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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Opinions

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Commonwealth of Pennsylvania v. David Joseph Paterson

Criminal Appeal—Guilty Plea—Denial of Motion to Withdraw Plea—No Plausible Claim of Actual Innocence—PNA—Plea Entered Knowingly—Sex Offenses

Court is permitted to require a criminal defendant to assert a plausible claim of actual innocence for plea to be withdrawn prior to sentencing.

No. CC 201513857, 201514198. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. McDaniel, J.—January 12, 2017.

OPINION

The Defendant has appealed from the judgment of sentence entered on August 29, 2016. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged at CC 201513857 with Rape,[1] Incest of a Minor (13-18 Years of Age),[2] Corruption of Minors,[3] Endangering the Welfare of a Child[4] and Unlawful Contact with a Minor[5] in relation to an incident that occurred with his 14 year-old niece and at CC 201514198 with Rape,[6] Sexual Assault[7] and Incest[8] in relation to an incident that occurred with his 18 year-old half-sister. He appeared before this Court on March 21, 2016 and, pursuant to a plea agreement with the Commonwealth, pled guilty to the Rape and Incest of a Minor charges at CC 201513857 and to the Rape and Sexual Assault charges at CC 201514198. The plea agreement also included an agreed-upon sentence of five (5) to 10 years at each charge with the sentences to run consecutively within each information but with both informations running concurrently, for an aggregate term of imprisonment of 10 to 20 years.

However, before the sentencing hearing occurred, the Defendant wrote a letter to this Court complaining about the agreed-upon sentence and asking to withdraw his plea. His attorney also filed a formal Motion to that effect. A hearing was held on the Defendant's Motion to Withdraw his Guilty Plea on April 27, 2016 at which time the Defendant indicated he wanted to withdraw his plea because his sentence was outside the guideline range and his attorney disagreed with his assessment that the charges were barred by the statute of limitations. At the conclusion of the hearing, this Court denied the Motion and set the sentencing hearing for May 26, 2016. Additionally, Mark Waitlevertch, Esquire, the Defendant's attorney, was permitted to withdraw and a new attorney was appointed to represent the Defendant

On May 26, 2016, at the time set for sentencing, the Defendant's new attorney, Lisa Leake, Esquire, renewed the Defendant's Motion to Withdraw his Guilty Plea, this time on the basis that the plea had been coerced by prior counsel and the Defendant did not understand the plea. At the conclusion of the hearing, this Court granted the Motion to Withdraw the Plea and set the case for trial on August 29, 2016. However, this Court reconsidered its decision and on August 4, 2016, it vacated its May 26 Order *sua sponte* and reinstated the Defendant's guilty plea. This Court subsequently granted the Commonwealth's Motion to amend the information at CC 201514198 from Rape and Sexual Assault to two (2) counts of Incest of a Minor.[9] The Defendant appeared before this Court on August 29, 2016 for his sentencing hearing and this Court imposed the agreed-upon sentence of terms of imprisonment of five (5) to 10 years at each remaining charge, run consecutively within each information, but with both informations run concurrently with each other, for an aggregate sentence of 10 to 20 years. Post-Sentence Motions were filed and were denied on November 9, 2016. This appeal followed.

The evidence presented by the Commonwealth established that the Defendant lived with his half-sister J.S. while they were growing up. Beginning when she was 12 years old, the Defendant would come into her bedroom, get into bed with her, take off her clothes and kiss her and touch her breasts. He put his fingers in her vagina and engaged in oral and vaginal intercourse with her. In 2002, just after her 18th birthday, the Defendant again came into her bedroom and had vaginal intercourse with her against her will. J.S. became pregnant as a result of that encounter, gave birth and has raised the child as a single parent.

The evidence also established that at some point during their childhood, David and J.S. were removed from their home due to parental neglect and were eventually adopted by their foster mother, E. The Defendant also had a full sister, R., who for reasons unknown to this Court, was not adopted by E. However, R. had a child, P., referred to throughout the proceedings as Jane Doe, and P. was also adopted by E. In January, 2015, P. presented to Children's Hospital of Pittsburgh pregnant at age 14. She gave birth to the baby who had significant physical deformities. P. indicated that she had been raped by the Defendant, who is her natural uncle, and he was the father of the baby.

DNA testing conducted on J.S.'s child and P.'s child confirmed that the Defendant was the father of both children.

On appeal, the Defendant challenges this Court's denial of his Motion to Withdraw his guilty plea and asserts that his plea was not knowing, voluntary or intelligently entered. His claims are addressed as follows:

1. Denial of Motion to Withdraw Guilty Plea

Initially, the Defendant argues that this Court erred in denying his Motion to Withdraw his guilty plea because his request was made prior to sentencing and because his plea was not knowingly, voluntarily or intelligently entered. His claim is meritless.

It is well-established that there is no absolute right to withdraw a guilty plea, although requests made prior to sentencing have "been generally construed liberally in favor of the accused." *Commonwealth v. Forbes*, 299 A.2d 268, 271 (Pa. 1973). "Thus, in determining whether to grant a pre-sentence motion for withdrawal of a guilty plea, 'the test to be applied by the trial courts is fairness and justice'… If the trial court finds 'any fair and just reason', withdrawal of the plea before sentence should be freely permitted, unless the prosecution has been 'substantially prejudiced.'" *Id.*

In its argument at the hearing on the Motion to Withdraw, the Commonwealth cited to our Supreme Court's decision in *Commonwealth v. Carrasquillo*, 115 A.3d 1284 (Pa. 2015), wherein our Supreme Court held that "we are persuaded by the approach of other jurisdictions which require that a defendant's innocence claim must be at least plausible to demonstrate, in and of itself, a fair and just reason for presentence withdrawal of a plea… More broadly, the proper inquiry on consideration of such a withdrawal motion is whether the accused has made some colorable demonstration, under the circumstances, that permitting withdrawal of the plea would promote fairness and justice. The policy of liberality remains extant but has its limits, consistent with the affordance of a degree of discretion to the common pleas courts." *Commonwealth v. Carrasquillo*, 115 A.3d 1284, 1292 (Pa. 2015). The Defendant takes issue with the Commonwealth's reliance on *Carrasquillo*, and asserts that the Superior Court's

decision in *Commonwealth v. Elia*, 83 A.3d 254 (Pa.Super. 2013) is more instructive. Therein, the Superior Court held that "while an assertion of actual innocence constitutes a fair and just reason to permit a defendant to withdraw his plea, it is not the only fair and just reason that would warrant a trial court to permit a defendant to withdraw a guilty plea." *Commonwealth v. Elia*, 83 A.3d 254, 264 (Pa.Super. 2013).

Despite defense counsel's repeated dismissal of *Carrasquillo* and emphasis on an assertion of innocence, this Court notes that the Defendant has never professed his innocence as a basis for withdrawal of his plea. In his correspondence to this Court wherein he initially requested to withdraw his plea, he asserted that the agreed-upon sentence exceeded the guideline ranges. The formal Motion filed by counsel asserted that there had been a "breakdown in the representation… such that Mr. Paterson contends his counsel is a 'Public Pretender' and 'threw him under the bus' [and] the relationship nearly came to blows the last time Mr. Waitlevertch visited Mr. Paterson." (Defendant's Motion to Withdraw Plea of Guilty, p. 1).

At the hearing on the Motion to Withdraw, the following occurred:

THE COURT: Okay, Mr. Paterson, I have a letter from you as well as two motions from your attorney basically asking for you to withdraw your guilty plea. Is that correct?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if you withdraw this plea that the original charges will be reinstated?

THE DEFENDANT: Yes.

THE COURT: Do you understand that the original charges include one count of rape, one count of sex assault, one count of incest at the one information and at the second information it's rape, incest of a minor, corruption of minors, endangering welfare of children and unlawful contact, which you could receive approximately seventy years in jail?

THE DEFENDANT: Yes.

THE COURT: Do you understand that there is also DNA evidence in this case which would point to the fact that you were the father of this child?

THE DEFENDANT: Yes.

THE COURT: Do you understand that this prior sentence will have nothing whatsoever to do with the sentence you may get in the future if convicted?

THE DEFENDANT: Yes.

THE COURT: Mr. Waitlevertch, do you have anything to add?

MR. WAITLEVERTCH: Only that at this point, Your Honor, I have done everything I can to try to explain all that as far as impact of the withdrawal of the plea, and my client and I have reached a total impasse.

THE COURT: Okay.

Mr. Paterson, I have to tell you that this is probably one of the worst ideas you have had in your life. You got a very good plea here. The guidelines are only guidelines, I never have to follow them. They are only a suggestion of what you should be sentenced to, so the fact that one of the sentences you may have been [sic] above the guidelines, it doesn't matter. I knew that you had no prior record score and since you offense gravity was a zero, was not a part of the plea agreement that I accepted. This - you can't have a worse idea than going to trial on this case.

THE DEFENDANT: Well, Your Honor, the problem I had was when I brought it to my public defender's - the thing that - the one case was past the statute of limitations. He didn't do nothing about it.

THE COURT: No, it wasn't.

THE DEFENDANT: How is it not?

THE COURT: I'm not here to answer your questions, Mr. Paterson.

…

THE DEFENDANT: The one I have a complaint about is where it's saying about the DNA.

THE COURT: That's not - that doesn't matter.

THE DEFENDANT: Well, when I asked the public defender he does not want to tell me anything. So that' my biggest problem, he will not communicate with me no matter what I ask him he's telling me that I have no idea what I'm talking about. That's why I'm asking him stuff. But the fact that I looked this up on the law library he goes you don't know what you're doing. That's why I wrote before, I wrote to you , wrote to him and he refused to get back to me, you know.

So that's my biggest problem. How am I supposed to have counsel that will not come forth and help me.

MS. KOREN: Your Honor, the nature of the plea agreement was all put on the record. The facts were put on the record, so even if that was an accurate statement that defense counsel was not giving him information, he testified under oat that he understood and that he was satisfied.

THE COURT: You're not asserting that you were forced to make this plea agreement?

THE DEFENDANT: Yes, I was, yes.

THE COURT: That's not what's in your letters.

THE DEFENDANT: I actually, if you look -

THE COURT: I see why he didn't want to talk to you. Go ahead.

THE DEFENDANT: If you look at the paperwork I signed last time I said I was not happy with my counsel. And he changed that.

THE COURT: You don't have to be happy, you don't have to take him home for Thanksgiving, he just has to represent you, he has to be effective when he is representing you.

THE DEFENDANT: He hasn't been.

(Motion to Withdraw Guilty Plea Transcript. pp. 2-4, 6-8).

Nowhere has the Defendant made any assertions of innocence. In several pleadings the Defendant's new attorney, Lisa Leake, Esquire, has stated that "While Mr. Paterson does maintain his innocence", but the Defendant himself has never made that assertion. Rather, the Defendant's statements indicate that he was displeased with his sentence and came close to physically assaulting his attorney when his attorney attempted to counsel him. Moreover, the DNA evidence is compelling and is a factor in considering counsel's assertion of innocence as a basis for withdrawal. (The voluntariness of the Defendant's plea is addressed in greater detail below, but in summary, there is no indication that the plea was not knowingly, voluntarily and intelligently made). Under these circumstances, this Court found that the Defendant's proffered reason for withdrawing his plea did not constitute a "fair and just reason" for its withdrawal. As such, this Court was well within its discretion in denying the Defendant's Motion to Withdraw his Guilty Plea. This claim must fail.

