IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-736-2019**
v.	:	
	:	
ZACHARY KIESS,	:	**OMNIBUS MOTION**
Defendant	:	

OPINION AND ORDER

Under the above docket, Zachary Kiess (Defendant) was charged on March 25, 2019 with one count of Rape by Forcible Compulsion,[1] one count of Criminal Attempt to Commit Rape by Forcible Compulsion,[2] one count of Involuntary Deviate Sexual Intercourse by Force,[3] one count of Sexual Assault,[4] one count of Aggravated Indecent Assault without Consent,[5] one count of Corruption of a Minor,[6] one count of Indecent Assault,[7] and one count of Criminal Attempt to Commit Sexual Assault.[8] Defendant filed an Omnibus Pretrial Motion on July 3, 2019 seeking to suppress any statements given by Defendant, petitioning for Writ of Habeas Corpus on counts one through four, and reserving the right to file any additional pretrial motions.[9] A hearing on the Motion was held by this Court on September 16, 2019. Both the Commonwealth and Defendant were then granted an opportunity to file briefs on the Motion. Defendant filed his brief on October 28, 2019 and the Commonwealth filed its brief on November 20, 2019. Defendant raises three issues to be addressed in the present Opinion:

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[1] 18 Pa. C.S. § 3121(1).
[2] 18 Pa. C.S. § 901(a).
[3] 18 Pa. C.S. § 3123(a)(1).
[4] 18 Pa. C.S. § 3124.1.
[5] 18 Pa. C.S. § 3125(a)(1).
[6] 18 Pa. C.S. § 6301(a)(1)(ii).
[7] 18 Pa. C.S. § 3126(a)(1).
[8] 18 Pa. C.S. § 901(a). The Commonwealth's Motion to Amend Information was granted by Order on August 26, 2019 adding this count.
[9] Defendant raised a number of other issues in his Omnibus Pretrial Motion, all of which were disposed of by this Court's Order entered on September 16, 2019.

whether suppression should be granted as Defendant contends he was illegally arrested at his residence, whether Defendant's interrogation was improper and/or he did not properly waive his *Miranda* rights such that the statements must be suppressed, and whether Counts One through Four were supported by a finding of probable cause.

Background and Testimony

Trooper Michael App (App) of the Pennsylvania State Police testified on behalf of the Commonwealth. The Commonwealth also provided a video recording of the interview of Defendant that occurred on March 24, 2019, a "Custodial Written Statement" from Defendant, a copy of the transcript from the preliminary hearing at which the alleged victim (A.G.) testified, and a copy of "Rights Warning and Waiver" signed by Defendant as exhibits. Based on this evidence the following was established.

Preliminary Hearing Testimony

A.G. testified at the preliminary hearing that in late March of 2019 she was attending a party at which she was drinking. P.H. 5/8/19, at 3-4. She testified that when she went upstairs to go to sleep that night she was alone and at some point Defendant joined her on her mattress. *Id.* at 3-5. They talked before she rolled over and went to sleep. *Id.* at 5. She awoke to Defendant with his hands down her pants. *Id.* She took Defendant's hands out of her pants and said stop. *Id.* When she rolled over to go back to sleep, Defendant grabbed her by the shoulders and placed her on top of him and began pushing her head down towards his penis. *Id.* at 6. Defendant's penis penetrated her mouth for approximately fifteen to twenty seconds during which time she made attempts to get out of that position but could not. *Id.* at 6, 22. After A.G.'s mouth came off Defendant's penis, she rolled back over. *Id.* at 7. When A.G. was on her side, Defendant pulled her pants down to her knees despite her saying no. *Id.* at 7, 19. Defendant

then tried to put his penis inside A.G., but it would not go in. *Id.* Defendant did not physically restrain A.G., she was not threatened, and she did not receive any physical injuries. *Id.* at 17-18, 20. A.G. estimates that the attempt lasted approximately fifteen seconds at which time she got up walked away. *Id.* at 6-7. Defendant was not given permission, at one point Defendant's finger penetrated A.G.'s vagina, and Defendant sent her a Snap Chat the next day saying "I'm sorry for whatever happened last night." *Id.* at 8.

