

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
BALDEV SINGH	:	
Appellant	:	No. 1431 MDA 2016

Appeal from the Judgment of Sentence June 21, 2016
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0003902-2015

BEFORE: GANTMAN, P.J., SHOGAN, J., and STRASSBURGER, J.*

MEMORANDUM BY GANTMAN, P.J.:

FILED APRIL 27, 2017

Appellant, Baldev Singh, appeals from the judgment of sentence entered in the Berks County Court of Common Pleas, following his jury trial convictions of two counts each of robbery and simple assault, and one count each of sexual assault, intimidation of witnesses or victims, terroristic threats, and stalking.¹ We affirm.

In its opinion, the trial court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.

Appellant raises the following issues for our review:

DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION

¹ 18 Pa.C.S.A. §§ 3701(a)(1)(ii), 3701(a)(1)(iv), 2701(a)(1), 2701(a)(3), 3124.1, 4952(a)(3), 2706(a)(1), and 2709.1(a)(3), respectively.

*Retired Senior Judge assigned to the Superior Court.

BY PERMITTING THE TESTIMONY OF DR. SHAMITA DASGUPTA INsofar AS HER TESTIMONY EXCEEDED THE SCOPE OF HER QUALIFICATION AS AN EXPERT IN "SEXUAL ABUSE VICTIM BEHAVIOR AND RESPONSE TO TRAUMA" UNDER 42 PA.C.S.[A]. § 5920 AND INCLUDED HIGHLY PREJUDICIAL STATEMENTS REGARDING PERPETRATOR BEHAVIOR?

DID THE TRIAL COURT ERR BY FAILING TO INSTRUCT THE JURY AS TO THE PERMISSIBLE LIMITS OF DR. [SHAMITA] DASGUPTA'S EXPERT TESTIMONY PURSUANT TO 42 PA.C.S.[A]. § 5920?

(Appellant's Brief at 10).

Our standard of review in cases involving the admission of expert testimony is as follows:

Generally speaking, the admission of expert testimony is a matter left largely to the discretion of the trial court, and its rulings thereon will not be reversed absent an abuse of discretion. An expert's testimony is admissible when it is based on facts of record and will not cause confusion or prejudice.

Commonwealth v. Watson, 945 A.2d 174, 176 (Pa.Super. 2008) (internal citations and quotation marks omitted).

Similarly, our standard of review of a court's decision to include or omit jury instructions "is one of deference—an appellate court will reverse a court's decision only when it abused its discretion or committed an error of law." ***Commonwealth v. Baker***, 24 A.3d 1006, 1022 (Pa.Super. 2011), *aff'd*, 621 Pa. 401, 78 A.3d 1044 (2013) (quoting ***Commonwealth v. Galvin***, 603 Pa. 625, 651, 985 A.2d 783, 799 (2009), *cert. denied*, 559 U.S. 1051, 130 S.Ct. 2345, 176 L.Ed.2d 565 (2010)). "The trial court has broad

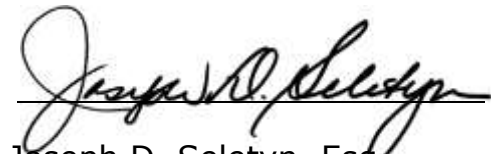
discretion in formulating jury instructions, as long as the law is presented to the jury in a clear, adequate, and accurate manner.” ***Commonwealth v. Lukowich***, 875 A.2d 1169, 1174 (Pa.Super. 2005), *appeal denied*, 584 Pa. 706, 885 A.2d 41 (2005).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Patrick T. Barrett, we conclude Appellant’s issues merit no relief. The trial court opinion comprehensively discusses and properly disposes of the questions presented. (**See** Trial Court Opinion, filed October 28, 2016, at 10-17) (finding: **(1)** Appellant objected to Commonwealth’s proposed testimony pursuant to Section 5920 because Appellant believed testimony would not provide guidance to jury on particular charges against Appellant; court overruled defense objection, and Commonwealth presented expert testimony of Dr. Dasgupta, who specializes in domestic violence and sexual abuse in Indian culture; Dr. Dasgupta provided general testimony on disclosure of sexual abuse, which included explanation of how importance of marriage in Indian culture could delay disclosure of marital sexual abuse; Dr. Dasgupta specifically opined there is no typical response to sexual abuse in Indian culture; this testimony was within confines of Section 5920 because Dr. Dasgupta merely offered general opinion about disclosure of sexual abuse and did not offer any opinion on credibility of Victim in this case; additionally, Dr. Dasgupta’s testimony was helpful to jury because it