2. Plea Was Not Knowing, Voluntary and Intelligent

The Defendant also asserts generally that his plea was not knowing, intelligent and voluntary. However, this claim is belied by the record.

The law regarding the voluntariness of guilty pleas is well-settled. Our courts "do not require that a defendant be pleased with the outcome of his decision to plead guilty…[only] that a guilty plea be knowing, intelligent and voluntary." *Commonwealth v. Martin*, 611 A.2d 731, 733 (Pa.Super. 1992). In *Commonwealth v. Cole*, 564 A.2d 203 (Pa.Super. 1989), our Superior Court extensively discussed the requirements of a knowing, voluntary and intelligent plea. It stated:

> 'A guilty plea is not a ceremony of innocence, it is an occasion where one offers a confession of guilt… The defendant is before the court to acknowledge facts that he is instructed constitute a crime… He is then to voluntarily say what he knows occurred, whether the Commonwealth would prove them or not, and that he will accept their legal meaning and their legal consequence'… A criminal defendant who elects to plead guilty has a duty to answer questions truthfully…
>
> Pennsylvania has constructed its guilty plea procedures in a way designed to guarantee assurance that guilty pleas are voluntarily and understandingly tendered… The entry of a guilty plea is a protracted and comprehensive proceeding where the court is obliged to make a specific determination after extensive colloquy on the record that a plea is voluntarily and understandingly tendered. A guilty plea colloquy must include inquiry as to whether (1) the defendant understood the nature of the charge to which he is pleading guilty; (2) there is a factual basis for the plea; (3) the defendant understands that he has the right to a jury trial; (4) the defendant understands that he is presumed innocent until he is found guilty; (5) the defendant is aware as to the permissible range of sentences; and (6) the defendant is aware that the judge is not bound by the terms of any plea agreement unless [s]he accepts such agreement… Inquiry into these six areas is mandatory in every guilty plea colloquy.

Commonwealth v. Cole, 564 A.2d 203, 206-207 (Pa.Super. 1989), *internal citations omitted*.

Prior to the plea hearing, the Defendant completed an extensive written colloquy wherein he acknowledged, inter alia, that he understood the charges, their factual bases and their possible sentences, that he had the right to a jury trial and was presumed innocent, that he was freely entering the plea and his attorney had not forced him to enter the plea or promised him anything as an incentive to enter the plea, that he had ample opportunity to consult with his attorney prior to entering the plea and that he was satisfied with the services of his attorney. (Guilty Plea Explanation of Defendant's Rights, p. 1-11).

Thereafter, the following occurred at the plea hearing:

THE COURT: Ms. Koren, is this a general plea or a plea agreement?

MS. KOREN: This is a plea agreement, Your Honor.

THE COURT: What are the terms?

MS. KOREN: Your Honor, at Commonwealth case 2015-14198, the defendant's going to be pleading guilty to amended counts. So Count 1 would be amended to incest of a minor. That would be 4304 A1. Count 2 is also amended to the same crime, and we would move to withdraw Count 3.

THE COURT: Wait. Count 2 is amend to incest of a minor?

MS. KOREN: Yes. And that would be A1, I believe.

THE COURT: Which is a felony 1.

MS. KOREN: It's on the guidelines, Your Honor. I think it actually is a felony 2.

MR. WAITLEVERTCH: I believe you're correct.

THE COURT: Thank you.

MS. KOREN: At Commonwealth case 2015-13857, defendant's going to be pleading guilty to Count 1, rape by force, and Count 2, incest of a minor victim between 13 and 18 years of age, and we'll be withdrawing the remaining counts. Sentences at that case, Your Honor, at the first case ending in 198, asking for five to ten years incarceration at each count.

Those two counts would run consecutive to one another for a total sentence of ten to 20 years.

At the case ending in 857, we're again asking for five to ten years at each count running consecutive to one another for a total sentence of ten to 20 years, and then the plea agreement is that the two cases will run concurrent to one another for a total sentence of ten to 20 years.

We're also asking for a term of probation to be set by Your Honor following the incarceration with all conditions of sex offender court. This case does require the defendant to register for life on Megan's Law, which is dictated by the legislature and not negotiable.

We're asking for no contact with the victims, and we are asking for a sexually violent predator assessment.

THE COURT: The defendant is not RRRI eligible?

MS. KOREN: That is correct, Your Honor.

THE COURT: Mr. Paterson, will you state your name for the record?

THE DEFENDANT: David Joseph Paterson.

THE COURT: How old are you?

THE DEFENDANT: 33.

THE COURT: How much education have you had?

THE DEFENDANT: 12th grade.

THE COURT: Are you able to read, write and understand the English language?

THE DEFENDANT: Yes.

THE COURT: Do you understand that at the criminal complaint ending in 198, Count 1 and Count 2 have been amended to two counts of incest. It's alleged that you had sexual intercourse with a child who was your descendent or who was your descendent by whole or half blood, each punishable by up to ten years of imprisonment.

At the second information, Count 1 charges you with rape, and it's alleged that you engaged in sexual intercourse by forcible compulsion that would prevent resistance by a person of reasonable resolution, punishable by 20 years of imprisonment. And Count 2 alleges that you engaged in - is Count 2 incest?

MS. KOREN: It is, Your Honor.

THE COURT: That you engaged in or cohabited - you engaged in sexual intercourse or cohabited with a person aged 13 to 18 who was a descendent by whole or half blood, punishable by ten years of imprisonment. Do you understand the charges against you?

THE DEFENDANT: Yes.

…

THE COURT: Mr. Paterson, you're pleading guilty. Are you pleading guilty because you are?

THE DEFENDANT: Yes, ma'am.

THE COURT: You filled out the guilty plea explanation of defendant's rights. Did you read, understand and answer all the questions?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did you do so while your attorney was available?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you satisfied with the services of your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I find that you understand the proceedings, that your plea is knowingly, intelligently and voluntarily made.

(Plea Hearing Transcript, pp. 2-5, 10-11).

The record clearly demonstrates that this Court made the appropriate inquiries during the plea colloquy and that in both his written and oral colloquies the Defendant expressed his understanding and agreement to the nature of guilty pleas in general and the terms of his plea in particular. Given the Defendant's expressed understanding and assent, this Court was well within its discretion in finding that the plea was knowingly, voluntarily and intelligently entered. To the extent that the Defendant asserts the involuntariness of his plea as a basis for its withdrawal as discussed more fully above, this claim is meritless. This claim must fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on August 29, 2016 must be affirmed.

BY THE COURT:
/s/McDaniel, J.

Dated: January 12, 2017

[1] 18 Pa.C.S.A. §3121(a)(1)

[2] 18 Pa.C.S.A. §4302(b)(2)

[3] 18 Pa.C.S.A. §6301(a)(1)(ii)

[4] 18 Pa.C.S.A. §4304(a)(1)

[5] 18 Pa.C.S.A. §6318(a)(1)

[6] 18 Pa.C.S.A. §3121(a)(1)

[7] 18 Pa.C.S.A. §3124.1

[8] 18 Pa.C.S.A. §4302

[9] 18 Pa.C.S.A. §4302(a)(1)

Commonwealth of Pennsylvania v. Richard McCracken

*Criminal Appeal—PCRA—Ineffective Assistance of Counsel—Prosecutorial Misconduct—Missing Medical Records—Improper Questioning of Expert Witness—Failure to Object—Sexual Assault Case Involving Juvenile**

Defense alleges ineffectiveness relating to Commonwealth expert on "typical rape victim" symptoms.

No. CC 201108518. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—January 12, 2017.

OPINION

The Defendant has appealed from this Court's Order of October 20, 2016, which denied his Post Conviction Relief Act Petition following a hearing. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, this Court's Order should be affirmed.

The Defendant was charged with Rape of a Child,[1] Unlawful Contact with a Minor,[2] Indecent Assault – Person Under 13 Years,[3] Statutory Sexual Assault,[4] Endangering the Welfare of a Child[5] and Corruption of Minors.[6] Following a jury trial held before this Court from December 13-14, 2011, the Defendant was convicted of one (1) count of Rape of a Child and the remaining charges.

Pursuant to this Court's Order, an evaluation by the Sexual Offenders Assessment Board (SOAB) was conducted, and the Defendant was found to be a sexually violent predator. Pursuant to the Commonwealth's Praecipe, a Sexually Violent Predator (SVP) hearing was held prior to sentencing on March 13, 2012, and this Court held that the Defendant was a Sexually Violent Predator. The Defendant was then sentenced to two (2) consecutive terms of imprisonment of ten (10) to twenty (20) years at the Rape of a Child and Unlawful Contact with a Minor charges, and a consecutive term of imprisonment of two and one half (2 ½) to six (6) years. A timely Post-Sentence Motion (captioned Post-Verdict Motion) was filed and was denied on March 15, 2012. The judgment of sentence was affirmed on August 27, 2013 and the Defendant's subsequent application for reargument or reconsideration was denied on October 25, 2013. Thereafter, the Defendant's Petition for Allowance of Appeal was denied by our Supreme Court on April 9, 2014.

No further action was taken until January 29, 2015, when the Defendant filed a counseled Post Conviction Relief Act Petition. After reviewing the Motion and the record, this Court Ordered an evidentiary hearing on the claims relating to Dr. Guertin's testimony only. On November 10, 2015, at the time scheduled for the evidentiary hearing, Attorney Gettleman presented a Motion to Compel Production of Records wherein he sought an Order compelling disclosure of the medical records from B.T.'s gynecological examination from the Commonwealth. After discussion, this Court directed Attorney Gettleman to continue his efforts to get the records directly from Children's Hospital of Pittsburgh and receive a definite response from them before involving this Court. On April 29, 2016, Attorney Gettleman filed a "Motion to Proceed on PCRA Petition" wherein he indicated that counsel for UPMC had advised him that the records were missing and could not be located and asking this Court to resume proceedings on the PCRA Petition. That Motion was granted and the previously-referenced evidentiary hearing was rescheduled for October 20, 2016. At the conclusion of that hearing, this Court denied collateral relief. This appeal followed.

Briefly, the evidence presented at trial established that until she was almost ten (10) years old, B.T. lived with her mother B. and two (2) younger brothers, X. and W., in the Leetsdale area. The Defendant, who was B.'s boyfriend and X.'s father, lived with another woman but would visit several times a week and occasionally spend the night Often, during his daytime visits, B. would leave him to babysit B.T. and her brothers, though B. did not work. B.T. testified that on several occasions, beginning when she was eight (8) years old and ending when she was almost ten (10) years old, the Defendant would tell her to pull down her pants and underwear and bend over a piece of furniture or a chair, etc. He would stand behind her and B.T. would then feel pain in her "girlie parts" that felt like something pushing in and out. She was not able to see what was happening. She told the Defendant to stop, but he would not.

