

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. 1294-CR-2016
	:	
STEPHEN HOGG,	:	
Defendant	:	
	:	
Cynthia A. Dydra-Hatton, Esquire	:	Counsel for the Commonwealth
Assistant District Attorney	:	
	:	
Matthew J. Mottola, Esquire	:	Counsel for Defendant
Assistant Public Defender	:	

MEMORANDUM OPINION

Serfass, J. - February 5, 2018

Stephen Hogg (hereinafter "Defendant") has taken this appeal from our Order of Sentence entered in this matter on July 3, 2017, and made final when his timely post-sentence motion was granted in part and denied in part by our order of December 8, 2017. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and recommend that the aforesaid orders be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL BACKGROUND

On March 6, 2016, Pennsylvania State Police Trooper Nicholas Mantione responded to a report of a sexual assault. In response to this report, Trooper Mantione drove to the home of Mark Eidson and his thirteen-year-old daughter, M.E., in Albrightsville,

Pennsylvania. When he arrived, Trooper Mantione spoke with Mr. Eidson about the report. Mr. Eidson told him that his daughter, M.E., had told her friend and her friend's mother that she had been raped. Later, Trooper Mantione learned that M.E. told her friend, A.A., that she had been raped, and A.A.'s mother overheard the conversation and told Mr. Eidson. M.E. stated that a friend of her father, Stephen Hogg, raped her when he stayed with the family eight (8) months earlier. Trooper Mantione concluded his investigation that day after speaking with Mr. Eidson and turned the investigation over to Trooper Eric Porpigilia of the Criminal Investigation Unit.

Trooper Porpigilia began his investigation by arraigning for M.E. to be interviewed by the Children's Advocacy Center (hereinafter "CAC") in Scranton. In this interview, M.E. stated that Defendant raped her in July of 2015. M.E. stated that Defendant had raped her twice during the one (1) to two (2) month period that he lived with her family. The first incident occurred in Defendant's bedroom. It began when Defendant asked M.E. to come into his bedroom so he could try to fix her cellphone that was damaged after it had fallen in water. When she entered his bedroom, he shut the door, came up behind M.E., grabbed her jaw, and threw her onto the bed. He then told her that if she said anything he would kill her father and hurt her brothers. He proceeded to get in the bed with her and removed her pants and underwear. He then

engaged in sexual intercourse with M.E. by penetrating her vagina with his penis. When he was engaging in sexual intercourse, she was lying on her side while he was behind her. He pushed M.E. onto her back and touched her vagina during intercourse, penetrating her vagina with his fingers. However, he did not perform oral sex on her during this incident. M.E. could not recall if he ejaculated and was unsure why he stopped engaging in intercourse with her. The incident ended when he told her to go to sleep in her room. M.E. complied and went into her bedroom.

According to M.E. in this interview, the second incident also occurred when Defendant was living with her family in July. Again, this incident occurred in his bedroom. M.E. stated that she was in Defendant's bedroom watching her little brothers play XBOX with him. She was initially sitting next to Defendant on the bed but he began rubbing and grabbing her thigh. In response, she moved to sit on the floor. M.E.'s brothers then left the room because Mr. Eidson was calling them for bed. M.E. attempted to leave the room as well, but Defendant grabbed her arm and told her to stay. He then pushed her onto his bed and held her down by her neck. He tried to remove her shirt, but she prevented him from doing so. He did remove her pants and underwear. She tried to get across the bed to leave, but he pushed her against the bed frame and returned her to the bed. She was again lying on her side and he was again behind her. He again engaged in sexual intercourse with her by

penetrating her vagina with his penis. He also performed oral sex on her during this incident prior to engaging in sexual intercourse. While he was engaging in sexual intercourse, M.E. kept trying to get up and repeatedly kicked him to escape. He did not ejaculate on this occasion. The incident ended when M.E. told Defendant that she was going to tell someone what had occurred. After she said this, he threatened to kill her. When it was over, he walked her to her bedroom and told her not to come out until the following day. A few weeks after this second incident, Defendant moved out of the Eidson home.

In addition to this forensic interview, Dr. Marla Farrell, a pediatrician who works at the Children's Advocacy Center, performed a medical evaluation of M.E. Because M.E. denied any oral or anal penetration, Doctor Farrell performed an exam of her genitals. In this exam, Dr. Farrell did not find any signs of trauma. Dr. Farrell testified that the lack of any signs of trauma could be caused by the eight (8) months between the alleged assault and the examination. Dr. Farrell also testified that, more often than not, in situations like M.E.'s there are no signs of trauma.

