

2014 PA Super 54

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ALFREDO REYES-RODRIGUEZ,	:	
	:	
Appellant	:	No. 2121 EDA 2013

Appeal from the PCRA Order June 28, 2013
in the Court of Common Pleas of Northampton County,
Criminal Division at No(s): CP-48-CR-0001684-2006,
CP-48-CR-0003501-2006, CP-48-CR-0001683-2006

BEFORE: ALLEN, STABILE, and STRASSBURGER*, JJ.

OPINION BY STRASSBURGER, J.:

FILED MARCH 18, 2014

Alfredo Reyes-Rodriguez (Appellant) appeals from the June 28, 2013 order dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. After review, we reverse the order of the PCRA court.

Appellant was charged at three separate docket numbers for sexually assaulting three minor victims, M.A. (born in 1990), S.C. (born in 1991), and Y.R. (born in 1995), who are half-sisters to each other. Appellant was married to the victims' mother while this abuse occurred. M.A., the oldest of the sisters, testified that Appellant began sexually abusing her when she was eight years old, shortly after she first met Appellant while her family resided in the Philadelphia area. She testified to several instances of abuse that

*Retired Senior Judge assigned to the Superior Court.

occurred while in Philadelphia. When M.A. was ten years old, the family moved to New York, and M.A. testified that Appellant was assaulting her two to three times per week during that time period. When M.A. was twelve years old, the family moved to Bethlehem, Pennsylvania in Northampton County, and the abuse continued. She testified that Appellant continued to abuse her until March 2006, when she and her sisters went into foster care.

S.C. testified that she met Appellant when she was eight or nine years old and he began sexually abusing her when she was ten years old and living in Philadelphia. She testified that this abuse also occurred when the family moved to Bethlehem.

Y.R., the youngest of the sisters, who was nine years old when she went into foster care, testified that Appellant sexually abused her while they lived in Bethlehem. On March 17, 2006, S.C.'s then-boyfriend made an anonymous report to child protective services that S.C. was being sexually abused by Appellant. This phone call led to the removal of the sisters into foster care and Appellant's arrest.

After initially pleading guilty to various charges, Appellant withdrew his plea and proceeded to a consolidated jury trial. "The testimony established that [Appellant] 'groomed' each child and that his victimization of each child started prior to her thirteenth birthday. Additionally, the evidence established that, although there was a common scheme evident with regard to the three victims, the nature of the assaults varied regarding the

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individual victims.” PCRA Court Opinion, 6/28/2013, at 1-2. With respect to M.A., Appellant was found guilty of criminal attempt to commit rape, aggravated indecent assault, endangering the welfare of children (EWOC), indecent assault, and corruption of minors. With respect to S.C., Appellant was found guilty of EWOC, indecent assault, and corruption of minors. With respect to Y.R., Appellant was found not guilty on all charges.

On May 14, 2007, the trial court imposed consecutive standard range sentences on all counts creating an aggregate term of incarceration of 14½ to 29 years. On July 25, 2011, this Court issued a memorandum affirming Appellant’s judgment of sentence. ***Commonwealth v. Reyes-Rodriguez***, 32 A.3d 280 (Pa. Super. 2011) (unpublished memorandum).¹

Appellant timely filed a *pro se* PCRA petition. Counsel was appointed, a hearing was held, and counsel filed a supplemental brief. On June 28, 2013, the PCRA court issued an order denying Appellant PCRA relief. Appellant timely filed a notice of appeal and court-ordered statement pursuant to Pa.R.A.P. 1925. The PCRA court filed a statement in lieu of opinion relying on its rationale set forth in its order denying PCRA relief.

On appeal, Appellant presents the following issues for our review, which we have reordered for ease of disposition.

¹ The lengthy delay between Appellant’s sentencing and the disposition of his direct appeal was due to the abandonment by trial counsel, Edward Andreas (Andreas), on appeal and the need to reinstate Appellant’s direct appeal rights three separate times.

[1.] Whether trial counsel was ineffective in failing to raise contemporaneous objections to the testimony of [M.A.] occurring on April 10, 2007 at pages 27-29, 30-32, 37, 72, and 128-129?

[2.] Whether trial counsel was ineffective in failing to present evidence of the character of [Appellant] concerning his general reputation in the community with regard to traits as to non-violence, peaceableness, quietness, good moral character, chastity, and disposition to observe good order? [**See Commonwealth v. Johnson**, 27 A.3d 244 (Pa. Super. 2011).]

