IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 26 EAL 2014

COMMONWEALTH OF PENNSYLVANIA
Petitioner

V.

WILLIAM J. LYNN

PETITION FOR ALLOWANCE OF APPEAL

Petition to appeal the published decision of the Superior Court of December 26, 2013 at 2171 EDA 2012, vacating the July 24, 2012 judgment of sentence for endangering the welfare of children in the Court Of Common Pleas Of Philadelphia County, Trial Division, Criminal Section, At CP-51-CR-0003530-2011.

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QUESTIONS PRESENTED

1. An Archdiocesan official responsible for protecting children from pedophile priests under his control instead reassigned such a priest, as part of a general scheme of concealment, in a manner that put additional children at risk. Was the evidence insufficient to prove endangering the welfare of children because defendant did not have direct contact with children?

(Answered in the negative by the Superior Court).

2. Assuming *arguendo* defendant could not endanger the welfare of children in his individual capacity, but as part of a general scheme placed a known sexual predator under his control in a position that promoted the risk of further sexual assaults, was the evidence sufficient to convict him as an accomplice?

(Answered in the negative by the Superior Court).

ORDER IN QUESTION

The order in question is found in the published opinion of the Superior Court at 2171 EDA 2012, ___ A.3d ___ (Pa. Super. 2013), vacating the judgment of sentence for endangering the welfare of children and discharging the defendant.

STATEMENT OF THE CASE

Defendant was a high-ranking Archdiocesan official specifically responsible for protecting children from pedophile priests. Instead he relocated them, as part of a general scheme of concealment, in a manner that put additional children at risk of being sexually molested. Here the relocated priest did molest another child, a 10-year-old altar boy. The Superior Court, in a published decision authored by President Judge Bender, held that defendant did not endanger the welfare of children. In so doing that Court applied a supposed holding from a prior case in which no such holding exists, in order to posit a statutory "element" that is not mentioned or discussed in that case or in the text of the statute, and which also does not exist; while ignoring critical statutory language and precedent of this Court directly on point. Review by this Court is warranted.

Monsignor William Lynn was Secretary of Clergy of the Archdiocese of Philadelphia from June 15, 1992 through 2004. In his own words, his "most important" duty in this capacity was to investigate reports of sexual misconduct by priests of the Archdiocese, including cases of sexual abuse of minors, and to protect children from these priests (N.T. 5/16/12, 98; 5/17/12, 32; 5/23/12, 190-193; 199-202; 219-220; 5/24/12, 56, 115). Lynn described himself as the "point man" in such matters (N.T. 5/24/12, 20-21). It was his role to collect and process information, make recommendations, and participate in the decision process of how to deal with the problem of priests within the Archdiocese who were sexual predators against children (N.T. 5/23/12, 197-202, 219-220). Lynn even claimed that his personal efforts

improved the manner in which the Archdiocese handled such issues (N.T. 5/24/12, 59-60).

The evidence told a very different story. Far from protecting children, Lynn engaged in a pattern of concealment and facilitation of child sexual molestation by priests. His misdirection of the public and aid to pedophile priests led directly to the sexual abuse of victim D.G. by Father Edward Avery.[1] Extensive evidence established that Lynn's handling of Avery's case was no oversight, but was in accord with his established practice for dealing with sexual predator priests.[2] The pattern is unfortunately a familiar one. *E.g., Hutchison ex rel. Hutchison v. Luddy*, 742 A.2d 1052, 1056 (Pa.1999) (plurality) (reversing Superior Court grant of judgment n.o.v. in a civil case based on "a longstanding practice [by the Altoona-Johnstown Diocese] of ignoring pedophilic behavior by priests, e.g., by intentionally failing to investigate reports of abuse; refraining from taking disciplinary action against priests known to have abused children; allowing such priests to continue to participate, without supervision, in activities involving children; and concealing from parents reports of ... misconduct"). While it was Lynn's chief duty to investigate and prevent priests from sexually molesting children, his real objective was to conceal the misconduct

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[1] Lynn was to be tried together with Avery and Father James Brennan, but Avery pleaded guilty to conspiracy to endanger the welfare of children and involuntary deviate sexual intercourse before testimony began. Lynn was therefore tried together with Brennan. The jury could not reach a decision in Brennan's case, however, and the scheduled retrial in that matter currently remains pending.

[2] N.T. 3/29/12, 22-25; 4/2/12, 263-266; 4/9/12, 4-7; 4/16/12, 210-213; 4/19/12, 247-249; 5/1/12, 232-234; 5/10/12, 199-202; 5/17/12, 101-104; 6/1/12, 44-47. This evidence is examined in depth in the trial court opinion.

and to avoid negative publicity, notwithstanding the resulting risk of harm to other potential child victims.

Lynn did not merely disregard that risk, he invited it. Despite being responsible for numerous cases of priests who molested children, in no instance did Lynn ever contact the police. He mollified victims by falsely telling them that their allegations were being seriously pursued, while within the system he did the opposite, acting as protector and advocate for the predators notwithstanding his full knowledge of compelling evidence of their guilt. Lynn ignored reports that these priests molested other victims who had not come forward, and never attempted to contact victims who had not already contacted the Archdiocese themselves. He routinely promised victims that their assailants would be kept away from other children while doing nothing to accomplish it. Lynn also invariably arranged for the prompt departure of such priests from their parishes so that they would no longer be visible to victims and their families, consistently arranging for parishioners to be told that the sudden departure was for "health" reasons. Lynn sent sexual predator priests for "treatment" that was ineffective and conducted solely for the sake of appearances. It was Lynn's practice to disregard plans for follow-up supervision recommended by therapists, and to arrange for known sexual predator priests to be reassigned to environments in which they would frequently encounter, and sometimes work closely with, children. He ordinarily kept the priest's new supervisor in the dark. In no instance did he take any steps to require a relocated sexual predator to be kept separated from children. Indeed, in instances in which other priests or nuns raised concerns about questionable

conduct by such predators, Lynn expressed clear disapproval of, and on several occasions retaliated against, the whistleblowers.

In September 1992 Lynn met with R.F., who as a minor had been a victim of sexual abuse by Father Avery. At all times relevant, Lynn was aware of the following information.

When R.F. had been in sixth grade he was an altar server at St. Philip Neri parish and encountered Father Avery, who was "gregarious," "charismatic" and "popular with the young people," and took the altar boys on trips to places such as Wildwood, New Jersey, where Avery had a house. He provided the boys with beer and would enter the loft area where they slept to "wrestle" with them. On at least two such occasions Avery's hand would "momentarily grab [R.F.'s] genitals." Avery was transferred to a different parish but maintained contact with R.F., inviting him to help Avery with his practice of "disc jockeying" at parties. On one occasion in 1978 Avery took R.F., then age 15, to Smoky Joe's Cafe in West Philadelphia to assist him with a party for college students. After the child was drunk on beer Avery took him to the rectory and directed him to "sleep in the bed with me." Sleeping on his back, the boy awoke to find the priest's "hand on top of my penis" over his underwear. Avery's hand then begin to reach inside the underwear, at which point the child rolled away. Because R.F. "hero-worshipped" Avery he "couldn't really accept what had happened" at the time. After R.F. had turned 18, Avery invited him on a ski trip to Killington Vermont with his (Avery's) brother. On this occasion the victim was awakened by Avery massaging R.F.'s penis, leaving the victim "devastated, confused

and angry." With considerable emotional difficulty R.F. contacted the Archdiocese in 1992 because he knew Avery continued to be a "threat to other impressionable young men," and he sought "assurance that Father Avery will not harm anyone else." Lynn told R.F. that the victim was of highest priority to the Archdiocese (N.T. 3/26/12, 259; 4/25/12, 6-25, 32-41). In a subsequent interview with Lynn, Avery first denied the events described by R.F., then admitted it "could be" they occurred under the influence of alcohol (N.T. 3/26/12,270).

Lynn sent Avery to Saint John Vianney, a mental health treatment facility operated by the Archdiocese (Lynn himself was on the board of directors for a number of years), for evaluation and treatment. But in the referral Lynn did not describe the sexual misconduct alleged by R.F., but vaguely alleged only that Avery had been "drinking" and took a minor to a place "serving alcohol." Nevertheless, Avery himself eventually acknowledged his "shame" to his therapist, and admitted that the conduct R.F. reported "must have" happened. The therapist reported "concerns about the existence of other victims," and the facility recommended that as part of "continued outpatient treatment" Avery be placed in an assignment "excluding adolescents" (3/27/12, 18, 42, 48; 5/23/12, 204-205).

Despite these warnings Lynn did nothing to keep Avery separated from adolescents or to protect children from him. To the contrary, Lynn – whose job specifically included participating in the assignment process (N.T. 5/23/12, 195-196) – recommended that Avery be made associate pastor at Our Lady of Ransom, a parish with a grade school. When Cardinal Anthony Bevilacqua declined that proposal,

Lynn recommended assigning Avery to a chaplaincy at Nazareth Hospital. But instead of requiring Avery to live in the hospital residence, Lynn decided he should be allowed to live in a rectory at nearby St. Jerome's parish, another parish with a grade school (N.T. 5/29/12, 109).

Lynn wrote to St. Jerome pastor Joseph Graham, but in that letter said nothing about Avery's sexual misconduct with children. In fact, the letter informed Graham that Avery "had been asked to offer assistance in the parish." Father Graham naturally complied with Lynn's letter and allowed Avery to "assist[ ] in the parish" – he allowed Avery to say Masses at which children were altar servers, and to be with children in the confessional, as Lynn knew he would (N.T. 5/29/12, 110-111).

Lynn did nothing about the therapist's "concerns about the existence of other victims" of Avery, and did nothing to enforce the recommendation that Avery be excluded from contact with adolescents. Other priests at the rectory where Avery lived thought he was there because of overwork (N.T. 4/23/12, 143). Lynn provided no warning to parishioners at St. Jerome, where Avery lived, or to the hospital where Avery was assigned to work. Avery's former parishioners were told that his departure was "for his health."

Meanwhile, Avery disregarded work at both the hospital and at St. Jerome parish in favor of constant disc jockeying at block parties, weddings, dances, and other events. Avery was constantly seeking new bookings and at one point scheduled three for a single weekend (N.T. 3/27/12, 75). This was a serious danger signal because it was the same type of activity Avery had used to groom R.F., the victim

who had contacted the Archdiocese and who had been interviewed by Lynn. To Avery's hospital associates this partying seemed odd given their understanding that he was being treated for overwork; but Lynn rebuffed complaints by Father Michael Kerper, Avery's associate at Nazareth Hospital, telling him to convey his concerns to Kerper's own immediate superior. Nevertheless, in response to a follow-up inquiry from St. John Vianney, Lynn falsely claimed that Nazareth was "very pleased with the work Father Avery is doing." In 1997 Lynn wrote a letter for the signature of the Cardinal to the National Association of Catholic Chaplains that described Avery's work at the hospital as "exemplary." To a secretary at Avery's former parish, Lynn wrote that the Archdiocese had never received "anything but compliments" about him (3/27/12, 45, 57-60, 65-82; 5/23/12, 50-51).

In the fall of 1998, ten-year-old D.G. was training to be an altar server at St. Jerome, where Avery continued to live and say Mass. Within a few months D.G. came to be sexually abused by another of the priests residing there, Father Charles Englehardt. Early in 1999, Avery accosted the altar boy, saying he had heard of his "sessions" with Englehardt and that "ours were going to begin soon." A week later, after D.G. assisted at Mass, Avery told him to stay because their "sessions were going to begin." Avery led the child to a storage room, put on music, and directed him in a "striptease" while watching with an "eerie smile." After the child was naked Avery also undressed and began to fondle him, telling him that "this is what God wants," and that it was time "to become a man." He masturbated the victim and also put his penis in the boy's mouth, then ejaculated on the child's chest and neck. D.G. was

afraid to tell anyone because he thought no one would believe his accusation against a priest (N.T. 4/25/12, 101-136).

The Commonwealth charged Lynn with two counts of criminal conspiracy and two counts of endangering the welfare of children. Following trial before the Honorable Theresa Sarmina, the jury on June 22, 2012 found Lynn guilty of endangering the welfare of children with regard to victim D.G., and not guilty of the remaining charges. On July 24, 2012, the court sentenced Lynn to three to six years imprisonment. On April 12, 2013, the trial court filed a factually detailed and comprehensive opinion addressing the 17 issues raised in Lynn's statement pursuant to Pa.R.A.P. 1925.

On appeal to the Superior Court Lynn raised 10 separate issues, including a claim that the evidence was insufficient because, according to him, his conduct did not amount to "endangering the welfare of children" under the Crimes Code. He was charged and convicted under the pre-2007-amendment version of 18 Pa.C.S. § 4304, stating in pertinent part:

> A parent, guardian or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.[3]

Although the statute states that it applies to a "person supervising the welfare of children," Lynn argued that the evidence was insufficient because it failed to show that he was a supervisor "of children." The Superior Court agreed with this argument,

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[3] Under subsection (b) the offense is a third degree felony if there is "a course of conduct of endangering the welfare of a child."

relying on its own en banc decision in *Commonwealth v. Hayle*, 719 A.2d 763 (Pa. Super. 1998) (en banc), which – according to the instant published decision – held that "actual" supervision "of children" is an "element" of the offense (Superior Court opinion, *14-*15). The Commonwealth argued that this Court's decision in *Commonwealth v. Mack*, 359 A.2d 770, 772 (Pa. 1976), requires the statute to be read "by reference to the common sense of the community and the broad protective purposes for which [it was] enacted." The Superior Court, however, concluded that, unlike *Hayle*, *Mack* "offers little guidance" on "interpretation of a specific element" of the statute (Superior Court opinion, *15).

