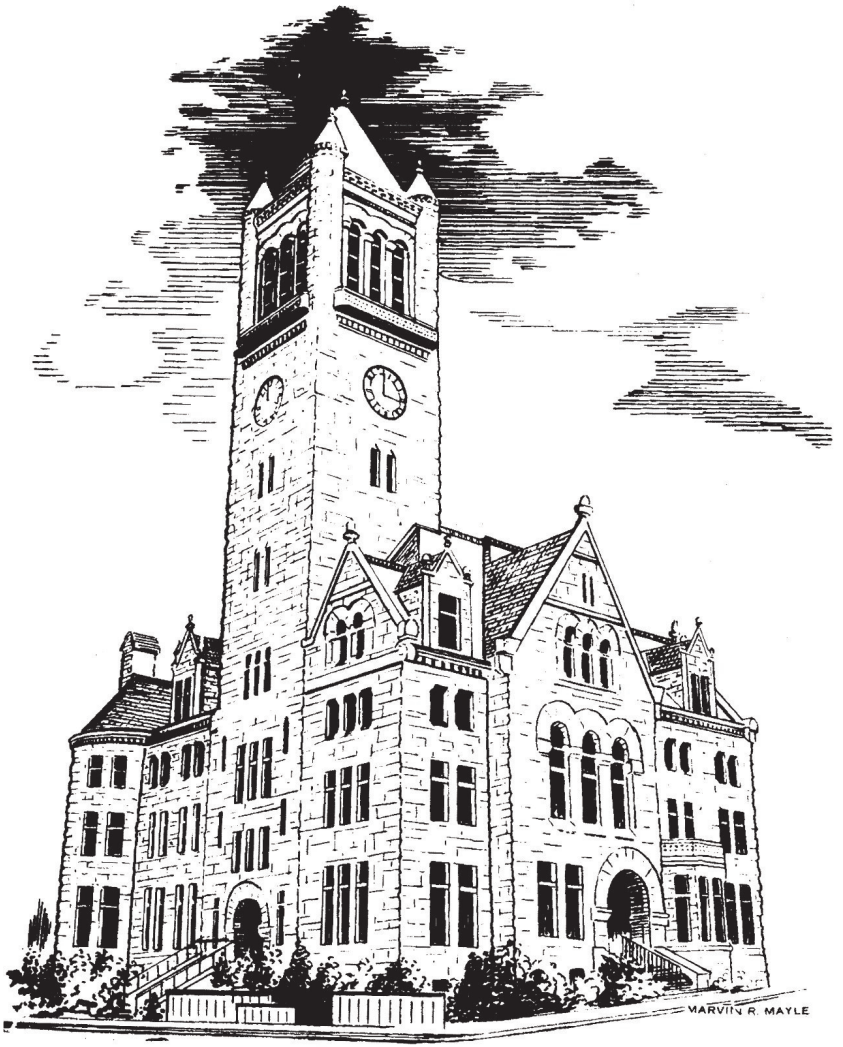
Fayette Legal Journal

VOL. 78 AUGUST 29, 2015 NO. 35



FAYETTE LEGAL JOURNAL

The FAYETTE LEGAL JOURNAL is published weekly by the Fayette County Bar Association, 2 West Main Street, Suite 711, Uniontown, Pennsylvania 15401, 724-437-7994. Legal advertisements should be submitted online at www.fcbar.org no later than 12:00 noon on Friday for publication the following Saturday. No date of publication is promised, however. Legal notices are published exactly as submitted by the advertiser.

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Cover Design by Marvin R. Mayle, 207 Lick Hollow Road, Hopwood, PA

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ESTATE NOTICES

Notice is hereby given that letters testamentary or of administration have been granted to the following estates. All persons indebted to said estates are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

Third Publication

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Reiss and Casini

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First Publication

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LEGAL NOTICES

NOTICE OF ADMINISTRATIVE SUSPENSION

Notice is hereby given that Michael Christopher Gallo of Fayette County has been Administratively Suspended by Order of the Supreme Court of Pennsylvania dated July 15, 2015, pursuant to Rule 111(b), Pa.R.C.L.E., which requires that every active lawyer shall annually complete, during the compliance period for which he or she is assigned, the continuing legal education required by the Continuing Legal Education Board. The Order became effective August 14, 2015 for Compliance Group 3.

