NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MARIO WALL	:	
Appellant	:	No. 1029 WDA 2021

Appeal from the Judgment of Sentence Entered July 28, 2021
In the Court of Common Pleas of Allegheny County Criminal Division at
No(s): CP-02-CR-0006020-2019

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MARIO WALL	:	
Appellant	:	No. 1030 WDA 2021

Appeal from the Judgment of Sentence Entered July 28, 2021
In the Court of Common Pleas of Allegheny County Criminal Division at
No(s): CP-02-CR-0002241-2021

BEFORE: STABILE, J., SULLIVAN, J., and PELLEGRINI, J.*

MEMORANDUM BY SULLIVAN, J.: **FILED: November 22, 2023**

Mario Wall ("Wall") appeals from the judgment of sentence imposed following his convictions for, *inter alia*, aggravated assault and person not to

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* Retired Senior Judge assigned to the Superior Court.

possess a firearm.[1] We affirm in part, vacate in part, and remand for further proceedings.

The trial court summarized the factual and procedural history, which we set forth in relevant part as follows:

> [Regarding docket number 6020-2019:] This case began [i]n [early] May [] 2019[,] when Turtle Creek [P]olice [O]fficer [] Mark Terry, responded to a call that a vehicle [had] been shot at in the Borough of Turtle Creek. The officer responded to the neighboring City of McKeesport police station and interviewed Akelya Wall [("Ms. Wall")]. Ms. Wall told the officer that her car was shot at twice and rammed three [] times on the Tri-Boro Expressway by her ex-intimate partner, . . . Wall . . .. Ms. [] Wall had her [then-five]-year-old daughter[, E.W.,] in the car, and she continued to drive until she arrived at the McKeesport Police Station.
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> Ms. Wall told police that she observed . . . Wall's vehicle to be on fire when she looked in the rear-view mirror as she fled the area.
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> At approximately 8:40 p.m., Officer Terry was contacted by North Versailles police asking him to respond to the scene of a vehicle on fire, which contained a firearm in the glove box. Officer Terry responded and recovered a Smith and Wesson .380 handgun, serial #KBT9679, which was reported to have been stolen. The officer then sought arrest warrants for [Wall,] charging him with[, *inter alia*,] . . . [a]ggravated [a]ssault . . ..
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> * * * *
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> [Regarding docket number 2241-2021, the underlying factual basis is not relevant to this appeal. The Commonwealth charged Wall with a single count of person not to possess a firearm arising from a separate incident later in May 2019. That matter was severed from Wall's other pending cases. Daniel Eichinger, Esquire ("Mr. Eichinger"), an Assistant Public Defender with the

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[1] ***See*** 18 Pa.C.S.A. §§ 2702, 6105(a)(1).

Allegheny County Public Defender's Office, represented Wall at numbers 6020-2019 and 2241-2021.]

* * * *

[Mr. Eichinger] filed a [m]otion to [w]ithdraw as [t]rial [c]ounsel prior to the trial[s for both cases], and a hearing was held [i]n [February 2020]. At the hearing, Mr. Eichinger alleged that [Wall] wrote him a letter requesting that he withdraw from the case. The court suggested reassignment to another trial lawyer in the office and defense counsel argued that a conflict with him would be perceived as a conflict with every other lawyer in the office because [Wall] may assume that "they are working with me." No other specific reasons were given as to the factual basis for the withdrawal request.

The court did not see any conflict, and without ruling on the motion, suggested that [Mr. Eichinger] talk to his supervisor, Stacey Steiner, Esquire, to have the case reassigned[.] The trial court[']s] impression was that this was a personality conflict, and not a substantive issue of effective assistance of counsel. [Wall] questioned the filing of motions by Mr. Eichinger in this case. . . ..

The court observed that Mr. Eichinger was zealously representing [Wall's] interests in his defense of these cases.

* * * *

. . . Nothing more was said or filed about the issue of the [m]otion to [w]ithdraw as defense counsel for sixteen [] months.

The trial court was not asked to rule on the [m]otion and no further relief was sought [in the interim.]

Additionally, Mr. Eichinger represented [Wall] in a jury trial in April[] 2021 at [number 2241-2021] in [the] firearms case that the trial court had severed . . ..

The case [at number 2241-2021] was tried . . ., [Wall] and Mr. Eichinger appeared to get along well in trial, and no relief by way of withdrawing as counsel was sought by Mr.[] Eichinger. [That case resulted in a conviction for person not to possess a firearm.]