The Superior Court also held that the evidence was not sufficient to convict Lynn as Avery's accomplice. Defendant argued that accomplice liability for endangering the welfare of a child is "redundant" and, somehow, a legal impossibility (defendant's Superior Court brief, 34). The relevant part of the accomplice provision, however, 18 Pa.C.S. § 306(c), states that a person is an accomplice of another in the commission of an offense if "with the intent of promoting ... commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it[.]" The Superior Court concluded that, notwithstanding Lynn's decision to place at risk additional child victims, the evidence was insufficient to prove that he intended the likely consequences of his actions. It concluded by ordering that Lynn be discharged, "forthwith."

As shown below, President Judge Bender's published opinion departs from the law governing statutory construction by inserting limiting words into the text of the

statute, ignoring language in the statute that broadens its application, misstating the content of supposedly controlling Superior Court precedent, and on the basis of that Superior Court precedent disregarding a decision of this Court on point. With regard to accomplice liability, the Superior Court decision misapplies the standard for sufficiency of the evidence by misstating the elements of the crime and viewing the facts in a light most favorable to the defendant.

Published error of this nature is always a serious matter, because it will govern how all statutes are applied, in all future appeals, in trial courts, and at the level of prosecutorial discretion: an erroneous standard of statutory construction may prevent meritorious criminal charges even from being filed. Such tainted precedent can also wrongly negate an unpredictable number of sound criminal convictions. The impact is exacerbated by the high degree of national public attention focused upon this case. The issues here transcend the immediate interests of the parties. Child sexual abuse is a crime in which victims and their families are reluctant to come forward. When, as here, the offenders are educational, religious, or other kinds of social leaders, they often benefit from an institutional policy of concealment designed to protect the institution and to exploit that reluctance. Reversal of the conviction in this case calls into doubt the ability of the criminal justice system to hinder such institutional wrongdoing.

The message sent by the Superior Court's published opinion in this high-profile case is therefore a dismal one – victims of child sexual abuse at the hands of pedophile priests who reluctantly come forward may do so in vain. This Court should

not allow that message to stand unreviewed.

The Commonwealth respectfully requests allowance of appeal.

REASONS FOR GRANTING THE APPLICATION

I. The Superior Court erred in holding that a church official who systematically reassigned pedophile priests in a manner that risked further sexual abuse of children did not endanger the welfare of children.

Lynn handled Avery in the same manner as other child-sexual-predator priests under his authority. Though it was his duty to protect children from them, he put the reputation of the Archdiocese above the safety of potential victims and deliberately subjected children to the risk of being sexually molested. In the words of the Superior Court opinion itself, "the Commonwealth provided ample evidence regarding Appellant's pattern of intentionally mishandling other sexually abusive priests with the intent to shelter both the priests and the larger church from disrepute," supporting a reasonable inference that he did so with regard to Avery (Superior Court opinion, *18). It was indisputable that Lynn endangered children.

Under the plain terms of 18 Pa.C.S. § 4304 it was equally indisputable that Lynn was a "person supervising the welfare of children":

> A parent, guardian or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

Lynn himself said that his "most important" duty as Secretary for Clergy in the Archdiocese was to protect children from sexual misconduct by pedophile priests under his authority (N.T. 5/16/12, 98; 5/17/12, 32; 5/23/12, 190-193; 199-202; 219-220; 5/24/12, 20-21, 56, 115). To conclude that Lynn was a "person supervising the welfare of children" is not a mere characterization or metaphor, but rather a concise

description of his job as he himself described it.

The Superior Court nevertheless held that Lynn committed no crime at all, because he was not a "person supervising the welfare of children." The process by which the Superior Court arrived at this result departed from the legal standard governing statutory construction.

With regard to provisions of the Crimes Code, 18 Pa.C.S. § 105 states in pertinent part:

> The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title and the special purposes of the particular provision involved.

The Crimes Code is subject to strict construction, but strict construction is irrelevant unless the provision is ambiguous. *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001) ("The need for strict construction does not require that the words of a penal statute be given their narrowest possible meaning or that legislative intent be disregarded ... nor does it override the more general principle that the words of a statute must be construed according to their common and approved usage"). Here there is no claim of ambiguity.

The Superior Court reasoned that defendant was not within the statutory term "*person supervising the welfare of children*" because he was not "*supervising a child.*" Citing its own en banc decision in *Commonwealth v. Hayle*, 719 A.2d 763 (Pa. Super. 1998) (en banc), the Superior Court held that the words "person supervising the welfare of a child" define "actual/direct supervision of a child" as an "element" of the offense (Superior Court opinion, *14-*15). Since the evidence did not prove

this supposed "element" of "actual" or "direct" supervision of a child, the Superior Court said, defendant could not have been guilty of endangering the welfare of children, because it was Avery who molested the child victim, and defendant supervised Avery, not the child.

This reasoning ignores the ordinary import of the statutory language. One who acts in a capacity of protecting children and who supervises another who has contact with those children, is a supervisor of the welfare of children. The statute does not suggest modifiers such as "direct" or "actual" in its use of the word "supervising." As even the Superior Court stated – although apparently without awareness of the significance of saying so – it is sufficient that the person was "responsible for the supervision" of a child (Superior Court opinion, *16). Lynn was indeed "responsible for the supervision" of children. His conduct was no less "supervision" because it was accomplished through a subordinate, from whom Lynn was specifically responsible for protecting children against sexual molestation. "Supervision" as ordinarily understood is routinely accomplished through subordinates. School principals, for example, or managers of day care centers, supervise the welfare of children; their supervision is no less "actual" if they do not personally encounter the children. Lynn endangered the welfare of children, including victim D.G., by breaching his undisputed duty to prevent priests under his supervision, such as Avery, from sexually molesting them.

President Judge Bender's published opinion deciding otherwise depends not on the plain language of the statute, but on the existence of a supposedly unmet

statutory "element" of "actual" or "direct" supervision. The Superior Court derived this supposed element by inserting a word that does not appear in the text of the statute – "direct" – to modify the word "supervising."

Unmodified, the word "supervising" facially includes any kind of supervising, including, as here, supervision through a subordinate. Aside from the fact that the statute says exactly nothing that would *exclude* supervision that is not sufficiently "actual," there is nothing about Lynn's supervision of children's welfare that rendered this supervision something other than "actual." Indeed, if the term "supervising" did not include *all* forms of supervision there would be no need for the Superior Court to supply a missing word such as "actual" or "direct" in order to limit "supervising." But the word "actual" (or "direct") simply is not there. There is no "element" of "actual" supervision in the plain words of the statute.

Contrary to the Superior Court's reading, moreover, the actual and unmodified text of the Crimes Code refers to a "person supervising *the welfare of* a child," not a "person supervising *a child.*" In ordinary English grammar the verb in the phrase "person supervising the welfare of a child" is "supervising," and the object of the verb is "the welfare of a child," not "a child." That which is supervised is the *welfare* of children. The Superior Court's construction of the statute, which requires "actual supervision of children," renders the words "the welfare of" meaningless. They are utterly without function or purpose if, as the Superior Court held, the phrase really means "supervising a child." The General Assembly could easily have said "supervising a child" but instead used the broader phrase "supervising *the welfare of*

a child." By rendering the words "the welfare of" meaningless, the Superior Court effectively rewrote the statute, in violation of settled principles of statutory construction. *Triumph Hosiery Mills, Inc. v. Commonwealth*, 364 A.2d 919, 921 (Pa. 1976) ("The Legislature cannot be deemed to intend that its language be superfluous and without import"); 1 Pa.C.S. § 1921(a) (directing courts to interpret statute in a way that gives effect to all its provisions); 1 Pa.C.S. § 1922(2) (requiring the presumption that the legislature intends "the entire statute to be effective and certain").

In insisting that "person supervising the welfare of a child" means "person directly or actually supervising a child," the Superior Court concluded that the purpose of the word "welfare" is merely to refer to "a child's overall well-being." Thus, the explanation goes, the Superior Court was not treating "welfare" as surplusage because it recognized that "welfare" is broader than mere freedom from injury. But the question here is the use of the word "welfare" in a specific context, not its general meaning. The statute imposes criminal liability on a "person supervising the welfare of a child [who] knowingly endangers the welfare of the child." What is significant in the "person supervising" iteration is that "the welfare of a child" expands the scope of "person supervising" and broadly defines the actors to whom the statute applies. It is in this context, the critical one, that the Superior Court treats "the welfare of" as surplusage. If "person supervising the welfare of a child" were really intended to mean "person supervising a child," the words "the welfare of"

would not only serve no purpose, but would be pointlessly confusing.[4]

That the words "supervising the welfare of a child" are broader than "supervising a child" is consistent with the purpose – a mandatory factor in statutory construction under 18 Pa.C.S. § 105 – of the provision. This Court explained in *Commonwealth v. Mack*, 359 A.2d 770, 772 (Pa. 1976), that the endangering the welfare of children statute is "basically protective in nature," and that such statutes "are necessarily drawn broadly" because it is "impossible to enumerate every particular type of adult conduct against which society wants its children protected." For this reason, this Court ruled that the statute must be applied in each case in accordance with "[t]he common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain."

The endangering the welfare of children statute has been in force since the Crimes Code became effective, June 6, 1973, yet in 40 years President Judge Bender's published opinion is the first ever to detect a supposed "element" of "actual supervision" in this offense. The alleged precedent that the Superior Court cites as supposedly finding and applying this supposed "element," *Hayle*, did not apply it, did

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[4] In a footnote, the Superior Court asserts that under the Commonwealth's argument, it supposedly is the term "supervising" in "person supervising the welfare of a child" that would be "rendered superfluous" by giving effect to the words "the welfare of" (Superior Court opinion, *16 n.19). This contention is difficult to understand. Giving "person supervising the welfare of a child" its plain meaning does not in any way diminish the meaning of the word "supervising," much less render it "superfluous." Rather, giving all of the words of the provision their plain and ordinary meaning *broadens* the meaning of "supervising." The real difficulty with this plain-meaning construction, in the Superior Court's view, appears to be that it conflicts with the narrow construction that the Superior Court prefers.

not find it, and did not even mention it.

In *Hayle* the offender was a visiting "second or third" cousin of the victim's family who left the other adults on the pretense of going to the bathroom, and sexually molested one of several children who were in a separate bedroom. In holding that this evidence failed to prove endangering the welfare of children, the en banc Court reasoned that Hayle was a mere visitor who had not been asked or expected to supervise anyone. The opinion in *Hayle* says nothing about "actual" supervision – the word "actual" does not even appear – much less does it deem "actual" supervising a supposed "element" of the offense. The decision did not conclude that Hayle was supervising *too indirectly*, but that he was not supervising *anything at all*. *Hayle* is consistent only with the tautological conclusion that sexually molesting a child does not make the assailant a person "supervising the welfare of a child."

That *Hayle* did not define a supposed element of direct supervision is confirmed by the fact that, in 2002 – four years ***after*** *Hayle* was decided – in *Commonwealth v. Wallace*, 817 A.2d 485 (Pa. Super. 2002), the Superior Court, in an opinion authored by the Honorable John T. Bender, recited each of the individual elements of endangering the welfare of children. But the supposed "direct supervision" element supposedly found in *Hayle* was not there:

> [T]o support a conviction under the EWOC statute, the Commonwealth must establish each of the following elements: "(1) the accused is aware of his/her duty to protect the child; (2) the accused is aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and (3) the accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.

Wallace, 817 A.2d at 490-491, citations and internal quotation marks omitted. If, as the instant published Superior Court decision claims, the en banc decision in *Hayle* defined a "direct supervision" element of the offense, it is strange that no such element is mentioned four years later when *Wallace* recited the elements of the offense.

President Judge Bender's inaccurate representation of *Hayle* in this case is all the more significant because it is presented as the justification for disregarding precedent of this Court. In *Mack* this Court held that the statute is to be broadly construed – guidance that should certainly have been followed by the Superior Court. Instead, to justify its conclusion that *Hayle* controls but *Mack* does not, the Superior Court states that *Mack* provides "only a general outline of the legislative purpose" in the context of a claim of unconstitutionality for vagueness; whereas *Hayle*, according to President Judge Bender's published opinion, "directly confronted the legal issue" of "whether the accused must be a supervisor of a child," and found "actual supervision of children to be an element of the offense" (Superior Court opinion, *15).

But the Superior Court's description of *Hayle* is simply not true. As already noted, *Hayle* never even referred to, let alone "directly confront," that supposed issue, nor did it in any way suggest that "actual supervision of children" is "an element of the offense."

Moreover, the Superior Court's assertion that *Mack* "offers little guidance" (*id.*) because it concerned a vagueness claim makes no sense. In deciding the

vagueness claim this Court determined that it was the intent of the General Assembly for the statute to be read broadly to effectuate its protective purpose. That legislative intent does not somehow disappear when the issue is sufficiency. Indeed, under 1 Pa.C.S. § 1921, the very fact that *Mack* dealt with a vagueness claim invoked such factors as the "occasion and necessity for the statute," the "mischief to be remedied," and the "object to be attained," all of which militate in favor of broad construction in order to protect children. *Mack* therefore is all the *more* significant, especially since the Superior Court's analysis here depends on reading the statute narrowly. Contrary to this Court's ruling, the Superior Court's constricted reading ignores broad statutory language and applies limiting words not found in the text.

This opinion is therefore something truly remarkable. It expressly disregards a decision of this Court concerning how the statute is to be read, *Mack*, in favor of following an unreal construct of a case *not* on point, *Hayle*. It purports to follow a supposed holding of *Hayle* that, in fact, does not even exist, derived from *Hayle's* supposed "direct confront[ation]" of an issue that, in fact, was never even mentioned in that case, in order to posit a statutory "element" that also was not mentioned or discussed in that case. This supposed "element" likewise does not exist. It is not found in the statute and was never before detected by any Pennsylvania court, even though the statute has been in effect since 1973. According to the Superior Court the occult presence of this "element" is predicated on an unreal construct of the statute that depends on applying limiting words ("actual" or "direct") *not* found in the text of the provision, while ignoring broadening language ("the welfare of") that *is* in the

provision. Based on all of these *completely nonexistent* factors, this published decision concludes, as a matter of law, that a statute designed to flexibly apply to a wide variety of conduct that endangers children, did not extend to defendant's conduct that *systematically* endangered children.