On appeal, the Defendant raises seven (7) claims of the ineffective assistance of trial counsel, although a careful examination of those claims reveals that several of the issues are essentially duplicative of each other. As such, this Court has combined and re-ordered the issues for ease of review, as follows:

Initially, this Court notes that in order to establish a claim for the ineffective assistance of counsel, "a PCRA Petitioner must demonstrate, by a preponderance of the evidence, that: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) there is a reasonable probability that the result of the proceedings would have been different absent such error." *Commonwealth v. Gibson*, 19 A.3d 512, 525-26 (Pa. 2011). "'The law presumes that counsel was not ineffective, and the appellant bears the burden of proving otherwise…[I]f the issue underlying the charge of ineffectiveness is not of arguable merit, counsel will not be deemed ineffective for failing to pursue a meritless issue… Also, if the prejudice prong of the ineffectiveness standard is not met, 'the claim may be dismissed on that basis alone and [there is no] need [to] determine whether the [arguable merit] and [client's interests] prongs have been met.'" *Commonwealth v. Khalil*, 806 A.2d 415, 421-2 (Pa.Super. 2002). "With regard to the reasonable basis prong, [the appellate court] will conclude that counsel's chosen strategy

lacked a reasonable basis only if the petitioner proves that the alternative strategy not elected offered a potential for success substantially greater than the course acutely pursued." *Commonwealth v. Busanet*, 54 A.3d 35, 46 (Pa. 2012).

1. Ineffective Assistance of Counsel re: Testimony of Dr. Jennifer Wolford

The Defendant first argues that trial counsel was ineffective in numerous respects with regard to the testimony of Dr. Jennifer Wolford. Specifically, he argues:

> 1. Trial counsel was ineffective when he cross-examined Commonwealth expert witness Dr. Jennifer Wolford and opened the door to testimony that a hymen can regrow itself. This testimony was extremely prejudicial to the petitioner's defense and there was no trial strategy to engage in said cross-examination.
>
> 2. Trial counsel was ineffective when he did not challenge Dr. Wolford's testimony that 90% of the exams of sexual abuse victims are "normal" in several regards (a) where did those statistics come from (b) what does normal entail (c) of the 90% normal examinations, how many entail the regrowth/rehealing of the hymen.
>
> 3. Trial counsel was ineffective when he did not challenge Dr. Wolford on the basis/source of her opinion re the regrowth of the hymen, whether that opinion was generally accepted in the medical community, whether there were any other experts, treatises or professional publications that supported her position.
>
> 7. Trial counsel was ineffective when he failed to object to Dr. Wolford's testimony on direct examination that a hymen can heal itself, failed to request that Wolford's testimony be stricken and failed to request a curative instruction to the jury.

(Defendant's Concise Statement of Matters Complained of on Appeal Pursuant to Rule of Appellate Procedure 1925(b), p. 1-2).

At trial, the Commonwealth presented the testimony of Dr. Jennifer Wolford, the attending physician of the Division of Child Advocacy at Children's Hospital of Pittsburgh. Although Dr. Wolford never examined B.T., it was explained that Dr. Evan Kim, the physician who conducted B.T.'s examination, had since taken a new position and moved to Virginia and so was unavailable to testify. Under these circumstances, the substitution of Dr. Wolford's testimony was appropriate and was not met with any objection from defense counsel. Dr. Wolford was also qualified as an expert without objection from defense counsel.

During her direct examination, Dr. Wolford testified as follows:

Q. (Ms. Carey): And referring to Dr. Kim's evaluation of B.T., could you tell the jury what the impressions were.

A. (Dr. Wolford): The vaginal exam showed that the mucosa, or lining of the vaginal area is pink. That is a normal color that we would describe in a typical exam of a 12-year old. No lesions or lacerations. So there were no cuts. There was no evidence of any bruising. And there was no redness. And then also, a key part of an exam for sexual abuse is to examine the hymen. That is the vaginal opening and it is shaped like a donut. It's a circular area with a large hole in the middle. That showed no lacerations or tears.

And then additionally, as part of the protocol, Dr. Kim evaluates her anal area. No evidence of any tears.

Q. Now, in your experience as an expert in this area, when there is a laceration to that tissue, to the vaginal tissue anywhere around the genitals, how long will it take to begin to heal?

A. I sort of have a little bit of a list of what I look for. So you may see swelling of an area after an acute or recent sexual abuse. An edema or swelling usually will result [sic] within five days. If there is bruising in the area, we typically give a range of two to eight days until that resolves. If there were lacerations, let's say abrasions, so those would be scrapes along that area, very superficial scrapes, that would usually start to resolve within 48 hours. A hymenal tear or laceration to the opening of the vaginal area can heal, but that could take a bit longer. It can begin to heal within five days. It may take longer, but the vaginal hymen can heal itself. That part of your body can heal itself.

Q. So when you have what I will call a normal exam, no lacerations or bruising to report, does that tell you that this child was at that time sexually abused?

A. No. In our field of evaluation or sexual abuse, we know that 90 percent of exams are normal. As we can imagine, a woman's body is meant to stretch in that area. Both for having intercourse or later in life when having a baby come out. Everybody stretches differently and heals differently. It's commonly known in our community of physicians who work in child abuse, that 90 percent of these exams are normal. So a normal exam does not disprove nor support any history provided.

Q. I understand that there is a lot of - well, tell us about the hymen specifically. If someone is raped, vaginal intercourse, a child is raped, tell us what you would expect to see, if anything.

A. One of the common misconceptions is that a physician can evaluate a woman or a young girl to see if she is sexually active, consensual or against her will. That's a common misconception. And to use vulgar terms, people may have said, pop a cherry, but a hymen, as I mentioned, it is not a sheet of tissue that goes over the vaginal entrance. So having a hymen intact, there is not a sheet that goes over your vaginal entrance to say that this young woman has never had intercourse. But, in fact the hymen, for lack of a better description, is a round area of pink tissue that's best described as a donut around the vaginal area. So through the center is how I can see into the opening of the vaginal area.

In a different child or different teenage girl doing a regular vaginal exam, I will use a speculum. A speculum can be inserted into a woman who has never had sexual intercourse.

…Q. And just to be clear, you said that 90 percent of - well, I'll let you state it. I don't want to put words in your mouth. You said something about 90 percent of sexual abuse examinations.

A. Sure. Again, it's commonly known that 90 percent of sexual abuse evaluations that we do have normal exams. It is not uncommon.

(Trial Transcript, pp. 150-153, 155).

Then, on cross-examination, the following occurred:

Q. (Mr. Donohue): Can you tell the jury what are the history of symptoms or physical signs of repeated sexual activity one examination of a female child? What would a doctor see?

A. (Dr. Wolford): Ninety percent of those exams are normal.

Q. And would repeated insertion of an object into an 11-year old girl's vagina reveal a normal hymen?

A. Quite possible.

Q. Possible?

A. Because the human body, particularly in that area, in the female area, is designed to stretch.

Q. What is a hymenal transection?

A. A transection, if we go back to the term donut, transection is simply a cut or laceration. If I were to see a hymenal transection during the examination, I may say there is a transection at 7:00. We sometimes use the clock face to localize.

Q. Isn't it important to look for transections located in the hymen?

A. It is.

Q. And it is important to make that notation there are some areas there, some transection and it could be accidental?

A. That is correct.

Q. And there is also medical documentation to support that conclusion, that areas at three to five and seven to nine on the hymen indicates an accidental effect, is that correct?

A. No. Most present between three and nine. Those are the most important transections that we look for.

Q. And why do you look for them in that particular area?

A. It's just because that's the posterior vaginal wall, and that is where we look for trauma. And the anterior side of the hymen because of the way a girl stands is -

Q. And the area between 9:00 and 7:00, those areas, when there is a transection in that part of the hymen, what does that indicate?

A. I don't use the term - I mention seven as the location, but between three and nine are the areas of transections that we most particularly look for. Again, that's her posterior area of her hymen.

Q. At what point does a woman's hymen stop regrowing?

A. I'm sorry. I cannot answer that with 100 percent certainty, but I will estimate that after she has reached menopause, she's at the peek [sic] of her development. And then you have a normal set of estrogen until you have menopause, but I expect if you are a fully-functioning female with a normal estrogen level, that the tissue can regrow itself.

Q. It can regrow itself?

A. That's right.

Q. But we don't know if it regrew itself in B.T.'s case, do we?

A. That's correct. By documentation, there is no way to know that.

Q. And we do know that he child has complained on repeated times over an 18-month period that something was inserted in her vagina that hurt really bad, caused her to cry and this occurred repeatedly. Did you understand that is the mechanism in this injury?

A. I do, sir.

Q. And you are telling us that will not cause a transection of a hymen in an 11-year old girl?

A. No, sir.

(T.T., p. 163-166).

As noted above, Dr. Wolford was qualified as an expert without voir dire or objection from the Defendant. As an attending physician sitting in for an absent Dr. Kim, she appropriately testified to the findings from B.T.'s medical examination and, having been qualified as an expert, she appropriately offered a medical explanation of those findings. Dr. Wolford testified appropriately and without objection on direct examination regarding the possibility of healing in the hymenal tissue, but did not use the word "regrow" until it was first used by defense counsel on cross-examination. Although the word "regrow" has been the subject of so much of the litigation in this matter, a review of the record in its entirety demonstrates clearly that counsel's use of the word did not impact the verdict. In light of the extensive and compelling testimony from B.T., there is no plausible argument that counsel's use of the word "regrow" caused the jury to convict the Defendant when it would otherwise have acquitted him - which is, in fact, what would be required to sustain a claim of ineffectiveness in this regard.

Neither is there a compelling argument that defense counsel was not prepared for Dr. Wolford's testimony or was somehow taken by surprise by her findings and medical explanations. As this Court noted in its Opinion on the direct appeal of this matter, defense counsel "engaged in a spirited and articulate cross-examination [of Dr. Wolford], most of which concentrated on the issue of the hymen" (Trial Court Opinion, 7/24/12, p. 6). The cross-examination was well-prepared, well-thought out and well-executed.

That it was ultimately not successful in securing an acquittal is not a reflection of counsel's failings, but rather simply a reflection of the overall strength of the Commonwealth's evidence and jury's belief in the Defendant's guilt. The fact that defense counsel may not have inquired as to the source of Dr. Wolford's 90% testimony or that he used the word "regrow" was not the cause of the guilty verdict and the Defendant has not established that the verdict would have been different had the 90% inquiry been made or the word "regrow" not used. Absent any such evidence, the Defendant has absolutely failed to establish his claim for the ineffective assistance of counsel. As such, this Court properly denied collateral relief. This claim is meritless.

2. Ineffective Assistance of Counsel re: Commonwealth's Closing Argument

Next, the Defendant argues that trial counsel was ineffective for failing to object to an "improper, inflammatory and prejudicial statement" made by Assistant District Attorney Carey during her closing argument. Again, this claim is meritless.

During his closing argument, defense counsel argued that B.T. had fabricated the allegations and questioned her motives for doing so:

> MR. DeFAZIO: We have a little girl who is coming in testifying. And she had an opportunity three times that I'm aware of to tell the story. Once at Children's Hospital. Once at the preliminary hearing at the Leetsdale District Judge. And then in court yesterday.
>
> I don't know why she is making these allegations. If it's an attempt for attention or maybe the medication. It was too strong for her. Maybe hallucinations. I don't know. I don't know. But we do know there are times when she told her story that created some questions.

