

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

M.B., a minor, by and through her parent and natural guardian, T.B., Plaintiff,	:	
	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
WOMEN'S CHRISTIAN ALLIANCE, et al., Defendants.	:	No. 00-5223
	:	
	:	

MEMORANDUM AND ORDER

Schiller, J.

June 16, 2003

I. BACKGROUND

Presently before the Court are Defendant Mary Barksdale's and Defendants Women's Christian Alliance and Marva Rountree's post-trial motions. Because a full recitation of the facts has been provided in prior rulings by this Court and the parties are familiar with the facts of this action, I will dispense with repeating the same here.¹ After a four-day jury trial concluding with a \$2.8 million dollar verdict and judgment for the Plaintiff, Defendants Mary Barksdale, Women's Christian Alliance, and Marva Rountree move this Court to enter judgment as a matter of law in their favor, or, alternatively, to order a new trial. In support of their respective motions, Defendants raise many issues which will be addressed below.

¹ For the factual background of this action, see *M.B. v. City of Philadelphia*, Civ. A. No. 00-5223, 2003 WL 733879, 2003 U.S. Dist. LEXIS 2999 (E.D. Pa. Mar. 3, 2003) or *M.B. v. City of Philadelphia*, Civ. A. No. 00-5223, 2003 WL 1144307, 2003 U.S. Dist. LEXIS 3732 (E.D. Pa. Mar. 13, 2003).

II. LEGAL STANDARDS

Defendants Women’s Christian Alliance and Marva Rountree (“WCA Defendants”) and Defendant Mary Barksdale respectively move for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), or, in the alternative, for a new trial pursuant to Federal Rule Civil Procedure 59. Upon a motion for judgment as a matter of law for insufficiency of the evidence, a district court may let the judgment stand, order a new trial, or direct entry of judgment as a matter of law. *See* FED. R. CIV. P. 50(b)(1). Judgment as a matter of law can only be granted when there is no legally sufficient basis for a reasonable jury to have found for the nonmoving party. *See* FED. R. CIV. P. 50(a); *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 149-150 (2000) (discussing standard under Rule 50); *Gomez v. Allegheny Health Sys. Inc.*, 71 F.3d 1079, 1083 (3d Cir. 1995); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2524 (2d. Ed. 1994). If the record contains even “the minimum quantum of evidence upon which a jury might reasonably afford relief,” the verdict must be sustained. *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691 (3d Cir. 1993) (*quoting Keith v. Truck Stops Corp.*, 909 F.2d 743, 745 (3d Cir. 1990)).

In making its determination whether the evidence presented at trial is sufficient to withstand a motion for judgment as a matter of law, a district court must view the record as a whole, drawing “all reasonable inferences in favor of the nonmoving party,” and may not weigh the parties’ evidence or credibility of the witnesses. *Reeves*, 530 U.S. at 150; *McDaniels v. Flick*, 59 F.3d 446, 453 (3d Cir. 1995); *Keith*, 909 F.2d at 745. “[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that

‘evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.’” *Reeves*, 530 U.S. at 150 (citations omitted).

Alternatively, Federal Rule of Civil Procedure 59 permits a court to order a new trial “for any reason for which new trials have heretofore been granted in actions at law in the courts of the United States.” FED. R. CIV. P. 59(a). As such, Rule 59(a) does not specify grounds on which a court can grant a new trial and the decision is left to the discretion of the district court. *See Blancha v. Raymark Indus.*, 972 F.2d 507, 512 (3d Cir. 1992) (“The decision to grant or deny a new trial is confided almost entirely to the discretion of the district court.”) (*citing Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980)). Common reasons to grant new trials include situations where there has been prejudicial errors of law or where the verdict is against the weight of the evidence. *See Maylie v. Nat’l R.R. Passenger Corp.*, 791 F. Supp. 477, 480 (E.D. Pa. 1992), *aff’d without opinion*, 983 F.2d 1051 (3d Cir. 1992).

The Third Circuit has provided different standards depending on whether the motion for a new trial is based on a prejudicial error of law or a verdict against the weight of the evidence. *See Klein v. Hollings*, 992 F.2d 1285, 1289-90 (3d Cir. 1993). When the district court commits a prejudicial error, it has wide discretion in deciding a motion for a new trial. *See Klein*, 992 F.2d at 1289-90 (holding that “the district court’s latitude on a new trial motion is broad when the reason for interfering with the jury verdict is a ruling on a matter that initially rested within the discretion of the court, e.g. evidentiary rulings, . . . or prejudicial statements made by counsel” (citations omitted)). Specifically, when claims are based on erroneous jury instructions, the court, in its discretion, reviews the charge to determine whether the instructions “taken as a whole, properly apprised the jury of the issues and the applicable law.” *Montgomery County v. Microvote Corp.*, 320

F.3d 440, 445 (3d Cir. 2003) (citing *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 275 (3d Cir. 1998)); see also *Dressler v. Busch Entm't Corp.*, 143 F.3d 778, 780 (3d Cir. 1998) (holding jury instructions should be reviewed by “totality of the charge given, not merely a particular paragraph or sentence”).