Subsequently, on June 2, 2021, [in] the days prior to jury selection in this case, [at number 6020-2019, Mr. Eichinger] filed a [second m]otion to [w]ithdraw as counsel.

Mr. Eichinger argued that[,] at a meeting with [Wall] the previous day[, Wall had] asked counsel to withdraw from his case, and that he discharged counsel and co-counsel, attorney Tirza Mullin, Esquire.

* * * *

The court found [Wall's] actions to be dilatory and disingenuous[, and, therefore, denied the motion.]

* * * *

[Additionally, the trial court held a competency hearing prior to the trial at number 6020-2019, during which the court sustained several Commonwealth objections to defense counsel's questions while cross-examining then-seven-year-old E.W. about her ability to remember events from around the time of the incident and further precluded defense counsel from inquiring about the details of E.W.'s interview with the prosecuting attorney.]

. . . On cross examination, defense counsel asked[, regarding E.W.'s pre-trial communication with the prosecuting attorney]:

Q. What did you talk to her about? . . ..

Another question on cross examination was:

Q. And I just want to ask you, so you said you talked to the prosecutor this weekend. Did you talk to your mother about something that happened a couple of years ago? . . ..

Finally, E.W. was asked:

Q. Can you tell me about something that happened when you were four or five? . . ..

> The court sustained the [Commonwealth's] objections to the questions.
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> * * * *
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> After a jury trial, [at which E.W., among others, testified, ***see*** N.T., 6/9-16/21, at 147-67, Wall] was found guilty [at no. 6020-2019] of[, *inter alia*, a]ggravated [a]ssault . . ..
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> [Wall] was sentenced [in July 2021] to an aggregate term of incarceration of [ten to twenty] years [at no. 6020-2019,] and [Wall] filed a timey appeal [from the judgment of sentence at no. 6020-2019, as well as from the six-to-twelve-year judgment of sentence following the conviction for the firearm offense at no. 2241-2021. The sentences were to run concurrently.]

Trial Court Opinion, No. 6020-2019, 4/27/22, at 2-8 (paragraphs re-ordered for clarity); ***see also*** Trial Court Opinion, No. 2241-2021, 4/27/22, at 2-3. Both Wall and the trial court complied with Pa.R.A.P. 1925.

Wall raises the following issues for our review:

1. Whether the trial court erred in denying [Mr.] Eichinger's motion to withdraw as [] Wall's counsel at [Nos. 6020-2019 and 2241-2021,] where there were irreconcilable differences and an irretrievable breakdown in communication between them?

2. Whether the trial court erred in denying [Mr.] Eichinger's second motion to withdraw as [] Wall's counsel at [no. 6020-2019,] where there were irreconcilable differences and an irretrievable breakdown in communication between them, the prosecutor stated her agreement that there was a basis for [Mr.] Eichinger's motion and withdrawal, and [Mr.] Eichinger specifically informed the trial court that he could not zealously and effectively advocate for [] Wall under the circumstances at hand?

3. At the competency hearing for E.W., whether the trial court erred in not permitting [] Wall['s counsel] to cross-examine E.W. as to whether she previously had spoken to the prosecutor about the incident at hand, where such line of questioning went

> directly to the second element of the competency test (the mental capacity to observe an event and accurately recall that observation), and was also relevant and probative on the issue of taint?
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> 4. Whether the trial court erred in determining that E.W. was competent to testify at trial?

Wall's Brief at 9-10.

In his first two issues, Wall argues the trial court erred in denying Mr. Eichinger's first motion to withdraw at both dockets and in denying Mr. Eichinger's second motion to withdraw at number 6020-2019. As these issues present the same questions of law, and arise from related facts, we address them together. The standard of review for a trial court's order deciding a motion to withdraw is as follows:

> Generally, the decision of whether to grant a request for a change of counsel is a matter vested to the sound discretion of the trial court and will not be disturbed on appeal, absent an abuse of discretion. It is well[-]established that a defendant has a constitutional right to choose any lawyer he may desire, at his own cost and expense. However, the situation is different for a defendant who is not employing counsel at his own expense, and who, at public expense, seeks court-appointed counsel. Such a defendant does not have a right to choose the particular counsel to represent him.