It would be a daunting challenge to find a more comprehensive misapplication of the law or a more complete departure from the plain language of the statute.

Defendant will likely argue that allowance of appeal is unwarranted because the statute was subsequently amended to address his conduct. In January 2007 the General Assembly amended § 4304 to add the words "or a person that employs or supervises such a person" to the phrase "person supervising the welfare of a child," such that the critical language going forward is, "person supervising the welfare of a child or a person that employs or supervises such a person."[5] Because the 2007 amendment, which did not apply in this case, supposedly supplies what was missing from the 1973 version of § 4304, and would supposedly suffice to convict someone who in the future acted as Lynn did here, the argument will go, the instant Superior Court ruling can affect only a small and diminishing number of cases and is beneath this Court's attention.

Unfortunately, none of this is correct. This published decision of the Superior

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[5] The amendment followed the recommendation of the September 2005 report of the first Investigating Grand Jury in this case that such language would afford greater clarity (2005 Grand Jury report, 75). Since, as shown above, the ordinary meaning of "supervising the welfare of a child" already encompassed such conduct, the amendment reinforced the already-existing legislative intent. *See Commonwealth v. Corporan*, 613 A.2d 530, 531 (Pa. 1992) (noting revision of drug sentencing statute to more clearly state what had already been manifest in the prior provision).

Court concludes as a matter of statutory construction that § 4304 requires "actual" or "direct" supervision of a child by the offender (Superior Court opinion, *14), even though words such as "actual" or "direct" are not found in the text of the statute. It makes no difference, then, that the words "actual" or "direct" also do not appear in the text of the *amended* statute. Since under the Superior Court's analysis they were implicit in the original version, the same must be true of the amended version. Indeed, since at the time of the 2007 amendment the Superior Court had yet to reveal that "direct" or "actual" supervision was a supposed "element" of the offense, the legislature could not have intended to remove it.

It is therefore not merely possible, but certain, that anyone charged under the amended statute will argue under this published Superior Court decision that "person supervising the welfare of a child or a person that employs or supervises such a person" must be read to mean "person *directly and actually* supervising the welfare of a child or a person that *directly and actually* employs or supervises such a person."

Under the Superior Court's erroneous construction even the amended statute would not have applied to Lynn's conduct. Lynn obviously did not "employ" pedophile priests, and it is by no means clear that his supervision of them, for the purpose of preventing their sexually molesting children, would be considered sufficiently "actual" or "direct" under the Superior Court's understanding of those terms – terms that, in addition to being nonexistent, are entirely *undefined*. How to distinguish mere "supervision" from "actual" and "direct" supervision remains entirely unknown. Of course, under the broad reading required by *Mack*, Lynn's

conduct was a crime under *both* versions of the statute; but this Superior Court ruling rejects *Mack* as a case that affords "little guidance," and instead indicates that there was *no crime at all* – in terms that would require the same outcome under *either* version of the statute.

Thus, as long as this published Superior Court decision stands, the 2007 amendment cannot be relied on to protect children. The problem is not in the statute, but in the Superior Court's wholesale departure from the rules of statutory construction, in a manner that edits the statute to insulate Lynn and people like him from criminal liability. It is a problem that will certainly continue unless this Court intervenes.

This Court should grant allowance of appeal.

II. If, as the Superior Court held, it was legally impossible for defendant to endanger the welfare of children in his individual capacity, the evidence was sufficient to prove his guilt as an accomplice.

Lynn was guilty as a principal. But even granting *arguendo* the Superior Court's erroneous conclusion that he could not be guilty because he was not within the class of persons defined by "person supervising the welfare of a child," he was *necessarily* guilty as an accomplice.

It is sufficient for accomplice liability "if [the offender] acts with the intent of promoting or facilitating the commission of an offense and agrees, aids, or attempts to aid" another in committing that offense. *Commonwealth v. Spotz*, 716 A.2d 580, 585 (Pa. 1998). This Court has held that "[t]he least degree of concert or collusion is sufficient to sustain a finding of responsibility as an accomplice." *Commonwealth v. Cocciolletti*, 425 A.2d 387, 390 (Pa. 1981). The necessary proof may be inferential and circumstantial. *Commonwealth v. Bachert*, 453 A.2d 931, 935-936 (Pa. 1982). No agreement is required; "only aid is required." *Commonwealth v. Graves*, 463 A.2d 467, 470 (Pa. Super. 1983). It is not a defense to accomplice liability that the offender is not himself within the class of persons who can commit the underlying offense. 18 Pa.C.S. § 306 states in pertinent part:

> **(e) Status of actor.**--In any prosecution for an offense in which criminal liability of the defendant is based upon the conduct of another person pursuant to this section, it is no defense that the offense in question, as defined, can be committed only by a particular class or classes of persons, and the defendant, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity.

See United States v. Ruffin, 613 F.2d 408, 413 (2d Cir. 1979) ("a person who operates from behind the scenes may be convicted even though he is not expressly prohibited by the substantive statute from engaging in the acts made criminal").

According to the Superior Court's analysis here, the sole impediment to defendant's guilt as a principal was that he supposedly could not commit the offense in an individual capacity, because it supposedly applied only to "direct" supervisors "of children." But for *accomplice* liability defendant did not need to be a supervisor of *any* kind. Logic dictates that one *not* in the defined class who facilitates another who *is* in that class, in fulfilling all remaining elements of the underlying offense, is *necessarily* guilty as an accomplice. That is the case here. The "not of the class is no defense" clause of 18 Pa.C.S. § 306, as well as the interplay between this clause and the underlying offense of endangering the welfare of children, appears to be a matter of first impression in this Court under the Crimes Code.[6]

It is important to note that the essence of the underlying offense is *endangering*. It requires the offender to *risk*, not *cause*, harm. There is no requirement

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[6] *See Commonwealth v. Weldon*, 48 A.2d 98, 101 (Pa. Super.1946) (Under the Penal Code, where principal's employment in a bank was an essential element of the offense, Weldon could be convicted as an accessory even though not an employee); *United States v. Lester*, 363 *F.*2d 68, 72-73 (6th Cir.1966) (private citizens properly convicted as accomplices of police officers acting under color of state law to deprive third party of civil rights, even though officers were acquitted); *State v. Hinds*, 674 A.2d 161, 166 (N.J. 1996) ("a private person may be an accomplice to official misconduct"); *State v. Cordero*, 851 P.2d 855, 859 (Ariz. Ct. App. 1992) (passengers not driving stolen car could be guilty of flight as accomplices); *People v. Evans*, 58 A.D.2d 919, 396 N.Y.S.2d 727, 728 (N.Y., 1977) (female offender properly convicted of rape as accomplice; "the fact that she is legally incapable of committing such an offense in her individual capacity has no effect").

that a specific victim be placed in danger. *See Commonwealth v. Lawton*, 414 A.2d 658, 662 (Pa. Super. 1979) (reckless endangerment "does not require any particular person to be actually placed in danger, but deals with potential risks"). As explained in *Wallace*, "the statute does *not* require the actual infliction of physical injury" or require "that the child or children be in imminent threat of physical harm." What is proscribed "is the awareness by the accused that his violation of his duty of care, protection and support is practically certain to result in the endangerment." 817 A.2d at 491-92 (emphasis original, citation and internal quotation marks omitted).

Because there was no requirement that Avery intend actual harm to the victim to violate § 4304, there likewise was no requirement that Lynn actually intend harm to the victim to be guilty as an accomplice. "For offenses where a principal actor need not intend the result, it is also not necessary for the accomplice to do so." *Commonwealth v. Roebuck*, 32 A.3d 613, 624 (Pa. 2011). Indeed, under the "express design" of the Model Penal Code on which the Pennsylvania accomplice liability statute, 18 Pa.C.S. § 306, is based, "it certainly is possible for a state legislature to employ complicity theory to establish legal accountability on the part of an accomplice for foreseeable but unintended results caused by a principal." *Id.* at 617.

The evidence is therefore sufficient if it supports an inference that Lynn's promoting or facilitating "violation of [a] duty of care" by Avery was "practically certain to result in ... endangerment." *Wallace*, 817 A.2d at 492. Here there was abundant evidence that defendant facilitated Avery's violation of a duty of care and that this was practically certain to endanger the welfare of children. There was no

burden on the Commonwealth to prove that Lynn specifically intended for Avery to sexually molest a particular child victim.

Knowing that Avery should be in an assignment "excluding" adolescents, Lynn arranged for Avery to live in a parish with a grade school (N.T. 2/27/12, 18, 42, 60; 4/25/12, 99; 5/23/12, 204-205). Lynn told the pastor that Avery should "assist[] in the parish," and so Avery encountered children in the confessional and said Masses at which children were altar servers, just as Lynn knew he would (N.T. 5/29/12, 110-111). Having placed Avery at the head of his list of priests "guilty of sexual misconduct with minors" (N.T. 3/27/12, 188-189; C-52A), and after being twice notified that follow-up treatment for Avery recommended by the St. John Vianney facility had never taken place, Lynn learned that Avery had resumed his practice of disk-jockeying. This was the same conduct Avery had used to groom R.F., his previous victim. Lynn was advised that Avery was ignoring his real work in favor of this activity, at one point booking three such engagements on a single weekend, and failing to work 25 out of 31 Saturdays at Nazareth Hospital (N.T. 3/27/12, 63-71, 75; 4/23/12, 154-155). But Lynn responded by only providing more cover for Avery. When Avery's supervisor Father Kerper reported these concerns, Lynn – who remained responsible for protecting children from Avery – told him to take his complaints elsewhere (N.T. 3/27/12, 76; C-69). Despite being extraordinarily well aware of the dangerous implications of Avery's actions, Lynn merely told Avery to be "more low-key" in the future. He recognized that Avery was "minimizing ... the allegations against him," even while at the same time describing Avery to outsiders

as "hard working" and "trustworthy" (*Id.*, 85-92; C-78, C-80, C-83).

In nevertheless reaching the counterintuitive conclusion that the evidence was *not* sufficient for accomplice liability, the Superior Court posited that, to prove the required mental state, the Commonwealth had to prove that Lynn's concern for the reputation of the Archdiocese or pedophile priests was "indistinguishable or interchangeable" with his intent to facilitate the danger Avery posed to children (Superior Court opinion, *18). In terms of sufficiency of the evidence this assertion is incoherent. The Commonwealth had no such burden, and there is no discernable, rational reason to supposed that it did. That *the defendant* sought to excuse his criminal conduct in these terms is irrelevant. A criminal does not honestly announce his criminal intent. It is almost always necessary "to look to the act itself to glean the intentions of the actor." *Commonwealth v. Hall*, 830 A.2d 537, 542 (Pa. 2003).

This Court's admonition in *Commonwealth v. Ratsamy*, 934 A.2d 1233, 1235 (Pa. 2007), in reversing a decision authored by then-Judge Bender, stated that sufficiency does not "require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt" (original emphasis, citation and internal quotation marks omitted). Here the Superior Court nevertheless relied on a remarkably selective reading of the record in defendant's favor.

According to the Superior Court "[t]here was no evidence that Appellant had any specific knowledge that Avery was planning or preparing to molest children at St. Jerome's" (Superior Court opinion, *19). But as a matter of law, evidence of "specific knowledge" of "planning or preparing" was *unnecessary* to prove Lynn's

guilt as an accomplice, just as it was unnecessary to prove Avery's guilt as a principal. *Commonwealth v. Roebuck*, 32 A.3d at 624 ("For offenses where a principal actor need not intend the result, it is also not necessary for the accomplice to do so"). As noted above, the evidence showed that defendant knew the *risk*, and that he concealed, exacerbated, facilitated and promoted the danger posed by Avery. That was sufficient to prove his guilt as an accomplice.

The Superior Court stated that "Avery was not even diagnosed with a mental impairment that suggested he had a predisposition to commit sexual offenses" (*Id.*). This borders on sophistry. Defendant had extensive experience with pedophiles because it was his job to protect children from pedophile priests. He himself stated that he had "seen where a person is not diagnosed as a pedophile and yet has engaged in acts of pedophilia" (N.T. 5/23/12, 91, 219). Thus, even though a psychologist had opined that Father Nicholas Cudemo was not a pedophile, *defendant* designated him a pedophile because he knew Cudemo was a threat to children (N.T. 5/3/12, 179; 5/24/12, 81). He likewise put *Avery* at the top of his list of priests who were "guilty of sexual misconduct with minors" (N.T. 3/27/12, 188-189; C-52A). Defendant was on the board of directors at the facility owned by the Archdiocese that attempted to treat pedophile priests (N.T. 5/23/12, 204-205). He was quite literally an expert on the subject. To suggest that he was unaware that Avery was dangerous to children would be frivolous under *any* standard of review. For the Superior Court to so conclude as a matter of the sufficiency of the evidence is incomprehensible.

The Superior Court stated that "there was no evidence that Avery had resumed

drinking, or that Appellant knew of such behavior." But defendant certainly knew Avery was ignoring his assigned work in favor of resuming his practice of disk-jockeying with a vengeance, the same conduct he had used to groom his previous victim (N.T. 3/27/12, 63-71, 75; 4/23/12, 154-155). The Superior Court appeared to have no awareness that the risk at issue was not whether Avery might drink, but whether he might sexually abuse another child.

The Superior Court went on, asserting that "Avery was appointed to a chaplaincy so as to limit his contact with children" (*Id.*). But defendant *undermined* that plan, which would have allowed Avery to live at Nazareth Hospital, by unnecessarily sending Avery to live in a parish *with a grade school.*

The Superior Court nevertheless claimed to be unable to find any "evidence that Appellant explicitly or implicitly approved of Avery's supervision of minors at St. Jerome's," when in fact, the evidence established that Lynn *knew* that his letter to the pastor, telling him that Avery should provide "assistance," would result in Avery contacting minors in confession and at Masses (N.T. 5/29/12, 110-111).

