APPENDIX

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DOCKET NO: CP-02-CR-0013390-2014
DATE OF ARREST: 06/20/2014
OTN: G 681589-6
SID: 418-09-67-1
DOB: 05/26/1978

ORDER OF SENTENCE - SOC

AND NOW, this 20th day of August, 2015, the defendant having been convicted in the above-captioned case is hereby sentenced by this Court as follows. The defendant is to pay all applicable fees and costs unless otherwise noted below:

Count 1 - 18 § 3121 §§ A1 - Rape Forcible Compulsion (F1)

To be confined for a minimum period of 66 Month(s) and a maximum period of 160 Month(s) at SCI Camp Hill.

This sentence shall commence on 08/20/2015.

To be placed on Probation - State (PBPP) Regular Probation - for a minimum period of 3 Year(s) and a maximum period of 3 Year(s) to be supervised by State Probation.
The following conditions are imposed:

Megan's Law Registration - Special Conditions: Charge specific special conditions

Megan's Law Registration - TIER 3 - Lifetime Registration: SORNA registration required for lifetime.

Contact - No Contact: Defendant is to have no contact with victim.

Count 2 - 18 § 3122.1 §§ B - Statutory Sexual Assault: 11 Years Older (F1)

To be confined for a minimum period of 30 Month(s) and a maximum period of 60 Month(s) at SCI Camp Hill.

Count 3 - 18 § 4302 - Incest (F2)

To be confined for a minimum period of 24 Month(s) and a maximum period of 48 Month(s) at SCI Camp Hill.

Count 4 - 18 § 901 §§ A - Criminal Attempt - Contact/Comm.W/Minor-Sexual Abuse (F2)

Offense Disposition: Guilty

Count 5 - 18 § 6301 §§ A1i - Corruption Of Minors (M1)

To be placed on Probation - State (PBPP) Regular Probation - for a minimum period of 2 Year(s) and a maximum period of 2 Year(s) to be supervised by State Probation.
The following conditions are imposed:

Megan's Law Registration - Special Conditions: Charge specific special conditions

Megan's Law Registration - TIER 3 - Lifetime Registration: SORNA registration required for lifetime.

Contact - No Contact: Defendant is to have no contact with victim.

Count 6 - 18 § 4304 §§ A - Endangering Welfare Of Children (M1)

To be placed on Probation - State (PBPP) Regular Probation - for a minimum period of 2 Year(s) and a maximum period of 2 Year(s) to be supervised by State Probation.
The following conditions are imposed:

Megan's Law Registration - Special Conditions: Charge specific special conditions

Megan's Law Registration - TIER 3 - Lifetime Registration: SORNA registration required for lifetime.

Contact - No Contact: Defendant is to have no contact with victim.

Count 7 - 18 § 3126 §§ A8 - Ind Asslt Person Less 16 Yrs Age (M2)

To be placed on Probation - State (PBPP) Regular Probation - for a minimum period of 2 Year(s) and a maximum period of 2 Year(s) to be supervised by State Probation.
The following conditions are imposed:

Megan's Law Registration - Special Conditions: Charge specific special conditions

Megan's Law Registration - TIER 3 - Lifetime Registration: SORNA registration required for lifetime.

Contact - No Contact: Defendant is to have no contact with victim.

Count 8 - 18 § 6301 §§ A1 - Corruption Of Minors (M1)

Offense Disposition: Withdrawn (Lower Court)

Count 9 - 18 § 4304 §§ A - Endangering Welfare Of Children (F3)

Offense Disposition: Withdrawn (Lower Court)

Count 10 - 18 § 3126 §§ A8 - Ind Asslt Person Less 16 Yrs Age (M2)

Offense Disposition: Withdrawn (Lower Court)

Count 11 - 18 § 3121 §§ C - Rape of Child ()

Offense Disposition: Dismissed (Lower Court)

LINKED SENTENCES:

Link 1
- CP-02-CR-0013390-2014 - Seq. No. 3 (18§ 4302 §§) - Confinement is Consecutive to
- CP-02-CR-0013390-2014 - Seq. No. 2 (18§ 3122.1 §§ B) - Confinement is Consecutive to
- CP-02-CR-0013390-2014 - Seq. No. 1 (18§ 3121 §§ A1) - Confinement

Link 2
- CP-02-CR-0013390-2014 - Seq. No. 1 (18§ 3121 §§ A1) - Probation is Consecutive to
- CP-02-CR-0013390-2014 - Seq. No. 3 (18§ 4302 §§) - Confinement

Link 3
- CP-02-CR-0013390-2014 - Seq. No. 5 (18§ 6301 §§ A1i) - Probation is Consecutive to
- CP-02-CR-0013390-2014 - Seq. No. 1 (18§ 3121 §§ A1) - Probation

Link 4
- CP-02-CR-0013390-2014 - Seq. No. 7 (18§ 3126 §§ A8) - Probation is Concurrent with
- CP-02-CR-0013390-2014 - Seq. No. 6 (18§ 4304 §§ A) - Probation is Concurrent with
- CP-02-CR-0013390-2014 - Seq. No. 5 (18§ 6301 §§ A1i) - Probation

The defendant shall receive credit for time served as follows:

Confinement Location	Start Date	End Date	Days Credit
Allegheny County Jail	05/29/2015	08/20/2015	84
Total			**84**

BY THE COURT:

08/20/2015

Jill E. Rangos

Judge Jill E. Rangos

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS JEFFREY,

Appeal of:

THOMAS JEFFREY,
Appellant

CRIMINAL DIVISION

CC No. 201413390

OPINION

Honorable Jill E. Rangos
Courthouse
436 Grant Street
Pittsburgh, PA 15219

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA — CRIMINAL DIVISION

v. — **CC No. 201413390**

THOMAS JEFFREY

Appeal of:

THOMAS JEFFREY,

Appellant.

