

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No. CR-305-2019
vs. :
ANDREW ALEXANDER, :
Defendant : Post-Sentence Motion

OPINION AND ORDER

Before the court is Defendant’s Post-Sentence Motion in arrest of judgment filed on July 9, 2020. The court held a non-jury trial on February 3, 2020. Although the court found the defendant not guilty on numerous other charges, the court found him guilty of obscene and other sexual materials in violation of 18 Pa. C.S.A. § 5903(a)(3)(i). On July 1, 2020, the court sentenced the defendant to a term of county incarceration, the minimum of which was six (6) months and the maximum of which was twenty-four (24) months minus one (1) day.

Defendant argues that the evidence introduced at trial was insufficient to prove that the allegedly obscene material existed, that the defendant prepared or published such material, that such material was obscene, and that the defendant knew that the material was obscene. The court cannot agree.

Section 5903(a)(3)(i) provides:

No person, knowing the obscene character of the materials or performances involved, shall: ... (3)(i) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials.

18 Pa.C.S.A. §5903(a)(3)(i). The statute also contains the following definitions pertinent to the issues asserted by the defendant.

“Knowing.” As used in subsections (a) and (a.1), knowing means having general knowledge of, or reason to know or a belief or ground for

belief which warrants further inspection or inquiry of, the character and content of any material or performance described therein which is reasonably susceptible of examination by the defendant.

“Material.” Any literature, including any book, magazine, pamphlet, newspaper, storypaper, bumper sticker, comic book or writing; any figure, visual representation, or image, including any drawing, photograph, picture, videotape or motion picture.

“Obscene.” Any material or performance, if:

(1) the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest;

(2) the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and

(3) the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.

“Sexual conduct.” Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, anal or oral sodomy and sexual bestiality; and patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

18 Pa. C.S.A. §5903(b).

While the court had some reservations about the obscene nature of the material after hearing the evidence, it was not enough to convince the court that the defendant was not guilty. Indeed, after reviewing the transcript, the court is convinced that there was more than sufficient evidence to prove that the material existed, the material was obscene, the defendant knew that the material was obscene and the defendant prepared and uttered or published such material.

Trooper Zachary Martin of the Pennsylvania State Police testified that on December 21, 2018, the defendant came to the barracks to report that someone was blackmailing him. The defendant permitted Trooper Martin to see and read text messages on the defendant’s phone. The defendant explained that the previous evening he made contact

with a female on an adult website. They exchanged cell phone numbers and continued texting each other. The defendant further explained that, because he was going to provide the phone to his daughter, he “factory reset” his phone and the only text messages remaining were from the morning of December 21, 2018.

Martin took photos of the text messages on the defendant’s phone. Included in the texts were messages from the defendant to the other number asking among other things: “so you in high school?” followed by an emoji with heart eyes; “you at school now?”; “how old are you really?”; “be honest”, to which the other number replied “16 on January 3”; “wow”; “how can I trust that you won’t get me in trouble?”; “I never talked to a young girl like you before”; “you like older men?”; “have you ever had sex with an older guy?”; “so you want to fuck an older guy?”; “you have friends like you?”; “so when can we meet up?”; “go out and have some fun together?”; “I can come pick you up and we can drive around and do something”; and “is there anything special you want to do?” followed by one emoji winking and another smiling.

A subsequent search of the defendant’s phone pursuant to a search warrant disclosed other text messages sent by the defendant on December 20, 2018. These texts included statements by the defendant such as: “your pussy lips”; “you bi?”; “I’m rubbing my cock right now”; “show me something to turn me on”; “I’m getting harder baby”; “Can I see that pretty pussy?”; “make a video”; “of me rubbing my cock?”; “if you make a video of your tight pussy”; “pic for pic?”; “video for video?”; and “so you’re in school?”. Among the responses that the defendant received from his texts were: “ready daddy?”, and “sorry my mom came home. I am supposed to be in bed, LOL school.”

Trooper Martin interviewed the defendant on December 21, 2018. Among

other things, the defendant admitted to sending nude pictures to the other phone number, that the individual he thought he was speaking to was only 15 years old and that he continued the sexually related dialog with someone who said they were 15.

The defendant testified that his intent was not to have a sexual relationship with another person on Adult Friend Finder but to “role-play” or participate in a “fantasy.” In fact, he testified that he actually believed that it was his wife “being fraudulent” with him. He explained that this role-playing would cause he and his wife to fight and then argue and then “make up.”

Defendant’s wife, Cathy Alexander also testified. Despite testifying on behalf of the defendant, she actually contradicted the defendant in material respects. Significantly, while she would occasionally go on the website and pretend to be someone else, she never posed as a minor and never tried to “catch him” as part of a game. Further, she always let him know it was her and her purpose in catching him was to prove that he was straying from the marriage.

The court did not credit the testimony of the defendant especially in light of his wife’s contrary testimony. It was clear to the court beyond a reasonable doubt that the defendant knew that he was texting (uttering and publishing) sexually explicit questions and comments to an individual who he believed was 15 years old. These texts, when viewed in context and in their totality, not only depicted or described in a patently offensive way, sexual conduct with a minor but also, lacked any literary, artistic, political, educational or scientific value. As well and determinatively, taken as a whole and applying the average person’s contemporary community standards, appealed to the prurient interests. The defendant’s admissions that he sent naked pictures of himself to the individual when

considered in conjunction with the comments he was sending bolsters the court's findings.

There was overwhelming evidence that the dominant theme of the material taken as a whole appealed to a prurient interest in sex, that it was patently offensive because it affronted the contemporary community standards relating to description or representation of sexual matters, and it was utterly without redeeming social value. In a nutshell, uttering or publishing text messages utilizing language suggesting a sexual encounter with a 15 year old and describing apparent masturbation to said 15 year old, constitutes a violation of 18 Pa. C.S.A. § 5903.

ORDER

AND NOW, this ___ day of October 2020 following consideration of Defendant's Post-Sentence Motion, a review of the transcript, and argument of counsel, said Motion is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Devin Walker, Esquire (ADA)
Jessica Feese, Esquire (APD)
Gary Weber, Esquire
Work File