Remarkably, the Superior Court found that defendant actually "extinguish[ed] the risk" posed by Avery because "the Commonwealth's own evidence" showed that the pastor "was told" that Avery "was not to be around children." In support of this argument the Court cites " N.T., 5/23/12, at 50." In fact, that page of the record states that the pastor was told this "by the Archdiocese." Further, that knowledge did nothing to negate the effect of the letter *defendant* sent to the pastor indicating that Avery *could* encounter children, or the fact that defendant *knew* the letter would lead

to that result. Moreover, the very same page of the record establishes that: (a) the pastor was *not* Avery's supervisor; (b) the pastor "*knew nothing*" about Avery's aftercare therapy; and (c) contrary to theraputic recommendation, *no* system of accountability had been put in place for Avery (N.T. 5/23/12, 50).

The Superior Court opinion concluded by stating that the evidence "was not sufficient to support the notion that the natural and probable consequence of Appellant's conduct was Avery's intentional act of molestation (which was the only conduct that could have given rise to Avery's EWOC violation)." But since the offense was *endangering* the welfare of a child, the Superior Court's assertion that an "intentional act of molestation" was the "only" conduct that could possibly establish it is again incoherent, and indeed, indicates that the Court did not clearly understand the offense in issue. As then-Judge Bender himself wrote in *Wallace*, the offense of endangering the welfare of children (and thus, accomplice liability for the same offense) "does *not* require the actual infliction of physical injury." 817 A.2d at 491 (emphasis original). This Court held in *Commonwealth v. Roebuck*, a case the Superior Court opinion ignores, that where an actor need not intend a particular result to be guilty as a principal, that intent is equally unnecessary to prove guilt as an accomplice. While the *severity* of defendant's crime was certainly exacerbated when Avery actually sexually molested another child, that event was only the inevitable result of criminal conduct by defendant that was *already* sufficient to prove the offense. The Superior Court's analysis thoroughly misunderstands and misapplies the law.

In *Commonwealth v. Davidson*, 938 A.2d 198, 209-210 (Pa. 2007), this Court explained that it is the policy of this Commonwealth to protect children from sexual abuse, and that this is "a government objective of surpassing importance" (citations omitted). Earlier, in *Commonwealth v. Mack*, this Court found a similar legislative protective purpose controlling in the specific context of endangering the welfare of children, as a matter of the law of statutory construction.

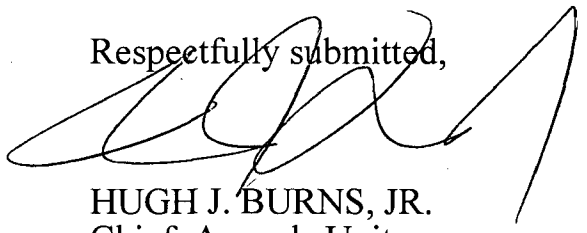
The policy of this State, as expressed by the General Assembly, and the above rulings by this Court, might as well not exist under the instant, published Superior Court decision.

In this case the defendant systematically put children in danger of sexual abuse by pedophiles and facilitated the risk to children posed by Avery – one of the many men defendant was responsible for protecting children *from*. Yet the Superior Court insulated defendant from criminal liability as a principal by inventing statutory language that does not exist, ignoring language that does, applying a nonexistent holding from a prior decision, and applying a nonexistent statutory element. As for accomplice liability, the Superior Court systematically misapplied the standard of review for sufficiency of the evidence. It again assumed the existence of statutory elements that do not in fact exist, ignored facts indicative of guilt, and read the record only for the purpose of finding inferences in the defendant's favor. It uttered this serially erroneous legal analysis in a decision that was not only published, but one that is the subject of national attention, in a matter of great importance as a matter of public policy. This Court should grant allowance of appeal.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court to grant allowance of appeal.

Respectfully submitted,



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Appendix A

2013 WL 6834765
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
William J. LYNN, Appellant.

No. 2171 EDA 2012. | Filed Dec. 26, 2013.

Synopsis

Background: Defendant, the secretary for clergy for ecclesiastical archdiocese, was convicted in the Court of Common Pleas, Philadelphia County, No. CP–51–CR–0003530–2011, of endangering the welfare of children (EWOC) based on his alleged conduct in placing a priest with known history of sexually abusing children in an environment where there was a significant risk that he would reoffend. Defendant appealed.

Holdings: The Superior Court, 2171 EDA 2012, Bender, P.J., held that:

[1] pre-amendment EWOC statute requires proof that the accused was a supervisor of an endangered child victim;

[2] evidence did not support finding that defendant supervised child victim in his role as secretary for clergy; and

[3] evidence did not support conviction for EWOC as an accomplice.

Reversed.

Appeal from the Judgment of Entered Sentence July 24, 2012, In the Court of Common Pleas of Philadelphia County, Criminal Division at No(s): CP–51–CR–0003530–2011.

BEFORE: BENDER, P.J., DONOHUE, J., and MUSMANNO, J.

Opinion

OPINION BY BENDER, P.J.

**1 Appellant, Monsignor William J. Lynn, appeals from the judgment of sentence of 3—6 years' incarceration, imposed following his conviction under the pre-amended version of the endangering the welfare of children (EWOC) statute, 18 Pa.C.S. § 4304 (amended 2007) .[1] Appellant presents ten questions for our review, generally falling into four categories. First, Appellant challenges the sufficiency of the evidence supporting his conviction by arguing, *inter alia,* that his conduct was not within the reach of the EWOC statute, either as a principal or an accomplice. Second, he claims the trial court abused its discretion by improperly admitting evidence of twenty-one instances of prior bad acts. Third, Appellant asserts the trial court abused its discretion by improperly charging the jury. Fourth, he claims the trial court abused its discretion when it denied his motion for a mistrial following prosecutorial misconduct that occurred during the Commonwealth's closing argument. After careful review, we reverse.

Factual Background

Appellant served as Secretary for Clergy ("Secretary") for the Archdiocese of Philadelphia ("Archdiocese") from June of 1992 until June of 2004. "During his tenure as Secretary ..., in addition to solving disputes among priests, and ensuring that parishes were filled with enough priests, [Appellant]'s responsibilities included handling clergy sexual abuse issues." Trial Court Opinion (TCO), 4/12/13, at 3. In his capacity as Secretary, Appellant did not have direct authority to transfer, remove, or even restrict the nature of a priest's ministry.[2] Such powers rested with the Archbishop. Nevertheless, Appellant "was the sole 'funnel' for information concerning clergy sex abuse, and it was his office alone that could pass on vital information about priests and their young victims up the chain of command." TCO, at 4.

Appellant was one of a limited number of church officials with access to the Archdiocese's Secret Archives, a repository of information regarding any major infraction committed by a priest within the Archdiocese. In 1994, Appellant's investigation into allegations concerning an active priest, whom he found to have had engaged in serious past misconduct as documented within the Secret Archives, prompted Appellant "to conduct a comprehensive review of the priests within the Archdiocese[.]" *Id.* at 5. Appellant identified thirty-five priests who had previously been accused of sexual misconduct against minors and classified them into three categories: 1) 'pedophiles,' 2) priest 'guilty of sexual conduct with minors,' and 3) priests subject to 'allegations of sexual misconduct with minors with no conclusive evidence.' *Id.*

The first name that appeared under the heading 'guilty of sexual conduct with minors' was that of Reverend Edward V. Avery ("Avery"). In March of 1992, R.F. wrote to Appellant's predecessor, Monsignor Jagodzinski, regarding sexual abuse he suffered at Avery's hands during the 1970's when R.F. was an adolescent. In the letter, R.F. complained that Avery's abuse had "wreaked emotional havoc" on him as a youth, and he wrote to Jagodzinski out of concern for others that might be victimized. However, Jagodzinski was in the process of ending his term as Secretary, and R.F. did not receive a response until Appellant discovered the letter when he began his term as Secretary a few months later. After reading R.F.'s letter, Appellant arranged to meet with him in September of 1992.

*2 At that meeting, attended by R.F., Appellant, and Reverend Joseph R. Cistone, R.F. "divulged the details of his relationship with Avery and how he was victimized." *Id.* at 7. The trial court reported R.F.'s allegations as follows: [3]

> R.F. was one of the altar servers who helped Avery serve Mass at St. Philip Neri. [4] "[Avery] had a lot of charisma. He was very popular with the young people; did a lot of things for the young people in the parish." R.F.'s relationship with Avery blossomed away from church. Avery gave R.F. his first beer at age 12. Avery took R.F. and other boys from their parish to his home in North Wildwood, NJ, where he provided alcohol. "There was generally beer there. And it was for anyone to consume." There were between eight and ten beds in Avery's loft, where all of the boys would sleep. Avery would come up to that area and wrestle with them. According to [Appellant]'s notes of that meeting, R.F. told him that during these encounters Avery's hand "slipped to [R.F.'s] crotch, at least on two or three occasions."
>
> This pattern of inviting R.F. to participate in seemingly-innocuous activities, and then groping him when vulnerable, escalated when R.F. was 15 years old. Even after Avery was transferred from St. Philip Neri, he maintained a connection with R.F. through the phone and by inviting him to help disc jockey parties. In 1978, after assisting at a number of events at which Avery taught R.F. how to use the disc jockey equipment, Avery took R .F. to Smokey Joe's Cafe in West Philadelphia to help disc jockey a party for college students. Avery allowed the then 15–year–old to drink; after a few hours R.F. became ill and went to the bathroom where he vomited before passing out in a back hallway. Avery took R .F. back to the rectory, where he encouraged the boy to sleep in his bed. When R.F. awoke several hours later, Avery's hands were inside his shorts.
>
> In June 1981, when R.F. was 18, Avery again lured him to participate in what appeared to be an ordinary activity: Avery invited R.F. on a ski trip to Killington, Vermont. Avery, his brother and R.F. shared a hotel room. In the night, Avery joined R.F. in bed, and again molested the boy after he had gone to sleep. On this occasion, Avery massaged R.F.'s penis until he became erect and ejaculated.

Id. at 7—8 (internal citations to the record omitted). After the September, 1992 meeting, R.F. sought assurances from Appellant that Avery would not be permitted to harm anyone else. Appellant reassured R.F., telling him that "the Archdiocese's 'order of priorities is the victim, the victim's family, the Church, and the priest himself.' " *Id.* at 8.

A week later, Appellant met with Avery. At that meeting:

> Avery denied R.F.'s account and expressed "shock" when [Appellant] told him that R.F. was going to counseling for this issue, [however,] Avery confirmed many of the details of R.F.'s story. Avery admitted that he took kids to his Shore house and "would rough-house with them in the loft ... [.]" He admitted to sharing a bed with R.F. while on a ski trip to Vermont, but stated that if he touched R.F. in the night it was "accidental" due to "tossing and turning" because he had "gotten sick on some red sauce from dinner." Finally, Avery admitted that the night R.F. got drunk at Smokey Joe's Cafe, he took the boy back to the rectory, but did "not remember much about the events afterward, since he had so much to drink himself." He admitted it "could be" that something happened while he was under the influence of alcohol that he might not remember. "[Appellant] asked if he thought these things could have happened and Avery responded: I don't know." [Appellant] spoke with Avery on the phone about these allegations again two days later; the notes from that phone interview do not include a denial. Instead, Avery's retort to the allegations was, "[R.F.] has a selective memory."

*3 *Id.* at 8—9.

Following R.F.'s allegations and Avery's tepid denials, Appellant "recommended that Avery be sent to an Archdiocese-affiliated mental health facility, St. John

Vianney[5], for a four-day outpatient evaluation, starting on November 30, 1992." *Id.* at 9.

> As part of the evaluation process, Sandra O'Hara, M.S., the Program Director at St. John Vianney, asked [Appellant] to complete a referral form with "detailed background on issues important for our consideration in assessing Father Avery." Despite Ms. O'Hara's request for details, [Appellant] did not include any information whatsoever about Avery touching R.F. while wrestling, placing his hands inside R.F.'s shorts in the rectory after disc jockeying at Smokey Joe's Cafe, or massaging R.F.'s penis until he ejaculated during their trip to Vermont. Instead, the defendant answered the question, "What specific behaviors/problems have you observed that cause you concern?" by writing, "When asked about these allegations, Fr. did admit to taking the minor into a place serving alcohol while he was disc jockey." [Appellant] also failed to mention that Avery admitted that it "could be" that something happened, and that he had reportedly been under the influence of alcohol. Though [Appellant] provided St. John Vianney with an incomplete, misleading referral,[6] the facility still recommended inpatient hospitalization. Cardinal Bevilacqua accepted that recommendation. Roughly six months after Avery was admitted to St. John Vianney Hospital, his primary therapist, Wayne Pellegrini, Ph.D., reported to [Appellant] that Avery "acknowledged that the incident [with R.F.] must have happened...." In addition, Dr. Pellegrini added, "there remains [sic] concerns about the existence of other victims." Dr. Pellegrini strongly recommended continued treatment in order to prevent future abuse: "Finally, Father Ed is at a point in treatment with his shame that necessitates continued inpatient treatment to prevent further acting out." On September 28, 1993, [Appellant] received the final pieces of information regarding Avery's sexual misconduct, treatment and plan for the future prior to his release from St. John Vianney on October 22, 1993. Dr. Pellegrini stated that Avery was not officially diagnosed with a "sexual disorder" because of "a number of reasons." The two reasons given were: "there is only one report of abuse" and "Father Ed had been drinking during those incidents, both by his and the victim's report." Though Dr. Pellegrini's team did not diagnose Avery with a sexual disorder, they still recommended that he receive continued outpatient treatment and that he receive an assignment where he would be separate from children:
>
> The treatment team's recommendations for Father Ed post discharge from the Villa include: One, continued outpatient treatment. Two, an aftercare integration team, ministry supervision. Three, a ministry excluding adolescents and with a population other than vulnerable minorities with whom Father Ed tends to overidentify [sic] with. Four, attendance at a 12–step [Alcoholics Anonymous] meeting for priests.

*4 *Id.* at 10—11.