OPINION

RANGOS, J. **April 22, 2016**

On May 29, 2015, Appellant was convicted by a jury of Rape[1], Statutory Sexual Assault[2], Incest[3], Criminal Attempt[4], Corruption of Minors[5], Endangering the Welfare of Children[6], and Indecent Assault[7]. On August 20, 2015 this Court imposed the following sentences: Count 1, Rape: 66-160 months incarceration with 3 years consecutive probation; Count 2, Statutory Sexual Assault: 30-60 months incarceration; Count 3, Incest: 24-48 months incarceration; Count 5, Corruption of Minors: 2 years probation; Count 6, Endangering the Welfare of Children: 2 years probation; and Count 7, Indecent Assault: 2 years probation. All counts were run consecutively. Appellant filed a post-sentence motion on August 21, 2015. This Court denied the post-sentence motion on October

[1] 18 Pa.C.S. § 3121 §§ A1
[2] 18 Pa.C.S. § 3122.1 §§ B
[3] 18 Pa.C.S. § 4302
[4] 18 Pa.C.S. § 901 §§ A
[5] 18 Pa.C.S. § 6301 §§ A(1)(i)
[6] 18 Pa.C.S. § 4304 §§ A
[7] 18 Pa.C.S.§ 3126 §§ A(8)

13, 2015. On November 12, 2015, Appellant filed a Notice of Appeal. Appellant filed a timely Statement of Errors Complained of on Appeal on January 5, 2016.

MATTERS COMPLAINED OF ON APPEAL

Appellant raises eight issues on appeal. First, Appellant alleges this Court abused its discretion by allowing statements made by Joanna Jeffrey, the victim, to the police in the Emergency Room ("ER") of Children's Hospital. (Concise Statement of Errors Complained of on Appeal, at 3). Specifically, Appellant alleges that Joanna's statements were testimonial in nature, and as such, inadmissible under the Sixth Amendment of the United States Constitution, and Article 1, Section 9 of the Pennsylvania Constitution. *Id.*

Second, Appellant alleges this Court abused its discretion by admitting testimony and documentation of statements made by Joanna to Doctors Plesa and Toto. *Id.* Appellant asserts that these statements were not made for purposes of Medical Diagnosis or Treatment and were inadmissible hearsay. *Pa.R.Evid. 803(4). Id.*

Third, Appellant alleges this Court erred in denying his Petition for Habeas Corpus Relief. *Id.* Appellant alleges Pa.R.Crim.P Rule 542(e) is unconstitutional to the extent it permits a magistrate to bind criminal charges to the Court of Common Pleas based on hearsay alone. Appellant claims that Rule 542(e) violated his fundamental right of Due Process, and his right to confront witnesses against him. *Id.* at 4.

Fourth, Appellant alleges this Court erred by denying Appellant's Post-Sentence Motion and failed to grant a new trial for after-discovered evidence and discovery violations which Appellant discovered post-verdict. *Id.* Here, Appellant refers to Joanna's letter dated July 28, 2015, in which she states that she fabricated the entire allegation. *Id.* At a subsequent hearing on Defendant's Motion for New Trial, Joanna testified under oath, in camera, that she had fabricated her allegation and that

she had disclosed this fabrication to Detective Kuma and Assistant District Attorney Lee Goldfarb at a preliminary hearing 9 months prior to trial. *Id.* Appellant alleges this evidence was never disclosed to Appellant prior to trial.

Fifth, Appellant alleges that this Court erred by admitting, through the testimony of Tabitha Hill, evidence of unauthenticated text messages purportedly sent by Joanna. *Id.* Specifically, Appellant alleges that the Commonwealth did not provide sufficient evidence under Pa.R.Evid. 901(A) to support a finding that the text messages were authored by Joanna. *Id.* Additionally, Appellant argues that since Joanna did not testify, the text messages were improperly admitted under the "prompt complaint" exception. *Id.*

Sixth, Appellant alleges that this Court erred by admitting hearsay statements, made by Joanna, through testimony of Patrolman Christopher Burns. *Id.* at 5. Since Joanna did not testify, Appellant argues it was improper to admit these statements as evidence of a "prompt complaint." *Id.*

Seventh, Appellant alleges that this Court erred by denying his Motion to Suppress his confession. *Id.* And finally, Appellant alleges that the evidence was not sufficient to convict Appellant of any and all of the charges. *Id.*

STATEMENT OF FACTS

The victim in this case, Joanna, is the oldest daughter of Appellant. She did not testify at trial. Joanna's church youth leader, Tabitha Hill, testified that on June 19, 2014, shortly after 10:00 p.m., she received text messages from Joanna. (Jury Trial Transcript, hereinafter "TT," at 139) Earlier that day, she and Joanna had returned home from a church trip. *Id.* The first text message from Joanna to Hill stated "It happened again." (TT 143) Hill responded "What happened again?" *Id.* Joanna replied "What I told you about earlier." *Id.* Joanna then began to describe details of a sexual assault that had taken place moments prior. (TT 144) Hill testified that, while on the church trip, Joanna

had disclosed to Hill that her father had been sexually assaulting her. (TT 145) Uncertain of what to do, Hill called her pastor who notified the police. (TT 144-145)

Officer Christopher Burns responded to the call and arrived to the Jeffrey residence. (TT 109) Joanna disclosed to Officer Burns that she had been sexually assaulted by her father, the defendant. (TT 113) Joanna was transported to Children's Hospital of Pittsburgh, where she initially met with the resident physician, Dr. Toto. (TT 113) Dr. Toto testified that, as she does with all incoming patients, she asked Joanna her reason for coming to the ER. (TT 73) Joanna disclosed to Dr. Toto that she had been sexually assaulted that evening, penile penetration was involved, no condom was worn, and that the perpetrator sucked on her earlobe and ejaculated on her thigh. (TT 75-76) Dr. Toto created a medical record containing Joanna's disclosure and the recommended course of treatment. (TT 79) While Dr. Toto was consulting with her attending physician about the plan of treatment, Joanna's mother arrived. After that, Joanna refused all treatment, including a sexual assault kit and testing for sexually transmitted diseases. (TT 77)

As a result of Joanna's disclosure, Officer Burns returned to the Jeffrey home that night and collected Joanna's duvet cover. (TT 113) Elizabeth Wisbon, a scientist in the Allegheny County Office of the Medical Examiners Forensic Laboratory Division, testified that Appellant's sperm was present on Joanna's duvet cover. (TT 152) The following morning, Appellant made a full recorded confession to detectives at the Allegheny County Police Headquarters. (TT 240-244)

Two months after the guilty verdict but shortly before sentencing, Joanna's therapist forwarded a letter of recantation written by Joanna to this Court. This Court held an in camera hearing on the record and with counsel present. At that hearing, Joanna was represented by counsel and chose not assert a 5th Amendment privilege. Joanna testified that she wrote the letter dated July 28, 2015 that began "To Whom it May Concern." (Transcript of in camera proceeding of August 21, 2015, hereinafter IC at 16) Joanna could not recall why she made a disclosure to Hill or exactly what she

said. (IC 24) She said that she chose to make her father the target of a sexual abuse allegation because she was mad at the fact that she was not enjoying her experience at camp and he was the last person with whom she spoke, and he had encouraged her to stay at the camp. (IC 25) She testified that she didn't know how to back out of what she said and texted to Hill, even though she also said she did not remember making any statements. (IC 39) She denied that anything inappropriate happened between her and Appellant. (IC 45) She testified that one of the detectives threatened her that if she refused to testify at the preliminary hearing against her father, both she and her mother would go to jail. (IC 60) Further, she said that she made up the detailed allegations of sexual abuse by her father because she wanted to get the police officers who interviewed her to leave. (IC 97)

