

~~IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY~~

PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

CP-46-CR-0000735-2018

V.

No. 3256 EDA 2018

CARLOS LOPEZ-VANEGAS

ORDER

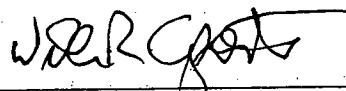
AND NOW, this 5th day of April, 2019, after a hearing on the Appellant's eligibility for court-appointed counsel, and the Appellant found to be eligible,

It is hereby ORDERED that Brooks T. Thompson, Esquire is appointed to represent Carlos Lopez-Vanegas on the above-captioned matter, for the purpose of appeal to the Superior Court.

This Order shall serve as Entry of Appearance of Brooks T. Thompson, Esquire, appointed counsel.

The compensation of said appointed counsel is to be borne by Montgomery County. The Petition for Compensation shall only be submitted to the Chambers of The Honorable William R. Carpenter. Do not send the Petition to the Clerk of Courts or to the Criminal Administrative Judge.

BY THE COURT:



WILLIAM R. CARPENTER J.

Copies sent on April 5, 2019

By Interoffice Mail to:

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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-46-CR-0000735-2018
V. :
CARLOS LOPEZ-VANEGAS : 3256 EDA 2018

OPINION

CARPENTER J.

FEBRUARY 1, 2019

FACTUAL AND PROCEDURAL HISTORY

Appellant, Carlos Lopez-Vanegas ("Appellant"), appeals from the judgment of sentence imposed on September 28, 2018, following his conviction of three counts of rape of a child, three counts of involuntary deviate sexual intercourse, one count of aggravated indecent assault of a child, two counts of indecent assault-person less than 13, one count of both corruption of minors and endangering the welfare of a child for the ongoing sexual abuse of his eleven-year-old niece, K.D., and his five-year-old daughter, C.L.¹

The trial established the following facts. On November 20, 2017, K.D. and C.L. disclosed the sexual abuse to their mutual grandmother, Carmen Vega. (Trial by Jury, V. 2, 7/10/18 pp. 79 - 80). Ms. Vega testified that she has two children, Brenda Rivera and Ileana Rivera. *Id.* at 75 - 76. Brenda Rivera is the mother to three children; in particular she is K.D.'s mother. *Id.* at 76. Ileana Rivera also has three children, including C.L. *Id.* at 78. Appellant is the father to

¹ Appellant was found not guilty of two counts aggravated indecent assault of a child.

Ileana's children and was living with her and their children at the time of the abuse.

On November 20, 2017, Ms. Vega was babysitting her grandchildren and her grandson touched one of her granddaughters "in the private parts." Id. at 80. Ms. Vega reprimanded her grandson. Spontaneously C.L. said, "[w]ell, my dad touch me in my private parts all the time." Id. C.L. indicated to her grandmother that her private parts include her genital area and her buttocks. Id. at 80 - 81.

K.D. also came forward to tell her grandmother that Appellant touched her "in her private parts too, a couple of times." Id. at 81. K.D. also disclosed that it would happen during sleepovers when Ileana would go to work. Appellant would take her into the bedroom where he and Ileana would sleep. He touched her and made her take her clothes off. Id. at 82. K.D. was nervous and was willing to talk more, but didn't since the other kids were around. Id. at 84. Ms. Vega relayed to Brenda what K.D. had told her. Id. at 85.

On December 29, 2017, Ms. Vega spoke to K.D. again about her previous disclosure of sexual abuse. Id. at 85. Ms. Vega and K.D. were alone and she asked her granddaughter some questions about their previous conversation. Id. at 85 - 86. Ms. Vega told the jury that K.D. became nervous but told her that, "[a]ctually, it did happen other things." Id. at 86. Ms. Vega asked her for more details and testified as to K.D.'s response as follows:

he took her to the bedroom and put them in bed; that
he took his clothes off and starting touching her. That

he did put his. Like she said, his private part in her. And I ask her if it was just touching her or if he put his penis inside, and she said yes, he did. Because she said, "Actually, it did hurt and I tried to scream and he covered my mouth and he didn't allow me to scream, so I started crying." And he said it was fine, it's okay, nothing is going to happen.

Id. K.D. also told her grandmother that it happened more than once at Ileana's house. Id. at 88.

Ms. Vega relayed this information to Brenda. Id. at 89. Ms. Vega and Brenda took K.D. to the hospital so she could be evaluated. Id. On December 30, 2017, the Lansdale Borough Police Department was notified of these allegations, and Detective Oropeza responded to the hospital. (Jury Trial, V. 3, 7/11/18 pp. 131 - 132). The following day, on December 31, 2017, Ileana was notified of the allegations involving C.L. Id. at 132 - 133. A short time after, Ileana and her family moved into the home Ms. Vega shared with Brenda and her children. (Jury Trial, V.2, 7/10/18 p. 92).

K.D. testified at trial. She was eleven at the time of trial. Id. at 68. She has two younger siblings, Brian and Leylanie. Id. at 73. K.D. told the jury that when she would sleep over Ileana's house with her cousins, Appellant would wake her, while Ileana was at work and he would take her to the bedroom where he and Ileana slept. Id. at 81 - 82. There, Appellant made K.D.'s take her clothes off. Id. at 83. He touched her vaginal area, and she testified that he would put his fingers, tongue and penis inside and move them around. Id. at 87 - 88, 91 - 93. Appellant also touched her buttocks area and his fingers and penis would go inside and outside that area moving around. Id. at 88 - 89.

Appellant used something "squishy" on his penis to make it hurt less. Id. at 96, 97. To keep K.D. from screaming, Appellant would put a blanket or a pillow in her mouth. Id. at 95. Appellant also forced K.D. to put his penis in her mouth and tell her to "suck it." Id. at 98 - 99. Appellant did all these things more than five times. Id. at 102 - 103. K.D. told the jury how she went to the hospital after disclosing this sexual abuse. Id. at 106.

On December 30, 2017, K.D. was examined by Amanda Schwenk, R.N., who is a registered nurse at Grandview Hospital. (Trial by Jury, V. 2, 7/10/18 pp. 98-99). At trial, Ms. Schwenk read from the triage notes which documented that K.D. requested for both her mother and grandmother not to be in the room to discuss the assault. Id. at 101. The only people present during the interview were Nurse Schwenk and Dr. Patro. Id. at 102.