explained dynamics of sexual abuse in Indian culture; under these circumstances, Appellant's challenge to scope of Dr. Dasgupta's testimony fails; moreover, Appellant waived his challenge to Dr. Dasgupta's testimony because he failed to object at appropriate time at trial or provide specific examples of how Dr. Dasgupta's testimony exceeded the scope of Section 5920; thus, Appellant's challenge to Dr. Dasguta's testimony warrants no relief; **(2)** Appellant did not ask court to instruct jury on permissible limits of expert testimony under Section 5920; Appellant also failed to object when court gave jury instruction on expert witness testimony; further, court issued jury instruction on effect of delayed reporting on assessment of Victim's credibility; Appellant requested no further jury instruction on this issue; thus, Appellant waived his challenge to court's jury instruction). Accordingly, we affirm on the basis of the trial court's opinion.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/27/2017

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COMMONWEALTH OF
PENNSYLVANIA

v.

BALDEV SINGH,
DEFENDANT: IN THE COURT OF COMMON PLEAS
: OF BERKS COUNTY, PENNSYLVANIA
: CRIMINAL DIVISION
:
: NO. CP-06-CR-0003902-2015
:
: PATRICK T. BARRETT, JUDGEJonathan H. Kurland, Esq., for the Commonwealth
Jay M. Nigrini, Esq., for Defendant at Trial
Anna Ferguson, Esquire, for Defendant (Appellant) on Appeal

PTB, J.

RULE 1925(a) OPINION**BARRETT, J.****October 28, 2016**

Defendant Baldev Singh, by and through counsel, appeals from the judgment of sentence entered on June 21, 2016, made final by the denial of his post-sentence motion on August 9, 2016.¹ Pursuant to Pa.R.A.P. 1925(a), we submit the following Opinion.

I. Background and Procedural History

On June 10, 2015, Defendant Baldev Singh was charged by criminal complaint. An Information was filed on September 1, 2015, in which Defendant was charged with two counts of robbery,² rape by forcible compulsion,³ sexual assault, ⁴ intimidation of victims or witnesses, ⁵ terroristic threats, ⁶ stalking, ⁷ and two counts of simple assault.⁸

¹ The Notice of Appeal states that Defendant appeals from the "Amended Order of August 9, 2016 denying Defendant's Motion for Post Sentence Relief and amending the previous order of August 2, 2016 also denying the Defendant's Motion."

² 18 Pa.C.S.A. § 3701(1)(1)(ii) and (iv)

³ 18 Pa.C.S.A. § 3121(a)(1)

⁴ 18 Pa. C.S.A. §3124.1

⁵ 18 Pa.C.S.A. § 4952(a)(3)

⁶ 18 Pa.C.S.A. §2706(a)(1)

⁷ 18 Pa.C.S.A. § 2709.1(a)(2)

⁸ 18 Pa.C.S.A. § 2701(a)(1) and (3)

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On March 17, 2016, the fourth day of trial, a jury found Defendant guilty of robbery by threatening or causing fear of serious bodily injury, robbery by inflicting or threatening or putting victim in fear of bodily injury, sexual assault, intimidation of a victim, terroristic threats, stalking, simple assault by attempting or causing bodily injury, and simple assault by physical menace. On one additional count - rape by forcible compulsion -the jury was unable to reach a verdict. N.T. 03/14-17/2016, at 416-417.

