PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

PLJ

The Pittsburgh Legal Journal Opinions *are published fortnightly by the*
Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org

Circulation 5,599

PLJ Editorial Staff

Opinion Selection Policy

Opinions selected for publication are based upon precedential value or clarification of the law. Opinions are selected by the Opinion Editor and/or committees in a specific practice area. An opinion may also be published upon the specific request of a judge.

Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. All opinions submitted to the Pittsburgh Legal Journal (PLJ) are printed as they are received and will only be disqualified or altered by Order of Court, except it is the express policy of the Pittsburgh Legal Journal (PLJ) not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

Opinions

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

Francis G. Graham v. Larry Check

Personal Injury—Motor Vehicle—Pedestrian

Jury instruction on Sudden Vigilance Doctrine proper; court refused to give instruction concerning duties of vigilance and controlling speed at intersection where pedestrian might be crossing; jury verdict for defendant upheld.

No. GD 16-020645. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Della Vecchia, J.—July 24, 2018.

OPINION

This matter comes before the Superior Court on the appeal of Francis G. Graham from the Jury Verdict returned in favor of Larry Check and the Judgment entered thereon.

I. BACKROUND

This motor vehicle accident occurred in the pre-dawn hours of March 8, 2016, when a vehicle operated by Larry Check struck Francis G. Graham as he attempted to cross Route 30 in the Borough of East Pittsburgh, Allegheny County, Pennsylvania. Francis G. Graham (hereinafter "Plaintiff") was attempting to cross a four (4) lane roadway (Route 30) where it creates a "T" at Center Street. A traffic light serves as the traffic control device at that intersection.

The undisputed testimony reveals that the Plaintiff was approximately three-quarters of the way across the roadway of Route 30 when the light changed. At said time, Larry Check (hereinafter "Defendant"), receiving a green light to proceed on Route 30, accelerated until he first saw Plaintiff just feet in front of his vehicle. Although Defendant would testify that he braked immediately, he could not determine whether any actual braking occurred prior to impact.

II. PROCEDURAL HISTORY

This matter was initiated with the filing of a complaint by Plaintiff on October 27, 2016. Following opposing counsel's entrance of appearance in January of 2017, Defendant served his First Set of Interrogatories as well as a Request for Production of Documents directed to the Plaintiff.

Larry Check filed his Answer and New Matter on July 25, 2017. By praecipe docketed on August 8, 2017, this matter was put at issue and scheduled for the 'Call of the List' of the Allegheny County Civil Division, commencing on March 28, 2018.

This case was assigned to this writer to conduct a jury trial. The trial was relatively brief, lasting from April 2 to April 5, of 2018, and well-tried by both attorneys. On April 5, 2018, the jury empaneled returned a verdict in favor of Defendant and against the Plaintiff, having found no negligence on the part of the Defendant.

The Defendant filed a Motion for Post-Trial Relief on April 10, 2018. The Defendant filed an Answer to Plaintiff's motion on April 18, 2018. By Order dated April 27, 2018, this writer scheduled argument on Plaintiff's motion for June 4, 2018, as well as providing a briefing schedule to the parties. The parties' briefs were timely filed, read and considered, as well as the arguments of counsel, prior to this court's Order dated June 5, 2018, denying Plaintiff's post-trial motion.

The Defendant entered Judgment of the Verdict on June 13, 2018. Plaintiff filed a Notice of Appeal to the Superior Court of Pennsylvania on June 20, 2018. In response thereto, this writer issued an Order directing Plaintiff to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Said statement was timely filed on July 13, 2018. This writer issues the foregoing opinion in response thereto.

III. ISSUE RAISED ON APPEAL

The Plaintiff presents the following claims of error with this Court's determinations:

> 1. The Honorable Court erred in instructing the jury on the doctrine of sudden emergency when it could not be applicable because the defendant was not faced with a sudden emergency not of his own making. Rather, the plaintiff was directly in front of the defendant's vehicle some 50 feet away within the headlight beams, and already committed to and totally within a crosswalk at a busy intersection where there is an expectation of pedestrians. Essentially, the defendant cannot avail himself of the defense of sudden emergency if he does not keep a proper lookout or travels too fast under the circumstances.
>
> 2. The Honorable trial Court erred in refusing to instruct the jury about the duties of vigilance and controlling speed at an intersection where pedestrians might be crossing. The absence of such an instruction allowed the jury to conclude that the defendant need not keep a proper lookout; which if he had, would have allowed him to stop before striking the plaintiff.

IV. DISCUSSION

When reviewing a claim that the trial court erred in instructing the jury, the scope of appellate review is whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case. (*Williams v. Philadelphia Transportation Company*, 203 A.2d 665 (Pa.1964)). The reviewing court is to look at the charge in its entirety and against the evidence in the case to determine whether error was made and whether it was prejudicial. (*Reilly by Reilly v. Southeastern Pennsylvania Transportation Auth.*, 507 Pa. 204, 489 A.2d 1291 (Pa. 1985); *Riddle Memorial Hospital v. Dohan*, 475 A.2d 1314 (Pa.1984), nor will it reverse for isolated inaccuracies. (*Noble C. Quandel Co. v. Slough Flooring, Inc.*, 558 A.2d 99 (Pa.Super.1989)).

Error will be found where the jury was probably misled by what the trial judge charged or where there was an omission in the charge which amounts to fundamental error. (*Sweeny v. Bonafiglia,* 169 A.2d 292, 294 (Pa. 1961)).

Plaintiff first claims err with the trial court's inclusion of a charging instruction related to the sudden emergency doctrine. As part of their proposed points for charge, Defendant requested that the jury be instructed to consider that Defendant was not liable due to the fact that Defendant acted reasonably when encountered with a sudden emergency that he had not created (*See*, Defendant's Proposed Points, #28).

The sudden emergency doctrine is available as a defense to a party who suddenly and unexpectedly finds him or herself confronted with a perilous situation which permits little or no opportunity to apprehend the situation and act accordingly. (*Lockhart v. List*, 665 A.2d 1176, 1180 (Pa. 1995), citing, *Liuzzo v. McKay*, 152 A.2d 265 (Pa. 1959).

The rule provides generally that an individual will not be held to the "usual degree of care" or be required to exercise his or her "best judgment" when confronted with a sudden and unexpected position of peril created in whole or in part by someone other than the person claiming protection under the doctrine. (*Lockhart*, 665 A.2d at 1180, *citing, Amodei v. Saunders*, 97 A.2d 362 (Pa. 1953).

The Superior Court has repeatedly announced that the assured clear distance ahead rule generally applies to static or essentially static objects while the sudden emergency doctrine applies to moving instrumentalities unexpectedly thrust into the driver's path. (*Id.*, at 1183). The undisputed evidence was clear that Plaintiff was moving and in the act of crossing the intersection at the time of this incident.

At the trial court's charging conference, Plaintiff's counsel raised his objection to the inclusion of a jury instruction related to the sudden emergency doctrine (Tr. at 313). Plaintiff's contention was that Plaintiff was "more like a stationary object than he is coming in sudden from the left." (*Id.*)

An independent witness, Joseph Millach, witnessed the incident as he was stopped at the red light parallel with Defendant just seconds prior to the impact. Mallich testified that at the time of this incident on March 8th, 2016, at approximately 5:45 a.m., it was dark, dry, and cloudy; that Plaintiff was wearing dark clothing; and proceeding through the intersection in front of Route 30 traffic as their light turned green. (*See*,Tr. 50-66).

Defendant testified that he was completely unaware of Plaintiff when he first saw him seven (7) to ten (10) feet in front of his vehicle. Defendant had previously testified that he had traveled that route for over thirty (30) years to and from work and would rarely see anyone traveling from the direction in which Plaintiff was traversing on the morning of March 8, 2016. (*See*, at Tr.88-91). Defendant testified that at said time he "slammed on the brakes. I don't know if I got to the brake by the time I hit Mr. Graham." (Tr. at 95).

On direct examination, Defendant confirmed that he had his lights on, stopped immediately and very close to the point of impact, was not on a cell phone, and was not fiddling with the radio or otherwise distracted. Defendant further testified that when he first saw Plaintiff, he slammed on the brakes and stopped as quickly as possible. (*See* Tr. at 124).

The credible testimony as determined by this writer and reflected by the jury's verdict was that Defendant was operating his vehicle with ordinary care under the circumstances when he was suddenly confronted with a pedestrian moving across his lane of travel, contrary to the traffic control device present and properly operating at the time. This Court found ample evidence in the testimony to submit this point to the jury.

Plaintiff's next assertion of err is in regards to this Court's failure to charge the jury on "the duties of vigilance and controlling speed at an intersection where pedestrians might be crossing". This writer charges its juries based on the latest version of the Pennsylvania Suggested Standard Jury Instructions, almost exclusively. Barring a stipulation or an unusual or unprecedented set of facts, this writer does not deviate from the 'standard points.' This writer saw nothing unusual in the facts presented to depart from the suggested standard points related to negligence.

Plaintiff claims err with the exclusion of point five (5) of his proposed instruction which state states, in part:

There are certain principles that apply to the vehicle operation at an intersection at where there is a crosswalk for pedestrians.

> a) a pedestrian in a crosswalk has the superior right of way at intersection; and a motorist is under a duty to exercise a very high degree of care at intersections, particularly where pedestrians may be expected to be present.
>
> b) As such, it is the presence of the intersection, not the position of a pedestrian or other object in it, which determines the care required of a motorist. Thus, a motorist must be highly vigilant and must be able to stop at the slightest sign of danger.
>
> c) A vehicle driver has a duty to anticipate the presence of a pedestrian at an intersection and to control his vehicle so that no harm will result.
>
> d) An operator of a vehicle is under a duty to be attentive, to discover the presence of a pedestrian in the highway ahead of him, to observe pedestrians in the range of vision and take precautions not to injure them…….

(Proposed Preliminary Instructions and Points for Charge, p.5, #5).

Plaintiff goes on to list several other thoughts, concerns and theories expressed in dicta, that although offers other sound advice, similarly fails to serve as a legal standard. There is no obligation for this writer to use the Plaintiff's proposed points for driver evaluation as a legal threshold to determine liability in a negligence action.[1]

This Commonwealth has relied on the definitions of negligence and factual cause to allow the juries empaneled to utilize their own common sense and practical experience to arrive at one's duty of care. This writer is unwilling to replace this standard with one's specifically tailored by and for each Plaintiff. This writer remains unwilling to practice creative writing or expand the instructions proposed by the Pennsylvania Supreme Court's Committee for Proposed Jury Instructions.

V. CONCLUSION

This writer finds Plaintiff's claims of error unrelated to the jury's determination that Defendant was not negligent. The testimony clearly allowed the jury empaneled to find that Defendant was operating his vehicle within the bounds of all statutes and ordinances at the time of this incident. It is not for this Court to substitute its judgment for that of the jury if the jury's verdict was the natural result of the evidence admitted at trial.