DISCUSSION

First, Appellant alleges that this Court abused its discretion by admitting testimonial statements made by Joanna in the ER of Children's Hospital. The admission of evidence is committed to the sound discretion of the trial court. *Commonwealth v. Smith,* 681 A.2d 1288, 1289 (Pa. 1996). The standard of review is abuse of discretion. *Id.* Discretion is abused when the course pursued by the trial court represents not merely an error of judgment, but where the judgment is manifestly unreasonable, or where the law is not applied, or where the record shows that the action is a result of partiality, prejudice, bias, or ill will. *Id.*

On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, which held that the Sixth Amendment Confrontation Clause requires unavailability and a prior opportunity to cross-examine a witness only where testimonial statements are at issue. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004). Although *Crawford* does not define "testimonial statements," it describes general classes of statements that may be testimonial in nature. *Id.* The first class includes *ex parte* in-court testimony, or its functional equivalent, such as affidavits, custodial determinations, prior

testimony, pretrial statements, depositions, or confessions that the declarant would *reasonably expect* to be used in litigation. *Id.* The second class of testimonial statements includes statements made to police in the course of interrogation. *Id.*

Here, the statements at issue were made to Dr. Toto, a resident physician in the ER of Children's Hospital. (TT 75). Dr. Toto testified that Jeffrey disclosed to her that her reason for visiting the ER was because she had been sexually assaulted. *Id.* In the privacy of a hospital room, Dr. Toto asked more specific details for the purpose of diagnosis and planning the most appropriate course of treatment. *Id.* This conversation between Jeffrey and Dr. Toto does not fit into either of the classes of testimonial statements described in *Crawford.* It was not *ex parte* in-court testimony, or its functional equivalent, nor was it a statement made to a police officer. Dr. Toto testified that she asks every patient what brings her into the ER. *Id.* Furthermore, the declarant, Joanna, would not reasonably expect her statements to a doctor in an ER to be used later in litigation. Joanna's statements to Dr. Toto were not testimonial in nature pursuant to *Crawford*, and therefore, their admission does not violate the Appellant's Sixth Amendment right to confront witnesses against him. *See, e.g. Commonwealth v. Dyarman,* 73 A.3d 565, 570-571 (Pa. 2013); *Commonwealth v. Yohe,* 79 A.3d 520, 527 (Pa. 2013).

Appellant also alleges that this Court abused its discretion by admitting the testimony of doctors and medical documentation of hearsay statements made by Joanna to Drs. Toto and Plesa in violation of *Pennsylvania Rule of Evidence 803(4).* Rule 803(4) provides that:

Statement Made for Medical Diagnosis or Treatment. A statement that:

> **(A)** is made for--and is reasonably pertinent to--medical treatment or diagnosis in contemplation of treatment; and
> **(B)** describes medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

Pa.R.E. 803.

The medical treatment exception to the hearsay rule provides that testimony repeating out-of-court statements made for the purposes of receiving medical treatment is admissible as substantive evidence. *Commonwealth v. Smith*, 681 A.2d 1288, 1289 (Pa. 1996). Statements to a doctor are admissible insofar as they are necessary and proper for diagnosis and treatment of the injury and refer to symptoms, feelings, and conditions. *Id.* The identity of the perpetrator of alleged abuse, however, is not reasonably pertinent to the diagnosis or treatment of the patient. *Id.* at 1292.

Drs. Plesa and Toto's statements, both written in the reports and orally at trial, that Joanna told them she had suffered a sexual assault involving penile penetration, that no condom was worn, and that the perpetrator sucked on her right ear (an allegation corroborated by Dr. Toto's observation of a red mark on Joanna's right earlobe (TT 76)), were reasonably pertinent to treatment and described the inception and general cause of the current symptoms. None of the admitted evidence pertaining to the doctors' testimony or the ER records violates *Rule 803(4).*[8]

Appellant next alleges that the denial of his Petition for Habeas Corpus Relief was an error of law because *Pennsylvania Rule of Criminal Procedure Rule 542(E)* is unconstitutional, specifically, as it violates his fundamental right of Due Process. Pa.R.Crim.P. Rule 542(E) provides, "Hearsay as provided by law shall be considered by the issuing authority in determining whether a prima facie case has been established. Hearsay evidence shall be sufficient to establish any element of an offense."

Some confusion on this issue arose after the Pennsylvania Supreme Court decision in *Commonwealth ex rel. Buchanan v. Verbonitz,* 581 A.2d 172, 174 (Pa. 1990). In *Verbonitz,* the Court opined that in order to establish a prima facie case, "the Commonwealth must produce legally competent evidence, which demonstrates the existence of each of the material elements of the crime charged." 581 A.2d at 174. The plurality held that inadmissible hearsay was not "legally competent evidence."

[8] The doctors' testimony and the written reports were both redacted so as not to indicate father as the perpetrator. (TT 421).

Id. Because it was a plurality decision, *Verbonitz* is not binding on this Court.[9] Further, the *Official Comment* to *Pa.R.Crim.P. Rule 542(E)* provides,

> Paragraph (E) was amended in 2013 to reiterate that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See the Pennsylvania Rules of Evidence* generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense.

Pa.R.Crim.P. Rule 542, Official Comment.

The Pennsylvania Legislature made clear in its 2013 amendment of Pa.R.Crim.P. Rule 542(E) that, at a Preliminary Hearing, hearsay may be used to establish a prima facie case. It is presumed that a state legislature, when enacting law, acts constitutionally. *Commonwealth v. Swinehart,* 664 A.2d 957, 961 (Pa. 1995).

Furthermore, the denial of Appellant's pretrial habeas corpus petition is a moot issue as a result of his conviction. It is well established that once a verdict has been rendered by a jury all questions about the preliminary hearing are moot. See: *Commonwealth v. McCullough,* 461 A.2d 1229 (Pa. 1983) (Once the Commonwealth establishes at trial that the evidence was sufficient beyond a reasonable doubt, any question regarding insufficient evidence at the preliminary hearing is irrelevant); *Commonwealth v. Jacobs,* 640 A.2d 1326 (Pa.Super. 1994) (Once a defendant has gone to trial and has been found guilty of a crime, any alleged defect in the preliminary hearing is rendered immaterial). Appellant's claim that this Court erred in denying his Petition for Habeas Corpus Relief is without merit.

