

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-784-2017
	:
vs.	:
	:
	: Opinion and Order Re
CARLOS CASTRO,	: Castro's Post-Sentence Motions
Castro	:

OPINION AND ORDER

This matter came before the court on March 19, 2019 on Castro Carlos Castro's post sentence motions filed on January 7, 2019 and February 25, 2019.

By way of background, Castro was charged with numerous sexual offenses against several female children. A jury trial was held September 11-13, 2018. Castro was convicted of three counts of Indecent Assault of a Complainant Less Than 13 Years of Age, three counts of Corruption of Minors, two counts of Endangering the Welfare of Children, one count of Aggravated Indecent Assault of a Child, one count of Rape of a Child, one count of Solicitation of Rape of a Child, two counts of Criminal Attempt Rape of a Child, and sixteen counts of Sexual Abuse of Children.¹

On December 27, 2018, the court sentenced Castro to an aggregate term of 67 to 189 years' incarceration in a state correctional institution, which consisted of three to seven years' incarceration on Count 3, Indecent Assault of a Complainant Less Than 13 Years of Age; five to ten years' incarceration on Count 6, Aggravated Indecent Assault of a Child; three to seven years' incarceration on Count 7, Indecent Assault of a Complainant Less Than 13 Years of Age; 20 to 40 years' incarceration on Count 8, Rape of a Child; two

¹ 18 Pa.C.S. §§ 3126(a)(7), 6301(a)(1)(ii), 4304(a)(1), 3125(b), 3121(c), 902(a), 901(a), and 6312(b)(1).

to five years' incarceration on Count 11, Endangering the Welfare of Children; ten to 40 years' incarceration on Count 12, Solicitation of Rape of a Child; seven to 20 years' incarceration on Count 14, Sexual Abuse of Children; seven to 20 years' incarceration on Count 19, Sexual Abuse of Children; and ten to 40 years' incarceration on Count 22, Criminal Attempt Rape of a Child.

Castro filed post sentence motions which consisted of a motion for reconsideration of sentence, a motion for a new trial, a motion in arrest of judgment.

Castro first asserts that his aggregate sentence was unduly harsh, unreasonable, and not guided by sound judgment and that his sentence on Count 3 was illegal in that it should have been graded as a misdemeanor of the first degree and not a felony of the third degree where the parties agreed on the trial record that there was not a course of conduct with respect to this Count.

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Garcia-Rivera, 983 A.2d 777, 780 (Pa. Super. 2009), quoting *Commonwealth v. Hoch*, 936 A.2d 515, 517-518 (Pa. Super. 2007).

The court agrees that the sentence on Court 3 was illegal. The parties agreed that Count 3 did not involve a course of conduct. N.T., 9/12/2018, at 86. The jury's findings on the verdict slip also did not support the grading of this offense as a felony of the third degree. In light of these facts, the court should have lowered the grading of this Count to a

misdemeanor of the first degree. The maximum sentence for a misdemeanor of the first degree is five years. The sentence imposed was three to seven years' incarceration. As the seven year maximum exceeds the lawful maximum for a misdemeanor of the first degree and the three year minimum exceeds one-half of the lawful maximum, the sentence imposed on Count 3 is clearly illegal. Therefore, the court will grant this aspect of Castro's motion and schedule a hearing to re-sentence Castro with respect to this Count.

The court, however, rejects Castro's claim that the length and severity of his aggregate sentence was "unreasonable" and "not guided by sound judgment." The court's sentence was not based on partiality, prejudice, bias or ill-will. It was based on the facts and circumstances of the case, the need to protect the victims and the public, the character of Castro, his prior criminal record and the fact that he was on supervision at the time he committed these crimes.

The jury convicted Castro of 29 crimes against three separate victims—Z.C., Y.O. and Y.D. A few of the crimes merged for sentencing purposes, but the vast majority of them did not. Some of the victims were sexually assaulted on multiple occasions. Not only did Castro sexually assault the victims, he videotaped himself doing so for most of the offenses. Despite the video evidence, Castro never expressed any remorse for his crimes.