In May, Trooper Porpigilia interviewed Defendant. During this interview, Defendant told Trooper Porpigilia that he believed he lived with the Eidsons in July of 2015. He said that he was there for a few weeks and that he had a good relationship with all three

(3) of the Eidson children, including M.E. Defendant denied having any sexual contact with M.E.

Relying exclusively on M.E.'s statement, Trooper Porpigilia filed charges against Defendant for two (2) counts of Rape of a Child, 18 Pa. C.S.A. § 3121(c), two (2) counts of Involuntary Deviate Sexual Intercourse, 18 Pa. C.S.A. § 6318(a)(1), two (2) counts of Aggravated Indecent Assault-Complaint 13 Years of Age or Younger, 18 Pa. C.S.A. § 3125(a)(7), Corruption of Minors, 18 Pa. C.S.A. § 6301(A)(1)(ii), and two (2) counts of Indecent Assault Person Less Than 13 Years of Age, 18 Pa. C.S.A. § 3126(a)(7).

Following a preliminary hearing, Magisterial District Judge Eric M. Schrantz bound over all charges to this Court. Once the case was transferred to this Court, the Commonwealth filed an information in accordance with Pennsylvania Rule of Criminal Procedure 560. In this information, the Commonwealth alleged that Defendant committed the offenses between July 1, 2015, and July 14, 2015.

Defendant was scheduled for a jury trial on these charges on March 6, 2017. Only three (3) days prior to trial, Defendant was released on nominal bail because his right to a speedy trial was violated under Pa. R. Crim. P. 600(B). On March 6, 2017, this Court granted Defendant's request for continuance of the trial because, during the three days he was released, Defendant had discovered several alibi witnesses who would testify that he was not living

with the Eidsons from July 1, 2015, to July 15, 2015. That same day, a jury was selected for the trial, which was rescheduled to commence on April 3, 2017.

On March 10, 2017, Defendant filed a notice of alibi listing several witnesses who would testify that he was living with his girlfriend, Krystle Ginter, during the first two (2) weeks of July 2015 and not with the Eidsons. In response to this notice of alibi, the Commonwealth filed a motion to amend the information. On March 31, 2017, this Court held a hearing on that motion. At the hearing, the Commonwealth stated that it will present evidence at trial showing that these offenses potentially occurred at some point in the month of July. Based upon this representation, this Court allowed the Commonwealth to amend the information to state that these alleged crimes occurred during the month of July 2015.

As Defendant prepared for trial and continued to investigate this matter, he discovered other witnesses and evidence that would establish that he did not reside with the Eidsons during the entire month of July 2015. Rather, Defendant alleged that was residing with his girlfriend, Krystle Ginter in Kunkletown, Pennsylvania. This evidence established that Defendant did not reside with the Eidsons until September 2015. On March 31, 2017, Defendant filed an amended alibi notice in accordance with this evidence, which consisted of two (2) additional witnesses not listed in his initial alibi notice. The Commonwealth responded with a motion to strike

the alibi notice amendment or, in the alternative, to amend its information.

On April 3, 2017, the same day that trial was set to begin, this Court addressed these issues, including two (2) motions filed by Defendant: one (1) to exclude the Commonwealth from presenting evidence that the offenses occurred outside of July and one (1) requesting that the Court prevent the Commonwealth from informing its witnesses about the amended alibi. After hearing argument on these issues, the Court did not strike Defendant's alibi. We allowed Defendant to present evidence that he did not reside with the Eidsons in July but rather in September. Additionally, this Court allowed the Commonwealth to amend its information to state that these alleged offenses occurred at some point between July 1, 2015, and September 30, 2015.

The trial commenced thereafter, beginning with the testimony of M.E. Consistent with her interview, she testified that Defendant raped her twice in July of 2015 when Defendant was living with her family. She testified that the first incident occurred in Defendant's bedroom after he had invited her into the room so that he could fix her cellphone, which had been damaged by Gatorade spilled by her brothers. She further testified that it was water damage, liquid damage, and apologized for not being specific enough.

Once she entered Defendant's bedroom, he shoved her onto the bed. Defendant claims that, unlike in her CAC interview, she did not testify that he grabbed her by the neck. M.E. testified that she was trying not to confuse the two (2) incidents, but Defendant's counsel cut her off before she could complete her answer. M.E. continued, stating that Defendant then took off her pants and underwear and removed his own pants. He then engaged in sexual intercourse by penetrating her vagina with his penis. While he was engaging in sexual intercourse, she was trying to push him off of her but was unable to do so. Defendant claimed that M.E. stated she was on her side the whole time, contrary to the previous CAC interview where she stated she was on her side and back. In the CAC interview, M.E. stated that she was on her side and back because she kept moving. Defendant also claimed that M.E.'s testimony was not consistent with her CAC interview statement when she said that the incident ended with him ejaculating on her leg. However, in the CAC interview, M.E. did not address whether Defendant ejaculated during the first incident. M.E. testified that Defendant threatened her as she did in her interview, and she testified that he had told her not to tell anyone or he would hurt her and her family. Defendant claims that she contradicted her CAC interview by testifying that Defendant did not touch her vagina, but did put his penis inside her.