Fourth, Appellant alleges this Court erred in denying a Motion for New Trial on the basis of after discovered evidence, specifically a letter dated July 28, 2015 by Joanna. Two months after her

[9] *Shinal v. Toms,* 122 A.3d 1066 (Pa.Super.2015).

father was convicted, Joanna wrote a recantation letter saying she lied about the sexual assault allegations she made against her father.

The standard for an after-discovered evidence claim is as follows:

> A new trial must be granted on the basis of after-discovered evidence only if the evidence (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely for impeaching credibility of a witness; and (4) is of such nature and character that a different verdict will likely result if a new trial is granted.

Commonwealth v. Colson, 490 A.2d 811, 826 (Pa. 1985) (quoting *Commonwealth v. Valderrama,* 388 A.2d 1042, 1045 (Pa. 1985).

After the conclusion of a Post Sentence Motion Hearing, this Court determined that Joanna's recantation was not credible. Joanna initially disclosed that her father had been sexually abusing her to her camp counselor and implored her counselor not to tell anyone because her mother couldn't handle it. (TT 144) While Joanna was subpoenaed as a witness, neither the Commonwealth nor Appellant chose to call her to testify at trial. After receiving the recantation letter, this Court conducted an interview of Joanna in chambers. Based upon the interview, and considering all testimony and collateral material from trial, Joanna's purported inability to recall any events pertaining to the sexual assaults or her disclosures, and evidence of considerable pressure placed on Joanna by her family[10], this Court did not find Joanna's recantation to be credible. (Post Trial Motion at 30). "Recanting testimony is exceedingly unreliable, and it is the duty of the (trial) court to deny a new trial where it is not satisfied that such (recanting) testimony is true." *Commonwealth v. Coleman*, 264 A.2d 649, 651 (Pa. 1970). *See also, e.g., Commonwealth v. Lopinson*, 234 A.2d 552 (Pa. 1967); *Commonwealth v. Palarino*, 77 A.2d 665 (Pa.Super. 1951). For this reason, "(t)he well-established rule is that an appellate

[10] Joanna testified that her disclosures, combined with other factors, ultimately resulted in Joanna and all four of her siblings being removed from mother and placed with various family members. (IC 70-76) She also stated that she was aware that Appellant had confessed and that her siblings Emily and Ben had also made disclosures. (IC 101)

court may not interfere with the denial or granting of a new trial where the sole ground is the alleged recantation of state witnesses unless there has been a clear abuse of discretion." *Coleman,* at 651.

Fifth, Appellant alleges this Court erred by admitting evidence, through the testimony of Tabitha Hill, Joanna's camp counselor, of unauthenticated hearsay statements, made via text messages. Specifically, Appellant alleges the Commonwealth did not provide sufficient evidence to support a finding that the text messages were authored by Joanna, as required under *Pennsylvania Rule of Evidence 901(A).*

In order to use content from a cell phone as testimonial evidence in a criminal prosecution, the Commonwealth must clearly prove its authenticity. *Commonwealth v. Mosley,* 2015 PA Super 88, 114 A.3d 1072, 1084. Authentication of electronic communications requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required. *Commonwealth v. Koch,* 39 A.3d 996, 1005 (Pa.Super. 2011). *Rule 901(A)* provides examples of evidence that would satisfy the requirement to authenticate electronic evidence. The examples relevant to this case include (1) *Testimony of a Witness with Knowledge*: testimony that an item is what it is claimed to be, (4) *Distinctive Characteristics and the Like*: the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with the circumstances. Pa.R.Evid. Rule 901(b)(1) and (4).

The text messages at issue were sent from Joanna's phone to her youth leader from summer camp, Tabitha Hill. (TT 139). The conversation began with a text message from Joanna to Hill shortly after 10:00 p.m. on the night Joanna returned from her church camp. The text read, "It happened again." (TT 143) The conversation then describes the sexual assault of Joanna by her father, the details of which are confirmed by Appellant's confession the next morning. (TT 143-44). The original text refers back to the disclosures Joanna made to Hill while they were at camp. These messages were properly authenticated because, not only did they come from Joanna's cell phone number, but they

related to a private conversation held earlier in the day between Joanna and Hill. (TT 143). It is Hill's testimony that only she and Joanna were present for the prior conversation in which Joanna described the details of ongoing sexual abuse by her father. Due to the content of the text messages, this Court found that only Joanna could have been the author. (TT 145). This Court determined that the text messages were properly authenticated.

Sixth, Appellant alleges this Court erred by admitting evidence of the hearsay statements purportedly made by Joanna through testimony of Officer Burns. Evidence of a complaint of sexual assault is competent evidence properly admitted when it is limited to establish that a complaint was promptly made and also to identify the occurrence complained of with the offense charged. *Commonwealth v. Stohr,* 522 A.2d 589, 592 (Pa.Super. 1987).

Officer Burns' testimony was sufficiently limited to establish only that a complaint was made and to identify the occurrence complained of with the offense charged. The testimony is as follows:

> Q: Thank you, Officer Burns. You met with Joanna?
> A: Yes, ma'am.
> Q: What happened when you met with her?
> A: I spoke with her. I told her why we were here and asked her if there was anything she wanted to talk to me about. Through the conversation, she did disclose that she had been sexually assaulted recently that day. I then spoke with her mother and transported both of them back to the station. That's when I contacted the County Police.

Further, the statements were used to lay a foundation for what the Officer did next and were not admitted to prove the truth of the matter asserted. Appellant's argument that this Court erred by admitting Officer Burns' testimony is without merit.

Seventh, Appellant alleges that this Court erred by admitting evidence of Appellant's confession to the police, specifically that the denial of Appellant's Motion to Suppress was an error of law. The standard of review in determining whether the trial court properly denied a suppression motion is whether the record supports the factual findings and whether the legal conclusions drawn from these facts are correct. *Commonwealth v. Stevenson,* 894 A.2d 759, 769 (Pa.Super. 2006).

