NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CRIZON JOSHUA KINGSBERRY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 519 MDA 2019

Appeal from the Judgment of Sentence Entered November 21, 2018
In the Court of Common Pleas of Lancaster County
Criminal Division at No.: CP-36-CR-0005104-2016

BEFORE: BOWES, STABILE, and MUSMANNO, JJ.

MEMORANDUM BY STABILE, J.: **FILED JANUARY 21, 2020**

Appellant, Crizon Joshua Kingsberry, appeals from the judgment of sentence entered on November 21, 2018 in the Court of Common Pleas of Lancaster County following his conviction of indecent assault of a person less than 13 years of age, unlawful contact with a minor (two counts), corruption of minors (two counts), rape of a child, statutory sexual assault, and indecent exposure.[1] His counsel has filed a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1969), as refined by ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). In the brief, Appellant's counsel explored challenges to the sufficiency of evidence and to the discretionary aspects of sentence. Counsel concurrently filed an application for leave to withdraw. Following review, we

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[1] 18 Pa.C.S.A. §§ 3126(a)(7), 6318(a)(1), 6301(a)(1)(ii), 3121(c), 3122.1(b)., and 3127(a), respectively.

grant counsel's application for leave to withdraw and affirm Appellant's judgment of sentence.

Our review of the record discloses that Appellant was charged with the above-listed offenses upon filing of a complaint on August 9, 2016. The complaint alleged that Appellant, who was born on May 7, 1983, committed various sexual acts during the summers of 2013 and 2014 with the daughters of his then-girlfriend. The victims' dates of birth are October 18, 2001 and January 13, 2004.

At the conclusion of a four-day trial in June 2018, the jury returned a verdict on all charges. Sentencing was deferred pending a pre-sentence investigation. In accordance with the trial court's order, Appellant underwent an evaluation pursuant to 42 Pa.C.S.A. § 9799.24. Based on the evaluation, the Pennsylvania Sexual Offenders Assessment Board determined Appellant did not meet the criteria of a sexually violent predator.

On November 21, 2018, the trial court imposed an aggregate sentence of 11 to 32 years' incarceration and advised Appellant of his lifetime registration obligation as a Tier III sexual offender. Appellant filed a timely post-sentence motion challenging the sufficiency as well as the weight of the evidence. Trial counsel contemporaneously filed a motion to withdraw based on Appellant's assertions of ineffective assistance of counsel.

The court granted counsel's motion to withdraw and appointed new counsel who filed a supplemental post-sentence motion. Appellant repeated

his claims regarding the sufficiency and weight of evidence and added claims relating to the discretionary aspects of sentence and the trial court's denial of Appellant's pre-trial request to discharge counsel. Counsel was granted additional time to review the transcripts, to determine whether any supplemental post-sentence motions might be appropriate.

Upon completion of his review, counsel advised the court of his conclusion that the four issues raised in the post-sentence motion were without merit. The trial court denied Appellant's post-sentence motion by order entered March 15, 2019. This timely appeal followed.

The trial court entered an order directing counsel to file a concise statement of errors pursuant to Pa.R.A.P. 1925(b). In response, counsel filed a notice of intent to file an ***Anders*** brief, pursuant to Pa.R.A.P. 1925(c)(4), and advised the court of his intent to withdraw on appeal based on the lack of any non-frivolous issues. Although not required to do so, the trial court issued a Rule 1925(a) opinion "to assist the appellate court in its review of the case." Rule 1925(a) Opinion, 5/13/19, at 6 n.7 (citing ***Commonwealth v. McBride***, 957 A.2d 752, 758 (Pa. Super. 2008)). Counsel subsequently filed his ***Anders*** brief with this Court as well as an application for leave to withdraw. Appellant did not respond to the application for leave to withdraw. The Commonwealth advised this Court that it would not file a response to the ***Anders*** brief.

We begin by discussing counsel's request to withdraw, a task we must undertake regardless of the facts and prior to any discussion of the merits of

any issues on appeal. ***Commonwealth v. Rojas***, 874 A.2d 638, 639 (Pa. Super. 2005). As this Court recognized in ***Commonwealth v. Cartrette***, 83 A.3d 1030 (Pa. Super. 2013), our Supreme Court's decision in ***Santiago*** did not change the procedural requirements for requesting withdrawal from representation. As outlined in ***Cartrette***:

> Counsel must: 1) petition the court for leave to withdraw stating that, after making a conscientious examination of the record, counsel has determined that the appeal would be frivolous; 2) furnish a copy of the brief to the defendant; and 3) advise the defendant that he or she has the right to retain private counsel or raise additional arguments that the defendant deems worthy of the court's attention.

Id. at 1032 (citing ***Commonwealth v. Lilley***, 978 A.2d 995, 997 (Pa. Super. 2009)).

We conclude counsel has satisfied the procedural requirements set forth in ***Anders***. He petitioned the court seeking leave to withdraw and confirming his determination that an appeal would be frivolous, based on his "review of the record, including the discovery, pretrial transcripts, sentencing transcript, and issues raised by [Appellant] in his letters, meetings, and phone calls to counsel." Application to Withdraw, 8/23/19, at ¶ 2. He furnished a copy of the ***Anders*** brief to Appellant and advised Appellant of his right to obtain private counsel or proceed *pro se* if he wished to raise any issues he believed were meritorious. Notice of Rights Letter, 8/23/19, at 1.

Having concluded counsel satisfied the procedural requirements of ***Anders***, we next ascertain whether the brief satisfied the substantive

mandates prescribed in ***Santiago***. In ***Santiago***, our Supreme Court announced:

> [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.

Santiago, 978 A.2d at 361.

In the ***Anders*** brief, counsel did not provide his own summary of the procedural history and facts. However, he represented that the trial court's factual and procedural history, as set forth in the court's Rule 1925(a) opinion, was "concise and accurate." ***Anders*** Brief at 5. **See** Rule 1925(a) Opinion, 5/13/19, at 1-6. We agree and further note that counsel did refer to the record in the analysis of arguable appellate issues. ***Anders*** Brief at 7-8. Counsel has generally satisfied the first requirement.

The second required element of an ***Anders*** brief is to reference anything in the record that counsel believes arguably supports the appeal. In his brief, counsel explores two issues, *i.e.*, sufficiency of evidence and discretionary aspects of sentencing. ***Id.*** at 7-8. He also reviewed an issue raised by Appellant relating to Appellant's assertion that the trial court denied his request to discharge trial counsel. We conclude counsel has satisfied the second ***Anders*** requirement.

