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

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	No. 289 CR 2008
	:	
MERRICK STEVEN KIRK DOUGLAS,	:	
Defendant	:	

Jean A. Engler, Esquire, Assistant District Attorney — Counsel for Commonwealth

Mark D. Schaffer, Esquire and Kenneth A. Young, Esquire — Counsel for Defendant

Criminal Law – Post-Trial Motion for Extraordinary Relief – Ineffective Assistance of Counsel - Failure to Provide Notice of Alibi Defense – Reference to Polygraph Testing – Sufficiency of 1925 Statement to Preserve Issues on Appeal

1. An oral motion for extraordinary relief prior to sentencing under Pa.R.Crim.P. 704(B) is neither a substitute for a written post-sentence motion nor a necessary or sufficient predicate to preserve any issue for appeal. Its use is reserved for exceptional circumstances: to correct errors so manifest and egregious that immediate relief is essential.
2. Claims of ineffective assistance of trial counsel are not the proper subject of a motion for extraordinary relief or a post-sentence motion and must ordinarily await collateral review.
3. A court acts appropriately in excluding alibi evidence from witnesses other than the defendant when proper notice of an alibi defense has not been given.
4. Reference on cross-examination to a Defendant's willingness to take a polygraph test without mention of the polygraph results or even if a polygraph test was given is not reversible error. Reversible error requires that Defendant be prejudiced by such reference and must be evaluated on a case-by-case basis.
5. A 1925(b) statement of errors complained of on appeal which claims as error that "the verdict was against the weight of the evidence" and "the evidence was insufficient to support the guilty verdict" is legally insufficient to identify and preserve any issue for appeal.

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and Kenneth A. Young, Esquire

MEMORANDUM OPINION

Nanovic, P.J. – June 1, 2010

PROCEDURAL HISTORY

On December 9, 2009, following a jury trial, Merrick Steven Kirk Douglas ("Defendant") was acquitted of one count of rape by forcible compulsion[1] and convicted of one count of criminal attempt of rape by forcible compulsion[2], one count of criminal attempt of aggravated indecent assault by forcible compulsion[3], one count of criminal attempt of aggravated indecent assault without consent[4], one count of criminal attempt of sexual

[1] 18 Pa.C.S.A. § 3121(a)(1) (Rape by Forcible Compulsion).
[2] 18 Pa.C.S.A. § 901(a) (Criminal Attempt); 18 Pa.C.S.A. § 3121(a)(1) (Rape by Forcible Compulsion).
[3] 18 Pa.C.S.A. § 901(a) (Criminal Attempt); 18 Pa.C.S.A. § 3125(a)(2) (Aggravated Indecent Assault by Forcible Compulsion).
[4] 18 Pa.C.S.A. § 901(a) (Criminal Attempt); 18 Pa.C.S.A. § 3125(a)(1) (Aggravated Indecent Assault Without Consent).

assault[5], one count of indecent assault by forcible compulsion[6], one count of indecent exposure[7], and one count of unlawful contact with a minor[8] for purposes of indecent assault by forcible compulsion, indecent exposure, and rape by forcible compulsion. These charges stemmed from an incident which occurred at the victim's home on July 10, 2007. On March 25, 2010, Defendant filed a Motion for Extraordinary Relief Pursuant to Pa.R.Crim.P. 704 seeking acquittal on all charges or, in the alternative, a new trial. We denied this Motion on March 26, 2010, and also sentenced Defendant on the same date to not less than seventy-two months and not more than one hundred and forty-four months of incarceration and ordered him to comply with Megan's Law as a sexual offender.[9]

We received Defendant's Notice of Appeal on April 9, 2010, and filed an Order dated April 13, 2010, giving Defendant twenty-one days within which to file a Concise Statement of the Matters Complained of on Appeal. Defendant complied by filing his Pa.R.A.P. 1925(b) statement on April 26, 2010. Defendant asserts the following complaints:

1. The Honorable Trial Court erred in denying the Appellant's Motion for Extraordinary Relief;

[5] 18 Pa.C.S.A. § 901(a) (Criminal Attempt); 18 Pa.C.S.A. § 3124.1 (Sexual Assault).
[6] 18 Pa.C.S.A. § 3126(a)(2) (Indecent Assault by Forcible Compulsion).
[7] 18 Pa.C.S.A. § 3127(a) (Indecent Exposure).
[8] 18 Pa.C.S.A. § 6318(a)(1) (Unlawful Contact with a Minor).
[9] Defendant's sentences for each convicted count are identical and are to run concurrently.

