

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

: No. CR-1221-2018

vs.

:

:

: Opinion and Order re

DAVID A. DYER,  
Defendant

: Defendant’s Omnibus Pretrial Motion

:

**OPINION AND ORDER**

By way of background, Defendant is charged with corruption of a minor and two counts of indecent assault. Defendant filed an omnibus pretrial motion which consisted of a motion for writ of habeas corpus, a motion to preclude reference to the complainant as a “victim”, a motion for disclosure of other crimes, wrongs or acts pursuant to Pa. R. Evid. 404(b), a motion for inspection of Children & Youth records, and a motion to reserve right.

In his motion for writ of habeas corpus, Defendant asserted that there was insufficient evidence to support the grading of the corruption charge as a felony of the third degree as there was no course of conduct and the evidence was insufficient to prove that the indecent assault in count 2 was “without consent.”

The Commonwealth agreed that the grading of corruption should be amended to a misdemeanor of the first degree. The court already issued an order reflecting that amendment.

In Count 2 of the information, Defendant is charged with indecent assault without consent, in violation of 18 Pa. C.S. §3126(a)(1). Defendant contends that the evidence presented at the preliminary hearing was insufficient to establish that the touching occurred without the consent of the alleged victim.

A petition for habeas corpus is the proper vehicle for a defendant to attack the

sufficiency of the Commonwealth's evidence pretrial. *Commonwealth v. Wyatt*, 203 A.3d 1115, 1117 (Pa. Super. 2019).

A defendant may challenge the sufficiency of the evidence presented by the Commonwealth pretrial through the filing of a petition for writ of habeas corpus. *Commonwealth v. Predmore*, 2018 PA Super 313, 2018 WL 6186215, \*2 (November 27, 2018). The burden of the Commonwealth at this stage is to set forth the prima facie case of the defendant's guilt. *Commonwealth v. Nieves*, 876 A.2d 423, 424 (Pa. Super. 2005). A prima facie case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. *Id.*

The evidence, if presented at trial and accepted as true, must be such that the trial judge would be warranted in permitting the case to be decided by the jury. *Id.* (citing *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001)); see also *Predmore, Id.* The evidence must be read in a light most favorable to the Commonwealth and inferences reasonably drawn from the evidence which would support a verdict of guilty must be given effect. *Nieves, Id.*

When considering a challenge to sufficiency of evidence, any question of doubt is for the trier of fact, unless the evidence is so weak and inconclusive that as a matter of law, no probability can be drawn from the combined circumstances. *Commonwealth v. Kirkland*, 831 A.2d 607, 610 (Pa. Super. 2003).

At the preliminary hearing, the Commonwealth presented the testimony of Trooper Matthew Miller. Trooper Miller observed an audio and videotaped interview with

the complainant and Sherry Moroz at the Child Advocacy Center (CAC). The complainant stated that the incident occurred in the springtime when she was 13 or 14 years. She described the residence and the room in which the incident took place. The complainant was at a sleepover at Defendant's residence. Other children were at the foot of the bed playing on iPads or tablets and the complainant was on the bed. Defendant laid down next to her on the bed and began to rub her leg up towards her hip. The complainant felt uncomfortable and wasn't sure what Defendant was trying to do. Defendant made a comment to her along the line of "you don't like it when I tease you." The complainant began to pull away, but Defendant placed his hands inside her shorts and underwear and began to rub her vagina. One of the other children commented that Defendant likes to "snuggle." The complainant pulled away, left the room, and slept in the living room the rest of the night. The next day, Defendant was very apologetic and made some comments about how sorry he was, how she was a very pretty girl, and how he was sorry he put her through that. Preliminary Hearing Transcript, at 9-10.

The defense called the complainant as a witness. She was 17 years old at the time of the preliminary hearing. The complainant testified that Defendant touched her, it was uncomfortable and she didn't know exactly what was happening at the time. He touched her vagina, she went out of the room, and sat or slept in a chair in a different room until the next morning. She didn't tell anyone about the incident until about a year prior to the preliminary hearing when she told a youth group leader. The Commonwealth did not ask the complainant any questions.

Defendant contends that the evidence is insufficient to show that an indecent

assault occurred without the complainant's consent. Despite the fact that the Commonwealth never asked the complainant whether Defendant asked if he could touch her vagina or whether she ever told him that he could touch her in that manner, which would have been very easy to do, the court finds that the evidence and the reasonable inferences from the evidence are sufficient to show that the touching occurred without the complainant's consent. The complainant immediately pulled away from Defendant, left the room and did not return. She slept in another room for the rest of the night. Furthermore, the next morning Defendant made comments to her to the effect that he was sorry he put her through that. If the complainant had consented to the touching, there would be no need for Defendant to apologize to her. Therefore, the court will deny Defendant's petition for habeas corpus with respect to Count 2, indecent assault without consent.

Defendant next requests that the court bar the Commonwealth and its witnesses from referring to the complainant as a "victim." Defendant contends that the use of this nomenclature is prejudicial as its only purpose is to invoke sympathy towards the Complainant. It would create bias against Defendant before the jury in violation of the presumption of innocence and would prevent him from obtaining a fair trial in violation of the Due Process Clauses of the United States and Pennsylvania Constitutions. The court will defer ruling on this issue until closer to trial.

Defendant also requests disclosure of other crimes, wrongs, or act pursuant to Pa. R. Evid. 404(b). Consistent with the Order dated August 27, 2018, if the Commonwealth intends to introduce 404(b) evidence at trial, it must provide reasonable notice to Defendant no later than the date of the pretrial unless such was discovered afterwards.

Defendant also seeks inspection of Children and Youth records. The court has received the records from Children and Youth and will provide copies to the parties.

Defendant's final motion is a motion to reserve right to file additional pretrial motions as there may be additional discovery in this case. The court will grant Defendant's motion to reserve right, but only to the extent that it is based on new or additional discovery.

**ORDER**

**AND NOW**, this \_\_\_ day of July 2019, upon consideration of Defendant's omnibus pretrial motion:

1. Defendant's motion for writ of habeas corpus is denied.
2. Defendant's motion to preclude reference to the complainant as a "victim" is deferred to a time closer to trial.
3. In accordance with Pa. R. Evid. 404(b), if the Commonwealth intends to introduce at trial any 404(b) evidence of crimes, wrongs or other acts, it must provide notice of the general nature of any such evidence to defense counsel no later than the date of the pretrial unless the evidence was discovered afterwards.
4. Defendant's motion for inspection of Children and Youth records is granted. The court has received the records and will provide copies to counsel for the parties in accordance with the Order dated February 28, 2019.
5. Defendant's motion to reserve right is granted but only to the extent that any additional pre-trial motions are based on new or additional discovery.

By The Court,

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Marc F. Lovecchio, Judge

cc: Aaron Gallogly, Esquire (ADA)  
Edward J. Rymza, Esquire  
Work file  
Gary Weber, Esquire (Lycoming Reporter)