NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. WILLIAM DETILLO Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1725 WDA 2012

Appeal from the Judgment of Sentence April 25, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0002362-2011

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

MEMORANDUM BY GANTMAN, P.J.: **FILED JUNE 10, 2014**

Appellant, William Detillo, appeals from the judgment of sentence entered in the Allegheny County Court of Common Pleas, following his jury trial conviction for aggravated assault.[1] We affirm and grant counsel's petition to withdraw.

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

As a preliminary matter, appellate counsel seeks to withdraw his representation pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and ***Commonwealth v. Santiago***, 602 Pa.

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[1] 18 Pa.C.S.A. § 2702(a)(1).

159, 978 A.2d 349 (2009). ***Anders*** and ***Santiago*** require counsel to: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal; and 3) furnish a copy of the brief to the appellant and advise him of his right to obtain new counsel or file a *pro se* brief to raise any additional points the appellant deems worthy of review. ***Santiago, supra*** at 173-79, 978 A.2d at 358-61. Substantial compliance with these requirements is sufficient. ***Commonwealth v. Wrecks***, 934 A.2d 1287, 1290 (Pa.Super. 2007). "After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous." ***Commonwealth v. Palm***, 903 A.2d 1244, 1246 (Pa.Super. 2006) (quoting ***Commonwealth v. Townsend***, 693 A.2d 980, 982 (Pa.Super. 1997)).

In ***Santiago, supra***, our Supreme Court addressed the briefing requirements where court-appointed appellate counsel seeks to withdraw representation:

> Neither ***Anders*** nor ***McClendon***[2] requires that counsel's brief provide an argument of any sort, let alone the type of argument that counsel develops in a merits brief. To repeat, what the brief must provide under ***Anders*** are

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[2] ***Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981).

> references to anything in the record that might arguably support the appeal.
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> * * *
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> Under ***Anders***, the right to counsel is vindicated by counsel's examination and assessment of the record and counsel's references to anything in the record that arguably supports the appeal.

Santiago, supra at 176, 177, 978 A.2d at 359, 360. Thus, the Court held:

> [I]n the ***Anders*** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state 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.

Id. at 178-79, 978 A.2d at 361.

Instantly, appellate counsel filed a petition to withdraw representation. The petition states counsel fully reviewed the record and concluded the appeal would be wholly frivolous. Counsel indicates he notified Appellant of the withdrawal request. Counsel also supplied Appellant with a copy of the brief and a letter explaining Appellant's right to proceed *pro se* or with new privately retained counsel to raise any points Appellant deems necessary. In his ***Anders*** brief, counsel provides a summary of the procedural history of the case. Counsel refers to evidence in the record that may arguably support the issues raised on appeal, and he provides citations to relevant law. The brief also provides counsel's reasons for his conclusion that the

appeal is wholly frivolous. Therefore, counsel has substantially complied with the requirements of ***Anders*** and ***Santiago***.

As Appellant has filed neither a *pro se* brief nor a counseled brief with new privately retained counsel, we review this appeal on the basis of the issues raised in the ***Anders*** brief:

> WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF AGGRAVATED ASSAULT WHEN THE COMMONWEALTH FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT ACTUALLY COMMITTED THE ASSAULT?
>
> WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF AGGRAVATED ASSAULT WHEN THE COMMONWEALTH FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT HAD THE *MENS REA* TO COMMIT THE ASSAULT?
>
> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL WHEN THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE?
>
> WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL WHEN APPELLANT BECAME INCOMPETENT AT TRIAL AND COULD NOT ASSIST IN HIS DEFENSE?
>
> WHETHER THE TRIAL COURT ERRED BY ALLOWING DR. SQUIRES, AN EXPERT WITNESS OF THE COMMONWEALTH, TO INCREASE THE SCOPE OF HER TESTIMONY FROM HER EXPERT REPORT, WITH HER FINDING OF AN UNEQUIVOCAL CONCLUSION AS TO THE CAUSE AND NATURE OF THE INJURIES SUFFERED BY THE VICTIM?
>
> WHETHER THE TRIAL COURT ERRED BY ALLOWING DR. SQUIRES TO TESTIFY AS TO THE BASIS OF A REPORT WHICH WAS NOT PROVIDED TO APPELLANT, THE ORIGINAL OF WHICH HAS NEVER BEEN PROVIDED TO APPELLANT BEFORE, DURING OR AFTER TRIAL?

