

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **No. 98-11,563**
:
:
vs. : **CRIMINAL DIVISION**
:
:
SCOTT FINCH, :
Defendant : **1925(a) Opinion**

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Judgment of Sentence issued on or about July 19, 1999.

Procedural History

On or about July 30, 1998, the police charged the defendant, Scott Finch, with three counts each of aggravated indecent assault, indecent assault and corruption of minors arising out of allegations of sexual abuse of his stepdaughter, C.B., and his daughters, A.F. and S.F. A jury trial was held May 17-19, 1999. S.F. was unable to testify at trial and the Court granted a demurrer with respect to the counts of the Information listing her as the victim.

The jury found the defendant guilty of aggravated indecent assault against A.F., two counts of indecent assault and two counts of corruption of minors.¹ On or about July 19, 1999, the Court sentenced the defendant to incarceration in a State Correctional

¹One count each of indecent assault and corruption of minors involved A.F. and the other counts of indecent assault and corruption of minors involved C.B.

Institution for a minimum of five and one-half (5 ½) years and a maximum of fourteen (14) years. The defendant filed a Notice of Appeal on August 17, 1999. In his Statement of Matters Complained of on Appeal, the defendant asserts the Court erred in the following respects: (1) excluding Dennis Foreman as a potential juror; (2) finding A.F. competent to testify but allowing the assistant district attorney to ask leading questions; (3) allowing Amy Hinds and Dr. Susan Lewis to testify regarding prior consistent statements made by C.B. and A.F., respectively; and (4) failing to instruct the jury that it should take the testimony of Lisa Cox, Amy Hinds, and Agent Robert Gilson with caution if no valid reason existed for not audio or videotaping the children's statements and questions exist to the accuracy of the statements.

The defendant first contends the Court erred in excluding Dennis Foreman as a potential juror over defense objection. The defendant is Caucasian; Mr. Foreman is African-American. Jury selection occurred on May 17, 1999. When Juror #30, Conrad Pinches, was excused for cause, Dennis Foreman moved up to his seat and became Juror #30, a potential alternate. The Commonwealth exercised a peremptory challenge to excuse Mr. Foreman. Defense counsel objected and contended the Commonwealth did not have a valid, race-neutral reason for excluding Mr. Foreman from the jury. The prosecutor stated she struck Mr. Foreman because he had a driving under suspension conviction under appeal and he laughed when defense counsel asked if everyone would judge police officers the same as other witnesses. Therefore, the prosecution believed this juror would have a bias against the Commonwealth. N.T., May 17, 1999, at pp. 76-78.

Although the defense did not specifically cite Batson v. Kentucky, 476 U.S.

79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), it is claiming the Commonwealth exercised its peremptory challenge in a racially discriminatory manner. It is the defendant's burden to establish a prima facie case of improper use of peremptory challenges. In order to do so, the defendant must make a record specifically identifying the race of all the venire persons stricken by the prosecution, the race of the jurors acceptable to the prosecution who were stricken by the defense and the racial composition of the final jury selected.

Commonwealth v. Porter, 556 Pa. 301, 728 A.2d 890, 900 (1999); Commonwealth v. Hackett, 735 A.2d 688, 694 (Pa. 1999). The defendant has failed to make such a record. Therefore, he has failed to preserve this claim for appellate review.

In the alternative, the Commonwealth offered valid, race-neutral reasons for striking Mr. Foreman, i.e., the defendant had a driving under suspension conviction under appeal and he laughed when asked if everyone would judge police officers the same as other witnesses. The reasons had nothing to do with the defendant's race, but rather concerned this particular defendant's potential bias towards the Commonwealth. For cases involving similar race-neutral reasons for exercising a peremptory challenge, see Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)(unkempt hair, mustache and beard); Commonwealth v. Rico, 551 Pa. 526, 711 A.2d 990, 993 (1998)(unemployment); Commonwealth v. Bond, 539 Pa. 229, 309-311, 652 A.2d 308, 313 (1995)(juror's demeanor indicate he or she did not want to serve); Commonwealth v. Eddings, 721 A.2d 1095, 1098 (Pa.Super. 1998)(lack of employment, slovenly appearance, and having a 'liberal bent'); Commonwealth v. Miller, 721 A.2d 1121, 1123-24 (Pa.Super. 1998)(inattention); Alexander v. Carlisle Corp., 449 Pa.Super. 416, 674