Suzanne E. Price
Attorney Registrar
The Disciplinary Board of
the Supreme Court of Pennsylvania

NOTICE OF SHERIFF'S SALE OF REAL PROPERTY

CIVIL ACTION LAW
COURT OF COMMON PLEAS
FAYETTE COUNTY
Number 95-2015GD

LSF9 Master Participation Trust
V.
John A. Vansickle and Amanda J. Vansickle

TO: John A. Vansickle and Amanda J. Vansickle
Your house (real estate) at **140 Tall Oaks Road, Farmington, Pennsylvania 15437** is scheduled to be sold at Sheriff's Sale on **October 8, 2015 at 10:30 a.m.** in the Fayette County Courthouse, 61 East Main Street, Uniontown, Pennsylvania

15401 to enforce the court judgment of $73,104.35 obtained by LSF9 Master Participation Trust against you.

NOTICE OF OWNER'S RIGHTS
YOU MAY BE ABLE TO PREVENT THIS SHERRIFF'S SALE

To prevent this Sheriff's Sale you must take immediate action:

1. The sale will be canceled if you pay to LSF9 Master Participation Trust the back payments, late charges, costs, md reasonable attorney's fees due. To find out how much you must pay, you may call McCabe, Weisberg and Conway, P.C., Esquire at (215) 790-1010.

2. You may be able to stop the sale by filing a petition asking the Court to strike or open the judgment if the judgment was improperly entered. You may also ask the Court to postpone the sale for good cause.

3. You may also be able to stop the sale through other legal proceedings.

You may need an attorney to assert your rights. The sooner you contact one, the more chance you will have of stopping the sale. (See the following notice on how to obtain an attorney.)

YOU MAY STILL BE ABLE TO SAVE YOUR PROPERTY
AND YOU HAVE OTHER RIGHTS
EVEN IF THE SHERRIFF'S SALE DOES TAKE PLACE

1. If the Sheriffs Sale is not stopped, your property will be sold to the highest bidder. You may find out the price bid by calling McCabe, Weisberg and Conway, P.C., Esquire at (215) 790-1010.

2. You may be able to petition the Court to set aside the sale if the bid price was grossly inadequate compared to the value of your property.

3. The sale will go through only if the buyer pays the Sheriff the full amount due on the sale. To find out if this has happened , you may call McCabe, Weisberg and Conway, P.C., Esquire at (215) 790-1010.

4. If the amount due from the buyer is not paid to the Sheriff. you will remain the owner of the property as if the sale never happened.

5. You have a right to remain in the property until the full amount due is paid to the Sheriff and the Sheriff gives a deed to the buyer. At time, the buyer may bring legal proceedings to evict you.

6. You may be entitled to a share of the money which was paid for your real estate. A schedule of distribution of the money bid for your real estate will be filed by the Sheriff within thirty (30) days of the sale. This schedule will state who will be receiving that money. The money will be paid out in accordance with this schedule unless exception (reasons why the proposed schedule of distribution is wrong) are filed with the Sheriff within ten (10) days after the posting of the schedule of distribution.

7. You may also have other rights and defenses, or ways of getting your real estate back, if you act immediately after the sale.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

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Pennsylvania Lawyer Referral Service
Pennsylvania Bar Association
100 South Street
P.O. Box 186
Harrisburg, Pennsylvania 17108
(800) 692-7375

McCABE, WEISBERG & CONWAY, P.C.
Attorneys for Plaintiff
123 S. Broad St., Ste. 1400, Phila. PA 19109, 215-790-1010

JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CRIMINAL ACTION
v.	:	
FRED AUGUSTA MITCHELL,	:	
Defendant.	:	Case No. 1539 of 2013

JUDGE JOSEPH M. GEORGE, JR.

ATTORNEYS AND LAW FIRMS
Anthony S. Iannomorelli, Jr., Esquire, Assistant District Attorney, For the Commonwealth
Deanna L. Fahringer, Esquire, Assistant Public Defender, For the Defendant/Appellant

OPINION

GEORGE, J. July 1, 2014

Following a trial by jury, Appellant, Fred Augusta Mitchell, was found guilty of Rape by Forcible Compulsion{1}; Rape of a Child{2}; Involuntary Deviate Sexual Intercourse, Forcible Compulsion{3}; Involuntary Deviate Sexual Intercourse, Person Less than 16 Years of Age{4}; Aggravated Indecent Assault, Forcible Compulsion{5}; Aggravated Indecent Assault, Victim Less than 13 Years of Age{6}; Indecent Assault, Victim Less than 13 Years of Age {7}; and Indecent Assault, Forcible Compulsion {8}. On April 3, 2014, we sentenced Appellant to a term of imprisonment not less than forty (40) years nor more than eighty (80) years. He filed a direct appeal to the Superior Court of Pennsylvania. This Opinion is in support of the verdicts of the jury.

Concise Issues

Appellant filed the following Statement of Errors Complained of on Appeal:

1. Whether the evidence was legally and factually insufficient to show that the defendant committed the crimes of Rape Forcible Compulsion, Rape of a Child, IDSI Forcible Compulsion, IDSI Person Less than 16Yrs (sic) of Age, beyond a reasonable doubt.

