IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CR-1997-2008, OTN: K7359063
	:	CR-2072-2008, OTN: K7359144
vs.	:	CRIMINAL DIVISION
	:	
LEON D. BODLE.	:	2251 MDA 2012

OPINION
Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

The instant matter is on remand from the Superior Court. By concise statement filed April 26, 2013, Defendant raises five (5) issues for review; these issues include that:

1. The trial court erred by allowing amendments of the informations' offense dates;
2. The Commonwealth failed to present sufficient evidence that the offenses occurred within the time frames set forth in the criminal informations;
3. The trial court erroneously charged the jury on consciousness of guilt;
4. The verdict was not supported by sufficient evidence; and
5. The verdict was against the weight of the evidence.

The Court addressed Defendant's first issue in its July 6, 2011 Order; the Court relies on that order for the purposes of this appeal. R.R., Ex. 86.

The Court will address Defendant's sufficiency and weight claims first.

I. Sufficiency of Evidence

Defendant claims that there is insufficient evidence to support the jury's verdicts in this matter. The Court does not agree. In *Commonwealth v. Velez*, 51 A.3d 260 (Pa. Super. Ct. 2012), our Superior Court defined the standard of review for sufficiency of evidence challenges where the Commonwealth prevailed at trial; specifically, that Court provided:

> [w]e must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable

> doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.
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> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

51 A.3d at 263 (citing *Commonwealth v. Mobley*, 14 A.3d 887, 889-90 (Pa. Super. Ct. 2011)). With this standard in mind, the Court turns to Defendant's claims.

a. Seven-year-old Nephew L.B. (CR-1997-2008)

The charges against Defendant filed at CR-1997-2008, pertain to the actions that he took against his seven-year-old nephew L.B. By verdict dated December 7, 2010, the jury found Defendant guilty of: 1) criminal solicitation, 2) unlawful contact or communication with a minor, 3) obscene and other sexual materials, 4) indecent assault, and 5) corruption of minors. R.R., Ex. 69. *See also* R.R., Ex. 70. The jury found that the act(s) that constituted unlawful contact or communications included "Defendant's request that [L.B.] perform oral sex and/or the defendant touched [L.B.'s] penis and/or the defendant disseminated explicit sexual materials to [L.B.]." R.R., Ex. 69. The Court believes that sufficient evidence supports the jury's verdict.

i. Trial Testimony

Prior to trial, the Commonwealth filed a Motion to Admit Certain Statements and a Motion for Recorded Testimony; these motions were based upon L.B.'s age. R.R., Exs. 30-32.

On September 8, 2009, and October 29, 2009, the Court held a tender years hearing. R.R., Ex. 44. By Opinion and Order dated February 8, 2010, the Court granted, in part, the Commonwealth's Motion to Admit Certain Statements; specifically, the Court found that L.B.'s statements to: Lycoming/Clinton Joinder Board employee Charles Fisher; Licensed Psychologist Dr. Michael Gillum; Licensed Psychotherapist Heather Weston Confer; and Child Psychologist Dr. Geeta Nangia. were admissible at trial, pursuant to 42 Pa. C.S. § 5985.1. *Id.* Pursuant to that order, these witnesses testified as to the statements L.B. made to them regarding Defendant's abuse.[1] The Court summarizes their testimony as follows.

The tender years hearing testimony of Charles Fisher, an employee of the Lycoming/Clinton Joinder Board, was read to the jury. N.T., 21-33: 14-25, 12/6/10. Mr. Fisher's testimony pertains to the first interview that he had with L.B. at L.B.'s elementary school after the agency received a tip from ChildLine that Defendant was abusing L.B. N.T., 23: 11-14 and 24: 13-20, 12/6/10. Mr. Fisher testified that L.B. told him that Defendant touched L.B.'s genitals. N.T., 27: 5-10 and 28: 5-10 and 19-20, 12/6/10. Also, Mr. Fisher testified that Defendant showed L.B. either a picture or a video of a woman performing oral sex on a man; this picture or video was on Defendant's computer. N.T., 27: 15-22, 12/6/10. Mr. Fisher testified that Defendant asked L.B. if Defendant could perform oral sex on L.B. N.T., 28: 12-17, 12/6/10. At some point Defendant also asked L.B. to remove his clothing. N.T., 31: 23-25, 12/6/10.