C.L., who was five at the time of the trial told the jury that Appellant did a bad thing to her body. (Trial by Jury, V. 2, 7/10/18 pp. 12 - 13). C.L., using a cartoon picture of the front and back of a girl, she testified that Appellant did something bad to her vaginal and buttocks area. Id. at 13 -14. It happened more than once. Id. at 14. C.L. was hesitant to provide details at trial, saying that she doesn't want to say. Id. at 17. C.L. acknowledged that she spoke to Miss Maggie at Mission Kids about what happened and said that everything she told her was the truth. Id. at 17 - 18.

Next, A.L., C.L.'s seven-year-old sister, testified. Id. at 7. When first asked if she ever saw Appellant do anything to her sister she replied, "No." Id. at 51. She said she saw nothing. Id. After the prosecutor asked, Anaelys stated

that her mother told to her to say that she saw nothing. Id. at 52, 57. She also told the jury that her mother told her that she needed to get her dad out of jail. Id. at 52 - 53. Upon further questioning, Anaelys admitted that she told Miss Maggie from Mission Kids that she had seen her father with C.L. in her mom's room in the same bed. Id. at 55. At trial she told the jury her dad had his clothes on, but reported to Mission Kids that Appellant did not have his clothes on when she saw him with her sister. Id. at 56. Anaelys testified that Appellant told her it was a secret when she saw them in the bed together and then took her to a playground. Id.

Maggie Sweeney, the Program Manager and forensic interviewer at Mission Kids Advocacy Center, also testified at trial on behalf of the Commonwealth. Id. at 109. She was recognized at trial as an expert in forensic interviewing. Id. at 110. She explained to the jury that as a forensic interviewer she utilizes open-ended, non-leading developmentally appropriate questions of the children because they elicit the most accurate information from children. Id. at 111, 112. On January 9, 2018, she conducted a forensic interview of K.D., C.L. and A.L. Id. at 113, 115, 117. A second interview of A.L. was conducted on June 27, 2018, based on new information. Id. at 117.

Ileana Rivera was told on December 31, 2017 about the allegations made against Appellant made by C.L. (Trial by Jury, V. 2, 7/10/18 p. 73). Ileana asked C.L. directly about it in front of Appellant, who interjected and said he did nothing. Id. at 93. Ileana and her three children moved in with Ms. Vega, Brenda and Brenda's three children. Id. at 95. C.L. revealed to her mother about

the sexual abuse. Id. at 95 - 96. A.L. also told her mother that she had a secret with Appellant, involving touching C.L. Id. at 96 - 97. After Ileana found all of this out she and her three children moved in with Brenda. Id. at 97.

Additionally, the Commonwealth questioned this witness as to whether she coached or influenced A.L. to change her statement in the second Mission Kids interview. Id. at 102 - 103.

Also to testify on behalf of the Commonwealth was Brenda Rivera, Detective Joel Greco, an investigating detective of the Lansdale Borough Police Department, Jacqueline Block Goldstein, an expert in victim behavior in child sex abuse cases, and Dr. Brian Brennan, an expert in child abuse pediatrics, who provided a physical examination of K.D. on January 10, 2018. (Jury Trial, V. 3, 7/11/18 p. 9).

On behalf of Appellant to testify was Hazel Ordonez, Appellant's sister-in-law and Jairo Lopez Venegas, Appellant's brother.

At the conclusion of the four-day trial, Appellant was found guilty of the aforementioned crimes. On September 28, 2018, a sentencing hearing was conducted at which both Appellant's father, brother, sister-in-law testified on his behalf. Two letters of support for Appellant were submitted and read to this Court. This Court sentenced Appellant to an aggregate sentence of 48 to 69 years' imprisonment.

A timely notice of appeal was filed. Appellant was directed to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), which he did. Those issues are addressed below.

ISSUES

- I. Whether Appellant's compulsory process and confrontation rights were not implicated when he was not permitted to present Brenda Rivera, Ileana Rivera and Carmen Vega at a taint hearing, when he was not entitled to a taint hearing.
- II. Whether this Court properly denied the request for a taint hearing, when Appellant did not meet the legal threshold.
- III. Whether claims of third-party child abuse were properly found to be inadmissible at trial.
- IV. Whether the Office of Child and Youth reports were properly found to be inadmissible at trial.
- V. Whether this Court properly sustained the Commonwealth objection during the cross-examination of K.D.
- VI. Whether this Court properly sustained the Commonwealth's objection during the cross-examination of A.L.
- VII. Whether this Court properly ruled inadmissible, during the cross-examination of Brenda Rivera, evidence that she was physically abusive to her children.
- VIII. Whether this Court properly prohibited the cross-examination of Brenda Rivera about third-party abuse allegations after her testimony on direct examination.

DISCUSSION

- I. Appellant's compulsory process and confrontation rights were not implicated when he was not permitted to present Brenda Rivera, Ileana Rivera and Carmen Vega at a taint hearing, when he was not entitled to a taint hearing.
- II. This Court properly denied the request for a taint hearing, when Appellant did not meet the legal threshold.

First in his 1925(b) statement, Appellant asserts that this Court erred in not allowing him to call Ileana Rivera, Brenda Rivera, and Carmen Vega at the June 25, 2018, pretrial motions hearing in contravention of his

compulsory process and confrontation rights under Article 1, Section 9 of Pennsylvania's constitution. Second, he contends that this Court erred in denying his motion for a taint hearing following his offer of proof at the June 25, 2018, pretrial motions hearing. Issues I and II will be addressed simultaneously because they both implicate Appellant's right to a taint hearing.

At the pretrial motions hearing held on June 25, 2018, defense counsel announced that there was a need for an evidentiary hearing. (Pretrial Motions Hearing 6/25/18 p. 4). He stated that he needed to be able to present Brenda Rivera and Ileana Rivera's statements and to examine them on the issue of taint. *Id.*

As discussed below, Appellant did not establish his threshold burden to entitle him to a taint hearing thereby Appellant's rights were not implicated.

Generally, a court evaluates an allegation of taint at a competency hearing. Commonwealth v. Delbridge, 578 Pa. 641, 855 A.2d 27, 40 (2003). Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering the child incompetent to testify." *Id.* at 35.

The proponent of the taint claim first bears the burden of establishing "some evidence" of taint. *Id.* at 40. Once the party meets that threshold requirement, he then must meet the ultimate burden of demonstrating taint by clear and convincing evidence. *Id.* The critical inquiry in

deciding the issue of taint at a competency hearing is whether the memory of the child has been corrupted. Id.

In analyzing whether a party has met the "some evidence of taint" standard, the trial court considers the totality of the circumstances around the child's allegations. Id. at 41. This Court has identified some of the common considerations relevant to this analysis as follows:

the age of the child; (2) the existence of a motive hostile to the defendant on the part of the child's primary custodian; (3) the possibility that the child's primary custodian is unusually likely to read abuse into normal interaction; (4) whether the child was subjected to repeated interviews by various adults in positions of authority; (5) whether an interested adult was present during the course of any interviews; and (6) the existence of independent evidence regarding the interview techniques employed.

