In the Superior Court of Pennsylvania

No. 166 MDA 2008

COMMONWEALTH OF PENNSYLVANIA

v.

ADAM WAYNE CHAMPAGNE,
Appellant.

REPLY BRIEF FOR APPELLANT

On Appeal from the Judgment of the
Court of Common Pleas of Lebanon County, Pennsylvania,
Criminal Division, No. CP–38–CR–249–2007

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I. INTRODUCTION

On the issue of defendant–appellant Adam Champagne's entitlement to a new trial, the prosecution's Brief for Appellee is more notable for the numerous appellate arguments that the prosecution fails to address than for the tenuous and unpersuasive lone ground that the prosecution relies on for affirmance.

Despite having had a total of sixty days to prepare its Brief for Appellee — the original thirty–day response period plus an additional thirty–day extension that the prosecution requested and this Court granted — the prosecution's Brief for Appellee fails to offer any direct response whatsoever to the following arguments advanced in the Brief for Appellant:

- that the admission of M.H.'s videotaped testimony as evidence of defendant's guilt, in the absence of any opportunity for cross–examination, violated Pennsylvania's "Recorded testimony" statute, 42 Pa. Cons. Stat. Ann. §5984.1(a) (*see* Brief for Appellant at 25–28);

- that the admission of M.H.'s videotaped testimony as evidence of defendant's guilt, in the absence of any opportunity for cross–examination, violated the defendant's Confrontation Clause and Due Process rights (*see* Brief for Appellant at 28–33); and

- that the erroneous admission of M.H.'s videotaped testimony as evidence of defendant's guilt, in the absence of any opportunity for cross–examination, entitles the defendant to a new trial, because that mistake fails to qualify as error that was harmless beyond a reasonable doubt (*see* Brief for Appellant at 34–38).

Accordingly, these three arguments found in the Brief for Appellant not only stand unrebutted in the Brief for Appellee, but this Court can and should now conclude that the prosecution was incapable of opposing these arguments and thus concurs that defendant Adam Champagne is entitled to a new trial unless the

prosecution can prevail on its lone appellate argument. The prosecution's lone appellate argument in support of affirmance on this issue is that the trial court properly granted the prosecution's request to play for the jury the videotaped testimony under oath of M.H. accusing the defendant of having committed criminal offenses against her, even in the absence of any opportunity for cross–examination, so that the jury could "consider M.H.'s demeanor on the videotape in assessing the weight and credibility of the [out–of–court] statements that M.H. made to her mother," which were admitted through M.H.'s mother's testimony under the so–called "tender years" hearsay exception. *See* Brief for Appellee at 10.

As explained in more detail below, the prosecution's lone ground for affirmance on the demeanor issue not only lacks merit as a matter of logic — because M.H.'s demeanor in her videotaped testimony does not establish or allow the jury to perceive M.H.'s demeanor on some earlier occasion when she allegedly spoke with her mother about the events in question — but it also requires the jury to improperly use M.H.'s videotaped evidence under oath, but not subject to cross–examination, as evidence of defendant's guilt. Only if the jury believed the substance of M.H.'s videotaped testimony accusing the defendant of having engaged in criminal conduct against M.H. is that recorded testimony relevant to evaluating the believability of M.H.'s earlier out–of–court statements to her mother, and yet that use of M.H.'s videotaped testimony as evidence of the defendant's guilt is indisputably improper given M.H.'s unavailability for cross–examination during her videotaped testimony.

Because the prosecution's Brief for Appellee fails to overcome defendant's arguments for a new trial, a new trial of the charges against defendant Adam Champagne will be necessary. The prosecution will have no one other than itself to blame for this outcome, as it was the prosecution that urged the trial court, over defendant's objection, to display the videotaped testimony of M.H. to the jury.

Once this Court grants a new trial, the other two issues raised on appeal will become academic. However, in the unlikely event that those issues remain relevant, the Brief for Appellee confirms that the prosecution concedes that Adam Champagne is entitled to full credit for all time served on the charges that resulted in his conviction. Unfortunately, the trial court's sentencing order improperly deprives the defendant of credit for two months' time served on these charges at the Lebanon County Correctional Facility.

