



PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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COMMONWEALTH OF PENNSYLVANIA vs.
HAROLD WALKER
Appeal of: HAROLD WALKER, Appellant

Sentencing

Court appropriately considered both aggravating and mitigating factors in fashioning its sentence.

CP-02-CR-07381-2019. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Rangos, J. September 23, 2022.

OPINION

Honorable Jill E. Rangos
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OPINION

On August 9, 2021, a jury convicted Appellant, Harold Walker, of one count each of Rape of a Child, Statutory Sexual Assault, Unlawful Contact With a Minor, Sexual Assault, Indecent Assault Person Less than 13 Years of Age, Corruption of Minors and Endangering the Welfare of Children.¹ This Court sentenced Appellant on February 11, 2022 to an aggregate sentence of 30.5 to 61 years of incarceration. This Court denied Appellant's Post-Sentence Motion on February 25, 2022. Appellant filed a Notice of Appeal on March 25, 2022 and after this Court granted several motions for extensions requested by Appellant, Appellant filed his Statement of Errors Complained of on Appeal on August 26, 2022.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges seven issues on appeal. Appellant alleges that the Court abused its discretion when it denied Appellant's motion to pierce the Rape Shield Law. Next, Appellant alleges that the Rape Shield Law 2019 Amendments violate his constitutional right of confrontation. Appellant further alleges that this Court erred in denying Appellant's motion to preclude applying the 2019 Amendments to Appellant's case. Appellant alleges this Court erred in permitting the commonwealth to voir dire the prospective jurors regarding the legal principle regarding the sufficiency of a victim's testimony. Appellant alleges this Court erred in admitting a forensic interview as a prior inconsistent statement. Penultimately, Appellant alleges that this Court erred in precluding Appellant from questioning an expert witness about an unauthenticated letter. Lastly, Appellant asserts this Court erred by in imposing a sentence that was unreasonable, manifestly excessive, and inconsistent with the Sentencing Code. (Statement of Errors to be Raised on Appeal, p. 2-5).

SUMMARY OF THE EVIDENCE

At trial, the victim in this case, eighteen-year-old M.W., testified that in 2013, she lived at home with her mother and her infant sister. (Jury Trial Transcript, Aug. 2-9, 2021, hereinafter TT, at 101). She testified that Appellant, Harold Walker, was her mother's boyfriend at the time and would sometimes babysit them. (TT 102). M.W. testified that when her mother was at work, Appellant would enter her bedroom, take off her underwear, and put his penis into her vagina. (IT 103). She testified that Appellant first did this to her when she was ten years old and it would happen approximately every other day. (TT 104). When M.W. was twelve, she told her mother and grandmothers what Appellant was doing to her. (TT 106.) She also told her doctor, who then tested her for a sexually transmitted infection ("STI"). (IT 107). M.W. testified that her mother did not believe her and became angry with her. (IT 110). M.W. stated that she started to punch walls, break things, and cut herself to deal with her trauma. Id. When M.W. was sixteen years old, she disclosed to one of her teachers, Kimberly Dunbar. (TT 111).

M.W. remembered having a forensic interview and testified that she believed that she disclosed the incidents to the interviewer. (TT 109). The forensic interview was recorded and played at trial. (IT 158). M.W., her recollection refreshed by the playing of the interview, was asked why she didn't disclose to the interviewer, and she responded that she was scared of what would happen if she did. (IT 159)

Dr. Jennifer Clarke of the Child Advocacy Center at Children's Hospital of Pittsburgh, testified as an expert witness in pediatrics and the diagnosis of child abuse. (IT 203) Dr. Clark reviewed M.W.'s medical records and observed that M.W. had been diagnosed with trichomoniasis, an STI, when she was eleven years old. (IT 215) The records indicate a concern for sexual abuse; however the child did not disclose and the physical examination was normal. (TT 216) Dr. Clarke testified that a normal physical

examination does not preclude the occurrence of sexual abuse. (IT 209-10) On September 9, 2015, Dr. Clarke interviewed M.W. as part of a follow up from the physical examination. (TT 218) Dr. Clarke testified that M.W. disclosed sexual abuse by her mother's boyfriend. (IT 219) M.W. said that she wanted it to stop, but also stated that if Dr. Clarke told anyone, M.W. would lie and say that she had a boyfriend who gave her the STI. Id. Based on the disclosure and the STI, Dr. Clarke diagnosed M.W. with sexual abuse. (IT 220). Dr. Clarke further stated that M.W. would not have been able to contract trichomoniasis from wearing another person's underwear. (IT 221).

Anna Henderson, M.W.'s maternal grandmother, and Kimberly Dunbar, M.W.'s former teacher, both testified that M.W. disclosed that Appellant had sexually abused her. (IT 295, 322).

DISCUSSION

Appellant alleges that the Court abused its discretion when it denied Appellant's motion² to pierce the Rape Shield Law. Appellant sought to introduce evidence that the person who committed the offenses for which he was charged was Dion Butler, who the victim claimed had committed several other assaults against her. Appellant sought to assert that Butler was the source of the victim's sexually transmitted infection and that the victim accused Appellant to compensate for Butler's acquittal and explain subsequent behavior changes.