Appellant's first recommendation for Avery's reassignment within the Archdiocese did not conform to Dr. Pellegrini's advice; Appellant suggested that Avery be placed as an associate pastor at Our Lady of Ransom, a parish with a grade school. Appellant justified the placement in a letter to Monsignor Molloy[7] ("Molloy") based upon the fact that Avery had not been diagnosed as a pedophile, and because the priest at that parish had agreed to "work with a priest who requires some supervision." N.T., 3/27/12, at 51. Nevertheless, Cardinal Bevilacqua, the Archbishop, rejected Appellant's recommendation, and instead suggested that Appellant find a chaplaincy for Avery. Appellant obliged, and soon found an opening for Avery as a chaplain at Nazareth Hospital.

Although chaplains were able to reside at Nazareth Hospital, Appellant successfully petitioned the Cardinal to permit Avery to live in a rectory at St. Jerome's Church pursuant to Avery's request. In a letter dated December, 2, 1993, Cardinal Bevilacqua appointed Avery to the chaplaincy at Nazareth Hospital and residency at St. Jerome's, effective December 13, 1993. Father Joseph Graham ("Graham"), St. Jerome's pastor, was the only church official at St. Jerome's alerted regarding Avery's abuse of R.F. Graham was told by the Archdiocese that Avery "was not to be around children and was to live in the parish, be around other priests, and minister to the local hospital." N.T., 5/23/12, at 50. On February 18, 1994, Appellant placed Avery's name on the list of priests 'guilty of sexual conduct with minors,' demonstrating his belief that R.F.'s accusations against Avery were truthful. TCO, at 13; N.T., 3/27/12, at 15.

In the first year following Avery's discharge from St. John Vianney, Avery saw a psychologist from that institution on a weekly basis. That psychologist notified Appellant on at least two occasions that Avery's aftercare integration team was slow to organize and that, afterwards, the group only

met with Avery sporadically.[8] Then, in late November of 1994, Father Graham contacted Appellant and notified him that Avery had been working as a disc jockey at weddings. Around the same time, Appellant was notified by another chaplain at Nazareth Hospital, Father Kerper, that Avery "keeps accepting many outside commitments, especially on weekends. These commitments usually entail weddings or events where he is the disc jockey." N.T., 3/27/12, at 67. Those commitments had caused some discord with the hospital and with his fellow chaplains, the latter being repeatedly asked by Avery to cover his weekend shifts. In a follow up letter, Father Kerper also indicated that Avery was scheduled to perform as a disc jockey at a dance at St. Jerome's in December of 1994.[9]

In December of 1994, Avery met with his aftercare integration team (consisting of Appellant, Graham, and another priest) and his outpatient care providers from St. John Vianney. At that meeting, Avery was told by Appellant that he was committing too much time to his disc jockey activities. Appellant told Avery that Avery "must make a success of [the chaplaincy] assignment because he will never be assigned to parish work." *Id.* at 69. Appellant's notes of the meeting went on to state:

> ***5** Even though this had been said to him before, it seems as if this was the first time he was really ready and able to hear it. This did upset him. I also reminded him he should not have been doing the work as a disc jockey, that he should be concentrating on his work as Chaplain and his own recovery. This, too, seemed to be the first time he could hear what was said.
>
> We agreed he would work out therapy sessions with his therapist. He will continue to see his therapist and follow his aftercare plan. This was an upsetting session for him, but it seems as if he is just beginning to realize all the ramifications of past actions.

N.T., 3/27/12, at 69—70 (Commonwealth's Exhibit C–59 read into the record).

On February 22, 1995, Appellant received a letter from Avery's psychologist notifying him that she had agreed to decrease the frequency of Avery's sessions at Avery's request. She wrote that "this treatment approach for Father Avery continues to be positive and I anticipate he will continue to progress toward the goals we have discussed[,]" but noted that "[i]f he appears to be having difficulty" complying with his treatment regimen under the revised schedule, "the frequency of his sessions will increase according to need." Commonwealth's Exhibit C–60. Father Kerper repeatedly raised concerns about Avery's shirking of his duties as chaplain at Nazareth Hospital until September 27, 1995. At that time, however, Appellant "instructed Father Kerper to convey his concerns about Avery to his supervisor at Nazareth Hospital, not to the Secretary for Clergy." TCO, at 15.

From the time R.F.'s accusations first came to light in 1992 until 1996, R.F. repeatedly wrote to Appellant to inquire about how the Archdiocese was dealing with Avery. For instance, on September 17, 1996, R.F. e-mailed Appellant and therein stated, "I'm not asking for details[,] what I want to know is[,] is he rehabilitated or in a situation where he can't harm others. Will the diocese vouch for the safety of its children. For my peace of mind I need to know." TCO, at 15 (quoting Commonwealth's Exhibit C–75). There was no evidence that Appellant ever responded to R.F.'s email. Detective Joseph Walsh, an investigator who "culled and compiled records of the Archdiocese[,]" testified that as of September of 2002, "there were no documents suggesting that the defendant followed up on R.F.'s concern for other victims." TCO, at 16.

In 1997, Appellant made efforts "to help advance [Avery's] career." *Id.* Avery wrote the Cardinal to ask for a letter of recommendation in order to pursue a doctoral degree from the Lutheran Theological Seminary of Philadelphia. The letter was passed on to Appellant by the Cardinal's representative with instructions to handle the matter as the Cardinal's delegate. The trial court described the content of that letter and Appellant's follow-up with Avery as follows:

> [Appellant] authored a letter describing Avery as a "very sincere, hard [-]working priest. He is honest and trustworthy. He is a man who is in touch with his spiritual life and this becomes evident in his work and service." A few weeks later, [Appellant] followed up with Avery about the letter of recommendation. Even though [Appellant] portrayed Avery as "trustworthy" to the Lutheran Theological Seminary, he told the priest that "in the future he should play things low-key," and that he had to be "more low-key than he has been recently."

***6** TCO, at 16 (internal citations omitted).

Avery remained in outpatient treatment with St. John Vianney therapists until 1998, and had regularly attended Alcoholics Anonymous meetings for the first two years after his discharge in 1993. Nevertheless, after meeting with Avery in

April of 1998, Appellant expressed concerns about Avery's rehabilitation. In a note placed in Avery's Secret Archive file, Appellant wrote that Avery was "minimiz[ing] his experience ... and the allegations against him." TCO, at 17 (quoting Commonwealth's Exhibit C83). During the April, 1998 meeting, Appellant told Avery that he would not recommend him for a position in another diocese because such a recommendation would require Appellant to certify that the priest seeking the transfer "has not had allegations against him." *Id.*

In the fall of 1998, D.G., a ten-year-old boy just beginning the fifth grade, commenced training to serve as an altar boy at St. Jerome's. D.G. was also a student at St. Jerome's grade school. He advanced quickly in his training and, by the end of his first semester that year, he was a "fullfledged altar boy." TCO, at 17. D.G. began assisting the priests of St. Jerome with Mass both on weekends and before school on weekdays. He received a schedule from the parish on which he and the other altar boys were given their Mass assignments up to a month in advance.

D.G. recalled serving Mass with four priests: Graham, Avery, [10] Englehardt, and McBride. At some point during the winter of 1998 to 1999, Englehardt began sexually abusing D.G. after Masses. [11] Englehardt referred to these events as "sessions." In early 1999, D.G. encountered Avery inside the church after school on a Friday. Avery pulled D.G. aside and told him that he heard about D.G.'s "sessions" with Father Englehardt, and that "ours were going to begin soon." N.T., 4/25/12, at 126. A week later, D.G. was serving weekend Mass with Avery when Avery told him to stay after the service because their "sessions" were going to begin.

As Mass ended that day and the parishioners cleared out, D.G. and another altar boy began cleaning up. Eventually the other altar boy left, leaving D.G. alone with Avery. [12] Avery took D.G. into the sacristy, [13] turned music on, and ordered D.G. to striptease for him. Avery then fondled D.G.'s penis and performed oral sex on him. Avery also penetrated D.G.'s anus with his finger. He then ordered D.G. to perform oral sex on him. Eventually, Avery ejaculated on the boy's neck and chest. D.G. recalled that Avery told him "[t]hat I'm doing good. God loves me. This is what God wants, and it's time for me to become a man." N.T., 4/25/12, at 132. Two weeks later, after D.G. served Saturday Mass with Avery, Avery subjected D .G. to another "session." D.G. was sexually abused in a similar fashion as the previous occasion, with the additional indignity of having Avery lick his anus. Afterward, Avery told D.G. that he did a good job, God loved him, and that Avery would be seeing him again soon. *Id.* at 140.

***7** Avery did not abuse D.G. after the second incident, as D.G. found ways to avoid Avery by switching his scheduled Masses with other altar boys. Nevertheless, the effect of the sexual abuse committed by Avery was devastating. "Leading up to his sixth grade year, D.G. had become withdrawn and began using drugs. Alcohol and marijuana [abuse] gave way to [abuse] of Percocet[ ], Oxycontin, and Xanax, until D.G. developed a full blown heroin addiction." TCO, at 18. Avery's abuse of D.G. was not reported to the Archdiocese until January 30, 2009, by which time the Appellant was no longer Secretary for Clergy. Appellant left that position to become the pastor at St. Joseph's Parish on June 28, 2004.

Two years after Avery's abuse of D.G. concluded, the child sex abuse scandal in the Archdiocese of Boston erupted, causing leaders in the Catholic Church to reexamine the manner in which they dealt with priests accused of sexually abusing minors. Consequently,

> leaders of the Catholic Church met in Dallas in June 2002 and produced the "Dallas Charter," which set forth requirements that the Diocese[s] around the nation had to follow when it came to child sex abuse. The "Dallas Charter" is a document in which the bishops of the United States "pled [sic] to the Catholics of the United States that they would offer proper care, spiritual, psychological care, to victims of sexual abuse by the clergy and offer prompt and proper investigation of accusations and dealings with those accused." As part of that promise, the Charter required each Diocese to establish a Review Board to evaluate and act upon allegations of clergy sex abuse. Additionally, the Charter eliminated the possibility of restricting a priest's ministry. While the scandal in Boston and the Dallas Charter were visible turning points in the Church's public stance on allegations of sexual misconduct, canonical law had always prohibited clergy sex abuse. For example, "No. 8 of the Essential Norms," which was in place long before 2002, stated:
>
> > When even a single act of sexual abuse by a priest or deacon is admitted or is established after an appropriate process in accord with canon law, the offending priest or deacon will be removed permanently from ecclesiastical ministry, not excluding dismissal from the clerical state, if the case so warrants.

TCO, at 18—19.

On June 20, 2002, R.F.'s brother contacted Appellant and revealed that he had also been sexually abused by Avery when he was 14 or 15 years old. He also told Appellant that Avery had been seen recently disc jockeying local parties. On June 3, 2003, Appellant initiated an investigation, under the new regimen instituted by the Dallas Charter, into the accusations made against Avery "on or about September 28, 1992, which resurfaced on or around June 19, 2002." N.T., 3/27/12, at 101 (Commonwealth's Exhibit C94). On September 27, 2003,

> the Archdiocesan Review Board found that Avery was "in violation of the Essential Norms defining sexual abuse of a minor," and concluded that he should be removed from active ministry as well as from the rectory living situation, "or any other living situation in which he would have unrestrained access to children now or in the future." On December 5, 2003, Cardinal Justin Rigali [Cardinal Bevilacqua's successor] signed a decree excluding Avery from ministry, prohibiting him from residing in "any ecclesiastical residence without the permission of the Archbishop" and from celebrating or concelebrating public Mass or administering the sacraments.
>
> *8 On June 20, 2005, Cardinal Rigali requested that Avery be laicized. On August 13, 2005, Avery wrote to the Vatican, requesting laicization. [14] On January 20, 2006, Pope Benedict XVI granted Avery dispensation from all priestly obligations.

TCO, at 19—20.

At trial, the Commonwealth also introduced copious evidence of prior bad acts concerning Appellant's handling of twenty other priests accused of molesting minors and similar transgressions. TCO, at 20—132. That evidence was offered to aid the jury in understanding Appellant's "intent, knowledge, motivation and absence of mistake when handling Avery's case[.]" TCO, at 20.

Procedural History [15]

This case was initiated by a criminal complaint charging Appellant with two counts each of EWOC, 18 Pa.C.S. § 4304, and conspiracy to commit EWOC, 18 Pa.C.S. § 903, relating to his supervision of Avery and another priest, Reverend James Brennan ("Brennan"). Initially, both Avery and Brennan were scheduled to be tried alongside Appellant as co-defendants. However, Avery pled guilty to involuntary deviate sexual intercourse [16] and conspiracy to commit EWOC on March 22, 2012, after the jury had been selected but before the Commonwealth began presenting its case. Brennan remained as Appellant's co-defendant until the case concluded.

Appellant's and Brennan's jury trial commenced on March 26, 2012. The Commonwealth rested its case on May 17, 2012 and, at that time, the trial court granted Appellant's motion for judgment of acquittal with regard to the Brennan-related conspiracy count, but denied the motion with respect to the remaining counts. The trial ended on June 22, 2012, when the jury returned a verdict of guilty with respect to the Avery-related EWOC charge, and acquitted him of the Avery-related conspiracy and Brennan-related EWOC charges. [17] Appellant did not file post-sentence motions.

On July 24, 2012, the trial court sentenced Appellant to a term of 3—6 years' incarceration for EWOC, graded as a third-degree felony. [18] Appellant filed a timely notice of appeal on August 8, 2012, and complied in a timely fashion with the trial court's order to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P.1925(b). The trial court eventually filed its 1925(a) opinion on April 12, 2013.

Appellant presents the following questions for our review:

> 1. Whether the pre-amended version of 18 Pa.C.S.A. § 4304 (endangering the welfare of children) ("EWOC") did not properly apply to Appellant, Msgr. William Lynn, who was not a parent, guardian or other person supervising the welfare of a child and who had no direct involvement with the child, never met and never knew the child, and whether Appellant's trial as a supervisor under EWOC was a violation of the *ex post facto* clauses of the U.S. and Pennsylvania Constitutions?
>
> 2. Whether the trial court erred in allowing the jury to deliberate on whether Appellant can be liable for EWOC as a principal or an accomplice when the Commonwealth failed to provide sufficient evidence to meet its burden of proving that Appellant violated each element of the crime, as either a principal or an accomplice?
>
> *9 3. Whether the lower court's refusal to provide a jury instruction on the definition of person supervising the welfare of a child consistent with *Commonwealth v.*

Brown, 721 A.2d 1105 (Pa.Super.1998)[,] and the model jury charge was reversible error mandating a new trial?

