IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	
	:	**CR-829-2020**
	:	
vs.	**:**	
	:	**CRIMINAL DIVISION**
WAYNE F. BENSON, JR.,	**:**	
Defendant	**:**	**Appeal**

Date: June 2, 2022

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

Wayne F. Benson, Jr. (hereinafter referred to as "Appellant") files this appeal following a trial where a jury found him guilty of the following charges:

Count 1: Photograph/Film/Depict on Computer/Filming Sexual Acts, a felony 2;

Count 2: Sexual Abuse of Children – Child Pornography, a felony 3;

Count 3: Criminal Use of a Communication Facility, a felony 3;

Count 4: Obscene and Other Sexual Materials and Performances, a misdemeanor 1;

Count 5: Invasion of Privacy, a misdemeanor 3.

On October 11, 2021, Appellant was sentenced to an aggregate state sentence of 16-32 months followed by 3 years of probation. On October 20, 2021, Jeana Longo, Esquire, filed a Post Sentence Motion to Modify Sentence on behalf of Defendant, wherein it was argued that the Court sentenced the Defendant "in the aggravated range for Counts 1-3 even though they were sentenced concurrently as the court found that the incident was one event and that

the sentencing guidelines provided the standard range for the conduct associated with each charge." The Defendant further asserted that "the court wrongfully aggravated his sentence based on the Commonwealth's assertion that he went to trial and did not take their plea offer." Based on these assertions, the Defendant requested that he be resentenced.

Simultaneously with the filing of the Post Sentence Motion, Attorney Longo filed a Petition to Withdraw as Counsel, indicating that the Defendant did not retain her to file an appeal on his behalf. Both the Post Sentence Motion and the Petition to Withdraw were scheduled to be heard on December 1, 2021. The Matter was continued until January 3, 2022, due to the unavailability SCI Video at the time of the hearing. On December 7, 2021, Edward J. Rymsza, Esquire, entered his appearance on behalf of the Defendant. The hearing did not take place on January 3, 2022, due to the Defendant being transferred from SCI Smithfield to SCI Laurel Highlands, and the matter was rescheduled for January 24, 2022. The matter again had to be rescheduled do to the Defendant being quarantined and was rescheduled to March 7, 2022.

The Court notes that by the time the hearing on the Post Sentence Motion was finally able to be held after a series of delays attributable to neither the Commonwealth nor the Court directly, more than 120 days had elapsed since the filing of the Motion, and therefore the Motion would be deemed denied by operation of law pursuant to Pa.R.Crim.P. 720(B)(3). Appellant's counsel filed a Notice of Appeal on March 17, 2022, and timely filed his Concise Statement of Matters Complained of on Appeal on April 11, 2022, wherein he raises the following:

1. Mr. Benson's convictions for the two counts of Sexual Abuse of Children (Counts I and II) must be overturned because the evidence is insufficient as a

matter of law to demonstrate beyond a reasonable doubt that the child was engaged in any conduct constituting a prohibited sexual act or simulation as defined by the statute where the evidence revealed only that the child was briefly using the toilet and there was no evidence that her genitals were ever visible, particularly when the photographs were taken only after she was seated, and no actual images of that incident were introduced into evidence.

2. Mr. Benson's conviction for Criminal Use of a Communication Facility must be overturned because the evidence is insufficient as a matter of law to establish that Mr. Benson used a communication facility in the commission of a felony, since the evidence in those felony counts, as set forth above, were insufficient as a matter of law to support those convictions.

3. Mr. Benson's conviction for Obscene and Other Sexual Materials and Performances must be overturned as insufficient as a matter of law to demonstrate beyond a reasonable doubt that the alleged photographs constituted obscene material as defined by the statute where the evidence revealed only that the child was briefly using the toilet and there was no evidence that her genitals were ever visible, particularly when the photographs were taken only after she was seated, and no actual images of that incident were introduced into evidence.

4. Mr. Benson was denied his due process rights to a fair trial under both the Pennsylvania and United States Constitutions where the Commonwealth improperly commented, both on cross-examination and in its closing argument, on Mr. Benson's right to remain silent after Miranda warnings were provided.

