NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CRAIG DAVID ICE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 990 MDA 2013

Appeal from the Judgment of Sentence May 2, 2013
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0003118-2011

BEFORE: GANTMAN, P.J., DONOHUE, J., and STABILE, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED APRIL 21, 2014**

Appellant, Craig David Ice, appeals from the judgment of sentence entered in the Dauphin County Court of Common Pleas, following his jury trial convictions for two (2) counts each of indecent assault, corruption of minors, and unlawful contact with minor.[1] We affirm.

The relevant facts and procedural history of this appeal are as follows.

> The victim, E.A. …, testified that she first met [Appellant] in February 2007. [Appellant] was her mother C.A.'s boyfriend and he moved into C.A.'s home with E.A. shortly thereafter. [Appellant] and C.A. married [on] May 23, 2010.
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> In the summer of 2009, C.A. and [Appellant] moved into a blue house, when E.A. was twelve years old, which they remained in for about one year. E.A. testified that after a

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[1] 18 Pa.C.S.A. §§ 3126, 6301, 6318, respectively.

couple of months in the blue house, [Appellant] began to act and touch her inappropriately. The first instance occurred when they were both sitting on a couch. E.A. was doing homework while her mother was at work. E.A. got up to get something and [Appellant] got up right after her and pulled down her shorts past her knees. About a half hour later, while E.A. was lying on the couch watching TV, [Appellant] stood between her and the TV and pulled down his pants. E.A. immediately turned her head and [could not] tell whether [Appellant] had pulled down his underwear. She ran upstairs to her bedroom. She then went to her mother's bedroom because she could lock it. [Appellant] later came up to the room and told her that he had only been "playing" and that "it wasn't a big deal."

E.A. recounted a second incident at the blue house occurring when she was twelve years old. E.A. testified that while her mother was away, she was in [a] room with [Appellant] used for storage. She was wearing an over-sized shirt with a built-in bra and [Appellant] suggested that E.A. fill the bra with aquarium stones located in the room. E.A. filled in one side of the bra with stones after which [Appellant] placed his hand into the bra and touched her breast and nipple. She told him to stop and he quickly removed his hand. [Appellant] told her he was only playing, that it was no big deal and not to tell her mom.

In the summer of 2010, after they had married, C.A. and [Appellant] moved with E.A. to a home on Cherrington Drive. E.A. testified that a few days after the move she was unpacking with [Appellant] while her mother was away. [Appellant] told her to say the "F" word and E.A. refused. She recalled that [Appellant] began to chase her, which she initially perceived as playful behavior. She ran into a closet and laid down on the ground. [Appellant] followed and kneeled down next to her. He first touched her breasts under her shirt. He then tried to put his right hand down under the top of her shorts. E.A. told him to stop and grabbed a book from a nearby shelf and placed it in her pants, blocking his reach. Undeterred, [Appellant] reached his right hand up through the bottom of her shorts and over her underwear, pinching E.A.'s vaginal area. E.A. stated that his hand remained there for about a minute. During the incident [Appellant] continued to try to

convince E.A. to use the "F" word. E.A. stated that she repeatedly told [Appellant] to stop and at one point reached up and bit his left shoulder hard enough to leave a bruise. She eventually yelled at him three or four times to "get the fuck off of me" and he eventually did so.

E.A. also testified about a fourth incident, occurring at the Cherrington Drive home. In the summer or early fall of 2010, E.A. got out of a shower from a bathroom connected to her bedroom, after which [Appellant] knocked on her door and said he lost his phone. E.A. volunteered to call his phone and discovered it on top of her TV. [Appellant] told her [he] had been videotaping the dog with it. E.A., who suspected he had been videotaping her, indicated that [Appellant] had no reason to have his phone in her room noting she had never seen it there, that [Appellant] did not use her charger, that she had never seen [Appellant] videotape the family dog and that the family dog never spent time in her bedroom. She nevertheless admitted that she could not tell if the phone had been videotaping.

E.A. did not tell her mother about any of the four incidents (pulling pants down near couch, touching breast in storage room, touching breasts and vagina in closet and leaving phone in bedroom) because she [did not] think her mother would believe her. She testified that her mother had told E.A. that she was very happy living with [Appellant] and E.A. [did not] want to upset that. E.A. testified that her mother would generally take [Appellant's] side when there was conflict between E.A. and [Appellant]. E.A. also testified she told no one else about any of the incidents at the time they happened other than a close family friend, Shawna Messersmith, whom she told about the phone in the bedroom. She did not tell Messersmith about the other incidents because E.A. assumed Messersmith would tell her mother, and her mother would not believe her.