Dr. Getta Nangia, L.B.'s child psychologist, also testified that L.B. told her that the Defendant touched L.B.'s genitals; however, Dr. Nangia also testified that Defendant made L.B. touch Defendant's genitals. N.T., 11: 2-9, 12/7/10. Lastly, Dr. Nangia testified that Defendant showed L.B. "dirty naked pictures" on Defendant's computer. N.T., 11: 2-3, 12/7/10.

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[1] L.B. did not testify at trial.

Heather Weston Confer, a licensed psychotherapist, testified as to her communications with L.B. N.T., 35-45: 10-3, 12/6/10. Ms. Confer worked with Dr. Nangia on L.B.'s treatment. N.T., 36: 1-11, 12/6/10. Ms. Confer testified that during her initial appointment with L.B., L.B. told her that Defendant showed L.B. pictures of little boys and little girls urinating into the mouths of each other; these pictures were on Defendant's computer. N.T., 39: 2-7 and 42: 20-21, 12/6/10.[2] Ms. Confer also testified that Defendant asked L.B. to take off L.B.'s pants two (2) times. N.T., 39: 9-13 and 42-43: 22-3, 12/6/10. Ms. Confer testified that L.B. told her the same story during a later interview. N.T., 39-40: 25-3, 12/6/10.

Lastly, Dr. Michael Gillum, licensed psychologist, testified. N.T., 45-52: 12-17, 12/6/10. Dr. Gillum testified that L.B. told him that "[Defendant] was in a sex club and was showing [L.B.] [Defendant's] computer monitor that had individuals that were naked doing sexual acts and [L.B.] said that [Defendant] wanted [L.B.] to take his clothes off and do that sexual act on [Defendant]." N.T., 46: 6-9, 12/6/10. L.B. did not indicate if these acts were portrayed on videos or on pictures. N.T., 49-50: 23-1, 12/6/10. L.B. also told Dr. Gillum that "[Defendant] kept putting [Defendant's] hand on [Defendant's] crotch, on [Defendant's] genitals, and putting [Defendant's] hands to [Defendant's] mouth saying that's what [Defendant] wanted [L.B.] to do." N.T., 46: 15-17, 12/6/10. L.B. also told Dr. Gillum that Defendant asked L.B. to take off his clothes. N.T., 46: 17-18, 12/6/10. Dr. Gillum testified that Defendant told L.B. not to tell L.B.'s grandmother (Defendant's mother), who resided in the home with Defendant, or L.B.'s mother (Defendant's sister-in-law), about the abuse. N.T., 46-47: 22-1, 12/6/10. However, Dr. Gillum testified that L.B. said Defendant did not touch [L.B.'s] genitals. N.T., 50: 18-22, 12/6/10.

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[2] At the tender years hearing, L.B. testified that Defendant showed L.B. an image on his computer that depicted a boy urinating into a girl's mouth. Tdr. Yrs. Hrg., 79: 2-5, 10/29/08.

With this testimony in mind, the Court will address Defendant's sufficiency claims.

ii. Criminal Solicitation (Involuntary Deviate Sexual Intercourse)

Criminal solicitation is defined as:

> (a) *Definition of solicitation.* --A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

18 Pa. C.S. § 902(a). *See* R.R., Ex. 6. The Commonwealth charged Defendant with intending to commit the crime of involuntary deviate sexual intercourse. R.R., Ex. 6. Involuntary deviate sexual intercourse with a child is defined as:

> (b) *Involuntary deviate sexual intercourse with a child.* --A person commits involuntary deviate sexual intercourse with a child, a felony of the first degree, when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.

18 Pa. C.S. § 3123. *See* R.R., Ex. 6. In the instant matter, both Mr. Fisher and Dr. Gillum testified that Defendant either requested to perform oral sex on L.B. or requested receipt of oral sex from L.B. after showing L.B. a video or pictures portraying oral sex. Taking this testimony into consideration, drawing all reasonable inferences therefrom, and viewing it in a light most favorable to the Commonwealth, the Court believes that there is sufficient evidence to enable to trier of fact to find that the Commonwealth has established every element of criminal solicitation to commit involuntary deviate sexual intercourse with a child beyond a reasonable doubt.

iii. **Unlawful Contact or Communication with a Minor**

Unlawful contact or communication with a minor is defined as:

> (a) Offense defined.—A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:
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> (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).