The first three issues the Appellant raises are challenges to the sufficiency of the evidence. When reviewing a challenge to the sufficiency of the evidence, the appellate court must review the evidence in the light most favorable to the verdict winner to determine whether there is sufficient evidence to allow the jury to find every element of a crime beyond a reasonable doubt. *Com. v. Tejada*, 107 A.3d 788, 792 (Pa. Super. 2015).

> In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder

> unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder 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.
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> Id. at 792, 793

The Appellant was found guilty of Count 1, pursuant to 18 Pa.C.S.A. §6312(b)(2), which states that any person who knowingly photographs, videotapes depicts on a computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act commits the offense of sexual abuse of children. He was also found guilty of Count 2 pursuant to 18 Pa.C.S.A. §6132(d), child pornography, which states that any person who intentionally views any . . . photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits sexual abuse of children. The Appellant argues that these convictions must be overturned because the evidence revealed that the child was using the toilet and there was no evidence that her genitals were ever visible as the photographs were only taken after she was seated and no actual images were introduced into evidence.

"A trier of fact need not find the material appeals to the prurient interest of the average person; it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Com. v.*

Savich, 716 A.2d 1251, 1255 (Pa. Super. 1998) *citing New York v. Ferber*, 458 U.S. 747, 764 (1982). The photographing of a nude child for the purpose of one's own sexual gratification or stimulation is a prohibited act under 18 Pa.C.S.A. §6312(a) ("prohibited sexual act" means "nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of *any* person who might view such depiction.").

The victim testified that her bathroom has a linen closet across from the toilet. (Transcript of Proceedings, 6/23/21, pg. 28). On the floor of the linen closet was dirty clothes. (Id. at 30). On the night of the incident, the door to the linen closet was open. (Id. at 28). The victim entered the bathroom to use the toilet, and pulled down her pants and her underwear. (Id. at 30). She testified that her shirt covered most of her body, but some of her vagina was showing. (Id. at 31). As she was using the bathroom, the victim noticed flashing coming from the closet and found the Appellant's phone hidden in the laundry pile. (Id.). The victim saw approximately nine (9) photos of herself going to the bathroom, and deleted the photos. (Id. at 32). After the victim exited the bathroom, she saw Appellant enter the bathroom; when he left the bathroom she returned and retrieved the phone from the laundry pile and deleted seven (7) of the photos from the "recently deleted" folder because she was upset and scared of him looking at her "like that." (Id. at 33-35).

Additionally, Pennsylvania State Police Corporal Tyler Morse conducted a lengthy interview with the Appellant regarding the incident and testified to the following:

Q: Following the search of his residence on June 25th, did you come to find yourself in contact with Mr. Benson?
A: I did. On July 2, 2020, I came in contact with Mr. Benson and transported him to PSP Montoursville.
Q: And during that transport did you have the opportunity to conduct an interview with Mr. Benson?

A: I did. I read Mr. Benson his Miranda Warnings. He acknowledged them, he agreed to answer questions. I then interviewed him about this case.

Q: And he agreed to speak to you?

A: He did.

Q: Knowing that he had the right to remain silent?

A: He did.

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Q: When you spoke with Mr. Benson did you relay the reason why you were speaking with him?

A: I did. I asked him about this incident in particular.

Q: And what did Mr. Benson provide to you that day?

A: He provided several stories. He acknowledged that this was a one time only thing where he attempted to photograph his step-daughter while she was in the bathroom. He admitted to setting up the cellular telephone. He admitted, first, that he just dropped the cellular phone and then he repositioned it later on top of a pile of clothing in the bathroom. He later went outside of the bathroom. He caught a glimpse on his phone – or he caught a glimpse on his watch which he then began to view the victim in the bathroom. He later admitted that this was the only time he ever tried to photograph the victim when she did not have clothing on.

(Id. at 80-81).

From the victim's testimony that some of her vagina was showing as she undressed to use the bathroom, coupled with the Appellant's own admission to (1) setting up the cell phone and (2) that it was the only time he attempted to photograph the victim when he did not have clothing on, it can be inferred that the Appellant photographed the victim for the purpose of his own sexual gratification or stimulation. When viewed in the light most favorable to the Commonwealth as verdict winner, the evidence presented at trial was sufficient for the jury to find every element of the crime charged in Counts 1 and 2 beyond a reasonable doubt.

