NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. WILLIAM JOSEPH GOODROW, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1035 MDA 2013

Appeal from the Judgment of Sentence of January 18, 2011
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0001073-2010, CP-22-CR-0001074-2010, CP-22-CR-0001076-2010 and CP-22-CR-0004846-2010

BEFORE: MUNDY, OLSON AND STABILE, JJ.

MEMORANDUM BY OLSON, J.: **FILED JULY 25, 2014**

Appellant, William Joseph Goodrow, appeals from the judgment of sentence entered on January 18, 2011. On this direct appeal, Appellant's court-appointed counsel has filed both a petition to withdraw as counsel and an accompanying brief pursuant to ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), and its federal predecessor, ***Anders v. California***, 386 U.S. 738 (1967). We conclude that Appellant's counsel has complied with the procedural requirements necessary to withdraw. Furthermore, after independently reviewing the record, we conclude that the appeal is wholly frivolous. We therefore grant counsel's petition to withdraw and affirm the judgment of sentence.

We previously detailed the factual background of this case as follows:

At the time of trial, A.J.G. [wa]s [15] years old, A.A.G. was 12 years old, and A.E.G. was ten years old (hereinafter collectively referred to as "the children"). They have another sister named A., a half-sister, and a 13 year old stepsister named E.M. The children currently attend school and live in Clearfield County with their biological mother P.B. ("Mother") and their stepfather R.B. Appellant is their biological father.

Prior to separation, the children lived with Appellant and Mother in Bald Hill, Clearfield County. After separation, Appellant and Mother agreed to let Appellant exercise periods of physical custody of the children every other weekend. Since Appellant was living there at the time, the custody visits were initially held at the paternal grandparents' residence in Clearfield County. The front door of paternal grandparents' residence opens into the living room. On one side of the living room is the kitchen. On the other side is a hallway that leads to two bedrooms and the bathroom.

Once Appellant and his wife S.G. obtained a townhouse in Harrisburg, visitations with the children occurred there every other weekend. S.G. and Appellant have been married for a little over two years. E.M., stepsister to the children, is S.G.'s only biological child. Upon entering the townhouse, a straightaway leads into the main living area and a set of stairs lead[s] up to the second level. The second floor consists of Appellant['s] and S.G.'s bedroom, E.M.'s bedroom, and the bathroom. Through E.M.'s bedroom, there is a second set of steps that provide access to a third floor attic where the children would sleep.

Testimony of A.J.G.:

A.J.G. was about seven or eight years old when Appellant first touched her. Said touching continued periodically until she was about 14 years old. When Appellant first began touching A.J.G., he would usually be drinking. However, he stopped drinking when she was about 13 years old.

While living in Bald Hill, A.J.G. was home alone with Appellant in the living room. A.J.G. did not want to go to sleep so Appellant asked if she wanted to play. She responded yes, misunderstanding his intention. He informed "not that kind of play." A.J.G. sat on the couch while Appellant proceeded to take

her pants off. A.J.G. laid down and Appellant's fingers touched her vagina. Appellant instructed her not to tell anyone or he would get in trouble. Appellant used his fingers to touch A.J.G.'s vagina a few times while living at the Bald Hill residence. At said moments, Appellant would put his fingers in her vagina and touch her privates. Usually, the other family members would be asleep or Mother would be at work.

During a visit to the children's paternal grandparents' residence, Appellant took A.J.G. and A.A.G. to a drive-in movie. While parked at the drive-in, Appellant shut the back of the gate of the vehicle, a GMC Envoy, with A.J.G. and A.A.G. laying in the back. The windows of the vehicle were tinted. A.J.G. recalled that no cars were parked directly beside the vehicle. At that point, Appellant took off the girls' pants and started touching them with his fingers. He stuck his fingers inside their vaginas. A.J.G. and A.A.G. never spoke to one another about the incident thereafter.