Commonwealth v. Smith, 167 A.3d 782, 790 (Pa.Super. 2017) (citing,

Commonwealth v. Judd, 897 A.2d 1224, 1229 (Pa. Super. 2006) (citation omitted).

A pretrial motions hearing was held on June 25, 2018, where defense counsel stated that the allegations of abuse to authorities were made after the December 29, 2017, conversation that Ms. Vega had with K.D. (Pretrial Motions Hearing 6/25/18 p. 5). Counsel argued that during that conversation, she asked questions of K.D. to which K.D. responded with single word, "Yes", answers. Id. at 5 - 6. He claimed that Ms. Vega walked K.D. through what eventually became her allegations of sexual assault. Id. at 6.

He further argued that when Brenda talked to the other children, there were multiple children that made claims of sexual molestation, some of which were not repeated at the child advocacy center interviews. Id. at 7 - 8. It was also reported that C.L. alleged that she was victimized by one Appellant's brothers, which she did not repeat that assertion. Id. at 8.

Defense counsel further argued that there were relationship difficulties between Appellant and Ileana, wherein Ileana accused Appellant of being unfaithful. Id. at 9.

In this case applying the Delbridge factors, this Court denied the defense request for a taint hearing because the defense offer of proof was insufficient and did not meet the threshold that would entitle him to a taint hearing. (Pretrial Motions Hearing 6/25/18 p. 17). There was no evidence of hostile intent or any reason to plant these suggestions or to distort the memory of the children, 11 and five years old. Id.

This Court determined that there was not any questioning that was suggestive. Id. The Mission Kids interviewer used open-ended, non-suggestive questions. The purpose of the Mission Kids interview is to see that the child is only interviewed once by law enforcement people. Id. The techniques that were used during the Mission Kids interview were open-ended. Id. at 18.

Importantly, the initial disclosures of sexual abuse by the children were spontaneous. The statements made were largely consistent. There is no evidence of implanting or distorting memories. Id.

Nothing presented indicated that the primary custodian would have been likely to read abuse in the normal situations. Id. In fact, the initial statements were not made to the victims' respective mothers.

There were not repeated interviews by various adults in positions of authority. The nurse, to the extent that was an interview, was minimal. It was also one where K.D. asked to be alone with the nurse. So there was no interested adult in the room at the time, or in the Mission Kids interviews.

It is important to note that in defense counsel's taint argument he skipped over the spontaneous initial disclosures made on November 20, 2017. Rather, his argument focused on the December 29th follow-up conversation in which Ms. Vega asked K.D. for additional details. Both the fact that Ms. Vega did not go to police after this initial disclosure goes to her lack of hostile intent, and the fact that even after the December 29th conversation Ms. Vega and Brenda took K.D. to the hospital and not the police also go to lack of hostile intent. Finally, it is important that Ileana was not told about any of the abuse allegations until December 31, 2017, which was after the police were involved and the abuse reports by the children were made to OCY. Clearly she could not have tainted the sexual abuse allegations and statements made prior to her knowledge.

- III. Claims of third-party child abuse were properly found to be inadmissible at trial.
- IV. The Office of Child and Youth reports were properly found to be inadmissible at trial.

Third and fourth on appeal Appellant challenges this Court's rulings that third-party sexual abuse allegations are inadmissible and will be discussed together. More specifically, Appellant claims that this Court erred in ruling that the contemporaneous complaints of K.D. that she had been raped and/or sexually abused by his two brothers were not relevant and inadmissible following the pre-trial motions hearing. Additionally, Appellant contends that this court erred in ruling not relevant and inadmissible testimony that reports were made to OCY that L.R., a blood relative and companion of both victims, was also sexually abused by him contemporaneously with the current offenses, but that she stated that no assault occurred.

Appellant challenges several evidentiary rulings by this court. In determining whether evidence should be admitted, the trial court must weigh the relevant and probative value of the evidence against the prejudicial impact of that evidence. Evidence is relevant if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact. Although a court may find that evidence is relevant, the court may nevertheless conclude that such evidence is inadmissible on account of its prejudicial impact. Commonwealth v. Vucich, 2018 PA Super 234, 194 A.3d 1103, 1106 (2018) (citing, Commonwealth v. Storey, 167 A.3d 750, 758 (Pa.Super. 2017) (citation omitted)).

The decision to admit or exclude evidence is committed to the trial court's sound discretion and its evidentiary rulings will only be reversed upon a showing that it abused that discretion. Such a finding may not be made "merely

because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." Commonwealth v. Sherwood, 603 Pa. 92, 112, 982 A.2d 483, 495 (2009). Furthermore, an erroneous ruling by a trial court on an evidentiary issue does not necessitate relief where the error was harmless beyond a reasonable doubt. Commonwealth v. Laird, 988 A.2d 618, 636 (Pa.2010).

The Commonwealth filed a motion in limine in order to prevent defense counsel from introducing evidence of third party sexual abuse allegations and from introducing Office of Children and Youth (OCY) records. A pretrial motions hearing was held on June 25, 2018.

At the pretrial motions hearing, defense counsel argued that the theory of the defense was that K.D. and CLs' allegations were made up at the behest of Appellant's fiancé, Ileana, in retaliation for perceived slights over the course of their relationship. (Pretrial Motions Hearing 6/25/18 p. 28). He asserted that being allowed to introduce third-party abuse allegations, especially those that were later determined to be unfounded, even those that were founded by against the defendant's family members, strike at that issue in regard to credibility, to motive and to whether or not there existed a condition in which frivolous sexual abuse allegations were being made. Id.

He also argued that it is important to note that there is no corroborating evidence that would tend to show that the victim's statements were true. There is no physical evidence. There is no other witnesses, with the

exception of potentially the witnesses that have not developed yet. Id. at 28 - 29. Therefore, he urged that credibility is almost a sole determination for the jury. Id. at 29. Counsel argued that to present the full picture he needs to be able to demonstrate that the allegations weren't only against Appellant, but also his family members. Id.

As to the OCY records, at the pretrial motions hearing, defense counsel argued that he is not seeking to introduce the OCY records for the purpose of the truth of the matter asserted; but rather, it would have been for impeachment purposes. More specifically, defense counsel asserted that the fact there were reports that they made to someone that then communicated that to OCY that Leylanie Roman, who is the sister and cousin of the two victims, and she refused to repeat that. Without this evidence counsel argued that the defense would be undercut. (Pretrial Motions Hearing 6/25/18 pp. 19 - 20).