Castro had a prior record score of a repeat felon or RFEL. The RFEL designation arose from prior sexual offenses—specifically, sexual assault and criminal attempt involuntary deviate sexual intercourse, in 2005. Castro was still under supervision for criminal attempt involuntary deviate sexual intercourse at the time he committed the offenses in this case. Neither a five to ten year incarceration sentence nor a consecutive

period of twenty years' probation on these sexual offenses rehabilitated Castro. Instead, shortly after he was released from maxing out his prison sentence and while still under a lengthy period of probation supervision, he sexually assaulted the three child victims in this case.

Castro's prior criminal record was not limited to his prior sexual offenses. He also had felony juvenile adjudications for drug and theft offenses as well as adult convictions for receiving stolen property, theft, and simple assault. He had previously been sentenced to probation, county incarceration, and state incarceration. Therefore, despite numerous prior opportunities, Castro was not rehabilitated. Instead, he committed new, serious criminal acts against the most vulnerable victims, children. In light of both the current offenses and Castro's criminal history, the court found that the only way to protect the victims and the public was to incarcerate Castro for a substantial period of time.

Specifically, the court stated:

"I have to consider the nature of the offense. I don't know if they get much worse. There's not a whole lot I can say. This is the stuff of nightmares. These are offenses that have a permanent impact on the victims, the victim's families.

My experience with presiding over these types of cases for close to a decade now show, unfortunately, for the family members who are here, but these young children, as well as the family members—and I was just writing some notes of the things I have seen. Shame, self-blame, depression, anxiety, post-traumatic stress disorder, self-esteem issues, sexual dysfunction, addiction, self-injury, suicidal ideation, mental health disorders, personality disorders, and they may, in fact, be more likely to offend themselves.

Betrayal is too kind of a word to use. All these victims will know for a very long time will be pain, desperation, dysfunction. My vocabulary is not advanced enough to adequately describe the horror of what these—these types of offenses do to the community and to the victims.

I looked at your history and characteristics as set forth in the pre-

sentence report. I made observations of you. It appears that you had some setbacks and some—things were far from perfect, but that's no excuse. It may explain some things, but that's really no excuse. You've lived a life of violating people and on your own terms, and you've chose the path and you've chose the result that you're going to see today.

Those—I have to agree with Mr. Wade. Those videotapes were disturbing. If anything, they reflected you. The deceit, the dishonesty, the surreptitious nature of it, the evilness of it. I mean those are pictures I'm sure those jurors and the people involved in the case will never really get out of their mind. And I don't see you—and maybe because it's the nature of the circumstances, the nature of the litigation but I don't see somebody who is particularly remorseful or see any remorse at all, or who has one iota of understanding of what he did. It's like you're oblivious to it and that's, again, your choice. You're not here because of circumstances. You're here because of choice.

I, of course, have to consider the guidelines and any other relevant sentencing factors that I reviewed in the particular reports. Any sentence that I impose—and I think Mr. Wade touched on it—has to reflect the seriousness of the offense, the gravity of the offense is what they call it to the extent it's impacted the lives of the victims and the community. It has to have a deterrent effect. It has to protect the public, and it has to have some rehabilitation purpose.

You're entitled to an individualized sentence. The punishment, however, has to fit the crime and the person who committed it. You will, in all likelihood, spend the rest of your life in prison, but that's the choice you made. Not me, not Mr. Wade, not Mr. Miele. That's the choice you made. And you can spend your time blaming everybody else and die a lonely, angry, resentful man or perhaps you can find some measure of rehabilitation, some measure of understanding why you're in there and you can try to do something positive. Again, that's your choice. It's no one else's choice. But I know when I sentence you today that if you obtain any semblance of rehabilitation that it will help you and perhaps might help other inmates who might get out. But in looking at this, that's the least of my concerns.