The third element of ***Anders*** requires counsel to set forth the conclusion that the appeal is frivolous. Counsel offers that conclusion with respect to each issue presented. The fourth element requires counsel to state his reasons for concluding that the appeal is frivolous. Counsel has done so, with citations to case law, in relation to the sufficiency of evidence and discretionary aspects challenges. He also explained that his review of the record "fail[ed] to reveal any proof that [Appellant] attempted to discharge [trial counsel]." ***Id.*** at 8. Counsel has satisfied the substantive requirements of ***Anders***.

Having determined the procedural and substantive requirements of ***Anders*** are satisfied, we must conduct our own independent review of the record to determine if the issues identified in this appeal are, as counsel asserts, frivolous, or if there are any other meritorious issues present in this case. ***Santiago***, 978 A.2d at 354 (quoting ***Anders***, 386 U.S. at 744) ("[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw.").

After conducting a full examination of all the proceedings, we conclude the case is wholly frivolous. We note that the trial court recognized it was not required to prepare a Rule 1925(a) opinion in light of counsel's filing of a statement of intent to file an ***Anders*** brief. Rule 1925(a) Opinion, 5/13/19, at 6 n.7 (citing ***McBride***, 957 A.2d 752 at 758). As mentioned above, the

court nevertheless prepared an opinion to assist us in our review of the case. ***Id.*** In the opinion, the trial court thoroughly summarized the background of the case. ***Id.*** at 1-6. The court also meticulously examined possible claims based on sufficiency of the evidence, ***id.*** at 6-15;[2] weight of the evidence, ***id.*** at 15-17; discretionary aspects of sentence, ***id.*** at 17-22; and trial continuance (relating to the claimed denial of Appellant's request to discharge counsel), ***id.*** at 22-28. Based on its examination, the court concluded there was no merit to any of the issues.

We agree with the trial court's analysis of each issue. Therefore, we adopt as our own, and incorporate by reference, the trial court's Rule 1925(a) opinion. Further, based on our own independent review, we conclude there are no other meritorious issues present. After full examination of the proceedings, we find the case is wholly frivolous. Therefore, we grant

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[2] As the trial court explained, because counsel filed a notice of intent to file an ***Anders*** brief, counsel did not specify the element or elements of the crimes for which the evidence was insufficient. Rule 1925(a) Opinion, 5/13/19, at 6. Consequently, the court addressed each element of each charge and concluded:

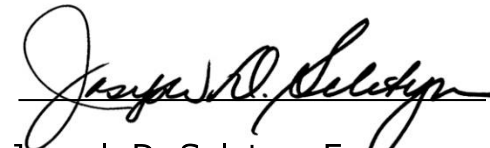
> The evidence, as well as all reasonable inferences drawn therefrom viewed in the light most favorable to the Commonwealth as the verdict winner, was sufficient to sustain [Appellant's] convictions for rape of a child, statutory sexual assault, indecent assault of a person less than 13 years or age, unlawful contact with a minor, corruption of minors and indecent exposure.

Rule 1925(a) Opinion, 5/13/19, at 15.

counsel's application to withdraw and affirm Appellant's judgment of sentence. In the event of further proceedings, the parties shall attach a copy of the Rule 1925(a) opinion to their filings.

Application for leave to withdraw granted. Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/21/2020

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IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
C R I M I N A L

COMMONWEALTH OF PENNSYLVANIA :
:
v. : No. 5104 - 2016
:
CRIZON KINGSBERRY :

OPINION SUR PA. R.A.P. 1925(a)

BY: ASHWORTH, J., MAY 13, 2019

Crizon Kingsberry has filed a direct appeal to the Superior Court of Pennsylvania from the judgment of sentence imposed on November 21, 2018, as finalized by the denial of his Post Sentence Motion by Order dated March 15, 2019. This Opinion is written pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure, and for the following reasons, this Court requests that this appeal be dismissed.

I. Background

The relevant facts and procedural history may be summarized as follows. A criminal complaint was filed on August 9, 2016, alleging Kingsberry (DOB 5/7/1983) committed various sexual acts with the victims, S.L. (DOB 1/13/2004) and S.L.'s sister, J.O. (DOB 10/18/2001), the daughters of his then-girlfriend, Joselyne Gonzalez. These offenses occurred in the victims' home on West New Street in Lancaster City, where Kingsberry also lived.

On July 3, 2016, the victims reported to their mother that Kingsberry[1] put his hands down the pants of S.L. and touched her vagina in the summer of 2013, and engaged in sexual intercourse with J.O. during the summer of 2014. After receiving this information, Ms. Gonzalez took S.L. and J.O. to the Lancaster City Police Station that evening. The victims spoke to Officer Jessica Higgins and told her that, approximately two years prior, Kingsberry had sexual contact with them.

As a result, on July 15, 2016, S.L. and J.O. were interviewed by forensic interviewer, Karen Melton, at the Lancaster County Children's Alliance.[2] N.T. at 279, 287, 538. During the videotaped interview of S.L., she disclosed that Kingsberry touched her vagina with his fingers. Id. at 287; *see also* Commonwealth Exhibit 7 (DVD of S.L. Interview). J.O. revealed during her videotaped interview that Kingsberry penetrated her vagina with his penis on two separate occasions. Id. at 538; *see also* Commonwealth Exhibit No. 12 (DVD of J.O. Interview).

A warrant was issued for Kingsberry's arrest and he was charged at Criminal Information No. 5104-2016, with the crimes of indecent assault of a person less than 13 years of age unlawful contact with a minor (two counts), corruption of minors (two

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[1]The girls referred to Kingsberry by his nickname, "Magic." Notes of Testimony (N.T.), Trial at 108.

[2]Lancaster County Children's Alliance is a child advocacy center that provides comprehensive services for children and families when there have been allegations of abuse. N.T. at 279-80. A multi-disciplinary team conducts investigations of child abuse through forensic interviews and physical examinations of children who have been referred either by the Lancaster County Children & Youth Agency, the District Attorney's Office, the YWCA Sexual Assault Prevention Counseling Center, Lancaster General Hospital, or local law enforcement agencies. Id. at 280.

counts), rape of a child, statutory sexual assault and indecent exposure.[3]

On July 12, 2017, the Commonwealth filed a petition to admit out-of-court statements by S.L. under the "tender years hearsay exception," 42 Pa.C.S.A. § 5985.1. Immediately prior to trial, counsel entered into a stipulation that the statements made by S.L. to her mother, Joselyne Gonzalez, and to Officer Jessica Higgins, as well as the video-recorded statement made to Karen Melton would be admitted as substantive evidence pursuant to the tender years hearsay exception. N.T., Trial at 46-47.