{1} 18 Pa.C.S. § 3121(a)(1)
{2} 18 Pa.C.S. § 3121(c)
{3} 18 Pa.C.S. § 3123(a)(1)
{4} 18 Pa.C.S. § 3123(a)(7)
{5} 18 Pa.C.S. § 3125(a)(2)
{6} 18 Pa.C.S. § 3125(a)(7)
{7} 18 Pa.C.S. § 3126(a)(7)
{8} 18 Pa.C.S. § 3126(a)(2)

2. Whether the Trial Judge committed reversible error in permitting the alleged victim, M. N., to testify on the lap of her grandmother, J. A., despite a sequestration of witnesses and over Defense Counsel's objection.

3. Whether the Trial Judge committed reversible error in permitting the drawing made by the alleged victim, M. N., and the drawing by forensic interviewer, Sara Gluzman, to come into evidence and to be viewed by the jury deliberations, (sic) despite Defense Counsel's objection as it was not provided in discovery by the Commonwealth.

4. Whether the Trial Judge committed reversible error in failing to instruct the jury about the improper prosecutor remarks during a closing when the defendant was called a "monster" and a "snake in the grass," despite objection from Counsel on the basis of Commonwealth v. Joyner.

5. Whether the Trial Judge committed reversible error in failing to instruct the jury on the failure to make a prompt complaint in certain sexual offenses, when Defense Counsel specifically requested that jury instruction be given.

Facts

On February 24, 2012, J. A., grandmother to M. N., the alleged victim, transported M. N. from the residence of M. N.'s "MeeMaw," B. Z., to a routine doctor's checkup. (T.T., pp. 47, 52, 57-58, 60). M. N., born May 18, 2007{9}, indicated that she did not wish to return to the home if Appellant, a co-resident, was there, unless her mother, B. M., also a co-resident, was present. (T.T., p. 60) {10}. M. N. noted only that "Fred was mean to her," but refused to elaborate. (T.T., p. 63).

During the checkup and in the doctor's presence, M. N. indicated to J. A. that her "cookie" hurt. (T.T., p. 53). J. A., assuming M. N. was speaking about actual cookies, informed her that she could have a pretzel after the appointment. (T.T., p. 53). M. N. again indicated that her cookie hurt, this time pointing to her genital area. (T.T., p. 53). She also called her anus a "celery." (T.T., p. 53). When J. A. asked where she heard those terms, she stated, "Fred told me that." (T.T., p. 53). M. N. then added that Fred had put his "peanut" in her cookie. (T.T., p. 53). When J. A. asked if it was just once, M. N. indicated, "one more time will be a hundred, Grammie." (T.T., p. 54).

The doctor instructed J. A. to take M. N. to Children's Hospital for an immediate evaluation. (T.T., p. 54). When J. A. informed M. N. that she was calling M. N.'s mother, M. N. plead with J. A. not to, stating that "Fred said I wasn't allowed to tell my mom." (T.T., p. 55). J. A. indicated that M. N. seemed upset and scared. (T.T., p. 57). This was the first time M. N. had overtly indicated an instance of abuse to J. A. (T.T., p. 57).

{9} Thus four years old at the time.

{10} The Commonwealth moved for admission of M. N.'s statements made to certain witnesses pursuant to the Tender Years exception to hearsay, 42 Pa.C.S. § 5985.1. The Court was satisfied that both elements for the exception were met under the facts of this case. (T.T. pp. 25, 31, 50). Both before and after the appointment, J. A. stated that M. N. would cry in the night that

her cookie hurt and that she did not want anyone to touch her cookie. (T.T., p. 58, 62). Again, J. A. initially assumed these nightmares concerned actual cookies. (T.T. pp. 58, 61).

M. N. also testified {11}. As discussed more fully below, the Court permitted her to testify while sitting on J. A.'s lap {12}. She stated that, at the time, she lived with her mother; her mother's boyfriend, N. Z., whom M. N. called "Uncle N."; her MeeMaw (B. Z.); and Appellant. (T.T., p. 47) {13}. Following further foundational questioning, M. N. noted that boys have a "penis," and girls have a "cookie." (T.T., p. 39-40). She then distinguished "good touch" and "bad touch." (T.T., p. 40). In response to the ADA's question whether any person in the room had given her a bad touch, she immediately and without hesitation identified Appellant. (T.T., p. 41). She indicated that Appellant used his "peanut" to bad touch her cookie and that he did so more than once. (T.T., pp. 41-42).

