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

COMMONWEALTH OF PENNSYLVANIA :

VS. : CP-14-CR-2421-2011
CP-14-CR-2422-2011

GERALD A. SANDUSKY :

OPINION ADDRESSING THE DEFENDANT'S POST-SENTENCE MOTIONS

John M. Cleland, Senior Judge
January 30th, 2013

The defendant was convicted by a jury on 45 counts of sexual abuse of minors. He was sentenced on October 9, 2013 and has now filed post-sentence motions. Although his post-sentence motions raise a number of issues, at oral argument defense counsel confirmed the statement in his brief[1] that all issues have been waived except those specifically argued in his brief.

The issues, which I have summarized and restated, that have been preserved and argued are:

1. That the denial of the defense requests for continuance based on the need for counsel to evaluate "the vast amount" (Defendant's brief p. ii) of material received in discovery resulted in a constructive denial of the defendant's Sixth Amendment right to counsel, and the defendant is not required to show that he was prejudiced as a result.

[1] "All claims raised in post sentence motions but not raised in the Brief are waived." (Defendant's Brief in Support of His Post Sentence Motions, p. 45).

2. That it was error to refuse to give to the jury the requested standard point for charge addressing the failure of the victims to make a prompt complaint as a factor to be considered in assessing their credibility.
3. That the jury was erroneously instructed regarding its consideration of the defendant's character evidence.
4. That the failure to give both the prompt complaint instruction and the phrasing of the character evidence instruction impaired the defendant's defense.
5. That the prosecution, in closing argument, improperly commented on the defendant's failure to testify at trial.
6. That it was error to permit the prosecution to introduce the hearsay statements of James Calhoun.
7. That it was error not to dismiss the charges filed against the defendant because of lack of specificity.

I will address the issues in order.

I

That the denial of the defense requests for continuance based on the need for counsel to evaluate "the vast amount" (Defendant's brief p. ii) of material received in discovery resulted in a constructive denial of the defendant's Sixth Amendment right to counsel, and the defendant is not required to show that he was prejudiced as a result.

At the hearing on the post-sentence motions, the defense established that it made some fifty discovery requests. In response the Commonwealth turned over 9,450 pages of materials; the Grand Jury supervising judge authorized the release of 674 pages of material; and other subpoenaed sources delivered 2,140

pages of material. Trial counsel testified that before trial he did not have either the time or opportunity to review the materials and properly prepare for trial. On cross-examination trial counsel also candidly testified he had reviewed the material post-trial and he had discovered no item he would have used at trial if he had had it; and he discovered nothing that would have altered his approach to the trial. It was also established that essentially all of the mandatory, exculpatory or discretionary discovery supplied by the Commonwealth pursuant to Pa. R. Crim. P. 573 was delivered in the early stages of the defense preparation.

Based on trial counsel's testimony it has been clearly established the defense is not able to prove any actual prejudice flowed from the court's denial of the continuance motions. While the volume of discovery produced might have been "vast," as the defense characterizes it, a post-trial review of the material has identified nothing that would have changed the defense trial strategy or would have been useful in advancing the defendant's defense.

Presented with a similar question in Avery v. State of Alabama, 308 U.S. 444, 452 (1940), the United States Supreme Court found "(t)hat the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted." [2]

Defense counsel argues, however, the failure to grant a continuance under the circumstances of this case constitutes a "structural defect" that

[2] With a more modern perspective the principle applied to the facts in Avery might have yielded a different result; but the principle itself endures. See Cronic at 661.

excuses the need to prove prejudice. The defense relies on United States v. Cronic, 466 U.S. 648 (1984) which held under some circumstances "...the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without any inquiry into the actual conduct of the trial." 466 U.S. at 660. As the Court further explained, "...if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Id. at 659.

While Cronic clearly establishes the "structural defect" analysis in principle, the principle in application is less clear. In Cronic the defendant was convicted on a complex mail fraud check kiting scheme. When the defendant's retained counsel withdrew shortly before trial, the trial judge, twenty-five days before trial, appointed a young lawyer with a real estate practice who had never participated in a jury trial. The prosecution had spent four and a half years investigating the case and had developed thousands of documents. Despite affirming the principle of Powell v. Alabama, 287 U.S. 45 (1932),[3] the Court held that the circumstances in Cronic's case did not create the kind of "structural defect" which excused the duty to show prejudice and affirmed the defendant's conviction.