18 Pa. C.S. § 6318(a)(1). *See* R.R., Ex. 6. In this matter, the jury found that Defendant had unlawful contact with L.B. when: 1) Defendant requested that L.B. perform oral sex on Defendant, 2) Defendant touched the boy's penis, and/or 3) Defendant disseminated sexual materials to L.B. When viewing the testimony of Mr. Fisher, Dr. Nangia, Ms. Confer, and Dr. Gillum in the light most favorable to the Commonwealth, the Court believes that the evidence submitted at trial supports this verdict beyond a reasonable doubt.

iv. **Obscene and Other Sexual Materials**

The dissemination of obscene and other sexual materials is defined as:

> (c) *Dissemination to minors.* --No person shall knowingly disseminate by sale, loan or otherwise explicit sexual materials to a minor. "Explicit sexual materials," as used in this subsection, means materials which are obscene or:
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> (1) any picture, photograph, drawing, sculpture, motion picture film, videotape or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or

> sadomasochistic abuse and which is harmful to minors[.]

18 Pa. C.S. § 5903(c)(1). *See* R.R., Ex. 6. During the trial, everyone who testified pursuant to the tender years hearing order testified that L.B. told them that Defendant showed L.B. either videos or pictures of individuals performing oral sex on one another or urinating in the mouths of each other; specifically, Mr. Fisher and Dr. Gillum testified that Defendant showed L.B. images depicting oral sex while Ms. Confer testified that Defendant showed L.B. pictures of people urinating into the mouths of each other. Dr. Nangia testified that Defendant showed L.B. naked pictures. When viewing this testimony in the light most favorable to the Commonwealth, the Court believes that every element of the crime of obscene and other sexual materials has been proven beyond a reasonable doubt.

v. **<u>Indecent Assault (Under 13 Years of Age)</u>**

Indecent assault is defined as:

> (a) *Offense defined.* --A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:
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> * * * * * * * * * *
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> (7) the complainant is less than 13 years of age….

18 Pa. C.S. § 3126(a)(7). *See* R.R., Ex. 6. In this matter, Dr. Nangia testified that Defendant touched L.B.'s genitals and that Defendant made L.B. touch Defendant's genitals; Mr. Fisher testified that Defendant touched L.B.'s genitals. When viewing this testimony in the light most favorable to the Commonwealth and drawing reasonable inferences therefrom, the Court believes that the elements of indecent assault has been proven beyond a reasonable doubt.

vi. Corruption of Minors

Corruption of minors is defined as:

> (a) *Offense defined.*
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> (1) (i) Except as provided in subparagraph (ii), whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.

18 Pa. C.S. § 6301(a)(1). *See* R.R., Ex. 6. When considering the totality of the testimony of Mr. Fisher, Ms. Confer, Dr. Gillum and Dr. Nangia, the Court believes that it is evident that the Commonwealth has proven the corruption of minors charge beyond a reasonable doubt.

b. Nine-year-old Neighbors D.R. and M.J. (CR-2072-2008)

The case docketed at CR-2072-2008, pertains to the actions that Defendant took against his nine-year-old neighbors D.R. (male) and M.J. (female). In that case, the jury convicted Defendant of two (2) counts each of: 1) criminal solicitation, 2) obscene and other sexual materials, 3) unlawful contact or communication with a minor, 4) indecent exposure, and 5) corruption of minors. R.R., Ex. 61. *See also* R.R., Ex. 62. The Court believes sufficient evidence supports this verdict.

i. Criminal Solicitation (Child Sexual Abuse)

The jury convicted Defendant for criminal solicitation of child sexual abuse. This charge pertained to: 1) Defendant asking and encouraging D.R. and M.J. to join his sex club, and 2) Defendant telling the minors that in order to join his sex club, they had to pull down their pants and allow Defendant to take a picture of them naked. Child sexual abuse is defined as:

> (b) *Photographing, videotaping, depicting on computer or filming sexual acts.* --Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.

18 Pa. C.S. § 6312(b). As previously provided, one is guilty of criminal solicitation to commit a crime if he encourages or requests another to commit actions that would constitute a crime. 18 Pa. C.S. § 902(a).