On the same day M. N. revealed the alleged abuse to J. A., a sexual abuse report was filed with the Fayette County CYS ("FCCYS"). (T.T., p. 82). Robert Madison, an intake supervisor with FCCYS, recorded the allegation and contacted Belle Vernon State Police Trooper William Hartley, the Trooper assigned to these types of allegations. (T.T., p. 83). Because Trooper Hartley was unavailable to accompany Mr. Madison to M. N.'s residence, he enlisted the aid of the Luzerne Township Police. (T.T., p. 83) {14}.

Sara Gluzman, a forensic interviewer at A Child's Place, Mercy Hospital, interviewed M. N. on March 13, 2012. (T.T., pp. 90, 91). The purpose of the interview was to "elicit a narrative . . . in a non-leading non-suggestive manner." (T.T., p. 91; see pp. 99, 111) {15}. The interview was recorded. Following in camera review, the Court permitted the jury to view that video during direct examination of Ms. Gluzman. (T.T. pp. 23-25, 93-97) {16}.

During all interviews with young children, Ms. Gluzman uses an anatomical depiction of the human body {17}, which the children can utilize in pointing out areas

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{11} M. N. was six-years-old at the time of trial. Regarding her competency to testify, the Court notes M. N.'s ability to tell the truth from a lie, understand the consequences of lying, and articulate the sexual distinctions between males and females and the circumstances of the alleged sexual abuse. (T.T., pp. 36-42, 48).

{12} Chronologically, J. A.'s testimony occurred after M. N.'s testimony. However, prior to M. N.'s testimony, the Court conducted a hearing in camera, during which J. A. provided the substance of her testimony, and was subject to cross-examination. (T.T., pp. 26-30).

{13} Other permanent or frequent members of the household included M. N.'s infant half-brother, N. Z., and N. Z.'s niece, P. R. (T.T., pp. 85, 87-88).

{14} Trooper Hartley was nonetheless involved with this investigation. He testified to tracking its progress and ensuring that appropriate authorities interviewed M. N. (T.T., p. 65).

{15} Ms. Gluzman's testimony was also admitted under the Tender Years exception to hearsay. (See T.T. pp. 25, 31, 50).

{16} "Commonwealth's Exhibit #1."

{17} "Commonwealth's Exhibit #3."

of the body, and which Ms. Gluzman then labels with the terms used by the particular

child. (T.T., pp. 91, 109, 110). The video showed M. N. pointing out several areas, including her "coochie," "peachie," or "cookie," all terms used interchangeably to reference the vagina, and her "butt." (T.T., pp. 91, 102, 106). She also produced a spontaneous drawing {18} of "boobs" and a "butt." (T.T., pp. 91, 101-02) {19}.

M. N. indicated that Appellant touched some of those areas. (T.T., p. 103). When Ms. Gluzman asked about particular spots, M. N. pointed to her anus, stating, "he put his ... [three taps on the table, followed by silence]." (T.T., p. 103). She thereafter clarified that he put "his part," and pointed again to her anus. (T.T., p. 103).

Regarding that alleged incident, M. N. indicated that Appellant had "snatched" her from the stairs during a trip to the bathroom at or around 5:00 o'clock, presumptively, a.m. (T.T., p. 104). Ms. Gluzman asked, ". . . what happened after he snatched you," to which M. N., again, remained silent and tapped on the table. She did answer that it occurred in the living room, when the rest of the household was asleep and that Appellant took her pants off and unbuttoned his jeans. (T.T., pp. 104-05).

When Ms. Gluzman asked what it felt like when Appellant put "his part" into her body, M. N. replied that "it hurt." (T.T., p. 106). Again, she claimed that this happened more than once. (T.T., p. 106). Then, using the term "cookie" for Appellant's penis, M. N. stated that Appellant had also put his cookie in her "peachie." (T.T., p. 106).

M. N. claimed that she had first told her mother about the abuse. When asked what she told her mother, M. N., for the third time, tapped on the table. (T.T., p. 105). She also claimed to have told MeeMaw, B. Z. (T.T., p. 106). The video concluded with Ms. Gluzman asking if anyone other than Appellant ever touched M. N., to which she replied, "no, just Fred." (T.T., p. 107).

M. N.'s mother, B. M., testified that, at the time of the alleged abuse, she and M. N. lived with N. Z. in B. Z.'s home, along with Appellant, a longtime friend of Mr. Z. (T.T., pp. 67-69, 139). B. M. provided testimony concerning the layout of the home, including that the only bathroom in the home was at the bottom of the stairs, and was accessible via the kitchen, which connected to the living room, where Appellant slept. (T.T., pp. 69-69, 70-71).

