IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	Nos. CP-14-CR-2421-2011 &
	)	CP-14-CR-2422-2011
GERALD A. SANDUSKY	)	
Commonwealth Attorneys:		*Joseph McGettigan, Esquire* *Frank G. Fina, Esquire*
Defense Attorneys:		*Joseph L. Amendola, Esquire* *Karl Rominger, Esquire*

COMMONWEALTH'S MEMORANDUM IN RESPONSE TO DEFENDANT'S SUPPLEMENTAL PRE-TRIAL MOTIONS/MOTIONS IN LIMINE

NOW COMES the Commonwealth of Pennsylvania, by and through Linda L. Kelly, Attorney General of the Commonwealth of Pennsylvania, Frank G. Fina, Chief Deputy Attorney General, and Joseph McGettigan, Senior Deputy Attorney General, and respectfully submits this memorandum in response to the Defendant's Supplemental Pre-Trial Motions/Motions in Limine, filed May 12, 2012 ("Supplemental Motion").[1]

I. Preliminary Matter

Before turning to the Defendant's few supplemental pre-trial motions/motions in limine that still require a response, the Commonwealth must address an important point that affects Defendant's motions seeking dismissal of this matter and the Commonwealth's ability to fully respond to them, namely, the absence of a factual record. As the procedural history of this case reflects, the Defendant waived a preliminary hearing and therefore no evidentiary record was compiled at that procedural stage. Other pre-trial motions he filed were resolved, too, without evidentiary hearings, due to his decision to waive the same. Putting to the side how unusual a

[1]Because the Court has already disposed of certain aspects of Defendant's supplemental motion, this memorandum will address only those portions that presently remain.

circumstance it is to have no factual record of any sort at this comparatively late point in this litigation, the dearth of any facts which have been established via the submission of evidence figures critically in the consideration of the Defendant's remaining requests for relief. The absence of a factual record requires this Court to deny those requests.

As it will become clear from the discussion of those requests, *infra*, they do not involve purely questions of law, that might be resolved without reference to factual material. To the contrary, all of the Defendant's requests can only be decided in the context of an established factual record. The "facts" he *asserts* in support of his motion are just that—*assertions*. Quite literally, they do not exist. There is no evidence of record to which he can point to substantiate his recited "facts," nor any evidence on which this Court could base factual findings to such effect, if it were inclined to do so.

In asking the Court to grant relief in the absence of an appropriate record, Defendant is inviting the Court to commit serious error. As a myriad of Pennsylvania cases make clear, the existence of a proper record containing evidence that is adequate to support findings of fact necessary to the determination of legal issues is a fundamental requirement in our system of justice. *See, e.g., Commonwealth v. Williams*, 877 A.2d 471 (Pa. Super. 2005)(where following the remand of a challenge to Megan's Law, Superior Court, in reciting the case history, recounted that, in earlier stages of the litigation, there was no record on which certain factual findings could be made); *Christian v. Allstate Ins. Co.*, 502 A.2d 192, 194 (Pa. Super. 1985)(where Superior Court said it could not rule on the legal issues in a case because the parties had not established a factual record in the lower court and that the trial judge's recitation of certain information with which he was familiar from his involvement with the case was insufficient); *Commonwealth v. Evans*, 473 A.2d 606, 608 (Pa. Super. 1984)(finding that the trial

court erred in making factual determination for which there was insufficient evidentiary support).[2] Given the current state of things, the Court is simply unable to make any factual findings necessary for the disposition of Defendant's requests and therefore cannot properly adjudicate the legal issues they involve. It must therefore deny them.

To this the Commonwealth would add that because there is no factual record to which it can make reference, it is in a rather untenable position when it comes to addressing the substance of the Defendant's requests. It cannot direct the Court to any pertinent evidence in the record because there is no evidentiary record. At this juncture, it can at most discuss the law, and will do so, *infra*, but that is an incomplete reply that can only be improved when there is a factual record to which reference can be made.

