IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	**CR-677-2022**
	:	**120 MDA 2024**
CHRISTOPHER FRAUNFELTER,	:	
Appellant	:	

Date: April 8, 2024

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

Christopher Fraunfelter ("Defendant") was charged with twenty (20) counts of Sexual Abuse of Children – Dissemination of Photos/Videos of Child Sex Acts pursuant to 18 Pa.C.S. 6312(c) and twenty (20) counts Sexual Abuse of Children – Possession of Child Pornography pursuant to 18 Pa.C.S. §6312(d). Following a jury trial held on May 5, 2023, Appellant was found guilty of all 40 counts. On September 5, 2023, Appellant was sentenced on Count 1 to a term of five (5) to ten (10) years in a state correctional institution and on Count 2 to a term of five (5) to ten (10) years in a state correctional institution, to run consecutive to the sentence in Count 1. On Counts 3-20, Defendant was sentenced to a term of five (5) to ten (10) years in a state correctional institution, to run concurrent to each other and concurrent to the sentences imposed on Counts 1 and 2. On Counts 21 and 22, Defendant was sentenced to a term of five (5) to ten (10) years in a state correctional institution, to run consecutive to each other and consecutive to the sentences imposed on Counts 1 and 2. On Counts 23-40, the Defendant was sentenced to a term of five (5) to ten (10) years on each count, to run concurrent to each other and concurrent to the sentences imposed under all other counts in the case. The aggregate sentence imposed was for a period of twenty (20) to forty (40) years in a state correctional institution. The Defendant is required to register as a

Tier II sexual offender under SORNA. The Defendant was deemed not to be a sexually violent predator.

At the time of his sentencing, Defendant's trial counsel, Kyle Rude, Esquire, informed the Defendant and the Lycoming County Public Defender's Office that he would not be representing the Defendant for his appeals. A timely Post Sentence Motion was filed on September 14, 2023, by Nicole Spring, Esquire, of the Public Defender's Office. Argument was scheduled for November 20, 2023. A continuance request submitted by Defendant's counsel due to the unavailability of the prison Polycom was granted on October 25, 2023, and the argument was not able to be rescheduled until January 16, 2024. Unfortunately, the date of the rescheduled argument was 124 days after the filing of the Post Sentence Motion and, as no motion was made by the Defendant for a 30 day extension for decision by the Court, the motion was deemed denied by operation of law pursuant to Pa.R.Crim.P. 720. An Order to this effect was entered on January 16, 2024.

On January 22, 2024, Appellant filed a Notice of Appeal. On January 25, 2024, Appellant filed a Concise Statement of Matters Complained of on Appeal as directed by this Court's Order pursuant to Pa.R.A.P. 1925(b). Appellant raises the following issues on appeal:

1. Defendant avers that the lower Court erred by permitting Trooper Ballentyne to testify at trial concerning general signs of deception by defendants during police interviews.

   The Defendant avers that Trooper Ballentyne was not qualified as an expert about signs of deception, and his testimony prejudiced the Defendant even though the Court sustained counsel's objection to testimony about the Defendant's actions during the

portions of his statement that were played for the jury. The Commonwealth argued those characteristics during her closing. Additionally, the testimony usurped the function of the jury to determine credibility. See Trial transcript 5/4/23 pp. 89-90.

2. The Defendant avers that the evidence presented at trial was insufficient to establish distribution of child pornography for counts 3, 5, 6, 8, 10, 11, and 13.

   The testimony of Trooper Ballentyne established that images and videos under those counts were sent by one Fraunfelter account to another Fraunfelter account and not to other individuals. Although it is for the jury to determine if the Defendant intended to distribute to others, the verdict was pure speculation since no evidence presented showed that the Defendant intended to distribute to others. The images/videos sent to the Defendant's accounts were received on December 5, 2021 and forwarded to the other account near the same time. Other images sent to outside groups were forwarded closely in time to their receipt. See Tr. pp. 102-113.

3. The Defendant avers the evidence was insufficient to establish prepubescence. The jury found in the affirmative to the questions on the verdict slip on Counts 9, 10, 11, 15 and 16. The Trooper was unable to determine the age range of the children depicted in those counts; therefore, the jury's finding that they were prepubescent was pure speculation.