In Florida v. Nixon, 543 U.S. 175 (2004), the United States Supreme Court, after analyzing the application of Cronic to the facts of the case, concluded

[3] "Powell was thus a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into the actual performance at trial." 466 U.S. at 661

defense counsel's admission of the defendant's guilt in a death penalty murder prosecution did not, in the words of Cronic, result "in a failure to function in any meaningful sense as the Government's adversary." 543 U.S. at 190. Instead, the Court held, the proper analysis was the standard prescribed in Strickland v. Washington, 466 U.S. 668 (1984) which required the defense to show trial counsel's strategy was objectively unreasonable and resulted in prejudice to the defendant. See also, Bell v. Cone, 535 U.S. 685 (2002) (The obligation to establish prejudice is only excused "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." at 697. Emphasis in original.)

The Supreme Court of Pennsylvania recently considered the application of Cronic in Commonwealth v. Cousin, 888 A.2d 710 (Pa. 2005). In Cousin, the Court held Cronic applies only "where the lack of a fair trial is a virtual certainty" and "is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable." 888 A.2d, at 719. In a capital homicide case, Commonwealth v. Williams, 950 A.2d 294 (Pa. 2008), the Supreme Court of Pennsylvania considered whether the limited time available to trial counsel to prepare, the capped fee on payment for his services and a limited investigation budget placed "untenable restrictions" on the representation. Citing Cronic, the Court held "neither the fee cap nor the asserted limitation on investigative fees, individually, or collectively with the time constraints, implicates presumed prejudice" because "trial counsel subjected the prosecution's case to meaningful adversarial testing, and, therefore, the doctrine of presumed prejudice is not

applicable." 950 A.2d at 313. See also: Commonwealth v. Mallory, 941 A.2d 686 (Pa. 2008).

As both a matter of fact and of law, I do not think it can be said that either of the defendant's trial counsel failed to test the prosecution's case in a meaningful manner. The defendant's attorneys subjected the Commonwealth's witnesses to meaningful and effective cross-examination, presented evidence for the defense, and presented both a comprehensive opening statement and a clearly developed closing argument. This is simply not a case where trial counsel's inability to review before trial all of the discovery material produced can be said to have resulted in a "structural defect" that made the lack of a fair trial a virtual certainty.

If Cronic does not apply to this case, then Strickland does. As previously noted, Strickland requires a showing of prejudice. And, as also previously noted, trial counsel conceded, having reviewed the discovery material after the trial, he could find nothing that would have changed his trial strategy if he had had the benefit of it before trial. There was, in other words, no prejudice to the defendant by denying defense counsel's motion for a continuance.

Therefore, the post-sentence motion on that ground will be denied.

II

That it was error to refuse to give to the jury the requested standard point for charge addressing the failure of the victims to make a prompt complaint as a factor to be considered in assessing their credibility.

The defense requested I charge the jury that the failure of the victims in this case to make a prompt complaint about the defendant's sexual assault could be considered in evaluating their credibility.

As the transcript of the charging conference reflects, I denied the request because "in my view the research is such that in cases involving child sexual abuse delayed reporting is not unusual and, therefore is not an accurate indicia of honesty and may be misleading." [4](N.T. June 21, 2012, p. 4).

The defense offered no particular wording for my consideration and, instead, relied on the Pennsylvania Standard Criminal Jury Instruction. It reads as follows:

> 4.13A (Crim) Failure to Make Prompt Complaint in Certain Sexual Offenses
>
> 1. Before you may find the defendant guilty of the crime charged in this case, you must be convinced beyond a reasonable doubt that the act charged did in fact occur and that it occurred without *[name of victim]*'s consent.
>
> 2. The evidence of *[name of victim]*'s [failure to complain] [delay in making a complaint) does not necessarily make [his] [her] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore,

[4] My use of the word "research" was not accurate. I did not conduct any ex parte research in preparing the jury charge or conducting the trial. A more accurate explanation would have been that my experience in handling child sexual abuse cases in a variety of contexts – including criminal prosecutions, child abuse and neglect proceedings, juvenile delinquency cases, and child custody litigation – has led me to that conclusion.