2. Trial Counsel was ineffective in representing the Appellant during pretrial matters and at trial; including but not limited to filing a Notice of Alibi Defense and by stating that the Defendant "did not take the stand", in Trial Counsel's closing Argument;
3. The Honorable Court erred in not allowing the Defendant's mother to testify, which would have impeached the Complaining Witness in this matter in regard to the time the alleged incident occurred;
4. The Honorable Court erred in failing to grant a mistrial, when the Investigating Trooper testified to the Jury that the Defendant stated he would take a polygraph test;
5. The verdict was against the weight of the evidence; and
6. The evidence was insufficient to support the guilty verdict.

We shall now address these assignments of error in conformance with Pa.R.A.P. 1925(a).

DISCUSSION

1. *The Honorable Trial Court erred in denying the Appellant's Motion for Extraordinary Relief*

We first note that the filing of a written motion for extraordinary relief is procedurally improper. *See* Commonwealth v. Askew, 907 A.2d 624, 627 n.7 (Pa.Super. 2006), *appeal denied*, 919 A.2d 954 (Pa. 2007). Per its plain language, Pa.R.Crim.P. 704(B) directs that a motion for extraordinary relief is to be oral. Pa.R.Crim.P. 704(B) ("(B) Oral Motion for Extraordinary Relief (1) Under extraordinary circumstances, when the interests of justice require, the trial judge may, before sentencing, hear an oral motion in arrest of judgment, for a judgment of acquittal, or for a new trial."). Here, Defendant filed of

record a written motion for extraordinary relief on March 25, 2010. While not expressly prohibited, a trial court's hearing of argument on such a motion has previously been deemed "misplaced and clearly disallowed by the Rules of Criminal Procedure." Askew, 907 A.2d at 627 n.7.

Furthermore, we note that such motions are "intended to allow the trial judge the opportunity to address only those errors so manifest that immediate relief is essential [. . . .] for example, when there has been a change in case law, or, in a multiple count case, when the judge would probably grant a motion in arrest of judgment on some of the counts post-sentence." Pa.R.Crim.P. 704, Explanatory Comment. No such claims were raised by Defendant.[10] Moreover, it has been repeatedly held that "[t]his Rule was not intended to provide a substitute vehicle for a convicted defendant to raise matters which could otherwise be raised via post sentence motion" and is only to be employed in exceptional circumstances. *See* Commonwealth v. Fisher, 764 A.2d 82, 85 (Pa.Super. 2000), *appeal denied*, 782 A.2d 542 (Pa. 2001); Commonwealth v. Grohowski, 980 A.2d 113, 115-16 (Pa.Super. 2009). This is specifically so as

[10] The matters complained of in Defendant's Motion for Extraordinary Relief were as follows: (1) The Commonwealth failed to provide the defense with requested and mandatory discovery; (2) Trial counsel was ineffective in representing Defendant; (3) Trial court errors; (4) The evidence was insufficient to sustain Defendant's conviction; and (5) The verdict was against the weight of the evidence.

it pertains to claims of ineffectiveness of counsel, which Defendant raised therein. *See* Fisher, 764 A.2d at 116, 116 n.7.

Lastly, we note that motions for extraordinary relief are "neither necessary nor sufficient to preserve an issue for appeal." Commonwealth v. Woods, 909 A.2d 372, 378 (Pa.Super. 2006) ("The failure to make a motion for extraordinary relief, or the failure to raise a particular issue in such a motion, does not constitute a waiver of any issue. Conversely, the making of a motion for extraordinary relief does not, of itself, preserve any issue raised in the motion, nor does the judge's denial of the motion preserve any issue."), *appeal denied*, 919 A.2d 957 (Pa. 2007). The Rule itself states that "[a] motion for extraordinary relief shall have no effect on the preservation or waiver of issues for post-sentence consideration or appeal." Pa.R.Crim.P. 704(B)(3). Seeing as counsel indicated at the sentencing hearing that the Motion was filed in order to preserve issues for appeal and that rather than pursue those issues under a pre-sentence motion, the issues would be pursued post-sentence, we denied the Motion. In any event, the majority of the issues raised in the Motion for Extraordinary Relief have all been raised again in the matter presently before us and will therefore be addressed on their procedural and/or substantive merits.