A.2d 268, 270 (1996)(lack of respect for the jury selection process evidenced by wearing sunglasses).²

The defendant next claims the Court erred in finding A.F. competent to testify, then allowing the prosecutor to ask leading questions. Again, the Court cannot agree. When evaluating the competency of children to testify, the Court is guided by the following principles:

A witness is presumed competent to testify unless proven otherwise. Commonwealth v. Riley, 458 Pa. 390, 326A.2d 384(1974). When a proposed witness is under fourteen years of age, however, there must be a searching judicial inquiry as to mental capacity. Commonwealth v. Short, 278 Pa.Super. 581, 420 A.2d 694 (1980). This inquiry will probe the capacity to communicate, observe and remember, and a consciousness of the duty to speak the truth in proportion to the witness's chronological maturity. Rosche v. McCoy, 397 Pa. 615, 156 A.2d 307 (1959)... [T]he judge holds the superior opportunity to evaluate the competency of a proposed child witness....Commonwealth v. Bailey, 322 Pa.Super. 249, 469 A.2d 604 (1983)....

[T]he trial court must be satisfied that the witness has:

'(1) such capacity to communicate, including as it does both an ability to understand questions and to frame express and intelligent answers; (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that [the witness] is called to testify about; and (3) a consciousness of the duty to speak the truth.'

Rosche v. McCoy, 397 Pa. 615, 620, 156 A.2d 307, 310 (1959)....

Commonwealth v. Pankraz, 382 Pa.Super. 116, 554 A.2d 974, 977-978, appeal denied, 563 A.2d 887 (1989). In this case, the Court conducted a comprehensive competency

²The Court also notes that even if the Commonwealth had not stricken Mr. Foreman from the jury he would not have participated in the deliberations in this case. Mr. Foreman was moved into an alternate position when Mr. Pinches was stricken for cause. The first twelve individuals were able to serve as jurors and the alternates were released prior to deliberations. Therefore, even if Mr. Foreman had not been stricken and remained an alternate, he would not have participated in the deliberations and verdict in this case.

hearing out of the presence of the jury, see N.T., May 17, 1999, at pp. 103-129. This hearing involved extensive questioning by the prosecution, the defense and the Court to determine A.F.'s capacity to remember and communicate the events in question and her understanding of the need to tell the truth. A.F. displayed an ability to do all these things. With respect to her understanding the need to tell the truth, A.F. demonstrated a knowledge of the difference between the truth and a lie and an understanding that she would get in trouble or go to jail if she lied. N.T., May 17, 1999, at pp. 107-109, 112, 114-115.

The trial judge also has wide discretion in controlling the use of leading questions at trial and his ruling will not be disturbed on appeal absent an abuse of that discretion. Commonwealth v. Upchurch, 355 Pa.Super. 425, 513 A.2d 995 (1986), allocatur denied, 514 Pa. 630, 522 A.2d 558 (1987). Furthermore, children are easily intimidated by the courtroom setting and a trial judge should display a certain tolerance for direct, succinct, and even leading questions. Commonwealth v. Polston, 420 Pa.Super. 233, 251, 616 A.2d 669, 678 (1992). Under the facts and circumstances of this case, the Court does not believe it improperly permitted the Assistant District Attorney to ask leading questions. A.F. was eight years old at the time of trial and seven years old or younger when she was sexually abused by her father. The perpetrator's familial relationship to the victim made testifying in court even more intimidating for this child. Furthermore, most of the prosecutor's questions were not leading. See, N.T., May 19 and 20, 1999, at pp. 36-43 and 56-58. The only significant questions that were leading related to the number of times the child's father molested her and whether he put his finger on the

inside or the outside when he touched her privates. The prosecutor asked leading questions regarding the number of times her father touched her because she replied that she didn't know when asked the non-leading question 'how many times did that happen.' Therefore, in order to get some information regarding the frequency of these occurrences, the prosecutor asked the child if it happened more than once, more than two times and more than ten times. N.T., May 19 and 20, 1999, at pp. 41-42. Similarly, the prosecutor tried to elicit testimony from the child regarding penetration without asking leading questions, but the child, due to her tender years, could not offer this testimony until she was asked directly whether her father put his finger on the inside or outside. N.T., May 19 and 20, 1999, at p. 41.³ Given the child's age, the Court finds that this was an appropriate way of eliciting testimony regarding penetration and, perhaps, the only way a young child would understand the concept.