I have to protect the public here that's been victimized by you, by your entire 37—during your entire 37, 36 years. And that's obviously an overstatement because you didn't start committing your offenses—I know you're pretty young but, say, 20 years. A community that's been victimized by you for 20 years and, you know, enough is enough.

This is not fun for me. It's not a good time for me. I get no pleasure out of this. Zero. Actually, it goes against my grain because I'm not vindictive. I'm not a person who lightly sends people to state prison. I'm not a person who lightly just imposes numbers because they are numbers. These are real people who are being sentenced, but more

importantly from my perspective these are real people whose lives have been destroyed and these are other real people who need to be protected.

N.T., 12/27/2018, at 16-19.

The court also did not impose a separate, consecutive sentence for each conviction. Instead, the court imposed a consecutive sentence on nine counts and imposed concurrent sentences or found merger on the remaining counts. Moreover, Castro was not entitled to a volume discount for the multitude of offenses he committed in this case. See *Commonwealth v. Austin*, 66 A.3d 798, 808 (Pa. Super. 2013)(sentence of 35 to 70 years' imprisonment on 96 counts of possession of child pornography was not a manifestly excessive aggregate sentence); *Commonwealth v. Prisk*, 13 A.3d 526, 533 (Pa. Super. 2011)(sentence of 633 to 1500 years' incarceration for 314 offenses based on years of sexual assaults against appellant's step-daughter when she was between ten and sixteen years old was not unreasonable or excessive).

Castro next contends he is entitled to a new trial because the court erred in failing to suppress the evidence retrieved from his cell phone. In rejecting this claim, the court would rely on its Opinion and Order entered on September 26, 2017 and its Opinion and Order entered on March 21, 2018.

In the final section of his post sentence motion, Castro filed a motion in arrest of judgment with respect to Count 3, Count 7, Count 8, and Count 12.

Count 3 relates to the indecent assault of Z.C. in February 2016. Castro contends the evidence was insufficient to support this conviction as the jury found that “[Castro] neither touched Z.C.’s sexual or intimate parts with his sexual or intimate parts nor did [Castro’s] sexual or intimate parts touch Z.C.’s sexual or intimate parts.” While a

grading of a felony of the third degree requires either a prior conviction for this offense, a course of conduct or contact between both the complainant's and the person's sexual or intimate parts, such is not required to sustain the conviction. Any contact with either party's sexual or intimate parts for the purpose of arousing or gratifying sexual desire is sufficient to sustain the conviction.

In Count 3, Castro was charged with indecent assault with a complainant less than 13 years of age. That crime is defined as follows:

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 complainant and the complainant is less than 13 years of age.

18 Pa. C.S.A. §3126(a)(7). Indecent contact is defined as “[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person.” 18 Pa. C.S.A. §3101(emphasis added).

Indecent assault with a complainant less than 13 years of age is

a misdemeanor of the first degree unless any of the following apply, in which case it is a felony of the third degree:

- (i) It is a second or subsequent offense.
- (ii) There has been a course of conduct of indecent assault by the person.
- (iii) The indecent assault was committed by touching the complainant's sexual or intimate parts with the sexual or intimate parts of the person.
- (iv) The indecent assault is committed by touching the person's sexual or intimate parts with the complainant's sexual or intimate parts.

18 Pa. C.S.A. §3126(b)(3).

In other words, if, for purposes of arousing or gratifying sexual desire, an offender touches the complainant's sexual or intimate parts with a body part other than his

sexual or intimate parts, it is still indecent contact in violation of the indecent assault statute. It is just a lower graded offense, i.e., a misdemeanor of the first degree instead of a felony of the third degree. The statute does not require skin-to-skin contact. *Commonwealth v. Ricco*, 650 A.2d 1084, 1085-1086 (Pa. Super. 1994). Furthermore, “intimate parts” are not limited to genitalia. *Commonwealth v. Fisher*, 47 A.3d 155, 157 (Pa. Super. 2012)(areas of the body other than breasts, buttocks, and genitalia, such as the back of the complainant’s legs, can be intimate parts); *Commonwealth v. Capo*, 727 A.2d 1126, 1127-1128 (Pa. Super. 1999)(complainant’s shoulders, neck and back found to be intimate parts).

