

NOV 13 2013

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

Middle

NOS. 835, 836 MAL 2013

**COMMONWEALTH OF PENNSYLVANIA,
Respondent**

v.

**GERALD A. SANDUSKY,
Petitioner**

**COMMONWEALTH'S BRIEF IN OPPOSITION
TO PETITION FOR ALLOWANCE OF APPEAL**

Petitioner For Allowance of Appeal From The Judgment Of The Superior Court Filed October 2, 2013, At Nos. 338, 343 MDA 2013 Affirming The Judgment Of Sentence Imposed October 9, 2012, In The Court Of Common Pleas Of Centre County At Nos. CP-14-CR-2421-2011 and CP-14-CR-2422-2011

**KATHLEEN G. KANE
Attorney General**

**LAWRENCE M. CHERBA
Executive Deputy Attorney General
Criminal Law Division**

**JAMES P. BARKER
Chief Deputy Attorney General
Appeals & Legal Services Section**

**OFFICE OF ATTORNEY GENERAL
Criminal Law Division
Appeals & Legal Services Section
16th Floor-Strawberry Square
Harrisburg, PA 17120
(717) 705-0098**

Received In Supreme Court

NOV 13 2013

Middle

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
OPINIONS DELIVERED IN THE COURTS BELOW	1
TEXT OF THE ORDER IN QUESTION	2
COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW.....	3
1. HAS PETITIONER FAILED TO DEMONSTRATE THAT THERE ARE SPECIAL AND IMPORTANT REASONS FOR ALLOWANCE OF APPEAL?	3
2. DOES A REVIEW OF EACH OF PETITIONER’S CLAIMS SHOW SUCH A LACK OF MERIT TO WARRANT DENIAL OF HIS PETITON FOR ALLOWANCE OF APPEAL?	3
COUNTERSTATEMENT OF THE CASE	4
ARGUMENT OR GROUND WHY THE ORDER INVOLVED SHOULD NOT BE REVIEWED	6
CONCLUSION.....	12
AVERMENT REGARDING COMPACT DISC.....	13
CERTIFICATE OF SERVICE.....	14
EXHIBIT A	
EXHIBIT B	

TABLE OF AUTHORITIES

Page(s)

Cases

Commonwealth v. Bullock, 868 A.2d 516, 525 (Pa. Super. 2005), *affirmed*, 590 Pa. 480, 913 A.2d 207 (2006). 8

Commonwealth v. Cleary, 135 Pa. 64, 84, 19 A. 1017, 1018 (1890)..... 11

Commonwealth v. Khamphouseane, 642 A.2d 490 (Pa. Super. 1994) 10

Commonwealth v. Neely, 522 Pa. 236, 561 A.2d 1 (1989) 10

Commonwealth v. Padden, 50 A.2d 722, (Pa. Super. 1947)..... 11

Commonwealth v. Sandusky, 2013 PA Super 264 (October 2, 2013)..... 1, 2, 5, 9

Commonwealth v. Sandusky, Nos. 338, 343 MDA 2013, 2013 WL 5477235 (Pa. Super. October 2, 2013) 1

Commonwealth v. Sandusky, Nos. CP-14-CR-2421-2011, CP-14-CR-2422-2011 (C.P. Centre January 30, 2013) 1

Commonwealth v. Sepulveda, 55 A.3d 1108, 1141 (Pa. 2012). 8

Commonwealth v. Snoke, 525 Pa. 295, 302, 580 A.2d 295, 298 (1990)..... 8

Commonwealth v. Washington, 592 Pa. 698, 927 A.2d 586, 603 (2007). 8

Rules

Pa.R.A.P. 1101 6

Pa.R.A.P. 1114 7

Pa.R.A.P. 1115 7

I.

OPINIONS DELIVERED IN THE COURTS BELOW

The Opinion of the Superior Court is published, *Commonwealth v. Sandusky*, 2013 PA Super 264 (October 2, 2013), also available as *Commonwealth v. Sandusky*, Nos. 338, 343 MDA 2013, 2013 WL 5477235 (Pa. Super. October 2, 2013), and is appended to the Petition for Allowance of Appeal as Exhibit A. The Opinion of the trial court is appended to the Petition for Allowance of Appeal as Exhibit B. *Commonwealth v. Sandusky*, Nos. CP-14-CR-2421-2011, CP-14-CR-2422-2011 (C.P. Centre January 30, 2013).

II.

TEXT OF THE ORDER IN QUESTION

Judgment of sentence affirmed.

Commonwealth v. Sandusky, 2013 PA Super 264, at 18 (October 2, 2013).

III.

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. HAS PETITIONER FAILED TO DEMONSTRATE THAT THERE ARE SPECIAL AND IMPORTANT REASONS FOR ALLOWANCE OF APPEAL?

2. DOES A REVIEW OF EACH OF PETITIONER'S CLAIMS SHOW SUCH A LACK OF MERIT TO WARRANT DENIAL OF HIS PETITION FOR ALLOWANCE OF APPEAL?

IV.

COUNTERSTATEMENT OF THE CASE

This is a petition for allowance of appeal from a judgment of the Superior Court of Pennsylvania, which reviewed a sentence imposed by the Honorable John M. Cleland, Senior Judge specially presiding in the Court of Common Pleas of Centre County. The Petitioner, Gerald A. Sandusky,¹ contended in the Superior Court that the prosecutor committed misconduct by referring to Sandusky's failure to testify at trial and that the trial court erred by failing to instruct the jury on prompt complaint in the manner suggested by the defense, denying a defense motion to continue trial, and instructing the jury that character evidence should be considered and weighed by the jury with all of the other evidence.

By criminal complaints filed on November 4, 2011, and December 7, 2011, Sandusky was charged with numerous counts relating to his sexual abuse of pre-teen and teenaged boys over the course of several years. On June 22, 2012, a Centre County jury found Sandusky guilty of 45 counts relating to that abuse. On October 9, 2012, the Court found Sandusky to be a sexually violent predator (SVP) for purposes of Megan's Law and imposed an aggregate sentence of imprisonment for 30 to 60 years.

The Superior Court summarized the facts of the case as follows:

¹ Sandusky was the Defendant in the Court of Common Pleas and the Appellant in the Superior Court.

A jury convicted Sandusky of 45 counts relating to the sexual abuse of young boys. The eight victims, now all adults, testified in detail about the sexual depravity they suffered as young boys at Sandusky's hands. Combined, the abuse spanned a thirteen-year period, 1995 to 2008. Sandusky met all the victims through a non-profit he founded called The Second Mile, an organization with the declared purpose of serving Pennsylvania's underprivileged and at-risk youth.

Commonwealth v. Sandusky, 2013 PA Super 264, at 1 (October 2, 2013).

Based on the evidence, the jury found Sandusky guilty and he was sentenced as recited above. On October 18, 2012, Sandusky filed post-sentence motions. The trial court conducted a hearing on January 10, 2013, and denied Sandusky's post-sentence motions on January 30, 2013. Sandusky filed a notice of appeal to the Superior Court on February 21, 2013. On October 2, 2013, the Superior Court affirmed the judgment of sentence. On October 30, 2013, Sandusky filed his Petition for Allowance of Appeal. This Brief is submitted in response thereto.

V.

**ARGUMENT OR GROUND WHY THE ORDER INVOLVED SHOULD
NOT BE REVIEWED**

The Pennsylvania Rules of Appellate Procedure set forth the considerations governing allowance of appeal:

(a) General Rule. Except as prescribed in Pa.R.A.P. 1101 (appeals as of right from the Commonwealth Court), review of a final order of the Superior Court or the Commonwealth Court is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.

(b) Standards. A petition for allowance of appeal may be granted for any of the following reasons:

(1) the holding of the intermediate appellate court conflicts with another intermediate appellate court opinion;

(2) the holding of the intermediate appellate court conflicts with a holding of the Pennsylvania Supreme Court or the United States Supreme Court on the same legal question;

(3) the question presented is one of first impression;

(4) the question presented is one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court;

(5) the issue involves the constitutionality of a statute of the Commonwealth;

(6) the intermediate appellate court has so far departed from accepted judicial practices or so abused its discretion as to call for the exercise of the Pennsylvania Supreme Court's supervisory authority;
or

(7) the intermediate appellate court has erroneously entered an order quashing or dismissing an appeal.

Pa.R.A.P. 1114. Consistent with Rule 1114, the Rules also require that a petition for allowance of appeal contain a concise statement of the reasons relied upon for allowance of appeal. Pa.R.A.P. 1115(a)(5) (also citing Rule 1114).