Now that both the trial court, in its Rule 1925(a) opinion, and the prosecution, in its Brief for Appellee, concede that defendant is entitled to credit for those two additional months of time served on these charges, this Court should vacate the trial court's sentencing order and instruct the trial court on remand to delete from that sentencing order the restriction that "[t]he Defendant shall be accorded credit for any time heretofore served *solely on this action number*" and replace it with a statement in accordance with 42 Pa. Cons. Stat. Ann. §9760(1) that "[c]redit * * * shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the

conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial."

And finally, on the issue of the trial court's conclusion that defendant should be designated as a "sexually violent predator" under Pennsylvania's Megan's Law, another newly issued decision of this Court further confirms that the charges on which defendant was convicted are not of the same cruel and heinous nature as the charges for which this Court ordinarily upholds "sexually violent predator" adjudications.

II. ARGUMENT IN REPLY

A. Defendant Is Entitled To A New Trial Because The Trial Court Committed Reversible Error In Admitting Into Evidence The Recorded Testimony Of Alleged Victim M.H.

The prosecution's Brief for Appellee, in addressing this issue, entirely ignores the contents and substance of the videotaped testimony of M.H. The videotaped testimony of M.H. began in the trial judge's chambers on the morning of Friday, June 1, 2007, one business day before the start of trial on the following Monday. R.126a–73a.

On June 1, 2007, M.H. was placed under oath and began testifying in the presence of the judge, the prosecuting attorney, defense counsel, a court stenographer, an aide who was present to provide comfort to M.H., and a video technician. M.H. began her testimony by answering that the defendant was a "bad boy" in response to the prosecutor's question whether the defendant is a "good boy"

or a "bad boy." R.133a. The prosecutor next asked M.H. "Did Adam do something to you that was bad?" R.133a. In response to that question, according to the transcript, M.H. nodded her head affirmatively and then answered "yes." R.133a.

The prosecutor next asked M.H. whether she was inside or outside when "this happened"? R.133a. In response to that question, M.H. answered "inside." R.133a. M.H. further testified that H.B. was also present "when Adam did something." R.134a. M.H. also stated in her videotaped testimony that she was at Adam's house for the purpose of "[s]leeping over there" together with H.B. and H.B.'s sisters. R.134a.

At that point in her recorded testimony, however, M.H. failed to answer any other questions put to her by the prosecuting attorney, and thus M.H. was not made available to counsel for defendant for purposes of cross–examination. R.135a. As a result, the defendant was unable to conduct any cross–examination of M.H. whatsoever.

As explained in great detail in the opening Brief for Appellant, the trial court committed reversible error in allowing the recorded testimony of M.H. to be shown to the jury over the timely objection of defendant's counsel. First, the recorded testimony was not properly subject to being exhibited to the jury, because the prerequisites of the governing statute, 42 Pa. Cons. Stat. Ann. §5984.1, had not been satisfied, given M.H.'s unavailability for cross–examination. Second, the fact that M.H. was unavailable for cross–examination violated defendant's rights under the Confrontation Clause and the Due Process Clause. A witness who gives sworn

testimony under oath on direct examination accusing the defendant of committing the wrongdoing at issue in a criminal trial but who then makes herself unavailable for cross–examination cannot have her testimony on direct examination placed before the jury for its consideration without infringing on the defendant's Confrontation Clause and Due Process rights.