When the verdict is against the weight of the evidence, however, the district court’s discretion to order a new trial is much narrower, *Klein*, 992 F.2d at 1290, and the “district court [is cautioned] not [to] substitute ‘its judgment of the facts and the credibility of the witnesses for that of the jury.’” *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 211 (3d Cir. 1992) (quoting *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (en banc)). As such, a district court should grant a new trial “only when the record shows that the jury’s verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience.” *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1353 (3d Cir. 1991) (citing *EEOC v. Del. Dep’t Health*, 865 F.2d 1408, 1413 (3d Cir. 1988)).

III. DISCUSSION

WCA Defendants and Defendant Mary Barksdale move for judgment as a matter of law, or, alternatively, for a new trial based on several grounds. To the extent that their motions are made on grounds already explained by the Court in prior opinion, I refer the parties to the explanations delineated in those rulings.² The remaining grounds asserted by Defendants do not warrant judgment

² Specifically, WCA Defendants and Defendant Barksdale object to the Court’s rulings denying summary judgment, deeming Mary Barksdale an agent of WCA as a matter of law, and retaining jurisdiction. Explanation of those rulings are contained in the Court’s memoranda and orders filed with respect to those motions. See Memorandum and Order denying Defendant WCA’s motion for summary judgment dated March 3, 2003, available at *M.B. v. City of*

as a matter of law or a new trial for the reasons set forth below.

A. Evidence of Mary Barksdale's Negligence

Defendant Barksdale asserts that judgment as a matter of law should be entered in her favor as there is no legally sufficient evidentiary basis for a reasonable jury to find for Plaintiff against her.³ Alternatively, Ms. Barksdale argues that a new trial should be granted as the verdict is against the weight of the evidence.

At trial, Ms. Barksdale testified that she did not know that Mr. Ford was using drugs or going to drug rehabilitation while he was living at her home. (Mar. 25, 2003 Tr. at 76-79.) Mr. Ford's testimony, however, suggests that Defendant Barksdale did have knowledge of his drug problem

Philadelphia, Civ. A. No. 00-5223, 2003 WL 733879, 2003 U.S. Dist. LEXIS 2999 (E.D. Pa. Mar. 3, 2003); Memorandum and Order granting Plaintiff's motion to deem Mary Barksdale an agent of WCA dated Mar. 13, 2003, available at *M.B. v. City of Philadelphia*, Civ. A. No. 00-5223, 2003 WL 1144307, 2003 U.S. Dist. LEXIS 3732 (E.D. Pa. Mar. 13, 2003); and Memorandum and Order retaining jurisdiction dated March 19, 2003.

³ Defendant Barksdale's initial motion for judgment as a matter of law was denied by this Court and the action was submitted to the jury. (Mar. 26, 2003 Tr. at 136-138; Mar. 27, 2003 Tr. at 48.) As such, Defendant Barksdale properly renews this motion pursuant to Federal Rule of Civil Procedure 50(b).

Alternatively, WCA Defendants argue that they were not permitted to argue their motion pursuant to Federal Rule of Civil 50(a) after the close of Plaintiff's evidence and that the Court committed error in prohibiting counsel to argue on behalf of the WCA Defendants. After review of the transcript, (Mar. 26, 2003 Tr. at 134-148), it is clear that WCA Defendants' counsel was not prohibited from making a Rule 50(a) motion, rather it seems the Court requested that counsel reserve these motions until after the close of all evidence (*Id.* at 136). Nevertheless, Federal Rule of Civil Procedure 50(b) states that "[i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." FED. R. CIV. P. 50(b). As WCA Defendants are now making their arguments for judgment as a matter of law and the Court is determining the legal questions raised in their motion, there has been no prejudice to WCA Defendants.

prior to permitting him to live in her home.⁴ Mr. Ford also testified that Plaintiff played unsupervised in the basement -where Mr. Ford lived - “millions of times.” (Mar. 26, 2003 Tr. at 44-46.) Giving all reasonable inferences to Plaintiff and resolving all conflicts in the evidence in her favor, it is clear that a reasonable jury could have concluded based on this record that Ms. Barksdale was negligent when she permitted Irving Ford, a known drug addict, to live in her home, and allowed

⁴ Mr. Ford’s deposition was read into evidence during trial, and the jury heard him testify to the following:

Q: Did [Ms. Barksdale] ever ask you if you were still using crack or any other drug before you moved into her home?