Finally, the Commonwealth offered the expert testimony of Dr. Mary Carrasco in the field of pediatric child abuse. (T.T., p. 119). Dr. Carrasco performed a physical examination of M. N. and asked related questions as to her physical, sexual health. (T.T., p. 119). Dr. Carrasco's examination results were "unremarkable"; that is, normal. (T.T., p. 120). Nevertheless, she explained a significant study, which found that, even in cases where abuse actually occurred, only six percent of children showed any physical signs. (T.T., pp. 120-21). She provided medical rationale as to why that might be the case. (T.T., pp. 121-22).

{18} "Commonwealth's Exhibit #2."

{19} Defense Counsel objected to admission of the anatomical depiction and M. N.'s drawing, because they were not provided in discovery. (T.T., p. 93). Following review of the video, which was provided in discovery, and which included several references to the drawing and depiction therein, the Court overruled that objection. (T.T., p. 107).

Dr. Carrasco further explained that the passage of time, usually anything outside of

a seventy-two hour window and as low as nine hours in children, leads to a dearth of DNA evidence. (T.T., p. 124, 125, 127). She claimed to be "very conservative" with respect to what she deems "physical evidence" of sexual abuse, and noted that, in her experience, physical evidence exists in only one to two percent of cases. (T.T., p. 123). On cross-examination, Dr. Carrasco maintained that even "numerous" incidents of sexual abuse could leave no physical evidence. (T.T., pp. 128-29).

Appellant called two witnesses, N. Z. and B. Z. N. Z. and Appellant were long-time friends. (T.T., pp. 141-42). N. Z. is not related to M. N. (T.T., p. 143). He testified that he and B. M. remained in the home with Appellant for at least three months after M. N. was removed. (T.T., p. 141). B. Z. likewise contradicted the testimony of B. M. by noting that she continued to interact with Appellant. (T.T., p. 142). He openly expressed disbelief concerning Appellant's guilt. (T.T., p. 144).

B. Z. provided similar testimony. B. Z. contended that these allegations were merely a "big scheme" by B. M. to get N. Z. to leave the residence for a new home. (See T.T., p. 152-53).

Following his conviction on the above crimes, Appellant did not make a motion for new trial or file any other post-trial or post-sentence motions.

Discussion

I. Sufficiency of the Evidence

We read Appellant's first concise issue as turning upon sufficiency of the evidence presented. Nevertheless, it is our practice

> to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, whereas a claim challenging the weight of the evidence if granted would permit a second trial.

Com. v. Widmer, 744 A.2d 745, 751 (Pa. 2000) (citation omitted).

"A challenge to the weight of the evidence, in contrast to a challenge to the sufficiency of the evidence, [also] concedes that there is sufficient evidence to sustain the verdict." Com. v. Smith, 853 A.2d 1020, 1027 (Pa. Super. Ct. 2004). For those reasons, it is well established that preservation of each issue requires distinct motions. Compare Pa. R. Crim. P 606 (sufficiency of evidence, motion for judgment of acquittal) with Pa. R. Crim. P 607 (weight of evidence, motion for new trial). {20}

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the

{20} The Court does not believe that a challenge to weight of the evidence was preserved here. Even if such a challenge were properly preserved, we believe the evidence of Appellant's guilt easily outweighs any exculpatory evidence provided.

> laws of nature, then the evidence is insufficient as a matter of law. When reviewing

> a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Widmer, 744 A.2d at 751 (citation omitted).

"A person commits [rape,] a felony of the first degree[,] when the person engages in sexual intercourse with a complainant: (1) By forcible compulsion...."18 Pa.C.S. § 3121(a)(1). Sexual intercourse, "[i]n addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required." 18 Pa.C.S. § 3101. Forcible compulsion is "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied...." 18 Pa.C.S. § 3101.

The facts, taken as true, plainly demonstrate sufficient evidence of both vaginal and anal sex between Appellant and M. N. Further, M. N.'s own words in describing the abuse, her anxiety in revealing it, and statement that Appellant told her not disclose it, demonstrates Appellant's exercise of either or both physical or psychological dominion over her.

Rape of a child, unlike normal rape, does not require compulsion or force. It requires only that "the person engages in sexual intercourse with a complainant who is less than 13 years of age." 18 Pa.C.S. § 3121(c). For the reasons stated, and because M. N. was at all times well under age thirteen, the evidence was sufficient for a conviction on that charge.

(a) Offense defined.--A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant:

> (1) by forcible compulsion;
>
> . . .
>
> (7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.

18 Pa.C.S. § 3123(a).

Deviate sexual intercourse is "[s]exual intercourse per os or per anus between human beings. . . . The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures." 18 Pa.C.S. § 3101.

The Court has already defined forcible compulsion. Furthermore, M. N. was four years old and Appellant was well over the age of eighteen at the time. (See T.T. p. 87, 172). Thus, we believe the evidence amply supports Appellant's conviction for involuntary deviate sexual intercourse under both quoted subsections.