In Harrisburg, when A.J.G. was about 13 years old, Appellant came into the attic to wake A.J.G. up and took her down into his bedroom. S.G. was not present in the house and everyone else was sleeping. While in his bedroom, he took off her clothes and stuck his penis in her vagina. A.J.G. pushed Appellant off of her, ran back upstairs, put her clothes back on, and laid down. Appellant did not continue to bother her. After getting up for the day, she acted like nothing happened.

Another time when A.J.G. was about 13 years old, she was asleep on the couch in the living room at her paternal grandparents' residence. She was wearing pajama shorts and a pajama top. Appellant was sleeping on the floor in front of the couch. Appellant woke A.J.G. up by touching her with his fingers on and in her vagina. Then, he pulled A.J.G. down onto the floor. She laid down on the floor and Appellant proceeded to take off her pants and turn her over. He put his penis inside her vagina. At that moment, she was positioned on her hands and knees and Appellant was behind her. He ejaculated into his shirt and/or the blanket. A.J.G. grabbed her pants, put them back on, and crawled onto the couch. Appellant proceeded to ask if she was all right, but A.J.G. did not answer. Eventually Appellant went to sleep. During this incident, no one woke up or entered the living room. The next day, they behaved as if nothing happened.

Additionally, Appellant kissed A.J.G. on her lips. A.J.G. identified Appellant in court as the person who did the above described actions to her. A.J.G. began fighting with Mother and her stepfather because she did not want to go for custody visits with Appellant. A.J.G. told Mother she did not want to go because she did not like S.G. A.J.G. texted Appellant and told him she did not want to go to his house because "every time I go down, you always touch me." Appellant replied that he was drunk. A.J.G. visited with Appellant after said text and the touching continued. At the age of 14, A.J.G. completely stopped going to Appellant's residence for custody visitations. A.J.G. had yet to tell anyone in her family about what Appellant did.

Eventually, A.J.G. told Mother. The conversation began because [M]other warned A.J.G. that she better not be having sex or she was going to get her tested. A.J.G. told her that it would not work. At the moment, A.J.G. was concerned about her mother finding out about a boy named Anthony. A.J.G. confessed she did not have the courage to tell Mother, so she left the conversation and went upstairs with her friend Melissa. She told Melissa what occurred with Appellant, who in turn assured A.J.G. she needed to tell Mother. The girls went back downstairs and Melissa proceeded to inform Mother of what A.J.G. revealed upstairs. Mother questioned A.J.G. if it [were] true, to which she responded yes. Additionally, A.J.G. informed Mother of what happened to A.A.G. Mother then questioned A.A.G. if it [were] true, to which she responded yes. Mother called the police.

A.J.G. testified that C.S. is a classmate who she occasionally texts. A.J.G. received a text message from C.S. about a boy named Anthony. C.S. asked A.J.G. if she ever had sex with Anthony. A.J.G. replied yes, because she previously dated him when she was 12 years old; approximately two weeks before she turned 13. A.J.G. claims she lost her virginity to him. A.J.G.'s Mother asked her about Anthony previously, but she denied anything happened with him until text messages between her and C.S. were revealed.

On August 8, 2009, A.J.G. commented on a picture of Appellant on Facebook that it was her daddy and she loved him. A.J.G. testified that Appellant is still her father and she still loves him.

Testimony of A.A.G.:

Using a drawing, A.A.G. pointed to places in which touching occurred between her and Appellant. She indicated Appellant touched her privates. Specifically, Appellant's finger, mouth, tongue, and private touched her. Sometimes there was clothing between her skin and his fingers when he touched her privates, but not always. Appellant would not say anything to her while he was touching her privates. Appellant's privates would touch her private, mouth, and butt.

She does not remember the first time Appellant touched her; however, it happened on more than one occasion. The touching transpired at Bald Hill, at her paternal grandparents' residence, and at the townhouse in Harrisburg.