II. Defendant's Motion to Dismiss/Due Process/Non-Specificity of Allegations [*sic*] Contained in Criminal Informations should be Denied

In this Motion, the Defendant submits no apposite authority for the proposition argued or the relief requested. Pennsylvania Rule of Criminal Procedure 560(B) is clear that a criminal information "*shall be valid and sufficient in law if it contains*" the elements set out in that rule. *Id.*(emphasis added). The Commonwealth respectfully submits each of the criteria set out in the rule are met by the instant Informations. The Commonwealth fully intends to insure that the *allegata* sufficiently match the *probata* in this trial. The pleadings and evidence will reflect, where possible, specific dates and/or date ranges that are appropriate to the serial nature of the offenses.

Further, the Commonwealth is unaware of any authority for the kind of pretrial inquiry into the "specificity of allegations" which Defendant demands. The Commonwealth must

[2] In the portion of the ruling in Evans cited here, the court referenced several of its own cases and cases of our Supreme Court enforcing this longstanding principle, including *Commonwealth v. Hall*, 380 A.2d 1238-1240-1241 (Pa. 1977).

present legally *sufficient* evidence prior to trial; i.e. a *prima facie* case. "[A] *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury." *Commonwealth. v. Karetny*, 880 A.2d 505, 514 (Pa. 2005) (internal citations omitted). It is this standard by which a pre-trial demurrer in a criminal case is evaluated.

Perhaps more importantly, Defendant freely elected to waive his preliminary hearing. The effect of that waiver is to concede that the Commonwealth has established a *prima facie* case for each count charged. To permit a criminal defendant to raise and argue boilerplate assertions of insufficiency via a pretrial motion would be to render waiver of the preliminary hearing a nullity. For that reason, Defendant's Motion to Dismiss should be denied.

Even were this court to reach the ostensible merits of Defendant's argument, the Defendant cannot prevail. The General Assembly and courts of this Commonwealth have taken note of the circumstances peculiar to prosecution of this type of serial sexual abuse of children. As our Superior Court has held "the Commonwealth must be afforded broad latitude when attempting to fix the date of offenses which involve a continuous course of criminal conduct. This is especially true when the case involves sexual offenses against a child victim." *Commonwealth v. Brooks*, 7 A.3d 852, 858 (Pa.Super. 2010)(internal citations omitted).

When confronted with the overwhelming authority expressly rejecting precisely the kind of argument Defendant submits, Defendant can offer no cogent response. Rather Defendant submits a confused mélange of inapposite authority. Defendant first acknowledges the rule that the "[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." *Com. v. Groff,* 548 A.2d 1237, 1242 (Pa.Super.1988). Defendant then embarks on an argument based on *Commonwealth v. Devlin*, 333 A.2d 888 (1975).

In *Devlin*, the victim, a twenty-two year old mentally challenged ward of the state, alleged a single act of sodomy had been committed upon him by a social worker assigned to help the victim. The young victim could not testify to the date of the assault other than to say "[t]he acts took place in the bedroom of the home of the appellant on an occasion when the victim had gone there to procure meal money and that 'it was real dark outside.' However, the victim could not give any indication as to the time of year, the month, day, or date when the crime occurred." *Devlin*, 333 A.2d 888, 889 – 890. The Defendant in *Devlin* was found guilty following a jury trial. On appeal, the Pennsylvania Supreme Court considered whether "the Commonwealth proved the date of the crime with sufficient particularity to uphold the conviction." *Devlin*, 333 A.2d 888, 889. The Court held:

> Here, as elsewhere, 'The pattern of due process is picked out in the facts and circumstances of each case. Due process is not reducible to a mathematical formula. Therefore, we cannot enunciate the exact degree of specificity in the proof of the date of a crime which will be required or the amount of latitude which will be acceptable. Certainly the Commonwealth need not always prove a single specific date of the crime. Any leeway permissible would vary with the nature of the crime and the age and condition of the victim, balanced against the rights of the accused. Here, the fourteen-month span of time is such an egregious encroachment upon the appellant's ability to defend himself that we must reverse.

Id. at 892 (internal citations omitted).