Following the jury verdict and after assessment by the Sexual Offender's Assessment Board,⁹ this court imposed an aggregate sentence of 8 to 27 years' incarceration on June 21, 2016 on the counts of robbery, sexual assault and intimidation of victims and witnesses, followed by 5 years' special probation on the remaining counts (terroristic threats, stalking and each of the simple assault charges) which did not merge for sentencing purposes. N.T. 06/21/2016, at 24-29. Finally, the court entered an order regarding special conditions for sexual offenders, and the Notification of Tier III SORNA registration and requirements was placed on the record. *Id.* at 13 -22, 27-29.

Defendant, through trial counsel, filed a timely motion for post sentence relief on June 27, 2016 in which he asserted as the sole basis for relief that the verdict was against the weight of evidence. In support of this claim, Defendant avers that it was "clear from the record that the victim and Sam Singh were found to be dishonest in several important

⁹ The SOAB assessment concluded that Defendant was not a sexually violent predator and the Commonwealth did not challenge the Board's conclusion. N.T. 06/21/2016 at 2-3.

details that so undermined their credibility". No further details were provided. This court denied the motion without hearing in an order filed on August 4, 2016.¹⁰ Defendant, through appellate counsel, filed a timely notice of appeal on August 30, 2016. In response to this court's order under Pa.R.Crim.P. 1925(b), Defendant filed a timely concise statement of errors on September 23, 2016.

Though the charges themselves are not unusual, they arise out of circumstances which are somewhat atypical. Karamjit Kaur, the victim, was born into a Sikh family in Punjab, India in 1982. In 2005, she came to the United States, speaking very little English,¹¹ and resided with family members (a sister and brother-in-law) in Berks County. N.T. 03/14-17/2016 at 30-34. She worked in her sister's family business, a gas station. *Id.* at 34. In or around April 2010, Ms. Kaur became an American citizen. *Id.* at 34, 97-98. On October 2, 2011, Ms. Kaur returned to her native country of India and married Defendant. Ms. Kaur did not know Defendant before they were married; the marriage was arranged by family members. *Id.* at 35-36, 207. Ms. Kaur stayed with Defendant in India for approximately one month, then returned to the United States to file paperwork which would permit him to live in this country. *Id.* at 35-36. She returned twice to India to complete paperwork and enable Defendant to obtain his visa. *Id.* at 37. Ms. Kaur incurred approximately \$30,000.00 in expenses to enable Defendant's legal entry into America. *Id.* at 37-38. Ms. Kaur completed immigration

¹⁰ An amended order (adding required language under Pa.R.Crim.P. 720(B)(4)) was filed August 10, 2016.

¹¹ The trial was accomplished with the assistance of Punjabi interpreters.

documents to enable Defendant to obtain residency or a green card. *Id.* at 105-116. This paperwork included an affidavit of financial support of Defendant, which was signed by Ms. Kaur and may also have been co-signed by her brother-in-law, Sukhchain Singh. *Id.* at 250. Eventually, Defendant arrived in the United States on March 8, 2014. *Id.* at 38. The couple lived with Ms. Kaur's sister, Manjit Kaur, her brother-in-law, Sukhchain (Sam) Singh, and their family. *Id.*

Within days after arriving in America, Defendant began to change. *Id.* at 40. He did not have a job when he arrived here; Ms. Kaur's sister trained him. Ms. Kaur did not know whether her sister paid him. *Id.* at 41. He began asking Ms. Kaur for money, then "forcibly wanted money from [Ms. Kaur], then he started hitting [her], beating [her]." *Id.* at 40-41, 46-50. He took money from her purse. *Id.* at 41-42. When Ms. Kaur stopped putting money in her purse, Defendant held a knife to her throat and told her to send money to his family. He threatened to kill her if she failed to send the money or told anyone about it. *Id.* at 43, 50. Ms. Kaur sent \$1,300.00 to Defendant's family on June 7, 2014. *Id.* at 43-45, 434 (Commonwealth Exhibit 10). Defendant hit Ms. Kaur many times during the period April to September 2014. *Id.* at 48-49. She had bruises. *Id.* at 50, 209-210. Ms. Kaur testified that after he began hitting her, Defendant also began to forcefully have sexual intercourse with her multiple times per week when she did not want to have sexual relations. *Id.* at 54 - 60. He threatened her with a knife if she told anyone. *Id.* at 55.