Moreover, the trial judge failed to give the jury any cautionary or limiting instructions either immediately before or immediately after the recorded testimony of M.H. was played at trial. And the only relevant instruction that the trial judge ever gave the jury with regard to its consideration of M.H.'s recorded testimony occurred in the jury charge after the close of the evidence and was confusing, nonsensical, and inadequate to preclude the jury from improperly considering M.H.'s recorded testimony — which accused the defendant of having done something bad to her, while inside and in H.B.'s presence, during a sleepover at the defendant's home — as persuasive evidence of the defendant's guilt.[1]

The opening Brief for Appellant concluded its argument on this point by observing that because the trial court erred and infringed the defendant's Confrontation Clause rights in allowing M.H.'s recorded testimony to be shown to the jury, the prosecution bears the burden of showing that the introduction of that evidence was harmless beyond a reasonable doubt in order for Mr. Champagne's convictions to survive appeal. Yet the prosecution's Brief for Appellee filed in this

[1] The opening Brief for Appellant, at pages 17–19 and 30–32, describes the trial court's limiting instruction and explains in detail why it was plainly inadequate to preclude the jury from using M.H.'s videotaped testimony, which was not subjected to cross–examination, as evidence of defendant's guilt.

case contains absolutely no "harmless error" argument whatsoever, not even in the alternative in the event that this Court finds, as it must, that the admission of M.H.'s videotaped testimony, in the absence of cross–examination, was erroneous.

Instead, the prosecution's Brief for Appellee offers a lone ground for affirmance: that M.H.'s videotaped testimony, even in the absence of cross–examination, was admissible so that the jury could assess "the weight and credibility of the [out–of–court] statements that M.H. made to her mother," which were admitted through M.H.'s mother's testimony under the so–called "tender years" hearsay exception. *See* Brief for Appellee at 10.

The prosecution's "demeanor" argument suffers from two fatal flaws. First, the hearsay declarant's repetition under oath on the witness stand of the assertion that "the defendant committed crimes against me" does not allow a jury to assess the hearsay declarant's demeanor on some earlier date when the hearsay declarant supposedly made the same accusation, not under oath, to her mother. As both this Court and the Supreme Court of Pennsylvania have observed, one of the central reasons why courts are so reluctant to admit hearsay evidence is that the hearsay declarant "is not available in order that his demeanor and credibility may be assessed by the jury." *Commonwealth* v. *Thomas*, 908 A.2d 351, 354 (Pa. Super. Ct. 2006) (quoting *Commonwealth* v. *Bracero*, 515 Pa. 355, 362, 528 A.2d 936, 939 (1987)); *see also Commonwealth* v. *Green*, 525 Pa. 424, 465, 581 A.2d 544, 564 (1990) ("Hearsay of this sort is unreliable for three reasons: 1) the out-of-court declarant was not under oath; 2) the jury did not have the opportunity to observe the

demeanor of the out-of-court declarant; and 3) the out-of-court declarant was not subject to cross-examination.").

M.H.'s mother could, and in fact did, testify to M.H.'s demeanor when M.H. made out–of–court statements to her mother about the events at issue, which were admitted through M.H.'s mother's testimony under the so–called "tender years" hearsay exception. But M.H.'s demeanor during her videotaped testimony in the trial judge's chambers on the last business day before the start of the defendant's trial shed absolutely no light on M.H.'s demeanor on some earlier occasion while talking with her mother at home. M.H. may have been upset about testifying for any number of reasons, including that her allegations against the defendant were nothing but lies. Certainly, the jury can and should evaluate the credibility of witnesses whose testimony the jury directly observes, but a jury cannot evaluate the credibility of a witness's *out–of–court statement* to a third–party, made at a time when the jury could not observe the declarant's demeanor, based on how the witness appears on the stand while testifying at trial. In the final analysis, the prosecution's "demeanor" argument fails because M.H.'s demeanor in her videotaped partial testimony sheds absolutely no light on M.H.'s demeanor on some earlier occasion in a completely different setting.

The other major fatal flaw from which the prosecution's "demeanor" defense suffers is that the only way that the jury could use M.H.'s recorded testimony to evaluate the credibility of M.H.'s out–of–court statements about the events of the night of July 3, 2006 was if the jury accepted M.H.'s recorded testimony, which was

not subjected to cross–examination, as truthful, in direct violation of defendant's Confrontation Clause rights afforded under both the United States and Pennsylvania Constitutions. In other words, it was impossible for the jury to use M.H.'s recorded testimony to evaluate the credibility of M.H.'s earlier out–of–court statements without first accepting or rejecting M.H.'s recorded testimony as truthful substantive evidence.

