E Webber

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0000305-2019**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
ANDREW ALEXANDER,	:	
Appellant	:	**1925(a) Opinion**

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

This Opinion is written in support of the court's judgment of sentence dated July 1, 2020 and docketed on July 9, 2020, which became a final and appealable order when the court denied Appellant's post sentence motion on October 26, 2020.

On December 21, 2018, Andrew Alexander ("Appellant") went to the Pennsylvania State Police barracks in Montoursville to report that someone was blackmailing him. Trooper Zachary Martin conducted an investigation, which included an interview with Appellant and viewing some material on his phone. Trooper Martin observed the numbers contacting Appellant had accused Appellant of soliciting and attempting to arrange to have sex with a fifteen-year-old woman. Appellant admitted making contact with a female on adultfriendfinder.com. He began conversing with her. They exchanged phone numbers so they could continue their conversation without incurring fees. The conversation continued the next day. During the conversation, the other party sent messages indicating that she was in high school and would turn 16 years old on January 3, 2019. Despite the messages indicating that the other party was a minor, Defendant sent messages of a sexual nature, including nude photographs of himself, and he asked when they could "meet up." Appellant

factory reset his phone, which deleted the conversation before Appellant went to the barracks. However, some messages were recovered from the execution of a search warrant. The photographs were not recovered.

Appellant was charged with criminal solicitation of statutory sexual assault, criminal solicitation of corruption of minors, corruption of minors-sexual offenses, criminal use of a communication facility, two counts of obscene and other sexual materials, criminal solicitation of sexual abuse of children, and three counts of criminal solicitation of unlawful contact with a minor.

Following a nonjury trial held on February 3, 2020, the court found Appellant guilty of Count 5, obscene and other sexual materials, a misdemeanor of the first degree in violation of 18 Pa. C.S.A. §5903(a)(3)(i).

On July 1, 2020, the court sentenced Appellant to undergo incarceration in the Lycoming County Prison for a minimum of six months and a maximum of two years minus one day followed by three years of supervision.

On July 9, 2020, Appellant filed a post sentence motion in which he challenged the sufficiency of the evidence. Specifically, Appellant asserted that the evidence failed to establish beyond a reasonable doubt that: (1) the allegedly obscene material (a photograph) existed; (2) Appellant prepared or published such material; (3) such material was obscene; and (4) Appellant knew the material was obscene. In an Opinion and Order entered on October 26, 2020, the court denied Appellant's post sentence motion.

Appellant filed a notice of appeal. Appellant raised the following issues in his concise statement of matters complained of on appeal:

1. The verdict of guilty on Count 5, Obscene and Other Sexual Materials, was against the weight of the evidence because insufficient evidence was presented to establish beyond a reasonable doubt that [Appellant] sent an obscene image from his phone.
2. The [c]ourt erred in finding [Appellant] guilty on Count 5, because direct electronic communication is not "obscene material" within the meaning of the statute.
3. The [c]ourt erred in finding [Appellant] guilty of Count 5, because any "obscene" texts allegedly sent were private, consensual communication and thus Constitutionally protected.

It is not clear to the court whether Appellant is attempting to raise a sufficiency or a weight of the evidence claim in his first issue. To the extent Appellant is attempting to assert a claim that the verdict was against the weight of the evidence, he did not assert such a claim in the trial court as required by Rule 607 of the Pennsylvania Rules of Criminal Procedure. Furthermore, "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a).

To the extent Appellant is challenging the sufficiency of the evidence, the court would rely on its Opinion and Order entered on October 26, 2020. Furthermore, the obscene material was not limited to a photograph or image, but also included the text messages.

Appellant also contends that direct electronic communication is not "obscene material" within the meaning of the statute. There is nothing in the statute that expressly excludes direct electronic communication from the definition of "obscene material." To restrict the statute in the manner suggested by Appellant would unduly curtail the statute at a time when electronic communication and electronic publication and dissemination is becoming more and more prevalent. It would insulate individuals from prosecution when

obscene material or sexually explicit material is sent via email, text message or other electronic means at a time when those forms of communication are the norm and "snail" mail and hard copies of books, magazines, newspapers and other publications are rapidly declining.

Appellant's final contention is that the trial court erred in finding Appellant guilty on Count 5 because any obscene texts allegedly sent were private, consensual communication and thus constitutionally protected. Appellant relies on language from *Commonwealth v. Stock*, 499 A.2d 308 (Pa. Super. 1985). Appellant's reliance is misplaced. In *Stock*, the Superior Court acknowledged that "Section 5903(a)(2) would appear to be violative of the right to privacy…if the statute were construed as making criminal the mere private showing of obscene materials between spouses in the confines of their home." Appellant, however, was not showing obscene materials to his spouse within the confines of his home. In fact, Appellant's wife credibly testified that she was not the other party posing as a minor. Appellant's contrary testimony was not credible. Rather, Appellant was creating and sending obscene material to a minor or a party claiming to be minor, who was not a resident or occupant of his home. Appellant also conveniently ignores the fact that "obscenity is not a protected mode of expression." *Stock*, 499 A.2d at 312.

DATE: _____

By The Court,

_____
Marc F. Lovecchio, Judge

cc: District Attorney
Jessica Feese, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)