Ms. Kaur did not tell her sister that Defendant was hitting her or seek her sister's help. *Id.* at 50-51. On September 27, 2014, Manjit Kaur happened upon the Defendant in the kitchen holding a knife against Ms. Kaur's throat to obtain money. *Id.* at 51, 52, 210-214. When Manjit Kaur attempted to call 911, Defendant promised not to do that again. He sank to her feet and asked her to forgive him. Manjit Kaur did not call the police, but rather attempted to give advice to Defendant. *Id.* at 212-215.

On October 2, 2014, while working at the family business, Defendant tried to take money from Karamjit Kaur's hands. She held onto the money, as it belonged to the business. Defendant pulled her hair and slapped and struck her with his fist. *Id.* at 62-67. Sukhchain Singh was at the store and heard Ms. Kaur scream. He saw Defendant pulling Ms. Kaur into a back room. He found Defendant with his arm on her neck. He told Defendant to get away from Ms. Kaur and he let her go. Ms. Kaur called the police. *Id.* at 242-246. When the police officer arrived, he issued a summary harassment citation to Defendant. *Id.* at 67, 248. Karamjit Kaur filed a petition for a protection from abuse order against Defendant on October 8, 2014. *Id.* at 435 (Commonwealth Exhibit 14).

On November 29, 2014, Manjit Kaur was driving a car in which Karamjit Kaur was a passenger. Karamjit Kaur received a phone call from Defendant. Speaker phone was activated, and Manjit Kaur heard Defendant telling Karamjit Kaur to "take the case back" or he would kill her. *Id.* at 225-227.

II. Issues Presented on Appeal

In his concise statement, Defendant identifies the following as error and seeks appellate review of the issues which are set forth below, *verbatim*:

1. The Trial Court erred and abused its discretion in denying Appellant's Post Sentence Motion where the verdicts for Robbery [18 Pa.C.S.A. § 3701(a)(1)(ii), Sexual Assault [18 Pa.C.S.A. §2123.1], Intimidation of Witnesses or Victims [18 Pa.C.S.A §4952(a)(3)], Terroristic Threats [18 Pa.C.S.A. §2706(a)(1), Stalking [18 Pa.C.S.A. 2709.1(a)(2)], Simple Assault [18 Pa.C.S.A. §2701(a)(1),(3)] were contrary the weight of the evidence presented at trial insofar as the credibility of both the victim and Commonwealth witness Sam Singh was undermined by inconsistent and demonstrably untrue testimony.
2. The Trial Court erred and abused its discretion in permitting Dr. Shamita Das Dasgupta to testify as an expert in "sexual abuse victim behavior and response to trauma" particularly as it relates to women in the Indian culture, where Dr. Dasgupta's testimony:
 - a. Exceeded the scope of qualification by the Court as an expert in "sexual abuse victim behavior and response to trauma" and/or exceeded the statutory provisions under which such experts are permitted to testify pursuant to 42 Pa.C.S. §5920; and
 - b. included generalizations that were prejudicial to Appellant.
3. The Trial Court erred in failing to instruct the jury as to the permissible limits of the expert testimony of Dr. Dasgupta under 42 Pa.C.S. §5920.

In the first issue, Defendant argues that the guilty verdicts were against the weight of the evidence. In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745 (2000), the Pennsylvania Supreme Court set forth the applicable standard when evaluating challenges to the weight of evidence:

A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa.Super. 120, 485 A.2d 459 (1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11, 102 S.Ct. 2211. An allegation that the verdict is against the weight of the evidence is

addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson*, *supra*.¹² A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that “notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.” *Id.*

744 A.2d at 751-752. “A verdict is against the weight of the evidence ‘only when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice.’” *Commonwealth v. Blakeney*, 596 Pa. 510, 522, 946 A.2d 645, 652 (2008), quoting *Commonwealth v. Cousar*, 593 Pa. 204, 928 A.2d 1025, 1036 (2007). Assessing the credibility of witnesses is within the sole province of the jury. *Blakeney*, 946 A. 2d at 653.

