

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CR- 889-2020
 :
 JEROLD VAUGHN, :
 Defendant : Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on July 31, 2020 with sexual abuse of children, corruption of minors, obscene and other sexual materials, and unlawful contact or communication with minor. On December 1, 2020, Defendant filed an Omnibus Pretrial Motion which included a petition for writ of habeas corpus.

This Opinion and Order will address the petition for habeas corpus. A hearing was held on February 16, 2021.

The proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a petition for writ of habeas corpus. *Commonwealth v. Lambert*, 2020 WL 7650278 (Pa. Super. 2020); *Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 (Pa. Super. 2016). At a habeas corpus hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a prima facie case against the defendant. *Commonwealth v. Williams*, 911 A.2d 548, 550 (Pa. Super. 2006), *abrogated on other grounds by Dantzler*, 135 A.3d at 1112 n.5; see also *Commonwealth v. Hilliard*, 172 A.3d 5, 10 (Pa. Super. 2017)(A trial court may grant a defendant's petition for writ of habeas corpus after a preliminary hearing where the Commonwealth has failed to present a *prima facie* case

against the defendant).

A workable definition of prima facie is not without controversy. See *Commonwealth v. Ricker*, 642 Pa. 367, 381, 170 A.3d 494, 503 (2017)(per curiam)(Saylor, C.J., concurring). On the one hand, a prima facie case consists of evidence, read in a light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime. Pa. R. Crim. P. 542(D); *Commonwealth v. Ouch*, 199 A.3d 918, 923 (Pa. Super. 2018). On the other hand, it has been stated that a prima facie case in support of an accused's guilt consists of evidence that, if accepted as true, would warrant submission of a case to a jury." *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001).

When reviewing a petition for a writ of habeas corpus, the court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. *Commonwealth v. Santos*, 876 A.2d 360, 363 (Pa. 2005). A prima facie case merely requires evidence of each of the elements of the offense charged, not evidence beyond a reasonable doubt. *Marti, supra*.

Defendant argues that Count 1, sexual abuse of children, 18 Pa. C.S.A. §6312(d), should be dismissed because the Commonwealth failed to produce prima facie evidence that Defendant intentionally viewed or knowingly possessed a depiction of the child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act. Defendant argues that the single photograph of the alleged victim's breasts did not constitute the alleged victim engaging in a prohibited sexual act or in the simulation of such act. The

court cannot agree with Defendant.

The victim testified that between October and November of 2019, when she was 16 years old, she engaged in Facebook conversations with Defendant, her uncle. As the days progressed, the conversations became increasingly sexual in nature. She recalled sending Defendant one picture of her nude breasts.

Trooper Rebecca Parker of the Pennsylvania State Police (PSP) testified that following her receipt of a report from a “cyber tip line” that a 16 year-old female and 61 year-old male were engaging in sexually explicit conversations, she interviewed Defendant as part of her investigation. Defendant admitted that his conversations with the victim were sexual in nature and that he received from her two pictures. One picture was of the victim’s nude breasts while the other was of her vaginal area. There is no question that Defendant knew that the victim was under 18. He indicated that she was 16, but would soon be turning 17.

Per the statute, a prohibited sexual act includes “nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might use such depiction.” 18 Pa. C.S.A. § 6312(g).

In viewing the totality of the circumstances, the Commonwealth has produced *prima facie* evidence that Defendant intentionally viewed and possessed nude photographs of the victim for the purpose of sexual stimulation or gratification.

As both Trooper Parker and the victim testified, not only were the conversations sexual in nature but they increasingly became more sexually explicit and

suggested or intended future physical interaction between the two. The conversations included oral sex, intimate touching, spanking and intercourse. Additionally, the timing and content of the pictures is indicative of sexual stimulation or gratification.

Following more explicit talk including intercourse, Defendant made statements such as: “The things I would do to you...ooh oh oh oh yeah...would have you begging for mercy”, “you eat cookies [and] I will eat you”, “I would love to feel your pussy” and “I want to put my dick in your mouth.” Defendant stated that he first shared with the victim a picture of his penis and a video of him masturbating. He then received her two photos. Further, in response to the conversations and inferentially the pictures, Defendant admitted that they were “just making each other feel good.” Finally, the parties discussed and planned to meet at Defendant’s house, as usual during the holidays with family for Christmas Eve. Their discussion and plan was that the two of them would sneak or “get away” and “do things like kissing and intercourse.”

As for the three counts of obscene or other sexual materials, Counts 3 through 5, Defendant argues that he cannot be charged with three counts when only one image exists, that the statute requires the adult to disseminate to a minor and that without the actual photos or video, the Commonwealth cannot meet its burden of proving the existence of “explicit sexual materials.”