A.A.G. recalled one occasion while at her paternal grandparents' residence that she and A.E.G. were playing outside. Appellant called her inside and her sister stayed outside. A.A.G. sat down in a chair in the living room. Then, Appellant pulled her pants and underwear down. He used his finger and put it inside her private area. A.E.G. was about to come inside so Appellant told A.A.G. to pull her pants up.

While at Bald Hill, A.A.G. and A.E.G. were playing upstairs in the bedroom. Appellant called A.A.G. downstairs and asked if she wanted to play a game. She thought it would be a video game or something of that nature. He responded it was not that kind of game. Appellant pulled down her pants. His fingers touched the outside and inside of her privates. Another time, Appellant touched A.A.G. and A.J.G. while they were at the outside movies. A.A.G., A.J.G., and Appellant were in the back of the car. During this incident, Appellant pulled down A.A.G.'s pants and used his finger inside her private.

A.A.G. recalled another incident during which she was in Appellant's bedroom leaning over the bed with her feet on the floor. Her clothes were off. Appellant's clothing was to his knees and he had his shirt on. Appellant put his private in her butt. A.A.G. testified that it hurt.

In Harrisburg, Appellant touched A.A.G. in his bedroom, while her sisters and S.G. were downstairs. A.A.G. was wearing shorts that were pulled down to her ankles. Appellant's clothes were pulled down as well. A.A.G. recalled that she was laying on her right side when Appellant's privates touched her private.

Appellant laid behind her. He lifted up her leg and put his private between her legs. A.A.G. does not remember exactly how many times that Appellant put his privates in her private. Further, Appellant put his private inside A.A.G.'s mouth. However, she does not recall where this happened. Appellant would instruct her not to tell anyone or he would get in big trouble. A.A.G. identified Appellant in court as the person who touched her.

A.A.G. had not told anyone about Appellant touching her. After A.J.G.'s initial discussion with Mother, A.J.G. told A.A.G. that she needed help telling Mother about what happened. As a result, A.A.G. told Mother that Appellant did that to her too. Thereafter, she spoke to the police. Previously, the children had discussions with S.G. and Appellant about them living with S.G. and Appellant in Harrisburg. A.A.G. said she would like that.

Testimony of A.E.G.:

While in Harrisburg, Appellant was laying down behind A.E.G. while she sat on the couch watching television. Appellant told A.E.G. to lay down while he remained laying behind her. Appellant placed his hand under her sweat pants and underwear and his finger touched her privates. About two weeks later Appellant touched A.E.G. again, repeating the above described scenario. During these two incidents, S.G. was either at the Hershey Bears game or the grocery store.

When A.E.G. was nine years old and staying at her paternal grandparents' residence, Appellant had A.E.G. rub his private. Later in Harrisburg, Appellant again had A.E.G. rub his private with her hand by having A.E.G. put her hand down his pants. A.E.G. testified that the person who touched her was Appellant. The first time that A.E.G. told anyone about Appellant touching her was when A.J.G. and A.A.G. told Mother. Mother called the police. A.E.G. recalls everyone sitting silently while on the way to the police station. Paternal grandmother questioned A.E.G. about this matter and A.E.G. informed her it did occur. Paternal grandmother asked her to drop charges against Appellant.

Testimony of S.G.:

S.G. described her encounters with Mother as tumultuous. S.G. and Appellant had custody of the children every other weekend.

Sometimes the children would come to Harrisburg and sometimes they would stay in Clearfield with Appellant at paternal grandparents' residence. Occasionally S.G. would join them in Clearfield and sometimes she would stay in Harrisburg. Likewise, S.G. admitted that there were times when the children were over at her house while she was not present. S.G. has season tickets to the Hershey Bears hockey games.

Appellant had a drinking problem to the point where he could not control it. However, S.G. was unaware of any issues between the children and Appellant. On a number of occasions, S.G. and Appellant had discussions with the children about them living in Harrisburg. S.G. wanted to try to get custody of the children.