Z.C.’s mother and Z.C. both testified that Z.C. was born on August 24, 2003. N.T., 09/11/2018, at 85, 97. Z.C. also testified that, in February 2016, Castro touched her private area. N.T., 09/11/2018, at 99. Therefore, the evidence was sufficient to show that Castro had indecent contact with Z.C., a complainant less than 13 years of age, in February 2016.

Castro next contends that the evidence was insufficient with respect to Count 7 to show that Castro engaged in a course of conduct on that date or that Z.C. was victimized on that date. Castro contends there is no testimony that Z.C. was victimized on September 10, 2016; rather, the testimony was that the September 10, 2016 incident involved one of the other victims. Castro does not challenge the sufficiency of the evidence in any other respect.

Unfortunately, there were multiple incidents on September 10, 2016. The court concedes that Z.C. did not testify about the indecent assaults that Castro perpetrated on her on September 10, 2016, as Z.C. was asleep at the time. Instead, the Commonwealth presented videos from Castro’s phone, testimony from Z.C.’s mother to identify Z.C. in the

videos, and testimony from Detective William Weber to establish the dates of the videos.

Z.C.'s mother identified Z.C. as the child in video 5 and video 7. N.T., 09/11/2018, at 88-90, 92-93.

Detective Weber testified that the date and time stamp on the video 5 was September 10, 2016 at 5:30 a.m. and the date and time stamp on video 7 was September 10, 2106 at 7:05 a.m. N.T., 09/11/2018, at 55, 60.

Video 5 depicts the waist to thigh area of a child wearing gray shorts with pink underwear underneath them. One can see Castro's fingers approach the child's private area between her legs. He slips his index finger between her shorts and underwear and rubs his index finger back and forth over her panties. Castro has a distinctive tattoo that extends from his forearm to his wrist and the back of his hand between his thumb and index finger. One can see a portion of the tattoo in the video. Video 7 depicts the same type of conduct, just at a later time in the morning.

Based on all of the evidence presented, the court finds the evidence was sufficient to show that Z.C. was victimized on September 10, 2016. Furthermore, as there were two separate indecent assaults of Z.C., separated by approximately 1 ½ hours, the court finds the evidence was sufficient to establish a course of conduct.

Castro next contends that there was insufficient evidence of penetration to sustain his conviction for Count 8, Rape of a Child. Again, the court cannot agree.

“A person commits the offense of rape of a child, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age.” 18 Pa. C.S.A. § 3121(c). In addition to its ordinary meaning, the term “sexual

intercourse” includes “intercourse per os or per anus, with some penetration however slight; emission is not required.” The phrase “penetration however slight” is not limited to penetration that reaches the vagina; the entrance of the labia is sufficient. *Commonwealth v. Hunzer*, 868 A.2d 498, 505-506 (Pa. Super. 2005); *Commonwealth v. Poindexter*, 646 A.2d 1211, 1214 (Pa. Super. 1994); *Commonwealth v. Ortiz*, 457 A.2d 559, 560-561 (Pa. Super. 1983).

Count 8 was based on Video 2. This video depicts a portion of the legs and torso of a sleeping child clothed in white underwear with pink trim. The child is on a bed with child’s sheets with a repeating, heart-shaped pattern. Castro is holding his penis in his fingers. He uses his fingers to move the child’s underwear to the side and then slides his penis inside the child’s underwear. Castro then moves his penis in and out at least an inch in between the child’s legs inside her underwear. Castro’s penis does not come out the other side of the child’s underwear nor does it protrude against the underwear; rather, it disappears underneath the underwear and in between the child’s legs. When Castro removes his penis from inside the child’s underwear, his penis appears wet or moist.

