

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-806-2022
:
vs. :
:
: **Opinion and Order regarding**
TROY BAILEY, : **Defendant's Request for Habeas**
Defendant : **Corpus Contained in His Omnibus**
: **Pretrial Motion**

OPINION AND ORDER

By way of background, Troy Bailey (“Defendant”) is charged with one count of disseminating explicit sexual material to a minor, two counts of indecent assault of a person less than 13 years of age, four counts of unlawful contact with a minor, one count of corruption of a minor (course of conduct), four counts of indecent exposure, and one count of endangering the welfare of a child (course of conduct).¹ On August 16, 2022, Defendant filed an omnibus pretrial motion in which he sought discovery and habeas corpus relief. The defense discovery request was moot because defense counsel obtained a copy of the Department of Human Services’ (DHS) Bureau of Hearings and Appeals (BHA) proceeding through other means. The Commonwealth has also sought the transcript, but has been unsuccessful thus far. The court held a hearing and argument on November 18, 2022. The parties agreed to rely on the transcript of the preliminary hearing at which Child and Child’s mother (“Mother”) testified.

Mother testified that she was in a relationship with Defendant from 2015 to 2019. Mother broke up with Defendant due to his lying and cheating. Defendant is not the father of Mother’s three children but he has two sons in their twenties and a daughter who is twelve.

During Mother and Defendant’s relationship, Defendant resided with Mother and her

children. Defendant would come home from work before Mother, so he would feed her children, make sure they did their homework, make sure they took showers and things of that nature. He was often at the home alone with the children.

In May of 2020, Child disclosed to Mother that Defendant had been having inappropriate contact with Child. In June 2020, when Mother was no longer residing in the residence that she previously shared with Defendant, Mother informed Child's father and the police. According to Mother, the police did nothing in 2020. She finally "got through" to the police on August 4, 2021, and Child was interviewed at the Children's Advocacy Center (CAC) on August 25, 2021.

Child testified that Defendant resided with them for about four years. She did not enjoy living with Defendant because he was very rude. He yelled a lot, and he threatened Child and her older sister. Child testified that Defendant had her touch his private parts (penis) about three times, but she only remembered details about the last time. Child testified Defendant would take her into his room, he would lay down on the bed, and he would tell her to touch his private part. Defendant would also have his computer on and go on a site showing a male having sex every time. Although Defendant remained clothed, she saw his private part but she was not comfortable answering a question about what it looked like. Defendant told her to move her hand up and down. Defendant's private part would shoot sperm out when she touched it. It happened all three times. During her CAC interview, she said it shot out "white stuff." Since that interview, she learned that the "white stuff" was called sperm. She knew at the time of the CAC interview that Defendant's private part was a penis but she was not comfortable then describing it as a penis

¹ 18 Pa. C.S.A. §§5903(c)(1), 3126(a)(7), 6318(a)(1), 6301(a)(1)(ii), 3127(a), and 4304.

Child testified that she was born in 2009. She testified Defendant was older than 18 years old and he was a lot older than her. Based on Child's date of birth, these incidents would have occurred when Child was between 6 and 10 or 11 years old. Child testified that the last time it was warm or hot outside. It was also toward the end of Mother's and Defendant's relationship.

The Information states that the charges occurred between January 1, 2019 and December 31, 2019.

Defense counsel argued that since Child only remembered the details of one incident, Defendant should only be charged with one count of each offense. The Commonwealth agreed that there should not be more than three counts of any offense but disagreed that it could pursue only one count for each offense. Further, the Commonwealth indicated that it provided the defense with as much specificity as it could.

DISCUSSION

At the preliminary hearing stage, the Commonwealth need not prove a defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused likely committed the offense. *Id.* Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001). To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and may also submit additional proof. *Commonwealth v. Dantzler*,

135 A.3d 1109, 1112 (Pa. Super. 2016). “The Commonwealth may sustain its burden of proving every element of the crime...by means of wholly circumstantial evidence.” *Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa. Super. 2001); *see also Commonwealth v. Jones*, 874 A.2d 108, 120 (Pa. Super. 2016). The weight and credibility of the evidence may not be determined and are not at issue in a pretrial habeas proceeding. *Commonwealth v. Wojdak*, 466 A.2d 991, 997 (Pa. 1983); *see also Commonwealth v. Kohlie*, 811 A.2d 1010, 1014 (Pa. Super. 2002). Moreover, “inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.” *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003).

Defendant’s sole assertion is that the evidence was not sufficiently specific with regard more than one incident; therefore, the additional counts must be dismissed. The court cannot agree.

Rule 560 provides that “if the precise date is not known or if the offense is a continuing one, an allegation that it was committed on or about any date within the period fixed by the statute of limitations shall be sufficient.” Pa. R. Crim. P. 560(B)(3).² Furthermore, “the Commonwealth must be afforded broad latitude when attempting to fix the date of the offenses which involve a continuous course of conduct.” *Commonwealth v. Brooks*, 7 A.3d 852, 858 (Pa. Super. 2010)(citations omitted). “This is especially true when the case involves sexual offenses against a child victim.” *Id.* As the Superior Court noted in *Commonwealth v. Niemetz*, 422 A.2d 1369, 1373 (Pa. Super. 1980), it would be unfair to permit an individual to sexually abuse a minor with impunity simply because the minor failed

to record the details in a daily journal.

Child testified that there were about three incidents. Although Defendant resided with Child for four years, the Commonwealth narrowed the date range for the offenses from January 1, 2019 to December 31, 2019. The court finds that Child's lack of detail regarding more than one incident goes to the weight and credibility of her testimony, which are trial issues.

Since the child did not testify to a fourth incident and the Commonwealth conceded that there should be at most three counts of the same charge, the court will dismiss Count 6 (a fourth count of unlawful contact with a minor) and Count 11 (a fourth count of indecent exposure). In all other respects, the court will deny Defendant's request for habeas corpus relief.

ORDER

AND NOW, this 25th day of April 2023, the court GRANTS Defendant's motion with respect to Count 6 (the fourth count of unlawful contact with a minor) and Count 11 (the fourth count of indecent exposure). In all other respects, the court DENIES Defendant's motion for writ of habeas corpus contained in his omnibus pretrial motion.

By The Court,

Nancy L. Butts, President Judge

² With respect to the statute of limitations for these offenses, see 42 Pa.C.S.A §§5552(c)(3), 5554(3).