During trial, both D.R. and M.J. testified that Defendant tried to get them to join his sex club. N.T., 67: 5-6, 70: 19, 74: 14-16, and 82: 13-14, 12/6/10. M.J. testified that Defendant told her and D.R. that "in order to get in[to the sex club] we have to get a picture of us naked." N.T., 82: 16-19, 12/6/10. D.R. testified that Defendant "told us both to pull our pants down and he was trying to take pictures of us." N.T., 70: 23-24, 12/16/10. *See also* N.T., 70-71: 25-3 and 75: 6-15, 12/6/10. Detective Kriner also testified that M.J. told him about Defendant's sex club and the requirements for joining the club, which included posing for naked photo. N.T., 108: 1-4 and 13-19 and 109: 17-20, 12/6/10. Additionally, one of Defendant's cell mates testified that Defendant told him about both his sex club and a little boy and a little girl involved with it. N.T., 114: 1-7. Both children testified that they never saw Defendant with a camera; Defendant merely told the children that he was going to take naked pictures of them. N.T., 76: 6-9 and 87: 20-22, 12/6/10. M.J. testified that Defendant never procured a naked photo of either child. N.T., 82: 20-22, 12/6/10.

Taking into consideration the minors' testimony, drawing all reasonable inferences therefrom, and viewing it in a light most favorable to the Commonwealth, the Court believes that there is sufficient evidence to enable to trier of fact to find that every element of the crime of criminal solicitation for child abuse has been established beyond a reasonable doubt. Both of the children testified that Defendant requested a naked picture of them. In fact, D.R. testified that Defendant attempted to pull D.R.'s pants down to obtain a picture. The sufficiency of the evidence claim must fail even despite the fact that the children did not see a camera in Defendant's bedroom.

ii. <u>Criminal Solicitation (Indecent Assault)</u>

The jury also convicted Defendant on one count of criminal solicitation of indecent assault. This charge pertained to Defendant's actions with D.R., specifically: 1) when Defendant asked D.R. to pull D.R.'s pants down, 2) when Defendant then attempted to pull D.R.'s pants down after D.R. refused, and 3) when Defendant squeezed D.R.'s upper legs. Indecent assault is defined as:

> (a) *Offense defined.* --A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:
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> * * * * * * * * * *
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> (7) the complainant is less than 13 years of age; or

18 Pa. C.S. § 3126(a)(7). As previously provided, one is guilty of criminal solicitation to commit a crime if he encourages or requests another to commit actions that would constitute a crime. 18 Pa. C.S. § 902(a).

As previously stated, both D.R. and M.J. testified that Defendant requested the children to take off their pants. *See* N.T., 70: 23-24, 70-71: 25-3 and 75: 6-15, 12/6/10. However, D.R. testified that Defendant "tried to like pull our pants down and tried to get us to like do stuff." N.T., 70: 20-21, 12/6/10. M.J. also testified that Defendant asked D.R. to show Defendant D.R.'s genitals. N.T., 88-89: 23-5, 12/6/10. Additionally, both D.R.'s mother and Detective Kriner testified to statements that D.R. made to them when reporting the abuse. D.R.'s mother testified that D.R. told her that "[Defendant] had touched [D.R.] in his upper or his upper thigh area" and that "[Defendant] tried to get [D.R.] to take his pants off. [Defendant] tried to get my son to take his pants off, and held onto his, you know, his hips like to, I don't know, to pull his pants down or just to get [D.R.] to do it, I guess." N.T., 58-59: 25-7, 12/6/10. Detective Kriner testified that D.R. told him Defendant touched his private area. N.T., 104-05: 22-5, 12/6/10. *See also* N.T., 105: 24-25, 12/6/10. Detective Kriner testified that D.R. told him that "[Defendant] again asked [D.R.] to pull down his pants and [D.R.] said no and then [D.R.] said that [Defendant] grabbed [D.R.] by the legs and squeezed [D.R.'s] upper legs and then [D.R.] said [D.R.] ran home." N.T., 106: 18-20, 12/6/10. D.R. never showed Defendant his genitals. N.T., 89: 5 and 106: 11-12, 12/6/10.