Further, the facts presented allowed the jury to find that this incident was not a result of Defendant's action or inaction, but rather a combination of unfortunate events, the most relevant of which being Plaintiff failing to cross the intersection while enjoying the right-of-way. For the foregoing reasons, this writer respectfully requests the Superior Court of Pennsylvania to affirm this Court's Order dated, June 5, 2018.

BY THE COURT:
/s/Della Vecchia, J.

Date: July 24, 2018

[1] One of the eight subparagraphs requested by the Plaintiff would have been considered but was not supported by the facts presented at trial. Plaintiff's Proposed Point 5(f) was a request that 75 Pa.C.S.A. §3112(1)(1)(i) be read to the jury. This writer will typically include the reading of statutory language when germane to the jury's determination.

Commonwealth of Pennsylvania v. Jeffrey Davis Burton

Criminal Appeal—DUI—VUFA—Sentencing (Discretionary Aspects)—Waiver—Time Credit—Merger

Resentencing required as trial court sentenced defendant for three counts of DUI based upon one criminal act.

No. CC 201614040. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Borkowski, J.—July 26, 2018.

OPINION

PROCEDURAL HISTORY

Appellant, Jeffrey Burton, was charged by criminal information (201614040) with one count each of driving while under the influence-general impairment (BAC .08-.10),[1] possession of a firearm prohibited,[2] firearms not to be carried without a license,[3] fleeing or attempting to elude officer,[4] accidents involving death or personal injury,[5] accident involving damage to attended vehicle/property,[6] reckless driving,[7] disregard traffic lanes,[8] driving at safe speed,[9] follow too closely,[10] no rear lights,[11] and no headlights.[12] Additionally Appellant was charged with two counts of driving while under the influence-general impairment (incapable of safe driving),[13] and four counts of recklessly endangering another person.[14]

On May 18, 2017, Appellant pled guilty to all aforementioned charges. On August 3, 2017, Appellant was sentenced by the Trial Court as follows:

Count one: driving while under the influence-general impairment (BAC .08-.10)–six months of probation to be served concurrent to the period of incarceration imposed at count four.

Count four: possession of a firearm prohibited–four to eight years incarceration;

Count six: fleeing or attempting to elude officers – one to two years incarceration to be served consecutive to the period of incarceration imposed at count four;

Count seven: accidents involving death or personal injury– one to two years incarceration to be served consecutive to the period of incarceration imposed at count six; and

All remaining counts: no further penalty.

Thus, the aggregate sentence was six to twelve years incarceration.

On August 8, 2017, Appellant filed post-sentence motions, which were denied by the Trial Court on September 15, 2017.

This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

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

> I. The sentence imposed was contrary to the dictates of the Sentencing Code, 42 Pa.C.S.A. §§ 9701-9909, and the fundamental norms underlying the sentencing process in that this Honorable Court failed to adequately consider and apply prior to sentencing, as it must under 42 Pa.C.S.A. § 9721 (Sentencing Generally), the following factors: (1) the specific need for protection of the public in relation to Mr. Burton's actions; (2) the gravity of the offense as it relates to the impact on the life of the complainant(s); and (3) Mr. Burton's need for rehabilitation.
>
> a. Specifically, this Honorable Court failed to follow the general principles of sentencing by not considering Mr. Burton's mitigation evidence including:
>
> i. Mr. Burton suffered a gunshot wound during robbery, claims to suffer from depression and Post-Traumatic Stress Disorder, and is not receiving treatment for those mental ailments;
>
> ii. Mr. Burton expressed interest in receiving drug and alcohol treatment for his struggles with addiction;
>
> iii. Mr. Burton took responsibility for his actions;
>
> iv. Mr. Burton began a business venture with the mother of his children and had significant employment history;
>
> v. He had the support of his family and assisted in the care of his children at the time of sentencing; and
>
> vi. Mr. Burton had been doing well in his sobriety and parole compliance prior to the incident leading to the above-captioned case.
>
> b. This Honorable Court abused its discretion in sentencing Mr. Burton to an aggregate of 6-12 years' incarceration. This sentence was excessive considering Mr. Burton's mitigating evidence at his sentencing hearing, his witnesses' testimony at that hearing at that hearing, and all other mitigating factors in the Presentence Report.
>
> II. Mr. Burton's sentence was illegal because this Honorable Court failed to credit him with time spent incarcerated for the above-captioned case. Mr. Burton was sentenced on August 3, 2017, but plead guilty on May 18, 2017. No discussion of credit time took place on the record at Mr. Burton's sentencing hearing on August 3, 2017, and thus no justification for not giving Mr. Burton credit for this period of incarceration was provided by this Honorable Court. Mr. Burton must be resentenced and given credit for the period of May 18, 2017 to August 3, 2017, a total of 78 days inclusively.
>
> III. Mr. Burton's sentence must be vacated, and he must be sentenced anew, because he received a sentence on three counts of DUI for one instance of drunk driving. In light of the Superior Court's recent holding in *Commonwealth v. Farrow*, 168 A.3d 207 (Pa.Super. 2017), Mr. Burton could only receive a sentence on one of these counts.

FINDINGS OF FACT

At Appellant's plea proceeding, the Commonwealth presented a summary of the evidence as follows:

> Had the Commonwealth proceeded to trial at CC 201614040, the Commonwealth would have called as witnesses Detective Justin DeSimone of the Allegheny County Police Department, as well as other officers from that police department and the victim in this case, Susan Hertzler, and also a representative from the Allegheny County Medical Examiner's office.

The facts as testified to would have been as follows: That on or about November 9, 2016, the defendant was operating a motor vehicle that was stopped by the county police.

During that traffic stop, the defendant pulled away from that scene and entered into a pursuit with the county police. The defendant struck a vehicle operated by the victim in this case, Susan Hertzler, and continued for some time before crashing itself.

From that vehicle a firearm was recovered. That was submitted to the Medical Examiner's Office at 16LAB10557, was test fired, and found to be in good operating condition. Also meets the appropriate barrel length for the statute.

The defendant had a felony drug conviction which prohibited him from possessing a firearm at the time of the incident. The defendant also did not have a valid license to carry a firearm concealed. Defendant was not properly licensed at the time of this incident.

Defendant's blood was tested and sent to the crime lab at the previous lab number mentioned and tested positive for 0.100 BAC within two hours of operating a motor vehicle.

The victim in this case, Susan Hertzler, had to go to the hospital. She spent five days in Mercy Hospital. To sum up her injuries, there was a broken nose, rib and teeth.

With that, the Commonwealth would rest.

Plea Transcript, May 18, 2017, at 4-6 (hereinafter "P.T.").

DISCUSSION

Appellant alleges in his first claim that the sentence imposed was "contrary to the dictates of the Sentencing Code, 42 Pa.C.S.A. §§ 9701-9909, and the fundamental norms underlying the sentencing process in that this Honorable Court failed to adequately consider and apply prior to sentencing, as it must under 42 Pa.C.S.A. § 9721 (Sentencing Generally), the following factors: (1) the specific need for protection of the public in relation to Mr. Burton's actions; (2) the gravity of the offense as it relates to the impact on the life of the complainant(s); and (3) Mr. Burton's need for rehabilitation. (A) Specifically, this Honorable Court failed to follow the general principles of sentencing by not considering Mr. Burton's mitigation evidence including: (i) Mr. Burton suffered a gunshot wound during robbery, claims to suffer from depression and Post- Traumatic Stress Disorder, and is not receiving treatment for those mental ailments; (ii) Mr. Burton expressed interest in receiving drug and alcohol treatment for his struggles with addiction; (iii) Mr. Burton took responsibility for his actions; (iv) Mr. Burton began a business venture with the mother of his children and had significant employment history; (v) He had the support of his family and assisted in the care of his children at the time of sentencing; and (vi) Mr. Burton had been doing well in his sobriety and parole compliance prior to the incident leading to the above-captioned case;" and (B) the Trial Court abused its discretion in sentencing Mr. Burton to an aggregate of 6-12 years' incarceration alleging the sentence was excessive "considering Mr. Burton's mitigating evidence at his sentencing hearing, his witnesses' testimony at that hearing, and all other mitigating factors in the Presentence Report." This claim has been waived, and even if not deemed waived, it is meritless.

Appellant has waived this claim for failure to comply with the requirements of Pa.R.A.P 1925(b). The Superior Court has long held that a Rule 1925(b) Statement "must be 'concise' and coherent [so] as to permit the trial court to understand the specific issues being raised on appeal." *Jiricko v. Geico Insurance Company,* 947 A.2d 206, 211 (Pa.Super. 2008) (*quoting Kanter v. Epstein*, 866 A.2d 394, 401 (Pa.Super.2004), *alloc. denied*, 584 Pa. 678, 880 A.2d 1239 (2005)). Where the Statement is "so incoherent, confusing, or redundant that it impairs appellate review, issues in the Statement are deemed waived." *Id.* at 213.

In the present matter, Appellant filed a Statement of Errors Complained of on Appeal setting forth as its first claim a verbose and obfuscatory issue statement containing a myriad of run-on arguments completely lacking in coherence. The Superior Court has stated that, "The purpose of Rule 1925 is to narrow the focus of an appeal to those issues which the appellant wishes to raise on appeal." *Mahonski v. Engel,* 145 A.3d 175, 180 (Pa.Super. 2016). Pa.R.A.P 1925(b) specifically states in relevant part:

> (i) The Statement shall set forth only those rulings or errors that the appellant intends to challenge.
>
> (ii) The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge....
>
> ***
>
> (iv) The Statement should not be redundant or provide lengthy explanations as to any error. Where non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of issues raised will not alone be grounds for finding waiver.
>
> ***
>
> (vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

Pa.R.A.P. 1925(b)(4)(i), (ii), (iv), and (vii).

As such, the rule sets forth clear requirements to avoid waiver of issues. If the Rule 1925(b) Statement fails to be "concise" and "coherent," the Trial Court is stripped of its ability to prepare a thorough legal analysis of the issue(s). Failure of an Appellant to submit "concise" and "coherent" issue(s) divests the Trial Court of a meaningful review which is "pertinent to those issues" and is a "crucial component of the appellate process." *Commonwealth v. Ray*, 134 A.3d 1109, 1114 (Pa.Super. 2016); *see also Commonwealth v. Dowling*, 778 A.2d 683, 686–87 (Pa.Super.2001).

Here, the present issue Appellant has set forth required a page and a quarter of this Opinion just to restate the issue. Appellant has blatantly ignored its duty in setting forth this issue for appeal in its 1925(b) Statement in any "concise" and/or "coherent" manner as required by the rule. *See Jiricko,* at 211-212. As such, this claim is waived. However, even if this claim is not deemed waived, it is still meritless.

A.