App's Testimony

App testified that the investigation into Defendant began with an anonymous tip provided through Safe to Say, an anonymous tip hotline designed specifically for school aged students for school based offenses. N.T. 9/26/19, at 10-11. After receiving the tip, App contacted A.G.'s mother to set up an interview. *Id.* at 12. During the interview A.G. disclosed conduct that App believed to constitute Rape, Sexual Assault, and Involuntary Deviate Sexual Intercourse. *Id.* at 12. Specifically, A.G. told App "that the previous night at a cabin party she was sexually assaulted by [Defendant]. She informed [App] that [Defendant] had attempted place her head on his penis, perform oral sex, and attempted to place his penis inside of her vagina and she said no and it was not consensual." *Id.* at 54-55. App spoke with another individual on the phone who was purported to be a witness to the alleged events. *Id.* at 12. App and Trooper Joel Follmer (Follmer) then proceeding to Defendant's residence. *Id.* at 12-13. App and Follmer arrived in an unmarked SUV and were wearing plain clothes. *Id.* at 13. App requested that Defendant's mother go inside the residence and retrieve Defendant, which she did. *Id.* at 14. App then initiated his conversation with Defendant on the front porch in the presence of Defendant's mother and father and Follmer. *Id.* at 15, 32. Defendant's parents and him were informed that the troopers were there investigating an alleged sexual assault. *Id.* at

31-32. Defendant admitted to attending a party, but denied a sexual assault occurring. *Id.* at 15. App then requested to speak with Defendant outside the presence of his parents, handcuffed him, and put him in the vehicle to be transported to the police barracks. *Id.* 15-16, 32-33. App testified that no conversation pertaining to the alleged incident occurred during transport. *Id.* at 18.

Interview of Defendant

Commonwealth's Exhibit #1 is a DVD containing the recording of Defendant's interview by App and Follmer. The interview room, Defendant was taken to, is a rather small, bland looking room with no uncovered windows. *Id.* at 36-37. At the beginning of the recording Defendant is sitting in a chair handcuffed behind his back, then App and Follmer enter, unhandcuffed Defendant and gave him water. Commonwealth's Exhibit #1 at 0:00-2:43. The door to the interview room remained open. App begins by saying "I have to read this form to you OK?" *Id.* at 3:07. App then reads through the Rights Warning and Waiver form before asking Defendant if he understands those rights and Defendant affirmatively nods. *Id.* at 3:09-:38; *see also* Commonwealth's Exhibit #4. App then states "with those rights in mind do you wish to give your side of the story," to which Defendant again affirmatively nods. *Id.* at 4:14. Defendant explains the events of the day, as well as the events leading up to and the beginning of the party. *Id.* at 4:20-13:50. Defendant states then when everyone was going to bed him and A.G. were talking and he asked if she wanted to sleep over with him. *Id.* at 13:52-4:10. Defendant says after a while he dozed off and A.G. went over to her bed, when Defendant woke up she was on her phone so he went over to talk to her and tried to pull her over into his bed. *Id.* at 14:24-:45. Defendant stated he did not remember anything after that. *Id.* at 14:48. When App again asks "what happened then," Defendant says "I was blacked out." 15:07-:12.