Defense counsel argued that this issue is separate from the third-party sexual assault issue because the OCY matter isn't addressing whether or not the victims in this case were the victims of sexual assault otherwise. It's looking at whether or not there is a party that, wasn't the victim of the sexual assault whatsoever, but was reported as being sexually assaulted by Brenda Rivera, Ileana Rivera and Carmen Vega, that want's actually assaulted in any way. Id. at 26.

Generally, the Rape Shield Law precludes evidence of an alleged victim's prior sexual conduct. See 18 Pa.C.S. § 3104(a). However, the Supreme

Court of Pennsylvania has clarified that the Rape Shield Law does not prohibit evidence of previous sexual assaults upon a victim because "[t]o be a victim is not 'conduct' of the person victimized." Commonwealth v. Johnson, 638 A.2d 940, 942 (Pa.1994). Therefore, evidence of K.D. and C.L.'s other sexual victimization is not subject to exclusion under the Rape Shield Law and must be examined under traditional rules of evidence. *Id.*; see also Commonwealth v. L.N., 787 A.2d 1064, 1069 (Pa.Super. 2001); Pa.R.E. 401. Therefore, the inquiry is whether the testimony is relevant and material. *Id.* Evidence is relevant when 'the inference sought to be raised by the evidence bears upon a matter in issue in the case and, second, whether the evidence renders the desired inference more probable than it would be without the evidence.'

Additionally, "a witness may not be contradicted on a collateral matter." Commonwealth v. Holder, 815 A.2d 1115, 1119 (Pa.Super. 2003). A collateral matter is "one which has no relationship to the case on trial." Commonwealth v. Fisher, 290 A.2d 262, 267 (Pa.1972) (quoting Commonwealth v. Petrillo, 19 A.2d 288, 295 (Pa.1941)).

This Court rejected this argument and found the third party abuse allegations not admissible because they were irrelevant and completely collateral. *Id.* at 32. There was no nexus shown to any of the allegations of bias against Appellant. There was a clear danger of confusion to the jury and distraction to the jury if these allegations were introduced. *Id.* at 32 - 33. However, this Court granted the Commonwealth's *motion in limine* without prejudice, depending on how the evidence at trial developed. *Id.* at 33.

On day two of the trial, defense counsel requested that this Court review its prior determination in light of C.L.'s testimony. He asserted that C.L. made certain statements that could arguably go to coaching by the mother. (Trial by Jury, V. 2, 7/10/18 p. 42). According to counsel, C.L. called into question whether or not the Commonwealth's version of the events with respect to the grandmother were factually accurate. Id. Defense requested that he be able to direct examine or cross-examine other children in this case, that made reports that were later determined to be unfounded to determine whether or not there is additional evidence that goes towards coaching, and also to bring up the other allegations that were made against other individuals in this case. Id. at 43.

Prior to the request was the cross-examination of C.L. in which defense counsel asked her in relevant part about her conversations with her mother about Appellant. Id. at 20 -28.

This Court denied the request. Id. at 45. There was simply nothing in C.L.'s cross-examination testimony that required a reversal of the previous ruling. Accordingly, this Court did not abuse its discretion in granting the Commonwealth's *motion in limine*.

V. This Court properly sustained the Commonwealth objection during the cross-examination of K.D.

Next, Appellant contends that this Court erred in sustaining the Commonwealth's objection to the question on cross-examination of K.D.

inquiring as to whether or not her mother would get physical with her during fights.

K.D. was cross-examined by defense counsel and the Commonwealth's objection that was sustained arose in the following context.

Q. ... A few questions. Let me start with your family members. Brenda is your mom; is that right?

A. Yeah.

Q. What kind of relationship do you have with Brenda?

A. Not a very good relationship.

Q. What makes it not very good?

A. We get into fights a lot.

Q. Did you say you get into fights a lot?

A. Why do you get into fights?

[THE COMMONWEALTH]: I'm going to object to the relevance, Your Honor.

THE COURT: Overruled.

BY [DEFENSE COUNSEL]

Q. Why do you get into fights?

A. Because I don't like what mom tells me to do. I don't like doing my chores, either.

Q. That's pretty normal.

When you guys get into fights, does she ever get physical with you?

[THE COMMONWEALTH]: Objection, Your Honor.

THE COURT: Sustained.

(Trial by Jury, V. 1, 7/9/18 pp. 109 - 110).

This line of questioning was irrelevant to the issues presented at trial of whether Appellant sexually abused his daughter and niece. Introducing evidence of third party sexual assaults does nothing to further this inquiry.

VI. This Court properly sustained the Commonwealth's objection during the cross-examination of A.L.

Sixth, Appellant contends that this Court erred in sustaining the Commonwealth's objection to the question to A.L. inquiring as to what her mother said to indicate why she was angry at him.

The context of the Commonwealth's objection during the cross-examination of A.L. is as follows:

Q. Did your mom tell you what your daddy did?

A. Yes. He didn't do nothing.

Q. Is that because you know he didn't do anything or is that because she said so?

A. She said so.

Q. When did she say that, a few days ago?

A. Uh-huh.

Q. What did she tell you back in December?

A. (No response.)

Q. You don't want to say?

A. No.

Q. I know it's hard for you but it's really important that we hear it. What did she tell you back in December?

A. Nothing.

Q. [A.L.], we know it was nothing. You told us it was nothing. Can you tell us.

A. I'm scared.

Q. You're scared?

A. (Indicating.)

Q. ~~You're not in trouble. You're safe here.~~

A. (No response.)

Q. Did she say that your daddy did something bad?

A. No.

Q. Did she say that your dad did something to your sisters?

A. No.

Q. Did she say that your dad did something to your cousin?

A. No.

Q. Did she say that you saw your daddy doing something?

A. No.

Q. What did she say?

A. (No response.)

Q. Did she say something bad?

A. Yes.

Q. What did she say that was bad?

A. (No response.)

Q. Was she angry at your dad?

A. Yes.

Q. Why was she angry at him?

[THE COMMONWEALTH]: Objections, call for speculation.

[THE COURT]: Sustained.

[DEFENSE COUNSEL]:

Q. Did she say why she was angry at him?

[THE COMMONWEALTH]: Objection.

[THE COURT]: Sustained.

(Trial by Jury 7/10/18 pp. 65 - 67).