(T.T. p. 249-250).

During the Commonwealth's closing argument, Assistant District Attorney Carey responded to defense counsel's statements:

> MS. CAREY: B.T. had nothing to gain. What she had to lose is half of her family, who chose to believe her mother's boyfriend, a convicted liar. They chose to believe her mother's boyfriend over a little girl…Not just the mother, the whole family. She had a lot to lose. Her family gave up on her and supporter her mother's boyfriend, who said he didn't do it. They don't know whether he did it or not. They are not there every minute.
>
> Sexual offenders don't commit sexual offenses in front of people. This isn't the kind of crime where you look for an audience. Her whole family failed her when she told. And then this is the part of my job I don't like. We put her through forensic interviews. She has to do the forensic interview. And then she has to come to a preliminary hearing and talk to a complete stranger.
>
> I had to build a rapport with her in a couple of minutes. I'm going to help you, but you have to tell again these horrible details of this violent rape that you went through time after time after time. You don't have a mother here to hold your hand while you do it. Half of your family is not talking to you. But trust me. I need you to tell this magistrate what happened.
>
> And then I will see you again in a couple of months downtown and you are going to have to tell 14 strangers. And the room is open to the public. And the defendant, the man who raped you, is going to be sitting there. You have to point him out and have to look at him at least once. And all the people that support him are going to fill the audience. Try to just look at me. I will get you through this.
>
> She had nothing to gain and everything to loose…
>
> Dr. Jennifer Wolford told you that it's widely recognized that ten percent of sexual assault cases result in physical injury at the time of the medical examination. She doesn't work for us. She is at Children's Hospital. The Child Advocacy Center. Young children are sexually assaulted. They are raped.
>
> And so, if you were raped or your loved one is raped and there is no physical signs left after the rape, the testimony is evidence. And we will put it on. And so if you believe B.T., then you have to find this defendant guilty of the charges.
>
> B.T. was failed by her whole maternal family. She needs you. You are all she has to stand up for her and for what this defendant did to her.
>
> The Commonwealth respectfully asks that you return a finding of guilt.
>
> Thank you.

(T.T., pp. 264-266, 267-268).

"'The phrase 'prosecutorial misconduct' has been so abused as to lose any particular meaning. The claim either sounds in a specific constitutional provision that the prosecutor allegedly violated or, more frequently, like most trial issues, it implicates the narrow review available under Fourteenth Amendment due process… However, 'the Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty'… The touchstone is the fairness of the trial, not the culpability of the prosecutor… If the defendant thinks the prosecutor has done something objectionable, he may object, and the trial court rules, and the ruling - not the underlying conduct - is what is reviewed on appeal. Where, as here, no objection was raised, there is no claim of 'prosecutorial misconduct' as such available. There is, instead, a claim of ineffectiveness for failing to object so as to permit the trial court to rule." *Commonwealth v. Cox*, 983 A.2d 666, 685 (Pa. 2009). To succeed on a claim of ineffective assistance of counsel based on trial counsel's failure to object to prosecutorial misconduct, the defendant must demonstrate that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process… 'To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Commonwealth v. Busanet*, 54 A.3d 35, 65 (Pa. 2012), internal citations omitted. In addition, the prosecutor must be allowed to respond to defense counsel's arguments, and any challenged statement must be viewed not in isolation, but in the context in which it was offered… 'The prosecutor must be free to present his or her arguments

with logical force and vigor,' and comments representing mere oratorical flair are not objectionable." *Commonwealth v. Thomas*, 54 A.3d 332, 337-8 (Pa. 2012), internal citations omitted.

A review of Ms. Carey's closing argument as a whole demonstrates no impingement on the Defendant's due process or other rights, but rather reflects her thoughtful response to defense counsel's allegations that B.T. had fabricated the story for attention or because she was hallucinating. Ms. Carey's statements reflect the trauma and personal cost to B.T. for coming forward and so weigh on her credibility. Ms. Carey's argument was both well-reasoned and artful, but in no way impinged on the Defendant's due process rights. The Defendant has utterly failed to establish that Ms. Carey's statements in her closing argument denied him the right to a fair trial, and so has failed to establish his claim for the ineffectiveness of trial counsel in this regard. This claim is also meritless.

3. Ineffective Assistance of Counsel re: Dr. Guertin

Finally, the Defendant argues that trial counsel was ineffective in failing to present expert testimony, specifically that of Dr. Stephen Guertin, on his behalf. However, as the Defendant has both failed to establish the merits of his claim and failed to present the appropriate record for a complete review of this claim, it should be denied.

"'Where a claim is made of counsel's ineffectiveness for failing to call witnesses, it is the appellant's burden tons how that the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the appellant'… 'The mere failure to obtain an expert rebuttal witness is not ineffectiveness. Appellant must demonstrate that an expert witness was available who would have offered testimony designed to advance appellant's cause.'" *Commonwealth v. Chmiel*, 30 A.3d 1111, 1143 (Pa. 2011), internal citations omitted. "Prejudice in this respect requires the petitioner to 'show how the uncalled witness' testimony would have been beneficial under the circumstances of the case.'" *Commonwealth v. Williams*, 141 A.3d 440, 460 (Pa. 2016), internal citations omitted. "Additionally, trial counsel will not be deemed ineffective for failing to call a medical, forensic or scientific expert merely to critically evaluate expert testimony [that] was presented by the prosecution." *Chmiel, supra* at 1143.

Before this Court can reach an analysis of the Defendant's claim regarding trial counsel's failure to call Dr. Guertin, however, this Court must first address PCRA counsel's failure to provide the complete record necessary for an evaluation of this claim. Despite counsel's failure to produce an expert report from Dr. Guertin (which is discussed in greater detail, below), this Court did hold an evidentiary hearing on this claim. Nevertheless, when he prepared his Notice of Appeal, PCRA counsel failed to request a copy of the transcript of that hearing, as he is required to do pursuant to Pennsylvania Rule of Appellate Procedure 1911. That rule states, in relevant part:

> *Rule 191. Request for Transcript*
>
> *(a) General rule. The appellant shall request any transcript required under this chapter in the manner and make any necessary payment or deposit therefor in the amount and within the time prescribed by Rules 4001 et seq. of the Pennsylvania Rules of Judicial Administration.*
>
> *…(c) Form. The request for transcript may be endorsed on, incorporated into or attached to the notice of appeal or other document and shall be in substantially the following form:*
>
> *[Caption]*
>
> *A (notice of appeal) (petition for review) (other appellate paper, as appropriate) having been filed in this matter, the official court reporter is hereby requested to produce, certify and file the transcript in this matter in conformity with Rule 1922 of the Pennsylvania Rules of Appellate Procedure.*
>
> _____
> *Signature*
>
> *(d) Effect of failure to comply. If the appellant fails to take the action required by these rules and the Pennsylvania Rules of Judicial Administration for the preparation of the transcript, the appellate court may take such action as it deems appropriate, which may include dismissal of the appeal.*

Pa.R.A.P. 1911.

In interpreting Rule 1911, our Supreme Court has held that it is not the duty of the trial court to obtain the transcripts or provide a complete record for the appellate court. It stated "the appellant has a duty to frame what is needed…Of course, if a party is indigent, and is entitled to taxpayer-provided transcripts or portions of the record, he will not be assessed costs. But, that does not absolve the appellant and his lawyer of his obligation to identify and order that which he deems necessary to prosecute his appeal. The plain terms of the Rules contemplate that the parties, who are in the best position to know what they actually need for appeal, are responsible to take affirmative actions to secure transcripts and other parts of the record." *Commonwealth v. Lesko*, 15 A.3d 345, 410 (Pa. 2011).

Here, this Court ordered an evidentiary hearing on the Dr. Guertin matter for the simple reason that it wished to consider additional evidence on the claim and in fact took that evidence into consideration when it denied relief. However, absent a record of that hearing, our appellate court is only left with the record of pleadings to evaluate this Court's ruling, and this Court is limited to the same in the preparation of its Opinion. Insofar as there is a record of pleadings from which an evaluation can be made, this Court does not demand that the claim be dismissed out of hand; that is a decision for the appellate court. Nevertheless, this Court does feel that its evaluation of the claim for the appellate court has been hampered by the lack of transcript. Neither does this Court feel that any attempts made by PCRA counsel to request the transcript following the filing of this Opinion would be satisfactory, inasmuch as this Court would still have been deprived of its opportunity to review the transcript and present a full analysis for the appellate courts.

Regardless, should the appellate courts wish to review this matter on the written pleadings only, this Court can provide the following limited analysis:

In support of his PCRA Petition, Attorney Gettleman presented first an unsigned copy of an "affidavit" from Dr. Guertin and then followed with a signed and notarized copy of the same affidavit. However, when this Court scheduled the evidentiary hearing, the pleadings reflect that Attorney Gettleman made efforts to obtain an official expert report and testimony from Dr. Guertin,

but Dr. Guertin would not provide an opinion or testify without having reviewed the records from B.T.'s gynecological examination at Children's Hospital. (See Defendant's Motion to Compel Production of Records, Images oof [sic] Gynecological Examination of B.T., Paragraph 2 "Dr. Guertin advised that he could offer no opinion in this matter until and unless he reviewed the images of the gynecological examination of B.T., the victim in this case.") It was eventually determined that the records were lost and unable to be produced by UPMC and, as a result, no expert opinion was ever offered by Dr. Guertin.

Given the absence of any expert opinion from Dr. Guertin or any other medical expert in support of the Defendant, the Defendant has necessarily failed to establish the elements of a claim for the ineffective assistance of counsel for failing to present expert testimony. See *Chmiel*, *supra*. Counsel will not be deemed ineffective for failing to present expert testimony that does not exist. This claim is meritless.

Accordingly, for the above reasons of fact and law, this Court's Order of October 20, 2016, which dismissed his Post Conviction Relief Act Petition following a hearing, must be affirmed.

BY THE COURT:
/s/McDaniel, J.

Date: January 12, 2017

[1] 18 Pa.C.S.A. §3121(c) – 2 counts

[2] 18 Pa.C.S.A. §6318(1)

[3] 18 Pa.C.S.A. §3126(a)

[4] 18 Pa.C.S.A. §3122.1

[5] 18 Pa.C.S.A. §4304

[6] 18 Pa.C.S.A. §6301(a)(1)

Commonwealth of Pennsylvania v. Javon Hart

*Criminal Appeal—Sufficiency—Evidence—Hearsay—Relevance—Sentencing (Discretionary Aspects)—Merger—Crimen Falsi—Impeachment of Witness—Sexual Assault Case Involving Juvenile**

Multiple claims in case involving sexual abuse of juvenile, including the use of a stuffed animal during child victim's testimony.

No. CC 201513855. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—January 5, 2017.

