

**IN THE COURT OF COMMON PLEAS FOR  
LYCOMING COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

<b>COMMONWEALTH</b>	:	
	:	
v.	:	<b>No: 04-11,019</b>
	:	
<b>DARRELL HARROLD,</b>	:	
<b>Defendant</b>	:	

**OPINION IN SUPPORT OF ORDER  
IN COMPLIANCE WITH RULE 1925(A)  
OF THE RULES OF APPELLATE PROCEDURE**

Defendant appeals this Court’s Order of Sentence dated February 15, 2005. He specifically alleges that the Court erred when it did not merge aggravated indecent assault of a child with the charge of involuntary deviate sexual intercourse (IDSI). The Court finds that the evidence was sufficient to support guilty verdicts based on separate acts by the Defendant and therefore the Court did not err in imposing separate sentences.

The facts are as follows. On May 8, 2004 Patrolman Thomas Bortz (Bortz) of the Williamsport Bureau of Police (WBP) arrived at a residence to meet with representatives from Children and Youth Services in investigation of a mother using/selling cocaine from the home. Defendant answered the door dressed only in underwear and, according to Bortz, had an erection. He reported that he was alone at the residence with the mother’s two children. Bortz detected an odor of alcoholic beverages coming from Defendant. Bortz described Defendant’s behavior as apologetic, talkative, and nervous. The Children and Youth representatives expressed some concern about the alcoholic odor with regard to caring for the children, but then exited the residence. The following day, Children and Youth Services received a report of sexual abuse involving Defendant. The report alleged that Defendant had performed oral sex on two boys, ages six and eight. An investigation

followed. Victim Niheem Freeman, age six, was interviewed first. He reported that Defendant touched him during a game of 'dare.' The victim reported oral sex occurring between each of the boys and Defendant. He also reported anal sex performed on him by Defendant. Rashawn Harrold, Defendant's nephew also described the game of 'dare.' Rashawn also described oral and anal sex acts between the boys and Defendant. Both victims alleged that Defendant had given them sips of beer during the game.

A person is guilty of aggravated indecent assault of a child as found at 18 Pa.C.S. § 3125(b) if he violates subsection (a)(1), (2), (3), (4), (5) or (6) and the complainant is less than 13 years of age. Subsection (a) (1) – (6) read:

Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if

- (1) the person does so without the complainant's consent;
- (2) the person does so by forcible compulsion;
- (3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (4) the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring;
- (5) the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
- (6) the complainant suffers from a mental disability which renders him or her incapable of consent;

A person is guilty of IDSI if he engages in deviate sexual intercourse with a complainant who is less than thirteen years of age pursuant to 18 Pa.C.S. § 3123. Deviate sexual intercourse includes “sexual intercourse per os or per anus.” 18 Pa.C.S. § 3101.

“It is well established that for two crimes to merge, one must ‘necessarily involve’ the other. It has oft been stated that in order for one crime necessarily to involve another, the essential elements of one must also be essential elements of the other. [Citations omitted] A less mentioned and perhaps more obvious requirement is that the crime be part of the same transaction.” *Commonwealth v. Wojciechowski*, 285 Pa.Super. 1, 10, 426 A.2d 674, 677 (1981). In order for two crimes to merge, they must be part of the same act. If the evidence supports all the convictions, Defendant is properly sentenced for each offense. *See also Commonwealth v. Romanoff*, 258 Pa.Super. 452, 392 A.2d 881 (1978) (rejected appellant's claim that he was improperly charged with both rape and involuntary deviate sexual intercourse, during the same criminal episode, because of the overlapping definitions of the offenses. It was held that “[h]e has not been indicted twice for the same offense because he was alleged to have committed upon the person of the complainant two different acts: ‘involuntary deviate sexual intercourse’ by placing his penis in her mouth and ‘rape’ by allegedly forcing his penis into her vagina.”)

In the present case, the evidence supports conviction on aggravated indecent assault and IDSI based on separate acts by Defendant. The evidence supports a finding by the jury that Defendant committed IDSI based on penile penetration. The evidence also supports a finding of aggravated indecent assault based on digital penetration of the victims. During direct examination of one of the victims, the following evidence was presented to the jury:

Q       What did [Defendant] get?

A Vaseline.

Q What did he do with the Vaseline?

A He put it in me and Naheem's back part.

Q In your back part on your rear end?

A Yes.

(N.T. 11/22-23/04, pp. 41). The evidence is sufficient to support the jury's finding that Defendant first penetrated the boys digitally before ever executing the crime of IDSI through penile penetration. The testimony continued:

Q Where else did he put the Vaseline.

A Nowhere

Q Okay. What happened then?

A He had called us one by one and he then he had put his front part in our back part.

Q He put his front part you mean his penis

A Yes.

Id. The testimony supports two incidents of penetration, one digitally and one anally and therefore supports convictions and sentences on each offense. In addition to the victims' testimony, the jury was presented with a videotaped interview of Defendant by police following his arrest. The interview questions involve the events leading up to the arrest and contemplate the actions that might have occurred, including digital penetration. During a portion of the interview, Defendant was asked by an agent of WBP:

Q Let me ask you this, is it possible that maybe it wasn't your penis that went into their butt but it was your finger? Is that possible?

A No.

Q And they thought it was your penis?

A No.

(Commonwealth's Exhibit # 1, Title 2, Chapter 1 at 52:05). Finally, before deliberation, the Court instructed the jury that the crime of aggravated indecent assault could involve penetration with Defendant's finger. (N.T. 11/22-23/04, pp. 100).

The evidence presented by the Commonwealth was sufficient to support a jury's finding that the evening in question included a series of events during which multiple acts of penetration had occurred on two separate victims. The evidence supports a finding that Defendant committed IDSI on both victims by anal penetration and also aggravated indecent assault on the victims by separate acts of penetration. Therefore, the imposition of separate sentences for the above-mentioned convictions was not in error.

By the Court,

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Nancy L. Butts, Judge

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Date

xc: PD  
DA  
Honorable Nancy L. Butts  
William Burd, Prothonotary  
Judges  
Law Clerk  
Gary Weber, Esquire