A.J.G. came to Harrisburg intermittently because she is involved in various activities in Clearfield. During the summer of 2009, A.J.G. came to Appellant's house about four times. However, during those times, S.G. never observed any problems. After November 22, 2009, the children stopped custody visitations with Appellant and S.G. S.G. was not sure why visitations ceased, but was told the children did not want to visit. Appellant and S.G. did not file for custody.

In January 2010, S.G. received a voice mail message from Trooper Arthur Kenneth Leinbach (hereinafter "Trooper Leinbach") requesting to speak to Appellant. Trooper Leinbach wanted to speak with Appellant alone, but Appellant insisted that S.G. be present for the interview. As Trooper Leinbach asked Appellant questions, S.G. participated in answering. S.G. testified she needed to participate in the interview because she takes care of the numbers, dates, and times in their relationship.

As a result of learning about the children's allegations, S.G. took measures to make sure E.M. was okay. S.G. testified that she and Appellant have an active sex life and their marriage is wonderful. S.G. thought she and A.J.G. had a good relationship, but there were occasions when they would compete for Appellant's attention. For example, S.G. posted a picture on Facebook of Appellant at their wedding. A.J.G. posted a comment to the picture on August 8, 2009, at 1:23 a.m. that this is her daddy and she loves him. S.G. came into possession of text messages between A.J.G. and C.S. a few days after the preliminary hearing.

Testimony of D.G.:

Paternal grandmother's name is D.G. She lives in Clearfield County. Before the current charges against Appellant were filed, she had the opportunity to see the children when Appellant had custody. Since Appellant was charged, D.G. continues to see the children.

D.G. was unaware of anything happening between the children and Appellant while in her residence. In fact, she denies that anything did happen and claims it is "impossible." During the times Appellant stayed at her residence with the children, Appellant would sleep in the living room and the children would sleep in the spare bedroom. A.J.G. did not stay at D.G.'s residence very often. However, when A.J.G. did stay over, if she was not in the bedroom, then she would sleep in the living room. A.E.G. has on occasion fallen asleep in the living room on the rocking chair. Conversely, D.G. also testified that when all the children would be at her residence for the night with Appellant, all four would sleep in the spare bedroom and she never saw them sleeping in the living room.

Every night, D.G. plays on the computer located in the living room into the early morning hours. While on the computer, she never observed anything unusual occurring between Appellant and the children. Further, the children were always outside with their grandfather. It was not very often that Appellant was in the residence by himself with the children. However, Appellant would be in the residence by himself while playing on his PlayStation. D.G. admitted Appellant could have had one of the children on his lap while playing video games. However, D.G. does not believe that if Appellant had a child with him by himself, with her being outside, that he would have had an opportunity to touch the child.

D.G. recalls Appellant taking two of the children to the drive-in theater, but avers she was with them at the time. D.G. owns a GMC Envoy that they take to the drive-in theater. On that one occasion, she did not observe Appellant in the back of the Envoy with the children. She is not aware of Appellant taking the Envoy to the drive-in any other time; however he did take the Envoy to the walk-in movies. She admits it could be possible that Appellant went to the drive-in with just A.A.G. and A.J.G., but she does not believe it.

D.G. testified she has a good relationship with her grandchildren. However, they have never said anything to her about Appellant. D.G. asked the children about this case with Appellant when they would come to visit, but no one would talk about it. Yet, D.G. testified that A.A.G. told her Appellant never touched her. Additionally, A.E.G. said she has to listen to what A.J.G. tells her and called A.J.G. a jerk. However, D.G. admits they are normal sisters who fight. D.G. told A.E.G. that if it was not true, she should drop the charges against Appellant. A.A.G. was on the phone with a friend, E.G., when she made the statement that Appellant never touched her. Someone could have been asking her questions and prompting her to respond about this matter. D.G. never spoke with any law enforcement officers about the case. She never told anyone the statement she heard from A.A.G. Conversely, D.G. made no efforts to contact the police. D.G. did however speak with an investigator who works for Appellant's attorney.