A: Yes.

Q: What did she ask you?

A: She asked me, she asked me to, she don’t ask me anything about, she said, why don’t you stop. Why don’t you go to your [rehab] program.

Q: Was this while you were living at your father’s house because my question was before you moved into Mrs. Barksdale’s house, before she said you could come live at her house, did she ask you any questions about your drug problem or your use of crack?

A: No.

Q: Did she ever tell you that if you lived in her home you would have to stop using crack?

A: Yes.

Q: Do you recall, did she tell you this before you moved in her home or . . . after you were living in her home?

A: Before and after.

(Mar. 26, 2003 Tr. at 40-41.)

him to have unsupervised contact with Plaintiff. Additionally, a reasonable jury could have found that Ms. Barksdale's acts or omissions afforded Mr. Ford the opportunity to cause Plaintiff harm, and as such, substantially contributed to the sexual abuse of Plaintiff. Thus, I deny the motion for judgment as a matter of law on this ground as there is at least a "minimum quantum of evidence" upon which a jury could grant relief. *Keith*, 909 F.2d 743. Similarly, I deny the motion for a new trial on this ground as: (1) I cannot weigh the testimony of these witnesses, and as such, the verdict cannot be said to be against the weight of the evidence; and (2) I do not find that the verdict shocks the conscience or that there has been a miscarriage of justice in the verdict against Ms. Barksdale.

B. Attorney Misconduct

WCA Defendants and Defendant Barksdale assert that Plaintiff's counsel's improper reference to allegations of sexual abuse of another child in the Barksdale home was unfairly prejudicial and warrants a new trial.⁵ "A new trial may be granted only where the improper statements made it 'reasonably probable' that the verdict was influenced by prejudicial statements."

⁵ WCA Defendants and Defendant Barksdale rely on an affidavit submitted by counsel for Defendant Mary Barksdale, Mr. Steven Cherry, in asserting that the verdict could have been influenced by these remarks. Mr. Cherry's affidavit asserts that after the verdict was returned, counsel for the parties discussed with the former jurors "what worked and didn't work at trial, and what facts and/or arguments impressed the jury the most." (Cherry Aff. at 2, attached to Def. Barksdale's Supplemental to Renewed Mot. for Jud. as a matter of law or, in the Alternative, for New Trial, Ex. B.) Mr. Cherry stated that one juror "specifically mentioned" recalling testimony regarding allegations of abuse regarding other children and that she thought that there were "other things going on" at the house that the jury was not hearing. (*Id.*) It is well-settled that a trial court may not consider statements, even those that are volunteered, from jurors regarding their "decisional processes" when deciding a motion for a new trial. *See Domeracki v. Humble Oil Refining Co.*, 443 F.2d 1245, 1247-48 (3d Cir. 1971) ("Neither a trial court nor an appellate court has the authority to inquire into the jury's decisional processes, even when information pertaining to the deliberations is volunteered by one of the jurors."); *see also Andrews v. Karras*, Civ. A. No. 97-3414, 1998 WL 754724, at *5, n.5, 1998 U.S. Dist. LEXIS 17004, at *15 (E.D. Pa. Oct. 29, 1998)(*citing* same). Therefore, Mr. Cherry's affidavit is not properly before the Court. Thus, I do not consider it in reaching my decision on this ground.

See Greenleaf v. Garlock, Inc., 174 F.3d 352, 363-64 (3d Cir. 1999) (*quoting Fineman*, 980 F.2d at 207). In an Order dated March 4, 2003, the Court granted Defendants' motion in limine to exclude reference to allegations of sexual abuse of another child who lived the Barksdale foster home. On the first day of trial, Plaintiff's counsel made a brief reference to another foster child who alleged sexual abuse in the Barksdale foster home. (Mar. 24, 2003 Tr. at 130-31.) The witness, Sandra Lewis, was discussing a particular form (the "CY-47 ") that is filed when allegations of abuse are reported to the child abuse hotline. The testimony was as follows:

[Plaintiff's counsel]: Nobody from WCA bothered to call [the child abuse hotline] throughout the month of May, did they?

[Sandra Lewis]: I can't remember.

Q: Well, if there was, there would be a CY-47, wouldn't there?

A: A CY-47 was filed and it was unfounded.

Q: The CY-47 is from April, April 15, 1997.