Taking into consideration the testimony of the minors, as well as the testimony of D.R.'s mother and Detective Kriner, drawing all reasonable inferences therefrom, and viewing it in a light most favorable to the Commonwealth, the Court believes that there is sufficient evidence to enable to trier of fact to find that every element of the crime of criminal solicitation for indecent assault has been established beyond a reasonable doubt.

iii. <u>Obscene and Other Sexual Materials</u>

The jury convicted Defendant on two (2) counts of disseminating obscene and sexual materials to minors; one (1) count pertained to showing D.R. pictures and videos of naked

individuals while another count pertained to showing M.J. pictures of naked women. As previously provided, the statute provides that Defendant should not knowingly show any minor a picture or motion picture depicting nudity or a sexual act. *See* 18 Pa. C.S. § 5903(c)(1).

During trial, D.R. testified that Defendant showed D.R. pictures and videos of people naked in bed kissing each other. N.T., 68: 8-20, 69:2-5 and 74-75: 21-1, 12/6/10. D.R. testified that Defendant showed him approximately twelve pictures (12) and three (3) distinct videos. N.T., 69: 10-14, 12/6/10. D.R. testified that some of the videos were tutorials on how to perform certain sex acts. N.T., 69:17-22, 12/6/10. Also, D.R. testified Defendant showed D.R. sex magazines. N.T., 69-70:23-1, 12/6/10. Similarly, M.J. testified that Defendant showed her approximately ten (10) pictures of naked women. N.T., 81: 4-20. M.J. testified that some of the pictures showed naked women pole dancing. N.T., 81-82: 22-4 and 86-87: 22-5, 12/6/10. M.J. testified that these pictures were on Defendant's computer. N.T., 84:16-24, 12/6/10. M.J. testified that D.R. was with her when Defendant showed her the pornographic pictures. N.T., 86: 9-15, 12/6/10. M.J. testified that Defendant did not show her any videos. N.T., 87: 6-10, 12/6/10.

Taking into consideration the minors' testimony, drawing all reasonable inferences therefrom, and viewing it in a light most favorable to the Commonwealth, the Court believes that there is sufficient evidence to enable to trier of fact to find every element of the dissemination of obscene and other sexual materials crimes have been established beyond a reasonable doubt.

iv. <u>Unlawful Contact or Communication with a Minor</u>

Defendant was convicted of having unlawful contact or communication with D.R. and M.J. These convictions were based upon Defendant showing the minors obscene and sexual photographs on his computer. As previously defined, unlawful contact or communication with a minor provides that the Defendant should not intentionally engage in communications with a

minor to engage in sexual offenses. *See* 18 Pa. C.S. § 6318(a)(1). Based upon both D.R. and M.J.'s testimony regarding Defendant showing the minors pornographic videos, magazines, and pictures, the Court believes that there is sufficient evidence to enable the trier of fact to find every element of the unlawful contact or communication with a minor crimes have been established beyond a reasonable doubt.

v. Indecent Exposure

In this matter, Defendant was convicted of exposing his genitals to both D.R. and M.J. Indecent exposure is defined as:

> (a) *Offense defined.* --A person commits indecent exposure if that person exposes his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm.

18 Pa. C.S. § 3127(a). *See* R.R., Ex. 7.

D.R. testified that Defendant showed both him and M.J. his genitals. N.T., 71:6-17, 12/6/10. D.R. testified that he only saw a "little bit" of Defendant's genitals before D.R. and M.J. left Defendant's home. N.T., 71:18-20, 12/6/10. After cross examination and redirect on extent that D.R. saw Defendant's genitals, D.R. continued to testify that he saw a "little bit" of Defendant's genitals. N.T., 78-79: 13:1, 12/6/10. D.R. explained that only saw a little bit of Defendant's genitals because he closed his eyes when Defendant was unzipping his pants. N.T., 78: 15-21 and 79: 12-14, 12/6/10. *See also* N.T., 106: 13-14, 12/6/10 (Detective Kriner's testimony that D.R. told him that D.R. saw Defendant's genitals). D.R. testified that after Defendant exposed himself, D.R. and M.J. left Defendant's home. N.T., 78: 19-21, 12/6/10. Similarly, M.J. testified that Defendant showed both her and D.R. his genitals. N.T., 83-84: 22-

13 and 87: 11-16, 12/6/10. M.J. also testified that she and D.R. left Defendant's home after he exposed himself to them. N.T., 84: 14-15 and 87: 17-19, 12/6/10.