There are several critical distinctions between *Devlin* and the instant case: Procedurally, *Devlin* speaks to *post-trial* consideration of a guilty verdict upon direct appeal. It is without application to the new rule of *pre-trial* 'specificity' that Defendant urges this Honorable Court to announce. Factually, *Devlin* concerned a single instance of assault for which the victim was

unable to provide *any* meaningful context. The defendant in Devlin, could, therefore, persuasively claim to be precluded from presenting an alibi defense. Here, this Defendant is responsible for a sad catalogue of assaults perpetrated on numerous victims over the course of the Defendant's entire career. The discovery already provided to Defendant supplies detail and context of the kind that make *Devlin* factually inapposite.

Moreover, our Superior Court considered the application of *Devlin* in *Commonwealth v. Groff*, 548 A.2d 1237 (Pa.Super. 1988), a case cited approvingly by Defendant. As in *Devlin,* the victim in *Groff* alleged a single act of sexual assault. The Superior Court considered, and rejected, a post-trial ineffective assistance claim based on trial counsel's "fail[ure] to preserve the issue of whether the Commonwealth denied him due process of law. More specifically, appellant maintains that the Commonwealth violated his rights under *Commonwealth v. Devlin,* 460 Pa. 508, 333 A.2d 888 (1975), which held that the prosecution must fix the date when an alleged offense occurred with reasonable certainty . . . . We conclude, however, that appellant's claim is without arguable merit." *Id.* at 1240 - 1241 (internal citations omitted). The Superior Court's holding clearly repudiates Defendant's use of *Devlin* - "[f]or purposes of a *Devlin* claim, the Commonwealth must be allowed a reasonable measure of flexibility when faced with the special difficulties involved in ascertaining the date of an assault upon a young child. *See Commonwealth v. Fanelli, supra; Commonwealth v. Niemitz,* 282 Pa.Super. 431, 422 A.2d 1369 (1980)." *Id.* at 1242. The Superior Court continued "[w]e note that the Commonwealth *would clearly prevail* if appellant had been convicted of *repeatedly* abusing the victim during the summer of 1985. Case 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. " *Id.* (internal citations omitted)(emphasis added). It bears noting that *Groff* is

also procedurally distinguishable as a case concerning post-conviction relief. However, the Superior Court's crystalline direction with respect to *Devlin* claims which involve a continuous course of conduct is, all by itself, the undoing of Defendant's argument for dismissal.

The Defendant's argument here, cobbled together from occasionally unattributed direct quotations from *Devlin* and *Groff*, is untenable. The Defendant provides no close analysis of the case law he submits. As to his alibi defense argument, there is simply no authority for the proposition that the invocation of an alibi defense by a defendant accused of serial sexual assault upon children creates a "time is of the essence" exception to the bright and clear rejection of Defendant's reasoning laid out above. This Honorable Court need look no further than *Niemetz* for the logical end of Defendant's argument for "[i]t would not serve the ends of justice to permit a person to rape and otherwise sexually abuse [a] child with impunity simply because the child has failed to record in a daily diary the unfortunate details of [his or her] childhood". *Niemetz*, 422 A.2d 1369, 1373.

Finally, the Commonwealth emphasizes that what Defendant requests of this Honorable Court is the creation of new "*prima facie*-plus" rule of pretrial criminal procedure. There is no authority, no matter how tortured the application, for pre-trial challenges to an otherwise proper Information, and after waiver of the preliminary hearing, based on objections to "specificity." The Commonwealth respectfully submits the jury will have an opportunity to consider Defendant's laments, and that the deliberation room is the proper forum for his complaints. His cry of "non-specific" is not a legal standard upon which to demand a pretrial demurrer.

Of Defendant's argument that his victims were not *young enough* for protection under *Devlin* and its progeny, the Commonwealth can only emphatically disagree.

For these reasons, the Commonwealth respectfully submits Defendant's Motion to

dismiss should be denied.