Appellant claims that the Trial Court failed to follow the general principles of sentencing by not considering mitigation evidence. Here, at the time of sentencing the Trial Court stated:

> I ordered a presentence report due to the nature of the offenses and Mr. Burton's history. And the guidelines are significant in terms of calling for a period of state incarceration. In that regard, a presentence report has been prepared, along with the sentencing guidelines which were made part of the record. Both of these documents have been reviewed by the Court. [...]
>
> As noted, the Court has reviewed the presentence report which details his background, his personal history, as well as his criminal history. The Court appreciates the presence of Ms. Hailsham and her comments today on behalf of Mr. Burton. And the Court empathizes with her circumstances and the two children that she's raising and Mr. Burton's activities with them when he was not incarcerated or involved in their lives. [...]
>
> The Court, pursuant to its statutory mandate, the individualized sentences in Pennsylvania that requires me to take into account the defendant's background and rehabilitative needs, the protection of the public, and the impact of the crime on the victims in this matter, believes that the following sentence is reasonable and consistent with my obligation and the guidelines [and] the statute itself in terms of the sentence to be imposed.

Sentencing Transcript, August 3, 2017, at 3-4, 11-12 (hereinafter referred to as "S.T.").

The record clearly indicates that the Sentencing Court took into account the mitigation evidence offered by Appellant within the context of the general principles of the sentencing law. *See* 42 Pa.C.S. § 9721(b); *Commonwealth v. Johnson-Daniels*, 167 A.3d 17, 29 (Pa.Super. 2017)(trial court sentenced appellant consistent with the general principles of sentencing and did not abuse its discretion by sentencing defendant to four and a half to nine years' incarceration for drug offenses as well as escape, flight to avoid apprehension, resisting arrest, and two summary driving offenses; appellant's claim that his sentence was excessive demonstrated his inability to comprehend the gravity of his offenses and impact of his crimes on the community and his family).

The fact that the Court did not place the weight on Appellant's "mitigation" evidence as he would have hoped, does not make his claim one with merit.

B.

Appellant's claim that the Trial Court abused its discretion by imposing an "excessive" sentence in light of the mitigating evidence is also without merit.

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. *Commonwealth v. Johnson*, 666 A.2d 690, 693 (1995). To constitute an abuse of discretion the sentence imposed must either exceed the statutory limits or be manifestly excessive. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, a defendant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias, or ill will, or arrived at a manifestly unreasonable decision. *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super 2003).

Further, a defendant challenging the discretionary aspects of his sentence must satisfy a four-part test in order to invoke the Superior Court's jurisdiction to review the claim:

> (1) whether appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

Commonwealth v. Moury, 992 A.2d 162, 170 (Pa. Super. 2010) (quotations and citations omitted).

Here the record establishes that the Trial Court: (1) ordered and reviewed a presentence report which included a detailed history of Appellant's background and contact with the criminal justice system; (2) considered the sentencing guidelines; (3) heard and considered witness(es) who testified on behalf of Appellant; (4) heard Appellant's own statement at the time of sentencing; and (5) considered argument made by counsel on Appellant's behalf at the time of sentencing.

The Court imposed consecutive standard range sentences at each count which reflected the gravity of the offense, the protection of the public, and the rehabilitative needs of the Appellant. *See Commonwealth v. Boyer,* 856 A.2d 149, 154 (Pa. Super. 2004) (where a pre-sentence report is reviewed, it is presumed that the sentencing court considered and weighed all required factors).

As such, the Trial Court did not abuse its discretion, and Appellant's claim is without merit.

II.

Appellant alleges in his second claim that his sentence is illegal because the Trial Court failed to give him proper credit time of 78 days. This claim is without merit.

Appellant contends the Trial Court failed to credit him with time spent incarcerated from the time of the plea, May 18, 2017, until the time of sentencing, August 3, 2017. The record belies the claim that the Trial Court failed to give Appellant the proper credit time attributable to this case. In fact, the sentencing order sets forth the attributable credit time in this matter as of the date of sentence. Specifically, the Trial Court credited Appellant with sixty-two days, November 10, 2016-Janaury 10, 2017. Further, Appellant conceded at the time of his plea that he was on state parole for an unrelated case and that the plea in this matter would constitute a violation of that state parole for which he would be subject to additional penalties. (P.T. 4). *See Commonwealth v. Miller*, 655 A.2d 1000, 1002 (Pa.Super.1995)(*citing Commonwealth ex rel. Bleecher v. Rundle*, 217 A.2d 772, 774 (Pa.Super. 1966)(holding that a defendant shall be given credit time for any days in custody prior to the imposition of sentence only if he is committed on the offense for which sentence is imposed. Credit will not be given for commitment on a separate and distinct offense); *see also* 42 Pa.C.S. §9760 (1), (4). As such, the Trial Court properly credited Appellant with the permissible credit time available in this case of 62 days, as he was not eligible for credit time from May 18, 2017-August 3, 2017 due to the parole violation.

As such, Appellant's sentence was not illegal and his claim is without merit.

III.

Appellant alleges in his final claim that his sentence must be vacated in light of the Superior Court's recent holding in *Commonwealth v. Farrow*, 168 A.3d 207 (Pa.Super. 2017).

In light of the recent holding in *Farrow*, the Trial Court acknowledges that Appellant must be resentenced at the counts of driving while under the influence-general impairment pursuant to the dictates of Farrow.

CONCLUSION

Based upon the foregoing, the judgment of sentence imposed by this Court should be affirmed in part and remanded in part for resentencing.

BY THE COURT:
/s/Borkowski, J.

[1] 75 Pa.C.S. § 3802 §§A2.

[2] 18 Pa. C.S. § 6105 §§A1.

[3] 18 Pa. C.S. § 6106 §§A1.

[4] 75 Pa. C.S. § 3733 §§A.

[5] 75 Pa. C.S. § 3742 §§A.

[6] 75 Pa.C.S. § 3743 §§ A.

[7] 75 Pa. C.S. § 3736 §§ A.

[8] 75 Pa. C.S. § 3309 §§ 1.

[9] 75 Pa. C.S. § 3361.

[10] 75 Pa. C.S. § 3310 §§ A.

[11] 75 Pa. C.S. § 4303 §§ B.

[12] 75 Pa. C.S. § 4303 §§ A.

[13] 75 Pa. C.S. § 3802 §§ A1.

[14] 18 Pa. C.S. § 2705.

Commonwealth of Pennsylvania v. Shataya McCoy

Criminal Appeal—DUI—Evidence—Hearsay—Sufficiency—Weight of the Evidence—Double Jeopardy—911 Report

Challenge to the introduction of a CAD report of a 911 call on the basis of hearsay.

No. CC 2017-05753. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—July 17, 2018.

OPINION

The Defendant has appealed from the judgment of sentence entered on November 8, 2017. After review of the record, the judgment of sentence should be affirmed at Counts 4 and 5 and vacated at Count 6.

The Defendant was charged at CC 201705753 with six (6) counts of Driving Under the Influence: Driving Under the Influence of Alcohol: .10 to less than .16% with a minor occupant in vehicle;[1] Driving Under the Influence of Alcohol: Accident resulting in bodily injury with a minor occupant in vehicle;[2] Driving Under the Influence of Alcohol: with a minor occupant in vehicle;[3] Driving Under the Influence of Alcohol: .10 to less than .16%;[4] Driving Under the Influence of Alcohol: Accident resulting in bodily injury;[5] and Driving Under the Influence of Alcohol.[6] Prior to trial, the three (3) counts involving a minor occupant of the vehicle were withdrawn. She appeared before this Court on November 8, 2017 for a non-jury trial. At its conclusion, she was convicted of the three (3) remaining counts. She was immediately sentenced to a term of imprisonment of 48 hours. Timely Post-Sentence Motions were filed and were denied on December 4, 2017. This appeal followed.

On appeal, the Defendant raises several claims of error, which are addressed as follows:

1. Admission of 911 Report

Initially, the Defendant argues that this Court erred in admitting the 911 CAD (Computer Aided Dispatch) report for the 911 call which summoned the police to the crash scene. The report of the 911 call, received at 2:53 a.m., noted that a crying female said that her vehicle crashed into a pole, that her legs were broken and she was outside in the street. The caller's name was listed as "McCoy" and also included a phone number. Prior to trial, the Defendant objected to its admission as hearsay. The following occurred:

> THE COURT: Ms. Serrano, who would testify to the 911 call?
>
> MS. SERRANO: Your Honor, I have the officer present as far as trying to enter it as a business record. I did tell defense I would request a postponement if the Court would want me to have the custodian present.
>
> THE COURT: No, we're good. We'll do it as a business record.
>
> MS. SERRANO: Okay. Thank you.

MR. SWEENEY: Your Honor, I would object to that, because for one thing, it's purporting - this isn't the 911 call itself. This is the log that's spit out by someone typing this, and, number one, so that - it's hearsay. It's relaying information provided to whoever the typer is, and we don't necessarily know that the person providing that information is even my client. So it might have been a third party, which would make it double and triple hearsay.

So I don't think it should be admissible for the truth of any matter that's asserted therein, because I don't think we can establish that anything contained in there was uttered by my client.

THE COURT: I think that's a pretty good argument. What do you think?

MS. SERRANO: You Honor, I disagree. However, I think it actually qualifies as a business record. It's kept in the normal course. It's an exact printout -

THE COURT: I know, but it's a summary of what somebody said.

MS. SERRANO: Well, the CAD record in and of itself, this is a copy of exactly what they look like, so those can be authenticated as a business record. The idea is that it has someone who has the qualified necessary understanding to authenticate it.

I think maybe Mr. Sweeney's arguing two separate issues. One would be authentication, and a separate would be hearsay. In this case I think we can authenticate it through our officer who deals with this on a daily basis and can authenticate it.

THE COURT: Is there a name given?

MS. SERRANO: There is a name given, Your Honor, and it is the defendant's name and and phone number that matches the number in the police report, so -

MR. SWEENEY: But we don't know -

MS. SERRANO: As far as the hearsay statement involved, I think we overcome that hurdle especially because it's the defendant's statement herself, and then as a secondary, it's made as a present-sense impression of what's going on at the moment. So I don't think -

MR. SWEENEY: Well, either way, we still don't know that the person relaying the information to whoever is typing that in is Shataya McCoy. We know that apparently her phone number was involved and her name was uttered to the person doing the typing.

THE COURT: I will allow it.

(Trial Transcript, p. 2-6).

Thereafter, the following occurred:

Q. (Ms. Serrano): Do you recognize that document?

A. (Officer Walker): I do.

Q. And can you state generally what it is?

A. It's just the call history we get whenever we get a 911 call.

Q. Okay. And is that a kind of play by play of exactly what's happening on the scene?

A. Correct.

Q. Okay. And is there information on that regarding who the caller would be that made the call to 911?

A. Yes. At the very end of the call, they always list the contact information of who calls, and it gives the last name of McCoy and phone number of 412-000-0000.

Q. And this is done by the 911 dispatcher; is that correct?

A. Correct.

Q. Okay.

MS. SERRANO: And, Your Honor, I would move to have this entered as Commonwealth's Exhibit 1.

MR. SWEENEY: Your Honor, I would, as per our previous conversation, object to the admission of this on not only the basis that it's hearsay, but also that it is irrelevant given the fact that we can't establish who actually prepared this and -

THE COURT: Okay. That would go to the weight of the evidence. I will admit it over objection.

…

Q. I'm going to ask you to review what we've already entered as Commonwealth's Exhibit 1.

I'm looking for an additional copy here. Bear with me.