App then goes on to say "you have been doing well so far," "you got to be honest here," and "Be a man. You are eighteen years old right? You just got to own up to it, whatever it is you want to tell me." *Id.* at 15:15-:53. After which Defendant explains that he remembers taking his pants off and he tried to get her to touch his penis. *Id.* at 15:59-6:23. Defendant states that he did not try to put his penis in her or push her head down though. *Id.* at 16:29-:37. He additionally states that at one point he thinks her pants were off and she was facing away from him when he tried to put his penis in her, but it would not fit so he stopped. *Id.* at 18:27-9:20. Defendant stated he does not remember her staying stop or no. *Id.* at 20:50. Follmer begins talking and told Defendant "You say it or it comes out. You know what I am saying? You either say it and come clean now or it comes out down the road and looks you know . . . it looks really bad." *Id.* at 22:34-:42. App told Defendant that no one is perfect, people make mistakes, and he could tell Defendant "had a good head on his shoulders." *Id.* 23:15-:26. Defendant then states "she did tell me to stop and put it away." *Id.* at 23:55. He additionally admits that he grabbed her hair for her perform oral sex, after which she came back up and said "stop it, stop it." *Id.* at 25:20. He said at that point he tried to put his penis in her again, but did not push it after she said stop this time. *Id.* at 26:00. Defendant stated he did not get his penis inside her. *Id.* at 29:55. Defendant said he had a pretty good idea why the troopers were there when they arrived at his house today. *Id.* at 34:57. Follmer asks Defendant to clarify as to the oral sex. *Id.* at 36:20-:25. Defendant stated he is not sure, but he did not recall grabbing her or forcing her down there. *Id.* at 36:25-:43. When asked if he was guiding her head he states "Yeah." *Id.* at 36:55.

App asked Defendant at the end of the interview to write down "a brief summary of [his] side of the story" to show his "remorse for everything." *Id.* at 38:20-:50. App asked

Defendant if he would be willing to do that and Defendant said "yeah I'll do it." *Id.* at 38:50-9:00. App then has Defendant put his name on the Custodial Written Statement and verbally asked Defendant "you understand all those rights I said to you though, right?"; "you wish to make a statement?"; and "can you read and write English?" *Id.* at 39:18-:49; *see also* Commonwealth's Exhibit #2. App then puts an "X" on the paper to have Defendant start writing "his side of the story." *Id.* at 40:08. App does not instruct Defendant to read the waiver form at any point prior to him making his statement. At one point Defendant stopped and asked App "can you say again what you really want me to put down?" *Id.* at 41:34-:39. After Defendant completes his written statement, App asked if there is anything else he want to add and then told Defendant "I need your signature here at this x" and "I need your initials here," which Defendant complies with. *Id.* at 51:45-2:50. At the conclusion of the interview, App asked Defendant if he wants to talk to his parents, told him he is going to type up charges, and that he will get Defendant finger printed. *Id.* at 52:58-3:24.

Motion to Suppress Evidence

Defendant raises issue with his arrest in two contexts. First that he was impermissibly arrested when police asked his mother to have him exit the premises without an arrest or search warrant and that he was arrested on his curtilage without an arrest warrant which is constitutionally protected. Second, Defendant claims that police did not have probable cause to effectuate the arrest regardless of where the arrest occurred. Defendant also challenges whether Defendant effectively waived his rights and made statements to police voluntarily, knowingly, and intelligently.

Whether Police Impermissibly Arrested Defendant without an Arrest Warrant

The United States Supreme Court has determined that individuals are protected from warrantless arrests within a home. *See Payton v. New York*, 445 U.S. 573, 585 (1980). In reaching that conclusion, the Supreme Court found that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" and that "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.* at 585, 587. The Pennsylvania Supreme Court has echoed the holding in *Payton* and found that "[w]arrantless entries or searches [of a residence] are *per se* unreasonable under our federal and state Constitutions." *Commonwealth v. Davido*, 106 A.3d 611, 622 (Pa. 2014). As such probable cause alone will not support a warrantless search or arrest within a residence absent exigent circumstances. *Commonwealth v. Govens*, 632 A.2d 1316, 1322 (Pa. Super. 1993). A warrantless search lacking both requirements, probable cause and an exigent circumstance, is a direct violation of both the Fourth Amendment of the United States Constitution and Article 1 § 8 of the Pennsylvania Constitution. *Commonwealth v. Gibbs*, 981 A.2d 274, 280 (Pa. Super. 2009).