On December 10 or 11, 2010, C.A. informed E.A. and E.A.'s grandmother that [Appellant] was having an affair. E.A. described C.A. as distraught and that C.A. intended to kick [Appellant] out of the house. While sitting with her grandmother, E.A. announced to her grandmother that she (E.A.) was going to put [Appellant] in jail. Her grandmother inquired as to why and E.A. confessed that

> [Appellant] had hurt her (E.A.) and explained some of what [Appellant] had done. The grandmother accused E.A. of lying, which E.A. denied. They both approached C.A. and E.A. told her mother that [Appellant] had hurt her. E.A. decided to tell her mother because she thought her mother now saw [Appellant's] "true colors" and would believe her. C.A. called the police immediately and E.A. was interviewed that evening and told police about the incidents….
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> After police were notified, E.A. was scheduled for an interview at the Children's Resource Center ("CRC") for December 16, 2010. In the days leading up to the interview, C.A. asked E.A. to provide specifics about what [Appellant] did to her. E.A. sensed her mother did not believe her and asked her mother if she missed [Appellant] and wanted to get back together with him. C.A. admitted she did. E.A. decided that since her mother did not believe her and because she wanted to protect her mother and make her happy, E.A. would lie during the CRC interview. E.A. followed through and denied all the allegations at the interview, which was videotaped and later played at trial for the jury. E.A. told the CRC interviewers that she initially accused [Appellant] of touching her because she was mad after hearing about [Appellant's] affair and wanted revenge. She also told them she was motivated to make up the allegations because she [did not] want a father figure in her life and liked having just her mother. Finally, she claimed she [did not] want to see an innocent man put behind bars. E.A. told the interviewers that she was prompted to make up the allegations about being touched from having read it in a book. E.A. testified at trial that her mother never told her what to say to the CRC interviewers.
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> E.A.'s CRC interview was watched on closed circuit TV by Sue Kolanda, the Coordinator of the Child Abuse Prosecutor Unit in the Dauphin County District Attorney's Office, and by Detective Michael Mull of the Susquehanna Township Police, who was the investigating officer. Kolanda testified that she had been told prior to the interview that E.A. might recant her allegations. Kolanda watched the video and was concerned because E.A. was "robotic," exhibiting a very flat affect. After the interview,

she and Detective Mull sought out E.A. Kolanda told her she was concerned for her. Kolanda asked E.A. a number of specific questions about the book E.A. had mentioned in her interview, including where, when and how she got it. Kolanda stated that E.A. became more nervous with each question she was unable to answer[,] and Kolanda believed there was no book. Kolanda also asked about a comment E.A. made during the CRC interview, which was that E.A. said [Appellant] makes her mom happy. Kolanda told E.A. that she was worried for her since E.A. may be going back to the same situation and live with [Appellant] again. According to Kolanda, E.A. then admitted that her mother and [Appellant] were discussing getting back together. Kolanda told E.A. to contact her if her allegations against [Appellant] were "legit."

E.A. testified that Kolanda and Detective Mull had approached her following her CRC interview and that Kolanda asked her the name of the book she read about inappropriate touching and from which library she got it. E.A. admitted she had no answers and assumed Kolanda and Detective Mull knew she had lied to the CRC interviewers.

A few days after the CRC interview, E.A. testified at a protection from abuse ("PFA") hearing in Dauphin County. She testified at the hearing that she had lied about [Appellant] touching her, explaining that she was mad at [Appellant] for cheating on her mother. E.A. explained at trial that at the time, her mother was trying to get back together with [Appellant], which is why she lied at the PFA hearing.

E.A. testified that her mother remained very upset and sad about her situation with [Appellant] throughout the holidays, which made E.A. sad and hurt for her mother. Around this time, C.A. attempted suicide over her situation with [Appellant]. E.A. then went to live with Shawna Messersmith for a few weeks in early January 2011. E.A. testified that while staying with Messersmith, she confessed the details of the incidents with [Appellant].

* * *

> Detective Mull testified that sometime after the CRC interview he received information from people close to E.A. that her initial report to the police was true. He contacted C.A. and they set up a meeting with E.A. for February 9, 2011 at the police station. Detective Mull later received a message that E.A. was unable to make the appointment and he and Kolanda volunteered to meet at their home. Upon their arrival, they found E.A. locked in her bathroom, refusing to open the door or respond to them. Detective Mull managed to open the lock and they found E.A. sitting in a ball in the bathroom closet, sobbing.
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> Detective Mull left to attend to C.A. and Kolanda stayed in the bathroom with [E.A.], trying to comfort her. Kolanda talked with E.A. for a while and was able to get her to sit up. E.A.'s grandfather, with whom E.A. has a good relationship, joined them. He told E.A. she needed to tell the truth, whatever it was. E.A. got up from the closet floor and hugged her grandfather. Kolanda told E.A. they needed to move forward at which point E.A. told her that [Appellant] had done things to her. E.A. agreed to come out and talk. Kolanda and Detective Mull testified that E.A.'s demeanor changed dramatically after she agreed to talk. E.A. described the details of the incidents to Kolanda and Detective Mull, the same ones she had initially described for police in December 2010.
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> E.A. testified that when Kolanda and Detective Mull arrived at her home she hid in her bathroom closet and locked the door. She testified that she intended "to keep lying" and deny [Appellant] had touched her in order to protect her mother, who still wanted to get back together with [Appellant]. E.A. testified, however, that after Kolanda talked with her and made her feel comfortable, she admitted to Kolanda she had lied at the CRC interview.

(Trial Court Opinion, filed May 2, 2013, at 2-7) (internal citations to the record omitted).