A: That wasn't the initial CY-47.

Q: The CY – you're absolutely right, ma'am and we haven't introduced that into evidence because – and I'm not going to testify here. But isn't it true that that CY-47 was not for an incident with [M.B.], but for another child in the foster home?

A: Yes.

Q: Another child who had been –

THE COURT: All right, stop right there.

[Defendant WCA's counsel]: Objection.

[Defendant Barksdale's counsel]: Objection.

THE COURT: It had nothing to do with this plaintiff.

(Mar. 24, 2003 Tr. at 130.)

WCA Defendants and Defendant Barksdale assert that Ms. Lewis was referring to a CY-47 filed on behalf of Plaintiff and not on behalf of another foster child that lived in the Barksdale foster home. Ms. Lewis's testimony, however, suggests that she was referring to the CY-47 that was filed for another foster child who lived in the Barksdale home when she replied affirmatively to counsel's question. As such, she opened the door to the questioning on this topic, and, thus, it cannot be said that Plaintiff's counsel's question was necessarily improper. Nevertheless, regardless of whether the question was improper, the Court stopped the line of questioning and further testimony on the topic and instructed the jury that "it had nothing to do with this plaintiff." (Mar. 24, 2003 Tr. at 130.) As the reference was isolated, I cannot conclude that it was reasonably probable, after three more days of additional testimony, that this brief reference influenced the verdict.

C. Jury Instructions

WCA Defendants and Defendant Mary Barksdale contend that a new trial is warranted because the Court refused to give a superceding cause instruction to the jury.⁶ Quoting *Ford v.*

⁶ The instruction given on this issue was as follows:

An act is not harmful or negligent unless it can reasonably be foreseen that the doing or not doing thereof is attended with such probability of injury to another that a duty arises to refrain therefrom or act in such manner that harm does not result.

Where a defendant could not reasonably foresee any injury as a result of his act or inaction, or where his conduct was reasonable in light of what he could anticipate, there is no negligence and no

Jeffries, 379 A.2d 111, 115 (Pa. 1977), Defendant Mary Barksdale argues that the Court should have included the following previously requested language:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

liability. No duty arises under the law of negligence unless the likelihood of harm to another is foreseeable.

It is for you to decide, as factfinder, in light of all the facts and circumstances including whether there was a duty to perform a background check of Irving Ford, whether it could have reasonably been foreseen by Ms. Barksdale, Marva Rountree, Sandra Lewis and Women's Christian Alliance that their actions or inactions afforded an opportunity to Irving Ford to cause harm to [M.B.] in some way. If you do not find that it was reasonably foreseeable to Ms. Barksdale, Marva Rountree, Sandra Lewis and Women's Christian Alliance that their actions or inactions would lead to [M.B.] being harmed by Irving Ford, then you may not find that these defendants were negligent.

Additionally, if you find that Women's Christian Alliance or Marva Rountree or Sandra Lewis or Mary Barksdale was negligent in not pursuing the possibility of sexual abuse of [M.B.], was it reasonably foreseeable that [M.B.] would suffer additional harm and did in fact suffer additional harm.

Also, if you find that Women's Christian Alliance, Marva Rountree or Sandra Lewis was negligent in leaving [M.B.] at the Barksdale home after [M.B.] was diagnosed with HPV and genital warts, was it reasonably foreseeable that [M.B.] would suffer additional harm and did in fact suffer additional harm.

(Mar. 27, 2003 Tr. 37-39.)

Jeffries, 379 A.2d at 115 (quoting RESTATEMENT (SECOND) OF TORTS §448, cmt. b). Additionally, Defendant Barksdale argues that the Court should have instructed the jury that if they found that Ms. Barksdale “did not realize or had no reason to realize that she created a situation which afforded Irwin [sic] Ford an opportunity to sexually assault M.B., or if you find that she did not realize or have reason to realize that Ford might avail himself of the opportunity to sexually assault M.B., you cannot find that Ms. Barksdale’s negligence was the proximate cause of M.B.’s harm, and you must find in favor of Ms. Barksdale.” (Def. Barksdale’s Mot. for New Trial at 7-8.) Similarly, WCA Defendants argue that the rape was an unforeseeable act that they did not cause and had no reason to know to prevent it.