OPINION

The Defendant has appealed from the judgment of sentence entered on June 23, 2016. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with Involuntary Deviate Sexual Intercourse with a Child,[1] Criminal Attempt,[2] Aggravated Indecent Assault,[3] Unlawful Contact with a Minor,[4] Indecent Assault of a Person Under 13,[5] Endangering the Welfare of a Child,[6] Corruption of Minors[7] and Indecent Exposure[8] in relation to a series of incidents that occurred between the Defendant and his step-daughter beginning when she was 10 years old and continuing until she was 11. Following a jury held before this Court from March 22 through 28, 2016, the Defendant was found guilty of all charges. On June 23, 2016, he appeared before this Court and was sentenced to four (4) consecutive terms of imprisonment of 10 to 20 years at the IDSI, Criminal Attempt, Aggravated Indecent Assault and Unlawful Contact charges, for an aggregate term of imprisonment of 40 to 80 years. Following a hearing, he was subsequently determined to be a Sexually Violent Predator. His Timely Post-Sentence Motions were filed and were denied on July 12, 2016. This appeal followed.[9]

On appeal, the Defendant has raised 18 claims of error.[10][11] This Court has combined and re-ordered the issues for ease of review, as follows:

I. Sufficiency of the Evidence

Initially, the Defendant argues that the evidence was insufficient to support the convictions for Unlawful Contact, Endangering the Welfare of a Child, Corruption of Minors and Indecent Exposure. A review of the record reveals that the evidence was sufficient to support all of the convictions and that this claim is meritless.

The evidence presented at trial established that when she was seven (7) years old, B.O.'s mother married the Defendant. One evening when she was 10 years old, B.O. laid down on the couch in the living room to watch television with the Defendant after she had finished her chores. While she was laying on the couch, the Defendant put his hands into her pajama pants and put his fingers inside of her vagina and anus and licked her vagina. On another occasion, B.O. was watching television in her mother's bedroom when the Defendant came in, took her pants off and licked her anus. He also had her use her hand to masturbate him. On another occasion, the Defendant came into B.O.'s room, pulled down his pants and attempted to pull her head towards his penis. He also had B.O. bring him some baby oil, then used it to masturbate and asked her to watch. The assaults continued until B.O. was 11 years old.

When reviewing a challenge to the sufficiency of the evidence, the court must determine "whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt…[An appellate court] may not weigh the evidence and substitute [its] judgment for the fact finder. In addition…the facts and circumstances established by the Commonwealth need not preclude every possibility

of innocence. Any doubts regarding appellant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances…Furthermore, the Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." *Commonwealth v. Lewis*, 911 A.2d 558, 563 (Pa.Super. 2006).

1. Unlawful Contact

Our Crimes Code defines Unlawful Contact with a Minor as follows:

§6318. Unlawful contact with minor

(a) Offense defined. – A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

(1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses)…

…(c) Definition. – As used in this section, the following words and phrases shall have the meanings given to them in this subsection:…

…"Contacts." Direct or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.

18 Pa.C.S.A. §6318.

The evidence discussed above is clearly sufficient to support the conviction for Unlawful Contact with a Minor. On several occasions, the Defendant exposed his genitals to his 10-year-old stepdaughter, made her touch and rub his penis, forcibly attempted to put his penis into her mouth, licked her vagina and put his fingers into her vagina and anus, each of which would constitute prohibited conduct under Chapter 31 of the Crimes Code. In order to commit the various touchings themselves, the Defendant necessarily had contact with B.O., which is the actual crime of unlawful contact. Although the Defendant seems to argue that Unlawful Contact is simply a way to double-charge the IDSI, Aggravated Indecent Assault, Indecent Assault and Indecent Exposure charges, his argument misconstrues the fundamental nature of the crime of unlawful contact itself. "Unlawful contact with a minor 'is best understood as unlawful communication with a minor.'" *Commonwealth v. Velez*, 51 A.3d 260, 266 (Pa.Super. 2012). "The elements of this crime consist of intentionally, either directly or indirectly contacting or communicating with a minor ***for the purpose*** of engaging in a sexual offense… Once appellant contacts or communicates with the minor for the purpose of engaging in the prohibited activity, the crime of unlawful contact with a minor has been completed… The actor need not be successful in completing the purpose of his contact or communication with the minor." *Commonwealth v. Morgan*, 913 A.2d 906, 910 (Pa.Super. 2006). The evidence clearly established that the Defendant had contact with B.O. for the purpose of engaging in the various sexual acts he performed on her. This claim is meritless.

2. Endangering the Welfare of a Child

Our Crimes Code defines Endangering the Welfare of a Child as follows:

§4304. Endangering welfare of children

(a) Offense defined. -

(1) A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

18 Pa.C.S.A. §4304.

The Defendant now argues that the Commonwealth failed to prove that he "knowingly" endangered B.O.'s welfare or that he was "practically certain that his conduct would cause the welfare of the complainant to be endangered" (Defendant's Concise Statement, p. 4). However, in *Commonwealth v. Retkofsky,* 860 A.2d 1098 (Pa.Super. 2004), our Superior Court discussed the element of intent necessary to support an endangerment conviction: "Whether particular conduct falls within the purview of the statute is to be determined within the context of the 'common sense of the community'…The accused must act 'knowingly' to be convicted of endangering the welfare of a child. We have employed a three-prong standard to determine whether the Commonwealth's evidence is sufficient to prove this intent element: (1) the accused must be aware of his or her duty to protect the child; (2) the accused must be 'aware that the child is in circumstances that could threaten the child's physical or psychological welfare;' and (3) the accused either must have failed to act or must have taken 'action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.'" *Commonwealth v. Retkofsky*, 860 A.2d 1098, 1099-1100 (Pa.Super. 2004), *internal citations omitted*. The evidence presented by the Commonwealth established that on multiple occasions the Defendant, who was watching B.O. touched and licked her vagina and anus, exposed his penis to her and made her touch his penis. The Defendant was certainly aware that his actions threatened B.O.'s physical and psychological welfare and yet he persisted in his assaults on her. The evidence was more than sufficient to establish the elements of Endangering the Welfare of a Child. This claim is meritless.

3. Corruption of Minors

Our Crimes Code defines Corruption of Minors as follows:

§6301. Corruption of minors

(a) Offense defined. -

(1)(ii) Whoever, being the age of 18 years and upwards, by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 commits a felony of the third degree.

18 Pa.C.S.A. §6301.

Here, the Defendant argues that while the acts he performed on B.O. may have had "deleterious physical and/or emotional effects", the "non-consensual nature of the acts cannot cause a corruption" of an 11-year-old's morals and there was no evidence to support the corruption of B.O.'s morals.

When considering the evidence to support a conviction for corruption of minors, our courts have held that "the statute requires that the knowing, intentional acts of the perpetrator tend to have the effect of corrupting the morals of a minor… *In Commonwealth v. Decker*, 698 A.2d 99, 101 (Pa.Super. 1997), [the Superior Court] held that actions that tended to corrupt the morals of a minor were those that 'would offend the common sense of the community and the sense of decency, propriety and morality which most people entertain' … In deciding what conduct can be said to corrupt the morals of a minor, 'the common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.'… Furthermore, corruption of a minor can involve conduct towards a child in an unlimited number of ways. The purpose of such statutes is basically protective in nature. These statutes are designed to cover a broad range of conduct in order to safeguard the welfare and security of our children." *Commonwealth v. Slocum*, 86 A.3d 272, 277-278 (Pa.Super. 2014), *internal citations omitted*. There is no question that the Defendant's conduct - exposing his genitals to his 10-year-old stepdaughter, making her touch and rub his penis, forcibly attempting to put his penis into her mouth, licking her vagina and putting his fingers into her vagina and anus, meets the definition of corrupting the morals of a minor as understood by the common sense of the community. This claim is meritless.

4. Indecent Exposure

Our Crimes Code defines Indecent Exposure as follows:

(a) Offense defined. – A person commits indecent exposure if that person exposes his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm.

18 Pa.C.S.A. §3127.

The Defendant now argues that the statute requires the presence of "[two or more] other persons", so that his exposure of his genitals to only B.O. does not satisfy the number of people required to convict him of this crime. The Defendant's argument is meritless on its face. The statute does not require "[two or more] other persons" as the Defendant now claims (the Defendant's attempted imputation using brackets notwithstanding). The evidence clearly proved that the Defendant exposed his genitals to B.O. - which is sufficient to establish the elements of the offense. This claim is meritless.

Ultimately, the Defendant has failed to establish any of his claims alleging the insufficiency of the evidence. His arguments are spurious and defy comprehension. His claims must fail.

II. Trial Court Error

Next, the Defendant avers a number of claims of trial court error. Again, they are addressed as follows:

5. Allowing Victim to Testify While Holding Stuffed Animal

The Defendant first argues that this Court erred in allowing B.O. to testify while holding a stuffed animal. He claims his "state and federal confrontation, cross-examination and due process rights" were violated when this Court allowed B.O. to testify with the stuffed animal, refused to allow her to be questioned regarding the animal and failed to give a cautionary instruction to the jury regarding the stuffed animal. He claims that the harm he suffered from the stuffed animal's presence was so egregious as to require a new trial.

This Court has presided over many child sex assault cases over its years on the bench, and so understands that different victims deal with the trauma in different ways. B.O. was ten (10) years old when the Defendant, her stepfather, began assaulting her sexually by (as described repeatedly above), exposing his genitals to her, making her touch and rub his penis, forcibly attempting to put his penis into her mouth, licking her vagina and putting his fingers into her vagina and anus, and she was 11 years old when she had to walk into a courtroom full of unknown adults and tell them what happened to her. It is a great understatement to characterize that experience as uncomfortable and if the child needed a stuffed animal to comfort her, then her holding a stuffed animal was acceptable to this Court. This Court was not inclined to let defense counsel take away the security provided by the stuffed animal by allowing it to become the subject of cross-examination and more upset for the child. B.O.'s use of the stuffed animal was age-appropriate and this Court did not abuse its discretion by allowing her to hold it during her testimony. This claim must fail.

6. Exclusion of Testimony from Tamara Fennell at Trial and Sentencing

Next, the Defendant argues that this Court erred in excluding testimony from his mother, Tamara Fennell, both at trial and at sentencing. Again, this claim is meritless.

The "standard of review regarding the admissibility of evidence is an abuse of discretion. 'The admissibility of evidence is a matter addressed to the sound discretion of the trial court and…an appellate court may only reverse upon a showing that the trial court abused its discretion'… 'An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law.'" *Commonwealth v. Collins*, 70 A.3d 1245, 1251 (Pa.Super. 2013), internal citations omitted.

The admission of evidence is controlled by Rule 402 of the Pennsylvania Rules of Evidence, which states:

Rule 402. General Admissibility of Relevant Evidence

All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.

Pa.R.Evid. 402.

"In determining the admissibility of evidence, the trial court must decide whether the evidence is relevant and, if so, whether its probative value outweighs its prejudicial effect… '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 the existence of a material fact.'" *Commonwealth v. Hawk*, 709 A.2d 373, 376 (Pa. 1998).

During the direct examination of Tamara Fennell, the following occurred:

Q. (Mr. Van Keuren): Do you recall at any point having a discussion with B.S. about the allegations forming the basis of this case?

A. (Tamara Fennell): Yes.

Q. When did you first learn that these allegations were made?

A. Every time there is a fight with those two she always seems to call me on the phone. Always calls the mother-in-law. So she would call me angry, argumentative, telling me what my son did to her, he is going to pay for what he has done, he is no f'n good -

MR. GLEIXNER: Your Honor, objection, hearsay.

THE COURT: I'm going to sustain on another basis.