On October 19, 2011, the Commonwealth filed a criminal information charging Appellant with multiple sex offenses. Following trial, a jury

convicted Appellant of two counts each of indecent assault, corruption of minors, and unlawful contact with minor. The jury found Appellant not guilty of one (1) count each of corruption of minors and unlawful contact with minor. Prior to sentencing, the Commonwealth informed Appellant of its intent to seek a mandatory minimum sentence for a second sex offense conviction under 42 Pa.C.S.A. § 9718.2(a)(1). The court conducted Appellant's sentencing hearing on November 27, 2012. At the conclusion of the hearing, the court sentenced Appellant to an aggregate term of three hundred (300) to six hundred (600) months' imprisonment. Significantly, the court imposed mandatory minimum sentences for the unlawful contact with minor convictions, pursuant to Section 9718.2(a)(1).[2]

Appellant timely filed a post-sentence motion on December 6, 2012. In it, Appellant argued that the imposition of Section 9718.2(a)(1) mandatory minimum sentences amounted to cruel and unusual punishment in violation of the United Sates and Pennsylvania Constitutions. Appellant subsequently sought permission to file an amended post-sentence motion

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[2] The court sentenced Appellant to consecutive terms of twenty-seven (27) to eighty-four (84) months' imprisonment for each of the indecent assault convictions. The court sentenced Appellant to three hundred (300) to six hundred (600) months' imprisonment for each of the unlawful contact convictions, to run concurrent with each other and concurrent with the indecent assault sentences. The court also sentenced Appellant to sixteen (16) to eighty-four (84) months' imprisonment for each of the corruption of minors convictions, to run consecutive to the indecent assault sentences and concurrent with the unlawful contact sentences.

nunc pro tunc, which the court granted. Appellant filed the amended post-sentence motion *nunc pro tunc* on January 25, 2013. In it, Appellant asserted that the court imposed illegal sentences for the indecent assault convictions. Appellant also challenged the discretionary aspects of sentencing and the weight of the evidence supporting the convictions.

On April 1, 2013, Appellant filed a motion for an extension of time for the decision on the post-sentence motions. The court granted Appellant's motion on April 2, 2013, providing a thirty-day extension. On May 2, 2013, the court filed an opinion and order granting Appellant's post-sentence motions in part. Specifically, the court vacated the sentence imposed for one count of indecent assault, re-sentencing Appellant to a term of twelve (12) to twenty-four (24) months' imprisonment for that conviction. The court denied relief in all other respects.

Appellant timely filed a notice of appeal on June 3, 2013. On June 5, 2013, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant complied with the court's order.

Appellant now raises five issues for our review:

> WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S POST-SENTENCE MOTION FOR MODIFICATION OF SENTENCE WHERE THE TWENTY-FIVE (25) YEAR MANDATORY MINIMUM SENTENCE OF IMPRISONMENT IMPOSED PURSUANT TO 42 PA.C.S.A. § 9718.2(a)(1), SENTENCES FOR SEXUAL OFFENDERS, AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 13 OF THE

> PENNSYLVANIA CONSTITUTION AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT IS GROSSLY DISPROPORTIONATE TO THE CRIME?
>
> WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S POST-SENTENCE MOTION WHERE THE JURY'S VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE SO AS TO SHOCK ONE'S SENSE OF JUSTICE WHERE THE ALLEGED VICTIM'S TESTIMONY WAS INCREDIBLE?
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> WHETHER THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE ADMISSION OF SUSAN KOLANDA'S EXPERT TESTIMONY WHERE SHE IS NOT AN EXPERT AND WAS NOT QUALIFIED AS AN EXPERT PRIOR TO HER TESTIMONY, WHERE APPELLANT WAS NOT GIVEN NOTICE OF SUCH TESTIMONY, AND WHERE THE ISSUES ADDRESSED THEREIN WERE NOT BEYOND THE KNOWLEDGE POSSESSED BY THE AVERAGE LAYPERSON?
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> WHETHER THE TRIAL COURT ERRED IN ADMITTING SUSAN KOLANDA'S TESTIMONY WHICH REFUTED THE VICTIM'S ASSERTION THAT THE VICTIM FABRICATED THE ALLEGATIONS AGAINST APPELLANT BASED ON A BOOK THE VICTIM READ WHERE KOLANDA'S TESTIMONY WAS SPECULATIVE?
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> WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF SHAWNA MESSERSMITH AS SUCH TESTIMONY WAS CUMULATIVE AND CONSTITUTED IMPERMISSIBLE BOLSTERING?

(Appellant's Brief at 6-7).

In his first issue, Appellant contends the Section 9718.2(a)(1) mandatory minimum sentences were grossly disproportionate to the gravity of the offenses. Appellant asserts that the predicate offense triggering the application of Section 9718.2(a)(1) was an incest conviction. Appellant explains that he committed the incestuous acts when he was a juvenile, but

the Commonwealth did not prosecute him until several years later, after he became an adult. Regarding the current criminal episode, Appellant emphasizes that the indecent assault convictions were graded as misdemeanors. Appellant acknowledges that the acts of touching E.A.'s breast and genitalia were inappropriate; nevertheless, Appellant maintains he did not engage in a prolonged course of conduct with E.A., and society would not deem his actions "as reprehensible as the archetypical sexual offense [of] rape." (Appellant's Brief at 18). Further, Appellant argues that defendants in Pennsylvania and other jurisdictions have received lesser sentences for similar and more egregious behavior. Appellant concludes the imposition of Section 9718.2(a)(1) mandatory minimum sentences amounted to cruel and unusual punishment in violation of the United Sates and Pennsylvania Constitutions. We disagree.