In the concise statement, Defendant argues that the testimony of two witnesses, Ms. Kaur and Sam Singh, was so “inconsistent and demonstrably untrue” such that it undermined their credibility. However, no specific examples or instances of such testimony or even a category of such testimony is provided. The court understands that the concise statement is an opportunity to “winnow the issues, recognizing that they will ultimately need to be refined to a statement that will comply with the requirements of Pa.R.A.P. 2116”, *see* Pa.R.A.P. 1925 Note. “Counsel should begin the winnowing process when preparing the Statement and should articulate specific rulings with which the appellant takes issue and why. Nothing in the rule requires an appellant to

¹² *Thompson v. City of Philadelphia*, 507 Pa. 592, 493 A.2d 669 (1985).

articulate the arguments within a Statement. It is enough for an appellant – except where constitutional error must be raised with greater specificity – to have identified the rulings and issues that comprise the putative trial court errors.” *Id.* “ In other words, the Rule 1925(b) statement must be ‘specific enough for the trial court to identify and address the issue [an appellant] wishe[s] to raise on appeal.’ ‘[A] [c]oncise [s]tatement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no [c]oncise [s]tatement at all.’ The court’s review and legal analysis can be fatally impaired when the court has to guess at the issues raised. Thus, if a concise statement is too vague, the court may find waiver.” *Commonwealth v. Hansley*, 24 A.3d 410, 415 (Pa.Super. 2011) (citations omitted).

Without providing specific examples of how the verdict was against the weight of the evidence, this court is left to guess at what they might be. ¹³ We are unable to meaningfully address this issue. We find this issue has been waived.

Were we nevertheless required to examine this issue, we would conclude that the verdicts were not against the weight of the evidence. On the record before us, we do not find the jury’s verdicts so contrary to the evidence as to shock one’s sense of justice or that a miscarriage of justice prevailed, warranting the grant of a new trial. Rather, the

¹³ As is typical and expected, defense counsel drew the jury’s attention to several instances of what he characterized as “dishonest”, “false”, “less than forthcoming” or “inconsistent” testimony in his closing argument. N.T. 3/14-17/2016 at 341-352. We do not presume to know whether the concise statement refers to any of these instances or perhaps has other instances in mind.

verdicts simply reflect that the jury believed Karamjit Kaur's testimony, the testimony of her sister, Manjit Kaur, and that of her brother-in-law, Sukhchain (Sam) Singh, and that it rejected the defense narrative, namely, that after realizing her arranged marriage to Defendant "was not working", Ms. Kaur and her family members fabricated allegations of physical and sexual abuse which would lead to Defendant's deportation in an effort to avoid financial responsibility for him. There was testimony from Criminal Investigator Karie Good that Ms. Kaur desired that Defendant be deported. N.T. 03/14-17/2016 at 201. However, it was entirely reasonable for the jury to conclude that Ms. Kaur wished the Defendant deported because of his violent actions towards her, and not because of any future financial responsibility she may have incurred. Such testimony is not inconsistent with the testimony that Defendant physically and sexually abused Ms. Kaur and threatened her with a knife if she did not wire money to his family.

As in any trial, there are bound to be inconsistencies or conflicts in the testimony, even involving the same witness. To the extent there were conflicts or inconsistencies in the testimony, the jury is presumed to have followed the instructions regarding such conflicts and was able to reconcile any discrepancies as instructed. *Id.* at 398-399. Considering the record as a whole, we detect no facts of "clearly of greater weight" which were either ignored by the jury or not given equal weight and therefore find that Defendant's assertion that the verdicts were against the weight of evidence is without merit.