In this case, defense counsel was attempting to elicit testimony that would suggest that A.L. first made her allegations that she witnessed Appellant with C.L. during the Mission Kids interview because her mother was mad at Appellant in December of 2017. The objection was sustained because counsel was trying to advance the defense theory that Ileana was mad at Appellant due to problems in their relationship, and Ileana influenced her daughter to make up the allegations against Appellant in her Mission Kids interview. As the cross-examination of A.L. reveals, trial counsel attempted to elicit testimony from A.L. but that A.L. was unable to answer. This is evidenced

by his repeated questioning of this witness in the same manner and the repeated responses from this witnesses that showed she was not able to answer for whatever reason. The objection was properly sustained.

Even if this objection was improperly sustained, it is harmless error. "Harmless error exists if ... the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error so insignificant by comparison that the error could not have contributed to the verdict." Commonwealth v. Mitchell, 135 A.3d 1097, 1106 (Pa.Super. 2016). In this case, there was overwhelming evidence of Appellant's guilt, including but not limited to the testimony Ms. Vega and from both victims, Mission Kids interviews from these victims and testimony of Mission Kids statement from A.L. who witnessed an instance of abuse against C.L.

VII. This Court properly ruled inadmissible, during the cross-examination of Brenda Rivera, evidence that she was physically abusive to her children.

Seventh, Appellant claims that this Court erred in ruling not relevant and inadmissible the testimony that Brenda Rivera was physically abusive to her children as supported by the foundation stated in his offer of proof.

Prior to the testimony of Brenda, defense counsel made an offer of proof in regard to alleged physical abuse of one of her other children, K.D.'s brother. (Trial by Jury, V. 3, 7/11/18 p. 51). Defense counsel's offer of proof was as follow:

I have been - - I'm in receipt of a video from Ileana Rivera, upon which [K.D.], one of the victims in this

case, recounts an instance where her mother, Brenda Rivera, did take their son [B.R.] by his hair, pulling him to the floor, scratching his face and hitting him. This was in response to what she said was him asking too many questions.

The reason why I would attempt to elicit this testimony in this trial is for the purpose of establishing a potential motive on part of the children to come up with an excuse. As Your Honor heard earlier in this trial, the testimony is that the initial disclosure of sexual abuse came from [C.L.] after one of her little brothers was confronted by Carmen Vega for hitting another one in the behind. It's our position that they could have been -- and this evidence would tend to show that they would have been in fear of physical abuse in response to this, giving the children reason to make up a story in their own defense. In fact, [C.L.] is recorded and testimony was heard by the jury that [C.L.] says, He didn't anything wrong. My daddy does this to me all of the time. It was from there that Carmen Vega began interviewing that the initial sexual allegation disclosure came to light.

This is, I think, particularly substantive, particularly probative, because there are no other witnesses and the children have said multiple times in response to my cross-examination that they had received or been told to say or do certain things by various interested parents in this case. For that reason I think that this evidence is admissible.

Id. at 51 - 53.

This Court found this line of questioning attempting to elicit testimony of alleged physical abuse to be inadmissible and irrelevant to the issues at trial. Defense counsel's argument, arguing that C.L., who made the first spontaneous disclosure to Ms. Vega, and K.L., who also made a contemporaneous spontaneous disclosure, were in physical fear of Brenda, so they fabricated these sexual abuse allegations is not supported by any

competent evidence whatsoever. Id. at 55. There was no suggestion of abuse by Ms. Vega, to whom the initial reports of abuse were made. There was nothing in the direct-examination or cross-examination of the children that suggests fabrication. The Mission Kids statements do not suggest fabrication. They were done with open-ended questions. It was not the product of extensive leading questioning by law enforcement personnel. It was one forensic interviewer. Id. Additionally, there are hearsay and wiretap issues involved. For all of these reasons defense counsel's video evidence of alleged physical abuse was properly found to be inadmissible.

VIII. This Court properly prohibited the cross-examination of Brenda Rivera about third-party abuse allegations after her testimony on direct examination.

Lastly, Appellant claims that this Court erred in refusing to allow the cross-examination of the third-party sexual abuse allegations following Brenda Rivera's testimony at trial.

At trial, during the cross-examination of Brenda, defense counsel renewed his request that this Court reverse its previous ruling precluding defense counsel from asking questions about third-party sexual abuse allegation based upon the contents of the cross-examination that just occurred. (Trial by Jury, V. 3, 7/11/18 p. 76). Counsel The request was denied.

The questioning immediately prior to this request by defense counsel was as follows:

Q. Did you ever speak to [K.D.] again, sit her down again to try and get that information yourself?

A. Yes, I tried several times to talk to her, but lately she doesn't really want to talk.

Q. Between November 20th and December 30th, I'm asking.

A. Yes, I spoke with her.

Q. How many times?

A. Three, four times.

Q. And you asked her again about the sexual assault?

A. Yes, We asked her every time we talked to her?

Q. What did you ask her?

A. I asked her how did it all happen, and lately she doesn't want to give much information, but she said they did occur.

Q. What did you ask her between November 20th and December 30th when you met her those three or four times?

A. I asked her how did she feel at that time, how did it happen? But at the moment she really doesn't want to tell.

Q. She doesn't want to say now?

A. No, right now she really doesn't want to talk much about that.

Q. Did she tell you back between November 20th and December 30th when you sat down these three or four additional times?

A. She did tell me that she had felt bad, that it had hurt her, that she felt really bad that it had happened.

Q. Did she say what happened to her?

[THE COMMONWEALTH]: Objection.
Can I see you at sidebar for a moment?

(A discussion is held off the record.)

THE COURT: Members of the jury
would you step out a moment for us?

(The jury leaves the courtroom.)

THE COURT: Out of the hearing of
the jury, the attorneys have agreed that there are only
certain things that you shouldn't talk about, all right?
The D.A. will review that right now with you and tell
you what to stay away from.

[THE COMMONWEALTH]: That you,
Your Honor.

Brenda, you recall that we are here
today to only talk about what Carlos did to [K.D.],
okay? So when [defense counsel] is asking you
questions, make sure you only tell him information
related to Carlos. So if he asks you what [K.D.] said,
only say what [K.D.] about Carlos.

(Trial by Jury, V. 3, 7/11/18 pp. 73 - 76). Immediately after, defense counsel
renewed his request for this Court to overturn its prior ruling.

This Court found nothing in this cross-examination testimony that
required a reversal of the previous ruling. Therefore, this request was properly
denied.

CONCLUSION

Based on the forgoing analysis, the judgment of sentence entered
on September 28, 2019, should be affirmed.