Commonwealth v. Patterson, 931 A.2d 710, 715 (Pa. Super. 2007) (internal citations and brackets omitted). Thus, "an indigent criminal defendant does not enjoy the unbridled right to be represented by counsel of his own choosing." ***Commonwealth v. Jette***, 23 A.3d 1032, 1041 (Pa. 2011), *abrogated on other grounds by* ***Commonwealth v. Bradley***, 261 A.3d 381 (Pa. 2021). Instead, "[a] motion for change of counsel by a defendant

for whom counsel has been appointed shall not be granted except for substantial reasons." Pa.R.Crim.P. 122(C). "To satisfy this standard, a defendant must demonstrate that he has an irreconcilable difference with counsel that precludes counsel from representing him." ***Commonwealth v. Keaton***, 45 A.3d 1050, 1070 (Pa. 2012) (internal citations and quotations omitted); ***see also id***. at 1071 (concluding that though the defendant and counsel "obviously disliked working together . . . there was no reason counsel was incapable of zealously representing [him]"). "[A] strained relationship with counsel, a difference of opinion in trial strategy, a lack of confidence in counsel's ability, or brevity of pretrial communications do not necessarily establish irreconcilable differences." ***Commonwealth v. Ganjeh***, 300 A.3d 1082, 1092 (Pa. Super. 2023) (internal citation omitted).

Wall argues that the trial court erred in denying the motion, at both dockets, because both he and counsel had informed the court that there was a "strained relationship and irreconcilable differences regarding pre-trial motions and how the trial . . . should be conducted." Wall's Brief at 38. Wall maintains that this was a "conflict of interest" that existed between him and Mr. Eichinger and it "inured to the entire Public Defender's office." ***Id***. at 38-39. Wall explained to the trial court, as he now maintains, that he and his attorney did not agree about a motion to sever joined cases, and, further, he "sent [Mr. Eichinger] information to prove my innocence multiple times" through family members, but Mr. Eichinger claimed he had not received it.

See id. at 40. Wall further maintains the trial court was required to "conduct an extensive inquiry into the matter" before deciding it, and, because the court did not, it had "no information suggesting that the claim of a conflict of interest had been arbitrarily made by [Mr.] Eichinger and/or Mr. Wall." ***Id***. at 45-46.

The trial court considered Wall's claim concerning counsel's first motion to withdraw and concluded it lacked merit. The court explained:

> At the hearing, Mr. Eichinger alleged that [Wall] wrote him a letter requesting that he withdraw from the case. The court suggested reassignment to another trial lawyer in the office and [Mr. Eichinger] argued that a conflict with him would be perceived as a conflict with every other lawyer in the office because [Wall] may assume that "they are working with me." No other specific reasons were given as to the factual basis for the withdrawal request.
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> The court did not see any conflict, and without ruling on the motion, suggested that defense counsel talk to his supervisor, Stacey Steiner, Esquire, to have the case reassigned. The trial court['s] impression was that this was a personality conflict, and not a substantive issue of effective assistance of counsel. This issue was not raised again in [number 2241-2021.]

Trial Court Opinion, No. 2241-2021, 4/27/22, at 3.

Following our review, we discern no abuse of discretion by the trial court in denying the first motion to withdraw. We observe that at the hearing on the first motion, Wall explained that he was dissatisfied with counsel's decision not to file a motion to sever cases previously joined for trial by the trial court. ***See*** N.T., 2/5/20, at 6. He further indicated Mr. Eichinger had not received from Wall's family "information to prove my innocence . . .." ***Id***. at 7. These are the only substantive complaints Wall provided about Mr. Eichinger, though

we also observe that Wall implied that a Public Defender was incapable of procuring a fair trial for him given the "very serious charges" at issue. ***See id***. at 10 (Wall asking for a court-appointed attorney because "[t]his is very serious charges"). The trial court explained that Wall could meet with Mr. Eichinger and that his family could bring the evidence to Mr. Eichinger's office. ***See id***. at 8-9. The trial court further directed that, should Wall and Mr. Eichinger have continued difficulties, Mr. Eichinger could refer the matter to his supervisor who could present the motion to the court. ***See id***. at 9. We additionally note that, following the trial court's directives, neither Wall nor counsel renewed the motion prior to trial at number 2241-2021. ***See generally*** N.T., 4/28-30/ 2021, at 6-11. Wall thus failed to demonstrate that the trial court abused its discretion in concluding Wall failed to show substantial reasons, or an irreconcilable difference with counsel, that precluded counsel from representing him. Accordingly, Wall is due no relief with respect to the denial of counsel's first motion to withdraw. ***See*** Pa.R.Crim.P. 122(C); ***Keaton***, 45 A.3d at 1070.[2]