[3.] Whether trial counsel was ineffective in failing to object or request a character evidence instruction that included the charge that “character evidence alone may be sufficient to raise a reasonable doubt and thus justify an acquittal of the charges”? [**See Johnson, supra**].

4. Whether trial counsel was ineffective in failing to challenge the consecutive nature of sentencing at the sentencing hearing and/or in post-sentence motions?

Appellant’s Brief at 3-4 (capitalization, references to notes of testimony, and suggested answers omitted).²

In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error. **Commonwealth v. Johnson**, 966 A.2d 523, 532 (Pa. 2009). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. **Commonwealth v. Boyd**, 923 A.2d 513 (Pa. Super. 2007). If the record supports a post-conviction court’s

² Appellant presents four additional issues in his brief, but concludes that all of them are without merit. Appellant’s Brief at 22-25. Because Appellant has abandoned those issues on appeal, we do not address them.

credibility determination, it is binding on the appellate court. ***Commonwealth v. Knighten***, 742 A.2d 679, 682 (Pa. Super. 1999).

As all four of Appellant's claims involve the ineffective assistance of trial counsel, we set forth our well-settled principles of law in that area. In reviewing the PCRA court's denial of Appellant's claims of ineffective assistance of counsel, we bear in mind that counsel is presumed to be effective. ***Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010). To overcome this presumption, Appellant bears the burden of proving the following: "(1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance." ***Id.*** Appellant's claim will be denied if he fails to meet any one of these three prongs. ***Id.***

Appellant contends that trial counsel was ineffective for failing to object to certain testimony offered by victims which referred to incidents of abuse that occurred outside of Northampton County.³ Specifically, Appellant contends that permitting the victims to testify to these prior instances of

³ On direct appeal, a panel of this Court concluded that Appellant did not offer any objections to this testimony at trial, and therefore it was waived. ***Commonwealth v. Reyes-Rodriguez***, 32 A.3d 280 (Pa. Super. 2011) (table), at 7.

abuse was “highly prejudicial to [Appellant] and outweighed its probative value.” Appellant’s Brief at 16.⁴

We conclude that counsel was not ineffective because the testimony was admissible under these circumstances.

Generally, evidence of prior bad acts or unrelated criminal activity is inadmissible to show that a defendant acted in conformity with those past acts or to show criminal propensity. Pa.R.E. 404(b)(1). However, evidence of prior bad acts may be admissible when offered to prove some other relevant fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. Pa.R.E. 404(b)(2). In determining whether evidence of other prior bad acts is admissible, the trial court is obliged to balance the probative value of such evidence against its prejudicial impact.

Commonwealth v. Aikens, 990 A.2d 1181, 1185 (Pa. Super, 2010) (citing ***Commonwealth v. Sherwood***, 982 A.2d 483, 497 (Pa. 2009)). “Evidence of prior bad acts is also admissible where the particular crime or act was part of a chain, sequence, or natural development of events forming the history of a case.” ***Commonwealth v. Passmore***, 857 A.2d 697, 711 (Pa. Super. 2004).

Instantly, the victims’ testimony provided a context for the jury to understand the history of this family and the abuse that happened while the family resided in Northampton County. “When such evidence is admitted ... the defendant is entitled upon request to a jury instruction explaining to the jury that the specific evidence is only admissible for one or more of the

⁴ The PCRA court did not address this issue in its opinion.

above-described limited purposes.” ***Commonwealth v. Tedford***, 960 A.2d 1, 37 (Pa. 2008). The trial court offered such an instruction here.

[B]efore I begin defining these charges, you have heard during this trial evidence that alleges that the defendant committed offenses in Philadelphia and New York in addition to the allegations in Northampton County. The defendant is not on trial for those actions that occurred outside of Northampton County.

The evidence with regard to the alleged sexual assaults in Philadelphia and New York is before you for a limited purpose. That is for the purposes of providing you with a complete history of the relationship between the alleged victims and the defendant. This event must not be considered by you in any way other than for that purpose I have just stated.

You must not regard this evidence as proof tending to show that the defendant is a person of bad character or that the person has criminal tendencies from which you might be inclined to infer that he is guilty of the crimes charged here in Northampton County.

You may not find the defendant guilty based on any of the alleged criminal facts that were referenced as having occurred in other jurisdictions. It is the Commonwealth’s burden to prove that the defendant exhibited the crimes that are charged here in Northampton County.

N.T., 4/12/2007, at 60-61.

Because the evidence was admissible and the trial court offered a limiting instruction, we conclude that trial counsel was not ineffective for failing to object to this testimony.

