NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ERIC SWANHART Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1115 EDA 2013

Appeal from the Judgment of Sentence March 14, 2013
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CR-09-CP-0001750-2012

BEFORE: ALLEN, J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY JENKINS, J.: **FILED MAY 15, 2014**

Appellant Eric Swanhart appeals the judgment of sentence entered on March 14, 2013, upon his conviction for one count of indecent assault of a person less than 13 years of age.[1] We affirm.

The trial court summarized the evidence underlying Appellant's conviction as follows:

> At trial, the evidence viewed in the light most favorable to the Commonwealth, as verdict winner, revealed the following:
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> On June 12, 2011, Appellant's stepdaughter, M.R., visited her friend M.H. and told her that Appellant had touched "[m]y private parts." Specifically, M.R. recounted that Appellant had touched her vagina while at their home in Tinicum Township, Bucks County, Pennsylvania. M.H. advised M.R. to tell her

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 3126(a)(7).

mother about the incident and M.R. informed her mother and M.H.'s mother of the touching. After notifying her mother about the event, "I stayed over at [M.H.'s] house and my mom went home to [Appellant]."

M.R.'s mother, Lisa Swanhart (hereinafter "Ms. Swanhart"), returned to the home owned by Appellant and his mother where she lived at the time of the incident with her two other children, M.R., Appellant and his mother. She confronted Appellant in the kitchen concerning what M.R. had told her. After the discussion with Appellant, Ms. Swanhart observed him remain in the kitchen for a brief period of time prior to going "upstairs to prepare for the next morning." The next morning, according to Ms. Swanhart, Appellant "got his bags together and left for the airport." She further noted that Appellant "never came back to the house after he left that morning." After leaving the home, Appellant did contact Ms. Swanhart by telephone. Ms. Swanhart later became aware that her husband, Appellant, "was in the hospital for being unwell and for trying to commit suicide."

On the evening of June 14, 2011, Appellant presented himself to the emergency department of St. Luke's Hospital in Quakertown, Bucks County, Pennsylvania. There, Appellant was first seen by nurse Yvette Stowman who initially assessed him. Nurse Stowman noted that Appellant was at the hospital for "suicidal ideations" or an "[i]ntent to harm himself." Appellant informed Stowman that he carried out his intent to harm by giving himself a dose of insulin the day prior to his visit to St. Luke's. In responding to Nurse Stowman's standard inquiries regarding the cause of his distress, Appellant recounted to her that "approximately a month ago he stuck his hand down his stepdaughter's pants."

Later that evening, Appellant was also treated by Dr. John Davis of St. Luke's Emergency Department. Dr. Davis recollected that Appellant "had come in voluntarily. He was concerned about having thoughts of killing himself." Appellant apprised Dr. Davis that on the day before his visit, "[h]e took 20 units of insulin injected in order to kill himself." Davis recalled that Appellant's "reason was that he…put his hand down his stepdaughter's pants about a month prior and was upset over that, and he told his wife about that."

Dr. Davis filled out an emergency physician record pertaining to his treatment of Appellant. In that record, Dr. Davis quoted Appellant remarking there was "nothing for me in this world." Finally, based upon his conversation with Appellant, Dr. Davis also noted in the emergency physician record that "[o]ne month ago the patient put his hands down his stepdaughter's pants" and that "he had touched the child for about ten seconds."

On June 16, 2011, two days after Appellant presented himself to St. Luke's, M.R. spoke with Jaime Valleley, a forensic interviewer for the Buck County Children's Advocacy Center, and told Valleley that Appellant "had touched me…[o]n my vagina." Valleley explained to M.R. that other individuals, namely the district attorney in this case, Officer Nicole Madden of the Tinicum Township Police Department, and a representative from Bucks County Children and Youth Services, were observing the interview from behind a two-way mirror. M.R. then revealed that Appellant touched her vagina for approximately two to four seconds. Valleley testified that M.R. recalled that she "was asleep but she had opened her eyes to see her stepfather sitting next to her on her bed." M.R. relayed to Valleley that the touching occurred at 2 or 3 in the morning while she was in her bed. M.R. stated to Valleley that Appellant had "touched me in a circular motion." M.R. told Valleley that "[Appellant] left without saying anything. He touched her there, he got up, and he left without saying anything."