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[2] Wall further argues that pursuant to the Rules of Professional Conduct, a conflict between him and Mr. Eichinger should be imputed to the entire Public Defender's office. ***See*** Wall's Brief at 46-47. This argument is moot as we conclude the trial court did not abuse its discretion in finding there was no conflict between the two. Further, the case Wall cites is distinguishable because it pertains to a conflict resulting from a public defender's office's representation of co-defendants. ***See*** Wall's Brief (citing ***Commonwealth v. Tharp***, 101 A.3d 736. 753 n.14 (Pa. 2013)).

Wall additionally argues that the trial court erred in denying counsel's second motion to withdraw at number 6020-2019. Wall concedes that this second motion occurred at nearly "the last possible moment," but argues this supports his assertion that he and Mr. Eichinger had attempted to "find a way to get along." Wall's Brief at 52. Wall further maintains that Mr. Eichinger "specifically informed the trial court that he was incapable of zealously and effectively representing [him] because communication between them had completely ceased." ***Id***. at 53.

The trial court concluded the second motion to withdraw also lacked merit:

> [Following the trial court's refusal to grant the first motion . . . to withdraw,] Mr. Eichinger represented [Wall] in [the] jury trial in April [] 2021 at [number 2241-2021] in [the] firearms case that the trial court had severed from being tried with [number 6020-2019.]
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> The [firearms] case was tried before the undersigned, [Wall] and Mr. Eichinger appeared to get along well in trial, and no relief by way of withdrawing [of] counsel was sought . . ..
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> Subsequently, . . . [in] the days prior to jury selection in this case, [at number 6020-2019,] [Mr. Eichinger] filed a [second] [m]otion to [w]ithdraw as counsel.
>
> Mr. Eichinger argued that at a meeting with [Wall] the previous day[,] [Wall had] asked counsel to withdraw from his case, and that he discharged counsel and co-counsel, attorney Tirza Mullin, Esquire.
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> * * * *
>
> The court found [Wall's] actions to be dilatory and disingenuous. He had been incarcerated on [his several] cases for nearly two . . . years. [Mr. Eichinger] was prepared, but for

> [Wall] not cooperating with him literally on the eve of trial. Sixteen months had passed since the initial [m]otion to [w]ithdraw as [c]ounsel was filed. No problems were brought to the attention of the trial court by [Mr. Eichinger] or his supervising attorney in that time. Under these circumstances, the [c]ourt denied relief.

Trial Court Opinion, No. 6020-2019, 4/27/22, at 6-7.

Based on our review, we again conclude the trial court did not abuse its discretion in denying the second motion to withdraw. Following the first motion, Mr. Eichinger and Wall talked and "had a meeting of the minds[,] and [Mr. Eichinger] said [he] could assign it to somebody else, but [he] already know[s Wall's] case," and, therefore, Wall stated he was willing to move forward with Mr. Eichinger. ***See*** N.T., 6/2/21, at 6-7. However, days before Wall's trial at number 6020-2019, and following his conviction at number 2241-2021, Wall refused to cooperate with Mr. Eichinger. Mr. Eichinger explained at the hearing on the second motion to withdraw that the motion was based on the following:

> Yes, Your Honor, ***we filed this motion late yesterday after meeting with Mr. Wall***. The reasons we filed it are multifold. ***Mr. Wall at the beginning of the meeting terminated or asked that we withdraw from his case***[;] he discharged us. We attempted to discuss the case with him; jury selection, his right to have a court reporter present, his right to have Your Honor present, court clothes, as well as just preparation for the trial[, and] he refused to communicate with us, therefore, we weren't able to prepare for trial.
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> ***He indicated that he does not trust us. He discussed the outcome of the last trial and he also brought up the Public Defender's representation at his first trial in 1995*** . . . he believes that the Public Defender's Office is not representing him well. He is very displeased with our office. It was just very

> difficult to communicate with him at all meaningfully about his case. So, really, our hands were tied. So those are the reasons that we are moving to withdraw.
>
> It's just, at this point, very hard, if not impossible, to communicate and prepare for his case. ***And we needed to get something filed immediately because we're scheduled to pick a jury tomorrow.***