2. *Trial Counsel was ineffective in representing the Appellant during pretrial matters and at trial; including but not limited to filing a Notice of Alibi Defense and by stating that the Defendant "did not take the stand", in Trial Counsel's closing Argument*

The Pennsylvania Supreme Court has expressly held that "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002). The Court further held that "a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness." Id. Defendant "can raise the claims of ineffectiveness [. . .] in a [Post-Conviction Relief Act ("PCRA")] petition, wherein the PCRA court will be in a position to ensure that [Defendant] receives an evidentiary hearing on his claims, if necessary." Commonwealth v. Grant, 992 A.2d 152, 154 (Pa.Super. 2010) (declining to address the issue of ineffectiveness of counsel on direct appeal from the trial court). We therefore decline to address the merits of this claim, if any, and suggest that this is not an appropriate basis for appellate relief.

3. *The Honorable Court erred in not allowing the Defendant's mother to testify, which would have impeached the Complaining Witness in this matter in regard to the time the alleged incident occurred*

Defendant's mother, Beverly Hendricks, was in fact permitted to testify. (N.T. 12/08/2009, pp. 239-241, 246-47). Her initial testimony was stricken from the record per an agreement between counsel at sidebar. (N.T. 12/08/2009, p. 245). This testimony, relating to the time the incident occurred, was properly stricken from the record because it constituted an alibi defense beyond mere impeachment of a Commonwealth witness, which is not permitted unless proper notice of an alibi defense has been given. Pa.R.Crim.P. 567 (Notice of Alibi Defense); *see also* Commonwealth v. King, 429 A.2d 1121, 1123 (Pa.Super. 1981) (finding that an attempt to introduce testimony regarding the defendant's whereabouts during the asserted time the crime occurred is an alibi defense, which testimony is properly precluded by the trial court when no notice of alibi has been filed); Commonwealth v. Lyons, 833 A.2d 245, 257 (Pa.Super. 2003) ("Under these circumstances, the court certainly had discretion to exclude these witnesses. [. . .] Therefore, we see no reason to disturb the trial court's decision to preclude the testimony of these witnesses."), *appeal denied*, 879 A.2d 782 (Pa. 2005). Because no notice of an alibi defense was given, it was not error to exclude a portion of Ms. Hendricks' testimony.

4. *The Honorable Court erred in failing to grant a mistrial, when the Investigating Trooper testified to the Jury that the Defendant stated he would take a polygraph test*

"[T]he mere mention of a polygraph test does not automatically constitute reversible error." Commonwealth v. Watkins, 750 A.2d 308, 315 (Pa.Super. 2000). "Whether a reference to a polygraph test constitutes reversible error depends upon the circumstances of each individual case and, more importantly, whether the defendant was prejudiced by such a reference." Id. at 317. Trooper Eric Cinicola mentioned the word "polygraph" during questioning by defense counsel. The allegedly problematic testimony went as follows:[11]

Q. You did not ask Mr. Douglas for any sample of DNA, correct?
A. That is correct.
Q. Did he not specifically say to you; I will provide you whatever you want?
A. No. I think he said to me he would provide me with a polygraph test.

(N.T. 12/08/2009, p. 198). It is certain that "the *results* of a polygraph test are inadmissible in Pennsylvania." Leonard v. Commonwealth, 558 A.2d 174, 177 (Pa.Cmwlth. 1989) (emphasis

[11] Trooper Cinicola subsequently mentioned the word "polygraph" again while testifying during defense counsel's questioning as follows:

Q. At the end of your report, you have left this open for investigation, right?
A. Right.
Q. And the next thing that comes into play, to your knowledge, is November 6, 2007?
A. That is the next reporting date, November 6, 2007, but - -
Q. And - - I am sorry. Go ahead.
A. I believe I was waiting when we left off with the polygraph exam. That is what I was waiting on for Mr. Douglas to get back.
Q. I didn't ask you about that. I asked you from November, nothing was done?

(N.T. 12/08/2009, pp. 214-15). However, no objection to this testimony was preserved on the record and this second reference is in fact not complained of herein.

supplied). Furthermore, "the Pennsylvania Supreme Court has declined to overturn convictions in criminal cases where the giving of a polygraph test had been mentioned during testimony but the results had not been given." Id. *See also* Commonwealth v. Smith, 410 A.2d 787, 790-91 (Pa. 1980) (finding no manifest reason necessitating a new trial when reference to polygraph only established the defendant's willingness to take one and not that he had actually taken one). No results of any polygraph examination were proffered here; nor is this testimony indicative as to whether or not Defendant in fact took a polygraph examination.