In contravention of Rule 115(a)(5), Sandusky's Petition for Allowance of Appeal contains no concise statement of the reasons relied upon for allowance of appeal. Further, Sandusky nowhere argues that there are special and important reasons for allowance of appeal, much less identify such reasons or explain their importance. Rather, he simply argues the merits of each of the issues that he raised before the Superior Court without explaining why this Court should address those issues, a requirement for a petition for allowance of appeal.

For this reason alone, Sandusky has failed to provide this Court with a basis for exercising its discretion in favor of allowing an appeal.

Moreover, a review of the issues that Sandusky raised in the Superior Court and attempts to raise before this Court demonstrates that they are not worthy of review.

Sandusky first complained that the trial court erred when it decline to instruct the jury with respect to a prompt complaint. The standard governing review of a jury charge is as follows:

[W]hen reviewing jury instructions for error, the charge must be read as a whole to determine whether it was fair or prejudicial. “The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration.” *Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 603 (2007).

Commonwealth v. Sepulveda, 55 A.3d 1108, 1141 (Pa. 2012). With respect to a jury instruction on prompt complaint in a sexual assault case, “where the actual occurrence of the assault is at issue in the case, the trial judge is required to charge the jury as to the relevance of a delay in disclosure and the significance of a prompt complaint.” *Commonwealth v. Snoke*, 525 Pa. 295, 302, 580 A.2d 295, 298 (1990). An erroneous jury instruction will not warrant a new trial when a reviewing court is convinced beyond a reasonable doubt that the error is harmless. *Commonwealth v. Bullock*, 868 A.2d 516, 525 (Pa. Super. 2005), *affirmed*, 590 Pa. 480, 913 A.2d 207 (2006).

The trial court did not give the standard prompt complaint instruction in this case, explaining that such an instruction would be misleading because delayed reporting in child abuse cases is not unusual and therefore not an accurate indicia of honesty. (N.T. 6/21/12 at 4) The Superior Court held that a prompt complaint instruction was required under the law. *Commonwealth v. Sandusky*, 2013 PA

Super 264, at 3-6 (October 2, 2013). However, the Superior Court concluded that the Superior Court's instruction on the credibility of witnesses, in combination with the evidence and arguments of counsel, adequately conveyed the necessary concepts to the jury, and so Sandusky was not prejudiced by the absence of the standard prompt complaint instruction. *Id.* at 6-8.

That is, when the absence of a specific prompt complaint instruction is placed into context, it is clear that the jury was well aware that the defense was that the victims should not be believed because they were motivated by money and their revelations were not made until the opportunity for money arose. This defense was supported by the delay in reporting. The Court's instruction directed the jury to consider all of the relevant factors put forth by the defense. There was no novel application of the law and no error by the Superior Court in this analysis.

Sandusky next claimed that there was "reversible error" when the trial prosecutor argued in his summation regarding Sandusky's public statements on the case. The Superior Court properly concluded that this argument is properly characterized as a claim of prosecutorial misconduct. However, because Sandusky never requested a curative instruction or moved for a mistrial, the claim was waived. *Id.* at 8-10. Again, this was a straightforward, correct application of clearly established law that does not warrant further review.

Sandusky next argued that the trial court erred by denying his pretrial requests for a continuance. Applying several opinions of the Supreme Court of the United States, the Superior Court rejected Sandusky's "structural defect" argument and concluded that Sandusky's argument essentially was that he was denied the effective assistance of counsel because his attorneys did not have time to prepare for trial. Since Sandusky failed to demonstrate that the circumstances amounted to an arbitrary action by the trial court, the standard governing such a constitutional claim, the argument failed. Moreover, any error would have been harmless, given trial counsel's testimony during the post-sentence motion hearing to the effect that there would have been no change in the presentation of the case by the defense even if a continuance had been granted. *Id.* at 10-15. Again, the Superior Court engaged in a straightforward analysis of clearly established law of the Supreme Court of the United States. Such a decision does not warrant further review.

Finally, Sandusky argued that the trial court erred by instructing the jury that it should consider and weigh the evidence of his good character in combination with all of the other evidence when deciding whether the Commonwealth had borne its burden of proving that he was guilty beyond a reasonable doubt. The Superior Court explained the law on this issue, consistent with *Commonwealth v. Neely*, 522 Pa. 236, 561 A.2d 1 (1989); *Commonwealth v. Khamphouseane*, 642 A.2d 490 (Pa. Super. 1994); *Commonwealth v. Cleary*, 135 Pa. 64, 84, 19 A. 1017,

1018 (1890); and *Commonwealth v. Padden*, 50 A.2d 722, (Pa. Super. 1947). The trial court's instruction accurately reflects Pennsylvania law and there was no error and no reason for further review.

V.

CONCLUSION

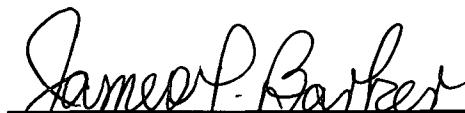
WHEREFORE, the Commonwealth respectfully requests that this Honorable Court enter an Order denying the Petition for Allowance of Appeal.

Respectfully submitted,

KATHLEEN G. KANE
Attorney General

LAWRENCE M. CHERBA
Executive Deputy Attorney General
Director, Criminal Law Division

By:



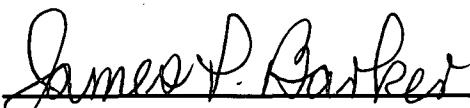
JAMES P. BARKER
Chief Deputy Attorney General
Attorney No. 67315
jbarker@attorneygeneral.gov

OFFICE OF ATTORNEY GENERAL
Criminal Law Division
Appeals and Legal Services Section
16th Floor-Strawberry Square
Harrisburg, PA 17120
(717) 705-0098
(Fax) (717) 783-5431

Date: November 13, 2013

AVERMENT REGARDING COMPACT DISC

Undersigned counsel hereby avers that the material contained on the compact disc (CD) filed contemporaneously with this Brief in Opposition to Petition for Allowance of Appeal is a complete and accurate representation of the paper version of the Brief in Opposition to Petition for Allowance of Appeal.

By: 
JAMES P. BARKER
Chief Deputy Attorney General
Attorney No. 67315
jbarker@attorneygeneral.gov

OFFICE OF ATTORNEY GENERAL
Criminal Law Division
Appeals and Legal Services Section
16th Floor-Strawberry Square
Harrisburg, PA 17120
(717) 705-0098
(Fax) (717) 783-5431

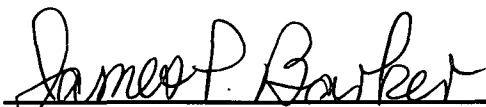
Date: November 13, 2013

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving one copy of the foregoing Commonwealth's *Brief in Opposition to Petition for Allowance of Appeal* upon the person and in the manner indicated below:

*Via U.S. First-Class Mail,
Postage pre-paid:*

**Norris E. Gelman, Esquire
2000 Market Street
Suite 2940
Philadelphia, PA 19103
(215) 574-0513
(Counsel for Appellant)**

By: 
JAMES P. BARKER
Chief Deputy Attorney General
Attorney No. 67315
jbarker@attorneygeneral.gov

**OFFICE OF ATTORNEY GENERAL
Criminal Law Division
Appeals and Legal Services Section
16th Floor-Strawberry Square
Harrisburg, PA 17120
(717) 705-0098
(Fax) (717) 783-5431**

Date: November 13, 2013

EXHIBIT “A”

2013 PA Super 264

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

GERALD A. SANDUSKY

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 338 MDA 2013
343 MDA 2013

Appeal from the Judgment of Sentence October 9, 2012
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0002421-2011
CP-14-CR-0002422-2011

BEFORE: PANELLA, J., MUNDY, J., and PLATT, J.*

OPINION BY PANELLA, J.:

FILED OCTOBER 02, 2013

Appellant, Gerald A. Sandusky, appeals from the judgment of sentence entered October 9, 2012, in the Court of Common Pleas of Centre County. We affirm.

A jury convicted Sandusky of 45 counts relating to the sexual abuse of young boys. The eight victims, now all adults, testified in detail about the sexual depravity they suffered as young boys at Sandusky's hands. Combined, the abuse spanned a thirteen-year period, 1995 to 2008. Sandusky met all the victims through a non-profit he founded called The Second Mile, an organization with the declared purpose of serving Pennsylvania's underprivileged and at-risk youth.

* Retired Senior Judge assigned to the Superior Court.

Immediately prior to sentencing, the trial court held a hearing at which time it determined that Sandusky was a sexually violent predator. The trial court then imposed an aggregate period of incarceration of thirty to ninety years. Sandusky filed post-sentence motions, which the trial court denied after a hearing. This timely appeal followed.

