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

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| COMMONWEALTH OF PENNSYLVANIA, | : | |
| | : | |
| v. | : | No. 1294-CR-2016 |
| | : | |
| STEPHEN HOGG, | : | |
| | : | |
| Defendant | : | |

Cynthia A. Dydra-Hatton, Esquire — Counsel for the Commonwealth
Assistant District Attorney

Paul J. Levy, Esquire — Counsel for Defendant
Assistant Public Defender

**MEMORANDUM OPINION**

Serfass, J. – December 8, 2017

Stephen Hogg (hereinafter "Defendant") brings before this Court his "Post-Sentence Motion" requesting entry of a judgment of acquittal on Count Three (3) of Involuntary Deviate Sexual Intercourse and a new trial for alleged evidentiary errors on the part of the Court. For the reasons stated hereinafter, the aforesaid motion will be granted in part and denied in part.

**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 Gnaden 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 this post-sentence motion. In his motion, Defendant asks 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.

**DISCUSSION**

In his post-sentence motion, Defendant raises the following four (4) issues: 1) Whether the evidence was sufficient to establish two (2) counts of involuntary deviate sexual intercourse; 2) Whether the jury's verdict was against the weight of the evidence when the Commonwealth relied primarily on M.E.'s testimony; 3) Whether this Court erred by allowing the Commonwealth to amend the information on the day of trial to extend the time period in which these offenses could have occurred; and 4) Whether this Court erred by allowing Dr. Clark to testify by telephone.

## I. The evidence was not sufficient to establish two counts of involuntary deviate sexual intercourse

Defendant avers that the evidence was insufficient to establish two (2) counts of involuntary deviate sexual intercourse (hereinafter "IDSI") because M.E. testified that Defendant performed oral sex on her only once, during the second incident. Therefore, because the evidence established that Defendant performed oral sex on only one occasion, one (1) count of IDSI should be dismissed. We agree.

The IDSI statute criminalizes conduct where "the person engages in deviate sexual intercourse with a complainant . . . by forcible compulsion[.]" 18 Pa. C.S.A. § 3123(a)(1). The statute defines "deviate sexual intercourse" as "[s]exual intercourse per os or per anus between human beings . . . . The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures" and defines a "foreign object" as "any physical object not a part of the actor's body." Additionally, the Supreme Court of Pennsylvania has held that "deviate sexual intercourse" is limited to oral and anal sex. Commonwealth v. Kelley, 801 A.2d 551, 555 (Pa. 2002).

The Commonwealth avers that, during the first incident, Defendant penetrated M.E.'s genitals with his finger but did not perform oral sex. The Commonwealth argues that Defendant's

penetration of M.E.'s vagina with his finger can satisfy the element of penetration of the genitals with a foreign object. This argument runs contrary to the statutory language on its face. The Defendant's finger is explicitly excluded from the definition of a foreign object in the statute because a finger is a part of the actor's body. "Digital penetration does not fall into the category of [deviate sexual intercourse.]" Kelley, 801 A.2d at 555.

Here, the Commonwealth concedes that there was neither oral nor anal sex during the first assault, and M.E. maintained throughout her CAC interview and trial testimony that Defendant performed oral sex on her only once, during the second assault. Therefore, we are constrained to enter a judgment of acquittal on Count Three (3) for Involuntary Deviate Sexual Intercourse.

**II. The jury's verdict was not against the weight of the evidence**

Defendant next challenges the weight of the evidence, averring that the inconsistencies in M.E.'s testimony, that the Commonwealth could not corroborate her testimony with other evidence, and that M.E.'s delay in reporting these assaults diminishes the weight of her testimony such that the evidence establishing Defendant's innocence far outweighed the evidence of his guilt. Defendant seeks a new trial to remedy this alleged miscarriage of justice. Contrary to Defendant's position, we do

not find the jury's verdict to be against the weight of the evidence.

> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. Rather, the role of the trial judge is to determine that[,] notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Commonwealth v. Clay, 64 A.3d 1049, 1054-55 (Pa. 2013) (citations and internal quotation marks omitted).