III. Defendant's Motion in Limine No. 2 – Petition for Writ of Habeas Corpus Should Be Denied

A review of Defendant's "Motion in Limine No. 2" quickly reveals that each claim (insufficiency of evidence for the criminal episodes related to Victims 2, 6 and 8) cites factual assertions, and asks the Court to adopt said assertions, despite the total absence of a record in this case. The Commonwealth incorporates its earlier arguments (contained in section I.) herein and requests the dismissal of this motion in total. Simply stated, this Court cannot possibly weigh the sufficiency of evidence that has not, in any part, been presented to this Court. As such, the Commonwealth will not argue prospective facts and will limit this brief to a response to the law asserted by the Defendant.

The Defendant has raised concerns about the Superior Court's holding in *Commonwealth v. Barnes,* 456 A. 2d 1037 (1983). Therein the Court was faced with the "very unusual circumstance" of a hearsay statement – in the form of an excited utterance -presented as the "only evidence of the event which gives rise to the statement." The event alleged in *Barnes* was a robbery for which no other corroborative evidence, of any kind, beyond the statement, was presented by the Commonwealth. The Commonwealth failed to even establish circumstantially that Barnes had been in the presence of declarant at the time of the alleged crime. The Superior Court held that, while a properly admissible hearsay statement can be sufficient to sustain a conviction, the statement in *Barnes* was not properly admissible without some additional corroborative evidence of its reliability. *Id. at 1040.*

It is well established through Pennsylvania Law that circumstantial evidence alone can sustain the Commonwealth's burden of proof. *Commonwealth v. Finnie,* 415 Pa. 166, 202 A.2d

85 (1964); *Commonwealth v. Leatherbury*, 469A2d.263,266 (Pa. Super. 1983). It is likewise well established that a sole eyewitness can provide sufficient evidence to support a conviction. Id.; In re: *Commonwealth v. Gonzales*, 405A2d 529,530 (Pa. Super. 1979).

Our Supreme Court has repeatedly held that a statement is an excited utterance exception to hearsay when it is:

> A spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person had just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties.

Commonwealth v. Chamberlain, 557 Pa. 34, 731 A.2d 593, 596 (1999); *Commonwealth v. Washington,* 547 Pa. 550, 692 A.2d 1018, 1022 (1997); *Commonwealth v. Coleman,* 458 Pa. 112, 326 A.2d 387, 388 (1974). The Supreme Court has specifically noted that the basis for this exception to the hearsay rule is that:

> the startling event speaks through the verbal acts of the declarant and vests reliability in an out-of-court statement whose accuracy would otherwise be suspect . . . . The spontaneity of such an excited declaration is the source of reliability and the touchstone of admissibility.[3]

Id.

In cases applying the aforementioned principles, the Court has repeatedly held that the exited utterance alone can be the "linchpin" linking the defendant to the crime. *Chamberlain* at 597; *Coleman* at 390. A "face-to-face observation" is "not a requirement for the *res gestae* present sense impression exception" so long as there exists a "sufficient confluence of time and events to vest special reliability in the statements." *Id.* Hence, the evidence that supports and corroborates the reliability of an excited utterance can be entirely circumstantial and contextual. *Id.*;

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[3] Of course, as repeatedly noted, a Court cannot make this determination pretrial without the benefit of any record evidence pertinent to the time, substance, context, form or contents of the utterance. Nonetheless, the Defendant seeks precisely such a determination by this Court.

Commonwealth v. Sanford, 580 A.2d 784, 788-789 (Pa. Super. 1990).

The Commonwealth avers that it will present an admissible excited utterance from a direct observer of an assault upon a child. In addition, direct evidence will be presented that the defendant was in the location (a shower) with an under-aged boy at the time of the declarant's observations and statements. Consistent with the Supreme Court's holdings, the Commonwealth will present sufficient evidence to "vest special reliability" in the excited utterance.

IV. Defendant's Motion to Compel Commonwealth to Provide Defendant with Written Statement of Uncharged Misconduct Evidence should be Deemed Satisfied or Denied

The Commonwealth recognizes and respects that the Court has already issued a ruling on this motion of the Defendant; however it requests the opportunity to be heard on this issue. The Commonwealth moves this Court to consider this portion of the Brief as a motion to reconsider or, in the alternative, as a showing of good cause to deem the requirement satisfied.