The case proceeded to a jury trial before the undersigned on June 4, 2018, and concluded on June 7, 2018, with a verdict of guilty on all charges. Following the verdict, sentencing was deferred pending a pre-sentence investigation. A further order was entered on June 26, 2018, directing Kingsberry to undergo an evaluation by the Pennsylvania Sexual Offenders Assessment Board (SOAB) pursuant to 42 Pa.C.S.A. § 9799.24, for purposes of determining whether he qualified as a "sexually violent predator"[4] (SVP) pursuant to the Sex Offender Registration and Notification Act (SORNA), 42 Pa.C.S.A. §§ 9799.10-9799.41, because of his guilty verdict on the predicate offenses of rape of a child, indecent assault and unlawful contact with a minor.

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[3]18 Pa.C.S.A. § 3126(a)(7), 18 Pa.C.S.A. § 6318(a)(1), 18 Pa.C.S.A. § 6301(a)(1)(ii), 18 Pa.C.S.A. § 3121(c), 18 Pa.C.S.A. § 3122.1(b), and 18 Pa.C.S.A. § 3127(a), respectively.

[4]A sexually violent predator is defined as "[a] person who has been convicted of a sexually violent offense as set forth in [42 Pa.C.S.A. § 9795.1 (relating to registration)] and who is determined to be a sexually violent predator under [42 Pa.C.S.A. § 9795.4 (relating to assessments)] due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 Pa.C.S.A. § 9792.

On August 15, 2018, the Office of the District Attorney received the evaluation conducted by the SOAB. The SOAB determined that Kingsberry did not meet the criteria of an SVP. With this recommendation, the District Attorney's Office notified the Court that it would not be filing a praecipe for an SVP hearing. Accordingly, the case was scheduled for sentencing.

On November 21, 2018, this Court imposed an aggregate sentence of 11 to 32 years' incarceration.[5] Kingsberry was deemed ineligible for a Recidivism Risk Reduction Incentive (RRRI) sentence due to his current convictions for Megan's Law Offenses, and his ineligibility was not waived by the Commonwealth. *See* Sentencing Order. Finally, Kingsberry was advised at sentencing of his lifetime registration obligations pursuant to SORNA, *supra*, as a Tier III sexual offender. Appellant was represented at trial and sentencing by privately retained counsel, John "Jack" McMahon, Esquire.

Following the sentencing, Attorney McMahon filed a timely post sentence motion on November 26, 2018, challenging the weight and sufficiency of the evidence to sustain the convictions. He contemporaneously filed a motion to withdraw as counsel, citing Kingsberry's claims of alleged ineffective assistance of counsel.

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[5]The specific sentence is as follows: Count 1, indecent assault, 1 to 2 years' incarceration; Count 2, unlawful contact, 1 to 2 years incarceration; Count 3, corruption of minors, 9 months to 2 years incarceration; Count 4, rape of a child, 10 to 30 years' incarceration; Count 5, statutory sexual assault, 2 years 6 months to 5 years; Count 6, unlawful contact, 10 to 20 years' incarceration; Count 7, corruption of minors, 1 to 2 years; and Count 8, indecent exposure, 9 months to 24 months. Count 1 is consecutive to Counts 4 through 8, Counts 2 and 3 are concurrent to Count 1, and Counts 5 through 8 are concurrent to Count 4.

This Court granted Attorney McMahon's motion to withdraw and appointed new counsel, Edwin G. Pfursich, IV, Esquire, to represent Kingsberry for purposes of post sentence and appellate relief. Attorney Pfursich filed a supplemental post sentence motion challenging the weight and sufficiency of the evidence to support his convictions, the discretionary aspects of his sentence, and the Court's abuse of discretion in denying Kingsberry's request to discharge Attorney McMahon and retain new counsel prior to trial. Counsel was granted additional time to review the trial transcripts and to supplement the post sentence motion should it be required. After his review of the transcripts, Attorney Pfursich concluded that the four issues raised in his post sentence motion were without merit and advised the Court of this conclusion in a letter dated February 21, 2019. Kingsberry's post sentence motion was denied by Order dated March 15, 2019.

Kingsberry directed his counsel to file a notice of appeal to the Superior Court. Accordingly, on April 1, 2019, counsel filed a timely notice of appeal to the Superior Court to preserve Kingsberry's appellate rights. *See* 519 MDA 2019. This Court granted counsel leave until April 25, 2019, to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). In lieu of filing a concise statement, on April 25, 2019, counsel filed a notice of intent to file an **Anders/ McClendon**[6] brief pursuant to Pa.R.A.P. 1925(c)(4), thus, declaring his intent to withdraw on direct appeal after finding there to be no non-frivolous issues to raise on

[6]**Anders v. California**, 386 U.S. 738 (1967), and **Commonwealth v. McClendon**, 495 Pa. 467, 434 A.2d 1185 (1981).

appeal. For purposes of this appeal, I will address the issues raised in Kingsberry's post sentence motion.[7]

II. Discussion

A. Sufficiency of the evidence

Kingsberry claimed generally in his post sentence motion that "the evidence presented at trial was insufficient to prove the charges beyond a reasonable doubt." Post Sentence Motion at ¶ 2. Because counsel filed with the Court a statement of intent to file an **Anders** brief in lieu of a Rule 1925 statement, Kingsberry has failed to "specify the element or elements upon which the evidence was insufficient" and failed to specify which convictions he was challenging. *See* **Commonwealth v. Garang**, 9 A.3d 237, 244 (Pa. Super. 2010). I will, therefore, address each element of each charge.

The standard of review when evaluating the sufficiency of evidence is well-settled:

> In reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, is sufficient to prove every element of the offense beyond a reasonable doubt. As an appellate court, we may not re-weigh the evidence and substitute our judgment for that of the fact-finder. Any question of doubt is for the fact-finder unless the evidence is so weak

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[7]If counsel files a statement of intent to file an **Anders/McClendon** brief pursuant to Rule 1925(c)(4), a trial court opinion is not necessary. *See* **Commonwealth v. McBride**, 957 A.2d 752, 758 (Pa. Super. 2008). This Rule 1925(a) Opinion has nonetheless been prepared to assist the appellate court in its review of the case.