4. The Defendant avers the evidence was insufficient to establish that the images/videos depicted indecent contact for counts 4, 6, 7, 8, 9, 11, 12, 13, 14, 16. The jury also answered the indecent contact in the affirmative for those counts when no evidence was presented that indecent contact occurred. For a few of those counts; if the trooper

was unsure or said no indecent contact was seen; then the jury's verdict was speculative.

5. The Defendant avers that the trial court abused its discretion when imposing consecutive sentences of 5 to 10 years for Counts 1 and 2 and 21 and 22. The Defendant avers counts 21 and 22 are the same images/videos as counts 1 and 2, and therefore, should have run concurrently.
6. The Defendant avers that the aggregate 20 to 40 year sentence was manifestly excessive based on the facts of the offenses, including that the Defendant did not have any contact with any of the depicted children, and based on his history and characteristics including his prior controlled substance use. In addition, the duplicative nature of counts 1 to 20 and 21 to 40.
7. Finally, the Defendant avers that his prior record score should have been calculated as 5 rather than RFEL.

The Court will address each issue raised individually.

TRIAL ERRORS

The first issue Defendant raises in his Concise Statement alleges that this Court erred in permitting Pennsylvania State Police Trooper James Ballentyne to testify about general signs of deception by defendants during police interviews. The Defendant argues that the testimony usurped the function of the jury to determine credibility. The Defendant avers that Trooper Ballentyne was not qualified as an expert about signs of deception, and his testimony prejudiced the Defendant even though this Court sustained defense counsel's objection to testimony about the Defendant's actions during the portions of his statement that

were played for the jury. The Defendant further avers that the Commonwealth argued those characteristics during her closing.

This Court sustained defense counsel's objection to the Commonwealth's questions of Trooper Ballantyne regarding his opinion of the Defendant's body language during his police interview. (Transcript of Proceedings, 5/4/23, pg. 88). However, the Court did permit Trooper Ballentyne to answer the Commonwealth's question regarding general signs of deception, even though he was neither offered nor qualified as an expert in the field, noting that he has 15 years of experience in law enforcement and had undergone training in the subject. Trooper Ballentyne testified that "[s]omeone not fully answering questions. Someone trying to dodge or redirect questions. An individual who is struggling to keep or maintain eye contact. An individual who would fidget or try to exert energy elsewhere versus the conversation." Id. at 89-90.

In her closing argument, the attorney for the Commonwealth, on two occasions, made reference to the Defendant's behavior in his police interview. The first time, she stated:

> **Mrs. Beucler**: So with that in mind we'll get to what he says in - in his interview later, but let's just talk about what you saw, okay? When Christopher Fraunfelter is asked why he got a new phone just a couple weeks ago, he immediately starts shifting. He can't sit still. He immediately is uncomfortable with the question. Why is he uncomfortable? Because he's caught. (T.P. 5/5/23, pg. 13).

The second time contained similar references to the Defendant's behaviors:

> What did he do? He lied. And why did he lie? Because he's caught. Why is he shifting? Why can't he sit still? Why is he tapping his pen? Why does he avoid eye contact? Why can't he answer a question? Because he's caught. (T.P. 5/5/23, pg. 16).

The Court submits that allowing Trooper Ballentyne to testify regarding the general characteristic of deception that he has been trained in and has observed over 15 years as a police

officer was not an error of law and did not usurp the function of the jury to determine the credibility of the Defendant because the Court specifically precluded him from giving his opinion with regard to how his training applied to what he observed in the Defendant's interview.

Additionally, this Court finds Defendant's argument that the Commonwealth pointed out the characteristics of deception as they applied to the Defendant during her closing arguments to be without merit. It is well established that a prosecutor must have reasonable latitude in presenting a case to the jury, and must be free to present arguments with "logical force and vigor." *Commonwealth v. Chamberlain*, 30 A.3d 381, 407 (Pa. 2011). Counsel may comment upon "fair deductions and legitimate inferences from the evidence presented during the testimony." *Id*. This Court does not find that the arguments made by counsel for the Commonwealth in her closing would have prejudiced the jury to such an extent that they could not weigh the evidence objectively and render a true verdict. *Id*. *quoting Commonwealth v. D'Amato*, 526 A.2d 300, 309 (Pa. 1987).