> the [failure to complain] [delay in making a complaint] should be considered in evaluating [his] [her] testimony and in deciding whether the act occurred [at all] [with or without [his] [her] consent].
>
> 3. You must not consider *[name of victim]*'s [failure to make] [delay in making] a complaint as conclusive evidence that the act did not occur or that it did occur but with [his] [her] consent. *[name of victim]*'s failure to complain [at all] [promptly] [and the nature of any explanation for that failure] are factors bearing on the believability of [his] [her] testimony and must be considered by you in light of all the evidence in the case.

The Advisory Committee Note following the instruction offers this guidance:

> The instruction is not appropriate where a child or a person otherwise incapable, by mental infirmity, of promptly reporting the incident is the alleged victim. *Commonwealth v. Snoke*, 580 A.2d 295 (Pa. 1990). See, generally, *Commonwealth v. Bryson*, 860 A.2d 1101 (Pa.Super. 2004). As the court said in *Commonwealth v. Thomas*, 904 A.2d 964, 970-71 (Pa.Super. 2006):
> The propriety of a prompt complaint instruction is determined on a case-by-case basis pursuant to a subjective standard based upon the age and condition of the victim. For example, where the victim of a sexual assault is a minor who "may not have appreciated the offensive nature of the conduct, the lack of a prompt complaint would not necessarily justify an inference of fabrication." *Commonwealth v. Jones*, 449 Pa. Super. 58, 66 n.2, 672 A.2d 1353, 1357 n.2 (1996). This is especially true where the perpetrator is one with authority or custodial control over the victim. *Commonwealth v. Ables*, 404 Pa. Super. 169, 183, 590 A.2d 334, 340 (1991), *appeal denied*, 528 Pa. 620, 597 A.2d 1150 (1991). Similarly, if the victim suffers from a mental disability or diminished capacity, a prompt complaint instruction may not be appropriate. *Commonwealth v. Bryson*, 2004 PA Super 405, 860 A.2d 1101, 1104-1105 (Pa. Super. 2004).
>
> Where an instruction is warranted, this language was approved in *Commonwealth v. Patosky*, 656 A.2d 499, 506 (Pa.Super. 1995), and *Commonwealth v. Trippett*, 932 A.2d 188, 200 (Pa.Super 2007).

The thrust of the defense attack on the credibility of the victims was that their testimony was the product of a conspiracy among them to align their stories into a common scenario. And further, that the victims were motivated by the

prospect of financial gain abetted by attorneys representing them in either filed or anticipated civil litigation. This line of cross-examination was directed to almost all of the victims and was a major theme in defense counsel's closing argument.

As the Supreme Court of Pennsylvania noted many years ago in Commonwealth v. Young, 317 A.2d 258 (Pa. 1974), "(w)e have said over and over again that one of the primary duties of a trial judge is to so clarify the issues that a jury may clearly understand the questions to be resolved." (citations omitted) 317 A.2d at 261, n 7. In doing so, the "charge must be viewed as a whole to assess if it adequately guided the jury in the performance of its fact-finding duty." Commonwealth v. Rodriquez, 495 A.2d 569 (Pa. Super. 1985). "There is no right to have any particular form of instruction given; it is enough if the instruction clearly and accurately explains the relevant law." Commonwealth v. Dozier, 439 A.2d 1185, 1188 (Pa. Super. 1982).

While I refused to give the prompt complaint instruction as requested by the defense, using basically the Standard Jury Instruction I did charge the jury as follows:

> "Now, as judges of the facts, you are also the judges of credibility of the witnesses and of their testimony. This means that you must judge the truthfulness and the accuracy of each witness's testimony and decide whether to believe all of it, part of it, or none of it. So, how you may ask do you go about doing that? Well, there are many factors that you may or should consider when judging credibility and deciding whether or not to believe a witness's testimony.
>
> You might consider, for example, was the witness able to see or hear or know the things about which he or she testified?
>
> How well could the witness remember and describe the things about which he or she testified?
>
> Did the witness testify in a manner that was convincing to you?

> How did the witness look and act and speak while testifying?
> Was the witness's testimony uncertain, confused, self-contradictory, argumentative, evasive?
> Has the witness ever been convicted of a crime involving dishonesty?
> What is the witness's reputation for testifying – or for truthfulness in the community among those who know the witness?
> How well does the testimony of the witness square with other evidence in the case, including the testimony of other witnesses? Was it contradicted or supported by the other testimony in evidence which you believe to be true?
> Did the witness have any interest in the outcome of the case, anything to gain or lose by the outcome of the case? Any bias, any prejudice, any motive that might affect his or her testimony?
> If you believe that a witness testified falsely about an important issue, then you may keep that in mind in deciding whether to believe the remainder of the witness's testimony.
> A person who testifies falsely about one thing may have testified falsely about other things but that is not necessarily so but that's among the factors that you can consider.
> And, finally, after thinking about all the testimony and considering some or all of the factors that I had mentioned to you, you draw on your own experience, your own common sense, and you alone, as the sole judges of the facts, should give the testimony of each witness such credibility as you think that it deserves.