N.T., 6/2/21, at 3-4 (emphases added). Wall also explained that he had not seen his "whole discovery" and expressed irritation that his attorney had conveyed plea offers to him. ***See id***. at 8, 10 (Wall stating, "I spoke to him[, *i.e.*, Mr. Eichinger,] previously about being innocent. I don't understand a plea offer. I told him multiple times I do not look for a plea offer, and then Mr. Eichinger keeps coming to me and asking me about taking a plea"). Wall also explained that he was disappointed with Mr. Eichinger given his (Wall's) conviction, in the interim, in the firearms case. ***See id***. at 16. Mr. Eichinger, when asked whether he was prepared to try the case, answered, "***Yes***, [with] the exception of Mr. Wall." ***Id***. at 11 (emphasis added); ***see also id***. at 13 (Mr. Eichinger explaining his readiness, as, "Well, I have to say no because of the lack of communication with Mr. Wall, that's the only hang-up. ***I mean, regarding everything else, yes***") (emphasis added). Based on the foregoing, the record supports the trial court's conclusion that Wall unilaterally decided two days before jury selection to completely cease cooperating with his attorney, and this last-minute decision was a delay tactic rooted in a generalized prejudice against the Public Defender's Office and lack of confidence in Mr. Eichinger rather than the result of irreconcilable differences.

See Keaton, 45 A.3d at 1070-71; ***Ganjeh***, 300 A.3d at 1092. Thus, Wall is due no relief regarding the denial of counsel's second motion to withdraw.

Wall maintains in issues three and four that the trial court made erroneous evidentiary rulings at the competency hearing and further erred in determining that E.W. was competent to testify at trial. As these issues both relate to the trial court's competency determination, and involve common law and facts, we address them together.

The standard of review for evidentiary claims, as well as competency determinations, is abuse of discretion. ***See Commonwealth v. Moore***, 980 A.2d 647, 650 (Pa. Super. 2009). Nevertheless, "[w]hen the witness is under fourteen years of age, there must be a searching judicial inquiry [by the trial court] as to [the child witness's] mental capacity . . .." ***Commonwealth v. D.J.A.***, 800 A.2d 965, 969 (Pa. Super. 2002). This Court has stated the relevant law as follows:

> In Pennsylvania, the general rule is that every witness is presumed to be competent to be a witness. [***See***] Pa.R.E. 601(a). Despite the general presumption of competency, Pennsylvania specifically requires an examination of child witnesses for competency. ***See*** Pa.R.E. 601(b) . . .. The Supreme Court of Pennsylvania established that when a witness is under the age of fourteen, the trial court must hold a competency hearing. ***See Rosche v. McCoy***, []156 A.2d 307, 310 ([Pa.] 1959) . . .. The ***Rosche*** Court instructed that the following factors must be applied in determining competency:
>
> > There must be (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering

> what it is that [the child] is called to testify about and (3) a consciousness of the duty to speak the truth.

Moore, 980 A.2d at 650. Rule 601(b) provides that a witness is incompetent to testify if because of a "mental condition or immaturity" the person, *inter alia*, "is, or was, at any relevant time, incapable of perceiving accurately." Pa.R.E. 601(b)(1). This Court has explained that the "[a]ny other relevant time" provision "necessarily includes the time during which the events the child is describing occurred." ***D.J.A.***, 800 A.2d at 971. Rule 601(b)(3) also provides that a witness is incompetent if she has an "impaired memory." Pa.R.E. 601(b)(3).

In ***Commonwealth v. Delbridge***, 855 A.2d 27, 39-40 (Pa. 2003), our Supreme Court expanded competency hearings to include a determination of whether a child's testimony was "tainted" by inquiries made by adults. As this Court explained:

> The core belief underlying the theory of taint is that a child's memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy. Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify.

Moore, 980 A.2d at 650 (quoting ***Delbridge***, 855 A.3d at 34-35).

We have explained the intersection of competency and taint as follows:

> A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and

> accurately recall that observation, and to understand the necessity to speak the truth.
>
> A competency hearing is not concerned with credibility. . . . An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation.
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> The Supreme Court accordingly concluded that an allegation of taint centers on the second element of the competency test and that the appropriate venue for investigation into a taint claim is a competency hearing.