> and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Thomas, 988 A.2d 669, 670 (Pa. Super. 2009) (citations omitted). The Commonwealth may sustain its burden of proving each element beyond a reasonable doubt by means of wholly circumstantial evidence. **Commonwealth v. Cramer**, 195 A.3d 594, 601 (Pa. Super. 2018). The trier of fact, in passing on the credibility of witnesses and the weight of the evidence produced, is free to believe all, part, or none of the evidence presented. Id. Viewing the evidence in the light most favorable to the Commonwealth, the verdict winner, there was sufficient evidence from which the jury could conclude that Kingsberry was guilty of rape of a child, statutory sexual assault, indecent assault, unlawful contact, corruption of minors, and indecent exposure.

Initially, Kingsberry was charged under section 3121(c) of the rape statute, which provides, in relevant part:

> **(c) Rape of a child.–** A person commits the offense of rape of a child, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age.

18 Pa.C.S.A. § 3121(c). "Sexual intercourse" is defined as follows: "In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required." 18 Pa.C.S.A. § 3101. Thus, to sustain a conviction for rape of a child, the Commonwealth was required to prove only that Kingsberry had sexual intercourse with a child under the age of 13.

Viewing the evidence in the light most favorable to the Commonwealth, it is clear that there was ample evidence from which the fact finder could determine that

Kingsberry engaged in sexual intercourse with a minor child under the age of 13. The evidence presented at trial established that Kingsberry twice engaged in sexual intercourse with J.O. when she lived on West New Street in 2014 when she was 12 years old.

J.O. testified that Kingsberry penetrated her vagina with his penis on two separate occasions during the summer of 2014.[8] N.T. at 205-06, 208-09. J.O. stated she was 12 years of age at the time. Id. at 215. J.O.'s mother, Joselyne Gonzalez, and her half-sister, Valessa Rosario, testified that J.O. revealed to them in July of 2016 that Kingsberry did "adult things," "nasty things" to her when they lived together on West New Street. Id. at 109, 276-77. Officer Higgins with the Lancaster City Bureau of Police testified that J.O. came to the police station with her mother on July 3, 2016, to report these two sexual assaults by Kingsberry in 2014. Id. at 514.

Finally, the Commonwealth presented the testimony of Detective Aaron Harnish with the Lancaster City Bureau of Police who interviewed Kingsberry following his arrest on these charges.[9] After waiving his **Miranda** rights, Kingsberry denied any criminal wrongdoing for two and one-half hours before finally making inculpatory declarations in a recorded statement. N.T., Trial at 416, 419-20, 427, 429-30; *see also* Commonwealth Exhibits No. 10 (**Miranda** Rights Form) & 11 (Voice Recording of Interview).

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[8]J.O. testified that the first time Kingsberry assaulted her he "moved around" while his penis was inside her, and that his penis was inside her for "minutes." N.T., Trial at 205, 207.

[9]Kingsberry was arrested by the Pennsylvania State Police Fugitive Task Force on August 16, 2016, and transported to the Lancaster County Courthouse. N.T., Trial at 413. He was interviewed by Detective Harnish in Jury Room No. 4, in the presence of a caseworker from Children & Youth. Id. at 414.

Specifically, Kingsberry confessed to sexually assaulting J.O. on two different occasions in two different locations of the house during the summer of 2014. Id. at 482, 484-85, 496-97; *see also* Commonwealth Exhibit No. 11 (Voice Recording of Interview). Kingsberry admitting placing his penis on J.O.'s vagina but denied penetrating the vagina. Id. at 495. At the conclusion of his interview with Detective Harnish, Kingsberry asked if he could speak to his then-girlfriend, Joselyne Gonzalez. Id. at 162. The detective placed the call and Kingsberry got on a speaker phone and told Joselyne that he loved her before confessing that he "did have contact with [her] girls." Id.

A review of the facts of this case confirms that the Commonwealth proved the elements of its case, namely, that Kingsberry had sexual intercourse with a child under the age of 13. *See* 18 Pa.C.S.A. § 3121(c). **Commonwealth v. Wall**, 953 A.2d 581, 584 (Pa. Super. 2008) ("A rape victim's uncorroborated testimony to penal penetration is sufficient to establish sexual intercourse and thus support a rape conviction.").

Next, Kingsberry contends that the evidence was insufficient to support a conviction for statutory sexual assault. The crime of statutory sexual assault is proven when the Commonwealth presents evidence that a "person engage[d] in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married to each other." 18 Pa.C.S.A. § 3122.1.

The evidence presented at trial clearly established that J.O. was 12 at the time of the sexual intercourse in 2014. N.T., Trial at 204. The parties were not married to each other, and Kingsberry was clearly more than four years older than his 12-year-old victim, having been born on May 7, 1983. Id. at 417.

Viewing the evidence in the light most favorable to the Commonwealth, it is clear that there was ample evidence from which the fact finder could determine that Appellant engaged in sexual intercourse with a victim under the age of 16. *See* **Commonwealth v. Stoner**, 284 Pa. Super. 364, 425 A.2d 1145 (1981) (the uncorroborated testimony of a child victim is sufficient to establish the defendant's guilt for statutory rape).

Kingsberry has also challenged the sufficiency of the evidence to support the indecent assault conviction. A person will be found guilty of indecent assault of a person less than 13 years of age:

> if the person has indecent contact with the complainant . . . for the purpose of arousing sexual desire in the person or the complainant and . . . the complainant is less than 13 years of age. . . .

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

S.L. testified at trial that Kingsberry touched her vagina on top of her clothing when she was 9 years old.[10] N.T., Trial at 169, 170-71. Moreover, S.L. specifically stated that Kingsberry was "moving his fingers" on her vagina, a sexual or intimate part of her body. Id. at 170. The factfinder found that S.L. was credible when she testified that Kingsberry touched her vagina through her underwear without her consent.

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[10]The fact that the indecent contact took place over a layer of clothing worn by the victim is irrelevant. As noted by our Superior Court: "When indecent contact has occurred, a victim feels no less shame, outrage and disgust merely because a layer of clothing comes between his/her own skin and the skin of the perpetrator." **Commonwealth v. Capo**, 727 A.2d 1126, 1128 (Pa. Super. 1999) (*quoting* **Commonwealth v. Ricco**, 437 Pa. Super. 629, 650 A.2d 1084, 1086 (1994)).

Lastly, Kingsberry's intent was clear. His abusive contact with this victim at the age of 9 obviates any suggestion that this contact was for anything other than Kingsberry's perverse sexual gratification. Kingsberry's actions in "moving his fingers" on S.L.'s vagina "were in no way avuncular, paternal, platonic . . . or otherwise demonstrative of familial or friendly affection." **Capo**, *supra* at 1128.

Accordingly, the evidence produced at trial, viewed in the light most favorable to the Commonwealth, was sufficient to sustain the indecent assault conviction. **Commonwealth v. McDonough**, 96 A.3d 1067, 1069 (Pa. Super. 2014) (finding that the testimony of a sexual assault victim was sufficient to affirm a conviction of indecent assault when the factfinder believed the victim was credible).