On June 20, 2014, the day after Joanna's disclosure, Appellant was contacted by the police and asked if he wanted to come in for an interview. Appellant freely accepted that invitation. Upon arrival at the Allegheny County Police Department, Appellant signed a written waiver indicating that he had been provided with and understood his *Miranda* rights. *Miranda v. Arizona,* 86 S.Ct. 1602 (1966). Less than two hours later, Appellant voluntarily gave a recorded confession with two officers present where he again stated that he has been provided with and understood his rights. (*See* Recorded Statement at 1). The confession proceeded in relevant part as follows:

> Detective Kuma: Mr. Jeffrey, you were advised of your rights prior to making this recorded statement, is that correct.
> Thomas Jeffrey: Yes.
> Detective Kuma: And you understand those rights, is that correct?
> Thomas Jeffrey: Yes.
> Detective Kuma: Having those rights in mind do you agree to provide a recorded statement?
> Thomas Jeffrey: Yes.
> Detective Kuma: Please tell us in your own words what you know about the incident in question involving your daughter Joanna.

Appellant then admitted that he sexually assaulted his daughter on the night in question and that he "finished" on her thigh.[11] At no point during his recorded statement did Appellant request counsel, refuse to participate, or even appear agitated. In fact, Appellant appeared cooperative throughout the interview. When Detective Kuma asked if Appellant had anything further to add to his statement, Appellant apologized to his daughter. The recorded interview lasted six minutes. The record does not reflect any coercion, duress, or police misconduct in obtaining Appellant's recorded statement. Appellant's argument is without merit.

Finally, Appellant alleges that the evidence was not sufficient to support a conviction on any of the charges. Specifically, that Joanna never testified and the entire case against Appellant was made

[11] His statement is consistent with the scientific evidence showing his sperm in multiple locations on her bedding, which evidence was not available until months after his statement.

through inadmissible testimony. The test for reviewing a sufficiency of the evidence claim is well settled:

> [W]hether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt.... This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.

Commonwealth v. Hardcastle, 546 A.2d 1101, 1105 (Pa., 1988) (citations omitted).

Appellant's argument is misplaced. As discussed *supra,* the testimony and evidence properly admitted at trial support the verdict. Further, overwhelming physical evidence, specifically Appellant's sperm on Joanna's duvet cover as well as Appellant's recorded confession to police corroborate statements made by Joanna and admitted into evidence through other witnesses. (Recorded Statement at 1-2). Viewing the evidence in the light most favorable to the Commonwealth, the jury verdict is supported by sufficient evidence to establish beyond a reasonable doubt that Appellant was guilty of Rape, Statutory Sexual Assault, Incest, Criminal Attempt, Corruption of Minors, Endangering the Welfare of Children, and Indecent Assault.

CONCLUSION

For the above reasons, the rulings of this Court shall be AFFIRMED.

BY THE COURT:

Jill E. Rangos J.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this OPINION was mailed to the following individuals by first class mail, postage prepaid on the 22nd day of April 2016.

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James J. Robertson

James J. Robertson, Law Clerk for Jill E. Rangos

J-A01016-17

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

COMMONWEALTH OF PENNSYLVANIA, Appellee v. THOMAS A. JEFFREY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1787 WDA 2015

Appeal from the Judgment of Sentence of August 20, 2015
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0013390-2014

BEFORE: BOWES, OLSON and STRASSBURGER,* JJ.

MEMORANDUM BY OLSON, J: **FILED JULY 14, 2017**

Appellant, Thomas A. Jeffrey, appeals from the judgment of sentence entered on August 20, 2015, following his jury trial convictions for rape, statutory sexual assault, incest, criminal attempt, corruption of minors, endangering the welfare of a child, and indecent assault.[1] We affirm.

The trial court set forth the facts of this case as follows:

> The victim in this case, [J.J.],[2] is the oldest daughter of Appellant. She did not testify at trial. [J.J.'s] church youth leader, Tabitha Hill, testified that on June 19, 2014, shortly after 10:00 p.m., she received text messages from [J.J.] Earlier that day, she and [J.J.] had returned home from a church trip. The first text message from [J.J.] to Hill

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[1] 18 Pa.C.S.A. §§ 3121, 3122.1, 4302, 901, 6301, 4304, and 3126, respectively.

[2] Because the victim was a minor, we use her initials to protect her identity.

*Retired Senior Judge assigned to the Superior Court.

> stated[,] "It happened again." Hill responded[,] "What happened again?" [J.J.] replied[,] "What I told you about earlier." [J.J.] then began to describe details of a sexual assault that took place moments prior. Hill testified that, while on the church trip, [J.J.] had disclosed to Hill that her father had been sexually assaulting her. Uncertain of what to do, Hill called her pastor who notified the police.
>
> Officer Christopher Burns responded to the call and arrived at the Jeffrey residence. [J.J.] disclosed to Officer Burns that she had been sexually assaulted by her father, [Appellant]. [J.J.] was transported to Children's Hospital of Pittsburgh, where she initially met with the resident physician Dr. [Regina] Toto. Dr. Toto testified that, as she does with all incoming patients, she asked [J.J.] her reason for coming to the ER. [J.J.] disclosed to Dr. Toto that she had been sexually assaulted that evening, penile penetration was involved, no condom was worn, and that the perpetrator sucked on her earlobe and ejaculated on her thigh. Dr. Toto created a medical record containing [J.J.'s] disclosure and the recommended course of treatment. While Dr. Toto was consulting with her attending physician about the plan of treatment, [J.J.'s] mother arrived. After that, [J.J.] refused all treatment, including a sexual assault kit and testing for sexually transmitted diseases.
>
> As a result of [J.J.'s] disclosure, Officer Burns returned to the Jeffrey home that night and collected [J.J.'s] duvet cover. Elizabeth Wisbon, a scientist in the Allegheny County Office of the Medical Examiners Forensic Laboratory Division, testified that Appellant's sperm was present on [J.J.'s] duvet cover. The following morning, Appellant made a full, recorded confession to detectives at the Allegheny County Police [h]eadquarters.

Trial Court Opinion, 4/22/2016, at 4-6 (record citations omitted).

A jury convicted Appellant of the aforementioned charges on May 29, 2015. On August 20, 2015, prior to sentencing, Appellant filed a notice of his intention to seek an oral motion for extraordinary relief pursuant to Pa.R.Crim.P. 704(b). Therein, Appellant argued that he was entitled to a

new trial because he received a copy of a handwritten recantation letter from the victim dated July 28, 2015, after the trial in this matter. The case proceeded to sentencing on August 20, 2015, wherein the trial court orally denied Appellant's motion for extraordinary relief and then sentenced Appellant to an aggregate sentence of 10 to 22½ years of imprisonment followed by a consecutive term of seven years of probation.