Q. What I want to know is when did you first learn about these allegations?

A. I guess it was - when she called me on the telephone and we were talking in conversation. She started getting upset and angry when we were talking. She said my son -

MR. GLEIXNER: Objection, Your Honor, hearsay.

THE COURT: Sustained.

MR. VAN KEUREN: Your Honor, I asked the witness if she said these things and she denied them. She was here to testify about them.

THE COURT: The objection is sustained. Actually, your question was when and she has never answered that.

Q. Let's go back to when, do you recall when you first learned about these allegations?

A. I'm not sure of the exact date. After a fight they had. It was after a fight they had. And she called me on the phone and told me that her and my son had a fight.

MR. GLEIXNER: Objection, Your Honor, hearsay.

THE WITNESS: I don't know the exact date in time. But it was in June sometime.

THE COURT: Sustained.

THE WITNESS: End of June, beginning of July.

Q. Did she make any statements to you about Javon's status as far as living in the same house?

A. She said he is not going to be living there anymore because I found a way to keep him out.

MR. GLEIXNER: Your Honor, I object again to hearsay.

THE COURT: Sustained.

MR. VAN KEUREN: Your Honor, I asked that very question of B.S. herself. She denied it. But she was here to testify about it.

Q. Did she have any comment about Javon towards you?

MR. GLEIXNER: Same objection, Your Honor.

THE COURT: Same ruling.

MR. GLEIXNER: Thank you.

Q. What did she say to you when she disclosed these allegations to you?

MR. GLEIXNER: Objection, Your Honor.

THE COURT: Mr. Van Keuren, I'm sure you get it. Okay. Sustained.

(T.T. p. 122-124).

In his Post-Sentence Motions, the Defendant averred that he was attempting to elicit testimony that B.O.'s mother told the Defendant's mother that he had molested one of the children and when the Defendant's mother asked who, B.O.'s mother "paused - as though thinking - then said 'B.O.'". The implication of this testimony - which the Defendant was clearly trying to put before the jury - is that B.O.'s mother concocted the story on the spot and had to pause to work out the details of the story. Counsel was most certainly attempting to introduce this testimony for its "truth," not simply as proof that a telephone conversation occurred. This is the definition of hearsay. That B.S. had previously testified and denied the statement is of no import to such a determination. The Defendant was attempting to introduce his mother's recounting of a conversation with B.O.'s mother as evidence that B.O.'s allegations were falsified at the behest of B.O.'s mother in order to remove the Defendant from her house. This is improper and the Court correctly sustained the Commonwealth's objections thereto. This claim is meritless.

The Defendant also argues that this Court improperly excluded his mother's testimony at sentencing. However, at the sentencing hearing the following occurred:

MR. VAN KEUREN: I would like to call his mother who wishes to speak on his behalf.

THE COURT: You may. Our deputy kicked her out of the courtroom because she was making a lot of noise.

(Pause noted)

THE CLERK: The record will reflect that one of our deputies said the mother of the defendant pointed at the victim and said something and the deputy escorted her out of the courtroom and does not feel comfortable allowing her back in.

THE COURT: So ordered.

(Sentencing Hearing Transcript, p. 10-11).

The record reflects that the Defendant's mother was removed from the Courtroom by the Sheriff's deputy due to her behavior towards the 11-year-old victim, and the deputy had safety concerns and so would not allow her back in the courtroom. This Court appropriately did not allow her to testify when she posed a safety threat to the victim and possibly others in the courtroom. Insofar as Ms. Fennell excluded herself from the courtroom due to her behavior, this Court appropriately considered the safety of all involved and excluded her testimony at the sentencing hearing. This claim also fails.

7. *Improper Admission of Crimen Falsi*

Next, the Defendant argues that this Court erred in allowing his prior conviction of Intimidation of a Witness or Victim to be admitted as *crimen falsi*. Again, this claim is meritless.

At trial, the following occurred outside the presence of the jury:

MR. GLEIXNER: My understanding is the defendant intends to testify and just so we don't run into an issue with the jury, I would intend to, in rebuttal, offer a certified conviction for a crime of falsehood within the past ten years. I have a copy of the Sentencing Order. I also have a copy of the Criminal Information in that case?

THE COURT: What's the charge?

MR. GLEIXNER: Burglary.

THE COURT: Okay.

MR. GLEIXNER: My understanding is, and Mr. Van Keuren, and there are also additional offenses that he was convicted of. Mr. Van Keuren does not believe those would be proper for the jury to see. My stance would be that it's a certified-

THE COURT: What are they?

MR. GLEIXNER: Intimidation of a witness or victim and criminal mischief.

THE COURT: No. I think intimidation would certainly fit because it's asking somebody to go against the judicial system. The criminal mischief we can let go.

MR. GLEIXNER: Would you like me to have these documents redacted or a cautionary instruction?

THE COURT: I'll give them the cautionary instruction and I will not permit it to go with the jury. It's a simple burglary and intimidation. Although they do have a right to know what the sentence was and when the conviction was.

MR. GLEIXNER: That is on the Order of Sentence?

THE COURT: Yeah, but you could just say that and not send the papers with them.

MR. GLEIXNER: Sure. I'll enter it as an exhibit but we understand it won't go to the jury.

THE COURT: Yeah.

MR. VAN KEUREN: My objection was to the intimidation of a witness coming in. So as long as that objection is on the record.

THE COURT: Your objection is noted.

(T.T. p. 87-89).

Rule 609 of the Pennsylvania Rules of Evidence discusses the impeachment of a witness with a criminal conviction. It states:

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendre, must be admitted if it involved dishonesty or false statement.

Pa. R. Evid. 609. "*Crimen falsi* involves the element of falsehood, and includes everything which has a tendency to injuriously affect the administration of justice by the introduction of falsehood and fraud." *Commonwealth v. Davis*, 17 A.3d 390, 395 (Pa.Super. 2011).

"When deciding whether a particular offense is *crimen falsi*, one must address both the elemental aspects of that offense *and* the conduct of the defendant which forms the basis of the anticipated impeachment… Accordingly, this Court employs a two-step procedure to determine whether a crime is *crimen falsi*… First, we examine the essential elements of the offense to determine if the crime is inherently *crimen falsi* - whether dishonesty or false statement are a necessary prerequisite to commission of that crime…Second, if the crime is not inherently *crimen falsi*, this Court then inspects the underlying facts that led to the conviction to determine if dishonesty or false statement facilitated the commission of the crime." *Id.* at 395-396.

On November 25, 2013, the Defendant was pled guilty to charges of Burglary, Intimidation of a Witness or Victim [18 Pa.C.S.A. §4952(a)(1)] and Criminal Mischief at CC 201305584. The admissibility of the burglary charge as *crimen falsi* was not questioned, though defense counsel took issue with the classification of the intimidation charge as *crimen falsi*.

Our Crimes Code defines Intimidation of Witnesses or Victims as follows:

§4952. Intimidation of witnesses or victims

(a) Offense defined. - A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to:

(1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime.

18 Pa.C.S.A. §4952.

The Defendant now argues that because subsection (a)(1) does not include a requirement of a false statement as subsections (a)(2) and (a)(4) do, it is not a crime of falsehood. However, as this Court explained in its ruling, intimidating a witness or victim to refrain from reporting a crime is as much of a falsehood against the judicial system as intimidating a witness to report false information about a crime. Both inherently require that a witness or victim not tell the truth about a crime - whether by saying it didn't happen or saying it happened in a different way than it did. The intimidation charge to which the Defendant pled guilty was clearly a crime of falsehood, and so this Court did not err in allowing it to be used as *crimen falsi* in rebuttal by the Commonwealth. This claim must fail.

8. Denial of Post-Sentence Motions

The Defendant also avers that this Court erred in denying his Post-Sentence Motions because he "should have been granted a new trial owing to the errors listed therein; or, in not a new trial, a reduction in sentence; or, at the least, a new sentencing hearing" (Concise Statement of Matters Complained of on Appeal, p. 11).

Despite the Defendant's hyper-detailed and overly exhaustive listing of perceived errors in the other 17 issues in his Concise Statement, this issue is too vague to allow this Court to address it. "When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review. When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues. In other words, a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." *Commonwealth v. Reeves*, 907 A.2d 1, 2 (Pa.Super. 2006), citing *Commonwealth v. Dowling*, 78 A.2d 683, 686-7 (Pa.Super. 2001).

Insofar as the Defendant has failed to state his claim(s) of error regarding this Court's denial of his Post-Sentence Motions with sufficient specificity, this Court is unable to review them and so this claim is waived.

III. Sentencing Issues

The Defendant also raises a number of sentencing issues, which are addressed as follows:

9. Illegal Sentence for Unlawful Contact

In his initial sentencing challenge, the Defendant argues that this Court erred in imposing a sentence at the Unlawful Contact charge, because he contends that it merges with the IDSI and Aggravated Indecent Assault charges for sentencing purposes.

Merger of sentences is governed by 42 Pa.C.S.A. §9765, which states:

§9765. Merger of sentences

No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S.A. §9765.

In interpreting §9765, our courts have held that "the merger doctrine is essentially 'a rule of statutory construction designed to determine whether the legislature intended for the punishment of one offense to encompass that for another offense arising from the same criminal act or transaction'… The Supreme Court, affirming its earlier decision in *Commonwealth v. Williams*, 521 Pa. 556, 559 A.2d 25 (1989), held in *Anderson*, 650 A.2d at 22: "in all criminal cases, the same facts may support multiple convictions and separate sentences for each conviction except in cases where the offenses are greater and lesser included offenses… Regarding the consideration of greater and lesser included offenses, 'if each offense requires proof of a fact which the other does not, the offenses are not the same for double jeopardy [and merger] purposes, even though arising from the same conduct or episode.'" *Commonwealth v. Williams*, 958 A.2d 522, 527 (Pa.Super. 2008), citing *Commonwealth v. Anderson*, 650 A.2d 20 (Pa. 1994).

In *Commonwealth v. Evans*, 901 A.2d 528 (Pa.Super. 2006), our Superior Court addressed the issue of whether an Unlawful Contact conviction merged with Indecent Assault for the purposes of sentencing. It stated:

> [T]he elements of [unlawful contact] consist of intentionally, either directly or indirectly, contacting or communication with the minor for the purpose of engaging in an indecent assault. The elements of indecent assault require a touching of the sexual or other intimate parts of a person under the age of 13 for the purpose of arousing or gratifying sexual desire, in either person. Here, the contact, proscribed by §6318, took place when Appellant called the minor victim over to his car, asked her if she liked him, told her that there were things that he wanted to do to her, asked for a hug, and told her to look up at him. This contact was clearly initiated for the purpose of effectuating the subsequent indirect assault, which consisted of inserting his tongue into the 11-year-old victim's mouth. While both crimes were carried out contemporaneously, such a circumstance does not require merger for sentencing purposes. Appellant's argument is premised upon the mistaken belief that the indecent assault must be carried out in order for the actor to have committed the unlawful contact offense. To the contrary, once the Appellant intentionally contacts or communicates with the minor for the purpose of engaging in the prohibited activity the crime of unlawful contact with a minor has been completed. The actual physical touching of an intimate part of the victim's body, with the requisite purpose of arousing or gratifying sexual desire, is not an element of the crime contemplated by §6318. In other words, the actor need not be successful in

> completing the purpose of his or her contact or communication with the minor. Moreover, the contact/communication contemplated in §6318 need not be made in person and can be accomplished through an agent or agency. Clearly, such is not the case with an indecent assault. Since each offense requires proof of an element that the other does not, the offenses do not merge.