> WHETHER THE COMMONWEALTH VIOLATED DUE PROCESS AND [ITS] DUTY UNDER ***BRADY V. MARYLAND***, [373 U.S. 83, 83 S.CT. 1194, 10 L.ED.2d 215 (1963)], WHEN DR. SQUIRES TESTIFIED TO SOMETHING DIFFERENT THAN WHAT WAS IN HER REPORT?

(***Anders*** Brief at 5-6).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Edward J. Borkowski, 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 December 9, 2013, at 7-16) (finding: **1-3)** sufficient evidence demonstrated Appellant committed offense where Appellant and victim's mother were arguing on morning of assault, victim appeared normal when mother left for work immediately prior to assault, Appellant was agitated when he first called victim's mother to notify her about victim's injuries, and Appellant was only person with victim from time victim's mother left for work until ambulance arrived to take victim to hospital; sufficient evidence demonstrated Appellant acted recklessly under circumstances manifesting extreme indifference to value of human life, where doctors diagnosed victim's injuries as abusive head trauma resulting from severe shaking event, victim would have been noticeably abnormal after severe shaking event, Appellant's explanation that victim fell out of bed

was inconsistent with victim's injuries, and victim is cognitively impaired due to injuries; jury's verdict was not against weight of evidence;[3] **4)** court granted recess during trial after Appellant suffered flare-up of Crohn's disease; although Appellant moved for mistrial following recess, court denied motion after considering available evidence, observing Appellant, and conducting colloquy; Appellant was coherent and cooperative, and he presented no medical evidence to support mistrial motion; subsequent to court's ruling, Appellant actively assisted trial counsel with defense; **5)** court permitted Dr. Squires to testify as expert in physical child abuse; Dr. Squires personally examined victim, interviewed victim's mother, and considered all medical data collected during victim's hospitalization before making diagnosis; court properly permitted Dr. Squires to opine that victim's injuries

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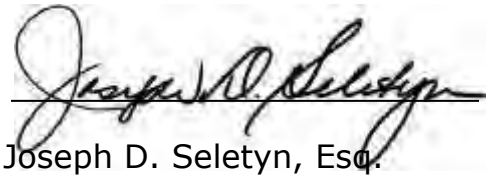
[3] In its opinion, the court concluded that Appellant's concise statement of errors complained of on appeal was too vague to permit review of the weight claim. We disagree with the court's waiver analysis and emphasize that counsel filed the concise statement pursuant to Pa.R.A.P. 1925(c)(4), which does not require counsel to list specific issues to be raised on appeal. Despite its finding of waiver, the trial court noted, "Even if the Superior Court was to address Appellant's [weight] claim, it is clear that the verdict was not against the weight of the evidence, and Appellant's claim is without merit." (***See*** Trial Court Opinion at 11 n.5) (citing ***Commonwealth v. Bruce***, 916 A.2d 657 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007)). For the reasons set forth in the trial court's analysis of Appellant's sufficiency claims, we agree that Appellant's weight claim is also without merit. ***See Commonwealth v. Champney***, 574 Pa. 435, 832 A.2d 403 (2003), *cert. denied*, 542 U.S. 939, 124 S.Ct. 2906, 159 L.Ed.2d 816 (2004) (stating weight of evidence is exclusively for finder of fact who is free to believe all, part, or none of evidence and to determine credibility of witnesses; appellate review is limited to whether trial court palpably abused discretion in ruling on weight claim).

were caused by abusive head trauma; **6)** Appellant initially objected to Dr. Squires' testimony, claiming he did not receive her expert report; court conducted sidebar and determined that all parties had received same report, which was only report Dr. Squires prepared; **7)** Commonwealth did not commit ***Brady*** violation; Commonwealth provided expert report to Appellant, who utilized report at trial; moreover, Dr. Squires testified consistent with report). Accordingly, we affirm on the basis of the trial court opinion and grant counsel's petition to withdraw.

Judgment of sentence affirmed; counsel's petition to withdraw is granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/10/2014

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

APPELLEE,

V.

WILLIAM DETILLO,

APPELLANT.

CC NO.: 201102362

1725 WDA 2012

OPINION

FILED BY:

THE HONORABLE
EDWARD J. BORKOWSKI

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, CRIMINAL DIVISION

APPELLEE, CC NO.: 201102362

V.

WILLIAM DETILLO,

APPELLANT.

OPINION

BORKOWSKI, J.