Sandusky first argues that the trial court erred in refusing to give the jury the prompt complaint instruction found at Section 4.13A of the Pennsylvania Suggested Standard Criminal Jury Instructions.¹ Sandusky argues that the instruction was necessary as all but one of the victims waited several years to report the sexual abuse; there were delays of sixteen years, fourteen years, thirteen years, twelve years, ten years, six years, and approximately two years.

¹ The Commonwealth contends that Sandusky waived this issue as he did not object to the trial court's failure to give the charge before the jury retired to deliberate. **See** Commonwealth's Brief, at 34. At the charge conference held in chambers, Sandusky requested that the trial court instruct the jury on prompt complaint and the trial court refused. **See** N.T., 6/21/12, at 4. After the trial court instructed the jury, it asked counsel for "[a]ny additions, corrections, exceptions to the charge as provided *that have not already been placed on the record* before court?" **Id.**, at 33 (emphasis added). Counsel for Sandusky, Karl Rominger, Esquire, specifically asked the trial court if "[e]verything we did in chambers is preserved for the record?" **Id.**, at 34. The trial court responded, "[y]es, all exceptions previously made are placed on the record." **Id.** Thus, the trial court was well aware of the requested instruction and its decision to not give the instruction to the jury. As per the trial court's explicit instructions to counsel, there was no reason to lodge any further objection. Therefore, this claim is not waived.

In relation to an issue such as this, our scope and standard of review is as follows:

In reviewing a challenge to the trial court's refusal to give a specific jury instruction, it is the function of this Court to determine whether the record supports the trial court's decision. In examining the propriety of the instructions a trial court presents to a jury, our scope of review is to determine whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case. A jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. Consequently, the trial court has wide discretion in fashioning jury instructions. The trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the Appellant was prejudiced by that refusal.

Commonwealth v. Thomas, 904 A.2d 964, 970 (Pa. Super. 2006) (internal citations, quotation marks, and brackets omitted).

The premise for the prompt complaint instruction is that a victim of a sexual assault would reveal at the first available opportunity that an assault occurred. ***See id.*** The instruction permits a jury to call into question a complainant's credibility when he or she did not complain at the first available opportunity. ***See Commonwealth v. Prince***, 719 A.2d 1086, 1091 (Pa. Super. 1998). However, there is no policy in our jurisprudence that the instruction be given in every case.

"The propriety of a prompt complaint instruction is determined on a case-by-case basis pursuant to a subjective standard based upon the age

and condition of the victim.” **Thomas**, 904 A.2d at 970. For instance, “[w]here an assault is of such a nature that the minor victim may not have appreciated the offensive nature of the conduct, the lack of a prompt complaint would not necessarily justify an inference of fabrication.” **Commonwealth v. Jones**, 672 A.2d 1353, 1357 n.2 (Pa. Super. 1996).

At the charging conference the trial court denied the requested instruction, reasoning that in its view “the research is such that in cases involving sexual abuse[,] delayed reporting is not unusual and, therefore, is not an accurate indicia of honesty and may be misleading.” N.T., Trial, 6/21/12, at 4. In its opinion addressing Sandusky’s post-sentence motions, the trial court explains that its use of the word “‘research’ was not accurate.” Trial Court Opinion, 1/30/13, at 7 n.4. The trial court notes that it did not conduct any research on this issue to prepare for the charge conference, but relied on its “experience in handling child sexual abuse cases in a variety of contexts....” **Id.**

The trial court opted to give only the standard credibility charge without the addition of the prompt complaint charge as it reasoned that “the jury would be more appropriately guided” by that charge. **Id.**, at 10. The standard credibility charge, in the trial court’s opinion, instructed the jury to consider “the specific credibility issues raised by the defense: memory, self-interest, motive, and bias.” **Id.** The trial court concluded its thoughts on the prompt complaint instruction as follows:

The practical reality is that the standard prompt complaint charge does not take into account the complex and myriad factors that might cause a child victim to delay in reporting an assault, or in comprehending the long-term significance of the assault, or even a child's motivation to protect the person who assaulted them. No one who has had the slightest experience with child sexual abuse or given a whit of thought to the dynamics could conclude that failure to make a prompt complaint, standing alone, is an accurate indicia of fabrication.

Id., at 11.

Although well intentioned, the trial court's analysis of the prompt complaint instruction and its application to cases involving children is not supported in the case law. ***See, e.g., Commonwealth v. Lane***, 521 Pa. 390, 398, 555 A.2d 1246, 1251 (1989) ("[I]t is important to note that evidence of a prompt complaint *should also be considered* when the victim is a child.") (emphasis added). As noted, its application is not determined by a blanket standard, but rather on a case-by-case basis. ***See Thomas, supra.***; ***Commonwealth v. Ables***, 590 A.2d 334, 340 (Pa. Super. 1991).

The prompt complaint instruction provides, in pertinent part, that evidence of "delay in making a complaint does not necessarily make [the victim's] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make." Pennsylvania Suggested Standard Criminal Jury Instructions Section 4.13A(2). The instruction further states that the failure to promptly complain and the victim's explanation for the failure "are factors bearing on the believability of

[the victim's testimony] and must be considered by you in light of all the evidence in the case." *Id.*, at (3).

In this case, the trial court should have evaluated the appropriateness of the instruction with respect to the age and maturity of each victim. There is no question that there was lengthy delay in all but one of the victims' complaints; however, this fact alone does not justify the prompt complaint instruction. Because we can find no discussion by the trial court as to whether the minor victims would have "appreciated the offensive nature" of Sandusky's conduct, we must determine if the trial court's lack of analysis prejudiced Sandusky. *See Commonwealth v. Marshall*, 824 A.2d 323, 328 (Pa. Super. 2003) (an error is harmless if the court determines that the error could not have contributed to the verdict). We conclude there was no prejudice.

The trial court's credibility instruction largely tracked Section 4.17, Credibility of Witnesses, General, of the Pennsylvania Suggested Standard Criminal Jury Instructions. The trial court instructed the jury as follows:

Now, as the judges of the facts, you are also the judges of the credibility of the witnesses and of their testimony. This means that you must judge the truthfulness and the accuracy of each witness's testimony and decide whether to believe all of it, part of it, or none of it. So, how you may ask do you go about doing that? Well, there are many factors that you may or should consider when judging credibility and deciding whether or not to believe a witness's testimony.

You might consider, for example, was the witness able to see or hear or know the things about which he or she testified?

How well could the witness remember and describe the things about which he or she testified?

How did the witness look and act and speak while testifying?

Was the witness's testimony uncertain, confused, self-contradictory, argumentative, evasive?

Has the witness ever been convicted of a crime involving dishonesty?

What is the witness's reputation for testifying – or for truthfulness in the community among those who know the witness?

How well does the testimony square with the other evidence in the case, including the testimony of other witnesses? Was it contradicted or supported by the other testimony in evidence which you believe to be true?

Did the witness have any interest in the outcome of the case, anything to gain or lose by the outcome of the case? Any bias, any prejudice, or any other motive that might affect his or her testimony?

If you believe that a witness testified falsely about an important issue, then you may keep that in mind in deciding whether to believe the remainder of the witness's testimony.

A person who testifies falsely about one thing may have testified falsely about other things but that is not necessarily so but that's among the factors that you can consider.

And, finally, after thinking about all the testimony and considering some or all of the factors that I had mentioned to you, you draw on your own experience, your own common sense, and you alone, as the sole judges of the facts, should give the testimony of each witness such credibility as you think it deserves.

N.T., Trial, 6/21/12, at 15-17 (emphasis added).

This instruction provided the jury with a sufficient framework to question the victims' credibility. In addition, at trial, Sandusky extensively argued that the victims not only delayed in reporting, but that they did so because the abuse never occurred and that they concocted their stories for financial gain. As stated above, the trial court specifically instructed the jury that they were to consider any possible motives of the victims in coming forward. The vigorous cross-examination of the victims and arguments by defense counsel, when combined with the trial court's instructions on credibility, clearly defined the issues for the jury. Therefore, we find that, under the facts of this case, the absence of the prompt complaint instruction did not prejudice Sandusky.

Sandusky next argues that the trial court committed reversible error when it denied his objection that the prosecutor commented adversely on his choice not to testify at trial. During his closing argument, the prosecutor stated:

The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think, or close.

Well, he had the chance to talk to Bob Costas and make his case. What were his answers? What was his explanation? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him? He didn't say he knew why he did it. He just said he saw you do it. Mike McQueary. The janitors. Well, you would have to ask them. That's an answer?

Mr. Amendola did I guess as good a job as possible explaining – he offered that his client has a tendency to repeat questions after they're asked. I would think that the automatic response when someone asks you if you're, you know, a criminal, a pedophile, a child molester, or anything along those lines, your immediate response would be, you're crazy, no. What? Are you nuts?

Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats question [sic]. I wouldn't know. *I only heard him on TV. Only heard him on TV.* So that's his explanation there. He enjoys young children.

N.T., Trial, 6/21/12, at 140-142 (emphasis added).

Pursuant to a court-approved stipulation, counsel reserved their objections until after closing arguments. **See id.**, at 5. After the Commonwealth's closing, Sandusky's counsel, Karl Rominger, Esquire, objected that the prosecutor committed misconduct by stating that Sandusky chose not to testify. The trial court then asked if Sandusky's counsel had "[a]nything further." **Id.**, at 158. Counsel stated, "[n]o, Your Honor." **Id.** The trial court concluded that the prosecutor's statements were "fair rebuttal" and that it had "cautioned the jury again and again the defendant has no obligation to testify or present evidence in his own defense." **Id.** The trial court further stated that it would "caution the jury again...." **Id.** Attorney Rominger then stated, "[t]hank you, Your Honor." **Id.**

"[E]ven where a defendant objects to specific conduct, the failure to request a remedy such as a mistrial or curative instruction is sufficient to constitute waiver." **Commonwealth v. Manley**, 985 A.2d 256, 267 n.8 (Pa.

Super. 2009) (citation omitted). Sandusky did not move for a mistrial or request a curative instruction; he merely lodged an objection. As such, this claim is not preserved for appellate review.² **See Commonwealth v. Jones**, 501 Pa. 162, 166, 460 A.2d 739, 741 (1983) (finding prosecutorial misconduct claim waived where defense counsel immediately objected to the prosecutor's conduct but failed to request mistrial or curative instructions); **cf. Commonwealth v. Rhone**, 619 A.2d 1080, 1083 (Pa. Super. 1993) (declining to find waiver for prosecutorial misconduct where counsel failed to request a curative instruction, but lodged an objection, moved to strike the comment, and requested a mistrial).

Sandusky next argues that the trial court's refusal to grant a continuance effectively deprived him of his Sixth Amendment right to the effective assistance of trial counsel. This is an error, he argues, that

² As noted, the record indicates that Sandusky agreed with the trial court's decision to "caution the jury again" as counsel indicated he had nothing further when asked by the trial court. Sandusky was apparently satisfied with the trial court's resolution of the alleged prosecutorial misconduct as he did not request any further remedy. We note, "the law presumes that the jury will follow the instructions of the court." **Commonwealth v. Huggins**, 68 A.3d 962, 973 (Pa. Super. 2013) (citation omitted).

At oral argument, Sandusky's counsel, Norris E. Gelman, Esquire, who we compliment for his able representation and forthright argument before the panel, admitted that this claim is technically waived.

constitutes a structural defect requiring automatic reversal of the judgment of sentence under the United States Constitution. This novel argument fails.

Structural defects are a class of constitutional error. **See *United States v. Gonzalez-Lopez***, 548 U.S. 140, 148 (2006). Structural defects “defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself.” ***Id.*** (internal quotation marks, brackets and citation omitted). Few constitutional errors qualify as structural defects. In ***Gonzalez-Lopez***, the Supreme Court identified these as the complete “denial of counsel, the denial of the right of self-representation, the denial of the right to public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction.” ***Id.***, at 149 (internal citations omitted). The Supreme Court named a new structural defect claim in ***Gonzalez-Lopez***: the erroneous disqualification of a criminal defendant’s choice of retained counsel. **See *id.***, at 150.

None of these claims is at issue in this case. Stripped of the structural defect artifice, Sandusky’s claim, at its core, is that the trial court erred in denying his continuance requests and that that decision denied him his Sixth Amendment right to the effective assistance of counsel.

The matter of granting or denying a continuance is within the discretion of the trial court. **See *Ungar v. Sarafite***, 376 U.S. 575, 589 (1964). “[A] myopic insistence upon expeditiousness in the face of a

justifiable request for delay can render the right to defend with counsel an empty formality." *Id.*, at 589. However, "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel."

Morris v. Slappy, 461 U.S. 1, 11 (1983).³ The Court in ***Morris*** observed that

[t]rial 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.

Id.

Accordingly, a trial court exceeds its constitutional authority only when it exercises its discretion to deny a continuance on the basis of "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay...." *Id.*, at 11-12 (internal citation and quotation marks omitted). To determine whether a constitutional violation occurred,

³ The Court in ***Ungar*** applied a due process standard pursuant to the due process clause of the Fifth and Fourteen Amendments, which provide independent protections against arbitrary denials of continuance requests. **See** 376 U.S. 588-589 and n.9. "At the point where such a refusal implicates the right to effective assistance of counsel, the guarantees of the [S]ixth and [F]ifth [A]mendments essentially converge, as necessarily do the constitutional inquiries forced by such a request and its denial." ***Sampley v. Attorney General of North Carolina***, 786 F.2d 610, 613 (4th Cir. 1986) (citing ***Morris***, 461 U.S. at 11-12) (addressing the Sixth Amendment challenge to the refusal to grant a continuance by applying the due process standard in ***Ungar***).

we must examine the circumstances present in the case, especially the reasons presented to the trial court for requesting the continuance. **See *Ungar***, 376 U.S. at 589.

Here, from January 28, 2012, until June 15, 2012,⁴ Sandusky received voluminous supplemental discovery. From the Commonwealth he received 9,450 pages of documentation, 674 pages of Grand Jury transcripts, and 2,140 pages from subpoenas *duces tecum*. Due to the high volume of discovery received so close to the trial date, counsel maintained they were unprepared for trial and requested continuances on March 22, 2012, May 9, 2012, and May 25, 2012.

In orders entered on February 29, 2012, and April 12, 2012, the trial court summarily denied the continuance requests. In an order entered on May 30, 2012, however, the trial court addressed Sandusky's claim regarding the need to postpone the trial due to the volume of material provided in discovery. The trial court explained its denial as follows:

The amount of material that I have ordered the Commonwealth to provide in discovery has been significant. No doubt sorting the wheat from the chaff has been time consuming. Again, however, the defense team is assuredly capable, even as the trial is ongoing, of sorting through the material to determine what is useful to the defense and what is not.

...

⁴ Jury selection started on June 5, 2012; the trial started on June 11, 2012.

While I certainly do not doubt the sincerity of defense counsel in requesting a continuance, the reality of our system of justice is that no date for trial is ever perfect, but some dates are better than others. While June 5th does present its problems, on balance and considering all the interests involved—the defendant’s right to a fair trial, the alleged victims’ right their day in court [sic], the Commonwealth’s obligation to prosecute promptly, and the public’s expectation that justice will be timely done—no date will necessarily present a better alternative.

Order, 5/30/12, at 3-4.

The trial court’s explanation denotes a careful consideration of the matter. The decision does not reflect a myopic insistence upon expeditiousness in the face of Sandusky’s request; it was not an arbitrary denial. Therefore, we can find no constitutional error, nor abuse of discretion, in the denial of the continuance requests.

Assuming for the sake of argument, however, that the trial court did commit an error in denying the continuance requests, we would find the error harmless. This is a claim that is subject to harmless error analysis.

See *Morris*, 461 U.S. at 12.

Sandusky called his trial counsel, Joseph Amendola, Esquire, to testify at the post-sentence motion hearing. At the hearing, the following exchange occurred on cross-examination regarding the trial court’s refusal to grant a continuance:

Q: What item have you discovered since the conclusion of the trial, in your review of these voluminous documents that you have talked about, that would have altered your conduct at trial?

Amendola: The answer is none.

Q: None. So there is no item, document, or person that in your review of the documents that you received at any time that would have altered your conduct at trial during the course of the trial; isn't that correct?

Amendola: That's correct.

N.T., Post-Sentence Motion Hearing, 1/10/13, at 39-40. As evidenced by counsel's own testimony, Sandusky suffered no prejudice from the trial court's denial of the continuance requests. Therefore, this claim fails.

Lastly, Sandusky argues that the trial court erred in instructing the jury on character evidence. The trial court utilized Section 3.06, Defendant's Character (Reputation), of the Pennsylvania Suggested Standard Criminal Jury Instructions and instructed the jury as follows:

Now, the defense has offered evidence tending to prove that the defendant is of good character. I'm speaking of the defense witnesses who testified that the defendant has a good reputation in the community for being law abiding, peaceable, nonviolent individual.

The law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. *Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty.*

So you must weigh and consider the evidence of good character along with the other evidence in this case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty. ... But in making that determination, you may consider evidence of good character which you believe to be true.

N.T., Trial, 6/21/12, at 22 (emphasis added).