Commonwealth v. Evans, 901 A.2d 528, 537 (Pa.Super. 2006), *internal citations omitted*.

As described in detail in the sufficiency arguments above which reflect the Defendant's misunderstanding of the offense, the crime of unlawful contact was completed when the Defendant communicated with B.O. for the purpose of engaging in a sexual offense with her. The crimes of IDSI and Aggravated Indecent Assault both required touchings which were not elements of the Unlawful Contact offense. As such, the Unlawful Contact charge does not merge with either the IDSI or Aggravated Indecent Assault charges and this Court appropriately imposed a separate sentence for it. This claim is meritless.

10. Excessive Sentence

Next, the Defendant argues generally that the aggregate sentence of 40-80 years was excessive both due to its length and the consecutive nature of the sentences. Again, this claim is meritless.

It is well-established that "sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an abuse of discretion. *Commonwealth v. Hardy*, 939 A.2d 974, 980 (Pa.Super. 2007). "An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. In more expansive terms… an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness or partiality, prejudice, bias or ill-will, or such lack of support as to be clearly erroneous." *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa.Super. 2008).

At the sentencing hearing, this Court noted that it had read and considered a Pre-Sentence Investigation report prepared on behalf of the Defendant. (S.H.T., p. 7). "Where pre-sentence reports exist, [the appellate court] shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. *Commonwealth v. Macias*, 968 A.2d 773, 778 (Pa.Super. 2009). This Court then placed its reasons for imposing sentence on the record:

> THE COURT: Okay, Mr. Hart, you assaulted this child when she was 11 years old, she was your stepdaughter and you assaulted her continuously over a term of one year. You have heard the impact that it has had on her, I can only imagine that this impact spreads to members of her family, her friends, and those people who loved this child.
>
> You violated a position of trust. You heard her say she wanted you to be her father and instead you sexually assaulted her over and over.
>
> THE DEFENDANT: It never happened, it never happened.
>
> THE COURT: Your priors consist of theft, possession with intent to deliver, burglary, a prior incarceration where you got state time, prior county time. I see no evidence that you have any value in this world. I see no evidence that you have attempted to rehabilitate yourself. Certainly you're [sic] combination of sexual assault, guns and drugs make you a danger to our society.

(S.H.T. p. 14-15).

As the record reflects, this Court appropriately read and considered the pre-sentence investigation report, considered the factors and severity of the present offense, evaluated the Defendant's potential for rehabilitation and imposed a sentence which took all of these factors into consideration. The record reflects great deliberation and consideration in the formulation of the sentence.

Neither is the Defendant's argument that this Court erred in imposing consecutive sentences persuasive. It is by now well-established that the decision to run sentences consecutively is within the discretion of the trial court. "Long standing precedent of [the Superior] Court recognizes that 42 Pa.C.S.A. §9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed." *Marts* at 612 (Pa.Super. 2005). Given the nature and circumstances of this crime, this Court was well within its discretion in running the sentences consecutively.

Ultimately, the fact that the Defendant would not be eligible for release until he is 72 years old is unfortunate for him, but appropriate given the circumstances of this case. The Defendant's unhappiness with the length of his sentence does not mean it is excessive or that this Court erred in running the sentences consecutively. Given the facts of this case, the sentence imposed was appropriate, not excessive and well within this Court's discretion. This claim must fail.

11. Improper Grading of Aggravated Indecent Assault

The Defendant now argues that this Court erred in grading the Aggravated Indecent Assault because the Commonwealth did not present evidence that the victim was under the age of 13 and that the jury was not instructed to or did find that the victim was under the age of 13. Although this Court will concede that its instructions to the jury did not specifically indicate that the Aggravated Indecent Assault charge required the jury to find that B.O. was under the age of 13 at the time of the assaults, this Court did previously discuss the requirement of finding B.O. was under the age of 13 in the context of other charges (See T.T., p. 210) and the verdict slip did require a finding that the victim was under the age of 13 for the Indecent Assault charge. Moreover, insofar as B.O. was 11 years old at the time of her testimony regarding events that had occurred in the past, a jury's finding of guilt as to any offense against B.O. would necessarily satisfy the requirement that she was under 13 at the time of that offense. This claim is meritless.

12. Improper Grading of Indecent Assault

Similarly, the Defendant argues that this Court improperly graded the Indecent Assault charge as a third-degree felony because the jury was not instructed to find that the victim was under 13, nor did they make such a finding. This claim is belied by the record.

> In its instructions to the jury, this Court stated:
> THE COURT: The defendant is charged with one count of indecent assault of a child. In order to find the defendant guilty of this charge, you must find that the following elements have been proven beyond a reasonable doubt:

First, that the defendant had indecent contact with the victim, or caused the victim to have indecent contact with him;

And second, that the victim was less than 13 years of age. The consent of the victim is not a defense.

(T.T., p. 213).

In addition to this Court's clear instructions to the jury regarding a finding that the victim was under 13 years of age, the verdict slip also required a finding that that the victim was under 13 for this offense. This claim is meritless.

13. Improper Grading of Unlawful Contact

The Defendant also argues that this Court erred in grading the Unlawful Contact charge as a first-degree felony rather than a third-degree felony. However, his claim fails with a plain reading of the statutory text:

§6318. Unlawful contact with minor

(a) Offense defined. - A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

(1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses)…

…(b) Grading. - A violation of subsection (a) is:

(1) an offense of the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or

(2) a felony of the third degree;

whichever is greater.

18 Pa.C.S.A. §6318.

Here, the Defendant was convicted of Unlawful Contact and various sexual offenses including Involuntary Deviate Sexual Intercourse with a Child, which the Defendant concedes is a first-degree felony. Thus, a plain reading of the statute requires a classification of the Unlawful Contact charge as a first-degree felony. This claim must fail.

14. Miscalculation of Sentencing Guidelines - Criminal Attempt

The Defendant next avers that this Court improperly calculated his offense gravity score (OGS) for Criminal Attempt as a 14. He avers that the OGS is properly calculated as 11.

Mindful of the statutory requirements indicating that an attempt shall be graded as one point less than the underlying crime, this Court concedes that because Involuntary Deviate Sexual Intercourse has an OGS of 14, the Criminal Attempt to Commit IDSI charge is properly graded as 13.

However, this minor miscalculation in the OGS is of no moment. The sentence imposed by this Court, though it may have exceeded the sentencing guidelines, did not exceed the statutory maximum and was, therefore, legal. [See *Commonwealth v. Johnson*, 873 A.3d 704 (Pa.Super. 2005) - "it cannot be gainsaid that a permissible and legal sentence under Pennsylvania statutory law is rendered improper simply because the sentence exceeds the guidelines; The guidelines do not supersede the statute." *Commonwealth v. Johnson*, 873 A.3d 704, 709 (Pa.Super. 2005)].

15. Miscalculation of Sentencing Guidelines - Unlawful Contact

The Defendant also argues that this Court improperly calculated the OGS for Unlawful Contact as 8 rather than 6. Here, however, this Court notes that the appropriate OGS for Unlawful Contact is the OGS of the underlying offense or 6, whichever is greater. Insofar as the Defendant was convicted of unlawfully contacting B.O. for the purpose of numerous sexual offenses, one of which had an OGS of 14, this Court believes that the OGS should have been calculated at 14, rather than 8. However, again, because the sentence imposed on the Unlawful Contact charge did not exceed the statutory maximum, the sentence imposed was not illegal. This claim must also fail.

IV. Constructive Absence of Sentencing Counsel

Finally, the Defendant avers that so many errors occurred at and in relation to the sentencing hearing that counsel's failure to object and/or resolve the issues constituted a constructive absence of counsel. This is, essentially, a claim concerning the ineffective assistance of counsel. Inasmuch as ineffectiveness claims are properly deferred until collateral review, see *Commonwealth v. Grant*, 812 A.2d 726 (Pa. 2002), this claim is not reviewable at this time and should be dismissed.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on June 23, 2016 must be affirmed.

BY THE COURT:
/s/McDaniel, J.

Date: January 5, 2017

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[1] 18 Pa.C.S.A. §3123(b)

[2] 18 Pa.C.S.A. §901(a)

[3] 18 Pa.C.S.A. §3125(b)

[4] 18 Pa.C.S.A. §6318(a)(1)(i)

[5] 18 Pa.C.S.A. 3126(a)(7)

[6] 18 Pa.C.S.A. §4304(a)(1)

[7] 18 Pa.C.S.A. §6301(a)(1)(ii)

[8] 18 Pa.C.S.A. §3127(a)

[9] The Defendant also filed a separate appeal from this Court's determination that he was a Sexually Violent Predator at 1601 WDA 2016.

[10] Reference is made to the oft-cited quote from Judge Aldisert: "With a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial court, it is rare that a brief successfully demonstrates that the trial court committed more than one or two reversible errors… When I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that this is an irrebuttable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness." Aldisert, *The Appellate Bar: Professional Competence and Professional Responsibility – a View from the Jaundiced Eye of One Appellate Judge*, 11 Cap.U.L.Rev. 445, 458 (1982).

[11] The Defendant has raised five (5) additional issues in his SVP appeal, for a grand total of 23 claims of error.

Commonwealth of Pennsylvania v. Joanna Charles

Criminal Appeal—Sufficiency—Theft Offenses—Restitution

Theft conviction based upon administratrix's failure to disburse funds from her father's estate.

No. CC 201503957. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Borkowski, J.—February 21, 2017.

OPINION

PROCEDURAL HISTORY

Appellant, Joanna Charles, was charged by criminal information (CC 201503957) with one count of theft by failure to make required disposition of funds received,[1] and one count of misapplication of entrusted property.[2]

On February 29, 2016, Appellant proceeded to a jury trial, at the conclusion of which she was found guilty as charged.

On June 20, 2016, Appellant was sentenced by the Trial Court at count one to five years of probation and ordered to pay restitution in the amount of $17,910.

On June 30, 2016, Appellant filed a post sentence motion, which was denied by the Trial Court on August 26, 2016.