M.R. also reported to Valleley when she told her mother about Appellant's contact with her vagina, "her mother was surprised but that they…had an incident a few months before, so she didn't know if her mother was…shocked." M.R. told Valleley that "during the initial incident her stepfather had come into the room and touched her on her chest." M.R. informed Valleley that "she was lying in her bed. She felt [Appellant] tickling…her leg and her stomach, and that was something that he typically did to wake her up in the morning." M.R. stated to Valleley that Appellant "did this and then he moved under her shirt and touched her chest. She reported that he used his hand in and he moved his hand in a – sort of box formation when he touched her chest." Valleley testified that M.R. said that Appellant's "hand went under her shirt onto her skin."

Officer Madden made several attempts to speak with M.R.'s mother, Lisa Swanhart. On July 5, 2012, Officer Madden

attempted to speak with Ms. Swanhart who rebuffed her and said that "she didn't believe it was in her best interest to speak with us." At trial, Ms. Swanhart revealed that she would suddenly lose a significant sum of money and a place to live if Appellant were excluded from her life. Nevertheless, Ms. Swanhart maintained that she was not concerned about the financial implications for her if Appellant, her husband, was found guilty.

In August, Ms. Swanhart did speak to Officer Madden at the Tinicum Township police station while M.R. was upstairs in the station with a representative from the Bucks County Office of the Network of Victim Assistance (NOVA). Swanhart opined to Officer Madden that "she did not believe [Appellant] had done it, and said that [M.R.] now was stating that she didn't think it happened, but she didn't want to tell us because she didn't want to be wishy-washy was the term she had used."

Officer Madden observed that when M.R. returned downstairs and spoke to her while Swanhart was out of the room. "she did express a little bit of confusion, but once we had her alone and she was able to feel comfortable about it she did state that the events did, in fact, happen." During this meeting at the Tinicum Township police station, M.R. gave authorities a letter she had written. M.R. testified that in the letter she wrote:

> I'm having second thoughts about [Appellant]…I don't want him to go to court. I miss him and would like to see him…I'm not sure if it happened. I don't know if it was Jordan, Kathleen, or even a dream. It was so long ago…I don't know everything. I wished I opened my eyes that night. I don't want anyone to get in trouble.

M.R. revealed that approximately four or five days after she had written the letter, she had lunch with Nicole Housenick. M.R. testified that Housenick, her Godmother, was the first person she informed that she had made up the story regarding Appellant. Regarding this lunch encounter with Housenick, M.R. further revealed that "I just remember going to lunch with her and her giving me a speech."

According to Housenick, M.R. asked her "[c]an we do breakfast tomorrow…and I said, sure." Despite opining at trial that her Goddaughter had a poor reputation for truthfulness, during this particular meal, Housenick encouraged M.R. to "tell me your truth." In addition to being M.R.'s Godmother,

Housenick has been friends with Appellant for about twenty years and became "very good friends" with Appellant's wife, Ms. Swanhart. Regarding her relationship with Ms. Swanhart, Housenick mentioned that "we try to get together often, but more recently than in earlier years. Ever since we've been in Pennsylvania we get together more often." In fact, "we used to meet for breakfast every week, her and I, at our favorite place."

Subsequently, at preliminary hearing and at trial, M.R. contradicted her prior statements and denied that the aforementioned incidents of inappropriate contact occurred. Appellant also presented testimony by Dr. Perry Berman, M.D., who was admitted by [the trial court] as an expert in the area of forensic psychiatry. Dr. Berman opined Appellant suffered from bipolar illness and a history of depression. As a result of this diagnosis coupled with abuse from his mother, Dr. Berman pronounced that if someone, such as Ms. Swanhart, accused him of an improper act "it had to be true; it had to be true, there was no doubt in his mind that it had to be true, and that the initial part of what disturbed him to the extent he was saying he did it, and he was repeating what he was told he had done."

In rebuttal, the Commonwealth called Dr. John Shanken-Kaye, who was admitted as an expert in the field of sexual offense diagnosis and treatment. Dr. Shanken-Kaye disagreed with Dr. Berman's finding because he did not "feel that Dr. Berman adequately supported his point of view that the [Appellant] somehow…admitted to something that he did not do." Dr. Shanken-Kaye continued, "I didn't feel that the evidence that Dr. Berman cited was significant enough to come to that conclusion when there was, in my opinion, an overwhelming amount of evidence to the contrary."