Turning to Defendant's sufficiency claim, M.J. clearly testified that she saw Defendant's genitals; therefore viewing her testimony in a light most favorable to the Commonwealth, the Court believes that there is sufficient evidence exists to find that the crime of indecent exposure against M.J. has been established beyond a reasonable doubt. Additionally, D.R. repeatedly testified that he saw a "little bit" of Defendant's genitals. D.R. stressed that he did not see all of Defendant's genitals; however, his testimony clearly indicated that he saw a part of Defendant's genitals. The crime of indecent exposure does not require Defendant to fully expose himself to be found guilty. Therefore, when viewing D.R.'s testimony in the light most favorable to the Commonwealth, the Court believes that sufficient evidence exists to support every element of the crime of indecent exposure against D.R. as well.

vi. Corruption of Minors

The jury convicted Defendant on two (2) counts of corruption of minors; again, one (1) count pertained to Defendant's actions with D.R., specifically by exposing himself to D.R, asking D.R. to pull his pants down and attempting to pull down D.R.'s pants, while the other count pertained to his actions with M.J., specifically by exposing himself to M.J. and asking her to pull down her pants to be photographed. As previously stated, one corrupts a minor when he is over the age of eighteen (18) and performs any act that corrupts or tends to corrupt the morals of a minor. 18 Pa. C.S. § 6301(a)(1). Based upon the totality of D.R. and M.J.'s testimony regarding Defendant showing the children pornographic pictures, exposing himself to the children, asking them to join his sex club, telling them that he needs to take a naked picture of them before they can join his sex club, and actually attempting to take D.R.'s pants off, the Court

believes that there is sufficient evidence to enable the trier of fact to find that every element of the corruption of minors crimes have been established beyond a reasonable doubt.

II. <u>Weight of Evidence</u>

Next, Defendant alleges that the jury's verdict was against the weight of the evidence. The Court does not agree. In *Commonwealth v. Champney*, 832 A.2d 403, our Supreme Court addressed the standard to be applied when the weight of the evidence is challenged.

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Id. at 408 (citations omitted). *See also Commonwealth v. Charlton*, 902 A.2d 554, 561 (Pa. Super. Ct. 2006). After review of the transcripts, the Court believes the victim and witnesses' testimony was sufficient to permit the jury to find Defendant committed all of the above-referenced charges beyond a reasonable doubt. "It was within the province of the jury as fact-finder to resolve all issues of credibility, resolve conflicts in evidence, make reasonable inferences from the evidence, believe all, none, or some of the evidence, and ultimately adjudge appellant guilty." *Charlton*, 902 A.2d at 562. This Court cannot conclude that the jury's verdict was so contrary to the weight of the evidence to shock one's sense of justice.

III. **Offense Dates**

Defendant also argues that the Commonwealth failed to present sufficient evidence that the offenses against the children took place during the time frame listed in the informations. The Court does not agree. In *Commonwealth v. Brooks*, 7 A.3d 852 (Pa. Super. Ct. 2010), *appeal denied*, 21 A.3d 1189 (Pa. 2011), our Superior Court delineated the standard that the Commonwealth must follow when assigning offense dates; that Court provided:

> [i]t is the duty of the prosecution to "fix the date when an alleged offense occurred with reasonable certainty…." 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.
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> However, "due process is not reducible to a mathematical formula," and the Commonwealth does not always need to provide a specific date of an alleged crime. Additionally, "indictments must be read in a common sense manner and are not to be construed in an overly technical sense." Permissible leeway regarding the date provided varies with, *inter alia*, the nature of the crime and the rights of the accused.
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> Case law has further "established that the Commonwealth must be afforded broad latitude when attempting to fix the dates of offenses which involve a continuous course of criminal conduct. This is especially true when the case involves sexual offenses against a child victim.