The defendant asserts the Court erred in allowing Children and Youth caseworker Amy Hinds to testify to prior consistent statements made by C.B. and allowing Dr. Lewis to testify to prior consistent statements made by A.F. Prior consistent statements are admissible when there are allegations of corrupt motive, recent fabrication, or faulty memory. Commonwealth v. Counterman, 553 Pa. 370, 719 A.2d 284, 301 (1998). Similarly, such statements are also admissible in response to questioning

³The prosecutor initially asked the child how did he touch it [her private], to which the child responded, "Put his finger on it". The prosecutor then asked if he did anything else and the child responded in the negative. The prosecutor then tried another avenue by asking the child how it felt when he touched her; she replied, "It hurt." When asked why it hurt, the child didn't know, so the prosecutor asked her whether her father put his finger on the inside or outside.

attacking a witness' ability to perceive events. Commonwealth v. Paolello, 542 Pa. 47, 73, 665 A.2d 439, 452 (1995). The defense theory of the case was that the children fabricated the allegations against the defendant at the instigation of their mother or their grandmother and/or they lacked the ability to perceive and remember the events in question. Clearly, defense counsel's cross-examination of A.F. explicitly asserted an allegation of recent fabrication. N.T., May 19 and 20, 1999, at pp. 51-56. Although defense counsel's questioning of C.B. did not expressly assert recent fabrication, the defense centered on impeaching the credibility of both children. C.B.'s credibility was challenged by questions focusing on where and when the events occurred (N.T., May 19 and 20, 1999, at pp. 67-71) and by comparing that testimony to A.F.'s testimony. Therefore, the Court finds that it properly admitted the prior consistent statements of A.F. and C.B.

In the alternative, the Court urges the appellate courts to adopt the reasoning of the plurality in Commonwealth v. Willis, 552 A.2d 682 (Pa.Super. 1988) regarding the admission of prior consistent statements of child victims of sexual assault, which stated:

Similarly, jurors are likely to suspect that unimpeached testimony of child witnesses in general, and child victims of sexual assaults in particular, may be distorted by fantasy, exaggeration, suggestion, or decay of the original memory of the event. Prior consistent statements may therefore be admitted to corroborate even unimpeached testimony of child witnesses, at the trial court's discretion, because such statements were made at a time when the memory was fresher and there was less opportunity for the child witness to be effected by the decaying impact of time and suggestion.

Id. at 692 (footnote and citation omitted).

The defendant's final assertion is the court erred by refusing to give the following requested jury instruction:

You heard testimony from Amy Hinds, Lisa Cox, and Agent Gilson regarding statements of [A.F.]. Evidence established statements were not audio or video taped. If you believe no valid reason existed for not doing audio or video tapes and questions exist as to accuracy of the statements attributed to [A.F.], then you can decide to take with caution the testimony of Lisa Cox, Amy Hinds and Robert Gilson. You can also decide to accept part of their testimony that you believe is accurate or to ignore all of their testimony since you have doubt as to the accuracy of the statements they are attributing to [A.F.].

A trial court has discretion in phrasing its instructions to the jury, and is not limited to particular language, provided the law is clearly, adequately, and accurately presented to the jury. Commonwealth v. Jacobs, 727 A.2d 545, 554 (Pa. 1999) (citations omitted). Initially, the Court notes that it has found no authority, nor has the defense provided any authority, that requires interviews of a victim or any other witness be audio or video taped. While taping can make the statements admissible as substantive evidence,⁴ the Court finds the failure to do so does not render the statements subject to any special scrutiny. Therefore, the Court questions whether the requested instruction accurately states the law. Moreover, the Court utilized the following standard suggested jury instructions in charging the jury: credibility of witnesses, conflicting testimony, inconsistent statements, prior consistent statements and false in one/false in all (see Pa.S.S.J.I. 4.17, 4.09, 4.08A, 4.08C, and 4.15). N.T., May 19 and 20, 1999 at pp. 249-252. These instructions clearly, adequately and accurately conveyed to the jury the manner in which they should consider the alleged inconsistencies in the testimony of these witnesses concerning their interviews

⁴See Commonwealth v. Lively, 610 A.2d 7 (1992).

of the children. Therefore, the Court finds no error in failing to give the requested jury instruction.

DATE: _____

By The Court,

Kenneth D. Brown, J.

cc: Diane Turner, Esquire(ADA)
William Miele, Esquire (PD)
Law Clerk
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)