Defendant argues that he was impermissibly arrested without an arrest warrant because police demanded he exit the residence. Defendant bolsters this argument by citing a case out of the United States Second Circuit Court of Appeals, *United States v. Allen*, claiming the case stands for the proposition that an arrest is considered an in-premise arrest when an individual exits at police demand. *See* Defendant's Brief in Support of Omnibus Motion 10/28/19, at 5-6. In *Allen*, the defendant was summoned to the door by police officers and told while in the threshold of the door that he was under arrest. *United States v. Allen*, 813 F.3d 76, 79 (2d Cir. 2016). The Second Circuit Court found that because the defendant was told he was under arrest

while he was still "inside the threshold" of his home, the arrest was impermissible. *Id.* at 86. The Second Circuit Court specifically held "that the protections of *Payton* are primarily triggered by the *arrested person's* location and do not depend on the location or conduct of the arresting officers." *Id.* at 78. The legal principal Defendant would have this Court recognize, known as coercive or constructive entry, was specifically disregarded in *Allen* and instead the holding determined that the issue to be decided was where the arrest occurred regardless of police commands. *See Allen*, 813 F.3d at 81, 87-89.

The facts in the present case are distinct from that in *Allen*. App and Follmer went on to Defendant's porch and requested his mother retrieve him so that they could speak to him. N.T. 9/26/19, at 12-14. Under *Allen*, App and Follmer's request is irrelevant because at this point it is not contended that Defendant was under arrest. Once Defendant was on the front porch, App and Follmer spoke with Defendant concerning a cabin party, which he admitted that he attended. *Id.* at 15. At this point, Defendant was placed under arrest and was being taken back for questioning. *Id.* at 15-16. Defendant's contention that he was impermissibly ordered out of the residence is therefore misplaced. Alternatively, Defendant argues that the front porch is considered curtilage and therefore under *Payton* a violation has still occurred. Although some jurisdictions cited by Defendant may hold a front porch is considered curtilage under Pennsylvania precedent it is not and Defendant's argument is without merit. *See Gibbs*, 981 A.2d at 279-80 (issue of first impression before the court holding the front porch does not constitute curtilage).

Whether Defendant was Arrested without the Requisite Probable Cause

To be constitutionally valid a warrantless arrest may not be made absent probable cause. *In Interest of O.A.*, 717 A.2d 490, 495 (Pa. 1998). "Where probable cause to arrest does not

exist in the first instance, any evidence seized in a search incident to arrest must be suppressed." *Id.* Officers "must have a warrant to arrest an individual in a public place unless they have probable cause to believe that 1) a felony has been committed; and 2) the person to be arrested is the felon." *Commonwealth v. Clark,* 735 A.2d 1248, 1251 (Pa. 1999). Pennsylvania courts have found probable cause to arrest rape suspects in multiple situations. *See Commonwealth v. Sabb*, 409 A.2d 437, 440-41 (Pa. Super 1978) (court found probable cause existed when the victim described her attacker's "approximate size, clothing, accessories, and facial hair" to police and an individual matching the description was found a half hour later in the vicinity); *Commonwealth v. Hughes*, 555 A.2d 1264, 1271-72 (Pa. 1989) (court found probable cause when, even though officers originally acted on unsubstantiated rumor, the victim identified her attacker as someone she knew from the neighborhood). In *Commonwealth v. Dozier*, a woman reported her rape to police by identifying the individual by name. 99 A.3d 106, 108 (Pa. Super. 2014). The woman knew the man from the neighborhood since childhood. *Id.* The Superior Court in determining whether probable cause existed to effectuate an arrest determined that it "would struggle to find a more detailed description of an assailant than an immediate identification by name by a victim who knew the suspect for many years preceding the assault." *Id.* at 113.