A. I have one.

Q. Now, could you tell the Court, indicate on there what the call was that you were responding to, what the caller stated?

A. Whenever the call was first generated, at 2:53 when it was entered, they - it was a female crying saying her legs are broken, caller is outside in the street.

Q. Okay. And then taking you down, I think it's two minutes later, what was next updated as far as what you were responding to?

A. Caller is now saying her vehicle crashed into a pole. Female screamed, and line disconnected.

Q. And based on your training and experience, do you use these CAD call logs in your routine as a police officer?

A. Absolutely.

Q. And would you say you use them on any call that a 911 call came in for?

A. Yes.

Q. And the information that you noted earlier when the document was being authenticated, at the end of the second page, is that your - what is your understanding of what that information indicates?

A. That Ms. McCoy is the one that called 911 to give all this information.

Q. And what do you base that on?

A. That's how they do their callbacks. Say if we go to a domestic and there's no answer at the door. We need someone to come. They call back the number that the original call was generated from, and then they can talk back to them.

Q. Okay. So it's your understanding that the phone number and the name associated with it on that page is the name and the phone number of the caller?

A. Correct.

Q. Okay. And so in this case it's your understanding that the caller was the defendant, Ms. McCoy?

A. Yes.

Q. Now, in your police report you also took the information of her phone number; is that correct?

A. Yes.

Q. Is the phone number - could you tell the Court what the phone number for the defendant would be?

A. It would be - do you mind if I refer back to my report?

Q. Yes, you can refresh your recollection if it would be useful.

A. That would be 412-000-0000.

Q. And is that the phone number that was the same as the caller for the 911 call?

A. It is.

(T.T., pp. 9-10, 15-17).

Generally, the "admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." *Commonwealth v. Drumheller*, 808 a.2d 893, 904 (Pa. 2002). "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).

The Pennsylvania Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial… offered in evidence to prove the truth of the matter asserted." Pa.R.Evid. 801(c). Rule 803 of the Pennsylvania Rules of Evidence enumerates various exceptions to the rule against hearsay. In particular, Rule 803(6) states:

Rule 803. Exceptions to the Rule Against Hearsay -
Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
…

(6) Records of a Regularly Conducted Activity. *A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if:*

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Pa.R.Evid. 803.

Our Courts have had several occasions to address the admissibility of logs of police reports. In *Commonwealth v. Lopez*, 57 A.3d 74 (Pa.Super. 2012), our Superior Court found that logs of police reports were admissible as pursuant to the business records hearsay exception contained in Rule 803(6). It stated, "[i]n *Commonwealth v. May,* 587 Pa. 184, 898 A.2d 559, 565 (2006) cert. denied, 549 U.S. 1022, 127 S.Ct. 557, 166 L.Ed. 414 (2006), our Supreme Court referenced its prior holding in *Commonwealth v. Graver,* 461 Pa. 131, 334 A.2d 667 (1975) that a log of police reports was a business record for the purpose of the exception to the hearsay rule." *Commonwealth v. Lopez*, 57 A.3d 74, 81 (Pa.Super. 2012). Our Commonwealth Court has further noted that "[i]f the

testifying officer responded to the events described in the police report, prepared or reviewed the reports, and the reports were maintained by the department in the regular course of business, the police report comes within the business record exception to the hearsay rule, and the contents thereof may be admissible." *Paey Associates, Inc. v. Pennsylvania Liquor Control Board*, 78 A.3d 1187, 1195 (Pa.Cmwlth. 2013).

Here, as the above except of the testimony reflects, the CAD reports are a log off 911 calls maintained in the regular course of business and are transmitted to the responding officer for the purpose of their response to the 911 call. Officer Walker testified that he receives a CAD report for every 911 call he responds to. Here, he used the 911 CAD report in question to assist in his response. Given Officer Walker's testimony, it is clear that the 911 CAD report introduced by the Commonwealth was properly admitted through the business records exception to the rule against hearsay. This Court was well within its discretion in so admitting it and, as a result, this claim must fail.

2. Sufficiency of the Evidence

Next, the Defendant argues that the insufficient to support the convictions because the Commonwealth failed to establish that she was driving the car or, alternatively, that her blood was drawn within two (2) hours of when the vehicle was driven. Again, this claim is meritless.

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).

Briefly, the evidence admitted at trial established that at 2:54 a.m. on March 5, 2017, a female caller with the last name McCoy and the cell phone number of 412-0000 called 911 to report that her car had crashed into a pole, that she was in the street and her legs were broken. Officer Christopher Walker responded to the call and found the Defendant laying in the street holding her leg, which was bloody, with a crashed car nearby. When Officer Walker spoke to the Defendant, he noted that her speech was slurred and she had alcohol on her breath. She admitted to having had a drink in another location. Other officers who responded to the scene noted that the vehicle was missing a headlight and followed a trial of fluid leaking from the vehicle to a nearby intersection where they found the missing headlight by a pole. After the Defendant was being taken to the hospital by EMS, Officer Walker requested that an officer be dispatched to Allegheny General Hospital for a blood draw, but the Defendant refused. Thereafter, the Defendant's blood test results from Allegheny General Hospital were obtained via a search warrant, and showed that the Defendant's blood alcohol content was .154%.

Section 3802 of the Vehicle Code, relating to Driving Under the Influence, states, in relevant part:

> *§3802. Driving under influence of alcohol or controlled substance*
>
> ***(a) General impairment. -***
>
> *(1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.*
>
> …
>
> ***(b) High rate of alcohol.** - An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.*
>
> …
>
> ***(g) Exception to two-hour rule.** - Notwithstanding the provisions of subsection (a), (b), (c), (e) or (f), where alcohol or controlled substance concentration in an individual's blood or breath is an element of the offense, evidence of such alcohol or controlled substance concentration more than two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle is sufficient to establish that element of the offense under the following circumstances:*
>
> *(1) where the Commonwealth shows good cause explaining why the chemical test sample could not be obtained within two hours; and*
>
> *(2) where the Commonwealth establishes that the individual did not imbibe any alcohol or utilize a controlled substance between the time the individual was arrested and the time the sample was obtained.*

75 Pa.C.S.A. §3802.

The Defendant first challenges the sufficiency of the evidence to establish that she was driving the vehicle. However, her operation of the vehicle was clearly established by circumstantial evidence. At 2:54 a.m., a 911 call was placed by a woman who was crying and screaming and stated that her car crashed and she was injured. The caller gave the Defendant's last name and cell phone number. The 911 call contained no mention of another person driving. When Officer Walker arrived on the scene, the Defendant was alone in the street, near her car which had been damaged. There was no indication that anyone else had been present and the Defendant never mentioned or identified anyone else as the driver of the vehicle. The circumstantial evidence is more than sufficient to establish that the Defendant was driving the vehicle.

As it relates to the time of the blood draw, as noted above, the 911 call was placed at 2:54 a.m. When Officer Walker arrived on the scene, the Defendant was screaming and crying, had urinated in her pants and otherwise appeared to be in great distress. (T.T., p. 11, 12). The Defendant's blood was drawn at 3:44 a.m. (T.T., p. 20). Given the Defendant's presentation to Officer Walker when

he arrived at the scene, circumstantial evidence suggests that the accident had occurred fairly recently. As the Defendant's blood was drawn less than an hour after the 911 call was placed, the evidence was sufficient to establish that the blood test took place within two (2) hours of the accident, as required by §3802(b). However, to the extent that the Defendant is suggesting that she had been laying in the street for over an hour before the 911 call was placed, which is entirely unreasonable under the circumstances, the same result would still prevail, as the Defendant was immediately transported to Allegheny General Hospital and so was from that point continually under the care and supervision of medics and hospital personnel, such that she was not imbibing additional alcohol. The evidence clearly supports the sufficiency of the evidence in this regard. This claim must also fail.

3. Weight of the Evidence

Next, the Defendant argues that the verdicts were against the weight of the evidence because there were no witnesses, the 911 CAD report was hearsay and there was no evidence of the cause of injuries. Again, this claim is meritless.

It is well-established that the "scope of review for [a weight of the evidence] claim is very narrow. The determination of whether to grant a new trial because the verdict is against the weight of the evidence rests within the discretion of the trial court, and [the appellate court] will not disturb that decision absent an abuse of discretion. Where issues of credibility and weight are concerned, it is not the function of the appellate court to substitute its judgment based on a cold record for that of the trial court. The weight to be accorded conflicting evidence is exclusively for the fact finder, whose findings will not be disturbed on appeal if they are supported by the record. A claim that the evidence presented at trial was contradictory and unable to support the verdict requires the grant of a new trial only when the verdict is so contrary to the evidence as to shock one's sense of justice." *Commonwealth v. Knox*, 50 A.3d 732, 737-8 (Pa.Super. 2012).

Moreover, "when the challenge to the weight of the evidence is predicated on the credibility of trial testimony, [appellate] review of the trial court's decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, those types of claims are not cognizable on appellate review." *Commonwealth v. Bowen*, 55 A.3d 1254, 1262 (Pa.Super. 2012).

"Where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim." *Commonwealth v. Shaffer*, 40 A.3d 1250, 1253 (Pa.Super. 2012). "A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence." *Commonwealth v. Moreno*, 14 A.3d 133, 136 (Pa.Super. 2011).

Here, a careful examination of the record reveals that the Defendant's challenges to the weight of the evidence is meritless. As discussed in greater detail above, the 911 CAD report was properly admitted and authenticated. The Defendant's state of distress suggested that the accident had occurred shortly before the 911 call was made and the blood test was performed within the requisite amount of time. The Defendant had the odor of alcohol on her breath and her speech was slurred. Her car had been wrecked and its missing headlight was found several blocks away, and the Defendant was found with bloody legs laying the street near the vehicle and it was reasonable to conclude that the accident was the cause of her injuries.

Because the Defendant properly raised his weight of the evidence claim on Post-Sentence Motions, the appellate court's review is only directed to this Court's discretion in denying the motion. See *Shaffer, supra*. After reviewing the record and the evidence discussed above, it cannot be said under any analysis that the testimony presented at trial was "so unreliable and/or contradictory as to make any verdict based thereon pure conjecture," see *Bowen, supra*. A review of the evidence as a whole clearly demonstrates Defendant's operation of her vehicle while under the influence of alcohol. Given the evidence presented at trial and discussed above, there is no question that the verdict was appropriate and not "shocking" to the conscience. This claim must fail.

4. Double Jeopardy Violation

Finally, the Defendant argues that her convictions at Counts 5 and 6 violate the prohibition against double jeopardy pursuant to *Commonwealth v. Farrow*, 168 A.3d 207 (Pa.Super. 2017). This Court is constrained to agree with the Defendant and so the conviction at Count 6 must be vacated.