The following principles govern our review:

> The Pennsylvania Supreme Court has consistently held that enactments of the General Assembly enjoy a strong presumption of constitutionality. All doubts are to be resolved in favor of sustaining the constitutionality of the legislation. Nothing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void. In other words, we are obliged to exercise every reasonable attempt to vindicate the constitutionality of a statute and uphold its provisions. The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases. Moreover, one of the most firmly established principles of our law is that the challenging party has a

> heavy burden of proving an act unconstitutional. In order for an act to be declared unconstitutional, the challenging party must prove the act clearly, palpably and plainly violates the constitution. Finally, we note that:
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> > The power of judicial review must not be used as a means by which the courts might substitute its judgment as to public policy for that of the legislature. The role of the judiciary is not to question the wisdom of the action of [the] legislative body, but only to see that it passes constitutional muster.

Commonwealth v. Barnett, 50 A.3d 176, 196-97 (Pa.Super. 2012), *appeal denied*, ___ Pa. ___, 63 A.3d 772 (2013) (quoting ***Commonwealth v. Smith***, 732 A.2d 1226, 1235-36 (Pa.Super. 1999), *affirmed*, 575 Pa. 203, 836 A.2d 5 (2003)) (internal citations and quotation marks omitted).

"This Court has consistently held that '[t]he Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendment of the United States Constitution' and, thus, 'the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution.'"[3] ***Barnett, supra*** at 197 (quoting ***Commonwealth v.***

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[3] Appellant does not argue that Pennsylvania Constitution offers greater protection against cruel punishments than the United States Constitution. Further, Appellant's brief does not include a separate argument under ***Commonwealth v. Edmunds***, 526 Pa. 374, 586 A.2d 887 (1991), which provides the suggested four-factor analysis for an appellant to present when raising issues implicating the Pennsylvania Constitution. Thus, we examine Appellant's claim as a challenge under the Eighth Amendment to the United States Constitution.

Yasipour, 957 A.2d 734, 743 (Pa.Super. 2008)). "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences which are grossly disproportionate to the crime." ***Commonwealth v. Baker***, ___ Pa. ___, ___, 78 A.3d 1044, 1047 (2013) (quoting ***Commonwealth v. Hall***, 549 Pa. 269, 307, 701 A.2d 190, 209 (1997)).

> In ***Commonwealth v. Spells***, 417 Pa.Super. 233, 612 A.2d 458, 462 (1992) (*en banc*), the Superior Court applied the three-prong test for Eighth Amendment proportionality review set forth by the United States Supreme Court in ***Solem v. Helm***, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and determined that a five-year mandatory minimum sentence for offenses committed with a firearm does not offend the Pennsylvania constitutional prohibition against cruel punishments. The ***Spells*** court observed that the three-prong ***Solem*** proportionality test examines: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." The ***Spells*** court correctly observed that a reviewing court is not obligated to reach the second and third prongs of the test unless "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."

Baker, supra at ___, 78 A.3d at 1047-48 (some internal citations omitted).

"A searching review of Eighth Amendment proportionality decisions shows that, with respect to recidivist sentencing schemes, successful challenges are extremely rare." ***Id.*** at 1048. "The United States Supreme

Court has continuously upheld longer sentences, for less serious crimes, against Eighth Amendment challenges." ***Barnett, supra*** at 200.[4]

Additionally, Section 9718.2 provides:

> **§ 9718.2. Sentences for sex offenders**
>
> **(a) Mandatory sentence.—**
>
> (1) Any person who is convicted in any court of this Commonwealth of an offense set forth in section 9795.1(a) or (b) (relating to registration) shall, if at the time of the commission of the current offense the person had previously been convicted of an offense set forth in section 9795.1(a) or (b) or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction, be sentenced to a minimum sentence of at least 25 years of total confinement, notwithstanding any other provision of this title or other statute to the contrary. Upon such conviction, the court shall give the person oral and written notice of the penalties under paragraph (2) for a third conviction. Failure to provide such notice shall not render the offender ineligible to be sentenced under paragraph (2).

42 Pa.C.S.A. § 9718.2(a)(1).[5]

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[4] In ***Barnett***, the jury convicted the defendant of unlawful contact with minor, indecent assault, and corruption of minors in conjunction with the defendant's sexual abuse of a minor female. The court sentenced the defendant to a term of 25–50 years' incarceration, pursuant to Section 9718.2, where the defendant's predicate offense was a 1978 incest conviction.

[5] We note the legislature amended this statute by 2011, December 20, P.L. 446, No. 111, § 5, effective December 20, 2012.