Id. at 650-51 (internal citations and quotations omitted).

Lastly, regarding taint, specifically, this Court has provided that:

> In order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. Once some evidence of taint is presented, the competency hearing must be expanded to explore this specific question. ***During the hearing the party alleging taint bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence.*** Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption . . .. [A]s with all questions of competency, the resolution of a taint challenge to the competency of a child witness is a matter addressed to the discretion of the trial court.
>
> When determining whether a defendant has presented some evidence of taint, the court must consider the totality of the circumstances surrounding the child's allegations. Some of the factors that courts have deemed relevant in this analysis include the age of the child, whether the child has been subject to repeated interviews by adults in positions of authority, and the existence of independent evidence regarding the interview techniques utilized.

Moore, 980 A.2d at 649–52 (some internal citations and quotations omitted; formatting altered; emphasis added). Where a defendant establishes entitlement to a new competency hearing for a child witness, "a remand . . . is required." ***Delbridge***, 855 A.2d at 42. Our Supreme Court has acknowledged there are "competing policy considerations" as to whether a "retrospective competency assessment" is appropriate, but concluded "that the better practice is to permit such an examination whenever a meaningful hearing can be conducted." ***Id***. at 42 n.15.

In his third issue, Wall argues the trial court erred at number 6020-2019 in finding E.W. competent because the evidence does not support the court's finding that E.W. satisfied the second prong of the competency test, namely, that she had the mental capacity to observe the occurrence itself and the capacity of remembering that about which she was called to testify. ***See***, ***e.g.***, Wall's Brief at 61. Wall further maintains the trial court erred in precluding his attorney from inquiring into the issue of taint, which, as noted above, is also relevant to the second prong of the competency test. ***See id***.[3] Relatedly, Wall lastly asserts in his fourth issue that "[b]ased on the sum and

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[3] Wall, maintains, for instance, that his attorney was precluded, upon objection from the Commonwealth, from "exploring the possibility that E.W.'s testimony, as well as her recollection of the incident at hand, may have been tainted." Wall's Brief at 56-57. Wall additionally argues that the trial court erred in sustaining the Commonwealth's objection to his attorney's question: "Can you tell me about something that happened when you were four or five?" ***See id***. at 58 (citing N.T., 6/7/21, at 12-13).

substance of E.W.'s testimony, there was clear and convincing evidence that she did not have the mental capacity to recall the occurrence itself and communicate effectively about it . . ., nor did she demonstrate a consciousness of the duty to speak the truth." ***Id***. at 63. Essentially, Wall maintains that E.W. failed all three prongs of the competency test. Accordingly, Wall argues the trial court erred in finding E.W. competent to testify.

The trial court considered Wall's arguments and concluded they merit no relief. At the time of the competency hearing, the trial court merely concluded:

> You know, I know children about [twelve] or [thirteen] [who] just returned from Disney World[,] and their parents ask them, ["]Tell them what you did last week,["] and they say, ["]Nothing.["] It was rather surprising.
>
> I find [E.W.] is competent to testify.

N.T., No. 6020-2019, 6/7/21, at 19. The trial court elaborated in its Rule 1925(a) opinion as follows:

> The nature of the question was general and nebulous in nature and were [sic] not designed to elicit a response which would assist in testing the child's "impaired" meaning. The child didn't appear to have impaired memory.
>
> A proper foundation should have been laid by defense counsel prior to any questions in their regard. Further, the questions should have been more narrowly focused so as to elicit responses which were relevant and material to the issue of the child's competency.
>
> Relating to the court "something that happened when you were four or five" could have just as easily triggered a response

> about a trip to the zoo or a vacation as well as the criminal episode relating to this case.
>
> For these reasons, the court sustained the objections to these questions.
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> * * * *
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> In . . . ***Delbridge*** . . . [our Supreme] Court determined that taint is a proper subject for inquiry and should occur at the competency hearing. The court reasoned that in order to trigger an investigation of competency and the issue of taint, the moving part must show some evidence of taint. [Wall] did not meet this threshold so as to expend the competency hearing on the issue of taint.

Trial Court Opinion, No. 6020-2019, 4/27/22, at 8-9 (internal citation and some quotations omitted).