Counts 3 and 4 relate to the photographs of Defendant’s penis that Defendant allegedly sent to the victim. Count 5 relates to the alleged video sent by Defendant.

As for Defendant’s claim that the Commonwealth cannot prove a prima facie

case without the actual photo or video, the court cannot agree. The Commonwealth may sustain its burden of proving any or even every element of a crime beyond a reasonable doubt by means wholly circumstantial evidence. *Commonwealth v. Robertson-Dewar*, 829 A.2d 1207, 1211 (Pa. Super. 2003).

Circumstantial evidence is proof of a fact or set of facts from which one could infer the fact in question. *Commonwealth v. Broughton*, 390 A.2d 1282, 1284 (Pa. Super. 1978). In other words, a witness presents evidence of other facts that based on reasonable inference, would cause the factfinder to conclude that the fact at issue is true.

For the Commonwealth to present a *prima facie* case of obscene or other sexual materials in violation of 18 Pa. C.S.A. §5903(c)(1), the Commonwealth would need to prove that Defendant knowingly disseminated to a minor “any picture, photograph, drawing, sculpture, motion picture film, videotape or similar visual representation or image of a person or portion of the human body” which depicted nudity or sexual conduct. Nudity means “the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.” 18 Pa. C.S.A. §5903(e)(2). Sexual conduct includes acts of masturbation. 18 Pa. C.S.A. §5903(e)(3).

The evidence supports a *prima facie* case of this. Defendant admitted sending the victim a picture of his penis and a video of himself masturbating. The victim testified that she received from Defendant more than one picture of Defendant’s penis as well as a video

of Defendant masturbating. The victim testified that the video depicted Defendant's hand going up and down on his penis. Although Defendant's face was not contained in any of the images, the victim knew Defendant was depicted in the pictures and video based on a variety of factors, including his skin tone.

Finally, Defendant requests that the court dismiss Counts 6 through 9, which charge Defendant with unlawful contact or communication with a minor under 18 Pa. C.S.A. §6318(a)(4) (Counts 6, 8 and 9) and 18 Pa. C.S.A. §6318(a)(5) (Count 7).

Under §6318(a)(4), it is unlawful for a person to intentionally contact a minor for the purpose of engaging in obscene or other sexual materials as defined in § 5903 (obscene materials). Under § 6318(a)(5), it is unlawful for a person to intentionally contact a minor for the purpose of engaging in sexual abuse of children as defined in § 6312 (prohibited sexual acts).¹ Contact is defined as “[d]irect or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.” 18 Pa.C.S.A. §6318(c).

Defendant argues that the Commonwealth has not established a *prima facie* case because the communication was merely “speech”, there was never any intention to act or to engage in prohibited acts and again, that no images exist of Defendant's penis or of him

¹ Thus, Count 6 corresponds with Count 3, Count 8 corresponds with Count 4, Count 9 corresponds with Count

masturbating.

Defendant's claims fail for a variety of reasons. First, the crime focuses directly on verbal communication. *Commonwealth v. Davis*, 225 A.3d 582, 587 (Pa. Super. 2019)(the crime of unlawful contact with a minor focuses on communication, *verbal or non-verbal*); *Commonwealth v. Rose*, 960 A.2d 149, 152-53 (Pa. Super. 2008)(unlawful communication with a minor is best understood as unlawful **communication** with a minor), *appeal denied*, 980 A.2d 110 (Pa. 2009). By its plain terms, it prohibits communication with a minor for the purpose of carrying out certain sexual purposes. *Rose, supra*. In fact, the *Rose* court noted that the communication may take place in person, on the telephone, via computer or other ways and that the crime is complete as of the moment of the communication; no further affirmative steps to have physical contact with the minor are necessary. *Id.*

Secondly, and as detailed above, the explicit sexual conversations between the parties, raises a strong inference that not only was Defendant interested in planning on engaging in sexual contact with the victim, but that he invited nude photographs from the victim by first sending his pictures and video.

Third, it could be inferred from the conversations both before and after the photos that they were part of a pattern of escalating explicit sexual communications for the purpose of sexual gratification and, ultimately, sexual physical interaction.

In this case, for *prima facie* purposes, Defendant communicated, engaged in

5 and Count 7 corresponds with Count 1.

“speech”, with the victim for the purpose of both disseminating photos containing nudity and a video depicting sexual conduct (§5903) and receiving nude photos of the victim for sexual gratification.

ORDER

AND NOW, this ___ day of February 2021 following a hearing and considering the arguments advanced by the parties, the court DENIES Defendant’s Petition for Habeas Corpus and Motion to Dismiss. The court notes that Defendant did not raise a petition for habeas corpus or to dismiss with respect to Count 2, corruption of minors.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Edward J. Rymysz, Esquire (APD)
Gary Weber, Esquire, Lycoming Reporter
Work file