Brooks, 7 A.3d at 857-58 (citations omitted). When a challenge is brought to an offense date, the Court should consider: 1) the nature of the crime, 2) the rights of the accused, and 3) the age and condition of the victim. *Commonwealth v. Devlin*, 333 A.2d 888, 892 (Pa. 1975). With these factors in mind, the Court believes sufficient evidence exists to uphold Defendant's convictions.

a. Nephew L.B. (CR-1997-2008)

Initially, the Commonwealth alleged Defendant's actions against his nephew occurred in the summer of 2008. R.R., Ex. 1. On April 15, 2010, upon the request of the Commonwealth, the Court amended the information at CR-1997-2008 to reflect dates of the offenses as the summer of 2007. R.R., Ex. 52. On October 26, 2010, Defendant filed a motion to reconsider; the Court denied Defendant's motion by order dated October 26, 2010. R.R., Ex. 57; R.R., Ex. 58.[3]

During trial, the testimony of Charles Fisher (Fisher), an assessment unit employee of the Lycoming/Clinton Joinder Board, was read into the record. Tr. 21-35: 14-1, 12/6/10. On November 12, 2008, Fisher spoke to L.B. at his elementary school. Tr. 24: 16-18 and 30: 8-10, 12/6/10. Fisher testified that L.B. told him:

> [L.B.] indicated that in the *summer* he was over at the paternal grandmother's and [Mr. Bodel's], they both lived in the same residence in the summer of that year he had indicated. [L.B.] had indicated that he had walked into Mr. Bodel's bedroom and he observed Mr. Bodel watching a sex act on his computer. I asked him if he could describe to me what the sex act was and he indicated it was a woman with her mouth on the man's private area.

Tr. 27: 15-22, 12/6/10 (emphasis added). If the Court looked at Fisher's testimony in a vacuum, it could conclude that L.B. reported the abuse occurring in the summer of 2008. However, the Court received detailed testimony from Dr. Michael Gillum, licensed psychologist, addressing the issue Defendant is now raising. Tr. 45-52: 12-17, 12/6/10.

Dr. Gillum's testimony supports the Commonwealth's assertion that the abuse occurred in the summer of 2007. Dr. Gillum testified that he first spoke with L.B. in October 2008;

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[3] As provided in the Court's July 6, 2011 Order, the Court believes this amendment was proper and within the Court's discretion. *See* Pa. R. Crim. P. 564. *See also* R.R., Ex. 86.

however, L.B. did not speak of the abuse until a November 2008 session with the Doctor. Tr. 47: 21-24 and 48: 16-21, 12/6/10. Pertaining to the summer 2007 offense date, Court notes the following exchange that took place between the Doctor and counsel:

> Q [L.B.] indicated that this incident occurred when he was being babysat, is that what you said?
>
> A Yes, that's correct.
>
> Q And did you ask him when that was specifically?
>
> A He told me it was last summer, not the summer that just happened; but the summer of 2007.
>
> A [L.B.] have any problems saying the exact date and time to you?
>
> Q Yes. He couldn't give me the exact date and time.
>
> Q But he said it was when he was babysat?
>
> A That's right.
>
> Q He was also being babysat in 2008, correct?
>
> A I believe so, but I don't have those notes.
>
> Q He didn't give you a specific date? He didn't tell you specifically what year, did he?
>
> A No, that would be pretty unusual for a child that age to do that.
>
> Q Okay. But I mean not - - okay let's - - did he give you - - did he specifically say to you what year?
>
> A He said it was the summer before.
>
> Q Well, did he say the summer before or last summer?
>
> A *He said, I clarified that with him, he said the summer before not the one that just happened.*

Tr. 51-52: 6-13, 12/6/10 (emphasis added).

The Court also received testimony from L.B.'s mother; Mother testified that L.B. was babysat by his grandmother and Defendant for the entire summer of 2007. Tr. 53: 15-21, 12/6/10. Mother testified that the summer of 2007 was the only time that Defendant ever

babysat L.B. Tr. 53: 19-21, 12/6/10. Also, Mother testified that L.B. went to the Y.M.C.A. during the summer of 2008 and was not babysat; Mother did acknowledge that paternal grandmother did occasionally babysit L.B. throughout 2008. Tr. 54: 18-24, 12/6/10.[4] Based upon the totality of this testimony, the nature of the crime, and the age of the victim, the Court believes that the Commonwealth established sufficient evidence that the offenses occurred in the summer of 2007.

b. <u>Neighbors D.R. and M.J. (CR-2072-2008)</u>

Initially, the Commonwealth alleged Defendant's actions against these children occurred on January 1, 2008. R.R., Ex. 1. On April 15, 2010, upon the request of the Commonwealth, the Court amended the information to reflect summer of 2007 offense dates. R.R., Ex. 43. *See also* R.R., Exs. 49-50.[5]

During trial, the testimony of the children and D.R.'s mother established that Defendant's offenses against D.R. and M.J. occurred in September-October 2008. D.R. testified that the incident with Defendant occurred about five (5) days before he told his parents; D.R. testified that he told his parents about Defendant sometime in October. N.T., 76-77: 23-3, 12/6/10. D.R.'s mother testified that she had a conversation with D.R. about his actions with Defendant in September-October 2008. N.T., 60: 5-13, 12/6/10. M.J. testified that the children's interactions with Defendant occurred in early October 2008. N.T., 84-85: 25-12, 12/6/10.