PROCEDURAL HISTORY

Appellant, William Detillo, was charged by criminal information (CC 201102362) with one count each of Aggravated Assault[1] and Endangering Welfare of Children.[2]

Appellant proceeded to a jury trial on January 17-26, 2012, at the conclusion of which Appellant was found guilty of Aggravated Assault and not guilty of Endangering Welfare of Children. On April 25, 2012, Appellant was sentenced by the Trial Court to ten to twenty years incarceration.

[1] 18 Pa. C.S. § 2702(a)(1).
[2] 18 Pa. C.S. § 4304.

Appellant filed a *pro se* post sentence motion on April 30, 2012, and a counseled post sentence motion on May 4, 2012, both of which were denied by operation of law on October 3, 2012. On November 2, 2012, Appellant filed a timely notice of appeal.

On October 24, 2013, Appellant's counsel filed a Statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(c)(4) with the Concise Statement of Matters Complained of on Appeal. As discussed below, the Trial Court agrees with Appellant's counsel that the appeal raises wholly frivolous issues.

STATEMENT OF ERRORS ON APPEAL

Appellant's claims are set forth below exactly as Appellant presented them:

> 1. Whether there was sufficient evidence to convict Mr. Detillo of aggravated assault when the Commonwealth failed to prove beyond a reasonable doubt that Mr. Detillo actually committed the assault?
> 2. Whether there was sufficient evidence to convict Mr. Detillo of aggravated assault when the Commonwealth failed to prove beyond a reasonable doubt that Mr. Detillo had the *mens rea* to commit the assault?
> 3. Whether the trial court abused its discretion in denying the motion for new trial when the verdict was contrary to the weight of the evidence? *See* post-sentencing motions.
> 4. Whether the trial court erred in denying the motion for mistrial when Mr. Detillo became incompetent at trial and could not assist in his defense? *See* TT 284-291. *See also* TT 375, and 520. *See* TT 56-57, 189-190, 277, 278-279-283.
> 5. Whether the trial court erred by allowing Dr. Squires, an expert witness of the Commonwealth, to increase the scope of her testimony from her expert report, with her finding of an unequivocal conclusion as to the cause and nature of the

injuries suffered by the victim? *See* post-sentencing motions, ¶ 7.

6. Whether the trial court erred by allowing Dr. Squires to testify as to the basis of a report which was not provided to the Defendant, the original of which has never been provided to the Defendant before, during or after trial? *See* post-sentencing motions, ¶ 7.

7. Whether the Commonwealth violated due process and their duty under *Brady v. Maryland*, when Dr. Squires testified to something different than what was in her report? *See* Defendant's letter to counsel, dated 10/7/13.

FINDINGS OF FACT

On January 6, 2011, C. S. woke up Appellant, her boyfriend, at 300 Arabella Street in the Knoxville neighborhood of Allegheny County to drive her to work for her 6:00 A.M. shift. They argued that morning, but Appellant drove C.S. to work with her son, two-year-old J. P., in the backseat. (T.T. 105-106).[3] C. S. got out of the car and J. P. waved goodbye to her before Appellant drove back home with J. P. (T.T. 107). Appellant called C. S. twenty minutes later and told her, "J. P. busted his mouth open and he's bleeding." (T.T. 108-109). Appellant sounded aggravated and J. P. was crying in the background, but C. S. told Appellant that she could not leave work. (T.T. 109). Fifteen minutes later Appellant called again and told her that J. P. was severely hurt, that his eyes were rolling back in his head, and he was having

[3] The designation "T.T." followed by numerals refers to Trial Transcript, January 17-26, 2012.

trouble breathing. Appellant unsuccessfully tried to administer CPR before calling 911. (T.T. 109-111, 115).

Paramedics responded to the home at 6:40 A.M. to find J. P. supine on the living room floor with massive trauma about his eyes, face, and mouth. He was breathing but was blue from recent trauma. (T.T. 60-61). When asked who beat the child, Appellant responded that J. P. fell out of bed. (T.T. 61). J. P. was immobilized and emergently transported to the Children's Hospital trauma unit. (T.T. 62). En route J. P. was unresponsive to treatment, and the paramedics called local police because Appellant's explanation that J. P. fell out of bed was inconsistent with his injuries. (T.T. 62-63, 70). Once paramedics transported J. P., Appellant picked up C. S. from work and drove her to the hospital. (T.T. 112).