> . . . [A] person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if:
>
> (2) the person does so by forcible compulsion;
>
> . . .
>
> (7) the complainant is less than 13 years of age . . .

18 Pa.C.S. § 3125(a).

We feel that our previous discussion and the evidence as stated supports a conviction on this charge under both quoted subsections.

(a) Offense defined.--A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:

(2) the person does so by forcible compulsion;

. . .

(7) the complainant is less than 13 years of age . . .

18 Pa.C.S. § 3126(a).

Indecent contact is "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person." 18 Pa.C.S. § 3101. We feel that our previous discussion and the evidence as stated supports a conviction on this charge under both quoted subsections.

II. Allowing the Child Victim to Sit on Her Grandmother's Lap

Prior to trial, the Assistant District Attorney, ("ADA") moved the Court to allow M. N. to testify from the lap of J. A. (T.T. p. 6). The stated purpose was to ensure M. N. was unafraid to provide testimony, despite Appellant's presence. (T.T. p. 9). In support of his motion, the ADA cited Com. v. Pankraz, 554 A.2d 974 (Pa. Super. Ct. 1989), a case in which the Superior Court affirmed a trial court's decision allowing a child-victim to testify while sitting on her grandmother's lap. Defense Counsel objected on the basis that J. A. was also a witness and thus subject to sequestration. Relying on Pankraz, the Court permitted M. N. to testify from J. A.'s lap.

"The general conduct of a trial is committed to the broad discretion of the trial judge." Com. v. Metzer, 634 A.2d 228, 231 (Pa. Super. Ct. 1993). For that reason, "[t]he examination of witnesses has always been and still remains subject to the control of the trial court in whom there is vested a large discretion." Pankraz, 554 A.2d at 979.

To avoid the possibility of unfair prejudice, Pankraz states that, where the trial court permits an attendant to sit with or near the child, it shall ensure that "the attendant is admonished that he [or she] is not permitted to make suggestions to the witness." 554 A.2d at 979. This Court took significant precautions to avoid any such suggestions. These included: (1) thoroughly admonishing J. A. to stay silent and still, (T.T. pp. 31-32); (2) placing M. N. and J. A. at a position where the Court could easily observe them, (T.T. p. 15); (3) noting for the record that no such suggestion occurred, (T.T., pp. 49); and (4) questioning both counsel, who each had different vantage points, whether they agreed that no suggestion occurred. Both counsel agreed no suggestion occurred. (T.T. pp. 49-50).

We acknowledged that this would impact the sequestration rule. However, the sequestration of witnesses is not a right; the trial court may grant or deny the same, subject to a "clear abuse of discretion" standard. Com. v. Stevenson, 894 A.2d 759, 767 (Pa. Super. Ct. 2006). "Moreover, an appellant must demonstrate that he or she was actually prejudiced by a trial judge's sequestration order before any relief may be warranted." Stevenson, 894 A.2d at 767.

Under those standards, and in light of our stated efforts to ensure no prejudice occurred, we believe Appellant's asserted error is unfounded.

III. Permitting the Jury to View Drawings by the Child Victim and the Anatomical Depiction used by the Forensic Investigator

The Court permitted introduction of the anatomical depiction and M. N.'s drawing, which were created and used during her interview with Sara Gluzman. Defense Counsel objected that the drawings were not provided in discovery. The Commonwealth admitted that the drawings were not in the discovery packet of information, but argued that they were often referenced in the video, which was available to Defense Counsel months in advance. (T.T. pp. 92-93).

"[O]ur discovery rules are designed to avoid 'trial by ambush,'" thus preserving a defendant's right to due process of law. Com. v. Ulen, 650 A.2d 416, 418 (Pa. 1994). A failure to disclose, however, does not per se warrant suppression of the evidence or mistrial. See Com. v. Causey, 833 A.2d 165, 171 (Pa. Super. Ct. 2003). Rather, the rule of mandatory discovery requires that the undisclosed information must be "material to the instant case." Pa.R.Crim.P. 573.

"Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Com. v. Jones, 637 A.2d 1001, 1004 (Pa. Super. Ct. 1994) (citation and internal quotation omitted). For that reason, a finding that non-disclosed information is merely cumulative of properly admitted evidence will not require suppression or a mistrial. See, e.g., Com. v. Lambert, 884 A.2d 848, 856 (Pa. 2005); Com. v. Burke, 781 A.2d 1136, 1145 (Pa. 2001); Com. v. Wade, 389 A.2d 560, 564 (Pa. 1978).