Defendants’ arguments lack merit. First, a “district court has substantial discretion with respect to specific wording of jury instructions and need not give [a] proposed instruction if essential points are covered by those that are given.” *Grazier v. City of Philadelphia*, 328 F.3d 120, 2003 U.S. App. LEXIS 8762, at *16 (3d Cir. 2003) (citing *Douglas v. Owens*, 50 F.3d 1226, 1233 (3d Cir. 1995)). Second, the arguments narrowly construe the law under *Ford v. Jeffries*. Specifically, the Supreme Court of Pennsylvania in *Jeffries* held that a negligent actor would not be liable for a superceding cause unless “the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.” *Ford*, 379 A.2d at 115. The court did not hold, however, that a superceding cause instructions must be given when a negligent actor realized or should have realized that his or her actions would have created an opportunity for a third party to commit the particular crime or tort that was actually committed. *Id.* As such, the law does not require that Defendants realized or should have realized that Mr. Ford would sexually assault

Plaintiff. Rather, the law provides that Defendants are liable if the jury determines that Defendants realized or should have realized that their acts or omissions created an opportunity for Mr. Ford to commit a tort or a crime that would cause harm to Plaintiff. *See id.* at 114-116 (holding that defendant's acts or omissions created opportunity "such that third persons might avail themselves of the opportunity to commit a tort or a crime" and that "whether or not [defendant] should have realized that such a situation had been created is a question for the jury to decide" (emphasis added)). After viewing the jury instructions as a whole, it is clear that the jury was apprised of the applicable law discussed above. Moreover, the jury knew from the verdict sheet that it could have found Defendant Ford one-hundred percent liable if it thought that it was appropriate. Thus, I deny the motions on this ground.

D. Attorney Summations

Pointing to the Court's determination of the order of attorney summations, Defendant Barksdale argues that a new trial is warranted. Defendant argues that the Court violated Local Rule 39.1 when it permitted Plaintiff's counsel a reply after all Defendants made their respective summations. Local Rule of Civil Procedure 39.1, however, states that a plaintiff's attorney will not be able to reply during summations "if no evidence has been admitted on offer of any defendant." *See* Local Rule 39.1(b). WCA Defendants introduced exhibits and called a social work expert. Therefore, it was not unfairly prejudicial to allow Plaintiff's counsel a reply summation as at least one defendant had put on evidence.

E. Admission of Evidence Related to Drug Use

WCA Defendants and Defendant Barksdale assert that a new trial is warranted because the introduction of evidence of Mr. Ford's drug use in the Barksdale foster home and his testimony

regarding the cost of crack cocaine was unfairly prejudicial. In making these arguments, Defendants assert that testimony regarding drug use in the home was irrelevant. As discussed above, the determination of whether Ms. Barksdale was negligent could have focused on whether she knew or should have known about Mr. Ford's drug addiction and his use of drugs in the foster home. Thus, evidence of drug use by Mr. Ford was relevant. Mr. Ford's testimony regarding the cost of crack cocaine was also relevant to whether he used drugs. The introduction of this testimony was no more prejudicial to Ms. Barksdale than testimony that she knew he had a drug problem. Any suggestion by Plaintiff's counsel regarding the fact that Ms. Barksdale paid Irving Ford five dollars - the cost of crack cocaine - for odds jobs, was argument based on circumstantial evidence. As instructed by the Court, the jury was free to disregard counsel's argument if it did not comport to the evidence as they heard it. Therefore, I find that the admission of this evidence was not unfairly prejudicial and deny the motion for a new trial on this ground.

F. Irving Ford's Guilty Plea

WCA Defendants and Defendant Mary Barksdale argue that the Court's ruling regarding the conclusive effect of Mr. Ford's guilty plea and exclusion of testimony by Mr. Ford denying that he committed the sexual abuse of Plaintiff was in error.⁷ On March 4, 2003, the Court ordered that:

- b. The fact of Irving Ford's guilty plea and the guilty plea colloquy of Irving Ford, dated October 15, 2001, are admissible in evidence at trial against Defendant Irving Ford only.
- c. The guilty plea and guilty plea colloquy are conclusive evidence that Defendant Ford committed the acts admitted to therein. Defendants are precluded from presenting evidence on the issue of whether these acts were committed.

⁷ Despite WCA's contention, Mr. Ford was not prohibited from testifying at all, he was, however, prohibited from testifying contrary to his guilty plea. *See* Order dated March 6, 2003.

- d. An appropriate limiting instruction will be given to the jury regarding the non-conclusive effect of the guilty plea against the other defendants in proving elements of the claims against them such as knowledge or deliberate indifference.

Order dated March 4, 2003.