Instantly, Appellant acknowledged the applicability of Section 9718.2(a)(1), due to a 2001 conviction for incest. (***See*** N.T. Sentencing, 11/27/12, at 7-8.) To the extent Appellant now suggests that the imposition of a mandatory minimum term of twenty-five years' imprisonment constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution, the trial court concluded Appellant could not establish an inference of gross disproportionality:

> [Appellant's] conduct against E.A. was reprehensible. He was in a position of trust with E.A., initially as her mother's boyfriend then later as her stepfather. The acts occurred in the victim's own home, when her mother was away while E.A. was between twelve and thirteen years of age. [Appellant] used his position of power and trust to violate his stepdaughter. Furthermore, there was no credible evidence presented that [Appellant's] actions were misguided attempts to punish E.A.'s misbehavior and/or a mistaken attempt at corporal punishment. They were clearly conducted for [Appellant's] sexual gratification.
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> I thus find that the grading of the offenses in question and the possible range of sentences which could be imposed, absent the mandatory sentence, fail to establish an inference of gross disproportionality considering the nature and gravity of the conduct in relation to the sentence imposed.
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> [Appellant] also argues his sentence is grossly disproportionate because he was a juvenile when he committed the predicate offense. [Appellant] raises this issue primarily to stress the fifteen-year gap between the commission of the incest crime(s) and his crimes against E.A.
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> * * *
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> [T]he fifteen year gap…is relevant to [the trial] court's inquiry and would arguably weigh in favor of a

> determination of gross disproportionality. However, it is not [the] court's exclusive or primary focus. As was the case in ***Barnett***, the time gap between crimes here is not sufficiently weighty or compelling to establish an inference of gross disproportionality when compared with the nature and gravity of the conduct, which…reveal no lack of gross disproportionality with the sentence imposed.

(***See*** Trial Court Opinion, filed May 2, 2013, at 14-15.)

We agree and emphasize that this Court and our Supreme Court have recently rejected similar constitutional challenges to the mandatory sentencing provisions of Section 9718.2. ***See Baker, supra*** (holding threshold comparison of gravity of second conviction for possessing and viewing child pornography against imposition of Section 9718.2 mandatory sentence did not lead to inference of gross disproportionality; appellant, who was thirty-three years of age at sentencing, had possibility of parole at some point following expiration of mandatory minimum sentence); ***Barnett, supra*** (holding appellant failed to establish inference of gross disproportionality regarding Section 9718.2 mandatory sentence, even though most serious offenses for which jury convicted appellant were third degree felonies, predicate offense occurred in 1978, appellant would be ineligible for parole until he was ninety-five years old, and appellant presented evidence that he had made amends with victim of predicate offense). We conclude that Appellant has not raised an inference of gross disproportionality; thus, he is not entitled to relief on his first claim.

In his second issue, Appellant maintains that E.A. had a reputation for lying, and her own family did not initially believe the sexual abuse allegations. Appellant asserts E.A. admitted fabricating the abuse allegations on multiple occasions, including the CRC interview and the PFA hearing. Appellant contends E.A. wanted to eliminate him from her life, because E.A. did not like being disciplined by Appellant. Appellant also claims E.A. wanted to end his relationship with C.A. so E.A. could be closer to her mother. Based upon the foregoing, Appellant argues "E.A.'s testimony was so patently unreliable and contradictory as to make any verdict based thereon pure conjecture…." (Appellant's Brief at 31). Appellant concludes the verdict was against the weight of the evidence. We disagree.

The following principles apply to our review of a weight of the evidence claim:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the…verdict if it is so contrary to the evidence as to shock one's sense of justice.
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> ***Commonwealth v. Small***, 559 Pa. 423, [435,] 741 A.2d 666, 672-73 (1999). Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 574 Pa. 435, 444, 832 A.2d 403, 408 (2003), *cert. denied*, 542 U.S. 939, 124 S.Ct. 2906, 159 L.Ed.2d 816 (2004) (most internal citations omitted).

The Pennsylvania Crimes Code defines indecent assault as follows:

> **§ 3126. Indecent assault**
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> **(a) Offense defined.—**A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:
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> * * *
>
> (7) the complainant is less than 13 years of age; or;
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> (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

18 Pa.C.S.A. § 3126(a)(7), (8). Indecent contact is defined as: "Any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 Pa.C.S.A. § 3101.

The Crimes Code defines corruption of minors as follows:

> **§ 6301. Corruption of minors**
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> **(a) Offense defined.—**
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> (1)(i) Except as provided in subparagraph (ii), whoever, being of the age of 18 years and upwards, by any act

> corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.

18 Pa.C.S.A. § 6301(a)(1)(i). The Crimes Code defines unlawful contact with minor as follows:

> **§ 6318. Unlawful contact with minor**
>
> **(a) Offense defined.—**A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:
>
> (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).
>
> * * *
>
> **(c) Definitions.—**As used in this section, the following words and phrases shall have the meanings given to them in this subsection:
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> * * *
>
> "Contacts." Direct or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.

18 Pa.C.S.A. § 6318(a)(1), (c).

Instantly, E.A. testified that she first met Appellant in 2007. Appellant moved in with E.A. and her mother shortly thereafter. In the summer of 2009, after E.A.'s twelfth birthday, Appellant began to act inappropriately on occasions when E.A.'s mother was not present. Initially, Appellant pulled down E.A.'s gym shorts while they were "goofing off" one night. (***See*** N.T. Trial, 8/6/12-8/8/12, at 65). E.A. was wearing underpants, which remained in place. E.A. immediately pulled up her gym shorts and proceeded to do her homework. Approximately thirty minutes later, Appellant pulled down his own pants in front of E.A. E.A. turned her head away and left the room. E.A. did not tell her mother about the incident, because she did not think that her mother would believe her.

