, at 108.) Similarly, the court found Y.B.[6] competent to remember her childhood and testify about her interactions with Appellant:

> She has, what appears to be a reasonably tight recollection of events, even those events [that] transpired some 13-14 years ago when she was five years of age. Nevertheless, her recollection appears to be responsible and credible and we think that ultimately, under these circumstances, she is competent and credibility becomes a question of fact for the jury.

(***See*** N.T. Trial, 10/22/10, at 175.) In light of the applicable standard of review and the relevant case law, we conclude the court properly determined

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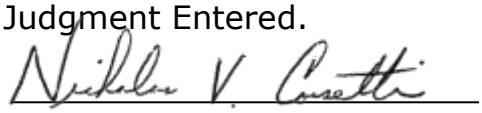
[6] The Commonwealth called Y.B. as a rebuttal witness, after Appellant testified and denied molesting any of the victims.

that the evidence of prior instances of abuse was inadmissible. ***See Drumheller, supra***. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

*JUSTICE FITZGERALD CONCURS IN THE RESULT.

Judgment Entered.



Deputy Prothonotary

Date: 5/29/2013