(NT June 21, 2012, pp 15-17).

In the context of the case, and considering the defense's line of cross-examination and argument, I concluded the jury would be more appropriately guided by the specific references of the standard credibility charge than it would be by the more generalized guidance of the prompt complaint charge. The charge as given instructs the jury to consider the specific credibility issues raised by the defense: memory, self-interest, motive, and bias. In addition, as requested by the defense, I included a "false in one, false in all" instruction.

The court's charge should state with accuracy those principles which will be genuinely helpful to the jury in deciding the particular case submitted to them.

The object is to assure the verdict is based on the evidence and law applicable to the case at hand. That purpose is defeated if the jury is simply offered a pro forma recitation of an arguably applicable point for charge when the particular instruction would not necessarily be helpful to the jury, and might actually be misleading based on the facts of the case and the arguments of counsel.

The practical reality is that the standard prompt complaint charge does not take into account the complex and myriad factors that might cause a child victim to delay in reporting an assault, or in comprehending the long-term significance of the assault, or even a child's motivation to protect the person who assaulted them. No one who has had the slightest experience with child sexual abuse or given a whit of thought to its dynamics could conclude that failure to make a prompt complaint, standing alone, is an accurate indicia of fabrication.

Therefore, the post-sentence motion on that ground will be denied.

III

That the jury was erroneously instructed regarding its consideration of the defendant's character evidence.

The defense asserts the Court's instruction was erroneous and misleading because, after instructing the jury that evidence of good character could by itself raise a reasonable doubt of guilt, the Court then improperly instructed the jury it should weigh all evidence in the case. Relying on Commonwealth v. Neely, 561 A.2d 1 (Pa. 1989), the defense argues: "Put another way, the requirement that the jury 'weigh' character testimony is totally inconsistent with Neely's mandate that the jury may use such testimony, 'in and of itself' to acquit, for if the jury must

weigh the character testimony it cannot then consider it 'in and of itself'."

(Defendant's Brief on Post-Sentence Motions, p. 28). (Emphasis in original).

Upon a review of the transcript of the charging conference, it appears the only reference to the issue is as follows:

> MR. ROMINGER: Mr. Amendola had raised the idea that defendant's character or reputation evidence alone would be enough to raise a reasonable doubt and it didn't have to be waived (I assume this to be "weighed") with all other evidence in the case. We would add that you propose good character made (I assume this to be "may") by itself raises (sic) a reasonable doubt and require a verdict of not guilty in and of itself, and then you could weigh and consider the evidence of other character but still reach a verdict on character evidence alone."

(N.T. June ___, 2012, p.4)

Using Standard Criminal Jury Instruction 3.06, I charged the jury as follows:

> "Now, the defense has offered evidence tending to prove that the defendant is of good character. I'm speaking of the defense witnesses who testified that the defendant has a good reputation in the community for being law abiding, peaceable, nonviolent individual.
>
> The law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty.
>
> So you must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty. However, if on all the evidence you are not satisfied beyond a reasonable doubt he is guilty, you should find – that he is guilty, you should find him guilty. But in making that determination, you may consider evidence of good character which you believe to be true.

(N.T. June 21, 2012 p.22)

Having reviewed the charge as given, I can only conclude that the Standard Instruction that I gave does precisely what the defense asked for. It

instructs the jury that evidence of good character "may by itself" raise a reasonable doubt and "require" a verdict of not guilty. It then instructs the jury that it must weigh and consider all the other evidence, but it can, basically as Mr. Rominger requested, "still reach a verdict on character evidence alone."

I do not read Neely as broadly as does the defense. The defense, as I understand it, argues under Neely that a jury may acquit based on character evidence without even considering any other evidence in the case. In other words, character evidence – standing alone and without consideration of other evidence – can merit an acquittal. It does not appear that is what Neely holds. Commonwealth v. Khamphouseane, 642 A.2d 490 (Pa. Super. 1994) has expressly held it does not.