In *Commonwealth v. Farrow*, 168 A.3d 207 (Pa.Super. 2017), the defendant was charged with three (3) counts of Driving Under the Influence - general impairment and refusing breath or blood alcohol testing, general impairment with an accident involving damage to a vehicle and general impairment. She was also charged with accidents involving damage to attended vehicle. She was found guilty at a nonjury trial and was subsequently sentenced to a term of imprisonment of three (3) to six (6) days with probation at count 1 and to no further penalty at the remaining charges. She challenged the convictions on the basis of double jeopardy. It held that "a single criminal act" cannot "result in multiple sentences for violations of the **same** DUI provision." *Commonwealth v. Farrow,* 168 A.2d 207, 217 (Pa.Super. 2017). It continued on to state that "[i]n the future, where a single DUI offense is subject to enhancements, the Commonwealth should file a criminal information that sets forth a single count under §3802. Enhancements under §3804 may be added as subparts or subparagraphs, as appropriate. This will eliminate identical criminal conduct leading to multiple convictions and sentences under the same criminal statue and, simultaneously, supply the accused with the requisite notice required under *Alleyne*. This method will also allow the fact-finder to make the necessary findings with respect to §3804 enhancements, as *Alleyne* also commands." *Id.* at 218-219 (Pa.Super. 2017).

Here, the Defendant was charged with six (6) counts of Driving Under the Influence although Counts 1 through 3 were withdrawn prior to trial. Count 5 charged the Defendant with general impairment involving an accident with bodily injury and Count 6 charged the Defendant with general impairment. In light of the *Farrow* decision, which was issued before the trial of this matter, this Court is constrained to conclude that Count 6, which charges the same subsection of §3802 as Count 5, is violative of the prohibition against double jeopardy and, as such, should be vacated.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on November 8, 2017 should be affirmed at Counts 4 and 5 and vacated at Count 6.

BY THE COURT:
/s/McDaniel, J.

[1] 75 Pa.C.S.A . §3802(b)

[2] 75 Pa.C.S.A. §3802(a)(1)

[3] 75 Pa.C.S.A. §3802(a)(1)

[4] 75 Pa.C.S.A. §3802(b)

[5] 75 Pa.C.S.A. §3802(a)(1)

[6] 75 Pa.C.S.A. §3802(a)(1)

Commonwealth of Pennsylvania v. Charles Kerr*

Criminal Appeal—Sex Offenses—Sufficiency—Weight of the Evidence—Evidence—Suppression—Failure to Specify Claims of Error—Discovery—Phone Records—Rape Shield—Relevancy—Jury Instructions

Appellant raises multiple claims of error with respect to sexual assault convictions.

No. CC 2017-00561. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—July 18, 2018.

OPINION

The Defendant has appealed from the judgment of sentence entered on January 9, 2018. 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 the above-captioned information with two (2) counts each of Involuntary Deviate Sexual Intercourse of a Person Under 16[1] and Unlawful Contact with a Minor[2] with four (4) counts of Statutory Sexual Assault[3] and with one (1) count each of Corruption of Minors,[4] Interference with Custody of a Minor,[5] Criminal Use of a Communication Facility[6] and Indecent Assault of a Person Under 16.[7] A jury trial was held before this Court from September 27, 2017 to October 5, 2017 and at its conclusion, the Defendant convicted of two (2) counts of Statutory Sexual Assault, Corruption of Minors, Interference with Custody of a Minor, Criminal Use of a Communication Facility and Indecent Assault of a Person Under 13. He was acquitted of the reminding charges. He appeared before this Court on January 9, 2018, when he was sentenced to a term of imprisonment of 11 1/2 to 23 months, with a subsequent term of probation of five (5) years. Timely Post-Sentence Motions were filed and were denied on January 30, 2018. This appeal followed.

Briefly, the evidence presented at trial established that on February 20, 2016, the Defendant, then 36 years old, contacted K.E., then 15 years old, online via the Kik app. The two messaged back-and-forth through Kik, then through texting. During these conversations, the Defendant encouraged K.E. to send him naked pictures of herself and she complied. K.E. told her mother she was going out to her friend's house and would be spending the night. As this was a common occurrence, her mother agreed. The Defendant drove from his residence in Greene County and picked K.E. up near her home in Plum Boro. The two went to Boyce Park and walked around and during this time, the Defendant kissed K.E.. They got back into the Defendant's car and he drove towards his house, making stops at at Eat 'n Park restaurant in Washington County and a Goodwill store near the restaurant. They arrived at the Defendant's house after 10 p.m. and went directly to the Defendant's bedroom where they had vaginal and oral intercourse and watched a movie before going to sleep. In the morning, they woke and had vaginal and oral intercourse again and showered after. The Defendant drove K.E. home and dropped her off at a bar near her house. K.E. went into her house, greeted her parents and showered again. Then K.E. called her friend, at whose house she told her parents she was spending the night, and told her what happened. K.E.'s friend told her mother, who called K.E.'s mother, who confronted K.E. and then called the police.

On appeal, the Defendant has raised 18 claims of error with 13 sub-issues, for a total of 31 claims of error.[8] They have been re-ordered and combined[9] for ease of review and are addressed as follows:

1. Sufficiency of the Evidence

Initially, the Defendant argues - in two separate issues - that the evidence was insufficient to sustain the verdicts. However, due to the Defendant's failure to provide specific averments of error, these claims have been waived.

Pursuant to this Court's Order of March 6, 2018, the Defendant was directed to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b) by March 28, 2018. Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure states, in relevant part:

> ***Rule 1925. Opinion in Support of Order***
>
> ***…***
>
> ***(b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court.*** *- If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").*
>
> *…*
>
> *(4) Requirements; waiver.*
>
> *(i) The Statement shall set forth only those rulings or errors that the appellant intends to challenge.*
>
> *(ii) The Statement shall concisely identify each ruling or error that appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge. The judge shall not require the citation to authorities; however, appellant may choose to include pertinent authorities in the Statement.*

Pa.R.A.P. 1925.

In response to this Court's Order, the Defendant, through his attorney David J. Russo, Esquire, filed a Concise Statement which identified two claims directed to the sufficiency of the evidence as follows:

> 17. The Defendant contends that the evidence was insufficient to sustain the Judge's verdicts on the charges convicted
>
> 18. It is alleged that after viewing all the evidence admitted at trial, together with all reasonable inferences therefor, in the light most favorable to the Commonwealth, the jury could not have found that each element of the offense charged was supported by evidence and inferences sufficient in law to prove guilt beyond a reasonable doubt.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 4).

It is by now well-established that "[a]pellants must comply whenever the trial court orders them to file a Concise Statement of Matters Complained of on Appeal pursuant to Rule 1925(b)." *Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998). Moreover, as our Superior Court has held, "[w]hen 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).

Our appellate courts have repeatedly held that general statements such as "the verdict of the jury was against the evidence" and "the verdict was against the law" were too vague to satisfy the requirements of Pa.R.A.P. 1925(b) and, therefore, resulted in a waiver of the claims on appeal. *Commonwealth v. Lemon*, 804 A.2d 34, 37 (Pa.Super. 2002). See also *Commonwealth v. Siebert*, 799 A.2d 54 (Pa.Super. 2002).

Here, the Defendant was convicted of six (6) offenses, each with multiple elements. Neither a statement that "the evidence was insufficient to sustain the Judge's[10] verdict" nor a recitation of the standard of review of a sufficiency claim are sufficiently specific to enable this Court to discern the particular claim of error being raised or to provide any meaningful analysis for the appellate courts. The Defendant should have identified each crime for which he was challenging the sufficiency of the evidence and provided a brief statement identifying which particular elements he believed had not been satisfied. Absent any such specific guidance, this Court is forced to conclude that the Defendant's sufficiency claims have been waived.

2. Weight of the Evidence

Next, the Defendant raises an equally vague challenge to the weight of the evidence. Again, this Court is forced to conclude it has been waived.

In his Concise Statement, the Defendant identifies a challenge to the weight of the evidence, as follows:

> 19. Additionally, it is alleged that the evidence was so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances. The Court had no idea[11] what facts the jury felt were not proven, or not established.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 4).

Again, a careful examination of the issue presented reveals that it is a statement concerning the standard of review for a weight of the evidence claim and does not identify with specificity which of the six (6) convictions are in question and why the Defendant avers that the verdicts were so contrary to the evidence as to shock one's sense of justice, information which is necessary to appropriately state a weight of the evidence claim. Again, this Court is forced to conclude that the Defendant's challenge to the weight of the evidence has been waived. See *Lemon, supra* and *Siebert, supra*.

3. Discovery Matters

The Defendant has raised numerous challenges to this Court's rulings on various discovery matters. A careful review of the record reveals that his claims are meritless.

"Generally, on review of an order granting or denying a discovery request, an appellate court applies an abuse of discretion standard… An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." *Commonwealth v. Mendez*, 74 A.3d 256, 260 (Pa.Super. 2013).

The Defendant raises the following claims of error regarding this Court's discovery rulings:

> 7. Prior to trial, the Court erred by not granting the Defense Motion for Discovery in the following manner:
>
> A. Defendant sent a Motion for Discovery to the Court and the DA, the entire phone extraction to be provided to but did not file it as of record due to the fact that the Motion contained victim information. The Court refused to rule on this Motion due to the content and contacted Defense Counsel's office and informed him to re-file the Motion with the one exhibit with the victims information on it.
>
> B. The Commonwealth refused to provide the entire phone extraction to the Defendant and would only allow them to review the phone extraction in the hall way of the DA's office at their presumptive lunch table.
>
> C. Defendant sent a second Motion to the Court for the discovery information so that Defendant could review it in the safety and privacy of his office. The Court erred by denying this request.
>
> D. The Court erred by not holding a hearing on Counsel's request for Discovery so that evidence could be made a part of the record. Such evidence would have included the conditions at which Defendant was limited to and forced to review evidence in the DA's office under.
>
> E. The Court erred in calling the DA's office to gather information regarding the Defenses [sic] Motion for Discovery without informing the Defendant until time of trial, without contacting Defendant's Counsel's office so that he could provide the Court with his information regarding the same. Again a hearing should have been scheduled.

F. The Court erred in not granting the Defendant a continuance of the trial so that he could receive or at least have additional time to review the discovery evidence being held at the DA [sic] office.

G. The Court erred in not reconsidering the issues aforementioned in this paragraph as Defendant has an absolute right to discovery, to review discovery, to have access to discovery and use the evidence at trial, especially that of a nonsexual nature, as well as a continuance of the trial to do the same when he was willing to waive any rule 600 speedy trial issues.

H. The Court erred in Ruling on Defendant's discovery Motion immediately before Jury selection further prejudicing Defendant's preparation of trial and discovery review.

I. The Court erred in only deciding the Defendants [sic] discovery request as it pertained to the "sexual content" and not addressing the non-sexual content of discovery which was not provided to Defendant. The Court erred by allowing the DA to keep discovery which could easily have been provided.

J. The Court erred in Ruling the Commonwealth did not have to provide the discovery in an easily accessible manner as Defendant's Attorney argued the CD file contained numerous menu's [sic] and pathways which made it hard, if not impossible to find all of the actual discovery contained therein. The ruling of the court was that the DA was not suppose [sic] to do the Defendant's job for him.

