

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 : CR 291-2017
v. :
 :
PAUL MATLOSZ, : CRIMINAL DIVISION
Appellant : APPEAL

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

Appellant appeals his verdict and sentence, which was rendered on August 20, 2019. This Court requested a Concise Statement of Matters Complained of on Appeal on October 2, 2019. Appellant was granted an extension and then complied by filing his Statement of Matters Complained of on Appeal on November 18, 2019. In his Statement of Matters Complained of on Appeal, Appellant raises the following four issues:

- (1) Whether the trial court erred in overruling trial counsel's beyond the scope objection, which constitutes reversible error;
- (2) Whether the weight of the evidence presented at trial supports the jury's finding of guilty;
- (3) Whether the evidence was sufficient to satisfy the verdict of guilty;
- (4) Whether trial counsel was ineffective to a degree, which he did not meet the standard of effective legal assistance therefore prejudicing Appellant at trial;

None of Appellant's issues have been previously addressed. The Court's Opinion on the issues raised above is as follows.

Background

On March 29, 2019, Appellant was convicted of Unlawful Restraint,¹ Corruption of Minors,² and Indecent Assault.³ The victim testified on behalf of the Commonwealth, while

¹ 18 Pa. C.S. § 2902(b)(2).

² 18 Pa. C.S. § 6301(a)(1)(ii).

³ 18 Pa. C.S. § 3126(a)(2).

Trooper Jason Miller (Miller) and Glenn Matlosz testified for Appellant. That testimony and the evidence presented at trial established the following.

The victim testified that December 12, 2014 when he was fourteen, he was at his grandfather's bowling league night at Faxon Lanes in Lycoming County, Pennsylvania. N.T. 3/29/19, at 9-11. Appellant at that time was in the same league as the victim's grandfather. *Id.* at 10-11. The victim testified that on that night he entered the bathroom and was the only one in there. *Id.* at 12. Appellant walked in the bathroom and "put [the victim] in the back stall, all the way in the back," then Appellant "walked in the door and he put his hand over [the victim's] mouth and pulled [the victim's] pants down and said don't say anything and started playing with [the victim's] dick." *Id.* at 12-13. The victim stated he could not get around Appellant as he was blocking the door. *Id.* at 13. The victim stated during the incident Appellant told him not to tell anyone. *Id.* at 14. The victim testified that during the incident he did not feel good and he did not know what to do. *Id.* at 15. The victim described what Appellant was doing to him as "[p]retty much jacking me off." *Id.* at 14. When the victim ejaculated, Appellant took his hand off the victim's mouth, left the bathroom, and told him not to tell anyone. *Id.* at 15. The victim did not tell anyone until 2016 when he finally told his stepdad. *Id.* at 15-16. On cross-examination, the victim further explained the layout of the bathroom at Faxon Lanes. *Id.* at 18-23. He also stated that during the eight to ten minute incident an individual came in asking for him and Appellant stated the victim was not in there while covering the victim's mouth. *Id.* at 23-24. That same person also told Appellant it was his turn to bowl. *Id.* at 29-30. Miller testified that Appellant was approximately twenty-three years old at the time of the incident. *Id.* at 51. Lastly, Glenn Matlosz testified as to the dimensions of the bathrooms, which he measured just a week prior. *Id.* at 54-58.

Discussion

Whether the Court Erred in Denying Appellant's Objection to Beyond the Scope

Appellant contends that this Court erred in overruling trial counsel's objection during the cross-examination of Miller. *See id.* at 51. Under the Pennsylvania Rules of Evidence "[c]ross-examination of a witness . . . should be limited to the subject matter of the direct examination and matters affecting credibility, however, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Pa. R. Evid. 611(b). The scope of that examination may include "inferences, deductions, or conclusions which may be drawn therefrom, which explain or destroy the effect of direct testimony." *Commonwealth v. Nunn*, 947 A.2d 756, 762 (Pa. Super. 2008). The questions at issue were asked by the Commonwealth in regards to Appellant's age at the time of alleged incidents. N.T. 3/29/19, at 51. This Court finds the cross-examination was proper and within the purview of the direct testimony as trial counsel asked Miller questions pertaining to his investigation. Miller was asked about interviews he had attended, who he interviewed at Faxon Lanes, whether he investigated what the bathrooms looked like, and what the extent of the sexual contact was between Appellant and the victim. *Id.* at 39-40, 46-48. Miller as the affiant of this case would have had to investigate the age of Appellant to substantiate what was charged. As such, trial counsel's questioning regarding the depth of Miller's investigation is sufficient to allow the further questioning on cross-examination.