Around the same time, E.A. recalled entering a room in the house used for storage. Appellant was with her. Appellant and E.A. found some rocks that were used for the base inside a fish tank. Appellant suggested that E.A. place the rocks inside her bra, and E.A. complied. Once E.A. had filled one side of her bra with the rocks, Appellant put his hand down her shirt. Appellant touched E.A.'s breast and nipple. E.A. asked Appellant to stop, and he quickly removed his hand. Appellant told E.A. "he was only playing," and she should not tell her mother about the incident. (***Id.*** at 79). Again, E.A. did not tell her mother.

About a year later, E.A., her mother, and Appellant moved into a different house. Appellant and E.A. were unpacking when Appellant asked

E.A. to use the "f" word. E.A. refused and started to joke with Appellant. In response, Appellant chased E.A. around the house. Thinking this was some sort of game, E.A. ran into a bathroom closet and sat down on the floor. Appellant followed E.A. into the closet and demanded that she say the "f" word. E.A. described what happened next as follows:

> [COMMONWEALTH]: And was he able to put his hand up your shorts?
>
> [WITNESS]: Yes.
>
> [COMMONWEALTH]: And do you know, did he put them underneath your underpants or over top of your underpants?
>
> [WITNESS]: Over top.
>
> [COMMONWEALTH]: And did it touch any part of your vagina?
>
> [WITNESS]: Yes.
>
> [COMMONWEALTH]: Did it go inside your vagina?
>
> [WITNESS]: No.
>
> [COMMONWEALTH]: Did he do anything with his hand once it was touching your vagina?
>
> [WITNESS]: Yes.
>
> [COMMONWEALTH]: What did he do?
>
> [WITNESS]: Pinched.

(***Id.*** at 89).

In December 2010, E.A. first informed her mother and grandmother about the inappropriate contact, only after learning that Appellant was

cheating on her mother. (***Id.*** at 102). E.A. also conceded that she recanted the abuse allegations at the CRC interview and the PFA hearing. (***Id.*** at 107, 111). E.A. decided to recant because her mother wanted to remain in a relationship with Appellant, and E.A. "wanted her to be happy." (***Id.*** at 107). Following the recantations, E.A. informed Ms. Kolanda that she had lied at the CRC interview, and Appellant "really did do it." (***Id.*** at 117).

Here, the jury was free to believe all, part, or none of E.A.'s testimony, and to determine her credibility. ***See Champney, supra***. We emphasize that the jury was fully aware of E.A.'s recantations, as well as her change of heart; nevertheless, the jury credited her version of the facts regarding the abuse. The court concluded the jury's verdict was not contrary to the weight of the evidence. (***See*** Trial Court Opinion, filed May 2, 2013, at 18.) We see no abuse of discretion in the court's conclusion. ***See Champney, supra***. On this record, Appellant is not entitled to relief on his second issue.

In his third and fourth issues, Appellant asserts that the trial court impermissibly permitted Ms. Kolanda to opine that E.A. had lied during the CRC interview. Appellant maintains Ms. Kolanda's opinion amounted to expert testimony regarding E.A.'s credibility, despite the fact that Ms. Kolanda had no specialized knowledge in the field of child psychology. Appellant insists the Commonwealth did not seek to qualify Ms. Kolanda as an expert, and the Commonwealth compounded this error by failing to disclose Ms. Kolanda's expert opinion prior to trial. Appellant contends he

suffered prejudice due to the admission of Ms. Kolanda's testimony, because the jury's verdict rested solely on its finding that E.A. was credible.

Appellant further argues that the court impermissibly permitted Ms. Kolanda to provide speculative testimony. Appellant cites a portion of Ms. Kolanda's direct examination where she commented on whether E.A. could have made up the abuse allegations after reading books on the subject. Appellant claims Ms. Kolanda's statement, "[C]learly there were no books [E.A.] was referring to," was speculative, because Ms. Kolanda had no way of knowing whether such books existed. (Appellant's Brief at 35) (citing N.T. Trial at 165). Appellant concludes the court erred in admitting Ms. Kolanda's testimony on these bases. We disagree.

"Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." ***Commonwealth v. Drumheller***, 570 Pa. 117, 135, 808 A.2d 893, 904 (2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003) (quoting ***Commonwealth v. Stallworth***, 566 Pa. 349, 363, 781 A.2d 110, 117 (2001)).

> Admissibility depends on relevance and probative value. 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 a material fact.

Drumheller, supra at 135, 808 A.2d at 904 (quoting ***Stallworth, supra*** at 363, 781 A.2d at 117-18).