Testimony of E.G.:

E.G. lives in Clearfield County. About 16 years ago, E.G. was involved in a romantic relationship with Appellant. However, she has not seen Appellant since that time. She remained friends with D.G. and spends time at D.G.'s residence. As a result, she has occasion to see the children. D.G. informed E.G. about this matter.

E.G. had a conversation with A.A.G. on the telephone and inquired about four times as to whether Appellant ever touched her. A.A.G. responded no. On another occasion, E.G. was in D.G.'s living room when, out of nowhere, A.E.G. said, "I can't believe Mother and A.J.G. are being jerk[s] and blaming this stuff on Appellant." The private investigator came to speak with E.G. and she gave him a statement to that effect. Then again, E.G. and A.A.G. went to breakfast. While there, E.G. said, "please don't lie about your dad." A.A.G. did not say much, but averred she would not lie.

Testimony of Trooper Leinbach:

Trooper Leinbach has been employed by the Pennsylvania State Police for over 24 years. Trooper Leinbach led the investigation in this matter. He interviewed Appellant. During the course of

> said interview, Trooper Leinbach asked Appellant about an incident that occurred at the drive-in or if Appellant ever took the children to a drive-in. Appellant stated he took the children to the drive-in over a dozen times. Trooper Leinbach specifically asked Appellant if he recalled ever taking A.A.G. and A.J.G. to the drive-in, to which he responded yes. Furthermore, Appellant revealed he specifically remembers taking A.A.G. and A.J.G. a few years ago to that specific drive-in in Clearfield. He also indicated that he drove the GMC Envoy on that occasion.

Commonwealth v. Goodrow, 1035 MDA 2013 (Pa. Super. Mar. 10, 2014) (unpublished memorandum), at 2-10 (internal alterations omitted), *quoting* Trial Court Opinion, 8/12/13, at 5-16.

We previously summarized the procedural history of this case as follows:

> At docket 1073-CR-2010, setting forth charges relating to Appellant's sexual assaults upon A.E.G., Appellant was charged with indecent assault,[1] unlawful contact with a minor,[2] and indecent exposure.[3]
>
> At docket 1074-CR-2010, setting forth charges relating to Appellant's sexual assaults upon A.A.G., Appellant was charged with rape of a child,[4] two counts of involuntary deviate sexual intercourse with a child,[5] incest,[6] aggravated indecent assault,[7]

---

[1] 18 Pa.C.S.A. § 3126(a)(1) & (a)(7).

[2] 18 Pa.C.S.A. § 6318(a)(1).

[3] 18 Pa.C.S.A. § 3127(a).

[4] 18 Pa.C.S.A. § 3121(c).

[5] 18 Pa.C.S.A. § 3123(b).

[6] 18 Pa.C.S.A. § 4302.

[7] 18 Pa.C.S.A. § 3125(a)(1) & (a)(7).

(Footnote Continued Next Page)

> statutory sexual assault,[8] unlawful contact with a minor, indecent assault, and indecent exposure.
>
> At docket 1076-CR-2010, setting forth charges relating to Appellant's sexual assaults upon A.J.G., Appellant was charged with rape of a child, involuntary deviate sexual intercourse with a child, unlawful contact with a minor, incest, aggravated indecent assault, statutory sexual assault, indecent assault, and indecent exposure.
>
> At docket 4846-CR-2010, setting forth charges relating to Appellant's sexual assaults upon E.M., Appellant was charged with three counts of aggravated indecent assault of a child,[9] three counts of aggravated indecent assault, three counts of aggravated indecent assault without consent, unlawful contact with a minor, three counts of indecent assault, and corruption of minors.[10]
>
> A jury trial commenced on August 10, 2010. [Prior to trial, a competency hearing was held for A.E.G. However, no competency hearing was held for A.A.G.] During trial, Appellant was represented by William T. Tully, Esquire. On August 11, 2010, Appellant was found guilty of all charges at dockets 1073-CR-2010, 1074-CR-2010, and all but the involuntary deviate sexual intercourse with a child charge at docket 1076-CR-2010.[11] Sentencing was deferred pending a Dauphin County Pre-Sentence Investigation Report and a Megan's Law Board assessment. On January 18, 2011, Appellant pled guilty to the charges at docket 4846-CR-2010.[12] Prior to sentencing,

(Footnote Continued) ———————————

[8] 18 Pa.C.S.A. § 3122.1.