There, the Superior Court noted:

> In *Commonwealth v. Neely*, 522 Pa. 236, 561 A.2d 1 (1989), the Supreme Court held that a defendant is entitled to a jury charge that evidence of good character may, in and of itself, create a reasonable doubt. Appellant concedes that the language required by *Neely* was employed by the trial court in the instant case. However, he contends that by subsequently instructing the jury that character evidence is to be weighed along with the other evidence in the case, the trial court diluted the effect of the charge mandated by *Neely*. Appellant asserts that, pursuant to *Neely*, character evidence must by viewed apart from the other evidence and may not be weighed by the jury against such other evidence. We disagree. 642 A.2d at 496.

Instead, the court held the Suggested Standard Jury Instruction, essentially the same instruction I used, "fully and correctly apprised the jury of the manner in which it could consider appellant's evidence of good character." Id. at 496.

Neely requires a trial judge to charge a jury on character evidence using Pennsylvania Suggested Standard Criminal Jury Instruction 3.06(3). Except for changing the Neely court's approved language to substitute "that person's" for "his," I gave 3.06 exactly as Neely requires.

Neely does not address specifically how the jury should be instructed regarding consideration of other evidence in the case. Neely does, however, cite Commonwealth v. Stoner, 108 A. 624, 625 (Pa. 1919) for the proposition that "Good character is of importance in this: that it may, in itself, in spite of evidence to the contrary, raise a reasonable doubt in the minds of the jury and so produce an acquittal." (emphasis added). The opinion then quotes (without citation) Justice James McDermott: "To offer evidence of an otherwise unblemished life is not a plea of mercy. It is, in fact, to be weighed against any present allegation to the contrary...." (emphasis added).

It appears, then, that Neely holds that the jury may find a defendant not guilty based on character evidence alone, but in doing so it may not cavalierly disregard all of the other evidence in the case. The jury must consider all of the evidence produced at trial to arrive at a just verdict, but having done so, a jury may acquit based only on evidence of the defendant's character.

I conclude that the Suggested Standard Jury Instruction, as given, is an accurate statement of Pennsylvania law.

Therefore, the post-sentence motion on that ground will be denied.

IV

That the failure to give both the prompt complaint instruction and the phrasing of the character evidence instruction impaired the defendant's defense.

Because I do not believe either issue standing alone is meritorious, I must also conclude they have no merit standing together.

Therefore, the post-sentence motion on that ground will be denied.

V

That the prosecution, in closing argument, improperly commented on the defendant's failure to testify at trial.

The defense argues the prosecutor's statement during his closing argument that the defendant "had wonderful opportunities to speak out and make his case" was an improper adverse reference to the defendant's failure to testify at trial.

Specifically, the prosecutor's statement in full was:

> The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think or close.
>
> Well, he had the chance to talk to Bob Costas and make his case. What were his answers? What was his explanations? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him? He didn't say he knew why he did it. He just said he saw you do it. Mike McQueary. The janitors. Well, you would have to ask them. That's an answer?
>
> Mr. Amendola did I guess as good a job as possible explaining – he offered that his client has a tendency to repeat questions after they're asked. I would think that the automatic response when someone asks you if you're, you know, a criminal, a pedophile, a child molester, or anything along those lines, your

> immediate response would be, you're crazy, no. What? Are you nuts?
>
> Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats questions. I wouldn't know. I only hear him on TV. Only heard him on TV. So that's his explanation there. He just enjoys young children."

N.T. June 21, 2012, pp. 140-142.

The quoted part of the Commonwealth's closing was less than two pages out of a nearly 60 page transcription of the closing argument. While it does not come through in the printed transcript, it was clear the prosecutor was at times referring to the transcript of the Costas' interview that had been submitted into evidence and was quoting or paraphrasing from it.

At the end of the Commonwealth's closing, counsel approached the bench and defense counsel specifically objected to the part of the closing argument which defense counsel characterized as "commenting on the silence." Id. at 157. I ruled, Id. at 158, that the Commonwealth's arguments were fair rebuttal and noted "I (have) cautioned the jury again and again the defendant has no obligation to testify or present any evidence in his own defense. I will caution the jury again that the decision must be made on the evidence presented and we'll proceed." In my subsequent closing instructions to the jury I then said to them "...that the defendant has no obligation at any time to present any evidence in his own defense." Id. at 160.