The Pennsylvania Rules of Evidence govern the admission of expert testimony as follows:

> **Rule 702. Testimony by experts**
>
> If scientific, 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, a witness qualified as an expert by knowledge, skill experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa.R.E. 702. Pennsylvania Rule of Evidence 701 governs opinion testimony by lay witnesses:

> **Rule 701. Opinion testimony by lay witnesses**
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Pa.R.E. 701.[6]

Instantly, the parties discussed the scope of Ms. Kolanda's testimony before the start of trial. Defense counsel requested that Ms. Kolanda "be excluded [from] mentioning any of her experiences with child victims or any so-called expert testimony about children not being able to come forward

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[6] On January 17, 2013, after Appellant's trial, the legislature rescinded these versions of Pa.R.E. 701 and 702. The current versions of the rules went into effect on March 18, 2013. For our purposes, the rules are essentially the same.

without trust or anything along those lines." (***See*** N.T. Trial at 16.) Defense counsel argued that Ms. Kolanda's testimony should be limited to what E.A. told her. In response, the prosecutor indicated that he "would probably tend to offer [Ms. Kolanda] just as a fact witness…." (***Id.*** at 19).

On direct examination, Ms. Kolanda testified that she was employed with the Dauphin County District Attorney's Office as the coordinator of the child abuse prosecution unit. Over the course of her fifteen-year career, she participated in "thousands" of investigations involving children. (***Id.*** at 153). The prosecutor asked Ms. Kolanda, "And in your experience in those thousands of cases, do kids sometimes make up the story?" (***Id.*** at 154). Defense counsel immediately objected, and the parties went to a sidebar. Defense counsel complained that the court should not permit Ms. Kolanda to provide an expert opinion about the probability of a child recanting. The prosecutor defended his question as follows:

> If I could just put on the record, Your Honor, and it is not my intention to mislead you but the entire defense is she made this up and I am asking [Ms. Kolanda] do kids sometimes make it up and do they sometimes say it didn't happen when it did and I am going to leave it there. I am not going to [ask] why do they do things[,] which in my opinion is an expert opinion.

(***Id.*** at 155). The court overruled defense counsel's objection, Ms. Kolanda stated that children "sometimes" make up stories about abuse, and the prosecutor moved on to a different line of questioning. (***Id.***)

Later, the prosecutor asked Ms. Kolanda about the CRC interview. Ms. Kolanda testified that she was "concerned" about E.A.'s recantation. (***Id.*** at 162). The prosecutor asked why Ms. Kolanda was concerned, and defense counsel again objected. The prosecutor offered to rephrase the question, which the court permitted. Consequently, the prosecutor asked, "Was there anything that you specifically observed about [E.A.] that gave you concern?" (***Id.*** at 163). Ms. Kolanda responded, "What I observed, I saw her very flat…affect. She was robotic is the way I saw her. She was unemotional. That is what I actually saw and then in addition…there [are] some things that she said that concerned me." (***Id.***)

Thereafter, Ms. Kolanda detailed the conversation she and Detective Mull had with E.A. after the CRC interview:

> We had her come over and [we] explain[ed] who we were again, introduced ourselves and, you know, she wasn't in any kind of trouble. Sometimes—well, she wasn't in any trouble and I told her I was concerned about her and I said to her, you know, you had mentioned this book, that this is where you are getting your ideas from. And specifically I recall in her interview when asked where…this stuff came from she said…a book or something. So to me that caught my attention.
>
> So I thought all right, let's talk about this book and I asked her where, you know, the book that you mentioned, can you tell me the name of it and she said no. No, I don't remember. Okay. And she's starting to get more nervous each time I ask her a question regarding the particulars of this book. I said, all right, if you don't remember we still probably could figure it out. I said how about where did you get it from. She responded the library. I said okay. I said what library was it. I don't remember. Okay. When did you get this book. Maybe, you know, I could track it

> down or something like that and I don't remember, it was a long time ago and she was becoming increasingly more nervous.
>
> * * *
>
> When she was in her interview I was obviously concerned and one thing she said that really struck me was…she said he makes my mom happy and that was with regard to [Appellant]. And with her the way she was acting, not being able to talk about what books there were, clearly there were no books she was referring to.

(***Id.*** at 164-65). Defense counsel immediately objected to the testimony as speculative, and the court overruled the objection.

Contrary to Appellant's assertions, Ms. Kolanda did not testify as an expert. Rather, the Commonwealth presented her as a fact witness. The challenged portions of the testimony amount to no more than Ms. Kolanda's observations of E.A. from the day of the CRC interview. Ms. Kolanda's testimony did not address "scientific, technical or other specialized knowledge beyond that possessed by a layperson." ***See*** Pa.R.E. 702. Further, Ms. Kolanda did not provide speculative testimony about the book E.A. claimed to have read. Instead, Ms. Kolanda provided a lay witness opinion based on her observations. ***See*** Pa.R.E. 701. We conclude the court properly admitted Ms. Kolanda's testimony, and Appellant is not entitled to relief on his third and fourth issues. ***See Drumheller, supra***.

In his fifth issue, Appellant asserts that E.A. was the Commonwealth's first witness at trial, and she maintained her abuse allegations were true, despite having recanted on multiple occasions. Appellant contends the

Commonwealth presented Ms. Messersmith to testify E.A. told her that the allegations were true. Appellant insists the Commonwealth could not use Ms. Messersmith's testimony to prove E.A.'s prior consistent statement. Appellant argues that E.A.'s prior consistent statement to Ms. Messersmith did not arise before E.A. had a motive to fabricate the allegations against Appellant; thus, Ms. Messersmith's testimony violated Pa.R.E. 613. Appellant concludes the court erred in admitting Ms. Messersmith's testimony on this basis.[7] We disagree.