Defendant claims because police were made aware of the claims by an anonymous tip, knew nothing of A.G., and had no corroborating physical evidence there was not sufficient probable cause to arrest him. As observed in *Hughes* an anonymous tip, like an unsubstantiated rumor does not *per se* invalidate an officer's finding of probable cause. *Hughes*, 555 A.2d at 1271-72. App testified that upon receiving the Safe to Say anonymous tip he set up an interview with A.G. to substantiate the claims. N.T. 9/26/19, at 10-12. Upon speaking with

A.G., App learned that there was a cabin party where A.G., Defendant, and others had been drinking. *Id.* at 54-55. A.G. told App "that the previous night at a cabin party she was sexually assaulted by [Defendant]. She informed [App] that he had attempted place her head on his penis, perform oral sex, and attempted to place his penis inside of her vagina and she said no and it was not consensual." *Id.* In addition, App spoke with another individual on the phone who was purported to be a witness to the alleged events. *Id.* at 12. A.G. at the time went to high school with Defendant and they were friends. P.H. 5/8/19, at 3, 10. App and Follmer then went to speak with Defendant regarding the allegations. N.T. 9/26/19, at 12-13. At this time Defendant admitted to being at the cabin and admitted to consuming alcohol, but denied the sexual assault. *Id.* at 13. As in *Dozier*, when an alleged victim names her alleged assailant by name from knowledge of the individual there is probable cause to effectuate the arrest. 99 A.3d at 113. That is certainly true here where an anonymous tip was substantiated by A.G. and a witness and then Defendant admits to being at the location and to some of the activities that occurred on that night (underage drinking). Therefore, App and Follmer had probable cause to effectuate the arrest.

Whether Defendant Voluntarily Waived His Rights

Defendant alleges that he did not voluntarily, knowingly, and intelligently waive his Fifth and Sixth Amendment rights and further that any statements made were not done so voluntarily. There is no disagreement between the parties that Defendant was subject to arrest and was being subjected to a custodial interrogation. Additionally, there is no allegation by Defendant that he attempted to or did invoke either his right to remain silent or right to counsel. The sole issue before this Court is solely whether Defendant voluntarily, knowingly, and intelligently waived his rights pursuant to his *Miranda* warnings.

Statements made during custodial interrogation are presumptively involuntary unless given *Miranda* warnings prior. *Commonwealth v. Williams*, 941 A.2d 14, 30 (Pa. Super. 2008). An individual must be informed the following rights prior to interrogation: his right to an attorney; that one will be appointed if he cannot afford one; if he desires an attorney, interrogation will cease until one can be consulted; he has the right to remain silent; and if he does choose to speak, anything he says can and will be used against him in court. *Miranda v. Arizona*, 384 U.S. 436, 471-74 (1966). A defendant's waiver of his *Miranda* warnings must be "voluntary, in the sense that [the] defendant's choice was not the end result of governmental pressure [and] knowing and intelligent, in the sense that it was made with full comprehension of both the nature of the right being abandoned and the consequence of that choice." *Commonwealth. v. Pruitt*, 951 A.2d 307, 318 (Pa. 2008). "It is the Commonwealth's burden to establish that a defendant knowingly and voluntarily waived his *Miranda* rights [and] [a] defendant must explicitly waive his *Miranda* rights by making an outward manifestation of that waiver." *Commonwealth v. Lukach*, 163 A.3d 1003, 1111 (Pa. Super. 2017) (internal citations omitted). The validity of a waiver is dependent upon

> whether the waiver was voluntary, in the sense that defendant's choice was not the end result of governmental pressure, and whether the waiver was knowing and intelligent, in the sense that it was made with full comprehension of both the nature of the right being abandoned and the consequence of that choice.
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> *Commonwealth v. Mitchell*, 902 A.2d 430, 451 (Pa. 2006).

If the totality of the circumstances shows an uncoerced choice accompanied by the requisite level of comprehension the waiver is sufficient. A proper waiver of one's *Miranda* rights satisfies both the Fifth and Sixth Amendments of the United States Constitution. *Commonwealth v. Woodard*, 129 A.3d 480, 500-02 (Pa. 2015).