In Commonwealth v. Noel, 53 A.3d 848, 858 (Pa. Super. 2012), the Superior Court recently summarized the law regarding the fair scope of a prosecutor's closing argument:

> It is well settled that a prosecutor has considerable latitude during closing arguments and his or her statements are fair if they are supported by the evidence or use inferences that can reasonably be derived from the evidence. *Commonwealth v. Holley*, 945 A.2d 241, 250 (Pa.Super.2008) (citation omitted). "Further, prosecutorial misconduct does not take place unless the 'unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict.' " *Id.* (quoting *Commonwealth v. Paddy*, 569 Pa. 47, 82–83, 800 A.2d 294, 316 (2002)). Moreover, a prosecutor can fairly respond to attacks on a witness's credibility. *Id.* (citation omitted). In reviewing a claim of improper prosecutorial comments, our standard of review is whether the trial court abused its discretion. *Commonwealth v. Hall*, 549 Pa. 269, 285, 701 A.2d 190, 198 (1997) (citation omitted). When considering such a claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one, because not every inappropriate remark by a prosecutor constitutes reversible error. *Commonwealth v. Lewis*, 39 A.3d 341, 352 (Pa.Super.2012) (citation and quotation marks omitted). "A prosecutor's statements to a jury do not occur in a vacuum, and we must view them in context." *Id.* (citation omitted).

I do not believe the Commonwealth's closing argument transcended the bounds prescribed by Noel. The prosecution was responding to the defense closing argument regarding how the defendant conducted himself during the Costas television interview. In addition, I had repeatedly instructed the jury during the trial and before closing arguments that the defendant had no obligation to testify and that their decision had to be based on the evidence presented. After the closing arguments, I instructed the jury on that point again.

Viewed in context, the part of the Commonwealth's closing objected to by the defense was fair argument, addressed to the arguments presented by the defense closing, and was not presented in a way that, in my view, was either

calculated to, or did, create in the jurors a fixed bias toward the defendant or an inclination to disregard the instructions of the Court.

Therefore, the post-sentence motion on that ground will be denied.

VI

That it was error to permit Ron Petrosky to testify regarding the hearsay statements of James Calhoun.

The defense argues it was error to permit the introduction into evidence of the hearsay statements of James Calhoun under the excited utterance exception to the hearsay rule because the testimony was barred by the holding of Commonwealth v. Barnes, 456 A.2d 1037 (Pa. Super. 1983).

Barnes holds that where the only evidence that a startling event occurred is the hearsay statement itself, then the required foundation for the admission of the hearsay statement under the excited utterance exception has not been laid. In other words, an excited utterance, standing alone, cannot be used to prove the exciting event occurred. "Where there is no independent evidence that a startling event occurred, an alleged excited utterance cannot be admitted as an exception to the hearsay rule." 456 A.2d at 1040.

The Commonwealth argues the excited utterance is not the only evidence that the exciting event occurred. In the Commonwealth's view evidence of other facts testified to by Petrosky and a second witness, Jay Witherite, support the conclusion the exciting event did occur and laid the foundation for the introduction of Calhoun's hearsay statements.

The Superior Court is respectfully directed to pp. 198-221 of the Notes of Testimony of June 13, 2012 where the positions of the parties are extensively argued and my ruling will be found.

While the law will benefit from an analysis of the issue by the Superior Court, if my evidentiary ruling is determined to be incorrect it will have no practical bearing on the outcome of the case or the sentence imposed. Even if the counts involving Victim 8 are set aside, the remaining evidence against the defendant was so overwhelming it cannot be said that the introduction of the hearsay statements as to this one victim was anything other than harmless error. In addition, at sentencing I noted the sentences imposed on Counts 36 through 40 at No. 2422 were specifically ordered to run concurrently "and if those convictions (on Counts 36-40) should happen to be set aside on appeal, it will make no difference to the sentence structure as a whole and will not require a remand for resentencing." (N.T. Oct. 9, 2012, p. 57).

Therefore, the post-sentence motion on that ground will be denied.

VII

That it was error not to dismiss the charges filed against the defendant because of lack of specificity.

Relying on Commonwealth v. Devlin, 333 A.2d 888 (Pa. 1975), the defense argues "(t)he Commonwealth failed to provide the Defendant with dates of the commission of the aforementioned alleged offenses with reasonable certainty and with sufficient particularity in order for the Defendant to adequately

prepare his defense, thus violating the notion of fundamental fairness embedded in our legal process." (Defendant's brief, p. 41).