At the hospital J. P. was placed on complete life support. (T.T. 203). J. P.'s injuries included: bruising on his abdomen, right eye, left ear, scrotum, and penis; a swollen, bruised lip; and multiple retinal hemorrhages. (T.T. 211, 214-215, 217, 221). He had abdominal surgery to relieve blood clots in his abdomen that were likely a result of a previous beating. (T.T. 203, 238, 248-249). His brain was swollen and there was blood in and on top of the brain. (T.T. 218). J. P. underwent a bilateral craniotomy, where his skull was removed to alleviate the pressure on his brain. (T.T. 211-212, 219). His brain was drained and a permanent ventricular shunt was inserted. (T.T. 219).

After the home was secured, Detective Vonzale Boose went to the hospital to investigate and interview potential witnesses, the parents, and medical staff. Detective Boose interviewed Appellant at the hospital and at police headquarters. Appellant provided a statement maintaining his story that J.P. injured himself accidentally, adding that he "did not intentionally hurt the kid." (T.T. 296-300, 329). The crime lab tested blood found in the bathroom on the faucet, shower curtain, sink, tub, and back wall, and found that it matched J.P.'s DNA profile. (T.T. 388, 433).

J.P. remained in pediatric intensive care for thirty five days, after which he was transferred to the Children's Institute for rehabilitation. (T.T. 118-119, 121). While at the Institute, his shunt became infected and he had to return to the hospital to fix the spinal fluid reabsorption mechanisms. (T.T. 119, 223-224). J.P.'s skull was replaced in June and he was able to go home in August after C.S. was trained on his feeding tube, feeding machine, and how to administer his several medications. (T.T. 119, 122, 223).

J.P. remains under physician's supervision and requires the care of his mother and a nurse twenty-four hours a day. He is unable to eat on his own, walk, or converse. (T.T. 123). J.P. lost about one third of his brain tissue as a result of this injury. (T.T. 225). J.P.'s injury was the result of abusive head trauma, or more commonly referred to as severe shaken child syndrome. (T.T. 227, 237). As a

result of the injuries inflicted J.P. is cognitively impaired, nonverbal medically,[4] will never be neurologically normal, and will always have cerebral palsy and spasticity. (T.T. 240-241).

Appellant was formally arrested and charged as noted hereinabove.

DISCUSSION

I & II.

Appellant alleges in his first two claims that the evidence was insufficient to convict Appellant of Aggravated Assault based on the arguments that the Commonwealth failed to prove beyond a reasonable doubt that: (1) Appellant was the actor who committed the assault; and (2) Appellant possessed the requisite *mens rea*. These claims are without merit.

The standard of review for sufficiency of the evidence claims has been stated thusly:

> The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The

[4] At the time of trial J.P. could say two words at most.

> Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.

Commonwealth v. Gray, 867 A.2d 560, 567 (Pa. Super. 2005). A person commits Aggravated Assault "if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa. C.S. § 2702(a)(1). When the victim suffers serious bodily injury, the Commonwealth need only prove that the defendant acted recklessly to establish the *mens rea* required for aggravated assault. *Commonwealth v. Hlatky*, 626 A.2d 575, 581 (Pa. Super. 1993).

The record established that: (1) Appellant and C.S. were arguing before he drove her to work with J.P.; (2) J.P. waved goodbye to C.S.; (3) Appellant sped away with J.P.; (4) when Appellant first called C.S. after J.P. sustained a bloody lip, Appellant was noticeably agitated and J.P. was crying; (5) Appellant was the only person with J.P. from the time C.S. went to work until the ambulance picked up J.P.; (6) fifteen minutes after the initial injury, Appellant called 911 because J.P. was motionless, had difficulty breathing and his eyes were rolling back in his head; (7) J.P.'s injuries were diagnosed as

abusive head trauma resulting from a severe shaking event; (8) after the severe shaking event J.P. would have been noticeably abnormal immediately; (9) upon being questioned Appellant was evasive with his answers and his explanation that J.P. fell out of bed was inconsistent with his injuries; (10) Appellant previously told C.S. that he could not take watching J.P.; and (11) as a result of the injuries, J.P. is cognitively impaired, nonverbal medically, will always have cerebral palsy and spasticity, and will never be neurologically normal. (10) (T.T. 60-61, 63, 93, 106, 109-110, 227, 232-233, 237, 240-241, 310, 605).

This evidence was sufficient to sustain the conviction of Aggravated Assault. *See Commonwealth v. Smith*, 956 A.2d 1029, 1037 (Pa. Super. 2008) (evidence sufficient to sustain conviction for aggravated assault where evidence indicated that infant suffered a severe brain injury as a result of being severely shaken, and violently shaking a child is sufficient to establish recklessness beyond a reasonable doubt); *Commonwealth v. Watson*, 627 A.2d 785, 787 (Pa. Super. 1993) (evidence sufficient to sustain aggravated assault conviction where evidence indicated that burn marks were consistent with hand being forcibly held in hot bowl of soup, inconsistent with an accidental burn, and three-year-old victim stated that his father caused the burns on his hand).

