

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-760-2022
	:	
vs.	:	
	:	CRIMINAL DIVISION
TODD ALLEN BABB,	:	
Defendant	:	

OPINION

This matter is before the Court on Defendant’s Omnibus Pretrial Motion filed July 13, 2022. For the reasons set forth below, the Motion is granted in part and denied in part.

I. Factual and Procedural Background

Todd Allen Babb (“Defendant”) was charged with one count of rape of a mentally disabled person¹ and one count of indecent assault of person with mental disability². A preliminary hearing was held on May 20, 2022. The Information was filed on June 10, 2022. On July 13, 2022, the Defendant timely filed his Omnibus Pretrial Motion, raising the following issues:

1. Motion for Habeas Corpus;
2. Motion to Compel Psychiatric Evaluation of Complaining Witness;
3. Motion to Compel Discovery; and
4. Motion to Reserve Right

¹ 18 Pa.C.S. §3121(a)(5)
² 18 Pa.C.S. §3126(a)(6)

An argument was held September 6, 2022, at which time Kirsten Gardner, Esquire, appeared on behalf of the Commonwealth and Defendant appeared and was represented by Eric Birth, Esquire.

II. Discussion

The Court will discuss each of the above Motions separately.

1. Motion for Habeas Corpus

The Defendant's Motion alleges that at the Defendant's Preliminary Hearing, the Commonwealth failed to meet its burden to establish a prima facie case and the Defendant requests that the Court dismiss the charges against him and release him from the Lycoming County Prison.

At the Preliminary Hearing, the Commonwealth introduced the testimony of Tierney Frame, who is the social services caseworker for the alleged victim. She testified that the alleged victim currently receives job support services and support coordination services. (Transcript of Preliminary Hearing, 5/20/22, pg. 14). In the past the alleged victim also received companion services, where a staff member would take her into the community to do community activities; however, those services were discontinued not because she was not in need or no longer eligible but because of the pandemic. (Id.). Ms. Frame testified that the alleged victim has an I.Q. level of 42, which puts her in the mild intellectually disabled range. (Id. at 15). She further testified that the alleged victim requires some assistance with interacting socially, including appropriate relationships, and with exercising reasonable judgment. (Id. at 15, 19).

At the hearing on Defendant's Omnibus Pre-Trial Motion, the Commonwealth called

Thelma Detweiler, the mother of the alleged victim. Ms. Detweiler testified that the alleged victim was put in a special education classroom within a week of starting kindergarten and remained in special education until she graduated. Ms. Detweiler opined that her daughter has a 3rd or 5th grade education level. The alleged victim is 43 years old and, with the exception of approximately 1 week, has resided with her parents her whole life. Ms. Detweiler testified that her daughter does not understand the value of money, does not purchase anything on her own, cannot make change, etc. and therefore she controls her daughter's finances. She must attend her daughter's medical appointments with her.

The alleged victim has a job cleaning at Arby's. She previously worked for 14 years at McDonalds, also cleaning. She has been successful in her employment with the assistance of a job coach. She rides the STEP bus to work and the city bus home from work. Her parents purchase a bus pass for her and the only time she rides the bus alone is when she is returning home from work, which does require her to make one transfer/connection. The alleged victim does not own her own cell phone, although her mother testified that she knows how to make phone calls. Ms. Detweiler testified that her daughter has expressed wanting to date from time to time but has never had any romantic relationships. Ms. Detweiler testified that her daughter has been diagnosed with 22q11.2 deletion syndrome, medication induced Parkinson's Disease, and intellectual disabilities.

“To demonstrate that a prima facia case exists, the Commonwealth must produce evidence of every material element of the charged offenses as well as the defendant's complicity therein.” Commonwealth v. Dantzler, 135 A.3d 1109, 1112 (Pa. Super. 2016). In each of the offenses under which the Defendant was charged, a “mental disability which

renders the complainant incapable of consent” is a key element. Defendant’s Omnibus Pre-Trial Motion alleges that by using a non-expert witness to testify to a psychiatric medical diagnosis, the Commonwealth established a material element of the crimes charged using inadmissible hearsay and that the Commonwealth failed to meet its burden to show a prima facie case.

The Court notes that Ms. Frame did not testify to a psychiatric medical diagnosis. She merely testified to the alleged victim’s I.Q. level, her social limitations, and the services the alleged victim receives. The alleged victim herself testified at the preliminary hearing about the Defendant’s actions. At the time of the hearing on the Motion for Habeas Corpus, the Commonwealth called the alleged victim’s mother to supplement the record with regard to the alleged victim’s mental disability, including her medical diagnoses and the assistance she requires with regard to activities of daily living. Pursuant to Pa.R.Crim.P. 542(E), “[h]earsay as provided by law shall be considered by the issuing authority in determining whether a prima facie case has been established. Hearsay evidence shall be sufficient to establish any element of an offense . . . “

This Court finds that among the alleged victim, her caseworker, and her mother, the Commonwealth elicited sufficient information to satisfy the elements of the crimes for which the Defendant has been charged. The Court further finds that expert testimony is neither necessary nor required to establish a prima facie case. Accordingly, the Defendant’s Motion for Habeas Corpus is **DENIED**.