Next, Kingsberry contends that the evidence was insufficient to support the two convictions for unlawful contact. Under 18 Pa.C.S.A. § 6318(a)(1), a person is guilty of unlawful contact with a minor if he is intentionally in contact with a minor for the purpose of engaging in a prohibited Chapter 31 sexual offense. In addition, the statutory definition of "contacts" for purposes of the crime is "[d]irect or indirect contact or communication by any means, method or device, including contact or communication in person. . . ." 18 Pa.C.S.A. § 6318(c). Even though the offense is titled "unlawful contact," our Superior Court has explained that this crime "is best understood as unlawful communication with a minor." **Commonwealth v. Leatherby**, 116 A.3d 73, 79 (Pa. Super. 2015). By its plain terms, the statute prohibits verbal or physical contact with a minor for the purpose of carrying out certain sex acts, including rape of a child and indecent assault. Because the crime is completed once a person contacts, or communicates with, a minor for the purpose of engaging in the unlawful activity, it is not

necessary for actual physical touching of an intimate part of the victim's body to take place. Id. *See also* **Commonwealth v. Evans**, 901 A.2d 528, 537 (Pa. Super. 2006).

In the instant case, J.O. testified that the first time Kingsberry assaulted her on the couch he "unbuttoned [her] pants and pulled them down" so he could have sexual intercourse with her, after telling her that she was "pretty" and whispering something in her ear "about making beautiful babies." N.T., Trial at 205-06, 257. The second time J.O. was assaulted in the bedroom, Kingsberry "pulled down [her] underwear [and] lifted up [her] dress" so he could "put his penis in [her] vagina." Id. at 209. After the second assault, Kingsberry instructed the child "not to tell [her] mom." Id. at 207. In her testimony at the preliminary hearing, J.O. additionally stated that Kingsberry placed her on the bed before assaulting her. Id. at 256. All of these contacts, verbal and physical, were sufficient to prove contact for the purpose of engaging in rape of a child. *See* **Commonwealth v. Velez**, 51 A.3d 260 (Pa. Super. 2012) (holding that unlawful contact with a minor can be inferred where the victim's pants were removed).

Kingsberry was also charged with having unlawful contact with the child victim, S.L., for the purpose of committing an indecent assault. The jury found that Kingsberry had unlawful contact with S.L. when he put his hands down her pants for the purpose of fingering her vagina. *See* N.T., Trial at 170-71.

When viewing the testimony of J.O. and S.L. in the light most favorable to the Commonwealth, the Court believes that the evidence submitted at trial supports these verdicts beyond a reasonable doubt.

Kingsberry next asserts the evidence presented by the Commonwealth was insufficient to prove beyond a reasonable doubt that he committed the two offenses of

corruption of minors. Section 6301 defines the offense of corruption of minors and also addresses the grading of the offense as follows:

> (1) (i) Except as provided in subparagraph (ii), whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.
> (ii) Whoever, being of the age of 18 years and upwards, *by any course of conduct* in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 *commits a felony of the third degree.*

18 Pa.C.S.A. § 6301(a)(1) (emphasis added). Thus, with respect to a charge of corruption of minors as a third-degree felony, the trial court must instruct the jury that the Commonwealth must prove that the defendant engaged in a "course of conduct." 18 Pa.C.S.A. § 6301(a)(1)(ii). If the Commonwealth cannot show a course of conduct, the corruption of minors offense is graded as a first-degree misdemeanor under 18 Pa.C.S.A. § 6301(a)(1)(i). **Commonwealth v. Smith**, — A.3d —, 2019 PA Super 83 (Pa. Super. Mar. 20, 2019). The use of the phrase "course of conduct" in subsection 6301(a)(1)(ii) imposes a requirement of multiple acts over time, in the same manner in which the term is used in the harassment, stalking, and endangering the welfare of children statutes. *See* **Commonwealth v. Kelly**, 102 A.3d 1025, 1030-31 (Pa. Super. 2014). In cases involving a continuous course of conduct, our appellate Courts have determined that the Commonwealth must be afforded even broader latitude in establishing the dates of the assaults. *See* **Commonwealth v. Brooks**, 7 A.3d 852 (Pa. Super. 2010); **Commonwealth v. G.D.M., Sr.**, 926 A.2d 984 (Pa. Super. 2007).

In the instant case, Kingsberry was charged with corruption of minors as a third-degree felony with respect to J.O. A review of the record reveals that, although the jury was not specifically instructed to consider whether Kingsberry engaged in a "course of conduct," N.T., Trial at 629-30, the jury nevertheless convicted Kingsberry of separate sexual offenses against J.O., thereby determining that Kingsberry had perpetrated multiple instances of improper sexual contact with the minor over several weeks. *See* Id. at 209 (J.O. testified the two assaults were "a couple of weeks" apart); *see also* Id. at 482, 484-85 (Kingsberry admitted he assaulted J.O. two times, in two different locations, on two different days); Commonwealth Exhibit No. 11 (Digital Recording of Kingsberry's Statement). Thus, the jury necessarily found that Kingsberry had, in fact, engaged in a "course of conduct." The evidence, therefore, was sufficient to sustain the corruption of minors conviction graded as a third-degree felony with respect to child victim J.O.

The corruption of minors charge with respect to S.L. was graded a misdemeanor. Kingsberry's commission of an indecent assault against S.L. was sufficient evidence to support the conviction for corruption of minors graded as a first-degree misdemeanor. *See* **Kelly**, 102 A.3d at 1033.

Finally, section 3127 of the Crimes Code defines "indecent exposure" as "expos[ing]" one's genitals "in any place where there are present other persons under circumstances in which he ... knows or should know that this conduct is likely to offend, affront or alarm." 18 Pa.C.S.A. § 3127(a). One acts knowingly with respect to a material element of an offense when, "if the element involves a result of his conduct, he

is aware that it is practically certain that his conduct will cause such a result." Id. at § 302(b)(2). Here, the indecent exposure was committed when Kingsberry exposed his penis in the presence of J.O. while in their home. *See* **Commonwealth v. Andrulewicz**, 911 A.2d 162 (Pa. Super. 2006).

The evidence, as well as all reasonable inferences drawn therefrom viewed in the light most favorable to the Commonwealth as the verdict winner, was sufficient to sustain Kingsberry's convictions for rape of a child, statutory sexual assault, indecent assault of a person less than 13 years of age, unlawful contact with a minor, corruption of minors and indecent exposure.