Here, the Court reserved ruling until we had an opportunity to review the file and video as it was played for the jury. (T.T. p. 93). At that point we were satisfied that the frequent references to the drawing and anatomical depiction in the video made their physical presence cumulative. We therefore overruled Defense Counsel's discovery objection and allowed the Commonwealth to follow appropriate procedures for admission. (T.T. pp. 107-08). When the Commonwealth moved to admit, Defense Counsel did not object on relevance or any additional grounds. (T.T. p. 111). Because the drawings were merely cumulative and no further objection was made, we do not believe admission of the exhibits constitutes reversible error.

IV. Remarks by the ADA During Closing Argument

The Superior Court reviews a trial court's denial of a motion for mistrial for abuse of discretion. Com. v. Bryant, 67 A.3d 716, 728 (Pa. 2013). "An abuse of discretion is not merely an error of judgment." Van Dine v. Gyuriska, 713 A.2d 1104, 1105 (Pa. 1998). It requires misapplication of the law, or a conclusion, which is manifestly unreasonable, partial, prejudicial, or contrary to the facts of record. Van Dine, 713 A.2d at 1105.

"When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity."

Pa.R.Crim.P. 605. Failure to request a mistrial or curative instruction results in waiver of that issue. Com. v. Brown, 359 A.2d 393, 396 (Pa. 1976).

"It is . . . well established that a trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict." Bryant, 67 A.3d at 728 (citation and internal quotation omitted). Such is the case where an event forms in the jurors' "minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively." Com. v. Chmiel, 889 A.2d 501, 542 (Pa. 2005) (emphasis added); see Com. v. Joyner, 365 A.2d 1233, 1234 (Pa. 1976); Com. v. Solomon, 25 A.3d 380, 383 (Pa. Super. Ct. 2011).

In closing argument, the ADA referred to Appellant as a "monster" and a "snake in the grass." In asserting error with these remarks, Appellant cites Commonwealth v. Joyner, 365 A.2d 1233, 1234 (Pa. 1976).

> [Our] standards reflect a consensus of the profession that the courts must not lose sight of the reality that "[a] criminal trial does not unfold like a play with actors following a script." It should come as no surprise that "in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused." Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statement or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.

Com. v. Green, 581 A.2d 544, 561-62 (Pa. 1990) (citation omitted) (emphasis added) (quoting United States v. Young, 470 U.S. 1 (1985)); see Solomon, 25 A.3d at 383.

Assessed in context, Joyner and related precedent turned upon expressions of prosecutorial opinion, which rather than addressing the facts of the particular case, bore almost exclusively upon the ultimate issue. See, e.g., Com. v. Cronin, 346 A.2d 59, 61 (Pa. 1975) (". . . the only way you cannot find this defendant guilty of murder of the first degree is for Louis Cooper [the decedent] to walk through that door."); Com. v. Capalla, 185 A. 203, 206 (Pa. 1936) (prosecutor called an accused murderer a "cold blooded killer").

Where epithets are used but do not speak to the ultimate issue, they must be considered in the context of the entire argument. In Com. v. Lipscomb, 317 A.2d 205 (Pa. 1974), the assistant district attorney called the defendant and his coconspirators in a murder-robbery case "'hoodlums' and 'animals,'" and made additional comments on behalf of the decedent. 317 A.2d at 206. Regarding the epithets, the court held that "the assistant district attorney interjected his personal belief in the guilt of the accused. Such 'expressions of personal belief . . . have no legitimate place in a district attorney's argument.'" Lipscomb, 317 A.2d at 207 (citation omitted).

Nevertheless, those statements while offensive to the court, were only considered for their prejudicial effect "in conjunction" with the prosecutor's additional comment. Lipscomb, 317 A.2d at 207. The additional comment was obviously prejudicial. The prosecutor made the following statement on the decedent's behalf: "The only way you couldn't find this defendant guilty of murder of the first degree is for me [the decedent] to come alive again before your very eyes." Lipscomb, 317 A.2d at 207. The two com-

ments taken together amounted "to a statement by the prosecutor that in effect he is personally convinced that the appellant is guilty, and his innocence is as unlikely as the resurrection of the deceased. Such personal assertions by a district attorney on the guilt of the accused is beyond the scope of fair play, and is emphatically condemned." Lipscomb, 317 A.2d at 207.

Cases reaching the opposite result did so because the words used, while inflammatory, were addressed to the evidence. In Solomon, supra, the prosecutor in a murder trial stated, of the defendant and his testimony:

> The most unrepentive and arrogant testimony I've ever seen is from this [Appellant], unrepentive, completely unrepentive. He shot a guy in the back, says it's an accident. Did you sense any – even a hint of bad feeling from him? No be cause he did it on purpose. He's thinking that SOB got what he deserved.

Solomon, 25 A.3d at 384 (alteration original).