We next address the issues relating to the expert testimony of the Commonwealth's witness, Shamita Das Dasgupta, Ph.D. Prior to trial, the Commonwealth filed a pretrial motion *in limine* seeking, *inter alia*, a ruling as to the admissibility of Dr. Dasgupta's testimony under 42 Pa.C.S.A. § 5920. This court held a hearing on the motion on March 10, 2016, at which the Commonwealth made an offer of proof as to Dr. Dasgupta's testimony, provided a copy of her 12 page *curriculum vitae*, and even provided an outline of its direct examination of the witness. During that hearing, defense counsel made the following objection to Dr. Dasgupta's proposed testimony:

Mr. Nigrini: Your Honor, I do not disagree that this particular witness does have expert knowledge in the areas that Mr. Kurland spoke to earlier. My objection lies in that this determination as to the scope and the extent that you would allow her to testify would be dependent upon what the victim testifies to at trial, number one.

And then I believe regarding the offer of proof that Mr. Kurland had represented, I would object specifically to the opinion that there is, quote, no typical victim response to sexual abuse or a, quote, typical victim response in the aftermath of sexual abuse.

The Court: All right. So what was the first one? No typical - - -

Mr. Nigrini: - - -victim response to sexual abuse. Sexual trauma. I'm sorry.

The Court: All right. And you're also objecting to what other part of the opinion?

Mr. Nigrini: That there is not a typical victim response in the aftermath of sexual abuse.

The Court: Okay.

Mr. Nigrini: I would argue that that provides no guidance to the jury regarding a crime of this particular nature. Essentially if I'm understanding that correctly, a victim can behave in any fashion and that is not unique to crimes of sexual abuse. It certainly is not unique to any particular crime. And, therefore, it provides no expert analysis or opinion that will guide the jury in reaching their decision.

I certainly understand the relevance relative to the remaining portions of her opinion. But specifically, that's what I will object to, that even if based upon the testimony of the victim, that lays the foundation for her testimony, that that should not be permitted in her opinion.

The Court: All right. So with regard to the opinions that the Commonwealth referenced that there expert intends to give, those are the two that you're objecting to?

Mr. Nigrini: Yes, Your Honor.

The Court: Nothing else?

Mr. Nigrini: Correct.

Mr. Kurland: Judge, I believe the witness's response that there is no typical response becomes relevant if the defense would use delayed disclosure or some responses by the victim to attempt to persuade the jury that a reasonable doubt is created in that she didn't respond or behave as a victim of sexual abuse would. Dr. Dasgupta could help the jury understand that, generally speaking, there is no typical response, which I would suggest is not something intuitive to most people or jurors.

The Court: Mr. Nigrini, anything?

Mr. Nigrini: Your Honor, I believe I've specifically indicated why that should not be allowed. And as I did not indicate any objection to her opinion that it's not unusual for delayed reporting, what we're talking about is that there's no typical behavior to which any behavior could be deemed a reasonable way of behaving if one is the victim of sexual abuse. And I don't believe that provides any expert guidance to this case.

The Court: All right. Is there anything else with regard to the first argument?

Mr. Kurland: Nothing further, Your Honor.

N.T. 03/10/2016 at pp. 10-12. A ruling on the defense objection to this line of questioning was deferred. At the time of trial, just prior to Dr. Dasgupta's testimony, this court overruled the defense's objection to the question of whether there is a typical

victim response to sexual abuse. N.T. 03/14-17/2016 at 161-162. (The second requested ruling - whether the Commonwealth could ask the expert the related "belt and suspenders" question of whether there is a typical victim response in the aftermath of dealing with trauma -- was withdrawn. *Id.*)

The Commonwealth called Dr. Dasgupta to testify in the area of sexual abuse victim behavior and response to trauma, and she was accepted by this court as an expert in that area, without cross-examination or objection by Defendant. *Id.* at 172. Dr. Dasgupta's specialty is in domestic violence and sexual assault, particularly in the area of Indian cultures and Indian family and women. *Id.* at 163. The Punjabi and Sikh experience is integrated into this work. *Id.* She has extensive experience (31 years), both nationally and internationally, working with victims of sexual abuse. *Id.* at 165, 167. She worked until recently as a clinical adjunct assistant professor at NYU Law School. *Id.* at 163, 457 (Commonwealth's Exhibit 19). She has provided training to the judiciary, law enforcement, healthcare workers, and advocates in the area of violence against women. *Id.* at 166. She has previously testified - approximately fifteen times -- as a cultural expert in other jurisdictions; of that amount, five related to sexual violence. *Id.* at 175. at 167. She prepared a report for this case. *Id.* at 462-472 (Commonwealth's Exhibit 20). However, she neither reviewed any materials nor interviewed anyone relating to this specific case. *Id.* at 172. Her testimony covered physical and sexual abuse and disclosure and reporting of such abuse in a broad context, but more specifically within the context of Indian culture and Punjabi or Sikh background. *Id.* at 177- 188. Dr. Dasgupta testified