[9] 18 Pa.C.S.A. § 3125(b).

[10] 18 Pa.C.S.A. § 6301.

[11] The charge of rape of a child was amended to rape, as A.J.G. was 13 years old at the time of the assault. ***See*** N.T., 1/18/11, at 21.

[12] The charges at docket 4846-CR-2010 relate to Appellant's sexual assaults of E.M. She did not come forward until after Appellant was convicted of the assaults upon his three biological daughters.

Appellant was designated a sexually violent predator. Then, on January 18, 2011, Appellant was sentenced as follows:

At docket 1073-CR-2010, Appellant received an aggregate sentence of two and one-half to five years in a state correctional facility consecutive to docket 1074-CR-2010.

At docket 1074-CR-2010, Appellant received an aggregate sentence of 10 to 20 years in a state correctional facility consecutive to 1076-CR-2010.

At docket 1076-CR-2010, Appellant received an aggregate sentence of 13½ to 27 years in a state correctional facility. He was granted time credit from February 19, 2010, to January 18, 2011.

Finally, at docket 4846-CR-2010, Appellant received [an] aggregate sentence of two and one-half [] to five years in a state correctional facility consecutive to 1073-CR-2010.

On January 31, 2011, Attorney Lawrence Bartel of the Dauphin County Public Defender's Office filed a motion to modify sentence. Said motion was denied on February 4, 2011. On March 4, 2011, Attorney Bartel filed a notice of appeal with this Court. Thereafter, Appellant's case was reassigned to Assistant Public Defender Joseph Gavazzi. On March 7, 2011, Appellant was ordered to file of record a concise statement of errors to be complained of on appeal ("concise statement"). A concise statement was filed on March 23, 2011.

Later, Attorney Gavazzi determined that the motion to modify sentence was filed untimely. Therefore, Attorney Gavazzi filed a praecipe to withdraw the appeal with this Court. On April 6, 2011, Appellant filed a PCRA petition. Essentially, Appellant requested his appeal rights be reinstated due to Attorney Bartel's failure to file a timely post-sentence motion. On April 14, 2011, the Commonwealth filed an answer thereto with no objection to reinstatement of Appellant's appeal rights. As a result, Appellant's request was granted on April 15, 2011. Thereafter, no further action was taken by the Public Defender's Office. On May 25, 2011, this Court issued an order allowing Appellant's appeal to be withdrawn.

> Appellant filed a *pro se* PCRA petition on April 10, 2013. On April 16, 2013, Jennifer Tobias, Esquire, was appointed to represent Appellant and to assist him in perfecting his PCRA [p]etition. On May 29, 2013, an amended PCRA petition was filed on behalf of Appellant requesting that his appellate rights be reinstated *nunc pro tunc*. On May 29, 2013, the Commonwealth filed a response thereto with no objection. Appellant's PCRA petition was granted on May 30, 2013. A notice of appeal was filed with this Court on June 11, 2013. On June 18, 2013, Appellant was ordered to file a concise statement []. Appellant timely complied with said Order on June 13, 2013.

Commonwealth v. Goodrow, 1035 MDA 2013 (Pa. Super. Mar. 10, 2014) (unpublished memorandum), at 10-13 (internal alterations omitted), *quoting* Trial Court Opinion, 8/12/13, at 1-5. Attorney Tobias filed an application to withdraw as counsel and accompanying brief pursuant to ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), and its federal predecessor, ***Anders v. California***, 386 U.S. 738 (1967).