III.

Appellant alleges in his third claim that the Trial Court abused its discretion in denying the motion for new trial based on the argument that the verdict was contrary to the weight of the evidence.

The Pennsylvania Supreme Court has stated the standard of review for challenges to the weight of the evidence as follows:

> It is well settled that the jury is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses, and a new trial based on a weight of the evidence claim is only warranted where the jury's verdict is so contrary to the evidence it shocks one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion.

Commonwealth v. Houser, 18 A.3d 1128, 1135-1136 (Pa. 2011) (citations and quotations omitted).

This claim is characterized by a sweeping approach which prevents the Trial Court from addressing it. *See Commonwealth v. Seibert*, 799 A.2d 54, 62 (Pa. Super. 2002) (defendant's weight of the evidence claims waived where he merely asserted in his 1925(b) statement that the jury's verdict was against the weight of the credible evidence as to all of the charges).

Appellant's claim is waived.[5]

IV.

Appellant alleges in his fourth claim that the Trial Court erred in denying the motion for mistrial based on the argument that Appellant became incompetent at trial and could not assist in his defense. This claim is without merit.

It is within the sound discretion of the trial court whether to grant a motion for a mistrial, and the trial court will not be reversed absent an abuse of discretion. As an extreme remedy, a mistrial "must be granted only when an incident is of such a nature that its unavoidable effect is to deprive defendant of a fair trial." *Commonwealth v. Szakal*, 50 A.3d 210, 218 (Pa. Super. 2012). Appellant specifically claims that a mistrial should have been granted based on the argument that Appellant became incompetent during trial due to his physical illness.

It is within the sound discretion of the trial court to determine a defendant's competency to stand trial. *Commonwealth v. Knight*, 419 A.2d 492, 497 (Pa. Super. 1980). In making this determination, the trial court must base its decision on a

[5] Appellant directs the Trial Court to his post sentence motion, presumably to provide the reason that he believes the verdict was contrary to the weight of the evidence. However, Appellant's post sentence motion was equally vague and failed to state why the verdict was against the weight of the evidence. Motion for Post Trial Relief, May 4, 2012 ("Whether the Trial Court abused its discretion by upholding a verdict that was clearly contrary to the weight of the evidence which is to be required for the Commonwealth to maintain its burden of proof of beyond a reasonable doubt"). Even if the Superior Court was to address Appellant's claim, it is clear that the verdict was not against the weight of the evidence, and Appellant's claim is without merit. *See Commonwealth v. Bruce*, 916 A.2d 657, 666 (Pa. Super. 2007) (verdict of guilt for aggravated assault not against the weight of the evidence where the jury could conclude from the available evidence that defendant struck victim forcefully when the victim was unprepared to defend himself).

careful and complete inquiry of the evidence. *Knight*, 419 A.2d at 497. In reviewing a competency determination, the standard has been stated thusly:

> A defendant is presumed competent to stand trial. Thus, the burden is on the defendant to prove, by a preponderance of the evidence, that he was incompetent to stand trial. In order to prove that he was incompetent, the defendant must establish that he was either unable to understand the nature of the proceedings against him or unable to participate in his own defense. Stated otherwise, the relevant question in a competency determination is whether the defendant has sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding, and to have a rational as well as a factual understanding of the proceedings. We extend great deference to the trial judge's determination as to competency because he or she had the opportunity to observe directly a defendant's behavior.

Commonwealth v. Flor, 998 A.2d 606, 617-618 (Pa. 2010).

Appellant, who suffers from Crohn's Disease, had a flare-up during trial on January 18, at which point the Trial Court recessed for the day. The Trial Court granted Appellant a recess until January 23, 2012, during which time Appellant sought medical treatment at UPMC Mercy Hospital. Following release from the hospital, Appellant returned to court. Due to Appellant's medications and pain, trial counsel moved for a mistrial. After considering all of the evidence available, observing Appellant, and conducting a colloquy with Appellant, the Trial Court denied the motion for mistrial. (T.T. 279-291). Specifically, the Trial Court stated that Appellant "seems coherent and cooperative and he understands what's going on. So if you want, if you have medical testimony that can convince me otherwise,

I'll listen to that, but right now we're going to proceed." (T.T. 289-291). Subsequent to this ruling, the Trial Court further noted that Appellant appeared to be actively engaged in conversation with his attorney, and "that he's been very alert and very attentive to the testimony. He's been writing at times vigorously, if not feverishly, passing the notes to [and talking with counsel] during the course of this trial." (T.T. 375, 520). The Trial Court properly found Appellant competent, and thus did not abuse its discretion in denying Appellant's motion for mistrial. *See Commonwealth v. Hazur*, 539 A.2d 451, 453 (Pa. Super. 1988) (if a defendant understands that he is accused of an offense and can cooperate with counsel in making a rational defense, then the defendant is competent).