It is well established that "the testimony of the victim, standing alone, is sufficient to convict in sex offense prosecutions." In re J.R., 648 A.2d 28, 33 (Pa.Super. 1994). Nevertheless, Defendant avers that inconsistencies in M.E.'s testimony taken together with contradictory testimony of unbiased third parties shows that the verdict in this case is against the weight of the evidence. We disagree.

With regard to the first incident, Defendant avers that M.E. was inconsistent as to how her cellphone was damaged. During the CAC interview, she stated that she had dropped it in water, but at the preliminary hearing, she testified that her cellphone was damaged when her brothers spilled Gatorade on it. At trial, M.E. initially testified that the cellphone was damaged by water and then changed her testimony to Gatorade. However, M.E. explained

that no one had asked her to be more specific with regard to the type of liquid that caused the damage. Additionally, the testimony consistently held that the phone was damaged by coming into contact with liquid, which resulted in a malfunction.

Defendant next avers that M.E. differed in her explanation of how Defendant pushed her onto the bed. In the CAC interview, she stated that Defendant grabbed her by the jaw and pushed her, but at trial she testified that he simply pushed her. M.E. was consistent in that she stated she was pushed onto the bed in both instances. Further, M.E. testified at trial that Defendant grabbed her by the throat but admitted that she was confused about whether this had occurred during the first or second incident.

Defendant also avers that M.E. gave conflicting statements about what he had said to threaten her. In the CAC interview, M.E. stated that Defendant said, "if you fucking say a word, I will kill your dad or hurt your brothers." At trial M.E. stated that Defendant said don't say a word or I will hurt you and your family. These two (2) statements are essentially the same, and it is unlikely that M.E. would remember precisely what was said to her considering the trauma she had experienced. Further, M.E. was not asked to state verbatim what had been said.

Defendant averred that M.E. was inconsistent about what acts Defendant had performed and how he had performed them. Defendant avers that in the CAC interview, M.E. stated that Defendant

inserted his finger into her vagina, while at trial M.E. testified that his fingers did not touch her vagina. This is not accurate. In the CAC interview, M.E. stated that she was "fingered" on the outside of her body, not in her vagina. Thus, her testimony was consistent on this point. M.E. stated in the CAC interview that Defendant initiated sexual intercourse while she was on her side, but during intercourse, he pushed her onto her back. At trial, Defendant avers that M.E. testified that she was on her side the entire time. Defendant argues this is inconsistent but overlooks the full context of M.E.'s answer. M.E. testified that she was "kind of" on her side during the incident. Thus, her testimony was not inconsistent. Furthermore, Defendant avers that M.E. did not indicate in the CAC interview that Defendant ejaculated during this incident, but she did so testify at the preliminary hearing and at trial. However, whether Defendant ejaculated was not addressed in the CAC interview. Thus, there is no inconsistency. Finally, Defendant avers that M.E. was inconsistent about whether she experienced pain during this incident. In the CAC interview, M.E. stated that the penetration hurt her. She testified similarly at trial by explaining that she has a "high pain tolerance", and while "it wasn't horribly excruciating pain", it was painful. Similarly, at the preliminary hearing, M.E. testified that the penetration was "not really" painful, which is not inconsistent with her statements at trial.

Defendant then addressed alleged inconsistencies in M.E.'s testimony about the second incident. First, Defendant avers that M.E. claimed in her interview that she entered Defendant's bedroom to watch her brothers play video games, while at trial, she testified that she entered Defendant's room because her father ordered her to go watch her brothers. A close reading of the CAC interview transcript reveals that M.E. never stated why she initially entered Defendant's bedroom. Thus, M.E.'s testimony was not inconsistent.

Second, Defendant avers that M.E.'s testimony differed from the CAC interview as to how the second assault began. Defendant avers that, in the CAC interview, M.E. stated that she got up off the floor to leave, and Defendant pushed her onto the bed. At trial, M.E. testified that she was standing in the doorway of his room when Defendant approached her, shut the door, pulled her into the room, and pushed her onto the bed by her neck. Again, a close review of the record reveals that M.E. testified at trial that she was standing at the doorway, but then she sat down to watch her brothers play video games before standing back up in the doorway.