B. Weight of the Evidence

Kingsberry also claimed that even if the evidence was sufficient to support his convictions, the verdict was against the weight of the evidence. A claim that the verdict is contrary to the weight of the evidence "concedes that there is sufficient evidence to sustain the verdict, but nevertheless contends that the trial judge should find the verdict so shocking to one's sense of justice and contrary to the evidence as to make the award of a new trial imperative." **Commonwealth v. Robinson**, 834 A.2d 1160, 1167 (Pa. Super. 2003). *See also* **Commonwealth v. Lewis**, 911 A.2d 558, 566 (Pa. Super. 2006). Our Supreme Court has summarized the standard to be applied in addressing a "weight of the evidence" issue:

> A weight of the evidence claim is primarily directed to the discretion of the judge who presided at trial, who only possesses 'narrow authority' to upset a jury verdict on a weight of the evidence claim. . . . Assessing the credibility of witnesses at trial is within the sole

> discretion of the fact-finder. . . . A trial judge cannot grant a new trial merely because of some conflict in testimony or because the judge would reach a different conclusion on the same facts, but should only do so in extraordinary circumstances, 'when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.' . . .

Commonwealth v. Blakeney, 596 Pa. 510, 522-23, 946 A.2d 645, 652-53 (2008) (citations omitted). Application of these concepts to the facts presented at trial required this Court to reject Kingsberry's challenge to the weight of the evidence.

Here, the jury determined credibility in favor of the child victims, S.L. and J.O. Now, on appeal, Kingsberry is asking the Superior Court to re-evaluate the credibility of the victims in this case. This is outside the purview of the appellate courts. "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact." **Commonwealth v. Champney**, 574 Pa. 435, 444, 832 A.2d 403, 408 (2003). *See also* **Commonwealth v. Lark**, 91 A.3d 165 (Pa. Super. 2014) (same).

There is no question that the evidence produced by the Commonwealth was clear, strong and unequivocal that Kingsberry sexually abused his victims. The credibility concerns were for the factfinder and the factfinder had every opportunity to evaluate each of the witnesses and the entire body of evidence produced by the Commonwealth. The jury obviously found the victims' testimony credible and chose not to believe Kingsberry's version of the events. It was within the province of the jury as factfinder to resolve all issues of credibility, resolve conflicts in evidence, make

reasonable inferences from the evidence, believe all, none, or some of the evidence, and ultimately adjudge Kingsberry guilty. **Commonwealth v. Charlton**, 902 A.2d 554, 562 (Pa. Super. 2006). The verdict was not so "contrary to the evidence as to shock one's sense of justice."

As the jury's verdict of guilty of indecent assault of a person less than 13 years of age, unlawful contact with a minor, corruption of minors, rape of a child, statutory sexual assault and indecent exposure was supported by the weight of the evidence, this issue lacks merit.

C. Discretionary Aspects of Sentence

Kingsberry further challenged his sentence in his post sentence motion. The individual sentences imposed are within the permissible statutory maximums and, therefore, clearly are legal sentences.[11] Kingsberry asserts that the aggregate sentence of 11 to 32 years of incarceration nonetheless is an abuse of discretion. *See* Post Sentence Motion at ¶ 3. With this issue, Kingsberry is challenging the discretionary aspect of his sentencing. **Commonwealth v. Lutes**, 793 A.2d 949, 964 (Pa. Super. 2002). Such challenges must be raised in a post sentence motion or during the sentencing proceedings, or they are waived. **Commonwealth v. Griffin**, 65 A.3d 932, 935 (Pa. Super. 2013). *See also* Pa.R.A.P. 302(a). Kingsberry did raise this claim in his post-sentence motion; therefore, this claim is preserved for appeal.

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[11]Kingsberry was convicted of rape of a child, statutory sexual assault, and unlawful contact with a minor, which are graded as felonies of the first degree, and the statutory maximum sentence is 20 years of incarceration. 18 Pa.C.S.A. § 1103.

I begin by noting that sentencing is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. **Commonwealth v. Solomon**, 151 A.3d 672, 677 (Pa. Super. 2016). An abuse of discretion is more than an error in judgment. An appellant must establish that "the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." Id. (*quoting* **Commonwealth v. Zirkle**, 107 A.3d 127, 132 (Pa. Super. 2014)).

In considering whether a sentence was manifestly excessive or unreasonable, the appellate court must give great weight to the sentencing judge's discretion, as he or she is in "the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." **Commonwealth v. Wall**, 592 Pa. 557, 565, 926 A.2d 957, 961 (2007) (*quoting* **Commonwealth v. Ward**, 524 Pa. 48, 568 A.2d 1242, 1243 (1990)). *See also* **Commonwealth v. Ellis**, 700 A.2d 948, 958 (Pa. Super. 1997) (noting that the sentencing court is in the best position to measure various factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance or indifference).

In clarifying the proper standard of appellate review of a sentencing court's imposition of sentence, our Supreme Court has noted:

> Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review. Moreover, the sentencing court enjoys an institutional advantage to appellate review, bringing to its decisions an expertise, experience, and judgment that should not be lightly disturbed. Even with the advent of the sentencing guidelines, the power of sentencing is a function to be performed by the sentencing court.

> . . . Thus, rather than cabin the exercise of a sentencing court's discretion, the guidelines merely inform the sentencing decision.

Wall, *supra* at 565, 926 A.2d at 961-62 (footnote omitted; citations omitted).

The first consideration is as to the consecutive nature of the sentence. Kingsberry was facing sentencing on five felony charges. The number of crimes which he committed against two separate victims could not be ignored by making the sentences concurrent with one another.

Although Pennsylvania's system stands for individualized sentencing, the court is not required to impose the "minimum possible" confinement. **Walls**, *supra* at 570, 926 A.2d at 965. In fact, our appellate courts have expressed disapproval of routinely running sentences concurrently lest criminals receive a "volume discount" for their separate criminal acts. *See* **Commonwealth v. Austin**, 66 A.3d 798, 808 (Pa. Super. 2013) (*citing* **Commonwealth v. Hoag**, 445 Pa. Super. 455, 665 A.2d 1212 (1995) (stating an appellant is not entitled to "volume discount" for his crimes by having all sentences run concurrently)). Consecutive sentences will be overturned only if the sentence imposed was "clearly unreasonable." **Commonwealth v. Fiascki**, 886 A.2d 261, 264 (Pa. Super. 2005). "A sentence is 'clearly unreasonable' if it 'violates the requirements and goals of the [Sentencing] Code.'" Id.