On August 21, 2015, Appellant filed a post-sentence motion, again requesting a new trial, but this time based upon after-discovered evidence of the victim's purported repudiation letter. Moreover, in further support of his post-sentence motion, Appellant alleged that a detective (later identified as Detective Michael Kuma) testified at the victim's dependency hearing held on November 7, 2014. Appellant claimed that Detective Kuma indicated at the dependency hearing that the victim had retracted her initial allegations against Appellant near in time to the preliminary hearing in this matter.

On August 21, 2015, the trial court conducted an *in camera* hearing wherein it questioned the victim about her alleged recantation:

> At that hearing, [J.J.] was represented by counsel and chose not [to] assert a 5th Amendment privilege. [J.J.] testified that she wrote the letter dated July 28, 2015 that began "To Whom it May Concern." [J.J.] could not recall why she made the disclosure to Hill or exactly what she said. She said that she chose to make her father the target of a sexual abuse allegation because she was mad at the fact that she was not enjoying her experience at camp and he was the last person with whom she spoke, and that he encouraged her to stay at the camp. She testified that she didn't know how to back out of what she said and texted to Hill, even though she also said she did not remember making any statements. She denied that anything

> inappropriate happened between her and Appellant. She testified that one of the detectives threatened her that if she refused to testify at the preliminary hearing against her father, both she and her mother would go to jail. Further, she said that she made up the detailed allegations of sexual abuse by her father because she wanted to get the police officers who interviewed her to leave.

Trial Court Opinion, 4/22/2016, at 6.

On October 13, 2015, the trial court resumed its hearing wherein Detective Kuma testified. Despite presenting Detective Kuma with transcripts from the victim's dependency hearing indicating he stated that the victim had retracted her allegations at a meeting prior to the preliminary hearing, Detective Kuma still denied saying that J.J. had recanted. At the conclusion of the October 2015 hearing, the trial court orally denied Appellant relief on his post-sentence motion. This timely appeal resulted.[3]

On appeal, Appellant presents the following issues for our review:

> I. Whether the [t]rial [c]ourt erred and abused its discretion by denying Appellant a full evidentiary hearing on his [m]otion in [l]imine and admitt[ing] evidence of testimonial statements made by J.J. where the statements obtained were obtained by law enforcement with the primary purpose to establish past events relevant to its criminal prosecution of [Appellant]?

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[3] On November 12, 2015, Appellant filed a notice of appeal. On November 13, 2015, the trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied timely after the trial court granted him an extension. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 22, 2016.

II. Whether the [t]rial [c]ourt erred and abused its discretion by admitting the testimony of Doctors Jocelyn Plesa and Regina Toto regarding J.J.'s statements made at Children's Hospital under Pennsylvania Rules of Evidence 803(4), where the statements were not made for purposes of medical diagnosis or treatment?

III. Whether the [t]rial [c]ourt erred in dismissing Appellant's [p]ost-[s]entence [m]otion for a [n]ew [t]rial when the record established that the Commonwealth failed to disclose materially relevant evidence to the [d]efense, namely, that J.J. had recanted her allegation at the preliminary hearing, nine months prior to trial?

IV. Whether the [t]rial [c]ourt erred in denying Appellant's [p]etition for [w]rit of [h]abeas [c]orpus where the only evidence presented at the preliminary hearing was rank hearsay, which subsequently denied [Appellant] his fundamental right of due process guaranteed by the Fifth and Sixth Amendment to the United States Constitution, as well as Article I, Section 9, of the Pennsylvania Constitution?

V. Whether there was sufficient evidence as a matter of law for the jury to convict [Appellant] of [r]ape where the Commonwealth failed to establish the [f]orcible [c]omplusion element of 18 Pa.C.S.A. § 3121(a)(1) beyond a reasonable doubt?

Appellant's Brief at 7-8.

In his first issue presented, Appellant argues that the trial court erred when it failed to hold an evidentiary hearing on his motion *in limine* seeking to exclude J.J.'s statements to medical personnel as testimonial. ***Id.*** at 14. Essentially, Appellant argues that the police exerted such control over the questioning of the victim at the hospital, that her statements were not elicited primarily for medical treatment. Instead, Appellant avers, "the

primary purpose behind law enforcement's interview with J.J. [at the hospital] on June 20, 2014, was to establish past events relevant to its criminal prosecution of [Appellant]." ***Id.*** Appellant suggests that the victim never actually spoke with emergency room doctors and "contends the two doctors generated their respective reports as the result of information received from the detectives and the victim's mother." ***Id.*** at 47. Accordingly, Appellant suggests that if he had been able to establish who was present in the examining room with J.J., he could have shown that the police, rather than the medical personal, were eliciting J.J.'s statements in order to prosecute Appellant. ***Id.*** at 20-25. Appellant contends that police "intercepted J.J. at Children's Hospital four minutes after her arrival and [] they were the first to question her." ***Id.*** at 25. Appellant argues that the victim did not independently seek medical treatment and there was no on-going emergency, "[r]ather, [the victim] was transported to the hospital at the express instruction of law enforcement[.]" ***Id.*** at 34 (emphasis omitted). Appellant contends that, once at the hospital, the police secured J.J.'s hospital room and began questioning, which functioned as the equivalent to a police interview room and a custodial interrogation. ***Id.*** at 38-40. Thus, Appellant argues that "J.J.'s statements were made in response to questioning directed and controlled by law enforcement, with the primary purpose of building a case against" Appellant, in violation of his right to confrontation under the United States and Pennsylvania Constitutions. ***Id.*** at 25-44.

Generally, our standard of review of a trial court's evidentiary ruling is whether the trial court abused its discretion. ***Commonwealth v. Minerd***, 753 A.2d 225 (Pa. 2000). However, "[an] assertion of a Confrontation Clause violation presents an issue of law. Our scope of review is plenary and our standard of review is *de novo.*" ***Commonwealth v. (Donald Earl) Williams,*** 103 A.3d 354, 358 (Pa. Super. 2014).

Our Supreme Court has explained:

> Under both the United States Constitution and the Pennsylvania Constitution, the right to confrontation specifically guarantees a person accused of a crime the right to be confronted with the witnesses against him. As the United States Supreme Court has explained, the right to confrontation is basically a trial right, and includes both the opportunity for cross-examination of the witnesses and the occasion for the jury to consider the demeanor of the witnesses. The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.

Commonwealth v. (Gordon Charles) Williams, 84 A.3d 680, 684 (Pa. 2014) (internal citations and quotations omitted).