8. The Court erred in denying the Defendant Discovery, in which the Defendant's Motion for Discovery requested the "sexual" content, i.e. pictures be separated and the remaining 40,000 data entries and the non sexual content be provided to Defendant for his preparation in his defense.

15. The Defendant contends the Court erred in denying Defendants discovery motion because the Defendant is entitled to review the evidence under the Rules of Criminal Procedure and under the Constitution of the United States.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 2-4).

In August, 2017, defense counsel forwarded a "Motion for Discovery" to this Court and to the District Attorney's Office, however he did not officially file a copy of the Motion with the Department of Court Records as required by Rule 576 of the Pennsylvania Rules of Criminal Procedure. Because the Motion was not properly filed, this Court was not able to address it. At this Court's direction, defense counsel was contacted and instructed in proper filing procedures. As defense counsel had been repeatedly sending various pleadings and documents to this Court without filing them, defense counsel was also instructed to obtain local counsel if he was unsure of or unable to follow proper procedures.

This Court did not call the District Attorney's Office "to gather information" and is offended by this disingenuous and spurious allegation.

Prior to trial, the following occurred:

MR. RUSSO: Your Honor, I do have some issues that I would like to address with the Court this morning.

THE COURT: Sure.

MR. RUSSO: The Court did preclude the use of exculpatory evidence that is of a nonsexual nature, which on the CD, and the District Attorney's office that we have not been allowed to have a copy of or information separated or given to us. The Court made this decision yesterday.

I have a motion to reconsider for all discovery for that matter. In regards to the messages themselves that are the nonsexual nature, if we have the specific message that we would like to have taken off there, and we can note that for the Court -

THE COURT: I don't know what you're asking me, but I'm not reconsidering the pretrial motions that I ruled on yesterday. I believe it was nonspecific.
I don't know even what you're asking me for, Mr. Russo. I know that you had asked for other people's involvement with the alleged victim to be admitted, those being of a sexual nature.

Mr. Gleixner, is there any evidence that the nonsexual nature is exculpatory to the Defendant?

MR. GLEIXNER: Your Honor, I will have looked through the phone to the best of my ability. Based on looking at them at prior cases, I did not see anything that jumped out as exculpatory. If it was, I would have provided it to defense counsel. I did print out numerous things from the phone and send it in paper form, but as pervasively noted, we are not willing to copy pornographic material or with an appropriate Order of Court.

THE COURT: This issue, again, is preserved for appeal. I prefer not to revisit it a third time.

MR. RUSSO: Well, Your Honor, the District Attorney is sitting there saying "Well, I went through it to the best of my ability," when there is 43,000 data files on there. What does that mean? I really -

THE COURT: Are you asking me a question?

MR. RUSSO: What does that mean? I went through it to the best of my ability? Does that mean -

THE COURT: Are you asking me a question?

MR. RUSSO: No, I'm asking him. Does that mean he went through ten files? Does that mean he went through and picked the stuff off that he wanted to use at trial and sent it to me?

THE COURT: That means that he went through it an there was nothing exculpatory, because as an officer of the Court and as somebody I know to be a competent attorney, he would have sent it to you.

(Trial Transcript, Vol. 1, p. 11-14).

Thereafter during trial, upon defense counsel's repeated objection, the following occurred at sidebar:

> (Whereupon, the following discussion was held at sidebar.)
>
> THE COURT: This is on the record.
>
> MR. GLEIXNER: I just didn't think it would be proper to speak in front of the jury. When I first went to the phone extraction, I printed out pertinent pages from the extraction that I thought counsel would need, knowing that he was still going to come in person and watch. I mailed it to him as a courtesy.
>
> Included within the extraction report is numerous links to conversations, links to photographs, videos, things that counsel had the opportunity to view in person the two times he came and viewed it.
>
> Within the extraction is conversations from regular text messages, Kik messages, phone logs. There is a variety of things in there. This is from the Kik section of the extraction, and in Kik, it is held as chat. so that's why - then you click on the link to the phone extraction chat. There is one that is labeled. That is the conversation that comes up and that's exactly what was printed.
>
> If this is something that I didn't include in the packet of hard documents I printed out, it is still included in the extraction that counsel viewed twice with his own views.
>
> MR. RUSSO: Your Honor, there was 34,000 video or data files, and I spent eight hours going through it. And I didn't - I didn't touch the surface of it, and he would not show me where the information was. Most of the -
>
> THE COURT: First of all, again, counsel does not have an obligation to do your work.
>
> Second of all, you have had this case since, I believe, April, and the fact that you only looked at eight hours worth is not on me; that's on you. Your objection is overruled.

(T.T. Vol. 3, p. 205-207).

As the record reflects, the information extracted from the victim's phone was extensive. Assistant District Attorney Gleixner represented to this Court that he printed out what he believed to be relevant. He further represented, as an officer of the Court, that he did not find any exculpatory information on the phone. Nevertheless, defense counsel was given the opportunity to come to the District Attorney's office without limitation and view the extraction. It is this Court's understanding that he only appeared twice, and once was several hours late for a scheduled appointment he had made with the District Attorney's office. As this Court noted, the fact that counsel did not spend the requisite time viewing the extraction is not the fault of the District Attorney or this Court, as he was given unlimited opportunity to do so. Further, as was noted by Mr. Gleixner, the entire extraction could not be provided on disc because it did contain pornographic material, which the District Attorney's Office will not disseminate. In that Mr. Gleixner represented, as an officer of the Court, that all relevant information was provided and the extraction did not contain any exculpatory information, and further that defense counsel was given ample opportunity to view the entire extraction himself, this Court was well within its discretion in denying both the Defendant's Motion for Discovery and Motion for Reconsideration in this regard.

Neither did this Court err in denying the Defendant's Motion for a Continuance in this regard. In the Motion (filed only 12 days before the start of jury selection) counsel admits to having received discovery from the Commonwealth and to have already viewed the cell phone extraction at the District Attorney's Office. The Motion failed to specify what additional discovery was needed. A mere statement that he needs "all discovery" is insufficient to justify a continuance when the Commonwealth admittedly already turned over discovery materials and counsel was given opportunity to view the extraction. This Court was well within its discretion in denying the motion.

Parenthetically, this Court notes that defense counsel's claims that he was forced to view the extraction at the DA's lunch table and that he would have preferred to view the extraction in the "safety and privacy" of his office are similarly without merit. It is not the District Attorney's obligation to provide defense counsel with a private office to view the discovery. The office has limited space constraints and this Court is certain that best efforts were made to accommodate him, even if those efforts were not to counsel's liking. Further, this Court notes that the District Attorney's Office is on the 4th floor of the Allegheny County Courthouse and the building is guarded by the Allegheny County Sheriffs and is only accessible by entry through metal detectors. The Courthouse is regularly teeming with police officers. The office itself is full of Assistant District Attorneys. This Court can think of no safer place for counsel to view discovery and his complaints in this regard also lack merit.

Given the above circumstances, this Court was well within its discretion in denying the Defendant's Motion to Compel Discovery, his Motion for Reconsideration and his Motion for Continuance. His discovery claims specified above must fail.

4. Rape Shield Matters

The Defendant next argues that this Court erred in disallowing evidence protected by the Rape Shield Law. He avers:

> 9. The Court erred in denying the discovery and finding that probative versus prejudicial was not the standard under the "Rape Shield Law", in which Defendant wanted to use evidence at trial suggesting the "victim" was contacting her boyfriend on the day the alleged offenses occurred and may have caused doubt as to her whereabouts on the evening in question, as well as Defendant did not have the opportunity not the time to sift through the 40,000+ files on the phone in the DA's office.
>
> 12. The Court erred in denying Defendant any questions of the victim regarding her boyfriend who she was in a relationship with on the day of the alleged charges.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 3, 4).

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).

Pennsylvania's Rape Shield law states, in relevant part:

§3104. Evidence of victim's sexual conduct

(a) General rule. – Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S.A. §3104. In interpreting Section 3104, our Courts have recognized only an extremely narrow exception to the Rape Shield provisions, for "genuinely exculpatory" evidence which is "relevant, non-cumulative, and more probative of the defense than prejudicial." *Commonwealth v. Wall*, 606 A.2d 449, 457 (Pa.Super. 1992).

Here, the Defendant wished to essentially go on a fishing expedition regarding the victim's sexual contact with her boyfriend. Even the most cursory examination of his averment demonstrates that the proposed evidence does not meet the narrow exception to the Rape Shield law and was, therefore, properly excluded. This claim is meritless.

5. Suppression

Next, the Defendant argues that this Court erred in denying his Motion to Suppress statements made by the Defendant after his arrest. He avers:

> 14. The Court erred in denying Defendants suppression Motion and allowing officer Marcus Simms to testify to communications between Attorney and Client at the Police station when the Defendant was in custody immediately after his arrest.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 4).

When reviewing a challenge to the trial court's denial of a suppression motion, the appellate court "is limited to determine whether the suppression courts factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, [the appellate court] may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, [the appellate court is] bound by those findings and may reverse only if the court's legal conclusions are erroneous… Where, as here, the appeal of the determination for the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, 'whose duty it is to determine of the suppression court properly applied the law to the facts'… Thus, the conclusion of law of the courts below are subject to [the appellate court's] plenary review." *Commonwealth v. Jones*, 988 A.2d 649, 654 (Pa. 2010).

As it specifically relates to the attorney-client privilege, our courts have repeatedly held that "once attorney-client communications are disclosed to a third party, the attorney-client privilege is deemed waived. *Commonwealth v. Chmiel*, 558 Pa. 478, 738 A.2d. 406 (1999); *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa.Cmwlth. 2001). See also *United States v. Fisher*, 692 F.Supp. 488 (E.D.Pa. 1988) (any voluntary disclosure by the holder of the privilege that is inconsistent with the confidential nature of the relationship thereby waives the privilege)." *Bagwell v. Pennsylvania Department of Education*, 103 A.3d 409, 417 (Pa.Cmwlth. 2014).

At the suppression hearing, the Commonwealth established that Waynesburg Borough Police Officer Marcus Sims served the arrest warrant on the Defendant on October 26, 2016 at the request of the Allegheny County detectives. After taking the Defendant into custody, he was shackled to a bench in the Waynesburg Police Department patrol room while the Allegheny County detectives traveled to pick him up. During the wait, Officer Sims sat at his desk, approximately five (5) feet from the bench where the Defendant was shackled. Thereafter, defense counsel herein, Mr. Russo, arrived at the police station and began to speak with the Defendant while he was seated on the bench. Mr. Russo did not ask for a private room to speak with the Defendant. While speaking with the Defendant, Mr. Russo at times conversed with Officer Sims. During the same conversation, the Defendant made statements including "That was a long time ago" and "If some of this goes through, how much time am I looking at?" (T.T. Vol. 3, p. 275).

At the conclusion of the suppression hearing, this Court placed its findings and conclusions on the record. It stated:

> THE COURT: And I don't' think the issue is whether it was 5 feet or 7 feet; I think the issue is whether there is a third-party present which would then make a waiver of the attorney/client privilege.
>
> And this Court finds that there was a third person present, Officer Simms; that he was able to hear and, in fact, talk with you during this interview and therefore, there was no attorney/client privilege at the police station that we just talked about.
>
> I don't know if there was further evidence or not, but it is not in the motion, so we need not address it. So the motion is denied.