4. Whether the lower court's jury charge on the EWOC element of "knowingly," which provided two directly conflicting definitions, was reversible error mandating a new trial?

5. Whether the lower court's jury charge on the EWOC element of "duty of care," which presupposed that the duty of care element was met and provided examples from civil, rather than criminal, law was reversible error mandating a new trial?

6. Whether the lower court's undue emphasis on accomplice liability, as well as an erroneous definition of accomplice intent, during its jury charge was reversible error mandating a new trial?

7. Whether the lower court's jury charge about Appellant's liability for endangering other unnamed minors supervised by Edward Avery, when there is no support in Pennsylvania law that EWOC applies to unknown and unknowable children, is reversible error mandating a new trial?

8. Whether the lower court's jury instruction on whether endangering the welfare of a child behavior must be criminal, which permitted the jury in this case to wrongly infer that Appellant violated EWOC, even though there is no underlying criminal conduct that Appellant was aware of, was reversible error mandating a new trial?

9. Whether it was abuse of discretion for the lower court to admit evidence of acts of abuse by 21 other priests, dating to the late 1940's, pursuant to Rule 404(b) of Pa. R. Evid., and did the [c]ourt err in holding that this evidence passed the probative/prejudicial test of Pa. R. Evid. 403?

10. Whether it was abuse of discretion for the lower court not to grant a mistrial on the basis of the Commonwealth's highly prejudicial summation which included numerous statements not supported by the trial record?

Appellant's Brief, at 4—5.

Appellant's first two claim address, *inter alia*, the sufficiency of the evidence supporting Appellant's conviction for EWOC. The first concerns his culpability as a principal actor, and the second concerns his culpability as an accomplice. Because of our ultimate disposition with regard to these two claims, we do not reach the remainder of Appellant's allegations of error.

Standard of Review

[1] [2] [3] [4] Both of Appellant's sufficiency claims require an identical scope and standard of review. The question of whether evidence is sufficient to sustain a verdict is a question law, and as such, "our standard of review is *de novo* and our scope [of review] is plenary." *Commonwealth v. Cruttenden*, 58 A.3d 95, 96 n. 1 (Pa.Super.2012). It is well-established that:

> Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

***10** *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751 (Pa.2000); *see also Commonwealth v. Maerz*, 879 A.2d 1267, 1269 (Pa.Super.2005) (stating "[w]hile we are not free to substitute our view of the evidence for the factual findings of the trial court, we as an appellate court are authorized, indeed required, to use a plenary scope of review in determining the validity of the legal conclusions made by the trial court.").

Conviction for EWOC as a Principal

It is undisputed that Appellant was tried under the pre-amended version of the EWOC statute. Prior to January 29, 2007, the statute read: "A parent, guardian or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of

the child by violating a duty of care, protection or support." 18 Pa.C.S. § 4304(a)(1). The 2007 amendment added language, *inter alia,* such that the statute now reads: "A parent, guardian or other person supervising the welfare of a child under 18 years of age, *or a person that employs or supervises such a person,* commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support." 18 Pa.C.S. § 4304(a) (current) (emphasis added).

It is undisputed that Avery was supervising D.G. when he sexually abused the boy. It is also undisputed that Appellant did not have any direct supervisory role over D.G. or any other child put at risk by Avery's presence at St. Jerome's. The Commonwealth's contention at trial was that Appellant, in his capacity as the Archdiocese's point-man on priests accused of sexual abuse, violated the pre-amended EWOC statute by placing Avery in an environment where he knew there was a significant risk that Avery would sexually abuse minors (or by failing to remove him once there were indications that Avery might reoffend). Thus, independent of whether Appellant owed a duty of care to the children of St. Jerome's, or to D.G. in particular, the prohibited conduct of his alleged violation of the EWOC statute was his inadequate supervision of Avery.

Appellant claims the pre-amended EWOC statute did not encompass the conduct of *a supervisor of* a "person supervising the welfare of a child." He contends that by the plain meaning of the terms of the pre-amended statute, it imposed criminal liability only upon those directly supervising children. He maintains that decisional law examining the pre-amended statute limited the class of persons subject to criminal liability to "parents and parental surrogates." Appellant's Brief, at 19. Appellant also directs our attention to the 2007 amendment language as a compelling indication that the prior version of the statute, the one under which Appellant's conviction rests, did not encompass persons described by the additional language, *i.e.,* those who employ or supervise the class of individuals that were within the purview of the pre-amended version. In essence, he argues that the legislature's inclusion of the "or a person that employs or supervises such a person" language in the amended statute indicated an intent to add a class of persons not originally subject to liability under the pre-amended version.

***11** The Commonwealth contends the plain meaning of the pre-amended statute clearly encompassed the class of persons added by the 2007 amendment and, thus, the amendment was merely a clarification of, rather than a substantial change of, the pre-amended statute's scope of liability. The Commonwealth further argues the case law addressing the preamended EWOC statute's broad reach supports that interpretation. Furthermore, the Commonwealth believes Appellant misconstrues the plain language of the statute by limiting the phrase "person supervising the welfare of a child" to apply only to those persons who directly supervise a child. The Commonwealth maintains that the terms "the welfare of" are rendered superfluous by such an interpretation, in contravention of the well-settled principles of statutory construction.

[5] "In a case involving a question of statutory interpretation, we are subject to the rules of statutory construction enacted by the legislature and embodied in 1 Pa.C.S.A. § 1901 *et seq.*" *Commonwealth v. Berryman,* 437 Pa.Super. 258, 649 A.2d 961, 965 (Pa.Super.1994). Section 1921 provides as follows:

> (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
>
> (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.
>
> (c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
>
> (1) The occasion and necessity for the statute.
>
> (2) The circumstances under which it was enacted.
>
> (3) The mischief to be remedied.
>
> (4) The object to be attained.
>
> (5) The former law, if any, including other statutes upon the same or similar subjects.
>
> (6) The consequences of a particular interpretation.
>
> (7) The contemporaneous legislative history.
>
> (8) Legislative and administrative interpretations of such statute.

1 Pa.C.S. § 1921.

[6] [7] [8] [9] [10] Accordingly, when this Court seeks to

> ascertain[ ] the meaning of a statute, it is our obligation to determine the intent of the legislature and give effect to that intention.
>
> We are to give the words of a statute their plain and ordinary meaning. The words are to be considered in their grammatical context. 1 Pa.C.S.A. § 1930. The scope of "grammatical context" includes the tenses of verbs used in a statute.
>
> > [S]ections of statutes are not to be isolated from the context in which they arise such that an individual interpretation is accorded one section which does not take into account the related sections of the same statute. Statutes do not exist sentence by sentence. Their sections and sentences comprise a composite of their stated purpose.
>
> *Commonwealth v. Lurie*, 524 Pa. 56, 60, 569 A.2d 329, 331 (1990) (quoting *Commonwealth v. Revtai*, 516 Pa. 53, 63, 532 A.2d 1, 5 (1987)). An interpretation of the language in a section of a statute must remain consistent throughout the statute.

...

*12 [11] Further, a statute should be interpreted as a whole, ... giving effect to all of its provisions if possible. Every word, sentence or provision of a statute is intended for some purpose and accordingly must be given effect. *Berryman*, 649 A.2d at 965—66 (some internal citations omitted).

[12] [13] When applying these rules to the construction or interpretation of a criminal statute, additional considerations apply. Generally, statutes are to be liberally construed as to give proper effect to the intent of the legislature; however, penal provisions "shall be strictly construed[.]" 1 Pa.C.S. § 1928(b)(1). Nevertheless,

> strict construction does not require that the intent of legislature be disregarded. Further, language which is capable of more than one meaning can be clear and unmistakable in the context of its usage by the selection of the meaning which is neither forced nor strained. It is only when a statute has two reasonable constructions, the construction which operates in favor of the defendant's liberty must be applied, not the construction supported by the greatest reason.

Berryman, 649 A.2d at 966–67 (internal citations omitted).

Here, the statute in question identifies three groups of people potentially subject to criminal liability for EWOC. The first two groups are not subject to dispute; the statute applies, in unambiguous terms, to a "parent" or a "guardian" of a child, if that parent or guardian "knowingly endangers the welfare of the child by violating a duty of care, protection or support." 18 Pa.C .S. § 4304(a). At issue in this case is the scope or breadth of a class of individuals subsumed in the phrase, "or other person supervising the welfare of a child[.]" *Id.* It is undisputed that Appellant was not, in any literal sense, supervising any child at St. Jerome's. He contends, therefore, that the pre-amended statute could not apply to him.

We begin with a review of the prior decisions of the Courts of Pennsylvania defining the scope of the EWOC statute. In *Commonwealth v. Mack*, 467 Pa. 613, 359 A.2d 770 (Pa.1976), our Supreme Court considered a facial challenge to the EWOC statute alleging that it was unconstitutionally vague. The Supreme Court found that the terms of the statute were indeed imprecise, but not unconstitutionally vague, because, like any statute pertaining to juveniles, the EWOC statute was intended "to cover a broad range of conduct in order to safeguard the welfare and security of our children." *Id.* at 772 (quoting *Commonwealth v. Martin*, 452 Pa. 380, 305 A.2d 14, 18 (Pa.1973)). Despite the apparent vagueness of the terms defining a violation of the statute, the Court held that "[a]n individual who contemplates a particular course of conduct will have little difficulty deciding whether his intended act 'endangers the welfare of the child' by his violation of a 'duty of care, protection or support.' " *Id.* The *Mack* Court explained:

> [S]tatutes such as the one at issue here are to be given meaning by reference to the 'common sense of the community' and the broad protective purposes for which they are enacted. With these two factors in mind, we believe that section 4304 is not facially vague. Phrases such as 'endangers the welfare of the child' and 'duty of care, protection or support' are not esoteric. Rather, they are easily understood and given content by the community at large.

*13 *Id.*

Thus, *Mack* instructs that the terms of the EWOC statute are, at least to some degree, intentionally imprecise so as to encompass a wide range of conduct, commensurate to the statute's broad, protective purpose. Nevertheless, neither this Court nor our Supreme Court has ever affirmed a conviction for EWOC where the accused was not actually engaged in the supervision of, or was responsible for supervising, the endangered child. In fact, in *Commonwealth v. Halye,* 719 A.2d 763 (Pa.Super.1998) (*en banc*), this Court reversed an EWOC conviction because the Commonwealth "failed in its burden of proving that the [a]ppellant was in the position of supervising the children" under the following circumstances:

> At trial the victim's mother testified that [the][a]ppellant, who was her second or third cousin, had come to her home with her former mother-in-law for a visit. The witness stated that her husband, her son and her daughter were also at home that evening. The children were playing in a bedroom while the adults were in another part of the home. At one point, [the] [a]ppellant indicated that he had to go to the bathroom. When he did not promptly return, and the children became quiet, the mother testified that she became concerned and walked back to the bedroom to check on them. Her daughter was seen sitting on the edge of the bed playing a game by herself. Upon opening a closet door, [the][a]ppellant was discovered with his head placed near her son's exposed privates.

Halye, 719 A.2d at 764–65.

Explaining our decision to reverse, we reasoned:

> Despite the criminal nature of [the] [a]ppellant's actions, which support his convictions for involuntary deviate sexual intercourse, indecent assault and corruption of minors, there is insufficient evidence of [the] [a]ppellant's role as a supervisor or guardian of the child to support the endangering the welfare of children conviction. No testimony was presented to indicate that [the] [a]ppellant was asked to supervise the children or that such a role was expected of him. Rather, [the] [a]ppellant was a visitor in the child's home. The child's parents were home and were supervising their children. This is evidenced by the mother's remarks that her concern for the children led her to check on them and to discover the assault by [the] [a]ppellant.

Id. at 765.

Here, the trial court rejected Appellant's argument that the evidence was insufficient as a matter of law because Appellant had no supervisory role for the children of St. Jerome's. The trial court determined that "the statute does not require that an individual be a 'supervisor of a child' to fall under EWOC's umbrella of criminal liability." TCO, at 183. The trial court explained:

> The difference between a "person supervising the welfare of a child" and a "supervisor of a child" is syntactically small, but far from trivial. The first element of the statute is satisfied when a defendant supervised the welfare of a child. In other words, the Commonwealth could have satisfied its burden to establish this element of the offense by showing that the defendant oversaw, managed, or had authority over the well[-]being of children. *See* Random House Dictionary 2013 (defining "supervise" as "to oversee (a process, work, workers, etc.) during execution of performance; superintend; have the oversight and direction of").

*14 This reading of the EWOC statute is not only consistent with a literal interpretation of the statute's language; it is also consistent with the longstanding and steadfast position that any statute designed to protect children must be read broadly. *Commonwealth v. Mack,* 467 Pa. 613, 359 A.2d 770, 772 (Pa.1976). These statutes "are to be given meaning by reference to the ... broad protective purposes for which they are enacted." *Id.* Specifically, the EWOC statute "attempts to prohibit a broad range of conduct in order to safeguard the welfare of children." *Brown,* 721 A.2d at 1107. As a result

> of the statute's protective purpose, our Supreme Court has explicitly instructed lower courts interpreting this provision to do so according to "the common sense of the community," as well as "the sense of decency, propriety and the morality which most people entertain." *Mack,* 359 A.2d at 772; *Commonwealth v. Marlin,* 452 Pa. 380, 305 A.2d 14, 18 (Pa.1973), quoting *Commonwealth v. Randall,* 183 Pa.Super. 603, 133 A.2d 276, 280 (Pa.1957).
>
> Viewing the evidence in the light most favorable to the verdict winner, the Commonwealth proved beyond a reasonable doubt that [Appellant] controlled sexually abusive priests, and that it was his responsibility to protect the children of the Archdiocese of Philadelphia from future harm. As the person who handled all issues concerning clergy sex abuse, the defendant oversaw where priests who had been accused of sexual misconduct with minors worked, lived, and spent time. It could be argued that every time a sexually abusive priest had access to a child, the child's welfare was endangered. Conversely, it could be argued that every time [Appellant] facilitated the placement of a sexually abusive priest in a position where he would be unable to have contact with a child, the child was removed from danger. Accordingly, deriving all reasonable inferences from the evidence which was presented at trial, viewed in the light most favorable to the Commonwealth, the evidence was sufficient to establish that [Appellant] was a "person supervising the welfare of a child."