Regardless of whether the questioning on cross-examination of Miller was permissible, this Court finds that it did not prejudice Appellant. The only charge at issue is Corruption of Minors, which requires a finding that Appellant be at least eighteen years of age. *Commonwealth v. Miller*, 657 A.2d 946, 947 (Pa. Super. 1995) ("A finding of guilt for corruption of minors requires the defendant to be at least eighteen years of age.") The jury may find this element

based on their observations of Appellant and the victim's identification of him in court and it need not be proven by direct evidence. *Id.* "Age can be established by circumstantial evidence." *Id.* at 948. The jury was charged with finding that Appellant "was 18 years of age or older at the time of the incident." N.T. 3/29/19, at 72. The jury had an opportunity to observe Appellant, who the victim identified. In addition, throughout the trial it was affirmed repeatedly that Appellant was bowling in an adult league that night. Based on these facts the jury could through reasonable inferences from circumstantial evidence reach the conclusion that Appellant was over the age of eighteen at the time of the offense.

Whether the Verdict was Against the Weight of the Evidence

Appellant next contends that the verdict reached by the jury was against the weight of the evidence provided at trial. "[T]he trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence." *Commonwealth v. Knox*, 50 A.3d 749, 754 (Pa. Super. 2012). This finding rests exclusively with the jury as the trier of fact. *Commonwealth v. Rice*, 902 A.2d 542, 546 (Pa. Super. 2006).

The weight given to trial evidence is a choice for the factfinder. If the factfinder returns a guilty verdict, and if a criminal defendant then files a motion for a new trial on the basis that the verdict was against the weight of the evidence, a trial court is not to grant relief unless the verdict is so contrary to the evidence as to shock one's sense of justice.

Commonwealth v. West, 937 A.2d 516, 521 (Pa. Super. 2007).

The weight of the evidence rests solely on the testimony of the victim. Trial counsel made attempts to have the jury question the victim's credibility. Trial counsel attempted to show the victim made inconsistent statements such as he was bowling that night although it was an adult league, that Appellant removed his pants although that would have been factually impossible with shoes on, and how many people entered the bathroom during the alleged incident. N.T. 3/29/19, at 19-20, 23-25, 28-30, 39-43. Trial counsel also attempted to

demonstrate that the bathroom was too small for things to occur the way the victim stated due to the size of Appellant. *Id.* at 52-57. The jury had an equal opportunity to review the statements of the victim in conjunction with the alleged inconsistencies and alleged factual improbability presented by trial counsel and chose to believe the testimony of the victim. The jury's verdict does not "shock one's sense of justice," which would permit this Court to overturn its verdict. *West*, 937 A.2d at 521.

Whether the Evidence was Insufficient to Sustain a Conviction

Defendant asserts the Commonwealth's evidence presented at trial was insufficient to justify a verdict of guilty. When evaluating the sufficiency of the evidence a Court "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." *Commonwealth v. Brown*, 52 A.3d 320, 323 (Pa. Super. 2012). All reasonable inferences are drawn in favor of the verdict winner. *Commonwealth v. Watley*, 81 A.3d 108, 113 (Pa. Super. 2013). "[T]he 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." *Brown*, 52 A.2d at 323.

An individual commits the crime of Unlawful Restraint "[i]f the victim is a person under 18 years of age, a person who is not the victim's parent commits a felony of the second degree if he knowingly: holds another in a condition of involuntary servitude." 18 Pa. C.S. § 2902(b)(2). Unlawful Restraint involves restraint "which do[es] not reach the magnitude of kidnapping but [is] somewhat more serious than mere false imprisonment." 18 Pa. C.S. § 2902 cmt. "[I]nvoluntary servitude has no time dimension" and further only requires that an individual deprive another of freedom of choice and subject another to his/her will. *Commonwealth v. Wells*, 460 A.2d 328, 330 (Pa. Super. 1983). The Pennsylvania Superior Court has also found

involuntary servitude exists when an individual did not leave the bed for the remainder of the night, because a jury could find “she stayed near appellant all night out of fear for her safety.” *Commonwealth v. Prince*, 719 A.2d 1086, 1089 (Pa. Super. 1998).