SUFFICIENCY OF THE EVIDENCE

Regarding issue #2 raised in his Concise Statement, the Defendant argues that the evidence was insufficient to establish distribution of child pornography for counts 3, 5, 6, 8, 10, 11, and 13 because those images were sent by one of the Defendant's accounts to another of the Defendant's accounts and not to another person. At the time of trial, the Defendant's counsel moved for judgment of acquittal on these counts for the same reason.

"Any person who knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide,

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 an offense" of sexual abuse of children pursuant to 18 Pa.C.S. §6312(c). Despite Trooper Ballentyne testifying that it was his belief that it was "distribution to send something to yourself" and "the crime defined as distribution is in the transmission. . . of any kind,"[1] 'transfer' within the context of 18 Pa.C.S. §6312(c) means a change of possession from one person to another. *Commonwealth v. McCue*, 487 A.2d 880, 883 (Pa. Super. 1985). "The legislature did not intend to include purely personal use within its perview [sic], but it did intend to include all other interpersonal use." *Id*. "Thus, noncommercial trading or exchange of the material would also fall within the coverage of the statute." *Id*. In denying the defense's motion for judgment of acquittal at the close of the Commonwealth's testimony, this Court found that while the defense was correct in its argument regarding that the Defendant's transfer from one of his accounts to another was insufficient, the Commonwealth was also correct in its argument that the Defendant could be convicted of the offense if the jury believed he possessed the material *for the purpose of* distributing it. (emphasis added). To cure the erroneous legal conclusion in Trooper Ballentyne's testimony, an additional instruction was given to the jury which indicated "the defendant cannot be guilty of dissemination solely based upon transfer of illegal material to himself. However, you may consider that testimony in determining if you believe he possessed the illegal material for the purpose of disseminating it to another person." (Transcript of Proceedings, 5/5/23, pg. 42).

Although the Defendant alleges that the evidence presented at trial was insufficient to establish distribution of child pornography for counts 3, 5, 6, 8, 10, 11, and 13 because the

[1] Transcript of Proceedings, 5/4/23, pg. 82.

only transfer/transmission that had been made at the time of Defendant's arrest was from one of the Defendant's accounts to another, the second part of the statute allows for conviction if the material was possessed for the purpose of dissemination. While the Defendant argues that the verdict was "pure speculation," the law is quite clear that the Commonwealth "may sustain its burden of proving every element of the crime beyond a reasonable doubt by relying wholly on circumstantial evidence." *Commonwealth v. Davalos*, 779 A.2d 1190, 1193 (Pa. Super. 2001). Here, members of the jury heard testimony of Trooper Ballentyne and saw the power point presentation he prepared which was marked as Commonwealth's Exhibit 6 and published to them. This presentation contained the images and videos of the Child Sexual Abuse Material (CSAM) retrieved from the Defendant's account(s) as it pertained to each dissemination and possession count, as well as a log noting the date and time the image was received and the date and time it was distributed, whether the image was distributed to another individual, a group of individuals, or to another account of the Defendant's. (T.P. 5/4/23, pg. 98-118).

"In reviewing a sufficiency of the evidence claim, [an appellate court] must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense." *Commonwealth v. Vela-Garrett*, 251 A.3d 811, 815 (Pa. Super. 2021). Based on the Trooper's testimony and the logs showing that other images received and possessed by the Defendant were subsequently disseminated to other accounts, this Court submits that there was sufficient circumstantial evidence for the jury to find that the Defendant also possessed the CSAM in counts 3, 5, 6, 8, 10, 11, and 13 for the purpose of

eventual "distribution, delivery, dissemination, transfer, display or exhibition to others" in satisfaction of 18 Pa.C.S. §6312(c).

In issue number 3 of his Concise Statement, the Defendant avers that the evidence was insufficient to establish prepubescence. Pursuant to 18 Pa.C.S. §6312(d.1)(3)(ii), the grading of the offense shall be one grade higher if the child depicted is under 10 years of age or prepubescent. The Defendant's Concise Statement alleges that the jury found in the affirmative to the questions on the verdict slip on Counts 9, 10, 11, 15 and 16 although the Trooper was unable to determine the age range of the children depicted in those counts. Therefore, the Defendant alleges the jury's finding that they were prepubescent was pure speculation.