This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant raises the following issues on appeal, and they are presented below exactly as Appellant presented them:

> The defendant now files the instant Concise Statement of Errors to be Complained of on Appeal contending that the jury's verdict was against the weight of the evidence and was insufficient as a matter of law and that this Honorable Court erred in ordering restitution in this matter prior to a finding being made in proper legal proceedings relative to the defendant's liability to her father's estate.
>
> 9. The defendant contends that the jury's verdict in this matter was against the weight of the evidence and that the Commonwealth's evidence was insufficient as a matter of law to sustain the charges. Specifically:
>
> a. The Commonwealth did not present any evidence at trial that the defendant had actually failed to administer the estate in an appropriate fashion. No evidence was presented as to the amount of a proper distribution of funds to the other inheritors under the estate.
>
> b. Additionally, no evidence was presented to establish beyond a reasonable doubt that the defendant acted with the requisite intent to permanently deprive the estate of money, or that any specific distribution of funds by the defendant had been improper.
>
> c. Further, the evidence presented at trial demonstrated that the attorney retained by the estate failed to adequately provide guidance to the defendant as the executrix and satisfy the barest of obligations to the disposition of the estate. Specifically:
>
> i. The attorney took possession of $8,000 that was located in the house after the decedent's passing to be placed in an estate account at a later time. Transcript of Jury Trial dated February 29, 2016 (hereinafter "TT") at 29. No such account was ever created. TT 36.
>
> ii. The attorney discovered that the residence in which the decedent was living was actually in his mother's name, and title could not be freely transferred through the estate. TT 33-34. No such action was ever taken. TT 35.
>
> iii. Although a desire had been communicated to the attorney that her services were no longer required, the attorney did not seek to withdraw as counsel, nor did she continue to take actions on behalf of the estate. TT 37-38.
>
> iv. The attorney conceded that she still had obligations to the estate, as she had not filed a motion to withdraw, but that no actions were taken. TT 48. The attorney made no attempts to contact the defendant about the estate after 2011. TT 49.
>
> d. Additionally, the Commonwealth's evidence presented at trial indicated that no estate inventory had been completed, so the value of the estate was not determined. TT 43. The defendant contends that without such a determination, it is impossible to determine what disposition of funds, if any, should be transferred through the estate.
>
> e. The defendant submits that her status as a layperson unfamiliar with the law of estates coupled with the ineffective assistance of her estate counsel caused issue[s] with the estate.

> 10. The defendant contends that this Honorable Court erred in ordering restitution where the disposition of funds to be made by the Defendant, if any, was not properly determined in a proceeding in Orphan's Court and that the criminal courts should not be used as a substitute forum for a civil proceeding.
>
> WHEREFORE, counsel for the defendant respectfully requests a hearing on the matter to determine if the child witnesses are competent to stand trial and/or if the child witnesses' memories have been tainted.

FINDINGS OF FACT

In mid-August of 2011, James Charles, Sr. passed away intestate. He was survived by three adult children: Appellant, James Charles, Jr., and Jamesina Charles. Charles, Jr. retained the services of Attorney Sally Frick to handle his father's estate. Appellant's siblings signed a renunciation, and Appellant was appointed as administrator of the estate. (T.T. 26-27, 31, 36, 59-60, 66).[3]

The estate included a home in Penn Hills, a large amount of cash, and several vehicles. At the initial meeting between Attorney Frick, Appellant, and Jamesina at the decedent's home, Jamesina and Appellant recovered $8000 cash. These funds were turned over to Attorney Frick to be placed in an estate account. Additionally, $14,000 cash was found on the decedent's person at the time of his death, and the coroner's office turned over the cash to Jamesina. (T.T. 28-29, 44, 66). Jamesina used $4000 from these funds to pay for funeral expenses. (T.T. 30-31, 66). In September 2011, Jamesina sent the remaining funds ($10,000) to Appellant, with the understanding that the funds would be made part of her father's estate account, which was maintained by Attorney Frick. However, Appellant retained possession of those funds. (T.T. 68, 70).

On September 28, 2011, Appellant visited Attorney Frick at her office, and informed her that her services were no longer needed. (T.T. 35). Attorney Frick relinquished the $8000 cash and estate documents to Appellant. Appellant never hired another attorney. Consequently, Attorney Frick remained the counsel of record, and though she tried to contact Appellant to ensure she hired a new attorney, she was unable to reach Appellant. (T.T. 35-39, 48).

As part of her duties as administrator of her father's estate, Appellant was provided with funds to be used to prepare the home for sale, and to be distributed amongst family members according to eventual court order. These funds included the $8000 cash from Attorney Frick, and the $10,000 from Jamesina. Additionally, Appellant withdrew $4600 from her father's checking account, and deposited it into a new estate account with other smaller deposits, on which she was the only signatory. (T.T. 73-75, 98). Appellant paid approximately $2,500 of those funds to a family friend, Colin Wesley Carr, to fix certain aspects of the decedent's home. Additionally, she paid for Carr's airfare from New York City, food while he stayed in the decedent's home, and all supplies for the home repairs. She also made some utility payments for the house, as detailed in Commonwealth Exhibit 10. (T.T. 75, 89; Testimony of Colin Wesley Carr, April 25, 2016, pp. 7-10, 14).

However, the remaining funds were not used in the administration of the estate, and were not saved for later distribution to the estate. Instead, Appellant mixed the estate funds with her personal account and used the funds for personal matters. As such, no funds remain for the administration of the estate or for distribution under any court order. (T.T. 60, 75, 96, 102).

Appellant was charged as noted hereinabove.

DISCUSSION

According to the introduction to Appellant's lengthy Concise Statement of Errors (¶8, p.3), Appellant's several arguments are properly considered as three overarching claims: (1) the verdict was against the weight of the evidence; (2) the evidence was insufficient to sustain Appellant's convictions; and (3) the Trial Court erred in ordering restitution prior to a finding being made regarding Appellant's liability to her father's estate. Appellant's claims will be discussed below accordingly.

I.

Appellant first alleges that the jury's verdict was against the weight of the evidence. This claim is without merit.

Appellant does not specify which conviction she is challenging, but given that Appellant was only convicted of two counts, the Trial Court will assume that she is raising this claim as to both counts. In her lengthy Concise Statement, Appellant raises several sub-arguments as to how the verdict was against the weight of the evidence and insufficient as a matter of law. Concise Statement of Errors, ¶9(a)-(e). Restated briefly: (1) the Commonwealth failed to establish that Appellant did not administer the estate appropriately; (2) the Commonwealth failed to establish that Appellant intended to permanently deprive the estate of the money; (3) the estate attorney was ineffective and failed to adequately provide guidance to Appellant; and (4) the estate inventory was never determined, and so Appellant could not know how to distribute any estate funds.

> The standard of review for weight of the evidence claims is well-settled:
>
> A weight of the evidence claim concedes that the evidence is sufficient to sustain the verdict, but seeks a new trial on the ground that the evidence was so one-sided or so weighted in favor of acquittal that a guilty verdict shocks one's sense of justice. On review, an appellate court does not substitute its judgment for the finder of fact and consider the underlying question of whether the verdict is against the weight of the evidence, but, rather, determines only whether the trial court abused its discretion in making its determination.

Commonwealth v. Lyons, 79 A.3d 1053, 1067 (Pa. 2013) (citations omitted). Theft by failure to make required disposition of funds received is defined as follows:

> A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition.

18 Pa. C.S. § 3927(a). Misapplication of entrusted property is defined as:

> A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted.

18 Pa. C.S. § 4113(a).

Here, the evidence established that Appellant, as the administrator of her father's estate, took possession of $22,600 of her father's estate money. After utility payments, approximately $21,910 remained. Appellant additionally paid a friend approximately $2500 to repair the home, plus additional miscellaneous home costs. After these costs, $17,910 remained, which was to be used to prepare the home for sale, and the remainder to be retained and distributed according to court order. However, those funds were no longer available and were not used to repair the home or dispersed to family members according to court order. Regardless of Attorney Frick's actions or the fact that a court order was not yet prepared for disbursement, Appellant had possession of those funds and was aware that these funds were to be used solely for the administration of her father's estate. Nonetheless, Appellant used the funds for her own personal purposes, permanently depriving her father's estate of those funds.[4] (T.T. 31-32, 35-36, 60, 68, 70, 73-75, 89, 96, 98, 102).

The evidence presented during the trial established Appellant's guilt beyond a reasonable doubt, and the Trial Court properly denied the motion for new trial as the verdict was not against the weight of the evidence. *See Commonwealth v. Atwood*, 601 A.2d 277, 286 (Pa. Super. 1991) (evidence sufficient to sustain conviction of theft by failure to make required disposition of funds received where defendant obtained funds for a specific purpose and instead intentionally used the funds for other purposes); *Commonwealth v. Edwards*, 582 A.2d 1078, 1087 (Pa. Super. 1990) (evidence sufficient to sustain conviction of misapplication of entrusted property where defendant received funds for specific purpose, was obligated to use funds for that purpose, and defendant instead used those funds for another purpose).

Appellant's claim is without merit.

II.

Appellant next alleges that the evidence was insufficient as a matter of law to sustain her convictions. Appellant does not specify which conviction she is challenging. However, similar to Appellant's weight claim, the Trial Court will assume that Appellant is challenging both of her convictions. Appellant set forth the same arguments to support her sufficiency claim as her weight claim. As such, the Trial Court now incorporates by reference the above discussion. For the reasons stated hereinabove, Appellant's claim is without merit, and the evidence was sufficient to sustain her convictions. *See supra* pp. 7-9. *Atwood*, 601 A.2d at 286; *Edwards*, 582 A.2d at 1087.

III.

Appellant, in her final claim, alleges that the Trial Court erred in ordering restitution prior to a legal proceeding in Orphans Court to determine her liability to her father's estate. This claim is without merit.

In reviewing a challenge to a restitution order, the Superior Court has held:

> An appeal from an order of restitution based upon a claim that a restitution order is unsupported by the record challenges the legality, rather than the discretionary aspects, of sentencing. The determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary.

Commonwealth v. Holmes, 2017 WL 337093, at *6 (Pa. Super. Ct. Jan. 4, 2017). In calculating restitution, the Superior Court has held that:

> Although restitution does not seek, by its essential nature, the compensation of the victim, the dollar value of the injury suffered by the victim as a result of the crime assists the court in calculating the appropriate amount of restitution. A restitution award must not exceed the victim's losses. A sentencing court must consider the victim's injuries, the victim's request as presented by the district attorney and such other matters as the court deems appropriate. The court must also ensure that the record contains the factual basis for the appropriate amount of restitution.

Commonwealth v. Pleger, 934 A.2d 715, 720 (Pa. Super. 2007) (citations and quotations omitted).

Here, the evidence presented at trial established that, of the funds Appellant took possession of as part of her father's estate, Appellant unlawfully spent $21,910 of those funds for her own personal purposes. At the time of Appellant's sentencing hearing, the Trial Court credited the testimony of Colin Wesley Carr regarding the improvements he made to the home, and cash payments he received for labor, travel, food, and supplies, and reduced the restitution amount to $17,910. Sentencing Transcript, June 20, 2016, pp. 6-8. The amount of restitution Appellant was ordered to repay to her father's estate was supported by the record at the time of sentencing, and represented the loss to her father's estate as a result of her criminal conduct. *See Commonwealth v. Burwell*, 58 A.3d 790, 794-795 (Pa. Super. 2012) (restitution order affirmed where calculation of restitution amount supported by the record).

Appellant's claim is without merit.

CONCLUSION

Based upon the foregoing, the judgment of sentence imposed by this Court should be affirmed.

BY THE COURT:
/s/Borkowski, J.

Date: February 21, 2017

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[1] 18 Pa. C. S. § 3927(a).

[2] 18 Pa. C.S. § 4113.

[3] The designation "T.T." followed by numerals refers to Trial Transcript, February 29 – March 1, 2016.

[4] For example, Appellant acknowledged that she used estate funds to purchase furniture for her mother and various items for other family members. (T.T. 96).