Third, Defendant avers that M.E.'s testimony about how the second assault occurred was inconsistent with her CAC interview account and preliminary hearing testimony. Defendant avers that in the CAC interview, M.E. stated that she was on her side when Defendant engaged in sexual intercourse with her, while at trial

she testified that she was on her back when he engaged in sexual intercourse. However, a review of the CAC interview transcript reveals that M.E. stated she was on her back then on her side during the second incident. Additionally, at trial, M.E. testified that defense counsel's questioning was causing her to confuse the two (2) incidents. Defendant also avers that M.E. was inconsistent as to whether he digitally penetrated her during the second assault. However, in the CAC interview, M.E. was not asked whether Defendant penetrated her digitally during the second incident. Thus, M.E.'s testimony at trial that Defendant digitally penetrated her vagina while performing oral sex is not inconsistent. Defendant avers that M.E. was inconsistent as to how the second incident ended, but M.E. was not asked at trial how the incident had ended. Thus, she could not have been inconsistent on that point. Finally, Defendant avers that M.E.'s testimony about what occurred after the second assault was inconsistent. Defendant avers that, in the CAC interview, M.E. stated that Defendant threatened her and then walked her to her room, while at trial she testified that Defendant threatened her and her family. However, in the CAC interview, M.E. stated that after the second incident, Defendant threatened her by telling her "the same thing" or the same threat as in the first incident, which included M.E. and her family. Defendant also avers that M.E. did not testify that Defendant walked her to her room at trial, when she said that he

had done so in the CAC interview. At trial, M.E. was not asked whether Defendant walked her to her room after the second incident. Thus, M.E.'s testimony on the second incident is consistent.

Defendant then turns to the testimony provided by other witnesses. Defendant avers that Dr. Farrell's testimony does not corroborate M.E.'s testimony because Dr. Farrell testified that she did not find signs of trauma during her examination of M.E. However, Defendant fails to recognize that Dr. Farrell also testified that the genitals of most children who were subjected to sexual abuse or assault appear normal upon examination. Indeed, Dr. Farrell further testified that it is common for children to have a difficult time coming forward after such trauma, which allows time for the injury, if any, to heal before a doctor can examine the child. Thus, neither the absence of physical signs of trauma during M.E.'s examination nor M.E.'s delay in reporting these incidents is evidence that weighs against the verdict.

Defendant also challenged M.E.'s testimony as to when these assaults took place. However, there is no dispute that Defendant lived with the Eidsons for a period of time, during which he had access to M.E.

While Defendant's witnesses provided different accounts from M.E., the finder of fact is free to believe all, part, or none of the evidence and to determine the credibility of witnesses. Commonwealth v. McCloskey, 835 A.2d 801, 809 (Pa.Super. 2003). We

find that the jury's decision to believe M.E. over Defendant and his witnesses was not a miscarriage of justice as Defendant claims.

Considering the evidence in toto, we find that the jury's verdict is fully supported by the weight of that evidence.

**III. This Court did not err in allowing the Commonwealth to amend the information on the day of trial**

Defendant next challenges this Court's decision to allow the Commonwealth to amend the information before trial commenced on April 3, 2017.

The information apprises the defendant of the charges filed against him so that he may have a fair opportunity to prepare a defense. Commonwealth v. Sinclair, 897 A.2d 1217, 1223 (Pa.Super. 2006). The Court may allow the information to be amended when there is a defect in the date charged, provided that the amended information does not charge an additional or different offense. Pa. R.Crim.P. 564. To determine whether the Commonwealth should be permitted to amend the information, Pennsylvania Courts employ the test of whether the crimes specified in the original information involve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended information. Commonwealth v. Davalos, 779 A.2d 1190, 1194 (Pa.Super. 2001) (quoting Commonwealth v. Stanley, 401 A.2d 1166, 1175 (Pa.Super. 1979)). If so, then the defendant is deemed to have been place on sufficient notice regarding his alleged criminal conduct. *Id.* The

amendment will not be permitted if the defendant would be prejudiced by the change. *Id.* The factors that the trial Court considers to determine whether an amendment is prejudicial are

> (1) whether the amendment changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether the entire factual scenario was developed during a preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; and (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

Sinclair, 897 A.2d at 1223. An amendment of the information is proper, even on the day of trial, if there is no showing of prejudice. *Id.* at 1224.