Under Pennsylvania law, “a conviction from a guilty plea is equivalent to a conviction from a trial-by-jury.” *DiJoseph v. Vuotto*, 968 F. Supp. 244, 247 (E.D. Pa. 1997) (citing *Commonwealth v. Mitchell*, 535 A.2d 581, 585 (Pa. 1987)). Criminal convictions, under Pennsylvania law, are admissible in subsequent civil proceedings as conclusive evidence of the facts underlying the conviction. *See id.* at 247 (“Operative facts necessary for criminal convictions are admissible as conclusive facts in civil suits arising from the same events and circumstances.” (citing *Folino v. Young*, 568 A.2d 171, 172 (Pa. 1990)); *Commonwealth v. Mitchell*, 535 A.2d 581, 585 (Pa. 1987))). Similarly, “it is well settled that a guilty plea constitutes an admission to all of the facts averred in the indictment.” *Mitchell*, 535 A.2d at 585 (citing *Commonwealth ex rel. Walls v. Rundle*, 414 Pa. 53, 198 A.2d 528 (1964)). Additionally, the Supreme Court of Pennsylvania has held that a defendant should not be allowed to subsequently “deny that which was established by his criminal conviction, without proof that his conviction was procured by fraud, perjury or some manner or error now sufficient to upset the conviction itself.” *Mitchell*, 535 A.2d at 585 (quoting *Hurt v. Stirone*, 206 A.2d 624, 626 (Pa. 1965)). Aside from fearing that he might spend twenty years in prison, there is no other evidence before the Court that would suggest that Mr. Ford’s guilty plea was obtained by fraud, perjury or other improper manner. As such, allowing Mr. Ford to deny the facts of his guilty plea would be improper under Pennsylvania law. Mr. Ford’s guilty plea is also properly considered conclusive evidence in this civil case regarding whether the acts were in fact committed. *See Stidham v. Millvale Sportsmen’s Club*, 618 A.2d 945, 952-953 (Pa. Super. 1992) (holding guilty

plea of third-degree murder established that insured shot and killed victim, although it did not establish intent); *State Farm Fire & Cas. Co. v. Estate of Cooper*, 2001 WL 1287574, at *4-5, 2001 U.S. Dist. LEXIS 17050, at *13-14 (E.D. Pa. Oct. 24, 2001) (holding that because a guilty plea constitutes an admission to all facts averred in the indictment, “it may be used ‘to establish the operative facts in a subsequent civil case based on those same facts’” (citing *Mitchell*, 535 A.2d at 584-85)). The guilty plea did not have conclusive effect regarding other factual issues in the negligence claims against the other Defendants. An instruction was given to this effect, and, therefore, Defendants were not unfairly prejudiced.

G. Use of the word “Rape”

Asserting that the Court’s prior ruling that denied a motion in limine to preclude Plaintiff’s counsel from using the word rape or making reference to multiple incidences of rape was unfairly prejudicial to them, WCA Defendants and Defendant Barksdale contend that a new trial is warranted.

In his guilty plea, Defendant Ford admitted to the following underlying facts:

Ms. McCartney [Assistant District Attorney]: Judge, a summary of the facts that the Commonwealth would present, we would first call [M.B.] . . . She would testify that back when she was four years old she was living in foster care with a Marie [sic] Barksdale. . . . That at the time that she was living with Ms. Barksdale the defendant, who she would identify as Erving Ford, rented or had a space down the basement of Ms. Barksdale’s house. She would testify that during the time that she was there the defendant would come upstairs when she was there, take her downstairs, remove her clothing and touch on [sic] her body, and he did at some point in time place his penis inside her vagina. . . .

The Court: Okay. You hear those facts.

The Defendant [Mr. Ford]: Yes, sir.

The Court: Are they substantially correct?

The Defendant: What [the assistant
district attorney] said?

The Court: Yes.

The Defendant: Yeah.

(Pl. Ex. 5, at 10-12; Mar. 25, 2003 Tr. at 197.)

While Defendant Ford plead guilty to statutory sexual assault, indecent assault, and corrupting the morals of a minor, he also admitted to placing his penis inside Plaintiff M.B.'s vagina. Additionally, the facts Mr. Ford admitted suggest that this sexual abuse occurred on more than one occasion. Plaintiff's counsel's characterization of these actions as rape was an argument that he made to jury. In the instructions to the jury, I explained that the attorney's arguments are not evidence and if the jurors' recollections of the evidence were different from the arguments by attorneys, they were free to disregard these arguments. The jurors heard the guilty plea when it was read into evidence. They heard that Mr. Ford plead guilty to statutory sexual assault, indecent assault, and corrupting the morals of a minor. They also heard Mr. Ford's admission that he "at some point in time" placed his penis in M.B.'s vagina. After hearing my instruction, the jury was free to disregard Plaintiff's counsel's characterization of the acts if they disagreed. Therefore, I do not find that my ruling on references to rape or multiple incidence of rape was unfairly prejudicial to Defendants as they could have similarly argued that the acts that occurred were not rape, and, thus, a new trial is not warranted on this ground.