Specifically, Dr. Shanken-Kaye observed that after Appellant received medication in the hospital to assist with his mood, "there's absolutely no mention in any of the records about the slightest bit of doubt, the slightest bit of equivocation, the slightest comment, maybe this didn't happen; maybe I'm being falsely accused." Conversely, Dr. Shanken-Kaye "felt that there was a very important spontaneous remorse on the part of [Appellant] that I think, in my opinion, he reasonably and justifiably felt really horrible about this, felt really terrible about this and guilty, and acted on those feelings, and to me, that's the plainest reading of all the records regarding [Appellant]." In Dr. Shanken-Kaye's opinion, "[t]o spin a different story…requires

> not only understanding but believing that the alleged victim was lying, [Appellant] is psychotic, that no one picked up on the fact that he was also mentally disordered that maybe he didn't even understand what he was doing, and, in my opinion, as a scientist, there's a principle that the simplest explanation of a situation tends to be the correct explanation."

Trial Court Pa.R.A.P. 1925(a) Opinion, June 6, 2013 ("Trial Court Opinion"), at 1-7 (record citations and footnotes omitted).

The jury convicted Appellant of indecent assault of a person less than 13 years of age. On March 14, 2013, the trial court sentenced him to 6 to 23 months' incarceration followed by 2 years' probation. This timely appeal followed.

Appellant raises the following issues for our consideration:

> I. Whether the Honorable Trial Court erred by admitting testimony about a prior uncharged incident where the victim alleged Appellant rubbed her chest because it was presumptively inadmissible under Pennsylvania Rule of Evidence 404(b), especially in light of the fact that there was no corroborating evidence that the incident occurred, the victim denied its' occurrence, and any minimal probative value was substantially outweighed by its' prejudicial effect?
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> II. Whether the Honorable Trial Court erred by charging the jury that Appellant exhibited consciousness of guilty by his suicide attempt because the Commonwealth, throughout the entire trial, consistently maintained that Appellant did not, in fact, attempt suicide, and Appellant's conduct was nothing more than a continuation of a lifetime of mental health issues?
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> III. Whether the Honorable Trial Court erred by ruling the victim's statements were admissible under the Tender Years Act, 42 Pa.C.S.A. § 5985.1 without conducting an *in camera* hearing and did not have sufficient evidence to determine whether the time, content, and circumstances of the statements provided sufficient indicia of reliability?

> IV. Whether the Honorable Trial Court erred by precluding Appellant from introducing evidence regarding the victim's psychiatric history during the examination of Appellant's expert witness because said testimony was relevant, admissible, and a part of the basis of the expert testimony?

Appellant's Brief at 4.

Appellant first contends that testimony regarding a prior incident where Appellant allegedly rubbed the victim's chest under her clothes was presumptively inadmissible character evidence, the prejudicial value of which outweighed its probative value. Appellant also alleges that the trial court erred by not providing the jury with a cautionary instruction regarding this evidence. We disagree.

This Court has stated the well-established standard of review for admission of evidence claims as follows:

> The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. Thus, [this Court's] standard of review is very narrow. To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.

Commonwealth v. Lopez, 57 A.3d 74, 81 (Pa.Super.2012).

In relevant part, Pennsylvania Rule of Evidence 404(b) reads:

> **(b) Other crimes, wrongs, or acts.**
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> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

> (2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
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> (3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

Pa.R.E. 404(b)(1)-(3).[2] As our Supreme Court has explained, "Rule 404(b)(2) reflects [that] evidence of other crimes, wrongs, or acts may be admitted when relevant for a purpose other than criminal character/propensity, including: proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." ***Commonwealth v. Dillon***, 925 A.2d 131, 137 (Pa.2007) (internal quotations omitted). Additionally, our Supreme Court has expressly "recognized a *res gestae* exception to Rule 404(b) which allows admission of other crimes evidence when relevant to furnish the context or complete story of the events surrounding a crime." ***Id.*** (citation omitted).

"Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material

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[2] This version of Pa.R.E. 404 was in effect during the Appellant's trial in the end of November through early December of 2013. The Legislature rescinded and replaced the rule on January 17, 2013, with an effective date of March 18, 2013. The changes to Rule 404(b) would have no bearing on our analysis of the instant appeal.

fact." ***Commonwealth v. Minerd***, 752 A.2d 225, 230 (Pa.2000) (citations omitted). Evidence is "prejudicial" only when it is "so prejudicial that it may inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." ***Commonwealth v. Colon***, 846 A.2d 747, 753 (Pa.Super.2004) (citation omitted).