Based upon the children's testimony, during the trial, Defendant requested a motion to dismiss; the Court denied that motion. N.T., 17-21: 11-9, 12/7/10. Similar to Defendant's trial motion, Defendant's instant motion asserts a due process violation. However, Defendant has not asserted how the offense date error rendered him incapable of preparing a sufficient defense for

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[4] This testimony corroborates L.B.'s testimony at the tender years hearing that Defendant hurt him in the summer when L.B. was six years old. Tdr. Yrs. Hrg., 76: 3-7 and 78: 1-4, 10/29/08.

[5] As provided in the Court's July 6, 2011 Order, the Court believes this amendment was proper and within the Court's discretion. *See* Pa. R. Crim. P. 564. *See also* R.R., Ex. 86.

trial. *See Brooks*, 7 A.3d at 860. As in *Brooks*, this Court believes that when "[c]onsidering the victims' testimony in this case, vis-à-vis [Defendant's] general assertion of a due process violation, our review of the record and applicable law supports [the conclusion] that the victims' testimony was sufficient to support the informations filed by the Commonwealth such that, if any due process violation in fact occurred, it must yield to the rights of the victims." *See id.* When balancing: 1) the nature of the crimes, 2) the rights of Defendant, 3) the age and condition of the children, and 4) our Superior Court's decision in *Brooks*, the Court believes that Defendant's sufficiency claim must fail.

IV. Jury Charge

Defendant also argues that the Court improperly instructed the jury as to consciousness of guilt. The Court does not agree. During trial, over Defendant's objection, the Court gave the following consciousness of guilt charge:

> [t]here was evidence tending to show that the defendant in this case said certain things to the children, specifically that he told [M.J.] not to tell anybody about things, and he told [L.B.] not to tell. If you believe this evidence you may consider it as tending to prove that the Defendant's consciousness of guilt. You are not required to do so, and you should consider and weigh this evidence along with all the other evidence in the case.

N.T., 77: 8-15, 12/7/10. *See also* N.T., 75-77: 12-23, 12/7/10. *Compare* CRIMINAL JURY INSTRUCTIONS, 2nd ed., § 3.14. During trial, Defendant argued that the consciousness of guilt charge was improper because the charge only encompasses the idea of flight or destruction of evidence, not Defendant's attempt to silence his child victims. N.T., 76: 10-19, 12/7/10.

Our appellate courts have long provided that it is within the province of the trial court to charge the jury, and the court has broad discretion over how the charge should be phrased. *Commonwealth v. Lukowich*, 875 A.2d 1169, 1173-74 (Pa. Super. Ct. 2005), *appeal denied*, 885 A.2d 41 (Pa. 2005); *Commonwealth v. Garcia*, 847 A.2d 67, 73 (Pa. Super. Ct. 2004), *appeal granted in part*, 858 A.2d 1161 (Pa. 2004). When reviewing jury charge challenge, the charge is reviewed in its entirety. *Id.* In this matter, the Court revised model point 3.14 to fit the facts of this case. The Court believed the charge to be appropriate after receiving testimony that Defendant attempted to silence the victims. When instructing the jury, the Court stated to the jury that it could consider Defendant's tactics as tending to prove his consciousness of guilt; however, the Court expressly provided that this inference *was not required*. *See* N.T., 77: 8-15, 12/7/10. *See also* N.T., 75-77: 12-23, 12/7/10. After reviewing the entirety of the charge, the Court believes that it adequately instructed the jury as to the law of the case.

Therefore, for the reasons stated above, this Court respectfully requests that its sentencing order of April 6, 2013, be affirmed by our Superior Court.

BY THE COURT,

____________ ________________________

Date Richard A. Gray, J.

cc: DA (KO)
PD (KG)
Gary L. Weber, Esq. – Lycoming County Reporter