The Rape Shield Law, 18 Pa.C.S. § 3104 states:

§ 3104. Evidence of victim's sexual conduct

(a) General rule.--Evidence of specific instances of the alleged victim's past sexual conduct, past sexual victimization, allegations of past sexual victimization, 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 of any offense listed in subsection (c) 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.

(b) Evidentiary proceedings.--A defendant who proposes to offer evidence of the alleged victim's past sexual conduct, past sexual victimization, allegations of past sexual victimization, opinion evidence of the alleged victim's past sexual conduct and reputation evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

18 Pa.C.S. § 3104. Prior to the 2019 amendments, the statute read as follows:

(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.

(b) Evidentiary proceedings.--A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

18 Pa.C.S. § 3104.

The purpose of the Rape Shield Law is to "prevent a trial from shifting its focus from the culpability of the accused towards the virtue and chastity of the victim." *Commonwealth v. Allburn*, 721 A.2d 363, 366-67 (Pa. Super. 1998). "Notwithstanding these worthy legislative aims, rules excluding evidence cannot be mechanistically applied to abridge a defendant's right of confrontation by denying admission of highly reliable and relevant evidence critical to his defense." *Commonwealth v. Spiewak*, 617 A.2d 696, 701 (Pa. 1992). "Pennsylvania courts have sought to balance the defendant's fundamental right to a fair trial, including his right to confront his accuser, against the state's interests embodied in the statute (as outlined above) and in the rules of evidence." *Commonwealth v. Rogers*, 250 A.3d 1209, 1217 (Pa. 2021).

'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice....'). This balancing determination between probative value and unfair prejudice should be made by the trial court at an in camera hearing similar to that outlined in 18 Pa.C.S. § 3104(b). At this hearing, the trial court should determine the following as a matter of record to be preserved for appellate review: (1) whether the proposed evidence is relevant to show bias or motive or to attack credibility; (2) whether the probative value of the evidence outweighs its prejudicial effect; and (3) whether there are alternative means of proving bias or motive or to challenge credibility.

Commonwealth v. Black, 487 A.2d 396,401 (Pa. Super. 1985) (internal footnote deleted).

The 2019 amendments added language to specifically include evidence of "past sexual victimization, allegations of past sexual victimization". Id. The conduct Appellant seeks to admit fall squarely within the 2019 amendments. Appellant asserts that the statute as amended violates his right to confront witnesses with relevant evidence and its retroactive application to his case violates the ex post facto clauses of the United States Constitution and the Pennsylvania Constitution.

Appellant's counsel argued at trial that piercing the Rape Shield Law was necessary to explain the detailed knowledge of sexual techniques or nomenclature by the victim. (IT 41-42). However, this evidence is not admissible unless it exonerates Appellant. *Commonwealth v. Fink*, 791 A.2d 1235,1242-43 (Pa. Super. 2002). The evidence does not exonerate Appellant. The victim's prior abuse or abuse allegations do not preclude Appellant from having abused her. Moreover, the allegations pertaining to Butler relate to digital penetration of the anus, but the allegations pertaining to Appellant relate to penile penetration of the vagina. (IT at 44). This Court found it unlikely that the victim would confuse the two typed of assaults.

Appellant incorrectly asserts that this Court retroactively applied the 2019 amendments in violation of the ex post facto clauses of the United States and Pennsylvania Constitutions. To the contrary, this Court determined that the proposed evidence was not relevant to the disposition of Appellant's case and precluded the evidence as irrelevant. (IT 49-51). As a result, Appellant's assertion of constitutional violations is moot. This Court notes that it has yet to be determined whether the 2019 amendments apply retroactively, but generally ex post facto protections apply to substantive, not procedural, law.

Appellant asserts in his Concise Statement that “The defense sought to use such evidence to show that Butler was the source of the sexually transmitted infection.” (Concise Statement at 3, unnumbered). However, counsel for Appellant stated the reverse at trial. “I am not going to say that Dion Butler was the source.” (IT at 40-41). Therefore, this argument is waived.

Next, Appellant alleges that this Court erred in permitting a question during voir dire whether they could follow the legal principle that a victim’s testimony, standing alone, may be considered sufficient evidence to find Appellant guilty. Appellant concludes that the question was wholly inappropriate, and prejudicial to the extent that he was denied his right to an impartial jury, a fair trial, and due process of law.

A challenge to a similar voir dire question was rejected in *Commonwealth v. Antill*, No. 194 WDA 2018, unpublished at *1-3 (Pa. Super. filed July 9, 2019).

Turning to the circumstances at hand, the Commonwealth’s case was based almost entirely on the victim’s testimony. Pursuant to this state of affairs, we cannot conclude the court abused its discretion when it permitted a question designed to expose any fixed opinions of the jurors regarding the lack of physical or corroborating evidence. As such, the question was used to “secure a competent, fair, impartial and unprejudiced jury” and was not used to ascertain the effectiveness of a potential trial strategy. See *Ellison*, 902 A.2d at 423-424.