(T.T. Vol. 1, p. 29-30).

A review of the record reveals that this Court's factual findings were supported by the record and the legal conclusions drawn therefrom were correct. The Defendant and his counsel were aware of the presence of Officer Simms as he was sitting five (5) feet away and defense counsel was conversing with him. The known presence of Officer Simms acted as a waiver of the attorney-client privilege and so the statements made by the Defendant and heard by Officer Simms were admissible. This claim must also fail.

6. Admission of Phone Extraction

Next, the Defendant raises multiple challenges to the admission of the extraction of the victim's cell phone, as follows:

> 5. The Court erred in allowing the Commonwealths [sic] phone extraction exhibit to be placed into evidence when the original document was available and requested to be used in lieu of the Commonwealth's modified typed, partial and inaccurate replica.
>
> 6. The Court erred in not allowing the phone extraction information to be admitted into evidence by setting a foundation through the expert Commonwealth witness who performed the phone extraction.
>
> A. The Court erred by finding the witness who performed the phone extraction was not qualified, nor the proper individual to lay a foundation for and admit the extraction to the record.
>
> B. The Court erred by ruling that the victim was the only individual who could lay a foundation for the phone extraction report to be admitted to the record.
>
> C. The Court erred by not admitting the entire accurate and original phone extraction report by placed [sic] on the record.
>
> 11. The Court erred in not admitting the full extraction exhibit of the texts, phones [sic] calls and web sites conserving [sic] the time period in question. The District attorney had an extraction report limited to the time period of the dates in question which contained no pornographic information. Over the objection of the Defendant the Court allowed only bits and pieces of the report to be admitted into evidence, and only in the form of the DA's type written [sic] exhibit. The full accurate report should have been admitted to the record in original form.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 2, 4).

At trial, the Commonwealth presented the testimony of Matthew Rosenberg, a motor device computer forensic analyst for the Allegheny County Police Department. He was initially qualified as an expert in the area of cell phone extraction. On direct examination, Mr. Rosenberg testified that he performed an extraction on the victim's cell phone. Thereafter, on cross-examination, the following occurred:

> Q. (Mr. Russo): Are you saying that you did not read the report?
>
> A. (Mr. Rosenberg): I don't read the reports, no.
>
> Q. Okay. Did somebody else read it that you know of?
>
> A. I give the reports to the detectives.
>
> Q. Is he qualified to read it that you know?
>
> MR. GLEIXNER: Your Honor, I'm going to object.
>
> THE COURT: I'll sustain.
>
> MR. RUSSO: Okay.
>
> Q. Now, your report - when you do a report, does your extraction cover text message, phone calls, photo sending, things like that?
>
> A. A full extraction, yes.
>
> Q. Okay. So it would have all the information on the phone?
>
> A. Correct.
>
> Q. Great.
>
> MR. RUSSO: Your Honor, I would ask if we could possibly approach in regards to something that counsel had brought up on break, if at all possible.
>
> THE COURT: You may.
>
> (Whereupon, the following discussion was held at sidebar.)
>
> MR. RUSSO: Your Honor, there was a motion beforehand in regards to calling this witness out of order. The purpose of that motion was because this witness is going to be unavailable next week.
> Now, I was under the impression that I would be given a little bit of leeway so I wouldn't have to call him on my case to bring in the contents of the report. Now, if he is going to be unavailable next week, then -
>
> THE COURT: What is the report, Dan?
>
> MR. GLEIXNER: I think there is some confusion in terminology. The report is the report he writes, and then also, like the first two pages of phone extraction that have the person's name, the phone number, that information.
>
> What counsel is referring to is not the report. It is an actual extraction, text messages, things like that, and I also noticed the exhibit that counsel is intending to show the witness has handwritten notes on it. Looks like they were written on there by counsel. You can't have things written on an exhibit.

MR. RUSSO: They were simply - there were a couple lines I jotted, so just like the other witness -

THE COURT: Okay. Hold on. What is the report? First of all, I agree with you about the handwritten notes.

MR. GLEIXNER: I think there is confusion. The report is not the entire phone extraction. The report is, like, the report that he writes.

THE COURT: What is the basis for the extraction? What was on the phone?

MR. GLEIXNER: Just everything that's on the phone, and he testified that he extracted the phone.

THE COURT: But he didn't read it.

THE COURT: And you're allowed to ask him about the report, not about the extractions.

MR. RUSSO: I will have to call him in my case to ask him about the extractions, and he's not going to be here next week.

THE COURT: He didn't look at them.

MR. GLEIXNER: He testified he has no knowledge of what's on an extraction.

MR. RUSSO: He can -

THE COURT: He has no -

MR. RUSSO: He can interpret them.

THE COURT: Okay. We are not - he cannot.

MR. RUSSO: Yes, he can.

THE COURT: No, he can't. They are words, and they are what they are. He is an expert in getting things off cell phones, not in interpreting things. Step back.

(T.T. Vol. 2, p. 143-146).

Thereafter, during the direct examination of the victim, K.E., the following occurred:

Q. (Mr. Gleixner): Okay. K.E., I'm going to show you what I have marked as Commonwealth Exhibit 1. Can you take a look at that and let me know if you recognize what that is?

A. (K.E.): These are the texts, the text messages.

Q. When were those messages sent?

A. The day that I met up with him.

Q. Were those messages sent before or after you met up with the Defendant?

A. These were before.

Q. Okay. And are those messages fair and accurate as you recall sending and receiving them?

A. Yes.

MR. GLEIXNER: Your Honor, I move for admission of Commonwealth Exhibit 1.

THE COURT: It will be admitted.

MR. GLEIXNER: Thank you.

MR. RUSSO: I would like to renew my objection, Your Honor.

(T.T. Vol. 3, p. 156).

Later during the victim's direct examination, the following occurred:

Q. (Mr. Gleixner): I'm going to show you what I previously marked at [sic] Commonwealth Exhibit 9. Please take a look at that and tell me if you recognize it.

MR. RUSSO: Your Honor, could I have a second to review this for authenticity. I don't believe this is exactly what was sent to me. If I can just have -

THE COURT: You can revisit it while we are asking questions.

Q. Please take a minute to look through that, tell me if you recognize it.

A. These are the texts from Kik.

Q. When were those sent?

A. Before we met up.

Q. I'm sorry. I couldn't hear you.

THE COURT: I think she said before we met.

Q. Did the two of you talk after he dropped you off at the house?

A. What was that?

Q. Did the two of you communicate at all after he dropped you off at the residence?

A. Yes.

Q. Do you recognize what those messages are. Please look through all of them. Take your time.

A. These were after.

Q. Are those fair and accurate as you recall speaking with the Defendant through Kik?

A. Yes.

MR. GLEIXNER: At this time, I move for admission of Commonwealth Exhibit 9.

THE COURT: I would like to clarify. Are they all from after?

THE WITNESS: Yes.

Q. Are all of those from after he dropped you off at home?

A. Yes.

THE COURT: Yes, Mr. Russo.

MR. RUSSO: Your Honor, my objection would be back to the best evidence rule which would be actual log itself which has been testified to in this courtroom. You keep getting exerts [sic] of something I believe the DA is typing up and handing to the witness. I believe my client has a right to have the actual evidence submitted to the court.

THE COURT: Is there an original available?

MR. GLEIXNER: That is the original from the extraction.

THE COURT: The objection is overruled.

MR. GLEIXNER: Thank you, Your Honor.

MR. RUSSO: Your Honor, I would like to note for the record if counsel is stating that this is the original, I did not receive this in this form in my extraction report.

THE COURT: Well, you mean your objection is that you didn't receive the original?

MR. RUSSO: I received an extraction report.

THE COURT: Is it the same as the original that hs [sic] just been admitted?

MR. RUSSO: I haven't gone through all of it. I believe - and I have not compared everything with what I have received. There is a lot of information on here, but what I received was in a different form. The pages were numbered - I mean, it was the actual extraction report, which I have a copy.

THE COURT: Is it the same information? Well I'm going to overrule your objection. If, in the future, you learn that it is different information on what you received and what was admitted as Commonwealth 9, I will readdress it. You may continue, Mr. Gleixner.

MR. GLEIXNER: Thank you, Your Honor. Your Honor, I have no additional questions for this witness. I would offer for cross at this time.

MR. RUSSO: Your Honor, in reviewing what counsel has handed me and what I received, I can say that no, this is not what I received in the extraction report. In the extraction report on each message -

MR. GLEIXNER: Your Honor, can we approach?

THE COURT: You may.

(Whereupon, the following discussion was held at sidebar.)
THE COURT: This is on the record.

MR. GLEIXNER: I just didn't think it would be proper to speak in front of the jury. When I first went to the phone extraction, I printed out pertinent pages from the extraction that I thought counsel would need, knowing that he was still going to come in person and watch. I mailed it to him as a courtesy.

Included within the extraction report is numerous links to conversations, links to photographs, videos, things that counsel had the opportunity to view in person the two times he came and viewed it.

Within the extraction is conversations from regular text messages, Kik messages, phone logs. There is a variety of things in there. This is from the Kik section of the extraction, and in Kik, it is held as chat. so that's why - then you click on the link to the phone extraction chat. There is one that is labeled. That is the conversation that comes up and that's exactly what was printed.

If this is something that I didn't include in the packet of hard documents I printed out, it is still included in the extraction that counsel viewed twice with his own views.

MR. RUSSO: Your Honor, there was 34,000 video or data files, and I spent eight hours going through it. And I didn't - I didn't touch the surface of it, and he would not show me where the information was. Most of the -

THE COURT: First of all, again, counsel does not have an obligation to do your work.

Second of all, you have had this case since, I believe, April, and the fact that you only looked at eight hours worth is not on me; that's on you. Your objection is overruled.

(T.T. Vol. 3, p. 201-207).

As the record reflects (and as was addressed, above), the complete extraction report was made available for counsel's viewing but was not produced in its entirety due to some pornographic contents. Mr. Gleixner, as an officer of the Court, represented that the relevant pages were printed and disclosed.

During his testimony, Mr. Rosenberg testified that he performed the extraction but did not read it. This Court correctly determined that he was not the appropriate person to enter the extraction into evidence. Rather, the victim, who was able to authenticate the messages, was the appropriate witness through which to introduce the relevant portions of the extraction, and the Court correctly so ruled.

A review of the record reveals that this Court was well within its discretion in allowing the relevant portions of the victim's cell phone extraction as admitted during her testimony. See Collins, supra. This claim must also fail.