Here, the prior incident evidence furnished the jury with the complete story of the events surrounding the indecent assault and comported with the expert testimony that defendants progress from minor to more serious incidents of abuse in child molestation cases. This evidence was relevant, probative, and formed an integral part of the case history. As the trial court properly concluded:

> …M.R.'s prior statements that the Appellant touched her chest a few months before the charged incident provided valuable background information to the fact-finder as it demonstrated the development of Appellant's behavior which ultimately resulted in the charged offense.

Trial Court Opinion at 9. Therefore, the testimony explaining the prior incident was admissible under the *res gestae* exception.

Moreover, we find that the prior incident testimony was not so prejudicial as to "suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially."

Pa.R.E. 403 cmt. Therefore, the probative value of the prior incident evidence outweighed its potential for prejudice.[3]

Additionally, to the extent Appellant claims that the trial court erred by failing to instruct the jury regarding the use of the prior incident testimony, the claim also lacks merit. First, the trial court did in fact instruct the jury on the limited use of the prior incident testimony during its jury charge.[4] Second, Appellant failed to object or request a cautionary instruction at the

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[3] We note that the jury maintained at all times the prerogative to believe or disbelieve the prior incident testimony. ***See Commonwealth v. Levy***, 83 A.3d 457, 461 (Pa.Super.2013) ("[T]he trier of fact while passing on the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.").

[4] The trial court instructed the jury as follows:

> Now, you have heard evidence in this case tending to prove that the [Appellant] was guilty of improper conduct for which he is not on trial, and I'm speaking of the testimony to the effect that while the [victim's] family was living in Lansdale several months before the alleged incident at issue in June of 2011, that the [Appellant] allegedly touched the minor's breast area. This evidence is before you for a limited purpose; that is, for the purpose of tending to show that the [Appellant] had the intent or purpose to have indecent contact with a minor on or about June 1st of 2011. This evidence of the prior incident may not be considered by you in any other way other than for the purpose I just stated to you. You must not regard this evidence of the prior incident as showing that the [Appellant] is a person of bad character or criminal tendencies from which you might be inclined to infer guilt.

N.T. 12/4/2012 at 118.

time the trial court admitted the testimony,[5] and so waived the claim. ***See*** N.T. 11/30/2012 at pp. 42-46, 52, 87-91, 107-108, 171-173, 184-185; ***Commonwealth v. Molina***, 33 A.3d 51, 55 (Pa.Super.2011) ("a defendant's failure to object to allegedly improper testimony at the appropriate stage in the questioning of the witness constitutes waiver."). He cannot now complain, on direct appeal, that the trial court erred in not providing an instruction that he did not request. Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); ***Commonwealth v. Colavita***, 993 A.2d 874, 891 (Pa.2010) ("[The Pennsylvania Supreme] Court has consistently held that an appellate court cannot reverse a trial court judgment on a basis that was not properly raised and preserved by the parties."); ***see also Commonwealth v. Holmes***, 79 A.3d 562, 576 (Pa.2013) ("claims of ineffective assistance of counsel are to be deferred to PCRA review"). Accordingly, we find that the trial court did not abuse its discretion or commit an error of law in admitting the prior incident testimony into evidence.

Appellant next contends the trial court improperly charged the jury that, if they believed a post-incident suicide attempt occurred, they could consider it as consciousness of guilt. ***See*** Appellant's Brief at 18-22. This argument also lacks merit.

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[5] In addition to not objecting, counsel inquired about the prior incident on cross-examination. N.T. 11/30/2012, pp. 52, 107-108.

We review jury instructions with deference to the trial court and may only reverse the lower court where it abused its discretion or committed an error of law. ***Commonwealth v. Hornberger***, 74 A.3d 279, 282 (Pa.Super.2013).

> [W]hen reviewing jury instructions for error, the charge must be read as a whole to determine whether it was fair or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration.

Hornberger, 74 A.3d at 283.

Pennsylvania law has long made clear that attempted suicide may be probative as to a defendant's consciousness of guilt. As we have explained:

> In general, evidence that the accused attempted to commit suicide is relevant as a circumstance tending in some degree to show consciousness of guilt. It is admissible on the theory that an *attempt at suicide* may be construed as an attempt to flee and escape forever from the temporal consequences of one's misdeed. As a general rule, therefore,
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> > The fact that one charged with a crime attempts to commit suicide soon after the offense occurs, or in order to escape prosecution for committing such crime, is admissible in evidence. The principle upon which evidence of flight of one accused of a crime is admitted is applicable to the evidence that the accused, when in custody, charged with a crime, attempted to take his own life and thereby escape further prosecution. Attempted suicide, as does flight, tends to show a consciousness of guilt.