Long standing precedent recognizes that 42 Pa.C.S.A. § 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed, upon consideration of the individual circumstances concerning the defendant and the

many crimes he committed. *See* **Commonwealth v. Johnson**, 961 A.2d 877, 880 (Pa. Super. 2008) (*citing* **Commonwealth v. Marts**, 889 A.2d 608, 612 (Pa. Super. 2005)).

It should be noted that three of the individual felony sentences (statutory sexual assault, unlawful contact with a minor (J.O.) and corruption of a minor (J.O.)) were made concurrent to the rape of a child sentence, and the other felony sentence (unlawful contact with a minor (S.L.)) was made concurrent with the indecent assault sentence. *See* Sentencing Order. The decision to impose a partial consecutive sentence rather than all concurrent sentences resulted from a balanced, dispassionate and scrupulous review of the entire record in this case. The sentences imposed on the various counts are within the sentencing guidelines as calculated by the Commonwealth and contained in the pre-sentence investigation report. Kingsberry's sentence was neither so manifestly excessive as to constitute too severe a punishment nor unreasonable given the sheer volume of the crimes committed and the circumstances of the cases.

The next issue is whether in fashioning this sentence the Court considered the individual circumstances concerning Kingsberry and the crimes he committed. It is clear from the record that this Court carefully considered the entire pre-sentence investigation report which included information regarding Kingsberry's age, his family history, his educational background, his employment history, and his adult criminal record. As our Superior Court noted:

> Since the sentencing court had and considered a presentence report, this fact alone was adequate to support the sentence, and due to the court's explicit reliance on that report, we are required to presume that the court properly weighed the mitigating factors

> present in the case. **Commonwealth v. Boyer**, 856 A.2d 149 (Pa. Super. 2004). In **Boyer**, we stated: 'In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a presentence investigation report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. . . .'

Commonwealth v. Fowler, 893 A.2d 758, 766-67 (Pa. Super. 2006). *See also* **Tirado**, *supra* at 368 (stating where sentencing court had benefit of pre-sentence investigation report, law presumes court was aware of and weighed relevant information regarding defendant's character and mitigating factors). To the extent that Kingsberry should argue that the trial court did not adequately consider the mitigating factors which were presented in the pre-sentence investigation report and by counsel, such a claim is not supported by the record.

The record reflects that this Court considered all relevant factors, including the number of victims harmed by Kingsberry's criminal conduct, the manner in which Kingsberry committed these crimes, the protection of society, as well as his age, mental aptitude, educational attainment, family history, employment history, prior criminal record, and rehabilitative needs before imposing sentence. Given the number of criminal acts committed against two separate victims in this case, as well as Kingsberry's total exposure as far as lawful maximums and potential consecutive sentences, the judgment exercised in this case was neither manifestly unreasonable, nor the result of partiality, prejudice, bias or ill-will, and, as such, the Court did not abuse its discretion. The sentence imposed was neither "clearly unreasonable" nor so

manifestly excessive as to constitute too severe a punishment. *See* **Commonwealth v. Mouzon**, 571 Pa. 419, 430-31, 812 A.2d 617, 625 (2002).

D. Trial Continuance

In his final post sentence issue, Kingsberry claimed this Court abused its discretion by refusing Kingsberry a reasonable continuance of the trial in this case in order to permit him to obtain new counsel following a breakdown of communications and irreconcilable differences between him and defense counsel. The record does not support this contention.

On March 4, 2018, Kingsberry provided the Court with a letter addressed to defense counsel, Jack McMahon.[12] In this letter, Kingsberry expressed concern regarding Attorney McMahon's failure to communicate with him, failure to communicate with his family, failure to conduct a "thorough and diligent investigation," and failure to review the Commonwealth's discovery with him. *See* March 4, 2018, Letter.

Kingsberry stated:

> I need an attorney who is going to fight for me in my defence [sic] and do their job to the very best of their ability, honestly and diligently. You was [sic] not paid $13,500 to only convince me to accept a guilty plea with no investigative work done on my behalf at all, nor motions.
>
> So if helping me prove my innocence is not an option for you, then I no longer think your counsel is in my best interest. There is a lot at stake concerning my life in spite of this case, so if you can't or won't take it serious and actually do some work and not over look me as you have been doing, I'd appreciate it.

Id.

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[12]The letter was dated March 4, 2018, time-stamped in the Clerk of Courts Office on March 8, 2018, and placed in the official file.

Aware that Kingsberry was dissatisfied with his representation, I conducted an on-the-record colloquy with Kingsberry at his next status conference on March 29, 2018.[13] I began by advising Kingsberry that he was entitled to change counsel at any time so long as it was not for the purpose of delaying trial. N.T., Status Conference at 2. Kingsberry expressed his disappointment in what he perceived as a lack of communication with counsel. Id. at 2, 5. I asked Kingsberry if he wanted a different lawyer and he responded:

> . . . I've been feeling that way; but if he's willing to put the effort in that I feel needs to be done, then by all means I will continue with him because there's some things that I requested and things that have been brought to his knowledge concerning my case and concerning my defense and I feel like it's been totally overlooked.

Id. at 5. I cautioned Kingsberry that his attorney is obligated to tell him the truth about the case, to give him legal advice that is appropriate, and to present a legal defense that has merit. Id. at 4, 6. I further advised Kingsberry that should he decide to retain new counsel, any unspent monies remaining from the retainer paid to Mr. McMahon would be returned to him.[14] Id. at 8. Finally, I told Kingsberry that the decision whether to stay with Mr. McMahon or retain new counsel was "[his] call" but that he was "at a point where [he] had to make a decision." Id. at 9, 11.

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[13]Attorney McMahon was not present at the status conference; rather, Emily Cherniack, Esquire, "an attorney who works with Mr. McMahon" was there on his behalf. N.T., Status Conference at 6-7.

[14]Attorney McMahon's fee for legal services was $18,000.00, of which Kingsberry had paid $13,500.00 between August 24, 2016, and March 8, 2017. As of March 29, 2018, a balance of $4,500.00 remained pursuant to the agreement for services. *See* Letter of April 10, 2018.

The case was listed on the April 2018 trial term but, given Kingsberry's concerns regarding his attorney, I moved the case to the June 4, 2018, trial term. N.T., Status Conference at 12. I cautioned Kingsberry: "[W]ithin the next few days, you need to make a decision, or if you can make a decision now, you have to decide whether you want Mr. McMahon to continue to represent you or whether you want to hire another attorney. That has to be your call." Id. at 13. At the conclusion of that status conference, Kingsberry was unable to make a decision regarding his representation and he was given until April 2, 2018, to notify the Court of his intentions. Id. at 17.

