[J-20-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 144 M.D. Appeal Docket 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered on May 8, 1998 at No.
	:	2840PHL97, affirming the judgment of
v.	:	sentence imposed on April 5, 1991 of the
	:	Court of Common Pleas of Montgomery
	:	County, Criminal Division, at No. 162-90.
PETER BALODIS,	:	
	:	
Appellant	:	
	:	ARGUED: February 2, 1999
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	:	
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DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: February 24, 2000**

I dissent. The Majority finds that counsel for Peter Balodis (Appellant) was ineffective for failing to preserve objections to the testimony of Maddi-Jane Sobel (Sobel). I disagree. Pursuant to Pennsylvania law, counsel is presumed effective and the burden is with Appellant to prove otherwise. Commonwealth v. Pierce, 527 A.2d 973, 975-76 (1987). To do so, Appellant must show that his counsel had no reasonable basis in serving his client by making the chosen decisions during trial. Id. The test should not be whether he made the best available decision, but merely whether the decision is a reasonable one under the circumstances. E.g., Commonwealth v. DeHart, 650 A.2d 38, 44 (Pa. 1994). Following a full review of the record, I cannot conclude that Appellant has proven that defense counsel was ineffective at trial or in post-trial motions. As more fully set forth

below, I find that counsel had a rational basis for his actions; and they were reasonable based on the decisional law at the time in which this case was tried.

First, I disagree with the Majority's conclusion that by permitting the testimony of Sobel, the trial court invited the jury to abdicate its responsibility to determine the credibility of the child on the ultimate issue in this case. Rather, it is evident from a review of both the cross-examination of the child and of Sobel that the testimony was not used to bolster the testimony of either witness. Instead, defense counsel used the testimony of Sobel as an intentional trial strategy to undermine the statements of the child and to show that Sobel initially did not believe that the child was abused. It was also used to set forth the many inconsistent and contrary statements that this child made to the authorities involved, including Sobel.

While it is true that the Commonwealth initially called Sobel as a witness, it was the defense, through his articulation of trial strategy to the court and in his cross examination of the child, that placed her reports into issue at trial.[1] Indeed, during the cross-examination of the ten-year-old boy, defense counsel questioned him at length regarding his conflicting stories of the abuse. (N.T. at 29-74.) Defense counsel raised the child's differing stories to the investigators, including Sobel, regarding the dates of the abuse, the number of other men involved in the abuse, and the location of the sexual acts at issue.

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[1] On direct examination Sobel testified as to the statements that appeared in her first report of August 1989, including that the child had denied any sexual abuse. She also was asked about the reasons why she re-interviewed the child in November of 1989 and in response detailed the claims of sexual abuse that the boy at that time reported. The assistant district attorney then questioned her regarding the reasons the child did not disclose to her in the first interview that he had been abused, but did so in the subsequent interviews (N.T. at 103 - 105.) In the course of this questioning, Sobel indicated that it was "normal" for children initially not to disclose incidents of abuse and gave a general description of children who have been sexually abused. (N.T. at 106-107) It was in this context that the testimony quoted by the Majority introduced at trial.

(Id.) The boy admitted during this cross-examination that he told Sobel, in his first meeting with her in August of 1989, that "none of this happened to him." (N.T. at 52.)

The Majority makes much of the fact that defense counsel objected to one of the questions of the prosecution to Sobel and that this objection belies that counsel had as an intentional trial strategy to use Sobel's later testimony that the child had been abused. However, counsel's own cross-examination of Sobel and statements to the court during trial indicate that this was indeed his strategy.[2] In counsel's cross-examination of Sobel, he questioned her quite extensively about her interviews with the boy and asked her opinion regarding whether the child had been sexually abused. (N.T. 111) Further, the defense counsel continued to probe Sobel about her third interview with the child in February of 1990, an interview about which the Commonwealth had not even specifically addressed with Sobel. (N.T. 115- 119). Moreover, counsel's own words during the trial show that his strategy was to elicit the opinion of Sobel regarding her assessment of the child. Counsel stated "I fully intend to argue to the jury that she believed him … all three times -- even though his stories, in my judgment, were different." (N.T. at 177)(Emphasis added). The court even made a point to note on the record that he admitted Sobel's testimony because of the request of defense counsel. The trial court stated:

> Ordinarily I would not allow that [Sobel's testimony] in. I allowed it in because of the fact that the defense -- and we discussed this **before** we came into the room, **before Maddi-Jane Sobel even took the stand** -- and I only allowed her opinion in because of the fact, from the Commonwealth's standpoint, because of the fact that **it had been brought in by the defense.** I know you told me your trial strategy -- and I can't disagree with it -- but I think you ought to put that on the record, because it wasn't on the record before she testified.