When evaluating the voluntariness of a defendant's statements a court must take into consideration "the duration and means of the interrogation; the defendant's physical and psychological state; the conditions attendant to the detention; the attitude exhibited by the police during the interrogation; and all other factors that could drain a person's ability to resist suggestion and coercion." *Commonwealth v. Yandamuri*, 159 A.3d 503, 525 (Pa. 2017). Additional factors for the court's consideration include: the individual's age and level of education; his previous experience with law enforcement; whether the individual was advised of his rights; and whether he was abused or threatened with abuse. *Id.*

Based on the totality of the circumstances, Defendant's statements were voluntarily given and the waiver of his *Miranda* rights was voluntary, knowing, and intelligent. Although the interrogation took place in a small interview room which did not have any windows, Defendant was not handcuffed during the actual interview, the officers were in plain clothes, they did not display their weapons at any time, and the door to the interview room remained open throughout the interview.[10] N.T. 9/26/19, at 36-37; *see also* Commonwealth's Exhibit #1. The interview was approximately one hour in length, which is not an excessive period of time. *Id.* at 23; *see also Commonwealth v. Templin*, 795 A.2d 959, 966 (Pa. 2002) (an hour and a half interrogation is "not an excessive period of time"). In the video of the interrogation it is apparent Defendant is not emotionally shaken or overcome psychologically. Defendant is calm and talking in a normal manner with the officers during the entirety of the interview. *See* Commonwealth's Exhibit #1. App and Follmer were not acting in an aggressive manner and gave Defendant water. Commonwealth's Exhibit #1 at 0:00-2:43. Defendant argues that the

[10] Defendant in his brief contends the door to the interview remained closed throughout the interview, but it is clear from Commonwealth Exhibit #1 the door remained open through the entirety of the interview.

tactics used were "psychological stratagems" that are impermissible, examples such as telling him to own up to it and be a man, separating him from his family, and talking about his good upbringing. This contention is also misplaced. There is nothing barring officers from strategizing on how to obtain a confession and implementing their training. *See Yandamuri*, 159 A.3d at 525-26 (psychological persuasion is not prohibited absent express threats or promises). Although Defendant is only eighteen years old and has no prior known contacts with law enforcement, these facts are not dispositive of voluntariness and based on the totality circumstances presented did not preclude Defendant from voluntarily, knowingly, and intelligently waiving his rights and giving a voluntary statement. *See Commonwealth v. Alston*, 317 A.2d 241, 244 (Pa. 1974) (defendant was seventeen years old, but "he was of normal intelligence, a student in the eleventh grade . . . he was not under the influence of drugs or alcohol . . . [and] there was a complete absence of any evidence that would suggest that the manner of the interrogation was in any way threatening or coercive" and therefore his confession was voluntary). Defendant was read his *Miranda* warnings verbatim. *Id.* at 3:09-:38; *see also* Commonwealth's Exhibit #4. App then stated "with those rights in mind do you wish to give your side of the story," to which Defendant again affirmatively nodded and signed the waiver form. *Id.* at 4:14. At the end of the interview Defendant again was given his rights and asked if he would write down "a brief summary of [his] side of the story" to show his "remorse for everything." *Id.* at 38:20-9:00. Defendant agreed and said "yeah I'll do it" before App then has Defendant put his name on the Custodial Written Statement and asked Defendant "you understand all those rights I said to you though, right?"; "you wish to make a statement?"; and "can you read and write English?" *Id.* at 39:18-:49; *see also* Commonwealth's Exhibit #2. This

Court is satisfied that Defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights and voluntarily made his statements to the officers.