In this motion, the Defendant argues an *ad hoc* motion *in limine* purportedly based on Pennsylvania Rule of Evidence 404(b)(4). That rule states:

(b) Other crimes, wrongs, or acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The Comment to section (b)(4) states:

> [s]ubsection (4), which applies only in criminal cases, and only to the Commonwealth, requires that reasonable notice be given before evidence of other crimes, wrongs, or acts is introduced at trial. It is the same as the federal rule. Its purpose is to prevent unfair surprise, and to give the defendant reasonable time to prepare an objection to, or ready a rebuttal for, such evidence.

Id. The Defendant supplies no authority whatsoever for the proposition that "reasonable notice" means a "written delineation" of uncharged misconduct to be supplied by the Commonwealth to a criminal defendant.

Our Superior Court recently considered the notice requirement in *Commonwealth v. Mawhinney*, 915 A.2d 107, 110 (Pa. Super. 2006). The Superior Court wrote:

> Essentially, Mawhinney asks this Court to adopt a requirement that the "notice" under Rule 404(b) must be formally given and in writing in order for the evidence to be admissible.
>
> However, there is no such requirement in either the rule or the comment to the rule. In fact, the rule itself provides that the trial judge may excuse pretrial notice "on good cause shown." Pa.R.E. 404(b)(4); *see* Hon. Mark I. Bernstein, *Pennsylvania Rules of Evidence,* Comment 17 to Pa.R.E. 404(b)(4) (Gann 2005 ed.). The purpose of the notice requirement is to prevent unfair surprise and give the defendant sufficient time to prepare an objection or a rebuttal to the evidence. *See* Pa.R.E. 404 Comment.

Id. The Commonwealth respectfully submits that Defendant has received the requisite notice through discovery.

With respect to cross examination and rebuttal, the Commonwealth cannot anticipate Defendant's case-in-chief and cannot be expected pre-emptively to produce the script Defendant demands. Any single question of the Defense could change the plan of the Commonwealth when it comes to the submission of evidence of "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." To require such a

pretrial list will only delay the proceedings with endless objections and arguments about the nature of evidence and its presence or absence from such a list.

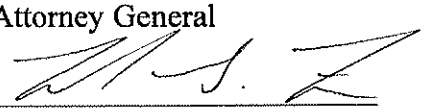
The Commonwealth submits the real purpose for Defendant's Motion is revealed at its end, when Defendant asks this Honorable Court for provision of this 'statement' "thirty (30) days prior to the commencement of trial." The Commonwealth submits the instant Motion is another effort to evince the necessity for a continuance; the Defendant having taken great pains to seek such a continuance by other means which were foreclosed by this Honorable Court's Order of May 21, 2012.

Because there is no authority for the kind of statement Defendant demands, because the Commonwealth has complied with the notice requirement of Pa.R.E. 404(b), and because the Commonwealth cannot predict what fair response will be appropriate to yet unknown Defense theories and questions, Defendant's Motion to Compel should be denied or deemed satisfied.

Respectfully submitted,

LINDA L. KELLY
Attorney General

Dated: May 25, 2012

By: 

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	:	CP-14-CR-2422-2011
vs.	:	
	:	
GERALD A. SANDUSKY	:	
	:	
	:	

CERTIFICATE OF SERVICE

I, Frank G. Fina, Chief Deputy Attorney General, Attorney for the Commonwealth, at Attorney General's Office, 16th Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120, hereby certify that I served a true and correct copy of the COMMONWEALTH'S MEMORANDUM IN RESPONSE TO DEFENDANT'S SUPPLEMENTAL PRE-TRIAL MOTIONS/MOTIONS IN LIMINE, upon

Joseph L. Amendola, Esquire
110 Regent Court
Suite 202
State College, PA 16801-7966

by email and first class mail, postage prepaid at Harrisburg, Pennsylvania on the date noted below.

I certify under penalty of perjury that the foregoing is true and correct.

Date: May 25, 2012

BY: _____

FRANK G. FINA
Chief Deputy Attorney General
Criminal Prosecutions Section
Attorney for the Commonwealth