[2] Trial counsel testified at the PCRA hearing that he "wanted the entire report in because I thought that would show more inconsistencies of the victim." (N.T., PCRA, 5/12/97, at 99)

(N.T. at 175-176.) (Emphasis added) The trial court had defense counsel place on the record that testimony of Sobel was introduced as his trial strategy. Defense counsel specifically indicated that he "took it upon himself to elicit that opinion testimony." (N.T. at 176.) Counsel further explained that the reasons he elicited the testimony was that at the first interview, the expert witness wrote a report indicating that she believed that the boy had not been sexually assaulted, and that it was only after the second and third interviews that the child had said he was abused. Defense counsel went on to state that:

> I understood what I was doing -- if I could place that on the record -- that that would open the door for the Commonwealth to introduce her opinion as to the second and third interviews, and I fully intend to argue to the jury that she believed him … all three times -- even though his stories, in my judgment, were different.
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> * * *
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> And I will say, right now, that I believe that was the correct strategy under the circumstances.

(N.T. at 177-78)(Emphasis added)

In addition, the trial court gave many cautionary instructions throughout the trial regarding the role of the jury in evaluating the testimony of Sobel. Before Sobel testified, the trial court instructed the jury that "she is permitted to testify first as a fact witness, as to some of the facts that occurred and second, she is also permitted to tell you about manifestations of sexual abuse in children generally." (N.T. at 102.) Later, the court instructed the jury:

> There was a question asked by defense counsel, with respect to the first report, and an opinion was requested. I will allow you [the prosecutor] to ask whether or not that opinion has

> changed, but again, I am emphasizing that her opinion is not what's important. The only person that can determine whether or not there was a child abuse situation here is you, and you have to determine who did it. You are the ones who make that decision.

(N.T. at 123.) Then, in its charge to the jury the trial court instructed:

> I want to make a special comment about Maddi-Jane Sobel's testimony. I believe I mentioned this before, but I want to mention it again. During the course of the direct examination, questions were asked, relating to whether or not she believed that [the child] had been sexually abused. That opinion which was rendered cannot be considered by you as substantive evidence and cannot be considered by you as opinion evidence on her behalf. You are the people who have to decide the issue. That's the real issue here whether or not he was abused, and by whom. You have to decide that issue.

(N.T. at 224-25)

Second, I disagree with the Majority's conclusion that the strategy of the trial counsel was not reasonable given the law in September of 1990. Indeed, the jurisprudence in this area was such that the Superior Court had interpreted our decisions in Seese, Davis, Gallagher and Rounds to mean that an expert's testimony exceeds permissible bounds only if the expert specifically commented upon the veracity or credibility of the victim. However, testimony regarding the general behavioral and psychological characteristics of sexual abuse victims was admissible. E.g., Commonwealth v. Cepull, 568 A.2d 247 (Pa. Super 1990); Commonwealth v. McIlvaine, 560 A.2d 155 (Pa. Super. 1988); Commonwealth v. Baldwin, 502 A.2d 253 (Pa. Super. 1985); Commonwealth v. Pearsall, 534 A.2d 106, 108 n. 1 (Pa. Super. 1987). These decisions certainly left open the conclusion that Sobel's testimony was admissible if not used for the purpose solely to sustain the credibility of the victim.

In particular, on January 3, 1990, only a few months before the trial at issue here, the Superior Court in Cepull, supra, specifically held that a "generalized description of rape trauma syndrome" did not conflict with the holding of this Court in Seese and did not "improperly enhance the victim's credibility." 568 A.2d at 248-49. See also Commonwealth v. Stonehouse, 555 A.2d 772, 782 (Pa. 1989)(expert testimony regarding general characteristics of victim's psychological and physical abuse is admissible.) Because our decisions at the time did not specify that expert testimony regarding the general characteristics of an abused victim would be per se inadmissible, and because the Superior Court had clearly held that such generalized testimony was admissible, I would find that trial counsel's strategy was eminently reasonable.

Finally, I disagree with the Majority's conclusion that the testimony of Sobel, assuming it was inadmissible, caused prejudice to Appellant. I believe that the evidence at trial was sufficiently strong to establish that the child had been abused. In particular, the testimony of the pediatrician revealed anal scarring and tightening of the sphincter muscle consistent with sexual abuse and the details of the abuse revealed by the boy and related by him to his foster parents support the claim that the abuse did occur. The child steadfastly identified Appellant as one of his abusers and did not waver from this testimony despite his age and the fact that he was subjected to extensive cross-examination. As set forth above, I do not agree that the testimony of Sobel was used to bolster the credibility of the child. In fact, defense counsel used it in just the opposite manner and yet the jury concluded that Appellant did indeed rape and sodomize this child on repeated occasions. This case is not like Seese, Rounds or Davis where the expert gave testimony directly commenting on the truthfulness of the victim and I would accordingly affirm the decision of the Superior Court.

Mr. Justice Castille joins this Dissenting Opinion.