Petition for Writ of Habeas Corpus

Defendant contends that a *prima facie* showing has not been established for Counts One through Four, Rape by Forcible Compulsion, Criminal Attempt to Commit Rape by Forcible Compulsion, Involuntary Deviate Sexual Intercourse by Force, and Sexual Assault, because the requirement of forcible compulsion has not been established. At the outset Sexual Assault is defined as "a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent." 18 Pa. C.S. § 3124.1. The element of forcible compulsion is not present in the crime and therefore Defendant's contention regarding Count Four is meritless. The Commonwealth acknowledges Counts One through Three require forcible compulsion and contends it has been shown to an extent to satisfy the Commonwealth's *prima facie* burden.

At the pretrial stage of a criminal prosecution, the Commonwealth is required to put forth a *prima facie* showing of a defendant's guilt. *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003). 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 presented need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2003). When evaluating the evidence "[i]nferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case." *Id.* However, "suspicion and

conjecture are not evidence and are unacceptable as such. Where the Commonwealth's case relies solely upon a tenuous inference to establish a material element of the charge, it has failed to meet its burden of showing that the crime charged was committed." *Commonwealth v. Holston*, 211 A.3d 1264, 1269 (Pa. Super. 2019).

Forcible compulsion is defined as "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa. C.S. § 3101. To satisfy the element of forcible compulsion there has to be more than a showing of mere lack of consent. *Commonwealth v. Gonzalez*, 109 A.3d 711, 721 (Pa. Super. 2015). The degree of force required is relative and depends upon the facts and particular circumstances of an individual case. *Commonwealth v. Eckrote*, 12 A.3d 383, 387 (Pa. Super. 2010). In the case relied upon by Defendant, *Commonwealth v. Berkowitz*, the victim entered the dorm room of the defendant of her own volition. 641 A.2d 1161, 1163 (Pa. 1994). The defendant lifted up her shirt and bra and massaged her breasts before attempting to get her to perform oral sex. *Id.* After the failed attempt the defendant pushed the victim her onto the bed, removed her underwear, and penetrated her vagina with his penis. *Id.* The victim testified that the push was not forceful and that she said no throughout the encounter, but at no point did she attempt any physical resistance. *Id.* at 1164. The Pennsylvania Supreme Court found that victim's "testimony simply fail[ed] to establish that the [defendant] forcibly compelled her to engage in sexual intercourse." *Id.* at 1165.

The factual situation presented here is distinct from that of *Berkowitz*. A.G. here did provide physical resistance. She testified that she woke up and Defendant's hands were down her pants, so she removed them and said stop. P.H. 5/8/19, at 5. A.G. testified that Defendant then "hoisted [her] on top of him" and pushed her head down. *Id.* at 6. She made attempts to get

out of that position, but was unable to because he was holding her head down there. *Id.* at 6, 17. Defendant then tried to penetrate her vagina, before she got up and left. *Id.* at 7-8. A.G. testified that she was saying no loud enough in hopes someone would wake up. *Id.* at 20. Based on the evidence provided the Commonwealth has met their *prima facie* burden to establish the element of forcible compulsion for Counts One through Three.

Conclusion

App permissibly arrested Defendant without an arrest warrant outside of his home with the requisite probable to effectuate such an arrest. Prior to being interviewed by App and Follmer, Defendant voluntarily, knowingly, and intelligently waived his rights pursuant to *Miranda*. Defendant was not coerced and his statements given voluntarily. Therefore Defendant's Motion to Suppress Statements is denied. Lastly, the Commonwealth has provided sufficient evidence to satisfy a *prima facie* showing that Defendant acted with forcible compulsion against A.G., as required to satisfy that element for Counts One, Two, and Three. Therefore Defendant's Petition for Writ of Habeas Corpus is denied.

ORDER

AND NOW, this 4th day of December, 2019, based upon the foregoing Opinion, Defendant's Motion to Suppress Statements and Petition for Writ of Habeas Corpus in his Omnibus Pretrial Motion are hereby **DENIED.**

By the Court,

Nancy L. Butts, President Judge

cc: DA (MW)
Edward J. Rymsza, Esquire

NLB/kp