H. Examination of Andrea Bartolo

WCA Defendants contend that prejudicial error occurred during the examination of their expert witness, Andrea Bartolo. During the trial, Defense Counsel was questioning his expert regarding the CY-47. The testimony was as follows:

[Defense Counsel]: Andrea, you testified with regard to the report of the diagnosis, that [M.B.] had human papilloma virus and therefore an inference that there was child sexual abuse. Let me show you what has already been marked as Exhibit WCA-817, the report to Child Line. Now, Mr. Fodera asked you about the CY-47?

A: That's correct.

Q: He didn't ask you about this?

A: Mm-hmm.

Q: Okay, is this a report of child abuse?

THE COURT: Well, first of all, let's identify whether or not she had seen this before she wrote her report.

Q: Did you review this as one of the records?

A: I had not seen this.

Q: You had not?

[Plaintiff's counsel]: Well, then, your Honor, I object to her commenting on it now.

THE COURT: You didn't-

THE WITNESS: I don't believe that I've see this.

[Defense counsel]: You didn't see it?

A: I'm sorry.

(Mar. 25, 2003 Tr. at 182-183.) Defense counsel went on to try to refresh Ms. Bartolo's recollection of reviewing this document by having her read her expert report that stated that WCA notified Department of Human Services of Plaintiff's medical condition. (*Id.* at 184.) Plaintiff's counsel objected and the Court sustained the objection.

Under Federal Rule of Evidence 612, a witness may use a writing to refresh her memory for

the purposes of testifying. FED. R. EVID. 612. Similarly, Federal Rule of Evidence 803(5) provides that such a writing is not excluded by the hearsay rule when it is “[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory, and to reflect that knowledge correctly.” FED. R. EVID. 803(5). WCA Defendants argue that Ms. Bartolo had referenced the CY-47 in her report, and because she referred to it in her report, she should be allowed to review her report to refresh her recollection of reviewing the document. This argument fails for two reasons. First, Ms. Bartolo stated that she did not review the document in preparing her report. Second, the mere reference to the CY-47 does not necessarily mean that she reviewed the document, rather she could have learned about the CY-47 from some other document that she reviewed in preparing her report. As the witness stated that she did not review the document, instead of stating that she could not remember if she reviewed it, the witness never had knowledge of reviewing the document and her memory could not be refreshed. Thus, the ruling was proper and did not unfairly prejudice WCA Defendants. I therefore deny WCA Defendants’ motion on this ground.

I. Expert Testimony Regarding Subsequent Trauma

WCA Defendants argue that it was prejudicial error to permit Plaintiff’s liability and medical experts to testify regarding the trauma Plaintiff suffered as a result of remaining at the Barksdale home after she had been sexually abused. Experts’ opinions must be based on “knowledge” rather than “subjective belief or unsupported speculation.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993) (holding similarly that “[o]f course, it would be

unreasonable to conclude that the subject of scientific testimony must be “known” to a certainty; arguably, there are no certainties in science”); *see also In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994); FED. R. EVID. 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.”); *Pa. Dental Ass’n v. Med. Serv. Ass’n of Pa.*, 745 F.2d 248, 262 (3d Cir. 1984) (“The factual predicate of an expert’s opinion must find some support in the record.”) (*citing Merit Motors, Inc. v. Chrysler Corp.*, 187 U.S. App. D.C. 11, 569 F.2d 666, 673 (D.C. Cir. 1977)).

During trial, Dr. Laurentine Fromm was qualified as an expert in psychiatry with special expertise in the area of child psychiatry. (Mar. 25, 2003 Tr. at 102.) Dr. Fromm testified that she had interviewed Plaintiff on three occasions and reviewed documentation on Plaintiff’s psychological and psychiatric treatment records as well as Mr. Ford’s guilty plea. (*Id.* at 104, 109.) Dr. Fromm testified at length about her interviews of Plaintiff and her findings that Plaintiff has a “psychiatric disorder and that in [her] opinion [Plaintiff] is suffering from post traumatic stress disorder and attention deficit hyperactivity disorder,” (*Id.* at 119), and that such diagnoses either were exacerbated by her experience with sexual molestation or consistent with that experience. (*Id.* at 121). After WCA Defendants’ objection had been overruled, Dr. Fromm responded to Plaintiff’s counsel’s question regarding whether Plaintiff’s symptoms were exacerbated by being left in the foster home after being sexually abused. (*Id.* at 131-32.) Dr. Fromm answered that in her opinion as an expert in child psychiatry, “when a child remains in a setting which she associates with the trauma and in which she feels vulnerable, she feels unprotected, the longer that a child is in a setting which causes feelings of high vulnerability the longer those brain chemicals are going to be putting out the danger signals.” (*Id.* at 132.)