This Court will recall that the only out–of–court statement against defendant attributed to M.H. that any witness was permitted to testify about at defendant's trial occurred in the testimony of M.H.'s mother that M.H. had said, while at home one day, that defendant had hurt her and, when asked where, that M.H. pointed between her legs. M.H.'s statement during her recorded testimony that defendant had done something bad to her can only influence the weight and credibility that they jury should attribute to M.H.'s earlier out–of–court statement to her mother if the jury accepted M.H.'s statement under oath as truthful, substantive testimony establishing that the defendant had in fact done something bad to her.

In sum, the jury could only evaluate the truthfulness of M.H.'s out–of–court statements to her mother if the jury accepted the truthfulness of M.H.'s videotaped testimony, not subject to cross–examination, accusing the defendant of criminal misconduct. The prosecution's "demeanor" argument, at the end of the day, proves too much, because the argument requires the jury to improperly rely on the substance of M.H.'s videotaped testimony, which the prosecution concedes is

inadmissible as evidence of defendant's guilt given that M.H. was not available for cross–examination.

Moreover, accepting the prosecution's "demeanor" argument in this case would have remarkably harmful results. In any case with an alleged child victim, the child would be entitled to take the stand and, under oath, accuse the defendant of criminal wrongdoing — without being subjected to cross–examination — solely for purposes of allowing the jury to evaluate the child's "demeanor" if the child had previously accused the defendant of wrongdoing out–of–court in a statement admissible under the "tender years" hearsay exception.

And the results of the prosecution's "demeanor" argument would not even be limited to cases involving alleged child victims. Assume a case in which two individuals are charged with conspiracy to commit murder. Assume that person B confessed to the police that he and person A agreed to murder a third–person. Assume further that person B's confession to the police would be admissible hearsay evidence at person A's trial through the police officer's testimony as an admission against interest by person B. Under the prosecution's remarkable "demeanor" argument in this case, person B could be called to the stand at person A's trial and would be allowed to repeat his confession that he and person A agreed to murder a third–person — without subjecting person B to any cross–examination by counsel for person A — solely to allow the jury to assess person B's demeanor when he originally confessed to the police officer outside of the jury's presence.

For these reasons, the prosecution's "demeanor" argument is utterly without merit. The prosecution cannot deny that defendant's conviction depends on the improper and unlawful admission of the videotaped testimony of M.H., not subjected to cross–examination, accusing the defendant of criminal conduct against her. That videotaped testimony was critical to the jury's determination that the defendant was guilty of having committed criminal offenses against both M.H. and H.B., and therefore a new trial is necessary.

B. The Trial Court's Sentencing Order Should Be Vacated To Allow The Trial Court To Award Defendant Credit Against His Sentence For All Time Previously Served In Connection With The Charges At Issue In This Case

In its Brief for Appellee, the prosecution agrees that the defendant is entitled to receive full credit for all time served while in custody on the charges at issue in this case, whether those charges were filed at the current action number or an earlier action number. Unfortunately, however, the trial court's sentencing order deprives defendant of full credit for all time served, because that order expressly limits defendant to "credit for any time heretofore served *solely on this action number*." *See* Order attached hereto as Exhibit C at page 1 (emphasis added).

The prosecution, in its Brief for Appellee, does not disagree that the aforementioned limitation on credit for time served violates 42 Pa. Cons. Stat. Ann. §9760(1), which entitles a defendant to credit for:

> all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody

> prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

42 Pa. Cons. Stat. Ann. §9760(1). Likewise, the trial judge, in his Rule 1925(a) opinion, also recognizes that the defendant's argument for full credit for all time served is meritorious.