Appellant's claim is without merit.

V.

Appellant alleges in his fifth claim that the Trial Court erred in permitting Dr. Squires, who testified as an expert witness for the Commonwealth, to state an unequivocal conclusion as to the cause and nature of the injuries suffered by the victim. This claim is without merit.

Expert witnesses are permitted to testify to an opinion as to an ultimate issue in the case in order to aid the jury so long as the admission of such evidence would not cause confusion or prejudice. *Commonwealth v. Brown*, 596 A.2d 840, 842

(Pa. Super. 1991). As with all testimony, expert opinions are still subject to credibility determinations by the jury. *Brown*, 596 A.2d at 842-843.

Here, Dr. Squires was permitted to testify as an expert in physical child abuse. Dr. Squires personally examined J.P., interviewed his mother, and considered all medical data collected in connection with J.P.'s admission to the hospital on January 6, 2011 prior to rendering an opinion as to his diagnosis. Based on a review of all of this information, Dr. Squires testified to a reasonable degree of medical certainty that J.P.'s head injuries were caused by abusive head trauma of children, more commonly referred to as shaken baby syndrome. The Trial Court properly admitted the testimony of Dr. Squires regarding J.P.'s diagnosis. *See Commonwealth v. Rodgers*, 528 A.2d 610, 614-616 (Pa. Super. 1987) (expert testimony that victim suffered battered child syndrome properly admitted to refute defense that victim injured herself accidentally, and such admission did not usurp the role of the jury as such testimony went to the cause of the injuries and not the culpability of the defendant).

Appellant's claim is without merit.

VI.

Appellant alleges in his sixth claim that the Trial Court erred in allowing Dr. Squires to testify as to the basis of a report based on the argument that the original report was not provided to Appellant. Appellant's trial counsel initially objected,

claiming that they did not receive the correct medical report. (T.T. 233). However, it was clarified at sidebar and during cross examination that all parties had the same, single and only report prepared by Dr. Squires. (T.T. 233-236, 242-245). This claim is without merit. *Commonwealth v. Causey*, 833 A.2d 165, 171 (Pa. Super. 2003) (no discovery violation where materials requested provided to defendant at trial).

VII.

Appellant alleges in his final claim that the Commonwealth violated due process and their duty under *Brady v. Maryland*[6] based on the argument that Dr. Squires testified to something different than what was in her report.[7] To succeed on a claim that the Commonwealth violated the dictates of *Brady v. Maryland*, the defendant bears the burden of proving that:

> (1) the prosecutor has suppressed evidence; (2) the evidence, whether exculpatory or impeaching, is helpful to the defendant, and (3) the suppression prejudiced the defendant. Prejudice is demonstrated where the evidence suppressed is material to guilt or innocence.

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[6] *Brady* held that suppression by the Commonwealth of evidence favorable to the defense and material to guilt or punishment violates due process, regardless of whether the Commonwealth acted in good faith. *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] Appellant refers the Trial Court to a letter to counsel, dated October 7, 2013, for support of this claim in his Concise Statement. However, this letter has not been made part of the record and thus is not available for the Trial Court to review. Additionally, Appellant has failed to make the medical report authored by Dr. Squires part of the record for appeal, and thus the Trial Court's review of this claim is limited to what it can glean from the trial transcript as it pertains to the contents of the disputed report.

Commonwealth v. Koehler, 36 A.3d 121, 133 (citations and quotations omitted). The record clearly establishes that Appellant and his counsel received the same medical report authored by Dr. Squires as the Commonwealth did. (T.T. 236, 242-245). As such, there was no *Brady* violation as the allegedly suppressed evidence was in fact provided to and used by Appellant at trial, and Dr. Squires testified consistent with her report. (T.T. 262-264). Appellant's claim is without merit.

CONCLUSION

Based upon the foregoing, the judgment of sentence imposed by this Court should be affirmed.

By the Court,

DATE: 12·6·13

Edward J. Borkowski