This Court has examined United States Supreme Court jurisprudence regarding the Confrontation Clause and noted:

> The principle evil at which the Confrontation Clause was directed was the civil-law mode of procedure, and particularly its use of *ex parte* communications as evidence against the accused. Likewise, the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. The [United States Supreme] Court [in the seminal case of ***Crawford v. Washington***, 541 U.S. 36 (2004)] found no occasion to offer a comprehensive definition of [the term] testimonial. Whatever

else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.

* * *

[In a decision following ***Crawford***, the United States Supreme Court] distinguished testimonial and nontestimonial hearsay:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The [United States] Supreme Court confirmed that the protection of the Confrontation Clause attaches only to testimonial hearsay.

* * *

[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred. The existence of an ongoing emergency is important because it indicates that the declarant's purpose in speaking was to help resolve a dangerous situation rather than prove past events[:]

> The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and

> magnitude of a continuing threat to the victim, themselves, and the public.

(Donald Earl) Williams, 103 A.3d at 358–361 (internal citations and quotations omitted).

Here, the trial court rejected Appellant's suggestion that the police dominated or directed the interview with the victim in the hospital, opining:

> [T]he [challenged] statements at issue [at trial] were made to Dr. Toto, a resident physician in the ER of Children's Hospital. Dr. Toto testified that [J.J.] disclosed to her that her reason for visiting the ER was because she had been sexually assaulted. In the privacy of the hospital room, Dr. Toto asked for more specific details for the purpose of diagnosis and planning the most appropriate course of treatment. This conversation between [J.J.] and Dr. Toto does not fit into either of the classes of testimonial statements described in ***Crawford***. It was not *ex parte* in-court testimony, or its functional equivalent, nor was it a statement made to a police officer. Dr. Toto testified that she asks every patient what brings her into the ER. Furthermore, the declarant, [J.J.] would not reasonably expect her statements to a doctor in the ER to be used later in litigation. [J.J.'s] statements to Dr. Toto were not testimonial in nature pursuant to ***Crawford***, and therefore, their admission does not violate [] Appellant's Sixth Amendment right to confront witnesses against him.

Trial Court Opinion, 4/22/2016, at 7 (record citations omitted).

Upon review of the record, we discern no abuse of discretion or error of law in admitting the non-testimonial statements the victim made to hospital staff for purposes of assessing her medical condition and considering potential courses of treatment. While Appellant casts the medical interview as being police controlled, Dr. Toto testified at trial that she asked the victim why she was at the emergency room and once J.J. stated she had been sexually assaulted, Dr. Toto cleared the hospital room

so that they could talk privately. N.T., 5/26/2015, at 75. Dr. Toto asked for details of the assault "to determine what the next best course would be in terms of, first of all, diagnosing her and then, second of all, planning her -- the most appropriate treatment." ***Id.*** The victim relayed that Appellant penetrated her with his penis, did not use a condom, and ejaculated on her hip. ***Id.*** at 76. As a result, Dr. Toto proposed performing tests for sexually transmitted diseases and a rape kit; however, the victim refused. ***Id.*** at 76-77. Dr. Toto testified that she did not meet with detectives before her interview with J.J., no one told her what questions to ask the victim, and that the medical report was based solely upon what J.J. disclosed to her. ***Id.*** at 77-78. Based upon the foregoing, we agree with the trial court's assessment. The victim's statements were made at the emergency room to hospital personnel for the purpose of medical treatment and, thus, non-testimonial in nature. Appellant had the opportunity to confront and cross-examine Dr. Toto regarding the victim's interview. As such, we discern no violation of the Confrontation Clause by the trial court's admission of the victim's statements at trial.

In his second issue presented, Appellant argues, in the alternative, that if this Court "concludes the victim's statements [were] non-testimonial, Appellant contends the victim did not make the statement[s] with a motive consistent with obtaining medical care, and as such were inadmissible under Pennsylvania Rule of Evidence 803(4)." ***Id.*** at 44. "[Appellant] contends the two doctors generated their respective reports as the result of

information received from the detectives and the victim's mother." ***Id.*** at 47.

Rule 803(4) provides an exception to the general rule against hearsay when a statement "is made for – and is reasonably pertinent to – medical treatment or diagnosis in contemplation of treatment[.]" Pa.R.E. 803(4)(A). Such a statement "describes medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment." Pa.R.E. 803(4)(B). As discussed above, the victim made the statements to medical staff for the purpose of treatment. Accordingly, it was proper for the trial court to admit the hospital records, including the victim's statement, pursuant to Rule 803(4). Hence, Appellant's second issue is without merit.

In his third issue presented, Appellant argues that the trial court erred in dismissing his post-sentence motion for a new trial when the Commonwealth failed to disclose materially relevant evidence to Appellant, *i.e.*, that the victim had recanted the allegations against Appellant at a meeting prior to the preliminary hearing in this matter. Appellant's Brief at 48. Appellant also contends that following the verdict, but prior to sentencing, he received after-discovered evidence of a handwritten letter from the victim dated July 28, 2015 wherein J.J. stated she fabricated the allegations against Appellant. ***Id.*** at 12. In that July 2015 letter, the victim says she told the Assistant District Attorney and the investigating detectives

at a meeting prior to the preliminary hearing nine months before trial that her allegations against Appellant were untrue. ***Id.*** at 48. In further investigating this claim, Appellant avers that, "on November 7, 2014, at a related dependency hearing [for the victim] before the Honorable Kathleen Mulligan (Family Division of Court of Common Pleas of Allegheny County), Detective Kuma testified consistent with J.J.'s account of the preliminary hearing [as expressed in her July 2015 letter]." ***Id.*** at 54. Appellant claims that upon uncovering the after-discovered evidence, the Commonwealth's ultimate failure to disclose the victim's recantation constitutes a violation under ***Brady v. Maryland***, 373 U.S. 83 (1963). ***Id.*** at 48-50.

Based upon the foregoing facts, Appellant raises two distinct legal claims. First, Appellant claims the July 15, 2015 recantation letter, and the evidence obtained thereafter, constitutes after-discovered evidence. Second, Appellant contends that the Commonwealth knew about, but withheld in violation of ***Brady***, the meeting prior to the preliminary hearing, as well as Detective Kuma's statements made at the victim's dependency hearing, relating to the victim's recantation of her assault claims against Appellant.