Id. at 183—85 (footnotes omitted).

In its Letter Brief, the Commonwealth endorses the trial court's distinction between 'actual supervision of children' and 'supervision of the welfare of children' as the basis for Appellant's liability for EWOC. Noticeably absent from the trial court's analysis is any mention of the *Halye* decision which, even if not controlling authority in a strict sense, clearly addresses the element at issue. *Halye* appears to conflict with both the trial court's and the Commonwealth's interpretation of the EWOC statute that actual/direct supervision of a child is not required for an EWOC conviction under the pre-amended version of the statute. The Commonwealth attempts to distinguish *Halye* in a footnote, arguing:

> The case that in [Appellant]'s view "captures this Court's interpretation" of the statute, [*Halye*], in fact announces no general "interpretation" (unlike ... *Mack*), but merely applies the facts to the law. As [Appellant] idiosyncratically puts it, Halye was not guilty under § 4304 "even though [he] knew the children and was the only adult in the room" ([A]ppellant's brief, 22). Halye was the "only adult in the room" because he was sexually molesting one of the children in the room. This Court unsurprisingly concluded that Halye's doing so did not somehow create a duty of care on his part. This, of course, says exactly nothing about the overall scope of the statute, nor does it suggest that [Appellant], who had a duty of care, is somehow equivalent to Halye, who had none.

***15** Commonwealth's Letter Brief, at 19 n. 8.

The Commonwealth's argument is faulty for several reasons. First, it is unmistakable that the *Halye* Court considered actual supervision of children to be an element of the offense of EWOC:

> There is insufficient evidence to sustain a conviction for child endangerment where the Commonwealth fails to prove any statutory element. In this matter, viewing the evidence in the light most favorable to the Commonwealth, we conclude that it failed in its burden of proving that [the][a]ppellant was in the position of supervising the children at the time of the assault.

Halye, 719 A.2d at 765.

Second, the Commonwealth's argument conflates the supervision and duty elements of the statute. The *Halye* Court did not address, in any fashion, whether Halye had a duty of care, protection or support with respect to the child victim in that case. The *Halye* Court based its decision solely on the Commonwealth's failure to prove that Halye "was in the position of supervising the children...." *Halye,* 719 A.2d at 765.

The distinction between the supervision and duty elements was addressed in *Brown.* In that case, the appellant attempted to argue that he was "not supervising the welfare of a child" because "he did not have a duty to report the abuse he witnessed" being inflicted on the child victim by the victim's mother, who was Brown's friend, and who resided with Brown in his residence. This Court dismissed his argument because we found that "[a]rguing that [an appellant] did not violate a duty does not address whether or not he was within

the scope of the statute as a 'person supervising the welfare of a child.' " *Brown,* 721 A.2d at 1107. We considered Brown's argument "circular" and found that it "addresses a separate element of the crime." *Id.* Conversely, the Commonwealth's attempt to distinguish *Halye* from the instant case on the basis that Halye had no duty of care, protection or support, whereas Appellant did have such a duty, conflates or otherwise ignores the distinction between the supervision and duty elements of the EWOC statute.

Third, the Commonwealth's characterization of *Halye* as a case that "merely applies the facts to the law" is worthy of consideration, but is hardly a basis upon which to justify ignoring the import of the decision's legal conclusions. The legal question before this Court is whether the accused must be a supervisor of a child for culpability to arise under the EWOC statute. *Halye* directly confronted that legal issue, albeit in a different factual context. *Mack,* on the other hand, while providing a general outline of the legislative purpose behind the EWOC statute, did so in a completely different legal context, that being the consideration of whether the statute, as a whole, was unconstitutionally vague. *Mack* certainly guides us on the question of legislative intent, but that case offers little guidance on the precise matter before us, which deals with the interpretation of a specific element of the EWOC statute. While we must be mindful to interpret the statute in a manner that gives effect to the intent of the legislature, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). Thus, we turn to the statute to ascertain its plain meaning.

***16** **[14]** Having failed to consider the compelling implications of *Halye,* which directly considered the element in question, and having relied to an excessive extent on the broad mandate outlined by *Mack,* which did not discuss the element in question at all, the trial court's endeavor at statutory construction of the pre-amended EWOC statute was fundamentally flawed in this case. Independent of the guidance provided by those authorities, however, the trial court's parsing of the terms "the welfare of" is not a reasonable construction because it adds ambiguity where none need exist. The plain meaning of the statute requires that, for a person who is not a parent or a guardian of the endangered child to be subject to criminal liability, he must at least be engaged in the supervision, or be responsible for the supervision, of "a child."

Contrary to the Commonwealth's argument, such a reading does not render the term "welfare" redundant in contravention of the principle of statutory construction that we give effect to all of the EWOC statute's provisions. "Welfare," as defined by the American Heritage Dictionary, means "health, happiness, or prosperity; well-being." AMERICAN HERITAGE DICTIONARY 923 (4th ed.2001). Similarly, Black's Law Dictionary defines the term as "[w]ell-being in any respect; prosperity." BLACK'S LAW DICTIONARY 1625 (8th ed.1999). In the context of the phrase, "person supervising the welfare of a child," the term "welfare" does not eviscerate the requirement of supervision. [19] Rather, the statute endeavors to protect a child's overall well-being, such as to include the emotional, psychological, and overall health of the child. The term operates to make clear that supervision encompasses more than protection from physical harm or the risk of physical harm.

[15] **[16]** **[17]** Thus, the plain language of the pre-amended EWOC statute requires proof, as an element of the offense, that the accused was a supervisor of an endangered child victim when the conduct or condition giving rise to the offense occurred. [20] In doing so, we reject the interpretation of the trial court, as endorsed by the Commonwealth, that inclusion of the terms "the welfare of" in 18 Pa.C.S. § 4304(a) implies that "the statute does not require that an individual be a 'supervisor of a child' to fall under EWOC's umbrella of criminal liability." TCO, at 183. The plain meaning of the terms of that clause does not support such a construction. And, despite the broad purpose of the EWOC statute as outlined in *Mack,* "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). Accordingly, we conclude that the evidence was not sufficient to support Appellant's conviction for EWOC as a principal actor, because the Commonwealth failed to offer any evidence that Appellant was a supervisor of D.G. or any other child at St. Jerome's. [21]

Accomplice to EWOC

***17** Although we conclude that Appellant could not be convicted as a principal for EWOC, the jury was charged to consider whether Appellant was culpable for EWOC as Avery's accomplice, presenting an independent avenue by which the jury could have convicted Appellant for a violation of the EWOC statute. Thus, in Appellant's second claim, he

contends that the evidence was not sufficient for accomplice liability premised upon three distinct, alternative arguments. He first contends that accomplice liability to EWOC is a legal nullity because applying accomplice liability to EWOC is illogical, as the EWOC statute itself directly prohibits aiding and abetting child abuse or other acts or omissions that constitute a violation of "a duty of care, protection or support." 18 Pa.C.S. § 4304(a). Second, Appellant argues that even if accomplice to EWOC is not a legal nullity, the Commonwealth still failed to meet its burden because the Commonwealth's specific theory of accomplice liability was itself legally improper. Third, he claims that the evidence was still insufficient to support his conviction, even assuming the legal validity of the Commonwealth's theories.

The Crimes Code provides that "[a] person is guilty of an offense if it is committed by his own conduct *or by the conduct of another person for which he is legally accountable,* or both." 18 Pa.C.S. § 306(a) (emphasis added). A person is "legally accountable for the conduct of another person" committing a criminal offense when "he is an accomplice of such other person in the commission of the offense." 18 Pa.C.S. § 306(b).

Our Supreme Court has summarized the requirements for establishing accomplice liability as follows:

> It is well-established ... that a defendant, who was not a principal actor in committing the crime, may nevertheless be liable for the crime if he was an accomplice of a principal actor. *See* 18 Pa.C.S. § 306; *see also Commonwealth v. Bradley,* 481 Pa. 223, 392 A.2d 688, 690 (1978) (the actor and his accomplice share equal responsibility for commission of a criminal act). A person is deemed an accomplice of a principal if "with the intent of promoting or facilitating the commission of the offense, he: (i) solicit[ed the principal] to commit it; or (ii) aid[ed] or agree[d] or attempt[ed] to aid such other person in planning or committing it." 18 Pa.C.S. § 306; *Commonwealth v. Spotz,* 552 Pa. 499, 716 A.2d 580, 585 (1998). Accordingly, two prongs must be satisfied for a defendant to be found guilty as an "accomplice." *See Commonwealth v. Woodward,* 418 Pa.Super. 218, 614 A.2d 239, 242 (1992). First, there must be evidence that the defendant intended to aid or promote the underlying offense. *See id.* Second, there must be evidence that the defendant actively participated in the crime by soliciting, aiding, or agreeing to aid the principal. *See id.* While these two requirements may be established by circumstantial evidence, a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene. *See Commonwealth v. Wagaman,* 426 Pa.Super. 396, 627 A.2d 735, 740 (1993). There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so. *See id.* With regard to the amount of aid, it need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the crime. *See Commonwealth v. Cox,* 546 Pa. 515, 686 A.2d 1279, 1286 (1997).

***18** *Commonwealth v. Murphy,* 577 Pa. 275, 844 A.2d 1228, 1234 (Pa.2004).

Appellant's first sufficiency claim regarding his culpability as an accomplice to Avery concerns whether accomplice to EWOC is ever a cognizable offense. Appellant asserts that "[t]here exist no published cases in Pennsylvania that have ever found accomplice liability for EWOC." Appellant's Brief, at 34. Neither the trial court nor the Commonwealth disputes this assertion, and our own review of Pennsylvania decisional law confirms that proposition. It can also be said that no published cases in Pennsylvania have ever ruled that accomplice to EWOC is not a cognizable offense. Thus, Appellant's first argument regarding accomplice liability would certainly be one of first impression for this Court; however, we decline to address it at this time because we can resolve Appellant's case without making such a determination. As set forth below, even if accomplice liability to EWOC is a cognizable offense, we conclude that the specific theory of culpability applied in this case was not legally cognizable and that, nevertheless, there was insufficient evidence to support such a theory.

[18] Here, the trial court found that the Commonwealth's evidence satisfied both prongs of the accomplice test: 1) that Appellant "intended to promote or facilitate the commission of EWOC[;]" and 2) that Appellant "aided, agreed, or attempted to aid Avery in committing the offense of EWOC." TCO, at 202. We disagree because we conclude that the evidence was not sufficient to prove that Appellant intended to promote or facilitate the commission of EWOC. Accordingly, we also do not reach the second prong.

The trial court found that the first prong was satisfied by evidence that Appellant "intended to prevent scandal and to protect Avery." TCO, at 204. The evidence, viewed in a light most favorable to the Commonwealth, demonstrated that Appellant's first priority in dealing with sexually abusive priests appeared to be the protection of the reputation

of the Archdiocese. His second priority appeared to be protection of the reputation of the offending priest. To demonstrate Appellant's general "intent" in this regard, the Commonwealth presented copious evidence of Appellant's mishandling of other cases involving sexually abusive priests.

Constrained by our standard of review, we cannot dispute that the Commonwealth presented more than adequate evidence to sufficiently demonstrate that Appellant prioritized the Archdiocese's reputation over the safety of potential victims of sexually abusive priests and, by inference, that the same prioritization dominated Appellant's handling of Avery. Nevertheless, we do not believe such a showing is sufficient to demonstrate intent to promote or facilitate an EWOC offense. The question of whether Appellant's priorities were more with the reputation of the church, or, instead, with the victims of sexual abuse at the hands of Archdiocese priests, is not at issue in this case. The relevant question is whether there was sufficient evidence to demonstrate Appellant intended to promote or facilitate Avery's endangerment of D.G. or other children at St. Jerome's. It is not at all clear that these are indistinguishable or interchangeable theories of intent, despite the trial court's implicit suggestion that they are:

> ***19** The Commonwealth satisfied its burden to prove that the defendant intended to facilitate the commission of EWOC by showing (a) that the [Appellant]'s overarching pursuits were applicable on a smaller scale in his management of Avery, and (b) that [Appellant] was aware of the 'natural and probable consequences' of his actions in this case.

TCO, at 203.

In the passage above, (a) stands for the proposition that Appellant handled Avery in the same manner in which he handled other cases of sexually abusive priests: he prioritized the reputation of the Archdiocese over the well-being of victims and potential victims of such priests. Again, the Commonwealth provided ample evidence regarding Appellant's pattern of intentionally mishandling other sexually abusive priests with the intent to shelter both the priests and the larger church from disrepute, thus giving rise to a permissible inference for the jury to draw that Appellant acted in conformity with that intent when dealing with Avery. However, implicitly acknowledging that such broad, general intent is not itself sufficient to establish accomplice culpability, the trial court states in (b) that the Commonwealth satisfied its burden by demonstrating that Appellant was aware of the 'natural and probable consequences' of his handling of Avery. By this, the trial court must mean that the conduct which gave rise to Avery's EWOC violation was the 'natural and probable consequence' of Appellant's conduct. The record simply does not support such a theory of culpability.

There was no evidence that Appellant had any specific knowledge that Avery was planning or preparing to molest children at St. Jerome's. Indeed, Avery was not even diagnosed with a mental impairment that suggested he had a predisposition to commit sexual offenses. As such, the notion that Avery was an ongoing, ever-present danger more than a decade after having sexually assaulted R.F. was tenuous at best. Even more tenuous, then, was the conclusion that the natural and probable consequences of Appellant's negligent supervision of Avery were Avery's intentional acts of molestation against a victim unknown to Appellant. Here, the information available to Appellant only suggested Avery's acts of sexual abuse were a byproduct of his alcohol abuse, and there was no evidence that Avery had resumed drinking, or that Appellant knew of such behavior.

Nevertheless, Avery was appointed to a chaplaincy so as to limit his contact with children. There was no evidence that Appellant explicitly or implicitly approved of Avery's supervision of minors at St. Jerome's. In fact, the Commonwealth's own evidence demonstrated that upon Avery's placement at St. Jerome's rectory, that parish's pastor, Father Graham, was told that Avery "was not to be around children and was to live in the parish, be around other priests, and minster to the local hospital." N.T., 5/23/12, at 50. Even if these facts did not extinguish the risk that Avery presented to the parish, the Commonwealth's evidence was not sufficient to support the notion that the natural and probable consequence of Appellant's conduct was Avery's intentional act of molestation (which was the only conduct that could have given rise to Avery's EWOC violation). Such an inference was far too tenuous a proposition to satisfy the Commonwealth's burden of proof, even viewing all the evidence in a light most favorable to the Commonwealth.

***20** We conclude, therefore, that the theories of accomplice liability applied by the trial court in this case were not supported by sufficient evidence. There was no underlying EWOC offense committed by Avery when Appellant facilitated his appointment to the St. Jerome's rectory, or

when Avery was permitted to remain at St. Jerome's after Appellant received the influx of negative information about Avery's rehabilitation. When there was an underlying EWOC violation, Appellant's accomplice liability to EWOC was unsupported by sufficient evidence. Appellant did not know or know of D.G., he was not sufficiently aware Avery's supervision of D.G. or any other child at St. Jerome's, nor did he have any specific information that Avery intended or was preparing to molest D.G. or any other child at St. Jerome's. In sum, the evidence was insufficient to demonstrate that Appellant acted with the "intent of promoting or facilitating" an EWOC offense.

Having determined that the evidence was not sufficient to support Appellant's conviction for EWOC either as a principal or as an accomplice, we are compelled to reverse Appellant's judgment of sentence. And, as there are no other offenses for which he was convicted in this case, Appellant is ordered discharged forthwith.

Judgment of sentence *reversed.* Appellant is *discharged.*

1 Amended by Act 179 of 2006, adopted November 29, 2006 and effective January 29, 2007. Unless otherwise noted, all references to section 4304 are to the pre–2007 amended version.

2 The sole caveat being that Appellant had the authority to remove a priest from a parish if that priest "admitted that he had abused someone." N.T., 5/23/12, at 77.

3 R.F. testified at Appellant's trial. Additional information regarding R.F.'s allegations in the trial court's factual summary derived from Appellant's own notes of their meeting.

4 The Secret Archives indicated Avery had previous issues with the Archdiocese prior to his molestation of R.F. which led to his transfer to St. Philip Neri in 1976. However, Archdiocese officials were cryptic in their description of Avery's misconduct at his prior parish, describing it as a "predicament" requiring the transfer so as to "avoid another breakdown." *Id.* at 8, 844 A.2d 1228.

5 Regarding that facility, the trial court noted the following:

> Detective Joseph Walsh, a detective who participated in the long term investigation into clergy sex abuse in the Archdiocese of Philadelphia, described St. John Vianney as being the center "where priests that—were sent, priests that had problems dealing, basically, sexually abusing minors, alcohol treatment problems, psychological problems. The center itself was owned and operated by the Archdiocese, and they would send priests with problems to the center to be evaluated." St. John Vianney is located in Downingtown, Pennsylvania.

Id. at 10 n. 17, 844 A.2d 1228 (internal citations to the record omitted).

6 Here, the trial court's summary leaves the impression that Appellant did not indicate the real reason he referred Avery for an evaluation, or that he had misrepresented the reason as being that Avery had provided alcohol to minors. This is not an accurate impression, as it is unsupported and, in fact, was contradicted by the record. The first question on the referral form asked, "What are the reasons for referral of this client for assessment?" Commonwealth's Exhibit C–26. Appellant responded, "Allegations of sexual misconduct made by an adult male against Fr. Avery. The male was in his teenage years when the alleged actions took place." *Id.* It is true, however, that Appellant did not convey the specific details of the allegations made by R.F., nor did he convey Avery's statement that something 'could' have happened while he was intoxicated, as indicated by the trial court. Nevertheless, the referral was not misleading regarding the purpose for which Appellant referred Avery for evaluation at the St. John Vianney Hospital.

7 At that time, Monsignor Molloy was Assistant Vicar for Administration and Appellant's immediate supervisor. In 1998, Molloy was promoted to Vicar for Administration. The Vicar for Administration answered to the Archbishop, Cardinal Anthony Bevilacqua, the organizational head of the Archdiocese.

8 Appellant was a member of Avery's aftercare integration team.

9 There was no indication in Father Kerper's letter whether the dance worked by Avery in December of 1994 was a school event or for adults of the parish. However, Appellant's own testimony indicated that he knew it was a school event. N.T., 5/29/12, at 122—123. Responding that he understood that disc jockeying a grade school dance could be perceived as grooming behavior, Appellant stated, "Right. My understanding was that a teacher, or whoever it was in charge of the dance, asked him to do it and Graham told the teacher never do that again." *Id.* at 123, 844 A.2d 1228. However, Appellant did not identify disc jockeying as grooming behavior in Avery's case. When asked if his subsequent advice to Avery that Avery should not be disc jockeying was based upon Avery's abuse of R.F. after having

invited R.F. to assist at a disc jockeying event, Appellant answered: "I did not equate the two. As I said before, he was abused the night he helped Avery with disc jockeying, but that was after he was abused on a skiing trip, too, you know. So-but the disc jockeying, the way I understood it from the therapist, was that was part of his ... [mania.]" *Id.* Appellant was not aware of any other instances of Avery's disc jockeying events for children. He testified that "It was a onetime thing and it stopped." *Id.* at 124, 844 A.2d 1228.

10 The evidence demonstrated that Avery was not authorized by the Archdiocese to perform or serve Mass at St. Jerome's; his sole responsibility was to his chaplaincy assignment. However, it appears that many of the priests who lived at St. Jerome's rectory were expected by Graham to help out around the parish. It is not clear from the record how frequently Avery performed/served Mass at St. Jerome's, nor the extent to which Appellant knew Avery was performing that function (if at all), and that he was doing so unsupervised.

11 At Appellant's trial, testimony was limited regarding Englehardt's abuse of D.G. because, although Englehardt lived at the St. Jerome's rectory with Avery and the other priests, he belonged to a separate order within the Catholic Church that was not under the supervision of the Archdiocese.

12 D.G. testified that when he served Mass with Avery, Avery was not being supervised by Graham or anyone else.

13 A sacristy is a room for keeping vestments and other church artifacts, often located near or behind the main altar.

14 'Laicization' is a process which takes from a priest or other cleric the use of his powers, rights, and authority.

15 Prior to this case, a grand jury was empanelled in 2002 at the behest of then Philadelphia District Attorney, Lynne Abraham, to investigate the Archdiocese's treatment of allegations of sexual abuse against its priests. Appellant and other Archdiocese officials repeatedly testified before that grand jury. Concluding in 2005, the investigation resulted in a scathing 400–page report, but no criminal indictments.

> The report concluded that the pre–2007 EWOC statute did not criminalize the actions of Archdiocesan officials, such as Appellant, despite obvious shortcomings in their supervision of sexually abusive priests:
>
> > As defined under the law, ... the offense of endangering the welfare is too narrow to support a successful prosecution of the decision-makers who were running the Archdiocese. The statute confines its coverage to parents, guardians, and other persons "supervising the welfare of a child." High level Archdiocesan officials, however, were far removed from any direct contact with children.
>
> Grand Jury Report of September 15, 2005, Misc. No. 03–00–239, at 65.
>
> Act 179 of 2006, effective January 29, 2007, amended the EWOC statute to include "a person that *employs or supervises* " a parent, guardian or other person supervising a child. 18 Pa.C.S. 4304(a)(1) (current) (emphasis added). Given the pre–2007 timeframe of Appellant's conduct, the amended statute is not applicable in this case.

16 18 Pa.C.S. § 3123.

17 The jury failed to reach a verdict on any of the charges pending against Brennan.

18 EWOC is a third-degree felony, rather than a first-degree misdemeanor, "where there is a course of conduct of endangering the welfare of a child[.]" 18 Pa.C.S. § 4304(b).

19 Ironically, then, by promoting an expansive interpretation of the term "welfare" in this manner under the pretense of giving effect to all of the statute's provisions, the import of the term "supervising" is rendered superfluous.

20 To be abundantly clear, this does not *necessarily* require that the accused be in the physical presence of the child victim at the time the events or circumstances that gave rise to the EWOC charge occurred. Physical presence may indeed be a critical factor for other purposes under the statute, particularly considering the vast array of potential facts that might give rise to an EWOC charge. Nevertheless, being in the physical presence of the endangered child is neither conclusive proof of supervision, *see Halye,* nor would its absence, alone, demonstrate that the accused was not a supervisor.

21 Under the umbrella of Appellant's first claim, he raises other quasi-related claims, including constitutional claims that were contingent upon the manner in which we chose to interpret the statute. Because of our disposition in this case, we need not reach Appellant's other embedded claims, and many of them have been rendered moot.

Parallel Citations

2013 PA Super 328

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Appendix B

PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH

v.

WILLIAM LYNN

Sarmina, J.

April 12, 2013

CP-51-CR-0003530-2011

Superior Court No.
2171 EDA 2012

OPINION[1]

PROCEDURAL HISTORY

On June 22, 2012, following a co-defendant jury trial,[2] William Lynn (defendant) was found guilty of one count of endangering the welfare of children (EWOC), victim D.G.[3] and other unnamed minors (F-3).[4] On July 24, 2012, the defendant was sentenced to a term of not less than three nor more than six years imprisonment in the State Correctional Institution. Notes of Testimony (N.T.) 7/24/2012 at 130. The defendant did not file post-sentence motions. On August

[1] Due to the voluminous nature of the evidence and the issues set forth in the course of this Court's 1925(a) Opinion, an index has been attached at the end of this document and may be of assistance to the reader.

[2] The defendant initially went to trial along with Rev. James Brennan and former priest Edward Avery. The Commonwealth charged the defendant with being in a conspiracy with each. Avery pled guilty to involuntary deviate sexual intercourse and conspiring to endanger the welfare of children – 18 Pa.C.S. §§ 3123(a) and 903(c) respectively – on March 22, 2012, after the jury had been selected but before the evidence began. The trial continued with just the defendant and Father Brennan.

[3] As per the October 4, 2012 Order of the Superior Court, issued in relation to the defendant's bail pending appeal motion, President Judge Stevens, "that all references to victims shall be by their initials only in all filings," this Court will only refer to victims by their initials.

[4] 18 Pa.C.S. § 4304. As the jury found a "course of conduct endangering the welfare of a child," this conviction was a third-degree felony. See 18 Pa.C.S. § 4304(b); see also discussion of "course of conduct" in § (II)(2), *infra*. The defendant was acquitted of one count of endangering the welfare of children, victim M.B. and other unnamed minors, and acquitted of conspiracy (F-3) with Avery and other Archdiocesan officials. At the conclusion of the Commonwealth's case-in-chief, the defendant had moved for a judgment of acquittal, which this Court granted as to the charge of conspiring with James Brennan. Notes of Testimony (N.T.) 5/17/2012 at 187.

8, 2012, a timely notice of appeal was filed. On August 30, 2012, in response to this Court's August 14, 2012 Order pursuant to Pa.R.A.P. 1925(b), the defendant filed a timely Statement of Matters Complained of on Appeal ("1925(b) Statement"), in which he raised the issues discussed herein.

FACTS

The defendant was ordained as a priest on May 15, 1976. N.T. 5/23/2012 at 66. Prior to his ordination, the defendant received eight years of education at the seminary and graduated with a Bachelor's degree in philosophy. N.T. 5/16/2012 at 93-94. He earned two postgraduate degrees: a Master of Divinity and a Master's in Education Administration. Id. Following two four-year stints as a parish priest, respectively at St. Bernard's Parish in Northeast Philadelphia and at St. Catherine of Siena in Wayne, PA, he became the Dean of Men at St. Charles Borromeo Seminary on June 6, 1984. N.T. 5/17/2012 at 32. In January of 1991, he was appointed as the Associate Vicar in the Office of the Vicar for Administration under Monsignor Edward Cullen. Id.; N.T. 5/23/2012 at 68. During the 18 months he worked in that position, the defendant assisted Monsignor James E. Molloy with "taking notes when he would meet with people in a matter of sexual abuse of a minor."[5] N.T. 5/23/2012 at 69. In June of 1992, Cardinal Anthony Bevilacqua appointed the defendant as Secretary for Clergy for the Archdiocese of Philadelphia,[6] effective June 15, 1992, replacing Monsignor John J. Jagodzinski. N.T. 5/17/2012 at 32. The defendant served in that post

[5] Monsignor Molloy taught the defendant that there was a certain way to interview victims and note the allegations against a priest. The defendant testified that Molloy "show[ed] me how to do it." N.T. 5/23/2012 at 183. "I learned from him." Id. at 184.

[6] The Archdiocese of Philadelphia is comprised of five counties – Philadelphia County, Montgomery County, Bucks County, Delaware County and Chester County. During the defendant's tenure as Secretary for Clergy, the offices of the Archdiocese of Philadelphia were located in Philadelphia County at 222 North 17th Street. N.T. 4/3/2012 at 264. See Attachment A (illustrating the hierarchy of the Archdiocese of Philadelphia – introduced at trial as Exhibit C-1749; N.T. 4/3/2012 at 270).