Presently, the victim’s testimony established that he was fourteen at the time of the incident and Appellant is not his parent. *Id.* at 9. The victim testified that Appellant forced him into the bathroom stall. N.T. 3/29/19, at 12. Appellant then shut the door behind him and blocked the door so that the victim could not get out. *Id.* at 13. The victim testified that he could not tell or ask Appellant to stop because his mouth was being covered. *Id.* at 14. The victim testified he was scared and did not know what to do. *Id.* at 15, 24. At that time, Appellant performed a sex act on the victim and when someone came in Appellant again covered the victim’s mouth. *Id.* at 14-15, 24. Although the incident only lasted eight to ten minutes, length of time is insignificant in determining involuntary servitude. *Id.* at 24. Based on the testimony provided by the victim viewed in a light most favorable to the Commonwealth as the verdict winner, Appellant deprived the victim of his freedom of choice and subjected him to Appellant’s will beyond a reasonable doubt. *Wells*, 460 A.2d at 330. Therefore evidence was submitted for the jury to find Appellant guilty on every element of Unlawful Restraint.

An individual commits the crime of Indecent Assault “if the person has indecent contact with the complainant . . . for the purpose of arousing sexual desire in the person or the complainant and the person does so by forcible compulsion.” 18 Pa. C.S. § 3126(a)(2). Under Chapter 31, 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. § 3101. Likewise, forcible compulsion is defined as “[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied.” *Id.*

The victim's testimony establishes that Appellant touched his penis, a sexual or intimate part of his body. N.T. 3/29/19, at 12-14. To the point it did arouse the victim and he eventually ejaculated. *Id.* at 15. Additionally, Appellant did so after pushing him into the bathroom, covering his mouth, closing and blocking the door, and being older and physically larger than the victim. *Id.* at 10-15. Based on this evidence, the jury could find Appellant had indecent contact with the victim for the purposes of arousing the victim by either express or implied physical, intellectual, emotional, and/or psychological force. 18 Pa. C.S. § 3126(a)(2). Therefore evidence was submitted for the jury to find Appellant guilty on every element of Indecent Assault.

Corruption of Minors occurs when an individual "being of the age of 18 years and upwards, by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age . . . commits a felony of the third degree." 18 Pa. C.S. § 6301(a)(1)(ii). The factual situation in the present case is almost factually indistinguishable from *Commonwealth v. Kelly*. In *Kelly*, the appellant was convicted of Corruption of Minors and Indecent Assault. *Commonwealth v. Kelly*, 102 A.3d 1025, 1026 (Pa. Super. 2014) (*en banc*). The appellant, while bathing a minor with learning disabilities, "grabbed [the victim]'s penis and began playing with it." *Id.* at 1027. Also similarly, the appellant covered the victim's mouth and the incident lasted approximately five minutes. *Id.* Based on these facts the Pennsylvania Superior Court found that 18 Pa. C.S. § 6301(a)(1)(ii) did not apply. The Superior Court held that a "course of conduct in the first provision of subsection (a)(1)(ii) imposes a requirement of multiple acts over time" and a course of conduct could not encompass a single act that gives rise to a Chapter 31 offense. *Id.* at 1031-32 (internal quotations omitted). Specifically, the Superior Court found that the appellant grabbing the victim's genitals was a single act, that restraining the victim was not a separate violation of Chapter 31, and that

“the restraining actions and the indecent assault occurred simultaneously,” which could not satisfy the requirement for a course of conduct. *Id.* at 1032.