WCA Defendants assert that this testimony is unsupported by fact, is unfairly prejudicial to them, and warrants a new trial.⁸ Dr. Fromm, however, testified at length that she had interviewed Plaintiff and reviewed her treatment records. From this evidence, she made her diagnoses and explained Plaintiff's symptoms. Dr. Fromm's expert testimony regarding whether being left in the foster home exacerbated these symptoms was merely an extension of her opinion that she had previously given based on her review of evidence in the record and on her examination of Plaintiff. *See Hines v. Consol. Rail Corp.*, 926 F.2d 262, 271 (3d Cir. 1991) (“[The expert’s] intensive and personal investigation of [plaintiff] distinguishes [the expert’s] testimony from the testimony excluded by courts in a number of cases . . . where there was no evidence in the record that experts ever examined or tested the plaintiff (or assertions) at issue” (citing *Pa. Dental Ass’n*, 745 F.2d at 262; *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1223, 1242-45 (E.D.N.Y. 1985))).

WCA Defendants knew in advance of trial that Dr. Fromm would be opining about the trauma Plaintiff suffered, the symptoms of the trauma, and the bases for such opinion as an expert in child psychiatry. Therefore, WCA Defendants were not unfairly prejudiced by this testimony. Additionally, the jury was free to accept or reject this part of Dr. Fromm's expert opinion as well as Dr. Fromm's entire expert testimony. As such, I do not find that this part of her testimony is unfairly prejudicial to WCA Defendants, and, as such, does not warrant grant of a new trial.

Similarly, Dr. Kathryn Gregoire's testimony regarding the trauma of being left in the foster

⁸ It should be noted that while WCA Defendants contend that “both Dr. Fromm and Dr. Gregoire took extreme liberties in their testimony,” (WCA Defs. Reply Brief at 12), WCA Defendants failed to cite specific examples in the trial transcript where these liberties occurred, despite being afforded ample time to supplement their original motions with citation to the trial transcript. Without the benefit of specific objections, I evaluate Dr. Fromm's testimony and Dr. Gregoire's testimony as a whole and find that it was within the scope of their expert reports and supported on evidence in the record as discussed below.

home after abuse was based on her opinion as an expert in the area of social work with special expertise in the area of child protective services. (Mar. 26, 2003 Tr. at 63.) WCA Defendants were aware that Dr. Gregoire would be testifying regarding the standard of care of a foster agency and foster mother. WCA Defendants were also aware that she would opine on the breach of such standards in this case based on her review of all of the records regarding Plaintiff's care. (*Id.*) Accordingly, Dr. Gregoire's testimony that Defendants breached their duty to Plaintiff when they did not remove her from the foster home after they had identified that she could have been sexually abused there was completely within the scope of her expertise and her opinion based on the records in this case. (*Id.* at 66.) Dr. Gregoire also testified that one of the reasons that a child must be promptly removed from the foster home after the child is identified as having a sexually transmitted disease is that "the child is living in a situation that has been emotionally damaging to her as well as physically damaging and [remaining there] allows for . . . an environment that will continue to traumatize her." (*Id.* at 66-67.) This testimony was also an extension of her previous testimony of the standard of care and the breach of the standard of care based on her review of the records in this case as an expert in social work and child protective services. Therefore, WCA Defendants' contention on this ground is without merit, and, thus, I do not grant a new trial on this ground.

IV. CONCLUSION

For the foregoing reasons, I deny WCA Defendant's and Defendant Mary Barksdale's motions for judgment as a matter of law, or, in the alternative, for a new trial. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

M.B., a minor, by and through her parent and natural guardian, T.B., Plaintiff,	:	
	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
WOMEN'S CHRISTIAN ALLIANCE, et al., Defendants.	:	No. 00-5223
	:	
	:	

ORDER

AND NOW, this 16th day of **June, 2003**, upon consideration of Defendant Mary Barksdale's Renewed Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial, Defendants Women's Christian Alliance and Marva Rountree's Post-Trial Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial, and all responses and supplemental replies thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant Mary Barksdale's Renewed Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial (Document No. 133) is **DENIED**.
2. Defendants Women's Christian Alliance and Marva Rountree's Post-Trial Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial (Document No. 134) is **DENIED**.

BY THE COURT:

Berle M. Schiller, J.