Sandusky agrees with the trial court's statement that "[e]vidence of good character may by itself raise a reasonable doubt of guilt and require a

verdict of not guilty." Appellant's Brief, at 55. He argues, however, "the [c]ourt immediately thereafter gave a contradictory charge," when it instructed the jury that it had to weigh and consider the evidence of good character with the other evidence in the case. **Id.** He maintains that if the character evidence must be weighed against other evidence "it is not being considered 'in and of itself' as required by [**Commonwealth v. Neely**, ... [522 Pa. 236, 561 A.2d 1 (1989)]." **Id.**, at 56. This very argument was rejected in **Commonwealth v. Khamphouseane**, 642 A.2d 490 (Pa. Super. 1994).

It has long been the law in Pennsylvania that "[e]vidence of good character is always admissible for the defendant in a criminal case. *It is to be weighed and considered in connection with all the other evidence in the cause.* It may of itself, in some instances, create the reasonable doubt which would entitle the accused to an acquittal." **Commonwealth v. Cleary**, 135 Pa. 64, 84, 19 A. 1017, 1018 (1890) (emphasis added). **See also Commonwealth v. Padden**, 50 A.2d 722, (Pa. Super. 1947) ("To be sure, it [i.e., character evidence] is to be *considered* with all the other evidence in the case.").

In **Neely**, our Supreme Court held that "[a] criminal defendant must receive a jury charge that evidence of good character (reputation) may, in and of itself, (by itself or alone) create a reasonable doubt of guilt and, thus, require a verdict of not guilty." 522 Pa. at 241, 561 A.2d at 3. The appellant

in ***Khamphouseane*** argued ***Neely*** mandates that character evidence must be viewed apart from other evidence and may not be weighed by the jury against such evidence. The panel disagreed.

The panel quoted the language from ***Cleary*** that evidence of character must be “weighed and considered in connection with all the other evidence” in the case and explained that

nearly a century later, the Supreme Court [in ***Neely***] did not undertake to change the substantive law regarding evidence of a defendant’s good character. Rather, the Court set out to ensure that the defendant received the benefit of a jury instruction consistent with the law announced in ***Cleary***.

642 A.2d at 496.⁵ The charge in ***Khamphouseane*** was “quoted almost verbatim” from the Pennsylvania Suggested Standard Criminal Jury Instructions⁶ and, as such, the panel held that “appellant had the benefit of

⁵ Indeed, the Court in ***Neely*** “implicitly endorsed” the Pennsylvania Suggested Standard Criminal Jury Instruction on Defendant’s Character (Reputation). ***Commonwealth v. Sampson***, 900 A.2d 887, 893 (Pa. Super. 2006).

⁶ The instruction was, in pertinent part, as follows:

Evidence of good character may by itself raise a reasonable doubt of guilt and justify a verdict of not guilty.

You must weigh and consider the evidence of good character along with the other evidence in the case. If on all the evidence, you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

642 A.2d at 495.

a jury instruction which fully and correctly apprised the jury of the manner in which it could consider appellant's evidence of good character." *Id.*

Here, as mentioned, the trial court quoted near verbatim from Section 3.06 of the Pennsylvania Suggested Standard Criminal Jury Instructions. Thus, pursuant to *Khamphouseane*, the trial court committed no error in charging the jury on the issue of character evidence.

Sandusky further argues that that use of the word "weigh" with the word "must" is erroneous as "it conveyed to the jury that the character evidence had to outweigh other evidence in the case, and if it did it would then 'justify' a verdict of not guilty." Appellant's Brief, at 58. The instruction does no such thing.

As the trial court aptly explains, the charge

instructs the jury that evidence of good character "may by itself" raise a reasonable doubt and "require" a verdict of not guilty. It then instructs the jury that it must weigh and consider all the other evidence, but it can . . . "still reach a verdict on character evidence alone."

Trial Court Opinion, 1/30/13, at 12-13. We agree, completely, with the trial court's reasoning. The trial court properly instructed the jury. Accordingly, Sandusky's argument fails.

Judgment of sentence affirmed.

J-A24001-13

Judgment Entered.

Mary A. Graybill

Deputy Prothonotary

Date: 10/2/2013

EXHIBIT “B”

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CRIMINAL DIVISION

FILED FOR RECORD
2013 JAN 30 P 11
DEBRA C. MILLER
PROthonotary
CENTRE COUNTY

COMMONWEALTH OF PENNSYLVANIA :

VS. :

GERALD A. SANDUSKY :

CP-14-CR-2421-2011
CP-14-CR-2422-2011

OPINION ADDRESSING THE DEFENDANT'S POST-SENTENCE MOTIONS

John M. Cleland, Senior Judge
January 30th, 2013

The defendant was convicted by a jury on 45 counts of sexual abuse of minors. He was sentenced on October 9, 2013 and has now filed post-sentence motions. Although his post-sentence motions raise a number of issues, at oral argument defense counsel confirmed the statement in his brief¹ that all issues have been waived except those specifically argued in his brief.

The issues, which I have summarized and restated, that have been preserved and argued are:

1. That the denial of the defense requests for continuance based on the need for counsel to evaluate "the vast amount" (Defendant's brief p. ii) of material received in discovery resulted in a constructive denial of the defendant's Sixth Amendment right to counsel, and the defendant is not required to show that he was prejudiced as a result.

¹ "All claims raised in post sentence motions but not raised in the Brief are waived." (Defendant's Brief in Support of His Post Sentence Motions, p. 45).

2. That it was error to refuse to give to the jury the requested standard point for charge addressing the failure of the victims to make a prompt complaint as a factor to be considered in assessing their credibility.
3. That the jury was erroneously instructed regarding its consideration of the defendant's character evidence.
4. That the failure to give both the prompt complaint instruction and the phrasing of the character evidence instruction impaired the defendant's defense.
5. That the prosecution, in closing argument, improperly commented on the defendant's failure to testify at trial.
6. That it was error to permit the prosecution to introduce the hearsay statements of James Calhoun.
7. That it was error not to dismiss the charges filed against the defendant because of lack of specificity.

I will address the issues in order.

I

That the denial of the defense requests for continuance based on the need for counsel to evaluate "the vast amount" (Defendant's brief p. ii) of material received in discovery resulted in a constructive denial of the defendant's Sixth Amendment right to counsel, and the defendant is not required to show that he was prejudiced as a result.

At the hearing on the post-sentence motions, the defense established that it made some fifty discovery requests. In response the Commonwealth turned over 9,450 pages of materials; the Grand Jury supervising judge authorized the release of 674 pages of material; and other subpoenaed sources delivered 2,140

pages of material. Trial counsel testified that before trial he did not have either the time or opportunity to review the materials and properly prepare for trial. On cross-examination trial counsel also candidly testified he had reviewed the material post-trial and he had discovered no item he would have used at trial if he had had it; and he discovered nothing that would have altered his approach to the trial. It was also established that essentially all of the mandatory, exculpatory or discretionary discovery supplied by the Commonwealth pursuant to Pa. R. Crim. P. 573 was delivered in the early stages of the defense preparation.

Based on trial counsel's testimony it has been clearly established the defense is not able to prove any actual prejudice flowed from the court's denial of the continuance motions. While the volume of discovery produced might have been "vast," as the defense characterizes it, a post-trial review of the material has identified nothing that would have changed the defense trial strategy or would have been useful in advancing the defendant's defense.

Presented with a similar question in Avery v. State of Alabama, 308 U.S. 444, 452 (1940), the United States Supreme Court found "(t)hat the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted." ²

Defense counsel argues, however, the failure to grant a continuance under the circumstances of this case constitutes a "structural defect" that

² With a more modern perspective the principle applied to the facts in Avery might have yielded a different result; but the principle itself endures. See Cronic at 661.

excuses the need to prove prejudice. The defense relies on United States v. Cronic, 466 U.S. 648 (1984) which held under some circumstances "...the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without any inquiry into the actual conduct of the trial." 466 U.S. at 660. As the Court further explained, "...if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Id. at 659.

While Cronic clearly establishes the "structural defect" analysis in principle, the principle in application is less clear. In Cronic the defendant was convicted on a complex mail fraud check kiting scheme. When the defendant's retained counsel withdrew shortly before trial, the trial judge, twenty-five days before trial, appointed a young lawyer with a real estate practice who had never participated in a jury trial. The prosecution had spent four and a half years investigating the case and had developed thousands of documents. Despite affirming the principle of Powell v. Alabama, 287 U.S. 45 (1932),³ the Court held that the circumstances in Cronic's case did not create the kind of "structural defect" which excused the duty to show prejudice and affirmed the defendant's conviction.