Pennsylvania Rule of Evidence 613 governs prior consistent statements as follows:

Rule 613. Prior statements of witnesses

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[7] The trial court concluded Appellant waived this issue, because he "raised no objection at trial…to Ms. Messersmith's testimony on the basis that it was either cumulative or bolstering." (Trial Court Opinion, filed July 2, 2013, at 2). ***See also Commonwealth v. Lopez***, 57 A.3d 74 (Pa.Super. 2012), *appeal denied*, ___ Pa. ___, 62 A.3d 379 (2013) (reiterating appellant complaining about admission of evidence will be confined to specific objection made in trial court). While the issue set forth in Appellant's statement of questions presented refers to the admission of cumulative testimony and impermissible bolstering, the crux of Appellant's argument is that the Commonwealth could not use Ms. Messersmith's testimony to prove E.A.'s prior consistent statement. At trial, defense counsel objected to Ms. Messersmith's testimony as follows, "And I am just going to renew my objection that I previously made about how I think that this testimony…is improper testimony to do prior consistent statements…." (***See*** N.T. Trial at 189.) Therefore, we will address Appellant's claim to the extent it challenges the admissibility of evidence of E.A.'s prior consistent statement.

> **(c) Evidence of prior consistent statement of witness.** Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:
>
> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
>
> (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation.

Pa.R.E. 613(c).[8] "[T]o be admissible to rebut a charge of improper motive, …the prior consistent statement must have been made before the motive to lie existed." ***Commonwealth v. Busanet***, 618 Pa. 1, ___, 54 A.3d 35, 66 (2012), *cert.* denied, ___ U.S. ___, 134 S.Ct. 178, 187 L.Ed.2d 122 (2013).

Instantly, E.A. testified that she told Ms. Messersmith about some of Appellant's behavior before December 2010. The only incident E.A. recounted to Ms. Messersmith was the occasion where she found Appellant's cell phone in her bedroom. E.A. did not tell Ms. Messersmith about the other incidents, because Ms. Messersmith would inform E.A.'s mother. At that time, E.A. still did not want her mother to know about the abuse. E.A. maintained that her mother would not believe the allegations. Moreover,

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[8] On January 17, 2013, after Appellant's trial, the legislature rescinded this version of Pa.R.E. 613. The current version of the rule went into effect on March 18, 2013. For our purposes, the rule is essentially the same.

E.A.'s mother was still happy with Appellant, and E.A. did not want to upset her mother.

On or about December 11, 2010, E.A. learned that Appellant was cheating on her mother. After watching her mother cry over Appellant's cheating, E.A. decided, "I was going to put [Appellant] in jail." (***See*** N.T. Trial at 103.) E.A. informed her mother and grandmother that Appellant had abused her. E.A. thought her mother would finally believe her abuse allegations, "[b]ecause she saw [Appellant's] true colors." (***Id.*** at 105). Upon learning of the abuse, E.A.'s mother contacted the police.

A few days later, E.A. attended the CRC interview. Immediately prior to the interview, E.A. asked her mother if she wanted to get back together with Appellant. E.A.'s mother conceded that she wanted to take Appellant back. In light of her mother's comments, E.A. decided to lie to the CRC interviewers. At trial, E.A. testified that she lied because she wanted her mother to be happy.

On cross-examination, defense counsel questioned E.A. about the day she learned Appellant was cheating on her mother. Defense counsel's questioning emphasized that E.A. informed her mother and grandmother about the abuse only after learning that Appellant had cheated. (***Id.*** at 132). Defense counsel also asked E.A. detailed questions regarding the CRC interview, the PFA hearing, and E.A.'s decision to recant on both occasions. At the conclusion of the cross-examination, defense counsel revisited the

subject of Appellant's cheating on E.A.'s mother. E.A. reiterated that she was angry with Appellant for cheating, but she recanted to make her mother happy. (***Id.*** at 144). Thus, Appellant attacked E.A.'s credibility by repeatedly highlighting her fabrication.

Later during trial, Ms. Messersmith testified that she had known E.A. since birth. In December 2010, prior to the cheating allegations, E.A. informed Ms. Messersmith about the discovery of Appellant's cell phone in her bedroom:

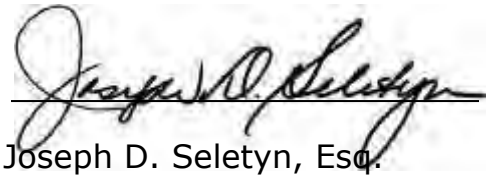
> She told me about an incident that happened…with the cell phone. I guess [Appellant] had mentioned he had lost his cell phone and she said well, why don't you call it and I guess he called it and she found the phone in her bedroom up on a shelf…facing the bathroom.

(***Id.*** at 200).

Here, E.A.'s statement to Ms. Messersmith constituted a prior consistent statement used to rebut an express charge of fabrication. ***See*** Pa.R.E. 613(c). Additionally, the testimony reveals that E.A. did not have a motive to fabricate at the time she made the statement to Ms. Messersmith. ***See Busanet, supra***. Under these circumstances, the trial court properly admitted Ms. Messersmith's testimony. ***See Drumheller, supra***. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



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Prothonotary

Date: 4/21/2014