We next consider Appellant’s issues related to character evidence.

As a general rule, evidence of a person’s character may not be admitted to show that individual acted in conformity with that character on a particular occasion. Pa.R.E. 404(a). However, Pennsylvania Rule of Evidence 404(a)(1) provides an exception which allows a criminal defendant to offer evidence of his or her

character traits which are pertinent to the crimes charged and allows the Commonwealth to rebut the same. Pa.R.E. 404(a)(1). This Court has further explained the limited purpose for which this evidence can be offered:

It has long been the law in Pennsylvania that an individual on trial for an offense against the criminal law is permitted to introduce evidence of his good reputation in any respect which has "proper relation to the subject matter" of the charge at issue. Such evidence has been allowed on a theory that general reputation reflects the character of the individual and a defendant in a criminal case is permitted to prove his good character in order to negate his participation in the offense charged. The rationale for the admission of character testimony is that an accused may not be able to produce any other evidence to exculpate himself from the charge he faces except his own oath and evidence of good character.

It is clearly established that evidence of good character is to be regarded as evidence of substantive fact just as any other evidence tending to establish innocence and may be considered by the jury in connection with all of the evidence presented in the case on the general issue of guilt or innocence. Evidence of good character is substantive and positive evidence, not a mere make weight to be considered in a doubtful case, and, ... is an independent factor which may of itself engender reasonable doubt or produce a conclusion of innocence. **Evidence of good character offered by a defendant in a criminal prosecution must be limited to his *general reputation for the particular trait or traits of character involved in the commission of the crime charged*.** The cross-examination of such witnesses by the Commonwealth must be limited to the same traits. Such evidence must relate to a period at or about the time the offense was committed, and **must be established by testimony of witnesses as to the *community opinion of the individual in***

question, not through specific acts or mere rumor.

Commonwealth v. Johnson, 27 A.3d at 248 *citing* ***Commonwealth v. Luther***, 463 A.2d 1073, 1077–78 (Pa. Super. 1983) (citations omitted) (emphasis added).

When an appellant claims counsel is ineffective for failing to call character witnesses, the appellant must demonstrate that witnesses existed, they were available and willing to testify on his behalf at the trial, his counsel had an awareness of, or a duty to know of, the witnesses, and their proposed testimony was necessary to avoid prejudice. ***Commonwealth v. Copenhefer***, 719 A.2d 242, 254 (Pa. 1998). It is well-established that “[f]ailure to present available character witnesses may constitute ineffective assistance of counsel.” ***Commonwealth v. Harris***, 785 A.2d 998, 1000 (Pa. Super. 2001).

At trial, counsel called three of Appellant’s neighbors, Nancy Swartz (Swartz), Rebecca Walser (Walser), and Virginia Serbia (Serbia), to testify on Appellant’s behalf. Swartz testified that she has known Appellant and his family for about six years and resides in an apartment “right across the way.” N.T., 4/11/2007, at 76. Swartz was asked the following questions about Appellant’s reputation.

Q. Now, in the community, what is the reputation for [Appellant] as to fatherhood?

A. To me?

Q. The type of father he is known to be?

A. A very good father. He was strict, but he was a good father.

Id. at 78.

Walser, Swartz's granddaughter who lived with Swartz, also testified that Appellant had "a good reputation as a father." **Id.** at 101. Serbia, another neighbor, also testified that Appellant's reputation in the neighborhood was that of a "good father." **Id.** at 112.

Appellant contends that trial counsel should have further inquired as to Appellant's "reputation in the community for character traits as to non-violence, peaceableness, quietness, good moral character, chastity, and the disposition to observe good order." Appellant's Brief at 13. Thus, Appellant contends trial counsel was ineffective and he is entitled to relief.

The PCRA court concluded the following.

The record supports that three witnesses were called by the defense as "hybrid" witnesses who provided both factual and character testimony ... Because [t]rial [c]ounsel called character witnesses during [Appellant's] trial, we are hard pressed to find trial counsel ineffective, as, clearly, that issue was discussed with [Appellant], witnesses were subpoenaed and brought into the courtroom to testify for [Appellant] and [Appellant] was able to place his character into the record.

PCRA Court Opinion, 6/28/2013, at 6-7.

Moreover, the PCRA court concluded "that any additional character testimony would have merely been cumulative" and therefore Appellant did not meet his burden of proof to establish counsel's ineffective assistance. **Id.**

at 7. We see no error in this reasoning. We also point out that Appellant did not present any witnesses at the PCRA hearing to testify to other aspects of his character he wished to be before the jury during his trial. Thus, Appellant is not entitled to relief on the basis that counsel was ineffective for failure to elicit additional or different character testimony.