In Florida v. Nixon, 543 U.S. 175 (2004), the United States Supreme Court, after analyzing the application of Cronic to the facts of the case, concluded

³ "Powell was thus a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into the actual performance at trial." 466 U.S. at 661

defense counsel's admission of the defendant's guilt in a death penalty murder prosecution did not, in the words of Cronic, result "in a failure to function in any meaningful sense as the Government's adversary." 543 U.S. at 190. Instead, the Court held, the proper analysis was the standard prescribed in Strickland v. Washington, 466 U.S. 668 (1984) which required the defense to show trial counsel's strategy was objectively unreasonable and resulted in prejudice to the defendant. See also, Bell v. Cone, 535 U.S. 685 (2002) (The obligation to establish prejudice is only excused "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." at 697. Emphasis in original.)

The Supreme Court of Pennsylvania recently considered the application of Cronic in Commonwealth v. Cousin, 888 A.2d 710 (Pa. 2005). In Cousin, the Court held Cronic applies only "where the lack of a fair trial is a virtual certainty" and "is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable." 888 A.2d, at 719. In a capital homicide case, Commonwealth v. Williams, 950 A.2d 294 (Pa. 2008), the Supreme Court of Pennsylvania considered whether the limited time available to trial counsel to prepare, the capped fee on payment for his services and a limited investigation budget placed "untenable restrictions" on the representation. Citing Cronic, the Court held "neither the fee cap nor the asserted limitation on investigative fees, individually, or collectively with the time constraints, implicates presumed prejudice" because "trial counsel subjected the prosecution's case to meaningful adversarial testing, and, therefore, the doctrine of presumed prejudice is not

applicable.” 950 A.2d at 313. See also: Commonwealth v. Mallory, 941 A.2d 686 (Pa. 2008).

As both a matter of fact and of law, I do not think it can be said that either of the defendant's trial counsel failed to test the prosecution's case in a meaningful manner. The defendant's attorneys subjected the Commonwealth's witnesses to meaningful and effective cross-examination, presented evidence for the defense, and presented both a comprehensive opening statement and a clearly developed closing argument. This is simply not a case where trial counsel's inability to review before trial all of the discovery material produced can be said to have resulted in a “structural defect” that made the lack of a fair trial a virtual certainty.

If Cronic does not apply to this case, then Strickland does. As previously noted, Strickland requires a showing of prejudice. And, as also previously noted, trial counsel conceded, having reviewed the discovery material after the trial, he could find nothing that would have changed his trial strategy if he had had the benefit of it before trial. There was, in other words, no prejudice to the defendant by denying defense counsel's motion for a continuance.

Therefore, the post-sentence motion on that ground will be denied.

II

That it was error to refuse to give to the jury the requested standard point for charge addressing the failure of the victims to make a prompt complaint as a factor to be considered in assessing their credibility.

The defense requested I charge the jury that the failure of the victims in this case to make a prompt complaint about the defendant's sexual assault could be considered in evaluating their credibility.

As the transcript of the charging conference reflects, I denied the request because "in my view the research is such that in cases involving child sexual abuse delayed reporting is not unusual and, therefore is not an accurate indicia of honesty and may be misleading." ⁴(N.T. June 21, 2012, p. 4).

The defense offered no particular wording for my consideration and, instead, relied on the Pennsylvania Standard Criminal Jury Instruction. It reads as follows:

4.13A (Crim) Failure to Make Prompt Complaint in Certain Sexual Offenses

1. Before you may find the defendant guilty of the crime charged in this case, you must be convinced beyond a reasonable doubt that the act charged did in fact occur and that it occurred without *[name of victim]*'s consent.

2. The evidence of *[name of victim]*'s [failure to complain] [delay in making a complaint] does not necessarily make [his] [her] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore,

⁴ My use of the word "research" was not accurate. I did not conduct any ex parte research in preparing the jury charge or conducting the trial. A more accurate explanation would have been that my experience in handling child sexual abuse cases in a variety of contexts – including criminal prosecutions, child abuse and neglect proceedings, juvenile delinquency cases, and child custody litigation – has led me to that conclusion.

the [failure to complain] [delay in making a complaint] should be considered in evaluating [his] [her] testimony and in deciding whether the act occurred [at all] [with or without [his] [her] consent].

3. You must not consider [name of victim]'s [failure to make] [delay in making] a complaint as conclusive evidence that the act did not occur or that it did occur but with [his] [her] consent. [name of victim]'s failure to complain [at all] [promptly] [and the nature of any explanation for that failure] are factors bearing on the believability of [his] [her] testimony and must be considered by you in light of all the evidence in the case.

The Advisory Committee Note following the instruction offers this guidance:

The instruction is not appropriate where a child or a person otherwise incapable, by mental infirmity, of promptly reporting the incident is the alleged victim. *Commonwealth v. Snoke*, 580 A.2d 295 (Pa. 1990). See, generally, *Commonwealth v. Bryson*, 860 A.2d 1101 (Pa. Super. 2004). As the court said in *Commonwealth v. Thomas*, 904 A.2d 964, 970-71 (Pa. Super. 2006):

The propriety of a prompt complaint instruction is determined on a case-by-case basis pursuant to a subjective standard based upon the age and condition of the victim. For example, where the victim of a sexual assault is a minor who "may not have appreciated the offensive nature of the conduct, the lack of a prompt complaint would not necessarily justify an inference of fabrication." *Commonwealth v. Jones*, 449 Pa. Super. 58, 66 n.2, 672 A.2d 1353, 1357 n.2 (1996). This is especially true where the perpetrator is one with authority or custodial control over the victim. *Commonwealth v. Ables*, 404 Pa. Super. 169, 183, 590 A.2d 334, 340 (1991), *appeal denied*, 528 Pa. 620, 597 A.2d 1150 (1991). Similarly, if the victim suffers from a mental disability or diminished capacity, a prompt complaint instruction may not be appropriate. *Commonwealth v. Bryson*, 2004 PA Super 405, 860 A.2d 1101, 1104-1105 (Pa. Super. 2004).

Where an instruction is warranted, this language was approved in *Commonwealth v. Patosky*, 656 A.2d 499, 506 (Pa. Super. 1995), and *Commonwealth v. Trippett*, 932 A.2d 188, 200 (Pa. Super. 2007).

The thrust of the defense attack on the credibility of the victims was that their testimony was the product of a conspiracy among them to align their stories into a common scenario. And further, that the victims were motivated by the

prospect of financial gain abetted by attorneys representing them in either filed or anticipated civil litigation. This line of cross-examination was directed to almost all of the victims and was a major theme in defense counsel's closing argument.

As the Supreme Court of Pennsylvania noted many years ago in Commonwealth v. Young, 317 A.2d 258 (Pa. 1974), "(w)e have said over and over again that one of the primary duties of a trial judge is to so clarify the issues that a jury may clearly understand the questions to be resolved." (citations omitted) 317 A.2d at 261, n 7. In doing so, the "charge must be viewed as a whole to assess if it adequately guided the jury in the performance of its fact-finding duty." Commonwealth v. Rodriguez, 495 A.2d 569 (Pa. Super. 1985). "There is no right to have any particular form of instruction given; it is enough if the instruction clearly and accurately explains the relevant law." Commonwealth v. Dozier, 439 A.2d 1185, 1188 (Pa. Super. 1982).

While I refused to give the prompt complaint instruction as requested by the defense, using basically the Standard Jury Instruction I did charge the jury as follows:

"Now, as judges of the facts, you are also the judges of credibility of the witnesses and of their testimony. This means that you must judge the truthfulness and the accuracy of each witness's testimony and decide whether to believe all of it, part of it, or none of it. So, how you may ask do you go about doing that? Well, there are many factors that you may or should consider when judging credibility and deciding whether or not to believe a witness's testimony.

You might consider, for example, was the witness able to see or hear or know the things about which he or she testified?

How well could the witness remember and describe the things about which he or she testified?

Did the witness testify in a manner that was convincing to you?

How did the witness look and act and speak while testifying?
Was the witness's testimony uncertain, confused, self-contradictory, argumentative, evasive?

Has the witness ever been convicted of a crime involving dishonesty?

What is the witness's reputation for testifying – or for truthfulness in the community among those who know the witness?

How well does the testimony of the witness square with other evidence in the case, including the testimony of other witnesses? Was it contradicted or supported by the other testimony in evidence which you believe to be true?

Did the witness have any interest in the outcome of the case, anything to gain or lose by the outcome of the case? Any bias, any prejudice, any motive that might affect his or her testimony?

If you believe that a witness testified falsely about an important issue, then you may keep that in mind in deciding whether to believe the remainder of the witness's testimony.