Regarding those comments, the court held that "the prosecutor was not stating a personal opinion, but rather was stating a conclusion that arguably followed from [Appellant's] testimony and demeanor." Solomon, 25 A.3d at 384 (alteration original). "Such a comment . . . was [merely] an attempt by the prosecutor to marshal the evidence on the issue . . ." Solomon, 25 A.3d at 384.

In sum, all of the cited cases dealt with arguments that "encouraged the jurors to shift their inquiry away from the case before them, and thus prejudiced [the] appellant." Com. v. Cherry, 378 A.2d 800, 804 (Pa. 1977).

Such was not the case here. While, in the Court's experience, we believe that the ADA's remarks were flamboyant, we did not and do not believe that they were of such nature and force as to create the presumption of prejudice, especially in the context of the rape of a four-year-old child. On the contrary, the ADA's remark that Appellant was a "snake in the grass" is consistent with M. N.'s statement that Appellant snatched her from the stairs, late at night {21}. That comment was equally consistent with the ADA's attempt, on direct examination of B. M., to establish that the layout of the home made it possible for Appellant to lie in wait for M. N. to use the bathroom.

Similarly, the ADA's comment that Appellant was a "monster" related to J. A.'s testimony that M. N. had nightmares about someone touching her "cookie." In particular, the comment came in the context of a larger argument by the ADA that M. N. was woken up in the middle of the night owing to the terrors Appellant exacted upon her.

Insofar as those terms were intended to marshal the evidence of Appellant's guilt in the rape of M. N., as we believe they were, they are not prejudicial. See Cherry, 378 A.2d at 804 (". . . the scope of argument must be consistent with the evidence and marked by the fairness which should characterize all of the prosecutor's conduct.").

Even if prejudice were possible, a proper curative instruction or jury charge may dispel the same. See Com. v. Gunderman, 407 A.2d 870, 874 (Pa. Super. Ct. 1979). The jury is presumed to follow the courts' instruction. Com. v. Jones, 668 A.2d 491, 507 (Pa. 1995).

{21} It being the ADA's analogy that snakes sneak into the nests of other animals and consume their young.

Following the ADA's remarks, Defense Counsel objected, citing Joyner, supra. The

Court sustained the objection. Immediately thereafter, we instructed the jury:

> The arguments of counsel are not part of the evidence and you should not consider them as such, but we, of course, ask you to weigh each of the arguments of counsel as they are required to make that in a light most favorable to each side, but keep in mind that you are the sole triers of the facts, and are to determine the facts of this case.

(Supp. to T.T., p. 17).

We reiterated that instruction in our charge:

> As I indicated earlier, the speeches of counsel are not part of the evidence and you should not consider them as such. However, in deciding the case, you should carefully consider the evidence in light of the various reasons and arguments which each lawyer presented. It is the right and duty of each lawyer to discuss the evidence in a manner which is most favorable to the side he or she represents. You should be guided by each lawyer's arguments to the extent that they are supported by the evidence and insofar as they assist you in applying your own reason and common sense.

(T.T. p. 183).

We believe the instruction and charge dispelled any prejudice.

Finally, harmless error also applies to this Court's denial of a mistrial.

> Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was de minimis; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Chmiel, 889 A.2d at 521 (quoting Com. v. Robinson, 721 A.2d 344, 350 (Pa. 1998)).

Even assuming prejudice exists and was not dispelled, we believe that Defense Counsel's prompt objection and the Court's sustaining of that objection and curative instruction, along with our analysis of Joyner and like cases, which requires statements not addressed to the facts, demonstrates that such prejudice was, at most, de minimis.

In addition, as has been discussed, the weight of evidence of Appellant's guilt was so substantial and overwhelming that even if any prejudice was more than de minimis, we do not believe it affected the jury's decision to convict. Consequently, and in any event, the motion for mistrial was properly denied.

V. The Court's Decision Not to Provide the Jury with the Prompt Complaint Instruction

Appellant's final argument is that the Court should have read the suggested standard criminal jury instruction concerning the failure by the alleged victim of a sex crime to make a prompt complaint.

The Advisory Committee Note to Pa. SSJI (Crim) 4.12A, the prompt complaint instruction, provides that "[t]he instruction is not appropriate where a child . . . is the alleged victim." (citing Commonwealth v. Snoke, 580 A.2d 295 (Pa. 1990)). In reliance

upon the Advisory Committee Note and after review of Snoke, the Court denied Appellant's motion to read that instruction. (T.T., p. 165).

Wherefore, it is respectfully submitted that this appeal is without merit and should be denied.

BY THE COURT:
JOSEPH M. GEORGE, JR., JUDGE

ATTEST:
CLERK OF COURTS