that there is not a typical victim response to sexual abuse or sexual violence; “[p]eople behave differently.” *Id.* at 173. Dr. Dasgupta testified as to delayed and piecemeal disclosure by victims of sexual abuse. *Id.* at 178-179. In the context of the Indian culture, disclosure of sexual abuse within a marriage runs contrary to the primacy of marriage for women and a woman’s obligation to keep the marriage going. *Id.* at 174-78. The divorce rate in India is 1.1 % and a divorced woman is almost always seen as a problem. *Id.* at 176. A woman’s marriage is essential to her identity. *Id.* at 183. India adopted a domestic violence law in 2005. However, there is no marital rape law in India; it is assumed that husbands have a right to access their wife’s body whenever and wherever. *Id.* at 178. Additionally, women especially are taught from early childhood to limit disclosure of shameful things, including domestic violence, sexual assault, family disharmony, certain diseases, *etc.* to insiders (mothers, sisters or those connected by blood or relationship). Law enforcement and mental and health professionals would fall within the category of outsiders. *Id.* at 183. Indian culture is also very sex-segregated. *Id.* at 186. This factor would also make it more difficult to disclose intimate matters to a member of the opposite gender. *Id.* at 186.

The Commonwealth offered Dr. Dasgupta’s testimony under 42 Pa.C.S.A. § 5920, which is set forth in its entirety below:

§ 5920. Expert testimony in certain criminal proceedings

a) **Scope.**--This section applies to all of the following:

(1) A criminal proceeding for an offense for which registration is required under Subchapter H of Chapter 97 (relating to registration of sexual offenders).

(2) A criminal proceeding for an offense under 18 Pa.C.S. Ch. 31 (relating to sexual offenses).¹⁴

(b) Qualifications and use of experts.--

(1) In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence, that will assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.

(2) If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.

(3) The witness's opinion regarding the credibility of any other witness, including the victim, shall not be admissible.

(4) A witness qualified by the court as an expert under this section may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony.

42 Pa.C.S.A. § 5920.

In *Commonwealth v. Olivo*, 127 A.3d 769 (Pa. 2015), a Pennsylvania Supreme Court majority found § 5920 "to be a substantive rule of evidence that does not violate our Article V, Section 10(c) authority over procedural rules." 127 A.3d at 780. It "does not dictate how the evidence is presented" but merely "provides the substantive authorization to present that testimony." *Id.* Because the statute is relatively new, there are few cases interpreting it, especially post-*Olivo*. Dr. Dasgupta was clearly an expert in the field of sexual violence, and particularly within the Indian culture. Her area of expertise is not within the knowledge possessed by the average layperson. Without

¹⁴ Defendant was charged with rape by forcible compulsion, 18 Pa.C.S.A. § 3121(a)(1), and sexual assault, 18 Pa. C.S.A. § 3124.1. Both offenses fall within Chapter 31. Therefore, the statute is applicable in this case.

having access to the facts of this particular case, she offered her opinion regarding disclosure and reporting of domestic and sexual violence by intimate partners such as a spouse. With respect to the defense objection to the expert's testimony about a typical victim response to sexual abuse, we find that such testimony was contemplated by § 5920. Disclosure and reporting of sexual abuse is a type of victim response. That there is no typical response in such cases, and that delayed or piecemeal disclosure of sexual abuse is not uncommon, is precisely the sort of information which would "assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted. " This information is of even more assistance to the trier of fact given the Indian cultural setting of this case. Dr. Dasgupta, consistent with the mandates of the statute, did not render any opinion as to the victim's credibility. In fact, she testified that she never interviewed the victim nor reviewed any reports with regard to this case.