2. Motion to Compel Psychiatric Evaluation of Complaining Witness

In his Omnibus Pre-Trial Motion, the Defendant requests that the Court order the

alleged victim to undergo a psychiatric evaluation to determine her capability to consent to sexual activities. Defendant argues that, although she has been characterized as mentally disabled, she is employed and capable of riding a bus from work without supervision. In his Motion, Defendant cites Com v. Alston, 864 A.2d 539 (Pa. Super. 2004), which held that a psychiatric examination should not be ordered unless the record demonstrates the existence of a compelling reason for the examination. Defendant indicates that the “compelling need” is that the alleged victim’s ability to consent is an element of the charges against him, and part of his defense is that he had the consent of the victim.

The Court notes that the Defendant does not appear to be seeking an evaluation to determine the *competency* of the alleged victim to testify, but rather her *capacity to consent* to sexual activities, and therefore the Defendant’s cited case is not directly on point. However, neither Pennsylvania’s criminal statutes nor the caselaw clearly define how to measure whether a person with a mental disability is capable of consenting to sexual activity. The ability to consent is dependent on whether an individual understands the nature of sexual contact and the ability to exercise the right to refuse sexual activity, and whether the individual understands the possible risks and consequences of sexual activity. As Defendant’s counsel indicated, consent is a key element of the crimes for which the Defendant has been charged, and Defendant intends to use the alleged victim’s consent as a defense. In order to properly present such a defense, the Defendant must present testimony establishing that the victim had the capacity to consent to the sexual activity. The Court finds that the Defendant is entitled to have the alleged victim examined by a qualified professional for the limited purpose of opining whether she possesses the capacity to consent

to sexual activity. Accordingly, the Motion to Compel Psychiatric Evaluation of Complaining Witness is **GRANTED**. The Commonwealth and the alleged victim shall cooperate with efforts by Defendant's counsel to arrange and participate in an evaluation of the alleged victim's capability to consent to sexual activity.

3. Motion to Compel Discovery

a. Discovery Related to Co-Defendant(s) and Witnesses

The Defendant requests all material required to be disclosed in accordance with Brady v. Maryland, 373 U.S. 83 (1963) and Pennsylvania Rule of Criminal Procedure 573(B)(1)(a) which has not been disclosed to date. Defendant specifically requests all written correspondence, email, any and all electronic communication, written summaries of all verbal communications between the District Attorney's Office and/or law enforcement and any witness or counsel for the same. The Defendant requests a copy of recorded interviews conducted by the District Attorney's Office and law enforcement and any co-defendants and/or witnesses and to include any report, written documentation containing information relayed or discussed during the interview, and all communication including electronic, written, and recorded communications related to said interview. Additionally, the Defendant's Motion requests that the Commonwealth disclose prior record information for all witnesses that the Commonwealth intends to offer at trial. Finally, the Defendant requests that all documents, information, and communications retrievable from social media relating to this matter be disclosed to the extent the Commonwealth has not done so to date.

In order to allow the Defendant to adequately prepare his defense, the Motion to Compel Discovery Related to Co-Defendant(s) and Witnesses is **GRANTED**. To the extent

it has not already done so, the Commonwealth shall provide to Defendant's counsel any information requested under this section that in its possession that is required under Brady.

b. Undisclosed Discovery³

Defendant's Motion indicates that the Commonwealth has not disclosed the following information in violation of the Pennsylvania Rules of Criminal Procedure:

- a. a phone extraction of Babb's cell phone
- b. video surveillance from River Valley Transit
- c. Lab Reports – SANE examination and Babb DNA sample
- d. Chain of Custody Documents related to SANE examination
- e. Quality Assurance and Quality Control Documents
- f. Any other surveillance videos and/or pictures
- g. the name of any expert, including but not limited to, a DNA expert that the Commonwealth intends to call at trial
- h. the expert's scientific, technical, or other specialized knowledge if beyond that possessed by the average layperson
- i. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue
- j. any expert reports that the above-mentioned expert prepares in support of the requests asserted in sub-paragraph d, e, and f above
- k. rap sheets for any witnesses that the Commonwealth intends to call at trial

³ The heading on this section of Defendant's Omnibus Pretrial Motion is listed as "Discovery Related to Co-Defendant(s) and Witnesses" however, based on the material being requested the Court believes it was erroneously labeled as such.

At the time of the argument on Defendant's Omnibus Pretrial Motion, the Commonwealth indicated that they have provided everything currently in their possession to the Defense. The Defendant's Motion is **GRANTED** to the extent that the Commonwealth shall disclose and provide to Defendant's counsel any additional materials that come into their possession. The Commonwealth shall provide these materials to Defendant's counsel within a reasonable amount of time in advance of the trial so that Defendant may adequately prepare his defense and be afforded the right to confrontation at trial.

4. Motion to Reserve Right

Defendant moves to reserve the right to make any additional pre-trial motions pursuant to Pennsylvania Rule of Criminal Procedure 579. This motion is **GRANTED**, but only to the extent that any motion is based on information or discovery provided by the Commonwealth after September 6, 2022, the date of the argument on Defendant's Omnibus Pre-Trial Motion.

Accordingly, the Court will enter the following Order.

ORDER

AND NOW, this 14th day of **September, 2022**, upon consideration of Defendant's Omnibus Pre-Trial Motions, the argument of counsel on September 6, 2022, and for the reasons set forth above, the Court hereby enters the following Order:

1. The following Motions are **GRANTED**: Motion to Compel Psychiatric Evaluation of Complaining Witness, Motion to Compel Discovery, and Motion to Reserve Right.
2. The following Motions are **DENIED**: Motion for Habeas Corpus.

By the Court,

Ryan M. Tira, Judge

RMT/jel

CC: DA – Kirsten Gardner, Esq.
PD – Eric Birth, Esq.
Gary Weber, Esq.
Jennifer E. Linn, Esquire