Unfortunately, the current language contained in the trial court's sentencing order deprives the Pennsylvania Department of Corrections of its power to grant the defendant full credit for time served. This Court should therefore vacate the trial court's sentencing order and instruct the trial court on remand to delete from that order the restriction that "[t]he Defendant shall be accorded credit for any time heretofore served solely on this action number" and replace it with a statement in accordance with 42 Pa. Cons. Stat. Ann. §9760(1) that "[c]redit * * * shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial."

That relief will allow the Department of Corrections to properly credit defendant with all time served and will correct the error prohibiting that result which currently appears in the trial court's sentencing order.

C. Insufficient Evidence Exists To Support The Trial Court's Finding, By Clear And Convincing Evidence, That Defendant Qualifies As A "Sexually Violent Predator" Under Pennsylvania's Megan's Law

Given the prosecution's inability, in its Brief for Appellee, to establish that the admission at the prosecution's behest of M.H.'s videotaped testimony did not violate the defendant's Confrontation Clause rights, thus necessitating a new trial, it is perhaps unsurprising that the major focus of the Brief for Appellee is in tarnishing the defendant's character in trying to defend the trial court's finding that defendant should be classified as a "sexually violent predator" under Pennsylvania's Megan's Law.

However, as noted in defendant's opening Brief for Appellant, the cases in which this Court has affirmed a trial court's finding that a defendant convicted of qualifying offenses should be classified as a "sexually violent predator" ordinarily have involved defendants whose serious sexual abuse of children occurred over a substantial period of time and was especially cruel and heinous. In addition to the cases discussed in the opening Brief for Appellant at pages 44–45, this Court in the week after the Brief for Appellant was filed in this case issued its ruling in *Commonwealth* v. *Feucht*, 955 A.2d 377 (Pa. Super. Ct. 2008). In *Feucht*, the defendant pled guilty to indecent assault after having been charged with indecent assault and indecent contact with his own stepdaughter during a time that spanned from 2004 through March 2006, and this Court affirmed the trial court's decision finding that defendant Feucht was a "sexually violent predator." *Id.* at 379–83.

In contrast with the truly distressing facts of that case and the cases discussed in the opening Brief for Appellant, involving serious repeat sexual offenses against children, the key facts of this case relating to "sexually violent predator" status share much in common with the relevant facts in *Commonwealth* v. *Merolla*, 909 A.2d 337, 344 (Pa. Super. Ct. 2006), where, as this Court explained, the defendant "indicates a low risk of recidivism; he did not exceed the means necessary to commit the offense; and he did not display unusual cruelty during the commission of the crime."

If being exposed to pornography during one's youth, switching jobs to obtain more interesting or rewarding work, separating from one's spouse for a short time, and remarking to a child's parent that the child has the potential to develop into an attractive adult are surefire indicators that someone is a sexually violent predator, as the prosecution seems to argue, then this Court would permit a large percentage of adults to be so designated.

Because of the need due to the prosecution's Confrontation Clause violation to grant a new trial at which defendant Adam Champagne can again seek to persuade a jury that it should find him not guilty of these charges, the defendant hopes that this Court will not need to reach his challenge to the trial court's Megan's Law finding. But if this Court does need to reach this issue, the evidence of record is plainly insufficient to support the trial court's finding, under the applicable clear and convincing standard, that Adam Champagne deserves to be classified as a "sexually violent predator."

III. CONCLUSION

For all of the reasons set forth above and in defendant's opening Brief for Appellant, this Court should vacate Adam Champagne's convictions and remand for a new trial due to the Confrontation Clause violation that occurred when the trial court admitted into evidence the recorded testimony of M.H., which was not subjected to any cross–examination due to M.H.'s failure to complete her direct examination after she provided testimony under oath that was highly incriminating against the defendant.

In the unlikely event that this Court does not order a new trial, this Court should at a minimum vacate defendant's sentence to require the trial court to give defendant full credit for all time served in connection with these charges. And the trial court's order finding defendant to be a "sexually violent predator" should be set aside due to insufficient evidence to support that finding under the clear and convincing standard.

Respectfully submitted,

Dated: October 24, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing document upon the person and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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