We now turn to Appellant's claim that counsel was ineffective for failing to request an appropriate jury instruction. He asserts: "The [trial court] failed to instruct the Jury that character evidence alone may be sufficient to raise reasonable doubt and justify an acquittal of the charges." Appellant's Brief at 13.

When character evidence is offered, "[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." **Commonwealth v. Neely**, 561 A.2d 1, 3 (Pa. 1989). In this case, the jury was offered the following charge with respect to character evidence.

Now, during this trial, you have also heard the defense offer evidence asserting that the defendant's reputation is held by some residents in the apartment building that he is a good father. The law recognizes that a person of good character is not likely to commit a crime that is contrary to that person's nature. You must weigh and consider the evidence presented by the defense with regard to the defendant[']s reputation as a good father along with other evidence in this case.

N.T., 4/12/2007, at 55. Notably absent from this charge is the portion of the suggested standard jury instruction that reads "[e]vidence of a good

character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty.” Pa. Suggested Standard Jury Instructions (Crim) § 3.06. In *Neely, supra*, our Supreme Court mandated that this instruction be given when character evidence is offered. Thus, Appellant contends that counsel was ineffective for failing to object to the trial court’s not including this instruction for the jury.⁵

As we stated long ago,

[e]vidence of good character is substantive and positive evidence, not a mere make-weight to be considered in a doubtful case, and, according to all our authorities, is an independent factor which may of itself engender a reasonable doubt or produce a conclusion of innocence. To be sure, it is to be **considered** with all the other evidence in the case. But it is not to be **measured** with or by other evidence. Its probative value, its power of persuasion, does not depend upon, and is not to be measured by, or appraised according to, the might or the infirmity in the Commonwealth's case. Even though, under all the other evidence a jury could reach a conclusion of guilt, still if the character evidence creates a reasonable doubt or establishes innocence a verdict of acquittal must be rendered.

Commonwealth v. Padden, 50 A.2d 722, 725 (Pa. Super. 1947))

(emphasis in original) (internal citations omitted) (cited with approval in

Commonwealth v. Wood, 637 A.2d 1335, 1352 (Pa. Super. 1994)).

Due to the mandatory and critical nature of this instruction, the issue has arguable merit and counsel could have had no reasonable basis for his failing to request it. Additionally, Appellant was clearly prejudiced under

⁵ The PCRA court does not address this issue in its opinion.

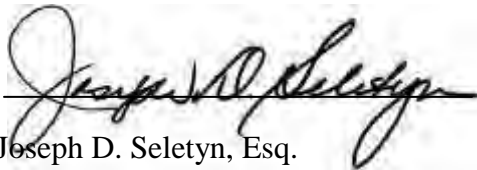
these circumstances where Appellant's character was squarely at issue in the case. Accordingly, we reverse the order of the PCRA court on this basis.⁶

Finally, Appellant contends that trial counsel was ineffective for failing to "challenge the consecutive nature of sentencing at the sentencing hearing and/or in post-sentence motions." Appellant's Brief at 17. However, because Appellant is entitled to a new trial, we need not consider this issue.

Order reversed. Case remanded for proceedings consistent with this opinion. Jurisdiction relinquished.

Judge Allen files a Concurring and Dissenting Opinion.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/18/2014

⁶ The concurring and dissenting opinion points out that we cite no authority for the "conclusion that Appellant's 'reputation' in the apartment complex as a 'good father', was proper reputation evidence of of 'his general reputation for the particular trait or traits of character involved in the commission of the crime charged.'" Concurring and Dissenting Opinion, at 3 (*citing Commonwealth v. Johnson*, 27 A.3d 244, 248 (Pa. Super. 2011)). To the extent that we have even reached this conclusion, we recognize that Pennsylvania law is sparse on this subject, but this issue has been addressed by our sister states. For example, in *Thomas v. State*, 669 S.W.2d 420 (Tex. Ct. App. 1984), the Court of Appeals of Texas concluded that evidence of a defendant's reputation in the community for the safe and proper treatment of young children was admissible in a rape case. Additionally, in *State v. Workman*, 471 N.E.2d 853 (Ohio Ct. App. 1984), the Court of Appeals of Ohio concluded that testimony that defendant was "excellent with children and they trusted him" was appropriate character evidence in an attempted rape case.