A person who testifies falsely about one thing may have testified falsely about other things but that is not necessarily so but that's among the factors that you can consider.

And, finally, after thinking about all the testimony and considering some or all of the factors that I had mentioned to you, you draw on your own experience, your own common sense, and you alone, as the sole judges of the facts, should give the testimony of each witness such credibility as you think that it deserves.

(NT June 21, 2012, pp 15-17).

In the context of the case, and considering the defense's line of cross-examination and argument, I concluded the jury would be more appropriately guided by the specific references of the standard credibility charge than it would be by the more generalized guidance of the prompt complaint charge. The charge as given instructs the jury to consider the specific credibility issues raised by the defense: memory, self-interest, motive, and bias. In addition, as requested by the defense, I included a "false in one, false in all" instruction.

The court's charge should state with accuracy those principles which will be genuinely helpful to the jury in deciding the particular case submitted to them.

The object is to assure the verdict is based on the evidence and law applicable to the case at hand. That purpose is defeated if the jury is simply offered a pro forma recitation of an arguably applicable point for charge when the particular instruction would not necessarily be helpful to the jury, and might actually be misleading based on the facts of the case and the arguments of counsel.

The practical reality is that the standard prompt complaint charge does not take into account the complex and myriad factors that might cause a child victim to delay in reporting an assault, or in comprehending the long-term significance of the assault, or even a child's motivation to protect the person who assaulted them. No one who has had the slightest experience with child sexual abuse or given a whit of thought to its dynamics could conclude that failure to make a prompt complaint, standing alone, is an accurate indicia of fabrication.

Therefore, the post-sentence motion on that ground will be denied.

III

That the jury was erroneously instructed regarding its consideration of the defendant's character evidence.

The defense asserts the Court's instruction was erroneous and misleading because, after instructing the jury that evidence of good character could by itself raise a reasonable doubt of guilt, the Court then improperly instructed the jury it should weigh all evidence in the case. Relying on Commonwealth v. Neely, 561 A.2d 1 (Pa. 1989), the defense argues: "Put another way, the requirement that the jury 'weigh' character testimony is totally inconsistent with Neely's mandate that the jury may use such testimony, 'in and of itself' to acquit, for if the jury must

weigh the character testimony it cannot then consider it 'in and of itself.'"

(Defendant's Brief on Post-Sentence Motions, p. 28). (Emphasis in original).

Upon a review of the transcript of the charging conference, it appears the only reference to the issue is as follows:

MR. ROMINGER: Mr. Amendola had raised the idea that defendant's character or reputation evidence alone would be enough to raise a reasonable doubt and it didn't have to be waived (I assume this to be "weighed") with all other evidence in the case. We would add that you propose good character made (I assume this to be "may") by itself raises (sic) a reasonable doubt and require a verdict of not guilty in and of itself, and then you could weigh and consider the evidence of other character but still reach a verdict on character evidence alone."

(N.T. June ____, 2012, p.4)

Using Standard Criminal Jury Instruction 3.06, I charged the jury as follows:

"Now, the defense has offered evidence tending to prove that the defendant is of good character. I'm speaking of the defense witnesses who testified that the defendant has a good reputation in the community for being law abiding, peaceable, nonviolent individual.

The law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. Evidence of good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty.

So you must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty. However, if on all the evidence you are not satisfied beyond a reasonable doubt he is guilty, you should find – that he is guilty, you should find him guilty. But in making that determination, you may consider evidence of good character which you believe to be true.

(N.T. June 21, 2012 p.22)

Having reviewed the charge as given, I can only conclude that the Standard Instruction that I gave does precisely what the defense asked for. It

instructs the jury that evidence of good character "may by itself" raise a reasonable doubt and "require" a verdict of not guilty. It then instructs the jury that it must weigh and consider all the other evidence, but it can, basically as Mr. Rominger requested, "still reach a verdict on character evidence alone."

I do not read Neely as broadly as does the defense. The defense, as I understand it, argues under Neely that a jury may acquit based on character evidence without even considering any other evidence in the case. In other words, character evidence – standing alone and without consideration of other evidence – can merit an acquittal. It does not appear that is what Neely holds. Commonwealth v. Khamphouseane, 642 A.2d 490 (Pa. Super. 1994) has expressly held it does not.

There, the Superior Court noted:

In *Commonwealth v. Neely*, 522 Pa. 236, 561 A.2d 1 (1989), the Supreme Court held that a defendant is entitled to a jury charge that evidence of good character may, in and of itself, create a reasonable doubt. Appellant concedes that the language required by *Neely* was employed by the trial court in the instant case. However, he contends that by subsequently instructing the jury that character evidence is to be weighed along with the other evidence in the case, the trial court diluted the effect of the charge mandated by *Neely*. Appellant asserts that, pursuant to *Neely*, character evidence must be viewed apart from the other evidence and may not be weighed by the jury against such other evidence. We disagree. 642 A.2d at 496.

Instead, the court held the Suggested Standard Jury Instruction, essentially the same instruction I used, "fully and correctly apprised the jury of the manner in which it could consider appellant's evidence of good character." *Id.* at 496.

Neely requires a trial judge to charge a jury on character evidence using Pennsylvania Suggested Standard Criminal Jury Instruction 3.06(3). Except for changing the Neely court's approved language to substitute "that person's" for "his," I gave 3.06 exactly as Neely requires.

Neely does not address specifically how the jury should be instructed regarding consideration of other evidence in the case. Neely does, however, cite Commonwealth v. Stoner, 108 A. 624, 625 (Pa. 1919) for the proposition that "Good character is of importance in this: that it may, in itself, in spite of evidence to the contrary, raise a reasonable doubt in the minds of the jury and so produce an acquittal." (emphasis added). The opinion then quotes (without citation) Justice James McDermott: "To offer evidence of an otherwise unblemished life is not a plea of mercy. It is, in fact, to be weighed against any present allegation to the contrary...." (emphasis added).

It appears, then, that Neely holds that the jury may find a defendant not guilty based on character evidence alone, but in doing so it may not cavalierly disregard all of the other evidence in the case. The jury must consider all of the evidence produced at trial to arrive at a just verdict, but having done so, a jury may acquit based only on evidence of the defendant's character.

I conclude that the Suggested Standard Jury Instruction, as given, is an accurate statement of Pennsylvania law.

Therefore, the post-sentence motion on that ground will be denied.

IV

That the failure to give both the prompt complaint instruction and the phrasing of the character evidence instruction impaired the defendant's defense.

Because I do not believe either issue standing alone is meritorious, I must also conclude they have no merit standing together.

Therefore, the post-sentence motion on that ground will be denied.

V

That the prosecution, in closing argument, improperly commented on the defendant's failure to testify at trial.

The defense argues the prosecutor's statement during his closing argument that the defendant "had wonderful opportunities to speak out and make his case" was an improper adverse reference to the defendant's failure to testify at trial.

Specifically, the prosecutor's statement in full was:

The defendant, he had wonderful opportunities to speak out and make his case. He did it in public. He spoke with Bob Costas. That's the other thing that happened to me for the first time. I had been told I'm almost as good a questioner as Bob Costas, I think or close.

Well, he had the chance to talk to Bob Costas and make his case. What were his answers? What was his explanations? You would have to ask him? Is that an answer? Why would somebody say that to an interviewer, you would have to ask him? He didn't say he knew why he did it. He just said he saw you do it. Mike McQueary. The janitors. Well, you would have to ask them. That's an answer?

Mr. Amendola did I guess as good a job as possible explaining – he offered that his client has a tendency to repeat questions after they're asked. I would think that the automatic response when someone asks you if you're, you know, a criminal, a pedophile, a child molester, or anything along those lines, your

immediate response would be, you're crazy, no. What? Are you nuts?

Instead of, are you sexually attracted to young boys? Let me think about that for a second. Am I sexually attracted to young boys? I would say, no, or whatever it is. But that's Mr. Amendola's explanation that he automatically repeats questions. I wouldn't know. I only hear him on TV. Only heard him on TV. So that's his explanation there. He just enjoys young children."

N.T. June 21, 2012, pp. 140-142.

The quoted part of the Commonwealth's closing was less than two pages out of a nearly 60 page transcription of the closing argument. While it does not come through in the printed transcript, it was clear the prosecutor was at times referring to the transcript of the Costas' interview that had been submitted into evidence and was quoting or paraphrasing from it.

At the end of the Commonwealth's closing, counsel approached the bench and defense counsel specifically objected to the part of the closing argument which defense counsel characterized as "commenting on the silence." *Id.* at 157. I ruled, *Id.* at 158, that the Commonwealth's arguments were fair rebuttal and noted "I (have) cautioned the jury again and again the defendant has no obligation to testify or present any evidence in his own defense. I will caution the jury again that the decision must be made on the evidence presented and we'll proceed." In my subsequent closing instructions to the jury I then said to them "...that the defendant has no obligation at any time to present any evidence in his own defense." *Id.* at 160.