As the factual situation in Appellant’s case is almost identical to *Kelly* this Court believes the sentence should be vacated and the case remanded so that Appellant may be resentenced in accordance with *Kelly*. Although Appellant asks the Superior Court to find the evidence was insufficient, it is clear from *Kelly* that when the evidence is insufficient to establish a course of conduct, “the evidence [is] sufficient to support the misdemeanor grading of the corruption of minors offense, subsection (a)(1)(i). It is ‘the settled law in Pennsylvania . . . that a defendant may be convicted of an offense that is a lesser-included offense of the crime actually charged.’” *Id.* (quoting *Commonwealth v. Sims*, 919 A.2d 931, 938 (Pa. 2007)). Therefore as in *Kelly* the entire sentence should be vacated and Appellant should be resentenced under 18 Pa. C.S. § 6301(a)(1)(i) as a misdemeanor of the first degree.⁴

Whether Trial Counsel was Ineffective

Appellant’s last allegation is that trial counsel was ineffective, in such a manner which prejudiced him during trial and directly resulted in the jury’s finding of guilty. “[A]s a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review.” *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002). Exceptions have been established to the general rule. New counsel may raise the issue in post-sentence motions, which allow the trial court to conduct a hearing and have trial counsel testify. *Commonwealth v. Bomar*, 826 A.2d 831, 853 (Pa. 2003). An appellant may raise ineffective assistance of counsel when he/she is not entitled to post-conviction collateral relief, such as when he/she is sentenced

⁴ It should be noted that *Commonwealth v. Kelly*, 102 A.3d 1025 (Pa. Super. 2014) was never brought to this Court’s attention by trial counsel or present appellate counsel in the form of a pre-sentence or a post-sentence motion or in the form of an objection to the filed information, guilty plea, or sentencing. This precedent was only uncovered in evaluating Appellant’s sufficiency of the evidence claim for the present Opinion.

to pay a fine. *Commonwealth v. Delgros*, 183 A.3d 352, 361-62 (Pa. 2018); *but see Commonwealth v. O’Berg*, 880 A.2d 597, 601-02 (Pa. 2005) (the appellant was not entitled to seek relief for ineffective assistance of counsel due to “a short sentence,” even when he would most likely not be granted the opportunity for post-conviction collateral review). The Pennsylvania Supreme Court has created two distinct avenues to seek an exception to *Grant*. *Commonwealth v. Holmes*, 79 A.3d 562, 577 (Pa. 2013). This can be accomplished by demonstrating an extraordinary situation where the issue is “both meritorious and apparent from the record so that immediate consideration and relief is warranted” or where an appellant accompanies such request with knowing, voluntary, and express waiver of his Post-Conviction Relief Act review of the issue. *Id.*

Appellant is not permitted to seek relief by claiming ineffective assistance of counsel at this juncture. Appellant received a sentence, which will allow him to seek the remedy during post-conviction collateral relief. This is not an extraordinary case, which is clearly meritorious and apparent from the record that warrants immediate consideration. Neither is this a case where Appellant has made a knowing, voluntary, and express waiver of his future review of the issue. Additionally, the issue was not raised in a post-trial motion, which would afford this Court the opportunity to evaluate the issue, which was the crux of the holding in *Grant*. *Grant*, 813 A.2d at 736 (“By requiring ineffectiveness claims to be raised on direct appeal when new counsel has entered the case, the trial court is eliminated from the process, leaving the appellate court in an awkward position as to the manner in which these claims can be assessed.”). For the above reasons Appellant’s claim of ineffective assistance of counsel is premature.

Conclusion

Appellant’s claim that this Court erred in overruling his beyond the scope objection is meritless. The questions asked by the Commonwealth on cross-examination were within the

scope of Appellant's direct examination. Regardless, it did not prejudice Appellant as the jury could still determine age based on its observation and other circumstantial evidence. Appellant's claim that the verdict was against the weight of the evidence is meritless as the jury found the victim's testimony credible. Appellant's claim that the evidence presented was insufficient to sustain the verdict is meritless as to the charges of Unlawful Restraint and Indecent Assault. As for the charge of Corruption of Minors the sentence should be vacated and remanded so that this Court may resentence Appellant in accordance with *Commonwealth v. Kelly*, 102 A.3d 1025 (Pa. Super. 2014). Lastly as for Appellant's claim that trial counsel was ineffective the claim is premature pursuant to *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002).

DATE: _____

By the Court,

Nancy L. Butts, President Judge

xc: DA
Christian Lovecchio, Esq.

NLB/kp