This Court denied the application because a transcript of counsels' closing arguments was not included in the certified record. We also noted that a potentially non-frivolous issue was present in the case, ***i.e.***, the trial court's failure to hold a competency hearing for A.A.G. We thus remanded the matter to the trial court for the preparation of a supplemental transcript. After the supplemental transcript was prepared, Appellant filed a supplemental concise statement. The trial court thereafter issued a supplemental Rule 1925(a) opinion.

Counsel raises two issues for our review in her ***Anders*** brief:

> 1. Whether the trial court abused its discretion in denying the Appellant's motion for a mistrial?

> 2. Whether the trial court erred by not holding a competency hearing for A.A.G., who was 12 years old at the time of trial?

Anders Brief at 5 (capitalization removed).

Before reviewing the merits of this appeal, this Court must first determine whether counsel has fulfilled the necessary procedural requirements for withdrawing as counsel. ***Commonwealth v. Washington***, 63 A.3d 797, 800 (Pa. Super. 2013). To withdraw under ***Anders***, court-appointed counsel must satisfy certain technical requirements. First, counsel must "petition the court for leave to withdraw and state that after making a conscientious examination of the record, [s]he has determined that the appeal is frivolous." ***Commonwealth v. Martuscelli***, 54 A.3d 940, 947 (Pa. Super. 2012), *quoting* ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009). Second, counsel must file an ***Anders*** brief, in which counsel:

> (1) provide[s] a summary of the procedural history and facts, with citations to the record;
>
> (2) refer[s] to anything in the record that counsel believes arguably supports the appeal;
>
> (3) set[s] forth counsel's conclusion that the appeal is frivolous; and
>
> (4) state[s] counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Washington, 63 A.3d at 800, *quoting* ***Santiago***, 978 A.2d at 361.

Finally, counsel must furnish a copy of the ***Anders*** brief to her client and "advise[] him of his right to retain new counsel, proceed *pro se* or raise any additional points that he deems worthy of the court's attention, and attach[] to the ***Anders*** petition a copy of the letter sent to the client." ***Commonwealth v. Daniels***, 999 A.2d 590, 594 (Pa. Super. 2010) (citation omitted).

If counsel meets all of the above obligations, "it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous." ***Santiago***, 978 A.2d at 355 n.5, *quoting* ***McClendon***, 434 A.2d at 1187. It is only when both the procedural and substantive requirements are satisfied that counsel will be permitted to withdraw. In the case at bar, counsel has met all of the above procedural obligations.[13] We now turn to whether this appeal is wholly frivolous.

In his first issue, Appellant contends that the trial court erred by failing to grant his motion for a mistrial based upon the closing arguments of the prosecutor. "[R]eversible error arises from a prosecutor's comments only where their unavoidable effect is to prejudice the jurors, forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict." ***Commonwealth v. Busanet***, 54 A.3d 35, 64 (Pa. 2012) (citation omitted).

[13] Appellant has not filed any response to counsel's ***Anders*** brief.

"Any challenged prosecutorial comment **must not be viewed in isolation**, but rather must be considered in the context in which it was offered." ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1146 (Pa. 2011) (emphasis in original; citation omitted).

"The prosecutor must be free to present his or her arguments with logical force and vigor." ***Commonwealth v. Bryant***, 67 A.3d 716, 728 (Pa. 2013) (citation omitted). "[I]t is entirely proper for the prosecutor to summarize the evidence presented, to offer reasonable deductions and inferences from the evidence, and to argue that the evidence establishes the defendant's guilt." ***Commonwealth v. Thomas***, 54 A.3d 332, 338 (Pa. 2012) (citation omitted). A prosecutor may use oratorical flair and may respond to arguments made by defense counsel. ***Commonwealth v. Sneed***, 45 A.3d 1096, 1110 (Pa. 2012) (citation omitted).