Defendant avers that his alibi defense was rendered void by the amendment of information on the day of trial. To support his position, Defendant cites several cases where the amendment was found to be prejudicial to the defendant. However, each of these cases is distinguishable from the instant case as none involve the amendment of the time period in which the crime took place. Defendant concedes that the Commonwealth's amendment did not alter the elements of the offense or substantially alter the factual situation, but Defendant avers that the amendment affected his alibi defense.

Defendant's use of an alibi was misplaced. Throughout this case, the Commonwealth has maintained that Defendant committed

these assaults while he was residing at M.E.'s residence. On March 31, 2017, three days before trial, Defendant's amended alibi altered his position as to when he was residing at the Eidson residence from July to September of 2015. Defendant never disputed the fact that he lived with, and had access to, M.E.

The timing of the Commonwealth's amendment was solely due to the last-minute actions of Defendant. Defendant failed to comply with Pennsylvania Rule of Criminal Procedure 567 when he asserted his alibi defense on March 10, 2017, well beyond the deadline of November 10, 2016, thirty (30) days after his arraignment on October 11, 2016. Defendant avers that he filed this notice of alibi untimely because his release from jail allowed him to investigate that defense. The Court views this excuse as suspect because Defendant had the benefit of counsel, a private investigator assisting counsel, and his girlfriend's assistance throughout the proceedings. Yet, Defendant's girlfriend, Ms. Ginter, did not assert that Defendant was living with her throughout the month of July 2015 until just before trial. In the interest of justice, this Court not only allowed Defendant's untimely alibi but also allowed the Commonwealth to amend the information to match the account of when Defendant resided with the Eidsons provided in the alibi.

Even if there was error, it was harmless. Defendant chose to proceed with his defense and did not seek to continue the trial.

Defendant's alibi avers, just as the Commonwealth has maintained throughout the proceedings, that Defendant resided in the Eidsons' home. Whether it was in July, August, or September of 2015, Defendant had access to M.E. for a period of weeks. Thus, this Court did not err in allowing the Commonwealth to amend the information on the day of trial.

Finally, Defendant cites Commonwealth v. Mikell for the proposition that this Court erred when we failed to instruct the jury on an alibi defense. 729 A.2d 566 (Pa. 1999). However, Mikell, is distinguishable from the instant case. The Supreme Court states in Mikell that the defendant is entitled an alibi defense instruction when evidence has been introduced "that places the defendant at the relevant time at a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." *Id.* at 570. Further, in that case, the defendant's alibi witnesses testified that Mr. Mikell was "**at all relevant times**, asleep at his mother's home." *Id.* (emphasis added). Here, the testimony of Defendant's witnesses does not exclude Defendant from the scene of the crime at all relevant times. To the contrary, Defendant's witnesses place him at the scene of the crime in September of 2015 when he resided with the Eidsons. Therefore, no such alibi instruction was warranted.

## IV. This Court did not err in allowing Dr. Clark to testify via telephone

Defendant lastly avers that this Court erred by allowing Dr. Andrew Clark to testify via telephone. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. However, the right to face-to-face confrontation is not absolute. Maryland v. Craig, 497 U.S. 836, 847 (1990). The Supreme Court has held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850. Pennsylvania Courts have adopted the same test. *See* Commonwealth v. Atkinson, 987 A.2d 743 (Pa.Super. 2009).

Here, Dr. Clark could not testify in person because he was the only doctor on call that day at the KidsPeace hospital, which treats at risk children. It served an important public policy to allow a doctor, who is required to be at a medical facility to treat patients, to testify telephonically. Additionally, Dr. Clark is an unbiased medical professional who treated M.E. and testified in accordance with his report, which was provided to Defendant during discovery, assuring the reliability of his testimony. Defendant was afforded the opportunity to cross-examine Dr. Clark.

Thus, this Court did not violate Defendant's right to confrontation by allowing Dr. Clark to testify via telephone.