In Commonwealth v. Noel, 53 A.3d 848, 858 (Pa. Super. 2012), the Superior Court recently summarized the law regarding the fair scope of a prosecutor's closing argument:

It is well settled that a prosecutor has considerable latitude during closing arguments and his or her statements are fair if they are supported by the evidence or use inferences that can reasonably be derived from the evidence. *Commonwealth v. Holley*, 945 A.2d 241, 250 (Pa.Super.2008) (citation omitted). "Further, prosecutorial misconduct does not take place unless the 'unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict.'" *Id.* (quoting *Commonwealth v. Paddy*, 569 Pa. 47, 82–83, 800 A.2d 294, 316 (2002)). Moreover, a prosecutor can fairly respond to attacks on a witness's credibility. *Id.* (citation omitted). In reviewing a claim of improper prosecutorial comments, our standard of review is whether the trial court abused its discretion. *Commonwealth v. Hall*, 549 Pa. 269, 285, 701 A.2d 190, 198 (1997) (citation omitted). When considering such a claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one, because not every inappropriate remark by a prosecutor constitutes reversible error. *Commonwealth v. Lewis*, 39 A.3d 341, 352 (Pa.Super.2012) (citation and quotation marks omitted). "A prosecutor's statements to a jury do not occur in a vacuum, and we must view them in context." *Id.* (citation omitted).

I do not believe the Commonwealth's closing argument transcended the bounds prescribed by Noel. The prosecution was responding to the defense closing argument regarding how the defendant conducted himself during the Costas television interview. In addition, I had repeatedly instructed the jury during the trial and before closing arguments that the defendant had no obligation to testify and that their decision had to be based on the evidence presented. After the closing arguments, I instructed the jury on that point again.

Viewed in context, the part of the Commonwealth's closing objected to by the defense was fair argument, addressed to the arguments presented by the defense closing, and was not presented in a way that, in my view, was either

calculated to, or did, create in the jurors a fixed bias toward the defendant or an inclination to disregard the instructions of the Court.

Therefore, the post-sentence motion on that ground will be denied.

VI

That it was error to permit Ron Petrosky to testify regarding the hearsay statements of James Calhoun.

The defense argues it was error to permit the introduction into evidence of the hearsay statements of James Calhoun under the excited utterance exception to the hearsay rule because the testimony was barred by the holding of Commonwealth v. Barnes, 456 A.2d 1037 (Pa. Super. 1983).

Barnes holds that where the only evidence that a startling event occurred is the hearsay statement itself, then the required foundation for the admission of the hearsay statement under the excited utterance exception has not been laid. In other words, an excited utterance, standing alone, cannot be used to prove the exciting event occurred. "Where there is no independent evidence that a startling event occurred, an alleged excited utterance cannot be admitted as an exception to the hearsay rule." 456 A.2d at 1040.

The Commonwealth argues the excited utterance is not the only evidence that the exciting event occurred. In the Commonwealth's view evidence of other facts testified to by Petrosky and a second witness, Jay Witherite, support the conclusion the exciting event did occur and laid the foundation for the introduction of Calhoun's hearsay statements.

The Superior Court is respectfully directed to pp. 198-221 of the Notes of Testimony of June 13, 2012 where the positions of the parties are extensively argued and my ruling will be found.

While the law will benefit from an analysis of the issue by the Superior Court, if my evidentiary ruling is determined to be incorrect it will have no practical bearing on the outcome of the case or the sentence imposed. Even if the counts involving Victim 8 are set aside, the remaining evidence against the defendant was so overwhelming it cannot be said that the introduction of the hearsay statements as to this one victim was anything other than harmless error. In addition, at sentencing I noted the sentences imposed on Counts 36 through 40 at No. 2422 were specifically ordered to run concurrently "and if those convictions (on Counts 36-40) should happen to be set aside on appeal, it will make no difference to the sentence structure as a whole and will not require a remand for resentencing." (N.T. Oct. 9, 2012, p. 57).

Therefore, the post-sentence motion on that ground will be denied.

VII

That it was error not to dismiss the charges filed against the defendant because of lack of specificity.

Relying on Commonwealth v. Devlin, 333 A.2d 888 (Pa. 1975), the defense argues "(t)he Commonwealth failed to provide the Defendant with dates of the commission of the aforementioned alleged offenses with reasonable certainty and with sufficient particularity in order for the Defendant to adequately

prepare his defense, thus violating the notion of fundamental fairness embedded in our legal process.” (Defendant’s brief, p. 41).

The Commonwealth relies on Commonwealth v. Kohler, 914 A.2d 427 (Pa. Super. 2006) and Commonwealth v. Brooks, 7 A.3d 852 (Pa. Super. 2010) for the proposition it is afforded a greater latitude in establishing the specific dates on which a crime occurred when the offense is a continuous course of conduct involving a child.

On May 18, 2012 the Commonwealth filed both amended Informations and an amended bill of particulars.

The amended bill of particulars addresses the specifics regarding each victim. Summarizing, the bill states:

Victim 1: “Between June 2005 and September 2008 (“the oral sex between June 2007 and September 2008) at the defendant’s home,... the Hilton Garden Inn,... Central Mountain Middle School... and elsewhere” when the victim was between the ages of 11 and 15.

Victim 2: “On or about February 9, 2001, in the evening, at the Lasch Football Building.”

Victim 3: “On various dates between July 1999 and December 2001 at the Defendant’s home and in the Lasch Building” when the victim was between the ages of 12 through 14.

Victim 4: “In the first half of 2000 in the Lasch Building.” (anal sex). “In excess of 25 times, on various dates between October 1996 and December 2000 at Defendant’s home... East Area Locker Building... Lasch Building... and

elsewhere." (oral sex). "On various dates in 1999...at Defendant's home, East Area Locker Building and Lasch Building...and elsewhere." (anal penetration). The victim was between the ages of 12 through 17.

Victim 5: "In August of 2001....in the Lasch Building" when the victim was 12 or 13.

Victim 6: "On May 3, 1998 between 7 o'clock p.m. and 9 o'clock p.m. at the locker/shower room of the Lasch Building" when the victim was 11 years old.

Victim 7: "On various dates between September 1995 and December 1996...at Defendant's home and in the East Area Locker Building" when the victim was 9 to 11.

Victim 8: "Between the dates November 20 and November 27, 2000, Thursday or Friday evening, on a weekend when the football team had an away football game...in the assistant coach's locker room of the Lasch Building" when the victim is believed to have been between the ages of 11 and 13.⁵

Victim 9: "On various dates between July 2005 and December 2008 at Defendant's home...Hilton Garden Inn...and elsewhere" when the victim was between 12 through 15.

Victim 10: "On various dates between September 1997 and July 1999 at Defendant's home, the outdoor pool at University Park and in Defendant's car" when the victim's age spanned 10 to 12.

⁵ By Memorandum and Order dated June 21, 2012, I denied the defense motion to dismiss counts 36 through 40 at Number 2422. The defense argued the evidence produced at trial was inconsistent with the amended bill of particulars. I concluded that any such inconsistency had not been established on the record produced at trial.

The Commonwealth further noted as to victims 1, 3, 4, 5, 7, 8, 9, and 10 that it was "unable to provide specific dates because there were numerous offenses over the course of several years. The victim, a child at the time of the crimes, is unable to provide exact times and dates."

The degree of specificity required in the Commonwealth's Information and Bill of Particulars has been the subject of some attention in previous stages of the case. In my Memorandum and Order dated February 13, 2012, I addressed the Commonwealth's objections to the defense request for a bill of particulars. Subsequently in a Memorandum and Order dated March 13, 2012, I addressed the defense Application for a More Specific Bill of Particulars. And finally, as noted, the Commonwealth filed an amended informations and bill of particulars on May 18, 2012.

As the cases cited in those memorandums make clear, Pennsylvania law gives the Commonwealth considerable latitude in fixing the date and location of sexual assaults against children, especially those alleged to have occurred over a period of months or years.

The specificity of the date and location implicates two concerns: (1) whether the alleged offense occurred within the statute of limitations and; (2) whether the defendant is sufficiently put on notice to enable him to investigate the facts to assert an alibi defense and attack the credibility of the victims. Commonwealth v. Devlin, infra. The defense has not pursued an argument that any of the prosecutions are barred by the statute of limitations. The defendant, in addition, has not proffered an alibi defense to any of the charges, even on the