The Commonwealth relies on Commonwealth v. Kohler, 914 A.2d 427 (Pa. Super. 2006) and Commonwealth v. Brooks, 7 A.3d 852 (Pa. Super. 2010) for the proposition it is afforded a greater latitude in establishing the specific dates on which a crime occurred when the offense is a continuous course of conduct involving a child.

On May 18, 2012 the Commonwealth filed both amended Informations and an amended bill of particulars.

The amended bill of particulars addresses the specifics regarding each victim. Summarizing, the bill states:

Victim 1: "Between June 2005 and September 2008 ("the oral sex between June 2007 and September 2008) at the defendant's home,... the Hilton Garden Inn,... Central Mountain Middle School... and elsewhere" when the victim was between the ages of 11 and 15.

Victim 2: "On or about February 9, 2001, in the evening, at the Lasch Football Building."

Victim 3: "On various dates between July 1999 and December 2001 at the Defendant's home and in the Lasch Building" when the victim was between the ages of 12 through 14.

Victim 4: "In the first half of 2000 in the Lasch Building." (anal sex). "In excess of 25 times, on various dates between October 1996 and December 2000 at Defendant's home...East Area Locker Building...Lasch Building...and

elsewhere." (oral sex). "On various dates in 1999...at Defendant's home, East Area Locker Building and Lasch Building...and elsewhere." (anal penetration). The victim was between the ages of 12 through 17.

Victim 5: "In August of 2001....in the Lasch Building" when the victim was 12 or 13.

Victim 6: "On May 3, 1998 between 7 o'clock p.m. and 9 o'clock p.m. at the locker/shower room of the Lasch Building" when the victim was 11 years old.

Victim 7: "On various dates between September 1995 and December 1996...at Defendant's home and in the East Area Locker Building" when the victim was 9 to 11.

Victim 8: "Between the dates November 20 and November 27, 2000, Thursday or Friday evening, on a weekend when the football team had an away football game...in the assistant coach's locker room of the Lasch Building" when the victim is believed to have been between the ages of 11 and 13.[5]

Victim 9: "On various dates between July 2005 and December 2008 at Defendant's home...Hilton Garden Inn...and elsewhere" when the victim was between 12 through 15.

Victim 10: "On various dates between September 1997 and July 1999 at Defendant's home, the outdoor pool at University Park and in Defendant's car" when the victim's age spanned 10 to 12.

[5] By Memorandum and Order dated June 21, 2012, I denied the defense motion to dismiss counts 36 through 40 at Number 2422. The defense argued the evidence produced at trial was inconsistent with the amended bill of particulars. I concluded that any such inconsistency had not been established on the record produced at trial.

The Commonwealth further noted as to victims 1, 3, 4, 5, 7, 8, 9, and 10 that it was "unable to provide specific dates because there were numerous offenses over the course of several years. The victim, a child at the time of the crimes, is unable to provide exact times and dates."

The degree of specificity required in the Commonwealth's Information and Bill of Particulars has been the subject of some attention in previous stages of the case. In my Memorandum and Order dated February 13, 2012, I addressed the Commonwealth's objections to the defense request for a bill of particulars. Subsequently in a Memorandum and Order dated March 13, 2012, I addressed the defense Application for a More Specific Bill of Particulars. And finally, as noted, the Commonwealth filed an amended informations and bill of particulars on May 18, 2012.

As the cases cited in those memorandums make clear, Pennsylvania law gives the Commonwealth considerable latitude in fixing the date and location of sexual assaults against children, especially those alleged to have occurred over a period of months or years.

The specificity of the date and location implicates two concerns: (1) whether the alleged offense occurred within the statute of limitations and; (2) whether the defendant is sufficiently put on notice to enable him to investigate the facts to assert an alibi defense and attack the credibility of the victims. Commonwealth v. Devlin, infra. The defense has not pursued an argument that any of the prosecutions are barred by the statute of limitations. The defendant, in addition, has not proffered an alibi defense to any of the charges, even on the

charges that alleged assaults which occurred in narrow time periods. Instead, the defense has been grounded on an attack on the credibility of the victims – and specifically on their motivation to falsify their testimony to further their civil claims for monetary damages. That defense has not been impeded in any material way by the Commonwealth's inability to specify with more precision the dates of the assaults.

As the Supreme Court noted in Devlin "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." (citations omitted). 333 A.2d at 892. In footnote 3 the Court references Judge Spaeth's dissent in the Superior Court's Devlin opinion. He cautioned "The sweeping language of Commonwealth v. Levy, 146 Pa. Super. 654, 23 A.2d 97 (1941) should be considered in the context of that case." Instead, "no fixed rule should be applied. Rather, the fact that the victim is emotionally young and confused should be weighed against the right of the defendant to know for what period of time he may be called on to account for his behavior. The fact that the victim cannot set a date for the crime should not necessarily be fatal to the Commonwealth's case, thus making the assailant virtually immune from prosecution." 310 A.2d at 313.

Applying the Devlin balancing test, under the facts of this case the balance tips in favor of the Commonwealth. The lack of specificity of dates has not

affectcd the defendant's ability to present an alibi defense because alibi has never been an issue. The defense has never asserted on any of the counts that the defendant was not present at the locations during the times the crimes are alleged to have occurred – even on the counts where the time has been identified with considerable specificity – or that he did not spend considerable time at many locations with all of the identified victims. The defendant has simply argued the offenses did not happen. Likewise, the inability to attack the victims' credibility has not impaired the defendant's ability to defend himself because the credibility attack has been directed toward the victims' motives to testify falsely, and that defense was clearly developed during trial.

Therefore, the post-sentence motion on that ground will be denied.

WAIVER

Finally, the Commonwealth argues the issues raised in the defense post-sentence motion regarding the Court's charge to the jury have been waived because the defense failed to take an exception after the charge was given and before the jury retired to deliberate as required by Pa. R. Crim. P. 647 and Commonwealth v. Pressley, 887 A.2d 220 (2005). (Commonwealth brief, p. 5 et seq.).

As the record of the charging conference demonstrates (N.T. June 21, 2013, p. 3 et seq.), I had prepared my charge in writing and delivered it to counsel the day before the charging conference. My intention was to give counsel an opportunity to review the charge thoroughly and for them to then offer whatever additions, deletions or corrections they thought appropriate during the

charging conference. This was to assure that I was aware of counsel's objections before I gave the charge, rather than waiting until the charge had been concluded and then have the exceptions argued at length at the bench with the jury still in the box. In addition, counsel agreed to a procedure in which I charged the jury on the law before their closing arguments. This had the benefit of permitting counsel to focus their arguments on the facts of the case without having to be concerned that in referring to the applicable law they might say something inconsistent with my charge if the charge were to be given after the closings.

Consequently, I met with counsel to review the charge I had given them the day before and to hear their objections. I held a full and comprehensive argument in chambers and summarized my rulings on the record. (Id. at pp. 3-7).

I then gave the charge in the form I had presented it to counsel the day before, with the changes discussed in chambers. At the end of the charge counsel approached the bench. This exchange occurred:

> MR. ROMMINGER: Everything we did in chambers is preserved for the record?
>
> THE COURT: Yes, all exceptions previously made are preserved on the record.

(Id. at p. 34).

It was clear to me at the time the defense was referring to any ruling I had previously made in chambers as fully as if there had been an exception lodged at the end of the charge. This procedure is certainly consistent with Rule 647. As the Supreme Court noted in Pressley, requiring counsel to take an exception at

the end of the charge "serves the salutary purpose of affording the court an opportunity to avoid or remediate potential error, thereby eliminating the need for appellate review of an otherwise correctable issue." 887 A.2d at 224. That is precisely what happened here. I knew what the defense objections to the charge were before I gave it, I had ruled on them, and the defense preserved the record at the conclusion of the charge by a reference to the proceedings in chambers.

I conclude, therefore, that the defense objections to the court's charge have not been waived.

Accordingly, I enter the following order:

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

COMMONWEALTH OF PENNSYLVANIA	:	
VS.	:	CP-14-CR-2421-2011 CP-14-CR-2422-2011
GERALD A. SANDUSKY	:	

ORDER

AND NOW, JANUARY 30th, 2013, in consideration of the foregoing Memorandum and Order, it is ordered as follows:

The Defendant's post-sentence motions are denied.

By the Court:

John M. Cleland, S.J.
Specially Presiding

FILED FOR RECORD
2013 JAN 30 P 12:06
KEVIN A. SNYDER
PROTHONOTARY
CENTRE COUNTY, PA