

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-1977-2014
	:	
vs.	:	
	:	Opinion and Order re
	:	Defendant's Omnibus Pretrial Motion J
JG,	:	
Defendant	:	

OPINION AND ORDER

By Information filed December 12, 2014, Defendant is charged with numerous counts arising out of his alleged sexual assaults on a minor female.

On January 5, 2015, Defendant filed an omnibus pretrial motion which included a petition for *habeas corpus* with respect to Count 3, involuntary deviate sexual intercourse with a child; Count 4, aggravated indecent assault of a child; and Count 5, unlawful restraint of a minor by parent.

Argument on the request for *habeas corpus* relief was held before the court on February 6, 2015. While Defendant's omnibus pretrial motion included other issues this Opinion will only address Defendant's request for *habeas corpus* relief with respect to Counts 3, 4 and 5.¹

The Commonwealth submitted, as Commonwealth Exhibit 1, a transcript of the preliminary hearing held in this matter on November 24, 2014 before Magisterial District Judge Jon Kemp. No further testimony was presented by either party at the hearing. Instead, the parties stipulated that the court would decide the *habeas corpus* issues raised by

¹ With the exception of the competency issue which will be heard on March 23, 2015, the other issues included in Defendant's omnibus pretrial motion have been addressed in other court orders.

Defendant based on the testimony set forth in the preliminary hearing transcript.

The proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a petition for writ of *habeas corpus*. *Commonwealth v. Marti*, 779 A.2d 1177, 1179 n.1 (Pa. Super. 2001). At a *habeas corpus* hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a *prima facie* case against the defendant. *Commonwealth v. Williams*, 911 A.2d 548, 550 (Pa. Super. 2006).

“A *prima facie* case consists of evidence, read in a light most favorable to the Commonwealth, which sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime.” *Commonwealth v. Packard*, 767 A.2d 1068, 1070 (Pa. Super. 2001). “Stated another way, a *prima facie* case in support of an accused's guilt consists of evidence that, if accepted as true, would warrant submission of the case to a jury.” *Id.* at 1071.

When reviewing a petition for writ of *habeas corpus*, the court must view the evidence and all reasonable inferences to be drawn from that evidence in a light most favorable to the Commonwealth. *Commonwealth v. Santos*, 583 Pa. 96, 101, 876 A.2d 360, 363 (2005). The *prima facie* standard does not require that the Commonwealth prove the elements of the crime beyond a reasonable doubt; it merely requires evidence of each of the elements of the offense charged. *Marti*, 779 A.2d at 1180 (citations omitted).

As noted previously, Count 3 of the Information charges Defendant with involuntary deviate sexual intercourse with a child in violation of 18 Pa. C.S.A. § 3123 (b). “A person commits involuntary deviate sexual intercourse with a child...when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.”

18 Pa. C.S.A. § 3123 (b). Deviate sexual intercourse includes sexual intercourse per anus between human beings. 18 Pa. C.S.A. § 3101. The term “includes penetration however slight” of the anus. *Id.*

Defendant argues that the victim’s testimony merely establishes that the Defendant’s penis went between her “but cheeks” and that this testimony fails to establish “anal intercourse.” The testimony produced at the preliminary hearing, however, clearly establishes for prima facie purposes that Defendant had anal intercourse with the minor by penetrating her anus with his penis.

The minor testified that Defendant did “bad things” to her. He put “his man-bug (penis) in [her] front and back private.” She testified that Defendant made her “sit on his man-bug” and that it “went into [her] butt.” She said yes when asked “did it actually go inside.” She testified that Defendant “would force [her] to sit on his man-bug.” She testified that she “felt it go in [her].”

Although she answered “yes” when she was asked on cross-examination if it went in between her butt cheeks, this does not establish that her anus was not penetrated. In fact, on redirect, she specifically answered “yes” when she was asked if Defendant’s man-bug (penis) ever went in her “butthole.”

Count 4 charges Defendant with aggravated indecent assault of a child.

This crime is defined in section 3125 of the Crimes Code, 18 Pa.C.S. §3125, which states:

(a) *Offenses defined.* --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;
- (7) the complainant is less than 13 years of age; or
- (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

(b) *Aggravated indecent assault of a child.* --A person commits aggravated indecent assault of a child when the person violates subsection (a)(1), (2), (3), (4), (5) or (6) and the complainant is less than 13 years of age.

(c) *Grading and sentences.*

- (1) An offense under subsection (a) is a felony of the second degree.
- (2) An offense under subsection (b) is a felony of the first degree.

18 Pa.C.S. §3125.

Defendant argues that the Commonwealth has failed to produce any evidence of conduct by Defendant which was not covered by the enumerated offenses of rape, statutory sexual assault, involuntary deviate sexual intercourse or sexual assault; therefore, he is entitled to habeas corpus relief. The Court cannot agree for several reasons.