Trooper Ballentyne was qualified as an expert in the fields of digital forensics and internet crimes against children, with additional expertise in computer systems. (Transcript of Proceedings, 5/4/23, pg. 35). When questioned by the Assistant District Attorney about the ages of the children depicted in the images, Trooper Ballentyne testified:

Q: Okay. In addition – in addition is it obvious – Trooper Ballentyne, as far as the ages of the - the children are concerned, in your – in your experience and in your opinion what are the approximate ages of these kids? And I'll clarify that question. Are they prepubescent?

A: There are images and videos that are prepubescent.

Q: And how do you know that?

A: Because there are not signs of puberty?

Q: Okay. What are you looking for with signs of puberty?

A: So in female there are no developed breast tissue, there would be no body hair present, the general facial features and overall body appears young.

Q: Okay, so size?

A: Yes.

(Id. at 85). Under the statute prohibiting possession and/or dissemination of material depicting a child under the age of 18 engaging in a prohibited sex act, the proof necessary to satisfy the element of age is not limited to expert opinion testimony. 18 Pa.C.S. §6312(e) merely allows that if competent expert testimony is presented it shall be sufficient to establish the age element of the crime. This subsection does not mandate such proof in order to sustain a conviction. Rather, the outward physical appearance of an alleged minor may be considered by the trier of fact in judging the alleged minor's age. See *Commonwealth v. Robertson-Dewar*, 829 A.2d 1207, 1212 (Pa. Super. 2003). Whether expert testimony is necessary to aid the trier of fact on this element of the crime must be determined on a case-by-case basis. In *Robertson-Dewar*, the trial judge, sitting as fact-finder, viewed all of the photographs and videos seized from Appellant's computer and determined that expert testimony was not necessary to assist him in determining the age of the persons depicted in the computer images. 829 A.2d at 1213. In fact, the trial court stated at one point in the trial "I don't know the age of the person on that image, but the person appeared to be prepubescent. I'll estimate around the age of ten." *Id*. In rejecting the notion that in every child pornography case the fact-finder is unable to view the images along with whatever other evidence is presented and make a determination as to age without the assistance of expert testimony, the court in *Robertson-Dewar* saw "no reason why the trier of fact based on everyday observations and common experiences cannot assess the age of the children

depicted with the requisite degree of certainty to satisfy the standard of proof beyond a reasonable doubt." *Id*.

We find the same applies in the present case. The enhancement question on the verdict slip asked the jurors to find whether the child depicted was under 10 years of age *or* prepubescent. Although Trooper Ballentyne may have testified that he was unable to determine the age range of the children depicted in the images, he did testify regarding the signs of puberty, or lack thereof in cases of prepubescence, that he looks for when viewing images of child pornography. The jurors, as the fact-finders in this case, applying Trooper Ballentyne's information along with their everyday observations and common experiences, were capable of making a determination that the child(ren) depicted in the images were prepubescent. The Court submits that their findings were not purely speculative as the Defendant asserts, and that, when viewed in the light most favorable to the Commonwealth as verdict winner, the evidence was sufficient to establish prepubescence for the Counts in question.

Finally, the Defendant avers that the evidence was insufficient to establish that the images depicted indecent contact for Counts 4, 6, 7, 8, 9, 11, 12, 13, 14, and 16. The Defendant argues that the jury answered the indecent contact enhancement question on the verdict slip in the affirmative for those counts when no evidence was presented that indecent contact occurred. The Defendant further argues that "for a few of those counts, if the trooper was unsure or said no indecent contact was seen, then the jury's verdict was speculative."

Indecent contact is defined as "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person." 18 Pa.C.S. 3101. Although the Defendant's Concise Statement alleges that if the trooper was unsure or

said no indecent contact was seen, the jury's verdict was speculative, it is the jury and not the trooper who is the ultimate decider of the facts. The jury viewed the images not once, but twice, prior to answering in the affirmative to the indecent contact question on the verdict slip. Furthermore, the effect of the question was only to enhance the OGS by one point and had no bearing on the ultimate conviction. As discussed below, due to the grading of the offense, depending on the ultimate calculation of the Defendant's prior record score, the enhancement questions may not have been applicable to the Court in considering the Defendant's sentence and therefore any determination that there was insufficient evidence to establish the images in question depicted indecent contact would be harmless.