On April 2, 2018, Kingsberry's Institutional Counselor, Ms. Alex Miller, contacted chambers to notify me of Kingsberry's decision to retain new counsel. In a letter dated April 10, 2018, Kingsberry reiterated his intention to fire Attorney McMahon and replace him with new counsel.

Subsequently, an on-the-record colloquy was conducted with Kingsberry during which Attorney McMahon questioned him regarding his choice of representation. At that time, Kingsberry indicated that he intended to continue with Mr. McMahon as his counsel.[15] This decision by Kingsberry was confirmed at the Call of the List on June 1, 2018, when Mr. McMahon appeared on Kingsberry's behalf, colloquied Kingsberry regarding his rejection of the Commonwealth's latest offer, and indicated his intention to defend the case in a trial to begin on June 4, 2018. N.T., Call of the List at 2-8. Attorney McMahon placed on the record the fact that in the last several weeks he had

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[15]A transcript of this conference cannot be located at this time. It is, however, the collective recollection of myself, my secretary and the assistant district attorney who handled the case, Fritz K. Haverstick, that this colloquy took place in open court with Kingsberry and that he unequivocally chose to proceed to trial with Attorney McMahon.

visited Kingsberry twice and, additionally, had his investigator do an in-person interview of Kingsberry, all in preparation for the trial. Id. at 4-5. Kingsberry did not voice any dissatisfaction with Attorney McMahon at that time, and never requested a continuance of the trial in order to secure new counsel. *See* id.

Kingsberry's suggestions that the Court failed to consider the alleged breakdown of communications and irreconcilable differences between Kingsberry and his defense counsel, and further failed to grant Kingsberry a continuance request to obtain new counsel for the trial are without merit.

It is well-settled that "a defendant has a constitutional right to choose any lawyer he may desire, at his own cost and expense." **Commonwealth v. Rucker**, 563 Pa. 347, 349-50, 761 A.2d 541, 542 (2000). The right to counsel of one's choice "is particularly significant because an individual facing criminal sanctions should have great confidence in his attorney." **Commonwealth v. McAleer**, 561 Pa. 129, 136, 748 A.2d 670, 673 (2000). This constitutional right is not absolute, however. It "must be exercised at a reasonable time and in a reasonable manner." **Rucker**, 563 Pa. at 350, 761 A.2d at 542-43 (*quoting* **Commonwealth v. Novak**, 395 Pa. 199, 214, 150 A.2d 102, 110 (1959)). The right of a defendant to choose his own counsel "must be weighed against and may be reasonably restricted by 'the state's interest in the swift and efficient administration of criminal justice.'" Id. at 351, 761 A.2d at 543 (*quoting* **Commonwealth v. Robinson**, 468 Pa. 575, 592, 364 A.2d 665, 674 (1976)). A defendant "clearly cannot be permitted to utilize his right to choose his own counsel so as *unreasonably* to clog the machinery of justice and hamper and delay the state in its efforts to do justice with regard both to him and to others whose rights to a speedy trial

may thereby be affected." Id. (*quoting* **Robinson**, 468 Pa. at 592-93, 364 A.2d at 674 (emphasis in original)).

Here, Kingsberry exercised his constitutional right and hired a lawyer of his choosing, Attorney McMahon – a very capable and experienced trial attorney. Attorney McMahon was involved with this case almost from its inception. He represented Kingsberry from the time of his arraignment through the trial. Attorney McMahon was well prepared for trial and presented a thorough and effective defense. He ably presented every factual argument and every legal argument which could be made. He fully discharged his duties responsibly, competently and diligently. Moreover, the record establishes the absence of any evidence to support a conclusion that either hostility, irreconcilable differences or communication difficulties between Kingsberry and Attorney McMahon prevented effective representation.

Kingsberry was given an opportunity at the status conference on March 29, 2018, to his express concerns about his attorney. He was given a trial continuance in April in order to secure new counsel but he failed to do so. Kingsberry had a period of almost two years in which to choose counsel of his liking and in whom he could have trust and confidence.[16] He was never denied the opportunity to exercise his right to choose his own counsel. Kingsberry knew in late March 2018 that his case would be going to trial in early June 2018.[17]

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[16]Appellant's June 2018 trial took place almost two years after his August 2016 arrest and after he retained Attorney McMahon, who received Kingsberry's first payment on August 24, 2016.

[17]On multiple occasions prior to the June 2018 trial, the case was continued at Kingsberry's request. However, not one continuance request was for Kingsberry to retain new counsel.

The efficient and effective administration of justice required that this matter proceed to trial on June 4, 2018 – nearly two years after the charges were filed. The Commonwealth, the prosecuting officer and defense counsel were all prepared for the trial. Most importantly, perhaps, the victims were prepared. This case involved the sexual assaults of two children. There had already been a delay of almost two years between Kingsberry's arrest and the time of trial. As the Supreme Court of the United States has remarked:

> [I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. . . .

Morris, 461 U.S. at 14-15. Moreover, "trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." **Commonwealth v. Sandusky**, 77 A.3d 663, 671 (Pa. Super. 2013) (*quoting* **Morris**, 461 U.S. at 11).

The intention of the defendant in seeking a continuance is critical, and the trial court must determine if the motion for a continuance is a reasonable attempt to delay the proceedings for the legitimate purpose of obtaining new counsel, or if it is intended to obstruct the process of justice and frustrate the operation of the court. In this case, I suspected Kingsberry was being manipulative and that the request for new counsel was a tactical decision on his part to further delay justice in this case. As cautioned by the Supreme Court in **Novak**, "[i]f a defendant who engages his own counsel refuses for

two years to engage other counsel and waits until the trial of his case to demand an opportunity to engage other counsel, he can repeat this strategy every time his case is called for trial, and society would not receive the protection and equal justice to which both they and the accused are entitled." 395 Pa. at 214-15, 150 A.2d at 110. This, obviously, was a concern to this Court as well, and it was expressed to Kingsberry. *See* N.T., Status Conference at 2-3. As such, Kingsberry was not deprived of his constitutional right to a lawyer of his choosing. *See* **Commonwealth v. Thomas**, 879 A.2d 246 (Pa. Super. 2005) (where colloquy indicates that appellant's request for a continuance was sought as much for the purpose of avoiding trial, as for retaining private counsel, appellant not denied his constitutional right to counsel of his choice).

III. Conclusion

For the reasons set forth above, it is respectfully suggested that the judgment of sentence of Crizon Kingsberry be affirmed.

Accordingly, I enter the following: