[J-49-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 35 EAP 2001
	:	
Appellant	:	Appeal from the Superior Court judgment
	:	entered March 13, 2001 at 477 PHL 1998,
	:	which vacated the June 9, 1997 judgment
v.	:	of sentence of the Court of Common
	:	Pleas of Philadelphia County, Criminal
	:	Division, at 884 October Term 1996.
EARNEST GATLING,	:	
	:	
Appellee	:	ARGUED: April 8, 2002

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: October 1, 2002**

I join the lead opinion in reaffirming that it is a threshold question to statutory merger analysis whether or not the underlying criminal conduct involved is fairly described as unitary. I have difficulty subscribing to the lead's "break-in-the-chain" test, however, since this issue of distinctness is best assessed according to the totality of the circumstances, and the discrete factors described by the opinion announcing the judgment of the court are open to subjective interpretation and may be difficult to definitively resolve, particularly where, as here, the offenses upon which multiple punishments are to be predicated occurred in close proximity in time and location. See generally Swafford v. State, 810 P.2d 1223, 1233 (N.M. 1991) (elaborating upon the difficulties encountered in attempts to

fashion judicial definitions of the same factual event). I would have no objection to an effort to identify factors to consider as a more general guideline in the assessment, as many other jurisdictions have done. See, e.g., Herron v. State, 805 P.2d 624, 628-29 (N.M. 1991).

In any event, I would emphasize that the essential inquiry where distinctness is legitimately in dispute is inherently factual, and I believe, therefore, that it should generally be resolved by the factfinder. Cf. Commonwealth v. Andrews, 564 Pa. 321, 330-31, 768 A.2d 309, 313-14 (2001); Wyant v. State, 519 A.2d 649, 661 (Del. Super. 1986) ("[w]hether a course of conduct involving multiple sexual assaults permits prosecution for more than one statutory offense . . . ultimately turns on the facts, particularly in the timing between the sexual acts and the physical movement of the victim between the acts").[1] Accordingly, I deem the assessment on appellate review best couched in terms of evidentiary sufficiency. Accord Andrews, 564 Pa. at 330, 768 A.2d at 314; Swafford, 810 P.2d at 1234 (describing the fundamental question in determining whether "similar statutory provisions sharing certain elements may support separate convictions and punishments" as whether "examination of the facts presented at trial establish[es] that the jury reasonably could have inferred independent factual bases for the charged offenses"). I would also note a tendency in a number of jurisdictions to view a series of overt acts in a sexual assault context as discrete crimes. Cf. State v. Rummer, 432 S.E.2d 39, 46-50 (W. Va. 1993) (summarizing cases involving multiple, proximate instances of offensive touching); People v. Perez, 591 P.2d 63, 68 (Cal. 1979) ("A defendant who attempts to achieve sexual

[1] In this context, a request for a bill of particulars may serve as an appropriate tool in ultimately narrowing the factfinder's focus. See Pa.R.Crim.P. 572.

gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.").[2]

Here, while I consider it a close question whether the evidence is sufficient to support the conclusion that Appellee's conduct is severable, ultimately I agree that the evidence as described in the lead opinion, viewed in the light most favorable to the Commonwealth as the verdict winner, and in particular Appellee's repositioning of the minor victim followed by his escalated invasion of her body, was sufficient to support the imposition of separate punishments for multiple acts. Accord Harrell v. State, 277 N.W.2d 462, 466 (Wis. 1979) ("If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment and he must be treated as accepting that risk whether he in fact knew it or not." (quoting Irby v. United States, 390 F.2d 432, 437-38 (D.C. Cir. 1967))). Thus, while the record might be read to suggest that the trial court, sitting as the factfinder, may have actually returned its verdict on the corruption of minors charge based on the entire course of conduct involved, thus failing the lead's break-in-the-chain test, Appellee's failure to narrow the factfinder's focus presently inures to the benefit of the Commonwealth, rendering it unnecessary to proceed further with a sentencing merger assessment.

Concerning the elements of sentencing merger analysis articulated by the opinion announcing the judgment of the court, I agree that the Court's jurisprudence, in its present state, focuses upon legislative purpose in terms of whether or not the General Assembly

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[2] As an aside, however, I find the "volume discount" rubric that has been employed by the Court to be somewhat problematic, since it falls short of an entire calculus, failing to account, in particular, for the ability of the sentencing authority to consider aggravating circumstances such as repetitive offensive acts in fashioning the appropriate punishment for a single offense. See generally 204 PA. CODE §313.13; Commonwealth v. Duffy, 341 Pa. Super. 217, 223, 491 A.2d 230, 231, 233 (1985).

intended for the crimes to be deemed greater and lesser included offenses, and that the evidence adduced at trial has been deemed to be either relevant to this inquiry or a separate factor in the assessment. I would merely observe that some additional development of the law would seem to be necessary to clarify the precise role that the evidence serves in Pennsylvania's sentencing merger jurisprudence. See generally State v. Meadors, 908 P.2d 731, 735-36 (N.M. 1995) (describing, inter alia, one evidence-based approach and its hybrids in merger analysis); James A. Shellenberger and James A. Strazzella, The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies, 79 MARQ. L. REV. 1, 6-13 (Fall 1995) (same).