BY THE COURT:

William R. Carpenter

WILLIAM R. CARPENTER J.
COURT OF COMMON PLEAS
MONTGOMERY COUNTY
PENNSYLVANIA
38TH JUDICIAL DISTRICT

Copies sent on February 1, 2019

By Interoffice Mail to:
Court Administration

By First Class Mail to:

Christopher W. Koschier, Esquire
266 E. Main Street
Suite 3
Norristown, PA 19401

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

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

CARLOS LOPEZ-VANEGAS

Appellant

No. 3256 EDA 2018

Appeal from the Judgment of Sentence Entered September 28, 2018
In the Court of Common Pleas of Montgomery County Criminal Division
at No(s): CP-46-CR-0000735-2018

BEFORE: BOWES, J., MURRAY, J., and McLAUGHLIN, J.

MEMORANDUM BY MURRAY, J.:

FILED FEBRUARY 13, 2020

Carlos Lopez-Vanegas (Appellant) appeals from the judgment of sentence imposed after a jury convicted him of three counts of rape of a child, three counts of involuntary deviate sexual intercourse with a child, one count of aggravated indecent assault of a child, two counts of indecent assault – complainant less than 13 years of age, one count of corruption of minors, and one count of endangering the welfare of children.¹ We affirm.

Appellant's convictions arise from the sexual assault of K.D., age 11, and C.L., age 5. The trial court detailed the facts and procedural history of this case as follows:

The trial established the following facts. On November 20, 2017, K.D. and C.L. disclosed the sexual abuse to their mutual grandmother [(Grandmother)]. [N.T., 7/10/18, at 79-80].

¹ 18 Pa.C.S.A. §§ 3121(c), 3123(b), 3125(b), 3126(a)(7), 6301(a)(1)(ii), 4304(a)(1).

[Grandmother] testified that she has two children, [B.R.] and [I.R.]. *Id.* at 75-76. [B.R.] is the mother to three children; in particular she is K.D.'s mother. *Id.* at 76. [I.R.] also has three children, including C.L. *Id.* at 78. Appellant is the father to [I.R.]'s children and was living with her and their children at the time of the abuse.

On November 20, 2017, [Grandmother] was babysitting her grandchildren and her grandson touched one of her granddaughters "in the private parts." *Id.* at 80. [Grandmother] reprimanded her grandson. Spontaneously C.L. said, "[w]ell, my dad touch me in my private parts all the time." *Id.* C.L. indicated to her grandmother that her private parts include her genital area and her buttocks. *Id.* at 80-81.

K.D. also came forward to tell her grandmother that Appellant touched her "in her private parts too, a couple of times." *Id.* at 81. K.D. also disclosed that it would happen during sleepovers when [I.R.] would go to work. Appellant would take her into the bedroom where he and [I.R.] would sleep. He touched her and made her take her clothes off. *Id.* at 82. K.D. was nervous and was willing to talk more, but didn't since the other kids were around. *Id.* at 84. [Grandmother] relayed to [B.R.] what K.D. had told her. *Id.* at 85.

On December 29, 2017, [Grandmother] spoke to K.D. again about her previous disclosure of sexual abuse. *Id.* at 85. [Grandmother] and K.D. were alone and she asked her granddaughter some questions about their previous conversation. *Id.* at 85-86. [Grandmother] told the jury that K.D. became nervous but told her that, "[a]ctually, it did happen other things." [*sic*] *Id.* at 86. [Grandmother] asked her for more details and testified as to K.D.'s response as follows:

he took her to the bedroom and put them in bed; that he took his clothes off and starting touching her. That he did put his. [*sic*] Like she said, his private part in her. And I ask her if it was just touching her or if he put his penis inside, and she said yes, he did. Because she said, "Actually, it did hurt and I tried to scream and he covered my mouth and he didn't allow me to scream, so I started crying." And he said it was fine, it's okay, nothing is going to happen.

Id. K.D. also told her grandmother that it happened more than once at [I.R.]'s house. **Id.** at 88.

[Grandmother] relayed this information to [B.R.]. **Id.** at 89. [Grandmother] and [B.R.] took K.D. to the hospital so she could be evaluated. **Id.** On December 30, 2017, the Lansdale Borough Police Department was notified of these allegations, and Detective Oropeza responded to the hospital. [N.T., 7/11/18 at 131-32]. The following day, on December 31, 2017, [I.R.] was notified of the allegations involving C.L. **Id.** at 132-133. A short time after, [I.R.] and her family moved into the home [Grandmother] shared with [B.R.] and her children. [N.T., 7/10/18, at 92].

K.D. testified at trial. She was eleven at the time of trial. [N.T., 7/9/18, at 68.] K.D. told the jury that when she would sleep over [at] [I.R.]'s house with her cousins, Appellant would wake her, while [I.R.] was at work and he would take her to the bedroom where he and [I.R.] slept. **Id.** at 81-82. There, Appellant made K.D. take her clothes off. **Id.** at 83. He touched her vaginal area, and she testified that he would put his fingers, tongue and penis inside and move them around. **Id.** at 87-88, 91-93. Appellant also touched her buttocks area and his fingers and penis would go inside and outside that area moving around. **Id.** at 88-89. Appellant used something "squishy" on his penis to make it hurt less. **Id.** at 96, 97. To keep K.D. from screaming, Appellant would put a blanket or a pillow in her mouth. **Id.** at 95. Appellant also forced K.D. to put his penis in her mouth and told her to "suck it." **Id.** at 98-99. Appellant did all these things more than five times. **Id.** at 102-03. K.D. told the jury how she went to the hospital after disclosing this sexual abuse. **Id.** at 106.

On December 30, 2017, K.D. was examined by Amanda Schwenk, R.N., who is a registered nurse at Grandview Hospital. [N.T., 7/10/18, at 98-99]. At trial, Ms. Schwenk read from the triage notes which documented that K.D. requested for both her mother and grandmother not to be in the room to discuss the assault. **Id.** at 101. The only people present during the interview were Nurse Schwenk and Dr. Patro. **Id.** at 102.

C.L., who was five at the time of the trial told the jury that Appellant did a bad thing to her body. [**Id.** at 12-13]. C.L., using a cartoon picture of the front and back of a girl, testified that Appellant did something bad to her vaginal and buttocks area. **Id.** at 13-14. It happened more than once. **Id.** at 14. C.L. was

hesitant to provide details at trial, saying that she doesn't want to say. *Id.* at 17. C.L. acknowledged that she spoke to Miss Maggie at Mission Kids about what happened and said that everything she told her was the truth. *Id.* at 17-18.

Next, A.L., C.L.'s seven-year-old sister, testified. . . . [A.L.] admitted that she told Miss Maggie from Mission Kids that she had seen her father with C.L. in her mom's room in the same bed. *Id.* at 55. At trial[,] she told the jury [that Appellant] had his clothes on, but reported to Mission Kids that Appellant did not have his clothes on when she saw him with her sister. *Id.* at 56. [A.L.] testified that Appellant told her it was a secret when she saw them in the bed together and then took her to a playground. *Id.*

Maggie Sweeney, the Program Manager and forensic interviewer at Mission Kids Advocacy Center, also testified at trial on behalf of the Commonwealth. *Id.* at 109. She was recognized at trial as an expert in forensic interviewing. *Id.* at 110. She explained to the jury that as a forensic interviewer she utilizes open-ended, non-leading developmentally appropriate questions of the children because they elicit the most accurate information from children. *Id.* at 111-12. On January 9, 2018, she conducted a forensic interview of K.D., C.L. and A.L. *Id.* at 113, 115, 117. A second interview of A.L. was conducted on June 27, 2018, based on new information. *Id.* at 117.

[I.R.] was told on December 31, 2017 about the allegations made against Appellant [] by C.L. [N.T., 7/11/18, at 93]. [I.R.] asked C.L. directly about it in front of Appellant, who interjected and said he did nothing. *Id.* [I.R.] and her three children moved in with [Grandmother], [B.R.] and [B.R.]'s three children. *Id.* at 95. C.L. revealed to her mother about the sexual abuse. *Id.* at 95-96. A.L. also told her mother that she had a secret with Appellant, involving touching C.L. *Id.* at 96-97. After [I.R.] found all of this out she and her three children moved in with [B.R.]. *Id.* at 97. Additionally, the Commonwealth questioned this witness as to whether she coached or influenced A.L. to change her statement in the second Mission Kids interview. *Id.* at 102-03.

* * *

At the conclusion of the four-day trial, Appellant was found guilty of the aforementioned crimes. On September 28, 2018, a sentencing hearing was conducted at which both Appellant's

father, brother, [and] sister-in-law testified on his behalf. Two letters of support for Appellant were submitted and read to [the trial court]. [The trial court] sentenced Appellant to an aggregate sentence of 48 to 69 years [of] imprisonment.

A timely notice of appeal was filed. Appellant was directed to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), which he did.

Trial Court Opinion, 2/4/19, at 1-6 (some citations modified).

On appeal, Appellant presents the following issues for review:

I. Whether the trial court abused its discretion in denying Appellant's request for a pre-trial evidentiary hearing to explore allegations of taint regarding the complaints of sexual abuse made by the witnesses of tender years?

II. Whether the trial court abused its discretion in precluding the admission of evidence of contemporaneous allegations of sexual abuse made by the minor victim K.D. against Appellant's two brothers, and evidence of contemporaneous reports to OCY that L.R., who was a relative and companion of both minor victims, was also sexually abused by Appellant and Appellant's two brothers?

Appellant's Brief at 4.²

In his first issue, Appellant argues that the trial court abused its discretion in denying his request for a taint hearing for the child witnesses in this case. Appellant asserts that he provided the trial court with evidence of

² We note that Appellant raised eight issues in his Pa.R.A.P. 1925(b) statement. We address only those issues that Appellant argues in his appellate brief, because the issues Appellant has not argued on appeal are waived. *See* Pa.R.A.P. 2119(a); *see also Commonwealth v. Johnson*, 985 A.2d 915, 924 (Pa. 2009) ("where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived").

taint relating to the child witnesses' testimony and consequently, a hearing was necessary to determine whether they were competent to testify at trial.

"The determination of a witness's competency rests within the sound discretion of the trial court." **Commonwealth v. Davis**, 939 A.2d 905, 906-07 (Pa. Super. 2007). As this Court has recently reiterated, "[t]he general rule in Pennsylvania is that every person is presumed competent to be a witness." **Commonwealth v. Adams-Smith**, 209 A.3d 1011, 1021 (Pa. Super. 2019) (quoting **Commonwealth v. Delbridge**, 855 A.2d 27, 39 (Pa. 2003)). In **Delbridge**, our Supreme Court explained the following regarding competency hearings:

A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. A competency hearing is not concerned with credibility. Credibility involves an assessment of whether . . . what the witness says is true; this is a question for the fact finder. An allegation that the [child witness'] memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be demonstrated that a [witness'] memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation.

Delbridge, 855 A.2d at 40.

In child sexual assault cases, taint is an issue that can necessitate a competency hearing. **Id.** at 39 ("[T]aint is a legitimate question for examination in cases involving complaints of sexual abuse made by young children."). In **Delbridge**, our Supreme Court defined taint as "the implantation of false memories or the distortion of real memories caused by

interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify." *Id.* at 35.

Allegations of taint necessitate a competency hearing in the following circumstances:

In order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. Once some evidence of taint is presented, the competency hearing must be expanded to explore this specific question. During the hearing the party alleging taint bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence. Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption.

Adams-Smith, 209 A.3d at 1021 (quoting ***Delbridge***, 855 A.2d at 40).

Additionally,

In analyzing whether a party has met the "some evidence of taint" standard, the trial court considers the totality of the circumstances around the child's allegations. [***Delbridge***, 855 A.2d] at 41. This Court has identified some of the common considerations relevant to this analysis as follows:

(1) the age of the child; (2) the existence of a motive hostile to the defendant on the part of the child's primary custodian; (3) the possibility that the child's primary custodian is unusually likely to read abuse into normal interaction; (4) whether the child was subjected to repeated interviews by various adults in positions of authority; (5) whether an interested adult was present during the course of any interviews; and (6) the existence of independent evidence regarding the interview techniques employed.

Commonwealth v. Judd, 897 A.2d 1224, 1229 (Pa. Super. 2006) (citation omitted).

Commonwealth v. Smith, 167 A.3d 782, 790 (Pa. Super. 2017).

Here, the trial court explained its decision to deny Appellant's request for a taint hearing as follows:

In this case, applying the **Delbridge** factors, this [c]ourt denied the defense request for a taint hearing because the defense offer of proof was insufficient and did not meet the threshold that would entitle him to a taint hearing. [N.T., 6/25/18, at 17]. There was no evidence of hostile intent or any reason to plant these suggestions or to distort the memory of the children, 11 and five years old. **Id.**

This Court determined that there was not any questioning that was suggestive. **Id.** The Mission Kids interviewer used open-ended, non-suggestive questions. The purpose of the Mission Kids interview is to see that the child is only interviewed once by law enforcement people. **Id.** The techniques that were used during the Mission Kids interview were open-ended. **Id.** at 18.

Importantly, the initial disclosures of sexual abuse by the children were spontaneous. The statements made were largely consistent. There is no evidence of implanting or distorting memories. **Id.**

Nothing presented indicated that the primary custodian would have been likely to read abuse in the normal situations. **Id.** In fact, the initial statements were not made to the victims' respective mothers.

There were not repeated interviews by various adults in positions of authority. The nurse, to the extent that was an interview, was minimal. It was also [the interaction] where K.D. asked to be alone with the nurse. So there was no interested adult in the room at the time, or in the Mission Kids interviews.

It is important to note that in defense counsel's taint argument he skipped over the spontaneous initial disclosures made on November 20, 2017. Rather, his argument focused on the December 29th follow-up conversation in which [Grandmother] asked K.D. for additional details. Both the fact that [Grandmother] did not go to police after this initial disclosure goes to her lack of hostile intent, and the fact that even after the December 29th conversation [Grandmother] and [B.R.] took K.D. to the hospital and not the police also go to lack of hostile intent.

Finally, it is important that [I.R.] was not told about any of the abuse allegations until December 31, 2017, which was after the police were involved and the abuse reports by the children were made to OCY. Clearly she could not have tainted the sexual abuse allegations and statements made prior to her knowledge.

Trial Court Opinion, 2/4/19, at 10-11.

Based upon our review of the record, including the transcripts of Appellant's pre-trial motions hearing and trial, and the parties' appellate briefs, we agree with the trial court's assessment that a taint hearing was not warranted. The record reveals no evidence indicating the presence of the factors set forth in **Smith** and **Judd**, other than the young age of the children.

As the trial court recognized, the actions of Grandmother, in reporting the allegations of sexual abuse, and the Mission Kids interviewer, reflect the absence of those factors, and thus a lack of taint in the child witnesses' testimony. **See id.**; **see also** N.T., 6/25/18, at 17-18.

Furthermore, in his appellate brief, Appellant provides a list of several facts that he contends demonstrates that he provided the trial court with "some evidence of taint." **See** Appellant's Brief at 22-27. Specifically, Appellant points to evidence indicating that: K.D., A.L., and C.L. were young (ages 11, 7, and 5, respectively) when they testified at trial; [I.R.] and Appellant had relationship issues (which included accusations of infidelity by [I.R.] against Appellant); L.R., one of K.D.'s younger siblings, raised allegations of abuse against Appellant and his brothers that the Office of Children and Youth determined were unfounded, and C.L. did not mention that

Appellant's brothers sexually assaulted her in her Mission Kids interview. *See id.* These facts do not provide "some evidence of taint." *See Adams-Smith*, 209 A.3d at 1021. As mentioned above, taint is "the **implantation** of false memories or the **distortion** of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify." *Delbridge*, 855 A.2d at 35 (emphasis added).

In sum, Appellant cites as evidence of taint certain facts that, at best, could undermine the child witnesses' credibility. He does not, however, point to any evidence that shows any person involved in the case attempted to implant false memories or distort the real memories of the child witnesses. Although the facts may ultimately impact witness credibility, they do not bear upon the objective of a taint hearing – to investigate facts that may show a witness' lack of competency to testify. *See Delbridge*, 855 A.2d at 40. Therefore, as there is no record evidence of taint, the trial court did not abuse its discretion in denying Appellant's request for a taint hearing.

In his second issue, Appellant argues that the trial court abused its discretion in precluding him from introducing evidence that K.D. raised allegations of sexual assault against Appellant's two brothers, and that L.R. also raised allegations of sexual assault against Appellant and his brothers.

The trial court denied admission of this evidence on the basis that it was irrelevant. N.T., 6/25/18, at 32-33.

"Questions concerning the admissibility of evidence are within the sound discretion of the trial court and its discretion will not be reversed absent a clear abuse of discretion." ***Commonwealth v. Leaner***, 202 A.3d 749, 773 (Pa. Super. 2019) (quotation and citation omitted). Generally, "all relevant evidence, *i.e.*, evidence which tends to make the existence or non-existence of a material fact more or less probable, is admissible, subject to the prejudice/probative value weighing which attends all decisions upon admissibility." ***Commonwealth v. Dillon***, 925 A.2d 131, 136 (Pa. 2007); ***see also*** Pa.R.E. 401. "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403. "Unfair prejudice means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403 (comment).

In denying Appellant's evidentiary request, the trial court explained that it "found the third party abuse allegations not admissible because they were irrelevant and completely collateral. . . . There was a clear danger of confusion to the jury and distraction to the jury if these allegations were introduced." Trial Court Opinion, 2/4/19, at 15. We agree.

This Court has explained in sexual assault cases, the Rape Shield Law, 18 Pa.C.S.A. § 3104,³ "does not always preclude evidence the complainant was a victim of a prior sexual assault, *see Commonwealth v. Johnson*, [] 638 A.2d 940, 942 ([Pa.] 1994), but the proffered evidence must still be **relevant and material** under the rules of evidence." *Commonwealth v. L.N.*, 787 A.2d 1064, 1069 (Pa. Super. 2001) (emphasis added). As the trial court recognized, the allegations of sexual assault against Appellant and his brothers that were not at issue in this case, "did not tend to prove or disprove" whether Appellant abused K.D. and C.L. *See L.N.*, 787 A.2d at 1069. Instead, Appellant's desire to introduce this evidence would have served only to impeach the victims' credibility. Witnesses, however, "may not be contradicted upon a collateral matter[,], i.e., "one which has no relationship to the matter on trial." *Johnson*, 638 A.2d at 942-43.

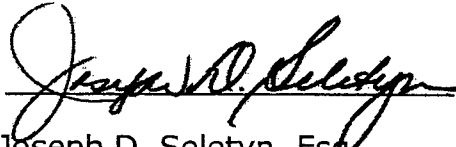
³ The statute reads, in pertinent part, as follows:

(a) General rule.--Evidence of specific instances of the alleged victim's past sexual conduct, past sexual victimization, allegations of past sexual victimization, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions of any offense listed in subsection (c) except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

Finally, given the collateral nature of the accusations, if the trial court had admitted this testimony at trial, the danger of unfair prejudice would have outweighed the testimony's probative value as impeachment evidence. **See** Pa.R.E. 403. In sum, the trial court did not abuse its discretion in precluding the admission of Appellant's proffered evidence. **See** Pa.R.E. 401, 403.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/13/20

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

CARLOS LOPEZ-VANEGAS,

Petitioner

No. 133 MAL 2020

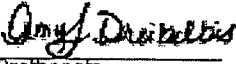
Petition for Allowance of Appeal
from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 21st day of July, 2020, the Petition for Allowance of Appeal is
DENIED.

A True Copy Amy Dreibelbis, Esquire
As Of 07/21/2020

Attest: 
Deputy Prothonotary
Supreme Court of Pennsylvania