Detective Weber testified that Video 2 had a date and time stamp of September 10, 2016 at 3:23 a.m. The following exchange took place between Castro’s trial counsel and Detective Weber:

Q: And in that video you cannot see whether or not he’s actually penetrating her vagina or her anus, correct?

A: Well my training and experience says penetration however slight. I would agree with you, you cannot see her vagina or her anus, but from where I saw his penis go her vagina is there. Touching the labia—touching the labia, touching the outside.

Q: But it’s fair to say you can’t see whether or not it enters into however slight her vagina or her anus at that point in that video?

A: I'll give you 50/50. My—my opinion it touched her labia, touched her vaginal lips, yes. Okay, do I see it going in her vagina, the tip of his penis? No.

Q: But you can't tell me with that video. You may believe that it could have touched her labia, but you can't see it in the video, correct?

A: Correct.

N.T., 09/11/2018, at 75.

The child's mother identified her child and Castro in the video. N.T., 09/11/2018, at 80-81. The child's mother also testified that the child was five years old at the time. N.T., 09/11/2018, at 82.

“It is well-settled that the Commonwealth may sustain its burden of proof by means of wholly circumstantial evidence and the jury, while passing upon the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence.” *Commonwealth v. Yandamuri*, 159 A.3d 503, 514 (Pa. 2017) (citing *Commonwealth v. Poplawski*, 130 A.3d 697, 709 (Pa. 2015)); see also *Commonwealth v. Cramer*, 195 A.3d 594, 601 (Pa. Super. 2018).

Trial counsel's questions focused on penetration of the vagina and the anus. As previously noted, however, there is not requirement that penetration reach the vagina; any penetration however slight of the labia is sufficient. *Hunzer*, supra; *Poindexter*, supra; *Ortiz*, supra.

Despite moving his penis in and out inside the child's underwear, Castro's penis did not exit the other side of the child's underwear or protrude against the child's underwear. When Castro removed his penis from inside the child's underwear, it was wet or moist. Both the angle of Castro's penis and its movement inferred that he was slightly penetrating the child's labia. Detective Weber's opinion, based on his training and

experience, was that there was penetration however slight. Therefore, the court finds that when the evidence as a whole is considered in the light most favorable to the Commonwealth as the verdict winner, the evidence was sufficient for the jury to reasonably conclude that there was penetration however slight of the child's labia.

Castro's final contention is that the evidence was insufficient to sustain the verdict for Count 12, Solicitation of Rape of Child because: (1) the testimony established that Castro solicited oral sex and not sexual intercourse; and (2) the verdict slip listed the wrong child in that Y.O. was listed instead of Y.D. These contentions are meritless.

The definition of sexual intercourse includes not only vaginal intercourse, but also "includes intercourse per os or per anus." 18 Pa. C.S.A. § 3101. Per os means through or by means of the mouth. *Commonwealth v. Kelley*, 801 A.2d 551, 555 (Pa. 2002).

Therefore, oral sex is clearly sufficient to satisfy the definition of sexual intercourse for rape.

Furthermore, Y.O. was the victim who testified about the solicitation of oral sex. Y.O. testified that she was born in 2004. In September 2016, Castro was in her bedroom and asked her if he could give her oral sex. Y.O. said no and told Castro that he should go downstairs. He asked a couple of times and Y.O. just kept saying no. Castro grabbed Y.O.'s arm but she pulled away from him, went downstairs, and asked her mother to get Castro out of her room. N.T., 09/11/2018, at 117-124.

ORDER

AND NOW, this ___ day of March 2019, the court grants in part and denies in part Castro's post-sentence motions. The court grants the post-sentence motion with respect to the claim that the sentence imposed on Count 3 is illegal. A re-sentencing hearing

is scheduled for **April 8, 2019 at 2:00 p.m. in Courtroom #4** of the Lycoming County Courthouse. In all other respects, the post-sentence motions are denied.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (DA's office)
William Miele, Esquire (PD's office)
Gary Weber, Esquire (Lycoming Reporter)(not for publication)
Work file