Commonwealth v. Sanchez, 610 A.2d 1020, 1026 (Pa.Super.1992) (internal quotations, brackets, and citations omitted) (emphasis in original); ***see also Commonwealth v. Giacobbe***, 19 A.2d 71 (Pa.1941) (suicide

attempts admissible to show consciousness of guilt); ***Commonwealth v. Homeyer***, 94 A.2d 743 (Pa.1953) (same). Likewise, suicidal ideations or threats also constitute proper consciousness of guilt evidence. ***See Sanchez***, ***supra***.

Here, the trial evidence established that, after his wife confronted him with the incident of sexual assault, the Appellant had suicidal ideations and attempted suicide by self-administering 20 units of insulin. He told hospital staff that his suicide attempt was in response to his remorse over the incident. The court accordingly instructed the jury on consciousness of guilt as follows:

> There was also evidence that the [Appellant] made an attempt to commit suicide shortly after the incident in question. Now, if you believe this evidence, you may consider it as tending to prove the [Appellant's] consciousness of guilt. You are not required to do so, however. You should consider this and weigh this evidence along with all the other evidence in the case in determining what weight and effect you give to this particular evidence.

N.T. 12/4/2012 at 118-19.

Given the evidence of record, the trial court properly charged the jury on consciousness of guilt.

Appellant's next claim concerns evidence admitted pursuant to the Tender Years Hearsay Act.[6] Appellant contends that the trial court abused

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[6] 42 Pa.C.S. § 5985.1.

its discretion in admitting the child victim's hearsay statements because they lacked sufficient indicia of reliability. We disagree.

The Pennsylvania Rules of Evidence define hearsay as "a statement, other than the one made by the declarant while testifying at the time of trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c).[7] "Hearsay is not admissible except as provided by [the Pennsylvania Rules of Evidence], by other rules prescribed by the Pennsylvania Supreme Court, or by statute." Pa.R.E. 802. The admission of hearsay statements made by a child 12 years old or younger who is an alleged victim of a sexual assault offense is governed by statute: the Tender Years Hearsay Act. ***Commonwealth v. Allshouse***, 924 A.2d 1215, 1217 (Pa.Super.2007).

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[7] The quoted text represents the version of Pa.R.E. 801(c) in effect at the time of Appellant's trial. Following Appellant's trial, the Legislature amended Pa.R.E. 801(c) to mirror Federal Rule of Evidence 801(c). The new rule makes no substantive changes; it merely restructures the definition as follows:

> **(c) Hearsay.** "Hearsay" means a statement that
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> **(1)** the declarant does not make while testifying at the current trial or hearing; and
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> **(2)** a party offers into evidence to prove the truth of the matter asserted in the statement.

Pa.R.E. 801(c), version effective March 18, 2013.

The tender years exception provides:

> **(a) General rule.–**An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
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> (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
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> (2) the child either:
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> (i) testifies at the proceeding; or
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> (ii) is unavailable as a witness.

42 Pa.C.S. § 5985.1. "The tender years exception allows for the admission of a child's out-of-court statement because of the fragile nature of young victims of sexual abuse." ***Commonwealth v. Lukowich***, 875 A.2d 1169, 1172 (Pa.Super.2005), *appeal denied*, 584 Pa. 706, 885 A.2d 41 (2005). A statement admitted under Section 5985.1 must possess sufficient indicia of reliability, as determined from the time, content, and circumstances of its making. ***Commonwealth v. O'Drain***, 829 A.2d 316, 320 (Pa.Super.2003) (citing ***Commonwealth v. Fink***, 791 A.2d 1235, 1248 (Pa.Super.2002)). "Factors to consider when making the determination of reliability include, but are not limited to, the spontaneity and consistent repetition of the statement(s); the mental state of the declarant; and, the lack of motive to

fabricate." ***Commonwealth v. Lyons***, 833 A.2d 245, 255 (Pa.Super.2003), *appeal denied*, 583 Pa. 695, 879 A.2d 782 (2005).