Antill also argues that the language used in the question does not conform to the law. Specifically, he contends the question omits any reference to the Commonwealth’s burden of beyond a reasonable doubt. We agree that the question, as written, does not accurately state the law. However, this conclusion does not automatically render the trial court’s decision to allow the question an abuse of discretion. The issue at hand is whether the question impaired the competence, fairness or impartiality of the jury. See *Noel*, 104 A.3d at 1171.

In its opening statement, the Commonwealth informed the jury that it was “solely on the Commonwealth to prove to you beyond a reasonable doubt that the defendant is guilty.” More importantly, the trial court properly instructed the jury that Antill was presumed innocent until the Commonwealth established, beyond a reasonable doubt, every element of every crime charged. Further, when the jury requested a clarification on the instruction, the court informed them “you may find the defendant guilty if the testimony of [the victim] convinces you beyond a reasonable doubt that the defendant is guilty.”

The facts of the present case, the at-issue voir dire question, and the arguments presented by Appellant mirror those in *Antill*. We find the *Antill* panel’s rationale for determining that the voir dire question was not improper to be persuasive and convincing. Therefore, for the reasons set forth in *Antill*, we similarly conclude that Appellant’s arguments are meritless, and that the Commonwealth’s voir dire question did not deprive Appellant of a fair and impartial jury.

Commonwealth v. Wilson, 240 A.3d 918 (Pa. Super. 2020) (internal footnote deleted).

Lastly, Appellant alleges that his sentence was manifestly excessive, unreasonable, and an abuse of discretion and inconsistent with the Sentencing Code. Before addressing the reasonableness of the Court’s sentence, this Court notes that Defendant must raise a substantial question that his sentence is not appropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b); *Commonwealth v. Urmia*, 653 A.2d 706, 710 (Pa. Super. 1995) Appellant alleges that this Court failed to adequately consider mitigating evidence and improperly considered a factor for which Appellant was not responsible. These issues require further consideration.

The standard of review with respect to sentencing is whether the sentencing court abused its discretion. *Commonwealth v. Smith*, 673 A.2d 893, 895 (Pa. 1996) A court will not have abused its discretion unless “the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.” *Id.* It is not an abuse of discretion if the appellate court may have reached a different conclusion. *Grady v. Frito-Lay, Inc.*, 613 A.2d 1038, 1046 (Pa. 2003). The sentencing court is given such broad discretion because it alone can observe the defendant’s conduct and behavior. “Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review.” *Commonwealth v. Walls*, 926 A.2d 957, 963 (Pa. 2007)

This Court reviewed the presentence report and the sentencing guidelines prior to imposing sentence. (Sentencing hearing, Feb. 11, 2022, hereinafter ST at 4). The Pennsylvania Supreme Court has held:

Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant’s character and weighed those considerations along with mitigating statutory factors. Having been informed by the pre-sentence report, the sentencing court’s discretion should not be disturbed.

Commonwealth v. Devers, 546 A.2d 12, 18 (Pa. Super. 1988)

In imposing its sentence on Appellant, this Court considered the sentencing factors listed in 42 Pa.C.S.A. §9721 (b) (the protection of the public, the gravity of the offense in relation to the impact on the victim and the community, and the rehabilitative needs of the defendant), in addition to the Pre-Sentence Report. This Court considered Appellant’s age and the letters written on his behalf regarding his character. (TT 37). In addition, the Court considered as a mitigating factor in sentencing Appellant that he had a stale prior record score, indicating that his previous crimes occurred several years ago. (TI 36).

However, this Court must also consider the gravity of the offense and its impact on the victim. Although Appellant was charged with only one count of Rape of a Child, the evidence established that he repeatedly raped a young girl from the time she was ten years old until she was twelve years old. *Id.* Appellant gave her a sexually transmitted infection when she was eleven-years old. *Id.* Moreover, he was not a stranger, but a person who was placed in a position of trust by the victim’s mother. *Id.* The violation of that trust caused a rift between mother and daughter that remains to this day. *Id.* Although Appellant is not responsible for repairing this relationship, he bears a substantial portion of the blame for creating the circumstances which damaged it. This Court considered Appellant’s substantial need for rehabilitation and risk to the community, and the serious nature of the crimes and the impact of those crimes on the victim and her family in imposing sentences that were within or below the standard range of the Sentencing Guidelines. Since this Court appropriately considered both the aggravating and mitigating factors in fashioning its sentence, no error occurred and this issue is without merit.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:

/s/The Hon. Jill E. Rangos

¹ 18 Pa.CS. §§ 3121 (c), 3122.1 (b), 6318 (a) (1), 3124.1, 3126 (a) (7), 6301 (a) (1) (ii), and 4304 (a) (1), respectively.

² This Court notes with disfavor the practice of last-minute filing of motions. Filing motions as late as the Friday at 3:00 before a Monday trial violates this Court's well-established protocols and seriously inconveniences the parties and the Court. Sex Offense Court in Allegheny County requires that all motions shall be filed by 30 days after final discovery is complete. See also Pa.R.Crim.P. 579. Nonetheless, so as not to disadvantage Appellant for his counsel's misdeeds, this Court fully considered counsel's motions filed on the eve of trial.