The second issue Appellant raises in his Concise Statement directly correlates to the first allegation of error. The Appellant does not appear to dispute that his use of an iPhone or Apple Watch to photograph his stepdaughter meets the definition of a "communication

facility" pursuant to 18 Pa.C.S.A. §7512. Rather, Appellant contends that the evidence was insufficient for a jury to convict him of the offenses of sexual abuse of children and therefore his iPhone and Apple Watch were not used to commit a crime which constitutes a felony under Title 18 of the Crimes Code. While this Court agrees that in order to uphold his conviction for criminal use of a communication facility (Count 3), the convictions for Sexual Abuse of Children (Counts 1 and 2) must be upheld, for the reasons set forth above, the Court finds that sufficient evidence was presented to enable the jury to find every element of the crimes of sexual abuse of children beyond a reasonable doubt, and therefore the conviction for criminal use of a communication facility should also be upheld.

The Appellant also argues his conviction under Count 4, Obscene and Other Sexual Materials, pursuant to 18 Pa.C.S.A. §5903(a)(3)(ii), and Count 5, Invasion of Privacy, pursuant to 18 Pa.C.S.A. §7507.1, because the evidence revealed that the child was using the toilet and there was no evidence that her genitals were ever visible as the photographs were only taken after she was seated and no actual images were introduced into evidence. As defined in the statute, "obscene" includes any material that "(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." 18 Pa.C.S. 5903(b). "Sexual conduct" as defined by the statute is "[p]atently 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."

While there are no allegations that the photographs of the victim depicted her in ultimate sexual acts or other representations defined by the statute, the victim testified that her vagina was visible when she was photographed as she sat down to use the toilet. This fact distinguishes the present case from that of *Com. v. Lebo*, wherein the Appellant's conviction for obscene and other sexual materials was reversed because the nude models were "not posed in overtly sexual or lewd poses, their legs [were] together, and their genitals [were] not visible." 795 A.2d 987 (Pa. Super. 2002). The photos taken of the minor victim in a private moment where her vagina would necessarily be exposed met the definition of obscenity as contained in the statute and said photos lacked any serious literary, artistic, political, educational, or scientific value. The photos were taken without the victim's knowledge and consent, in a place where she would have an expectation of privacy and without the intention that her intimate parts would be visible by normal public observation. Accordingly, the conviction under Counts 4 and 5 should be affirmed.

Appellant's final issue raised in his Concise Statement alleges that he was denied his due process right to a fair trial when the Commonwealth improperly commented, both on cross-examination and during closing arguments, on his right to remain silent after *Miranda* warnings were given. This Court notes that counsel for the Defendant did not object to the Commonwealth's allegedly improper references to *Miranda* at the time of trial or in the post-sentence motion. Pursuant to Pa.R.A.P. 302, "issues not raised in the trial court are waived and cannot be raised for the first time on appeal." Notwithstanding this, should the

appellate Court determine the issue has not been waived, the allegation of error is without merit.

Defendants are afforded protections under both the state and federal Constitutions when they exercise the right against self-incrimination. Prosecutors may not comment on a non-testifying defendant's silence or utilize it as substantive evidence of guilt. *Com. v. Molina*, 104 A.3d 430 (Pa. 2014). In the instant case, however, the Appellant was apprised of his right to remain silent pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and voluntarily chose to answer Corporal Morse's questions while being transported back to Lycoming County after he was medically cleared to be released from his psychiatric commitment. Furthermore, Appellant took the stand and testified in his own defense at his trial. Under both state and federal precedent, the analysis changes dramatically once a defendant decides to testify because he has waived his right against self-incrimination: "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Com. v. Molina*, 104 A.3d at 447, *citing Raffel v. U.S.,* 271 U.S. 494, 497, 46 S.Ct. 566, 70 L.Ed. 1054 (1926). This Court has reviewed the trial transcript and finds no error in the prosecution's references to the Appellant's understanding of his rights pursuant to *Miranda v. Arizona*,

and his decision to waive those rights and speak to Corporal Morse.

For all of the foregoing reasons, this Court respectfully requests that the convictions following a jury trial be affirmed and the Appellant's appeal be denied.

By the Court,

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Ryan M. Tira, Judge

RMT/jel
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