Here, in anticipation of the victim's expected recantation testimony, the Commonwealth filed a motion *in limine* seeking to allow four witnesses' testimony regarding the victim's previous reports of abuse. ***See*** N.T. 11/29/2012 at 6-17. Prior to trial, the parties discussed the motion with the trial court. ***Id.*** The Commonwealth explained the tender years procedure and informed the court as to the availability of the witnesses for both trial testimony and an *in camera* hearing. ***Id.*** at 9-13. The court indicated it would conduct an *in camera* hearing regarding the proposed tender years witnesses, at which hearing he would require each to testify. ***Id.*** at 11, 14. Thereafter, defense counsel withdrew the objection to the Commonwealth's tender years motion, stating:

> Your Honor, let me speed things along even further. If the [c]ourt is going to conduct an in camera hearing, I am aware of what these people are going to say, and I have a very hard time thinking that the [c]ourt is going to find that irrelevant, so I'm going to withdraw that objection at this point, just to save time.

Id. at 15. The parties then stipulated that the summary of the testimony included in the Commonwealth's motion was the witnesses' proffered testimony, and acquiesced to an *in camera* review of the testimony by the

court in lieu of a full *in camera* hearing. ***Id.*** at 16.[8] After its review, the court found it would view the testimony as relevant and reliable, provided the witnesses testified at trial in conformity with the averments of the Commonwealth's motion *in limine*. ***Id.*** at 17.

The record makes clear that the Commonwealth stood ready to proceed with the required tender years *in camera* hearing. The trial court also stood ready to proceed with the required tender years *in camera* hearing. The hearing did not occur because Appellant's counsel withdrew the objections to the intended testimony, stating that he had "a very hard time thinking that the [c]ourt is going to find [that testimony] irrelevant." N.T. 11/29/2012 at 15. As a result of withdrawing his objection, Appellant waived the claim. ***See Colavita***, ***supra***.

In his final claim, Appellant argues the trial court erred in refusing to allow his expert to testify regarding the victim's mental health history. We find no error.

As with other evidence, the admission of expert scientific testimony is within the purview of the trial court's discretion and should not be disturbed absent an abuse of that discretion. ***Commonwealth v. Szakal***, 50 A.3d 210, 227 (Pa.Super.2012). Expert testimony is proper "if scientific,

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[8] This testimony included the victim's spontaneous statement to a witness within one month of the incident and her repetition of the account, with a high degree of consistency, multiple times thereafter to another witness.

technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Pa.R.E. 702.[9] However, "[c]redibility is always a question of fact for a jury rather than the subject of proper testimony of an expert witness." ***Commonwealth v. Rounds***, 542 A.2d 97, 998 n.4 (Pa.1988); ***see also Commonwealth v. Seese***, 517 A.2d 920, 922 (Pa.1986) ("It is an encroachment upon the province of the jury to permit admission of expert testimony on the issue of a witness' credibility.").

Here, the trial court limited the scope of the Appellant's expert testimony as follows:

> Certainly, if the victim has a psychiatric condition that goes to her ability to observe events, her ability to tell the truth and -- or inability to tell the truth, I would permit an expert -- again, depending upon whether there is a foundation for that expert's testimony -- to testify as to this issue. I will not permit an expert to testify against her about her general psychological or psychiatric condition if it does not relate specifically to her ability to observe events and tell the truth.

N.T. 11/29/2012 at 32.

We find no abuse of discretion in the trial court's admission of this evidence or the limitations placed upon it. We further note that even if we had found error in the trial court's evidentiary determination, the error would

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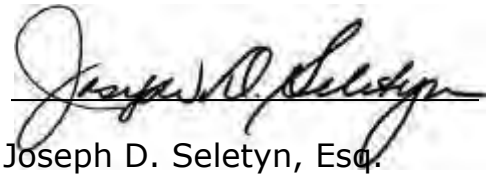
[9] The Legislature also changed this rule effective March 18, 2013, although, again, the changes have no effect on our analysis.

have been harmless.[10] The jury received information about the victim's mental health history and alleged predilection for lying through the testimony of both the victim's mother and her godmother. ***See*** N.T. 11/30/2012, pp. 113-125; N.T. 12/3/2012, pp. 45-48. Accordingly, this claim is without merit.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/15/2014

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[10] "[A]n erroneous ruling by a trial court on an evidentiary issue does not require us to grant relief when the error is harmless." ***Commonwealth v. Mitchell***, 902 A.2d 430, 452 (Pa.2006). "An error will be deemed harmless where the appellate court concludes beyond a reasonable doubt that the error could not have contributed to the verdict." ***Id.*** (internal quotations and citations omitted).