7. Admission of Evidence during Commonwealth's Case-in-Chief

Next, the Defendant argues that this Court erred in prohibiting him from entering an exhibit into evidence during the Commonwealth's case in chief:

> 16. The Court erred at time of trial that the rules prohibited the Defendant from entering evidence on the record during the Prosecutions [sic] case in chief.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 4)

> During the defendant's cross-examination of Detective Mark Restori, the following occurred:
>
> Q. (Mr. Russo): I'm going to hand you what I just labeled as Defense Exhibit A. And as you have already testified, that is a submittal form to the lab for the sexual assault kit in this case. Is that the one you submitted?
>
> A. (Det. Restori): It is.
>
> Q. And your name does appear on there?
>
> A. Yes, on the last page. My name is there and it is signed.
>
> Q. Okay. This document evidences that you took the kit from the hospital per your testimony over to the lab?
>
> A. No. This document is what we send with the kit to our evidence room. Our evidence personal then take the kit along with this submittal to the lab. I don't physically take it there; other evidence personnel do. This was on a Sunday evening that we took custody of this. The evidence personnel were not in the office. They would return on Monday morning and find this in the secure evidence lockers at headquarters. They would then take the kit to the crime lab.
>
> Q. Okay.
>
> MR. RUSSO: Your Honor, I would ask this be admitted as Defense Exhibit A.
>
> MR. GLEIXNER: I'm going to object. Defense is not admitting evidence in the Commonwealth's case-in-chief.
>
> THE COURT: I'll sustain the objection.
>
> MR. RUSSO: Would the Court like me to recall this witness?
>
> THE COURT: No, you don't need to. All you need to do is move that it be admitted in the defense case.
>
> MR. RUSSO: Okay.

(T.T. Vol. 4, p. 347-348).

As Mr. Gleixner properly noted, the Defendant is not permitted to introduce evidence during the Commonwealth's case-in-chief. This Court appropriately instructed defense counsel to simply move for its admission during the defense case. This claim must also fail.

8. Call Victim in Defense Case

> Next, the Defendant argues that this Court erred in not allowing him to re-call the victim during his own case-in-chief:
>
> 4. The Court erred in not allowing the Defendant to call the victim to the stand during his case, even if only for the limited purpose of setting a foundation to introduce parts of the phone extraction after he was directed by the court he could not bring it into evidence during the Commonwealth's case and had to wait until Defense's case and could recall the victim.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 1).

> At the conclusion of the defense case, the following occurred:
>
> THE COURT: Mr. Russo?
>
> MR. RUSSO: Your Honor, I do need to call K.E. to the stand.
>
> MR. GLEIXNER: Your Honor, may we approach?
>
> (Whereupon the following discussion was held at sidebar.)
>
> MR. GLEIXNER: Your Honor, I'm going to object. She is a witness that's the victim. She has already testified. She has been directed; she has been crossed. She has been questioned about numerous exhibits, about the call logs.
>
> At this point, for the defense to call the victim in their case-in-chief, that would be nothing more than harassment.
>
> MR. RUSSO: Your Honor, I mean, he has the right to ask her questions. I believe this Court had limited me upon objection as to entering exhibits in the prosecution's case because it wasn't my case.

THE COURT: That has nothing to do with who is going to - can we kind of stick to the point?

MR. RUSSO: I would like to examine her regarding the extraction, the phone extraction, which was not put on the record, which I would like to put on the record.

THE COURT: It's been admitted as a Commonwealth exhibit, I believe.

MR. GLEIXNER: He is speaking about something else. It has not been admitted. She has already been cross-examined.

THE COURT: Yes. You cross-examined her for the better part of two days. I think that's enough with her. She completely broke down and the end and closed off, and she is just - so no, I'm going to deny it.

MR. GLEIXNER: I want it noted that she was cross-examined about things that weren't admitted into evidence. I let that happen for a reason.

MR. RUSSO: Your Honor, I respect your ruling. I'm just saying that the Court said she was to review, because I was going to have her admit the phone that - they didn't actually put the phone calls into evidence.

I was going to have her review that extraction. You said she would do it over lunch.

THE COURT: Now is not a very good time to ask me. We are ready to close. I'm not going to let you call that kid again.

MR. GLEIXNER: She was questioned about the phone calls. She was actually impeached about them and admitted the order they occurred. That evidence is on the record.

(T.T. Vol. 5, p. 540-543).

As the record reflects, the victim testified at length and underwent extensive cross-examination. As Mr. Gleixner correctly pointed out, she was cross-examined and impeached with exhibits that had not been entered into evidence. There was no good reason for the victim to be re-called during the Defendant's case-in-chief and this Court properly denied the attempt. This claim must also fail.

9. Defendant's Request for Recess

The Defendant next argues that this Court erred in denying him a break before his closing argument. He states:

2. Defendant requested a short break before he had to give his closing argument to the jury and the court [sic] denied any such break. The court [sic] then recessed for lunch giving the Commonwealth the entire lunch break to prepare their closing argument in response to Defendants closing.

A. Defense counsel should have been entitled to a short recess before entering into closing arguments, and the Closing [sic] should have been held together.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 1).

At the close of the defense case, the following occurred:

THE COURT: We are going to close. Are you resting?

MR. RUSSO: Yes. Will you permit a break?

THE COURT: No. We [sic] going right into your closing. We are going to do lunch, and then his closing.

(T.T. Vol. 5, p. 543).

This claim of error is utterly without merit. This Court is responsible for the conduct of its courtroom and the decision to grant or deny a break was within its discretion. Defense counsel's unhappiness with this Court's decision to deny him a break does not mean that this Court's decision was in error. This claim is also meritless.

10. Commonwealth's Closing Argument

Next, the Defendant avers that this Court erred in failing to stop the Commonwealth's closing argument when he suggested that the Defendant should be convinced because he was "weird". He avers:

3. The Court did not stop, prohibit or correct the Commonwealth's closing arguments when the ADA made such remarks to the jury that the Defendant should be convicted because he was "weird" and other such negative portrayals.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 1).

It is not this Court's responsibility to frame or make the Defendant's objections for him. That counsel failed to object to a portion of the closing argument does not mean that this Court somehow erred in failing to make his objections for him. This Court found nothing inappropriate in the Commonwealth's closing argument.

Moreover, a careful review of the record reveals that Defendant's claim of error grossly misstates the substance of the Commonwealth's argument. Mr. Gleixner never called the Defendant "weird" and he never argued, implied or otherwise even suggested that the Defendant should be convicted because he was "weird." This argument is both spurious and inappropriate. This claim is utterly without merit.

11. Jury Instructions

Finally, the Defendant argues that this Court erred in improperly instructing the jury on the mistake of age defense. He states:

10. The Court erred in informing the Jury that the "mistake of age" defense was not available to the Defendant when the Defendant did not use the mistake of age defense. The instruction only served to prejudice the Defendant before the jury. Additionally, Defendant feels the law is in err [sic] wherein a person can not mistake the age of an individual unless he has sex with a victim.

(Defendant's 1925(b) Statement of Matters Complained of on Appeal, p. 3).

When reviewing a challenge to jury instructions, "it is the function of [the appellate] court to determine whether the record supports the trial court's decision. In examining the propriety of the instructions a trial court presents to a jury, [the appellate court's] scope of review is to determine whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case. A jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. Consequently, the trial court has wide discretion in fashioning jury instructions. The trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the Appellant was prejudiced by that refusal." *Commonwealth v. Sandusky*, 77 A.3d 663, 667 (Pa.Super. 2013).

During a recess in the Defendant's testimony, the following occurred:

(Out of jury presence)

THE COURT: I perceive somewhat of a problem here. Is your defense that he didn't have sex with her, and if he did, he didn't think she was 15? You can't have alternate defenses.

MR. GLEIXNER: Your Honor, I was thinking the same thing. Mistaken age is only a defense in the criminality. The conduct is the same so if it is not going to be testimony about sex acts, that defense would not apply.

THE COURT: You can't have it both ways. I didn't have sex with her, but if I did, I didn't know she was 15. One or the other. You're going to have to chose what you're doing here.

(T.T. Vol. 4, p. 482).

The defense then proceeded on the theory that nothing happened. The Defendant testified that he dropped the victim off at a movie theater after their meal and never saw her again.

During its charge, this Court instructed the jury regarding Involuntary Deviate Sexual Intercourse as follows:

THE COURT: The Defendant is charged with two counts of involuntary deviate sexual intercourse with a child over 12 and under 16. Both of these cases allege that there was oral intercourse.

A person commits involuntary deviate sexual intercourse when the person engages in deviate sexual intercourse with a child who is over 12 but under 16 and the Defendant is four or more years older.

Under our Crimes Code, an offense may be committed either by a male or female with a child of the same or opposite sex.

In order to find the Defendant guilty of this type of involuntary deviate sexual intercourse, you must be satisfied beyond a reasonable doubt that the Defendant had deviate sexual intercourse with the victim and that the victim was under the age of 16.

You must also consider whether or not the Defendant was four or more years older than the child, and that the Defendant and the child were not married to each other.

Deviate sexual intercourse has a particular meaning in criminal law. By deviate, I do not mean to imply a value judgment either way. Deviate is a legal term that should not be confused with deviant, which often has a negative connotation.

Deviate sexual intercourse occurs if the man's penis penetrates the mouth of a person. For all forms of deviate sexual intercourse, the slightest degree of penetration is sufficient. No emission of semen required.

Don't let the name of this crime fool you. Involuntary deviate sexual intercourse makes it immaterial whether or not the child under the age of 16 objected or resisted or even whether the child consented. When a child is under the age of 16, and the Defendant is four or more years older, consent is not a defense.

The Defendant asserted that he did not know the age of the victim or was mistaken as to her true age. This is not a defense to the charge.

(T.T. Vol. 5, p. 595-597).

The record reflects that this Court appropriately charged the jury. Having chosen a "it didn't happen" defense, the Defendant was not also entitled to a mistake of age defense. Further, a careful review of the record reveals that the jury was instructed that the mistake of age defense was not applicable to the charges of Involuntary Deviate Sexual Intercourse, but that the Defendant was ultimately acquitted of both of those charges. Thus, there can be no prejudice shown from this Court's (entirely proper) instruction. Again, this claim is meritless.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on January 9, 2018 must be affirmed.

BY THE COURT:
/s/McDaniel, J.

[1] 18 Pa.C.S.A. §3123(a)(7) - 2 counts

[2] 18 Pa.C.S.A. §6318(a)(1) - 1 count and §6318(a)(5) - 1 count

[3] 18 Pa.C.S.A. §3122.1(b)

[4] 18 Pa.C.S.A. §6301(a)(1)(ii)

[5] 18 Pa.C.S.A. §2904(a)

[6] 18 Pa.C.S.A. §7512(a)

[7] 18 Pa.C.S.A. §3126(a)(7)

[8] 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).

[9] The Defendant's challenges include three (3) challenges to the sufficiency and weight of the evidence and the remaining 28 challenges to this Court's rulings in various aspects. This Court has grouped those alleged errors into nine (9) main categories in order to facilitate its analysis, but will identify each specific claim of error within each sub-group as part of its analysis. It has also re-ordered them to coincide with the natural progression of a trial.

[10] The Defendant was tried before and convicted by a jury;

[11] This Court sincerely hopes that this is a typographical error and that the Defendant or his counsel are not attempting to state what this Court knows or doesn't know;

**This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.*