First, there is a question whether the prefatory “except” language of paragraph (a) even applies to paragraph (b).

Second, there is a question what the legislature meant when it included the proviso in question. The Pennsylvania Superior Court recently rejected a similar claim with respect to the crime of statutory sexual assault.

In *Commonwealth v. (Norman C.) Jackson*, 2015 PA Super 33, 2015 Pa. Super. LEXIS 49 (Pa. Super. Feb. 17, 2015), the appellant claimed that the court erred when it sentenced him to an additional five years' probation for statutory sexual assault because the plain language of section 3122.1 precluded a sentence for both rape and statutory sexual assault. His argument was premised on the fact that statutory sexual assault was defined as follows:

Except as provided in section 3121 (relating to rape), a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married.

18 Pa.C.S.A. §3122.1 (1995). The appellant highlighted the proviso “[e]xcept as provided in section 3121 (relating to rape)” and argued that this proviso limited the application of section 3122.1 where the crime of rape otherwise applied. The Superior Court rejected this claim and found that the proviso referred “to the offense grading of the crime – not a wholesale exclusion of rape.” 2015 Pa. Super. LEXIS 49, *6.

A similar interpretation is possible for the aggravated indecent assault statute, especially when one considers that when the offense was originally created, it too was only graded as a felony of the second degree.

Another possibility is that the legislature included this proviso to preclude a defendant from arguing that he could not be convicted of the offenses listed in this proviso

because aggravated indecent assault was the more specific offense.

In any event, the court believes that the legislature did not intend to insulate a perpetrator from prosecution as argued by the defense. The child testified that Defendant forced her to sit on his man-bug (penis) and it went inside her butt. This conduct is sufficient to constitute rape, involuntary deviate sexual assault, and aggravated indecent assault. See *Commonwealth v. Gonzalez*, 2015 PA Super 13, 2015 Pa. Super. LEXIS 20, *21 (January 21, 2015)(digital penetration is sufficient to support a conviction for aggravated indecent assault, as is penetration with the defendant’s penis). All the charges should be submitted to the jury, because there is the possibility that a jury could exercise leniency and only convict Defendant of aggravated indecent assault.

Even if the Court agreed with Defendant’s interpretation of this proviso, the Court would not grant Defendant’s request for habeas corpus relief, because there is a factual issue for the jury. Defendant is correct that on cross-examination the child testified that Defendant put lotion “in the crack” and “right in the middle, but not in [her] butthole.” It was “on the sides of [her] butt cheeks.” During direct examination, however, the child testified that Defendant put his hands down her pants, took lotion and put it “inside” her butt cheeks. This apparent inconsistency in the child’s testimony is a credibility issue for the jury.

With respect to Court 5, unlawful restraint of a minor by a parent, the Commonwealth must prove for *prima facie* purposes that the victim was under 18 years of age, that the perpetrator was a parent of the victim and that the perpetrator restrained the victim unlawfully in circumstances exposing her to a risk of serious bodily injury. 18 Pa. C.S.A. § 2902 (c) (1). See also *Commonwealth v. Shaffer*, 763 A.2d 411, 413 (Pa. Super.

2000).

Defendant argues that the Commonwealth failed to present sufficient evidence that his conduct exposed the minor to a risk of serious bodily injury. Serious bodily injury is defined at 18 Pa. C.S.A. § 2301 as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”

The evidence established that for at least several months while the minor was six or seven years old, Defendant had vaginal intercourse with the minor and on one occasion he had anal intercourse with her. While having vaginal intercourse with the minor, Defendant would “lay” on her. “He would lay on his belly and be on top of [her] belly.” While he was “lying down” on her, she was not able to get away. She described him as “really, really heavy.” With respect to the anal intercourse, the minor described Defendant as “forcing” her and pushing her down with his hands on her shoulders.

Clearly by laying on top of his six or seven year old daughter, the “really, really heavy” Defendant restrained her. While restraining her, he had vaginal intercourse. On another occasion, he forced her to sit on his penis while anally penetrating her. Clearly, this conduct exposed her to a risk of serious bodily injury. By lying on top of her, he exposed the minor to the risk of suffocation and not being able to properly breathe. By penetrating her at such a young age, he exposed her to the risk of vaginal and anal tearing, bruising, internal injuries and substantial blood loss.

ORDER

AND NOW, this ____ day of March 2015, following a hearing and argument and the Court's review of the November 24, 2014 preliminary hearing transcript, the Court **DENIES** Defendant's Petition for Writ of Habeas Corpus with respect to Count 3, involuntary deviate sexual intercourse with a child, Count 4 aggravated indecent assault of a child, and Count 5, unlawful restraint of a minor by parent.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
Don Martino, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file