Our Supreme Court has stated:

> After-discovered evidence cases premised upon recantation testimony are instructive in explicating the [importance of a] credibility assessment. When seeking a new trial based on alleged after-discovered evidence in the form of recantation testimony, the petitioner must establish that: (1) the evidence has been discovered after trial and it could not have been

> obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict. Given that the [] petitioner must demonstrate, and the [lower] court must determine, that the after-discovered evidence "would likely compel a different verdict," as well as the fact that recantation testimony "is notoriously unreliable, particularly where the witness claims to have committed perjury," [our Supreme] Court has remanded after-discovered evidence cases and specifically directed the trial or PCRA court to make credibility determinations on the recantation testimony with an eye to the relevant prejudice standard.
>
> * * *
>
> Thus, the after-discovered evidence cases tie the court's credibility determination to the governing prejudice standard.

Commonwealth v. Johnson, 966 A.2d 523, 541–542 (Pa. 2009) (internal citations omitted).

Furthermore, to establish a ***Brady*** violation, an appellant must prove three elements:

> (1) the evidence at issue was favorable to the accused, either because it is exculpatory or because it impeaches; (2) the evidence was suppressed by the prosecution, either willfully or inadvertently; and (3) prejudice ensued.

Commonwealth v. Paddy, 15 A.3d 431, 450 (Pa. 2011). "Favorable evidence is material, and constitutional error results from its suppression by the government, 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." ***Id.*** There is no ***Brady*** violation, however, when the appellant knew or, with reasonable diligence, could have uncovered the

evidence in question, or when the evidence was available to the defense from other sources. ***Id.*** at 451.

Here, we conclude that Appellant failed to establish that he could not have obtained the proffered evidence at or prior to trial through reasonable diligence, or that the Commonwealth suppressed it.[4] While the July 2015 letter obtained from the victim after trial technically qualifies as after-discovered evidence, Appellant knew of the underlying recantation evidence that he now relies upon prior to trial. The victim's dependency hearing was held on November 7, 2014, over six months before the trial in this matter. At that dependency hearing, when asked when the victim purportedly recanted, Detective Kuma stated, "[a]t the preliminary hearing she was saying it didn't happen, it never happened." Dependency Hearing N.T., 11/7/2014, at 43. Appellant, represented by a parent advocate, was personally present for that hearing and exercised his Fifth Amendment right to refuse questioning. ***Id.*** at 48-49. Thus, Appellant heard the entirety of the evidence he now claims was unknown to him and suppressed by the

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[4] We recognize that the trial court did not address whether the information was known to Appellant prior to trial and, instead, determined that the victim's recantation was not credible and, combined with the additional evidence presented at trial, there was no prejudice to Appellant. However, "[w]e can affirm the trial court's decision if there is any basis to support it." ***Commonwealth v. Sunealitis***, 153 A.3d 414, 423 (Pa. Super. 2016) (citation omitted). Additionally, as discussed at length below, we also agree with the trial court's prejudice assessment under the after-discovered evidence and ***Brady*** standards.

Commonwealth. Accordingly, the proffered evidence simply does not qualify as after-discovered. Moreover, because the Commonwealth did not have this evidence in its exclusive possession and it was available from another source, namely the dependency hearing Appellant personally attended, the Commonwealth did not suppress the proffered evidence under ***Brady***.

Finally, as noted before, the trial court determined that Appellant failed to establish prejudice. The trial court initially determined that the victim's recantation was not credible. Trial Court Opinion, 4/22/2016, at 10. The trial court concluded that the victim was under considerable pressure from her family because J.J. and her four siblings were removed from the family home. ***Id.*** Since this assessment finds support in the record, we will not disturb the court's credibility determination. Additionally, the Commonwealth produced evidence that corroborated the victim's initial statements to her camp counselor and hospital staff, as well as Appellant's audiotaped confession. At trial, the Commonwealth introduced physical evidence of Appellant's semen that police collected from the victim's bedspread shortly after the most recent alleged assault. In light of the trial court's credibility assessment as to J.J. and the additional, unchallenged evidence against Appellant, we conclude Appellant failed to establish that the outcome of his verdict would have been different under either the after-discovered evidence or ***Brady*** standards. For all of the foregoing reasons, Appellant's third issue lacks merit.

In his fourth issue presented, Appellant argues that his fundamental right to due process was violated when the Commonwealth relied solely on hearsay evidence at his preliminary hearing. This Court has recently rejected this precise claim. ***See Commonwealth v. McClelland***, 2017 WL 2312083, at *10 (Pa. Super. 2017) ("[W]e cannot find that the inability to subject the primary accuser to adversarial examination violated due process."). Hence, Appellant is not entitled to relief on his fourth allegation of error.

Finally, Appellant argues that there was insufficient evidence for the jury to convict him of rape because the Commonwealth failed to produce evidence that he used force or the threat of force against the victim. Appellant's Brief at 76-77. We previously determined:

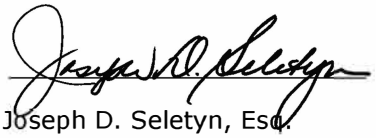
> In order to preserve a challenge to the sufficiency of the evidence on appeal, an appellant's Rule 1925(b) statement must state with specificity the element or elements upon which the appellant alleges that the evidence was insufficient. Such specificity is of particular importance in cases where, as here, the appellant was convicted of multiple crimes each of which contains numerous elements that the Commonwealth must prove beyond a reasonable doubt.

Commonwealth v. Garland, 63 A.3d 339, 344 (Pa. Super. 2013). In this case, Appellant challenged the sufficiency of the evidence "on any and all of the charges presented against him by the Commonwealth." Rule 1925(b) Statement, 1/5/2016, at *6, ¶ h (unpaginated). Appellant failed to identify the specific conviction and the elements of that crime subject to his sufficiency challenge. This results in the waiver of Appellant's claim.

Moreover, the trial court did not have the opportunity to address the specific claim that Appellant currently advances and "[n]ew legal theories cannot be raised on appeal." ***Commonwealth v. Truong***, 36 A.3d 592, 598 (Pa. Super. 2012); Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). As such, Appellant waived his last issue.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/14/2017

J-A01016-17

Filed 09/19/2017

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 1787 WDA 2015
	:	
	:	
v.	:	
	:	
	:	
THOMAS A. JEFFREY	:	
	:	
Appellant	:	

ORDER

IT IS HEREBY ORDERED:

THAT the application filed July 28, 2017, requesting reconsideration/reargument of the decision dated July 14, 2017, is DENIED.

PER CURIAM

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 395 WAL 2017
	:	
Respondent	:	
	:	Petition for Allowance of Appeal
	:	from the Order of the Superior Court
v.	:	
	:	
	:	
THOMAS A. JEFFREY,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 18th day of November, 2020, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Patricia Nicola
As Of 11/18/2020

Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania