COMMONWEALTH	:	IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
	:	
v.	:	No. CP-14-CR-2421-2011
	:	No. CP-14-CR-2422-2011
	:	
GERALD A. SANDUSKY	:	

COMMONWEALTH'S BRIEF IN OPPOSITION TO DEFENDANT'S POST-SENTENCE MOTIONS

TO THE HONORABLE JOHN M. CLELAND, SENIOR JUDGE SPECIALLY PRESIDING:

AND NOW, comes Linda L. Kelly, Attorney General of the Commonwealth of Pennsylvania, by James P. Barker, Chief Deputy Attorney General, who files this Commonwealth's Brief in Opposition to Defendant's Post-Sentence Motions, and in support thereof represents as follows:

I. BACKGROUND

Before the Court are Post-Sentence Motions filed by the Defendant, Gerald A. Sandusky. Sandusky was charged with numerous counts relating to his sexual abuse of pre-teen and teenaged boys over several years. On June 22, 2012, a jury found Sandusky guilty of 45 counts relating to that abuse. On October 9, 2012, the Court

found Sandusky to be a sexually violent predator (SVP) for purposes of Megan's Law and imposed an aggregate sentence of imprisonment for 30 to 60 years. On October 18, 2012, Sandusky filed his Post-Sentence Motions. Pursuant to Court Order, Sandusky filed a Brief in Support of His Post-Sentence Motions. This Commonwealth's Brief in Opposition to Defendant's Post-Sentence Motions is submitted in response thereto.

II. QUESTIONS PRESENTED

1. DID THE COURT ACT WITHIN ITS DISCRETION IN DENYING A DEFENSE MOTION FOR A CONTINUANCE?

2. DID THE COURT ACT WITHIN ITS DISCRETION WHEN IT DECLINED TO INSTRUCT THE JURY SPECIFICALLY AS TO THE FAILURE OF THE VICTIMS TO MAKE A PROMPT COMPLAINT?

3. DID THE COURT PROPERLY INSTRUCT THE JURY THAT CHARACTER EVIDENCE SHOULD BE WEIGHED WITH ALL OF THE OTHER EVIDENCE IN THE CASE IN DECIDING WHETHER THE COMMONWEALTH HAD BORNE ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT?

4. HAS DEFENDANT FAILED TO SHOW THAT THE "COMBINED EFFECT" OF THE COURT'S EXERCISE OF ITS DISCRETION WITH RESPECT TO A PROMPT REPORT INSTRUCTION AND THE CHARACTER EVIDENCE INSTRUCTION WARRANTS A NEW TRIAL?

5. DID THE TRIAL PROSECUTOR ACT WITHIN THE BOUNDS OF ZEALOUS ADVOCACY WHEN ADDRESSING DEFENDANT'S FAILURE TO ANSWER QUESTIONS RELEVANT TO THE TRIAL IN HIS PUBLIC STATEMENTS?

6. DID THE COURT ACT WITHIN ITS DISCRETION WHEN IT ADMITTED A STATEMENT UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE?

7. DID THE COURT PROPERLY DENY DEFENDANT'S MOTIONS TO DISMISS SPECIFIED COUNTS OF THE CRIMINAL INFORMATIONS?

III. ARGUMENT

1. THE COURT ACTED WITHIN ITS DISCRETION IN DENYING A DEFENSE MOTION FOR A CONTINUANCE.

Sandusky first argues that the Court erred by denying his pretrial requests for a continuance. The Superior Court recently summarized the principles to be considered when a defendant moves for a continuance:

> [T]he grant or denial of a motion for a continuance is within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of discretion. *Commonwealth v. Boxley,* 596 Pa. 620, 628, 948 A.2d 742, 746, *cert. denied,* 555 U.S. 1003, 129 S. Ct. 506, 172 L. Ed. 2d 372 (2008). An abuse of discretion "is not merely an error of judgment; rather, discretion is abused when 'the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record." *Commonwealth v. Randolph,* 582 Pa. 576, 583–84, 873 A.2d 1277, 1281 (2005), *cert. denied,* 547 U.S. 1058, 126 S. Ct. 1659, 164 L. Ed. 2d 402 (2006); *Commonwealth v. Thomas,* 879 A.2d 246, 261 (Pa. Super. 2005), *appeal denied,* 605 Pa. 685, 989 A.2d 917 (2010). A bald allegation of an insufficient amount of time to prepare will not provide a basis for reversal of the denial of a continuance motion. *Commonwealth v. Ah Thank Lee,* 389 Pa. Super. 201, 566 A.2d 1205, 1206 (Pa. Super. 1989), *appeal denied,* 527 Pa. 615, 590 A.2d 756 (1990). Instead,
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> > [a]n appellant must be able to show specifically in what manner he was unable to prepare his defense or how he would have prepared differently had he been given more time. We will not reverse a denial of a motion for continuance in the absence of prejudice.
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> *Commonwealth v. Brown,* 351 Pa. Super. 119, 505 A.2d 295, 298 (Pa. Super. 1986).

Commonwealth v. Ross, No. 1566 WDA 2009, 2012 WL 4801433, *4-*5 (Pa. Super. October 10, 2012) (*en banc*) (footnote omitted).

As an initial matter, Sandusky claims that he is not required to demonstrate prejudice because the failure to grant a continuance constructively denied him the right to counsel. Defendant's Brief at 6-8. In *Commonwealth v. Williams*, 597 Pa. 109, 950 A.2d 294 (2008), our Supreme Court discussed just such an argument:

> For its part, the Commonwealth develops that the presumption of prejudice discussed in [*United States v.*]*Cronic*[, 466 U.S. 648 (1984),] applies within a very narrow spectrum of cases. *See Chadwick v. Green,* 740 F.2d 897, 900 (11th Cir. 1984) (elaborating on the narrow range of cases manifesting a fundamental breakdown in the adversarial process and explaining that "the [*Cronic*] Court made clear that a presumption of prejudice from a trial court's refusal to postpone a criminal trial will arise in only very limited and egregious circumstances"). The Commonwealth also observes that the United States Supreme Court has declined to create a rule under which every conviction that followed a "tardy appointment of counsel" would be reversed *per se. Chambers v. Maroney,* 399 U.S. 42, 54, 90 S. Ct. 1975, 1982, 26 L. Ed. 2d 419 (1970). With regard to the fee cap and asserted restriction on investigative assistance, based upon the standard posited by *Cronic,* the Commonwealth maintains that neither creates a presumption of ineffectiveness. In this regard, the Commonwealth explains that the *Cronic* Court emphatically stated that courts will not infer or presume ineffectiveness merely on account of such factors as length of preparation or lack of prior experience or expertise. Rather, the Court directed the focus to whether there had been an actual breakdown in the adversarial process during trial. *See Cronic,* 466 U.S. at 658–59, 104 S. Ct. at 2046–47. The Commonwealth reiterates that the voluminous record of the case demonstrates that counsel subjected the prosecution's witnesses to extensive cross-examination, made innumerable objections, and fought very hard for his client. *Accord Williams,* 537 Pa. at 28, 640 A.2d at 1265 (reflecting this Court's finding, upon its review of the record, of the same).
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> . . .
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> We agree with the PCRA court and the Commonwealth that trial counsel subjected the prosecution's case to meaningful adversarial testing, and therefore, the doctrine of presumed prejudice is not applicable. Both the PCRA court and the Commonwealth appropriately develop that in *Cronic* itself the United States Supreme Court held that a newly-appointed attorney, who was afforded only twenty-five days to prepare for trial in a case which the government spent four and one-half years investigating and preparing, was not *per se* ineffective. *See Cronic,* 466 U.S. at 663–66, 104 S. Ct. at 2049–51. The fact that counsel was a young real estate attorney trying his first criminal case, the severity of the criminal charges, the complexity of the matter, and the inaccessibility of witnesses to counsel did not, individually or in combination, provide a basis for concluding that counsel could not render adequate stewardship. *See id.; see also Avery,* 308 U.S. at 447, 60 S. Ct. at 322 (holding that it was not presumptively unreasonable to expect capital counsel appointed three days before trial to prepare, and the attorney was not *per se* ineffective).

Williams at 138-139, 140, 950 A.2d at 312, 313 (initial brackets added, others in original).

In this case, counsel had over seven months to prepare for trial after Sandusky was charge by criminal complaint. This time period does not account for the fact that Sandusky and his attorney knew in 2008 that there had been a report of a sexual assault. The Grand Jury investigation became public knowledge in March 2011. Lead trial counsel is an experienced, capable attorney with whom Sandusky had prior personal and professional relationships, such that there was no breakdown in communication or personal animus between client and counsel. The issues in the trial were relatively straightforward, as the defense hinged on the credibility of the victims. The victims were cross-examined at length by defense counsel. A review of the extensive record reflects that "trial counsel subjected the prosecution's case to meaningful adversarial testing." *Williams* at 140, 950 A.2d at 313. As in *Williams* and *Cronic*, the presumption of prejudice does not apply under these circumstances.

In his Post-Sentence Motions and Brief, Sandusky fails to establish prejudice. That is, he identifies not a single act that counsel could have performed or a single piece of information that would have been learned with more time before trial that would have had any impact whatsoever on the jury's consideration of the evidence. He merely raises a "bald allegation of an insufficient amount of time to prepare will not provide a basis for reversal of the denial of a continuance motion." *Ross* at *4.

The Court did not abuse its discretion when it denied a continuance.

2. THE COURT ACTED WITHIN ITS DISCRETION WHEN IT DECLINED TO INSTRUCT THE JURY SPECIFICALLY AS TO THE FAILURE OF THE VICTIMS TO MAKE A PROMPT COMPLAINT.

Sandusky next complains that the Court erred when it decline to instruct the jury with respect to a prompt complaint. As an initial matter, Sandusky waived any objection

to the final instruction to the jury by failing to raise an objection or take an exception after the charge was given by the Court and before the jury retired to deliberate, as required by Pa.R.Crim.P. 647. *See also Commonwealth v. Pressley*, 584 Pa. 624, 887 A.2d 220 (2005) (clarifying that Rule 647 requires counsel to place on the record any objection or exception to the final charge, as given, before the jury retires to deliberate).

For some reason, Sandusky argues that *Pressley* is a plurality decision and therefore not precedential. Defendant's Brief at 10-11. Actually, Justice Saylor authored the opinion and was joined by then-Chief Justice Cappy, Justice Newman and Justice Eakin. *Pressley* at 633, 887 A.2d at 225. Justice (now Chief Justice) Castille concurred, and Justice Baer issued a concurring and dissenting opinion in which Justice Nigro joined. Because four of the seven Justices joined in the opinion, *Pressley* most certainly is a majority opinion and is binding precedent. *See also Commonwealth v. Laird*, 605 Pa. 137, 183, 988 A.2d 618, 646 (2010) (unanimous opinion applying the rule of *Pressley*), *cert. denied*, 131 S. Ct. 659 (2010).

Given the foregoing, Sandusky's citation to a supposed preservation of the issue during a discussion in chambers. Defendant's Brief at 9-10 (citing N.T. 6/21/12 at4, 34). Rule 647 and *Pressley*, however, require specific objections[1] and not a general reference to prior discussions. This claim was waived.

Even if not waived, Sandusky's objection to the final charge lacks merit. The standard governing review of a jury charge is as follows:

> [W]hen reviewing jury instructions for error, the charge must be read as a whole to determine whether it was fair or prejudicial. "The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its

[1] Defense counsel made and preserved an objection to the lack of an instruction on a pecuniary interest in the outcome of the proceedings. (N.T. 6/21/12 at 33-34)

consideration." *Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 603 (2007).

Commonwealth v. Sepulveda, 55 A.3d 1108, 1141 (Pa. 2012). With respect to a jury instruction on prompt complaint in a sexual assault case, "where the actual occurrence of the assault is at issue in the case, the trial judge is required to charge the jury as to the relevance of a delay in disclosure and the significance of a prompt complaint." *Commonwealth v. Snoke*, 525 Pa. 295, 302, 580 A.2d 295, 298 (1990). An erroneous jury instruction will not warrant a new trial when a reviewing court is convinced beyond a reasonable doubt that the error is harmless. *Commonwealth v. Bullock*, 868 A.2d 516, 525 (Pa. Super. 2005), *affirmed*, 590 Pa. 480, 913 A.2d 207 (2006).

With respect to the credibility of witnesses, the Court charged as follows:

> Now, as judges of the facts, you are also the judges of the credibility of the witnesses and of their testimony. This means that you must judge the truthfulness and the accuracy of each witness's testimony and decide whether to believe all of it, part of it, or none of it. So, how you may ask do you go about doing that? Well, there are many factors that you may or should consider when judging credibility and deciding whether or not to believe a witness's testimony.
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> You might consider, for example, was the witness able to see or hear or know the things about which he or she testified?
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> How well could the witness remember and describe the things about which he or she testified?
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> How did the witness look and act and speak while testifying?
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> Was the witness's testimony uncertain, confused, self-contradictory, argumentative, evasive?
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> Has the witness ever been convicted of a crime involving dishonesty?
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> What is the witness's reputation for testifying – or for truthfulness in the community among those who know the witness?

How well does the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses? Was it contradicted or supported by the other testimony in evidence which you believe to be true?

Did the witness have any interest in the outcome of the case, anything to gain or lose by the outcome of the case? Any bias, any prejudice, or any other motive that might affect his or her testimony?

If you believe that a witness testified falsely about an important issue, then you may keep that in mind in deciding whether to believe the remainder of the witness's testimony.

A person who testifies falsely about one thing may have testified falsely about other things but that is not necessarily so but that's among the factors that you can consider.

And, finally, after thinking about all the testimony and considering some or all of the factors that I had mentioned to you, you draw on your own experience, your own common sense, and you alone, as the sole judges of the facts, should give the testimony of each witness such credibility as you think that it deserves.

(N.T. 6/21/12 at 15-17)

These instructions must be considered in their entirety. The Court made clear to the jury that it should consider whether the witness had a pecuniary interest in the outcome of the case and whether the witness accurately recalled the events about which the witness testified. These are precisely the matters that are covered by the instruction requested by the defense. Although not given specifically, the concepts were communicated to the jury.

Also, the instructions should be considered in the context of the evidence and arguments that were to be considered by the jury. The defense did not rely merely on a failure to report promptly. Rather, the defense argued that, once a victim came forward and reported that Sandusky had "fondled" him, that victim's mother pushed her son to pursue the allegations as part of a scheme to obtain money from Sandusky. (*See, e.g.*, N.T. 6/21/12 at 40-41) From that, according to the defense, this initial victim became

motivated by money as well. *Id.* at 42. The defense emphasized to the jury that many, if not all, of the victims had attorneys who were present in court. *Id.* at 51-52. The presence of these lawyers showed that the victims had a financial interest in the outcome of the litigation. *Id.* at 52-53. The defense argued that the delay in reporting the abuse was because the abuse never occurred and that the victims made more serious allegations as they realized that more money might be available. *See, e.g., id.* at 55-60. The defense conceded that Sandusky "was a public figure who's well-known not only in Pennsylvania but throughout the United States as one of the best defensive coordinators in college football history." *Id.* at 47.

Placed into context, then, it is clear that the jury was well aware that the defense was that the victims should not be believed because they were motivated by money and their revelations were not made until the opportunity for money arose. This defense was supported by the delay in reporting. The Court's instruction allowed the jury to consider all of the relevant factors put forth by the defense.

Moreover, the record demonstrates that the victims had clear reasons for not disclosing the abuse by Sandusky: not only were they ashamed of the acts of abuse, but Sandusky gave them gifts, including access to the PSU football program, and was a prominent figure who was more likely to be believed than they were. Under these circumstances, any error in refusing to give the requested instruction was harmless. *See Commonwealth v. Ables*, 404 Pa. Super. 169, 590 A.2d 334 (1991) (where record demonstrated reason for lack of prompt complaint, i.e. that victim was under duress, any error in failing to give instruction under *Snoke* was harmless).

The Court's failure to instruct the jury on prompt complaint in the manner requested by the defense does not warrant a new trial.

3. THE COURT PROPERLY INSTRUCTED THE JURY THAT CHARACTER EVIDENCE SHOULD BE WEIGHED WITH ALL OF THE OTHER EVIDENCE IN THE CASE IN DECIDING WHETHER THE COMMONWEALTH HAD BORNE ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT.

Sandusky next argues that the Court erred by instructing the jury that it should consider the evidence of Sandusky's good character in combination with all of the other evidence when deciding whether the Commonwealth had borne its burden of proving that he was guilty beyond a reasonable doubt. Specifically, the Court charged:

> Now, the defense has offered evidence tending to prove that the defendant is of good character. I'm speaking of the defense witnesses who testified that the defendant has a good reputation in the community for being [a] law abiding, peaceable, nonviolent individual.
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> The law recognizes that a person of good character is not likely to commit a crime which is contrary to that person's nature. Evidence of good character may be itself raise a reasonable doubt of guilt and require a verdict of not guilty.
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> So you must weigh and consider the evidence of good character along with the other evidence in the case and if on the evidence you have a reasonable doubt of the defendant's guilt, you may find him not guilty. However, if on all the evidence you are not satisfied beyond a reasonable doubt he is guilty, you should find – that he is guilty, you should find him guilty. But in making that determination, you may consider evidence of good character which you believe to be true.

(N.T. 6/21/12 at 22)

This instruction is consistent with Pennsylvania law:

> ""Evidence of good character is to be regarded as evidence of substantive fact just as any other evidence tending to establish innocence and may be considered by the jury in connection with all the evidence presented in the case on the general issue of guilt or innocence." *Commonwealth v. Harris,* 785 A.2d 998, 1000 (Pa.Super.2001) (citing *Commonwealth v. Luther,* 317 Pa. Super. 41, 463 A.2d 1073, 1077 (1983)).

Commonwealth v. Hull, 982 A.2d 1020, 1023 (Pa. Super. 2009).

Taking Sandusky's argument to its logical conclusion, if a jury credits testimony that a defendant has a good reputation for being law abiding, the jury may consider only that evidence and must acquit the defendant. (*See* N.T. 6/21/12 at 6 (defense counsel arguing, "We would add that you propose that good character [may] by itself raises [sic] a reasonable doubt and *require a verdict of not guilty in of itself...*"; emphasis added) Essentially, a defendant has a "get out of jail free card" if he or she can present a credible witness to reputation because no other evidence may be considered under those circumstances. This plainly is not the law and should never be the law.

The Court's instruction accurately reflects Pennsylvania law and there was no error.

4. DEFENDANT HAS FAILED TO SHOW THAT THE "COMBINED EFFECT" OF THE COURT'S EXERCISE OF ITS DISCRETION WITH RESPECT TO A PROMPT REPORT INSTRUCTION AND THE CHARACTER EVIDENCE INSTRUCTION WARRANTS A NEW TRIAL.

Sandusky next argues that the "combined effect" of the failure to provide a prompt complaint instruction and the purportedly erroneous instruction on character evidence deprived him of a fair trial. As noted above there was no error in either instance. With respect to the prompt complaint, any error would be harmless. There is no "combined effect" to be reviewed. At best, any error was harmless because all of the relevant concepts were conveyed to the jury in a clear, comprehensible, accurate manner. Sandusky was not deprived of a fair trial by any "combined effect" of the final charge to the jury.

5. THE TRIAL PROSECUTOR ACTED WITHIN THE BOUNDS OF ZEALOUS ADVOCACY WHEN ADDRESSING DEFENDANT'S FAILURE TO ANSWER QUESTIONS RELEVANT TO THE TRIAL IN HIS PUBLIC STATEMENTS.

Sandusky next claims that there was "reversible error" when the trial prosecutor argued in his summation regarding Sandusky's public statements on the case. This argument is properly characterized as a claim of prosecutorial misconduct.

> It is well settled that a prosecutor has considerable latitude during closing arguments and his or her statements are fair if they are supported by the evidence or use inferences that can reasonably be derived from the evidence. *Commonwealth v. Holley,* 945 A.2d 241, 250 (Pa. Super. 2008) (citation omitted). "Further, prosecutorial misconduct does not take place unless the 'unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict.'" *Id.* (quoting *Commonwealth v. Paddy,* 569 Pa. 47, 82–83, 800 A.2d 294, 316 (2002)). Moreover, a prosecutor can fairly respond to attacks on a witness's credibility. *Id.* (citation omitted). In reviewing a claim of improper prosecutorial comments, our standard of review is whether the trial court abused its discretion. *Commonwealth v. Hall,* 549 Pa. 269, 285, 701 A.2d 190, 198 (1997) (citation omitted). When considering such a claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one, because not every inappropriate remark by a prosecutor constitutes reversible error. *Commonwealth v. Lewis,* 39 A.3d 341, 352 (Pa.Super.2012) (citation and quotation marks omitted). "A prosecutor's statements to a jury do not occur in a vacuum, and we must view them in context." *Id.* (citation omitted).

Commonwealth v. Noel, 53 A.3d 848, 858 (Pa. Super. 2012).

Sandusky raises this claim in the context of the prosecutor's discussion of Sandusky's television interview by Bob Costas. Specifically, the prosecutor pointed out that Sandusky, instead of denying the accusations against him or explaining why the witnesses against him would make the accusations that they did, responded only that Costas would have to "ask them." (N.T. 6/21/12 at 140-142) What Sandusky ignores is that this comment was made in the context of responding to attacks on the credibility of Commonwealth witness Michael McQueary. *Id.* at 75-79, 137-140. Further, the

prosecutor's argument was fair response to defense counsel's own attempt to explain away the evidence of Sandusky's interview. *Id.* at 66-73.

Additionally, the prosecutor confined his statements to the failure of Sandusky to answer simple questions during the interview in any manner that was incompatible with his guilt. He did not raise any issue regarding Sandusky's failure to testify at trial, as Sandusky now argues. Defendant's Brief at 33 (arguing that prosecutor's comment was "broad enough to cover the trial"). This never occurred.

There was no prosecutorial misconduct and no "reversible error" based on the prosecutor's comments.

6. THE COURT ACTED WITHIN ITS DISCRETION WHEN IT ADMITTED A STATEMENT UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE.

Sandusky complains that the Court erred by admitting evidence in the form of hearsay statements by a janitor indicating that he saw Sandusky "licking on [a boy's] privates." (*See* N.T. 6/13/12 at 229-231) This testimony was properly admitted under the excited utterance exception to the hearsay rule.

> The excited utterance exception provides "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible even if the declarant is available as a witness. Pa.R.E. 803(2). This court has further defined such statement as:
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> > A spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person had just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties.
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> *Commonwealth v. Jones,* 590 Pa. 202, 912 A.2d 268, 282 (2006) (quoting *Commonwealth v. Stokes,* 532 Pa. 242, 615 A.2d 704, 712 (1992)). There is no

> clearly defined time limit within which the statement must be made after the startling event; the determination is factually driven, made on a case-by-case basis. *Id.; see also Commonwealth v. Boczkowski,* 577 Pa. 421, 846 A.2d 75, 95–96 (2004). "The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance." Pa.R.E. 803(2), cmt. (quoting *Commonwealth v. Gore,* 262 Pa. Super. 540, 396 A.2d 1302, 1305 (1978)).

Commonwealth v. Wholaver, 605 Pa. 325, 364, 989 A.2d 883, 906-907 (2010), *cert. denied*, 131 S. Ct. 332 (2010).

In this case, at the time that the janitor made his first statement to a coworker, his face was white and his hands were trembling as a result of what he had seen. (N.T. 6/13/12 at 229) The coworker walked the janitor to a nearby room to calm him down, and the janitor told others that he had seen Sandusky performing oral sex on the boy. *Id.* at 230-231. The janitor was still shaking and white, and was so upset that the others thought that he was going to have a heart attack. *Id.* at 231. The janitor plainly was still under the stress caused by the event when he made his statements, and the testimony was admissible as an excited utterance.

Sandusky also claims that the statement was inadmissible because there was no "independent evidence" that the startling event occurred. Defendant's Brief at 37-38 (citing *Commonwealth v. Barnes*, 310 Pa. Super. 480, 456 A.2d 1037 (1983)). *But see Commonwealth v. Keys*, 814 A.2d 1256, 1259 (Pa. Super. 2003) (questioning "continued efficacy of *Barnes*"). Under Pa.R.E. 803, which became effective after issuance of *Barnes*, there is no mention of requirement of independent evidence to support admission under excited utterance exception. It is respectfully submitted that *Barnes* no longer represents the law of Pennsylvania.

Even if *Barnes* has continued validity, the excited utterance in this case was supported by independent evidence that a crime had taken place. The coworker testified that he saw "two sets of legs" in a shower when he went to clean a locker room. (N.T. 6/13/12 at 226) One set was "hairy" and the other "skinny." *Id.* at 227. Sandusky later emerged from the locker room with a small boy, both with wet hair and carrying gym bags. *Id.* at 228-229. On the way down the hallway, Sandusky took the boy's hand. *Id.* at 228. The coworker then returned to his cleaning activity but was interrupted when he encountered the janitor, which is when the excited utterances were made. *Id.* at 229.

Based on this evidence, the Commonwealth established that Sandusky was in the shower with a small boy and thereby corroborated the statement by the janitor. There was no error.

7. THE COURT PROPERLY DENIED DEFENDANT'S MOTIONS TO DISMISS SPECIFIED COUNTS OF THE CRIMINAL INFORMATIONS.

Finally, Sandusky claims error in the Court's denial of his motion to dismiss certain counts of the Criminal Informations based on the non-specificity of the dates on which the offenses were committed.

> It is the duty of the prosecution to "fix the date when an alleged offense occurred with reasonable certainty...." *Commonwealth v. Jette,* 818 A.2d 533, 535 (Pa.Super.2003) (citation omitted). The purpose of so advising a defendant of the date when an offense is alleged to have been committed is to provide him with sufficient notice to meet the charges and prepare a defense. *Commonwealth v. Gibbons,* 567 Pa. 24, 784 A.2d 776 (2001).
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> However, "[d]u[e] process is not reducible to a mathematical formula," and the Commonwealth does not always need to prove a single specific date of an alleged crime. *Commonwealth v. Devlin,* 460 Pa. 508, 515–516, 333 A.2d 888, 892 (1975). Additionally, "indictments must be read in a common sense manner and are not to be construed in an overly technical sense." *Commonwealth v. Einhorn,* 911 A.2d 960, 978 (Pa.Super.2006) (quoting *Commonwealth v. Ohle,*

> 503 Pa. 566, 588, 470 A.2d 61, 73 (1983)). Permissible leeway regarding the date provided varies with, *inter alia,* the nature of the crime and the rights of the accused. *Commonwealth v. Einhorn,* 911 A.2d 960, 978 (Pa.Super.2006). *See* Pa.R.Crim.P. 560(B)(3), stating that it shall be sufficient for the Commonwealth to provide in the information, if the precise date of an offense is not known, an allegation that the offense was committed on or about any date within the period fixed by the statute of limitations.

Commonwealth v. Koehler, 914 A.2d 427, 436 (Pa. Super. 2006). The Commonwealth is granted greater latitude when the offense is a continuous course of criminal conduct and when the victim is a child. *Commonwealth v. Brooks*, 7 A.3d 852, 858-859 (Pa. Super. 2010).

In this case, the Commonwealth established the dates to the extent feasible, given that the events took place over a number of years and involved a number of young victims (albeit not as young as involved in *Brooks*). In both the Criminal Informations and in other materials provided to the defense, the Commonwealth narrowed the scope of the timeframe as to each victim and permitted Sandusky to raise his defense. To this it should be added that time was not of the essence, *see Brooks* at 859, for a defense that the victims made up their stories in order to obtain money. As such, there was no error in the Court's denial of Sandusky's motion to dismiss.

WHEREFORE, the Commonwealth respectfully requests that the Court enter an Order denying Sandusky's Post-Sentence Motions.

Respectfully submitted,

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VERIFICATION

The facts recited in the foregoing motion are true and correct to the best of my knowledge and belief. This statement is made with knowledge that a false statement is punishable by law under 18 Pa. C.S. § 4904(b).

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving one copy of the foregoing Commonwealth's Brief in Opposition to Defendant's Post-Sentence Motions upon the persons and in the manner indicated below:

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