SENTENCING ISSUES

In issue number 5 of his Concise Statement, the Defendant's avers that the trial court abused its discretion when imposing consecutive sentences of 5 to 10 years for Counts 1 and 2 and 21 and 22. The Defendant avers counts 21 and 22 are the same images/videos as counts 1 and 2, and therefore, should have run concurrently. The Defendant further avers in #6 of his Concise Statement that the aggregate 20 to 40 year sentence was manifestly excessive based on the facts of the offenses, including that the Defendant did not have any contact with any of the depicted children, and based on his history and characteristics including his prior controlled substance use.

At the time of sentencing, counsel for the Commonwealth agreed to some corrections to the PSI, namely that Counts 1-40 should all be felonies of the second degree and each count had a pre-enhancement OGS of nine. (Transcript of Proceedings, 9/5/23, pg. 2). There was disagreement regarding the calculation of the Defendant's prior record score, which was calculated in the presentence investigation to be a repeat felon ("RFEL"). The

Commonwealth separately calculated the Defendant's prior record score and agreed that he was an RFEL. Defendant, meanwhile, contended that his prior record score was a five.

"Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." *Commonwealth v. Hess*, 745 A.2d 29, 31 (Pa. Super. 2000). "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." *Id*.

The trial court is afforded broad discretion in sentencing criminal defendants "because of the perception that the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." *Commonwealth v. Mouzon,* 571 Pa. 419, 812 A.2d 617, 620 (Pa.2002) (quoting *Commonwealth v. Ward,* 524 Pa. 48, 568 A.2d 1242, 1243 (1990)). Furthermore, under 42 Pa.C.S.A. § 9721, the court has discretion to impose sentences consecutively or concurrently and, ordinarily, a challenge to this exercise of discretion does not raise a substantial question. *Commonwealth v. Pass,* 914 A.2d 442, 446–47 (Pa.Super.2006). The imposition of consecutive, rather than concurrent, sentences may raise a substantial question in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment. *Id.* Despite the Defendant's allegation that his sentence was manifestly excessive given the fact that he personally did not have contact with any of the victims, the Court notes that the sentence given for each count was at the bottom end of the standard range according to the sentencing guidelines. Given the nature of the crimes and the importance of recognizing the multiple

victims associated with the Defendant's crimes, it was not an abuse of discretion to run a portion of Appellant's sentences consecutively in light of the fact that the remaining counts were ordered to run concurrent to each other.

The Defendant's argument that the duplicative nature of counts 1 to 20 and 21 to 40 supports his contention that his sentence is manifestly excessive is similarly without merit. While there were only 20 pieces of material which formed the basis for the 40 charges, each image constituted a separate and distinct charge: possession and dissemination. The Defendant possessed the image for his own use and enjoyment but he also possessed the image for the purpose of disseminating it to others. The Defense did not argue for merger at the time of the sentencing, and the Court does not find that it would be appropriate under the circumstances.

Finally, the Defendant argues that his prior record score ("PRS") should have been calculated as 5 rather than RFEL. As noted earlier in this opinion, there was a disagreement between the Commonwealth and the defense regarding the calculation of the Defendant's prior record score. When sentencing the Defendant, the Court did not specify which PRS it was using to sentence the under, because, pursuant to the sentencing guidelines in effect at the time, if the Defendant was sentenced under a PRS of RFEL and an OGS of 9 as agreed to by counsel, his standard range would be 60 to 72 months. As each of the Defendant's charges was graded as a felony of the second degree, his maximum sentence would be 10 years. Accordingly, if he were sentenced as an RFEL, the enhancement questions answered by the jury which would have increased his OGS would not have been able to be contemplated by the Court. If the Defendant were sentenced with a PRS of 5, then the enhancement questions to which the jury answered in the affirmative would have increased the OGS to a 10, making

the standard range 60 to 72 months as well. Therefore, the sentences would have been substantially similar, if not identical, according to the guideline ranges regardless of whether the Defendant's PRS was a 5 or RFEL. Accordingly, this Court submits that any error would have been *de minimis*.

For all of the foregoing reasons, this Court respectfully requests that the Appellant's appeal be denied and the judgement of sentence entered on September 5, 2023, be affirmed.

By the Court,

_____
Ryan M. Tira, Judge

RMT/jel

cc: Superior Court (Original +1)
DA
Nicole Spring, Esquire
Gary Weber, Esquire
Jennifer E. Linn, Esquire