Some of the factors that indicate that a defendant did not suffer undue prejudice warranting a new trial from a polygraph reference include: "1) the witness' reference to the polygraph test was not prompted by the question; 2) the witness' reference did not suggest the results of the polygraph; 3) the trial court issued prompt and adequate instructions regarding the unreliability and inadmissibility of polygraph tests and cautioned the jury to disregard any testimony concerning such tests." Watkins, 750 A.2d at 318-19. We submit that the first and second criteria have been met, and suggest that the third is not determinative of whether a new trial is warranted. *See* Smith, 410 A.2d at 790-91 (no mention of a curative instruction in denying a new trial); Commonwealth v. Johnson, 272 A.2d 467,

470 (Pa. 1971) (curative jury instruction was not sufficient to overcome prejudice resulting from polygraph examination testimony).

No curative instruction was requested. Indeed, the giving of a curative instruction given the testimony elicited would have highlighted and raised a question in the jury's mind not contemplated: Did Defendant, in fact, submit to a polygraph test and if so, what were the results? Moreover, not only was Defendant not prejudiced by this reference, he stood to gain from it. *See* Commonwealth v. Saunders, 125 A.2d 442, 445-46 (Pa. 1956) ("Defendant's offer [to take a polygraph examination] was merely a self-serving act or declaration which obviously could be made without any possible risk, since, if the offer were accepted and the test given, the result, whether favorable or unfavorable to the accused, could not be given in evidence."). We therefore find that the error complained of, if any, was harmless.

5. *The verdict was against the weight of the evidence*

and

6. *The evidence was insufficient to support the guilty verdict*

Seeing as the same analysis applies to points five and six, we will consider them together. Preliminarily, we must determine whether Defendant has sufficiently identified the errors of which he complains. "Any issues not raised in a

1925(b) statement will be deemed waived." Commonwealth v. Lord, 719 A.2d 306, 309 (Pa. 1998). Similarly, "[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. Dowling, 778 A.2d 683, 686-87 (Pa.Super. 2001). "[W]aiver under Rule 1925 is automatic." Commonwealth v. Butler, 812 A.2d 631, 633 (Pa. 2002).

Claims which are generic, boilerplate, and all-encompassing, as well as claims which are unduly vague and imprecise, are insufficient to preserve any error for review. *See* Dowling, 778 A.2d at 686-87. The purpose behind this rule is "to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal" thereby enabling the trial court to efficiently, accurately, and meaningfully discuss the claim of error raised, an indispensable criteria for effective and meaningful appellate review. *See* id. To require the trial court to search and frame issues the parties may have intended to raise, but of which the court is uncertain, disserves the parties and the adversarial process which is dependent on the parties framing and arguing the nuances of multifaceted issues. *See* Commonwealth v. Lemon, 804 A.2d 34, 38 (Pa.Super. 2002); Commonwealth v. Shaw, 770 A.2d 295, 304 (Pa. 2001) ("Our system of jurisprudence, of course, proceeds upon the time-proven assumption that adversarial

presentation in actual cases and controversies, rather than visceral reactions to academic questions discovered by the Court itself, produces the best and wisest decision-making.") (Castille, J., dissenting).

Claims which allege simply that "the evidence was insufficient to support the verdict" without specifying in what respect the evidence was insufficient, or which assert that "the verdict was against the weight of the evidence" without stating why the verdict was against the weight of the evidence, are deficient. *See* Commonwealth v. Holmes, 461 A.2d 1268, 1270 (Pa.Super. 1983) (discussing the inadequacy of "boilerplate" post-verdict motions); *see also*, Lemon, 804 A.2d at 37 (Rule 1925(b) statement claiming that "[t]he verdict of the jury was against the evidence," "[t]he verdict of the jury was against the weight of the evidence," and "[t]he verdict was against the law" held to be too vague to preserve sufficiency of the evidence claim); Commonwealth v. Seibert, 799 A.2d 54 (Pa.Super. 2002) (Rule 1925(b) statement claiming that "[t]he verdict of the jury was against the weight of the credible evidence as to all of the charges" held to be too vague to preserve weight of the evidence claim).

With respect to both of these claims, the court is forced to speculate about the precise error claimed and in so doing is unable to analyze and focus precisely on what specific

error is complained of. It is in this context that we believe the fifth and sixth assignments of error contained in Defendant's 1925(b) statement – "The verdict was against the weight of the evidence" and "The evidence was insufficient to support the guilty verdict" – are legally deficient and identify no specific error(s) we can intelligently discuss. Nevertheless, we can discern no support for either assignment of error upon our independent review of the record.

CONCLUSION

In accordance with the foregoing, we believe Defendant's contentions to be without merit and we respectfully request that Defendant's appeal be denied.

BY THE COURT:

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P.J.