Defendant also avers that, even if Dr. Clark had been in the courtroom, the contents of his testimony were unduly prejudicial to Defendant such that his testimony should have been excluded under Pennsylvania Rule of Evidence 403.

Under Rule 403, the trial court may exclude relevant evidence if its probative value is outweighed by the danger of unfair prejudice. Pa. R.E. 403. Unfair prejudice is "a tendency to suggest a decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa. R.E. 403 cmnt. However, the trial court "is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand[.]" Commonwealth v. Page, 965 A.2d 1212, 1220 (Pa.Super. 2009) (internal quotation marks omitted). Instead, the exclusion of evidence for prejudice is limited to evidence that is so prejudicial that it would inflame the jury to make their decision based upon something other than the relevant legal standards. Commonwealth v. Foley, 38 A.3d 882, 891 (Pa.Super. 2012).

Defendant concedes that Dr. Clark's testimony about M.E.'s hospitalization for fear of testifying in front of Defendant is relevant. *See* Commonwealth v. Pickford, 536 A.2d 1348, 1351-52 (Pa.Super. 1987)(holding that evidence that a victim of a sex crime

was fearful, having difficulty sleeping, moved out of her apartment, and would wake up at night screaming was relevant for a jury to determine whether a rape occurred). Defendant avers that, despite its probative value, Dr. Clark's testimony is highly prejudicial because the hospitalization of a young girl due to the trauma allegedly inflicted by Defendant will tug at the jurors' heartstrings. However, it is not Dr. Clark's testimony that would cause an emotional reaction, but rather it is the characteristics of M.E., the victim, that increase the likelihood of an emotional reaction in the jurors. Dr. Clark's testimony does not create any more sympathy than that which already exists in cases of sexual assault against a child. Because a victim is inherently sympathetic is not a sufficient reason to exclude evidence that supports the Commonwealth's case in defense of that victim. Thus, this Court did not err in admitting Dr. Clark's testimony.

Even if the admission of Dr. Clark's testimony into evidence was in error, it was harmless error. An error does not merit a new trial if it was harmless and could not have contributed to the verdict. Commonwealth v. Wright, 961 A.2d 119, 143 (Pa. 2008); Commonwealth v. Rasheed, 640 A.2 896, 898 (Pa. 1994). An error is harmless if it "did not prejudice the defendant or the prejudice was de minimis[.]" Commonwealth v. Robinson, 721 A.2d 344, 350 (Pa. 1998).

As stated above, we find that Dr. Clark's testimony did not prejudice Defendant. But even if we were to assume arguendo that it did, it created at most de minimis prejudice in that Dr. Clark's testimony could not demonstrably affect the degree of sympathy jurors are likely to possess for the victim in a case of child sexual assault. Therefore, a new trial is not warranted.

**CONCLUSION**

For the foregoing reasons, Defendant's "Post-Sentence Motion" will be granted in part and denied in part, and we will enter the following

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

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|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| | : | |
| v. | : | No. 1294-CR-2016 |
| | : | |
| STEPHEN HOGG, | : | |
| Defendant | : | |

Cynthia A. Dydra-Hatton, Esquire — Counsel for the Commonwealth
Assistant District Attorney

Paul J. Levy, Esquire — Counsel for Defendant
Assistant Public Defender

**ORDER OF COURT**

**AND NOW**, to wit, this 8th day of December, 2017, upon consideration of Defendant's "Post-Sentence Motion" and for the reasons set forth in our Memorandum Opinion bearing even date herewith, it is hereby

**ORDERED and DECREED** that Defendant's Post-Sentence Motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Defendant's motion as to Count Three (3) is **GRANTED**, and we will enter a judgment of acquittal on Count Three (3): Involuntary Deviate Sexual Intercourse[1]; and
2. In all other respects, Defendant's motion is **DENIED**.

**BY THE COURT:**

_____
**Steven R. Serfass, J.**

[1] We note that our sentencing scheme in this case will not be impacted by our decision relative to Count Three (3) as Defendant's sentence to a period of incarceration in a state correctional institution of not less than eighteen (18) years nor more than thirty-six (36) years was to run concurrently with the sentences we imposed on Counts One (1) and Two (2), which were also eighteen (18) to thirty-six (36) year sentences.