Based on our review, we conclude the trial court abused its discretion by precluding Wall's counsel from exploring E.W.'s capacity to communicate (including both an ability to understand questions and to frame and express intelligent answers), as well as her mental capacity to observe the occurrence itself and her capacity for remembering that for which she was called to testify. The incident at issue here occurred in May 2019. ***See***, ***e.g.***, Information, 7/22/19. The competency hearing did not occur until over two years later, in June 2021, at which time E.W. was seven years' old. ***See*** N.T., 6/7/21, at 5. At the hearing, E.W. exhibited some confusion about her age at the time of the incident and at the time of the competency hearing; for example, she testified that at the time of the incident, which was two years prior, she would have been four years old. ***See id***. at 12. Additionally, when asked on cross-

examination if she was seven years old at the time of the hearing, she replied, "No. I'm turning eight. I've been seven, but two years ago I was four." ***Id***. When asked to relate something "that happened when you were four or five," the trial court sustained the Commonwealth's objection:

> Objection, Your Honor. With regard to competency, we have to determine whether she is or was at any relevant time incapable of perceiving accurately. ***The relevant time actually refers to the time you are testifying either here or at a preliminary hearing. It does not refer to any time when the incident occurred***.

Id. at 12-13 (emphasis added). The Commonwealth's recitation of the law was erroneous. ***See D.J.A.***, 800 A.2d at 971 (stating that Rule 601(b)(1)'s provision that a witness is incompetent if she "at any relevant time" is or was incapable of perceiving accurately "necessarily includes the time during which the events the child is describing occurred"). Having heard Wall's response, the trial court sustained the Commonwealth's objection without explanation, in essence adopting the Commonwealth's erroneous recitation of the legal standard. ***See id***. at 13. As cross-examination continued, E.W. subsequently was unable to relate anything "that happened to you last week" apart from her conversation with the prosecuting attorney in preparation for her testimony. ***Id***. at 14.[4] We conclude that the trial court abused its discretion

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[4] E.W., on redirect, was able to answer questions about whether the homework she had completed was on a computer and that her three siblings were home with her while she was attending school via computer. ***See id***. at 15. E.W. gave generalized accounts of the subjects she studied in school the
(Footnote Continued Next Page)

and committed an error of law by sustaining the Commonwealth's objection so early into Wall's cross-examination of E.W., which was, additionally, premised on an inaccurate statement of the law. Because of this error, Wall was unable to cross-examine E.W. about her ability to accurately perceive the events at issue at the time they occurred, as well as about E.W.'s ability to remember and communicate at the time of trial events from the time of the incident. Without this information, the trial court was incapable of performing a "searching judicial inquiry as to [E.W.'s] mental capacity" and exercising its "discretion . . . to make the ultimate decision as to competency." ***D.J.A.***, 800 A.2d at 969 (internal citations and quotations omitted). For the foregoing reasons, Wall is entitled to a new competency hearing. ***See Delbridge***, 855 A.2d at 42.[5] Accordingly, we vacate the judgment of sentence at number

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prior week: "math," "reading," and "science." ***Id***. at 16. She was unable to remember if she studied any other subjects. ***See id***. On re-cross, E.W. was unable to remember anything she had read the previous week, nor any math problems she encountered. ***See id***. at 16-17.

[5] We decline the Commonwealth's invitation to conclude the trial court's error was harmless, as the trial court's finding of competency was premature and occurred before Wall had a full and fair opportunity to explore E.W.'s competency. ***Cf. Moore***, 980 A.2d at 658 (declining to remand for a new competency hearing because, "while a competency hearing . . . should have been held, there was no evidence in the record that would demonstrate that [the witness] was incompetent or tainted"); ***contra*** Commonwealth's Brief at 24-27.

Additionally, we reiterate that, regarding taint, specifically, ***"[i]n order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint.*** Once some evidence .
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6020-2019 and remand for a new competency hearing. If the trial court finds E.W. competent, it shall reinstate the judgment of sentence. If the trial court finds E.W. incompetent to testify, the trial court shall conduct a new trial. We affirm the judgment of sentence at number 2241-2021.

Judgment of sentence vacated at number 6020-2019; judgment of sentence affirmed at number 2241-2021. Case remanded for further proceedings. Jurisdiction relinquished.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 11/22/2023

. . is presented, the competency hearing must be expanded to explore this specific question." ***Moore***, 980 A.2d at 652 (emphasis added). Further, "[d]uring the hearing[,] the party alleging taint bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence." ***Id***.