Appellant contends that the prosecutor shifted the burden during his closing argument. In particular, Appellant argues that the prosecutor improperly argued to the jury that it was the defendant's burden to produce text messages between A.J.G. and C.S. at trial. ***See*** Supp. N.T., 10/11/10, at 58 ("And [A.J.G.] misspoke about something. She misspoke about it. But I told you before, she could have -- she could have just come in here and denied it, denied those -- those – we've never had an opportunity to look at those text messages."). After the prosecutor's closing argument, Appellant moved for a mistrial. Supp. N.T., 10/11/13, at 70. The trial court denied

the motion, and instead provided limiting instructions to the jury. The trial court reminded the jury that closing arguments were not testimony and that the burden of proof was always on the Commonwealth to prove each element of the offense and that burden never shifted to Appellant.

When considered in the context of the prosecutor's closing argument, the prosecutor did not attempt to shift to burden to Appellant. Instead, he was merely stating a fact – the jury had not seen the text messages between A.J.G. and C.S. He did not argue that the jury should draw some negative inference because the text messages were not produced at trial. Instead, he merely mentioned the fact that the actual messages were not produced in order to remind the jury that they would have to rely upon testimony to determine the content of those text messages and when they occurred.

Furthermore, any misunderstanding that the jury may have had regarding the burden of proof after the prosecutor's closing argument was quickly rectified by the trial court reminding the jury in its charge that the burden of proof was with the Commonwealth and that the burden of proof never shifted to Appellant. Thus, the prosecutor's closing argument did not "prejudice the jurors, forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict." ***Busanet***, 54 A.3d at 64 (citations omitted). Accordingly, we conclude that Appellant's contention that the trial court

erred by failing to declare a mistrial based upon the prosecutor's closing argument is wholly frivolous.

In his second issue on appeal, Appellant contends that the trial court erred by failing to hold a competency hearing for A.A.G. A competency hearing is required for all witnesses under 14 years old. ***Commonwealth v. Moore***, 980 A.2d 647, 653 (Pa. Super. 2009) (citation omitted). In this case, no competency hearing was held for A.A.G., who was only 12 years old at the time of trial. In its supplemental Rule 1925(a) opinion, the trial court admitted that failure to hold the competency hearing was an error. Trial Court Opinion, 5/5/14, at 3. However, the trial court contends that the error was harmless. ***Id.*** at 3-4.

In her ***Anders*** brief, counsel argues that the issue is frivolous because although no competency hearing was held for A.A.G., A.A.G. was indeed competent. ***See Anders*** Brief at 12-14. However, such a finding could only be made after adversarial briefing, not in the context of an ***Anders*** brief. Although we decline to find the issue is frivolous based upon A.A.G.'s alleged competence, the issue is frivolous for a different reason.

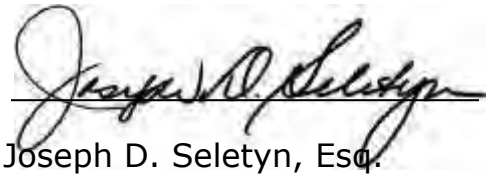
Under Pennsylvania Rule of Appellate Procedure 302, "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). We have carefully reviewed the entire transcript of trial. At no point in the transcript did Appellant object to A.A.G. testifying based upon her age and/or competency. Furthermore, Appellant

never requested that the trial court hold a competency hearing for A.A.G., despite the fact that a competency hearing was held for A.E.G. prior to trial. An issue that is waived is frivolous. ***See Commonwealth v. Kalichak***, 943 A.2d 285, 291 (Pa. Super. 2008). Therefore, we conclude that Appellant's second issue is frivolous.

In sum, we conclude that both issues raised in counsel's ***Anders*** brief are frivolous. Furthermore, after an independent review of the entire record, we conclude that no other issue of arguable merit exists. Therefore, we will grant counsel's request to withdraw. Having determined that the issues raised on appeal are frivolous, we will affirm the judgment of sentence.

Application to withdraw as counsel granted. Judgment of sentence affirmed.[14]

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/25/2014

[14] We also, *sua sponte,* direct that the reproduced record be sealed, as it contains the full names of the minor victims.