M.E. then testified about the second incident which she claimed occurred a few days to a week later in July of 2015. As in her CAC statement, she stated that this incident also occurred in Defendant's bedroom. She testified that her father ordered her into Defendant's bedroom to watch her brothers. M.E. was not asked why she had entered the bedroom during the CAC interview, but stated that she was watching her brothers play video games there. M.E. testified that she was standing at the bedroom door, sat down to watch her brothers play the game, and then stood back up in the doorway. When her brothers left the room, she was standing near the doorway. Defendant then approached her and shut the door to his bedroom. In the CAC interview, M.E. stated that she was standing and walking away from Defendant when he grabbed her. M.E. was not asked where she was standing in the room at that moment.

M.E. testified that Defendant pulled her into his room, pushed her onto the bed, pulled down her pants and underwear, and performed oral sex on her. Similarly, during the CAC interview, she stated that Defendant "licked her" before he had sex with her. However, at trial she testified that while performing oral sex, Defendant penetrated her vagina with his finger. He then engaged in sexual intercourse with her by inserting his penis in her vagina. She testified that she was on her side at one point but another time she was laying flat on her back. M.E. testified that there was no clear explanation why the incident ended, leaving out

her account from the CAC interview where she had threatened to tell other people what Defendant had done. M.E. testified that Defendant threatened her and her family again after it was over, which is consistent with her statement during the CAC interview where she said he had told her the same thing.

During cross examination, M.E. testified that these incidents had occurred during July of 2015.

The Commonwealth next called Mr. Eidson to testify. He stated that Defendant had lived with his family in July of 2015. He testified that he did not suspect that anything had occurred between his daughter and Defendant at the time. Troopers Mantione and Porpigilia were also called to testify as to their investigation as described herein above. Additionally, Carbon County Children and Youth Services case worker Jill Geissinger was called to testify that she had spoken with M.E. Ms. Geissinger stated that M.E. would not come downstairs to speak with her, and that M.E. told her that she does not go into Defendant's old room because of these incidents. Ms. Geissinger also spoke to Defendant about these incidents and noted that Defendant was visibly upset about the allegations. While Defendant denied that anything had happened, he did indicate that he believed M.E. was flirting with him. Ms. Geissinger also authenticated the transcript of CAC's interview with M.E., which was admitted into evidence.

The Commonwealth called two (2) doctors as trial witnesses, Dr. Marla Farrell, a pediatrician at CAC, and Dr. Andrew Clark, who is both a psychiatrist at KidsPeace Hospital and M.E.'s treating doctor. Dr. Farrell's testimony is referenced above. Dr. Clark testified by telephone, over Defendant's objection, that he evaluated M.E. on June 29, 2016, when she was admitted to Gnadon Huetten Memorial Hospital. Dr. Clark stated that he treated M.E. when she was hospitalized because she was distressed about testifying in front of Defendant.

Defendant called three (3) witnesses to establish that he lived with the Eidsons in September of 2015, not July. First, Jo Paszych, a neighbor of the Eidsons testified that she met Defendant in July of 2015, but then corrected the timeframe to the end of August 2015 when Mark Eidson introduced Defendant to her because Defendant was going to assist her with a carpentry job at her home. She testified that Defendant worked on this job at her home in September of 2015, while he was living with the Eidsons. She specifically remembered Defendant assisting the two Eidson boys in a fishing derby held in their community on September 13, 2015. However, she stated that between July and September of 2015, she was not in Mark Eidson's home, and therefore could not have known who was living in the household.

Second, Defendant called Krystle Ginter, his girlfriend since 2009, as a witness. She testified that Defendant was living with

her in Kunkletown throughout the month of July 2015. She claimed that Defendant only lived with the Eidsons for two (2) weeks during September of 2015.

Finally, Defendant called Jennifer Chappell who testified that she was a friend of both Defendant and Mark Eidson. She stated that she had introduced Defendant to Mark Eidson. She also testified that Defendant lived with the Eidsons in September of 2015, which she learned through a phone conversation with Defendant.