We find that the defense's assertion of error that Dr. Dasgupta's testimony "exceeded the scope of qualification by the Court as an expert in "sexual abuse victim behavior and response to trauma and/or exceeded the statutory provisions under which such experts are permitted to testify pursuant to 42 Pa.C.S. § 5920" has been waived. As with the first issue, this assertion of error is broadly stated and provides no specific instance or example to support it or allow this court to conduct meaningful review of the issue.

We further find waiver of the issue on scope of qualification for failure to object when appropriate during the trial. As described above, Defendant reserved the right to object to scope and extent of the expert's testimony at the pretrial motion *in limine* hearing: "[m]y objection lies in that this determination as to the scope and the extent that you would allow her to testify *would be dependent* upon what the victim testifies to at trial, number one." Defendant did not renew this contingent objection during Dr. Dasgupta's testimony. Pa.R.A.P. 302(a) sets forth the general rule regarding requisites for a reviewable issue: "[I]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal". Describing issue preservation as "foundational [to] proper appellate review", the Pennsylvania Supreme Court has noted that requiring an issue to be raised at the trial court safeguards the trial court's ability to both consider an issue and correct any error at the earliest opportunity. *In re F.C.*, III, 607 Pa. 45, 64, 2 A.3d 1201, 1211-1212 (2010) (citations omitted). The issue preservation requirement "advances the orderly and efficient use of our judicial resources" and "concepts of fairness and expense to the parties are implicated as well." *Id.* (citation omitted). Though reserving the right to object depending on the expert's testimony, Defendant failed to object to the scope and extent of the expert's testimony at trial. Defendant had no objection to the qualification of the witness as an expert. In failing to raise the objections at trial, Defendant deprived the court of the opportunity to rule upon them and to take any corrective action. Therefore, this issue is waived.¹⁵

¹⁵ Were we to conclude that it had *not* been waived, on this record, we are confident that Dr. Dasgupta's testimony was consistent with and within the parameters of § 5920.

With respect to the claim that Dr. Dasgupta's testimony "included generalizations that were prejudicial to Appellant", we find that the issue has also been waived. Dr. Dasgupta's testimony was consistent with her report. We find the report to be within the parameters of the statute. Defendant did not object when the testimony was given (other than the objection to testimony about "no typical victim response"). Moreover, he cross-examined the witness who acknowledged that her opinions were "absolutely" based upon generalizations. N.T. 03/14-17/2016 at 192.

Finally, in a closely related issue, Defendant asserts this court erred in failing to instruct the jury as to the permissible limits of the expert testimony of Dr. Dasgupta under 42 Pa.C.S. § 5920. The jury was instructed on expert witness testimony. N.T. 03/14-17/2016 at 399-400. Defendant did not object to the instruction as given. *Id.* at 410. Defendant did not request a particular instruction as to the "permissible limits of testimony" under § 5920, nor did he object that none was given. N.T. 03/14-17/2016 at 410. The jury was also instructed as to the victim's failure to complain or delay in making complaint as a factor for consideration in assessing the believability of Ms. Kaur's testimony in light of all the evidence presented in the case. *Id.* at 400-402. No further or amended instruction regarding the scope of the expert witness was requested of this court. Therefore, this issue is waived.

III. Conclusion

For the foregoing reasons, this court respectfully requests that this appeal be DENIED and the judgment of sentence AFFIRMED.

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Defense Counsel(trial) Jay M. Nigrini, Esq.

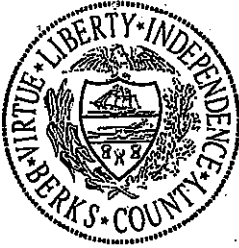
Defense Counsel(appeal) Anna Ferguson, Esq.

Defendant

Judge

COUNTY OF BERKS, PENNSYLVANIA

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