Defendant testified at trial that he had stayed with the Eidsons in September of 2015. He also denied M.E.'s allegations.

The final witness called by Defendant was Rita Wenzel, a friend of Mark Eidson and M.E. She does not and did not know Defendant. She testified that she had four (4) conversations with M.E. over a five (5) day period shortly after the police began investigating these incidents. She testified that M.E. told her about the rapes and gave her different accounts than those presented in the CAC interview and at trial. In the final conversation, M.E. told Ms. Wenzel that she was scared about proceeding with the case against Defendant. Ms. Wenzel reassured her by telling her that people will protect her and that she had nothing to worry about if she tells the truth. In response, M.E. sighed and said "it's already gone too far." On cross-examination, Ms. Wenzel admitted that she was unaware of M.E.'s emotional state

and that she assumed M.E. was lying because there were variations in M.E.'s account of the assaults. Ms. Wenzel also admitted that she did not know whether M.E. was afraid of pursuing the matter or of testifying.

In response to this testimony, M.E. was recalled and denied that she ever spoke to Ms. Wenzel in detail about the assaults. M.E. testified that she did not want to talk about it, but Ms. Wenzel kept pressing her for details. M.E. stated that she was getting scared to testify in front of people because the details are very personal and hard for her to talk about. Nevertheless, M.E. stated that it was too far into the process for her to quit and not do this for herself.

At the close of evidence, this Court instructed the jury and addressed the issue of alibi. The Court stated

Now, ladies and gentlemen, the information in this matter alleges that the crimes were committed between the dates of July 1st and September 30th, 2015. The first information filed in this matter indicated that the crimes had been committed between July 1st, 2015, and July 14th, 2015. As a result of an alibi notice received March 31st, 2017, the information was amended to expand the dates through July 31st, 2015. And then after the receipt of a second alibi notice on April 3rd, 2017, the information was again amended to expand the dates through September 30th, 2015.

You are not bound, ladies and gentlemen, by the dates alleged in the information. It is not an essential element of any of the crime charged. You may find the Defendant guilty if you are satisfied beyond a reasonable doubt that he committed the crimes charged between the dates of July 1st, 2015, and September 30th, 2015, even though you are not satisfied that he committed it on a particular date alleged in the information.

After deliberating on the above stated evidence for several days, the jury rendered a verdict of guilty on all charges. On July 3, 2017, this Court sentenced Defendant to an aggregate sentence of a period of incarceration of no less than eighteen (18) to no more than thirty-six (36) years.

On July 13, 2017, Defendant timely filed a post-sentence motion. In his motion, Defendant asked this Court to enter a judgment of acquittal or, in the alternative, to order a new trial. Oral argument on Defendant's motion was held on October 27, 2017, at the conclusion of which defense counsel submitted a supporting brief. The Commonwealth's responsive brief was filed on November 13, 2017. On December 8, 2017, this Court granted Defendant's post-sentence motion in part by entering a judgment of acquittal on Count Three (3) and denied Defendant's post-sentence motion in all other respects.

On December 11, 2017, Defendant filed a Notice of Appeal to the Superior Court of Pennsylvania. On December 13, 2017, this Court ordered Defendant to submit a concise statement of the matters complained of on appeal within twenty-one (21) days pursuant to Pennsylvania Rule of Appellate procedure 1925(b). In compliance with our Order, on December 18, 2017, Defendant filed a "Concise Statement of Errors Complained of on Appeal", raising the following issues for appellate review:

1. Whether this Court erred by allowing the Commonwealth to amend the information just before trial began so as to extend the time period during which the offenses could have occurred;
2. Whether this Court erred by allowing Doctor Andrew Clark to testify via telephone;
3. Whether this Court erred in finding that Doctor Andrew Clark's testimony that the victim was hospitalized because she was distressed about testifying was not unduly prejudicial under Pennsylvania Rule of Evidence 403; and
4. Whether this court erred by finding that the jury's verdict was not against the weight of the evidence.

DISCUSSION

Each issue raised by Defendant on appeal was specifically addressed in our memorandum opinion of December 8, 2017. Relying upon the reasoning contained therein, we have attached a copy of that memorandum opinion for the convenience of the Honorable Superior Court and incorporate the same herein.

CONCLUSION

For the reasons set forth hereinabove and in our memorandum opinion dated December 8, 2017, we respectfully recommend that the instant appeal be denied and that our Order of Sentence dated July 3, 2017, and our Order of Court dated December 8, 2017, granting

in part and denying in part Defendant's post-sentence motion, be affirmed accordingly.

BY THE COURT:

Steven R. Serfass, J.