

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-233-2024
	:	
v.	:	
	:	
AHKIEM TYSHON BURRAGE,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the court on August 2, 2024, for a hearing and argument on the Omnibus Pre-Trial Motion (OPTM) filed on behalf of Ahkiem Tyshon Burrage (“Defendant”). At the hearing, counsel for the Defendant indicated that both the motion to compel discovery and the motion for CYS records contained in the OPTM had been resolved by the parties. The motion also included a request for habeas corpus relief and a motion to reserve the right. In addition, the Commonwealth filed a last minute Motion to Admit Statements of Child victim to be litigated at the same time, asking that the Court allow the recording of the CAC interview of the victim be permitted to be used at trial. After discussion, this last motion will be heard at another time.

By way of background, Defendant is charged with four counts of Involuntary Deviate Sexual Intercourse (IDSI) with a child, felonies of the first degree in violation of 18 Pa. C.S.A. §3123(B), four counts of Unlawful Contact with a Minor, felonies of the first degree in violation of 18 Pa. C.S.A. §6318(a)(1); one count of Indecent Assault of a complainant less than 13 years of age, a felony of the third degree in violation of 18 Pa. C.S.A. §3126(a)(7); one count of Endangering the Welfare of a Child (EWOC)-course of conduct, a felony of the third degree in violation of 18 Pa. C.S.A. §4304(a)(1); and one count of

Statutory Sexual Assault – 11 years older, a felony of the first degree, in violation of 18 Pa. C.S.A. §3122.1(b).

With respect to the motion to reserve the right to file additional motions based on discovery that had not been provided at the time the OPTM was filed, the Rules of Criminal Procedure specifically allow the filing of motions *nunc pro tunc* when the opportunity did not exist within 30 days after arraignment, if the Defendant or his attorney were not aware of the grounds for the motion, as well as when required in the interests of justice. *See* Pa. R. Crim. P. 579 (A), 581(B). Therefore, the court will grant the motion to reserve right as provided by the Rules of Criminal Procedure.

On the issue of Defendant's request for habeas corpus relief, Defendant contends that the Commonwealth failed to establish a *prima facie* case for any of the charges. More specifically, Defendant contends that the Commonwealth failed to establish penetration of Complainant's anus for two counts of IDSI or penetration of the Complainant's mouth for the other two counts of IDSI. In regard to the four counts of Unlawful Contact with a Minor and one count of Indecent Assault, the Defendant contends that unlawful and/or indecent contact was not established from the testimony at the preliminary hearing. Alternatively, the Defendant argues that even if there was sufficient evidence for a *prima facie* case for IDSI and Unlawful Contact with a Minor, the evidence presented did not establish that these crimes were committed four times each. In regard to the charge Endangering the Welfare of a Child, the Defendant argues that the Commonwealth did not establish a duty of care, protection, or support that the Defendant would have had for the victim, nor was a course of conduct established. Finally, the Defendant argues that the Commonwealth failed to

establish the count of Statutory Sexual Assault because there was no testimony that the Defendant and the victim were not married.

Discussion

At the preliminary hearing stage of a criminal prosecution, 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 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).

1. Did the Commonwealth present prima facie evidence of Involuntary Deviate Sexual

Intercourse?

Defendant is charged with four counts of IDSI. A person commits involuntary deviate sexual intercourse with a child, a felony of the first degree, when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age. 18 Pa. C.S.A. § 3123. Deviate sexual intercourse is oral intercourse or anal intercourse between human beings. *See* 18 Pa. C.S. §3101. Sexual intercourse is defined as intercourse per os or per anus, with some penetration however slight; emission is not required. *Id.*

The evidence at the preliminary hearing showed that Complainant was seven years old at the time of the preliminary hearing and six years old when the inappropriate games with Defendant started. N.T., 2/9/2024 at 5, 16. These games were called knees and guess the candy. *Id.* at 8, 11. The knee game would take place in Complainant's mother's room since Complainant had nothing in his room. *Id.* at 9. The knee game consisted of Complainant being blindfolded, pulling his pants and underwear down. *Id.* at 8-9. Complainant would then bend over on the bed face down where Complainant would be humped by Defendant. *Id.* at 8. In the process of being humped, Complainant said that his bottom was being touched and it would hurt. *Id.* at 10. Complainant testified that this game was played more than once. *Id.* at 14.

The guess the candy game consisted of Complainant being blindfolded and Defendant placing different things into Complainant's mouth. *Id.* at 12. Complainant testified that Defendant's finger was in his mouth before. *Id.* Complainant also testified when Defendant would put something else in his mouth that he held on to it with two hands. *Id.* at 15. It was squishy like a finger with no bone, a hole in the middle, and he was told to suck and not to

bite. *Id.* at 13,18. When Complainant would bite or try to swallow, Defendant would say ow. *Id.* at 13. Complainant also testified that what felt like a soft bag with two balls would also be placed in his mouth. *Id.* at 20-21. Complainant testified that when he bit the balls, Defendant would say ow. *Id.* Complainant testified that this game was played every month or every week. *Id.* at 14.

Williamsport Agent Christopher Salisbury testified that he had received a referral from Children and Youth. *Id.* at 23-24. Complainant had gone to the doctors for issues of defecating on the floor. *Id.* at 25. When Complainant was speaking with the doctor, sexual abuse in the household was described. *Id.* An interview with the Child Advocacy Center was conducted, and Agent Salisbury was present for the interview. *Id.* Agent Salisbury testified that during the interview, Complainant described what he thought was Defendant's "wee wee" was in his mouth. *Id.* at 27.

This evidence and the reasonable inferences to be drawn from this evidence when viewed in the light most favorable to the Commonwealth show that Defendant inserted his penis and his testicles in the Complainant's mouth and had him suck on them. *See Commonwealth v. Wilson*, 825 A.2d 710, 714 (Pa. Super. 2003)(evidence was sufficient to establish penetration however slight where Victim's testimony revealed that Appellant inserted his testicles into her mouth). Although a closer question, the testimony and the inferences viewed in the light most favorable to the Commonwealth also showed that during the knees game while Defendant was humping the Complainant's bottom his penis slightly penetrated the Complainant's anus, causing pain. Therefore, the testimony presented at the preliminary hearing established a *prima facie* case for the four counts of IDSI.

2. Did the Commonwealth present prima facie evidence of Unlawful Contact with a Minor?

Defendant is charged with four counts of Unlawful Contact with a Minor. In Pennsylvania, a person commits an unlawful contact with a minor if the person is intentionally in contact with a minor for the purpose of engaging in an activity prohibited under any of the offenses enumerated in Chapter 31 (relating to sexual offenses) and either the person initiating the contact or the person being contacted is within this Commonwealth. See 18 Pa. C.S. § 6318. The statute defines the term “contacts” as follows:

Direct or indirect 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). As the Pennsylvania Supreme Court explained in *Commonwealth v. Strunk*,

Section 6318 does not criminalize inappropriate touching of minors; other statutes accomplish that goal. Section 6318 is perhaps best described as an anti-grooming statute. But even that description is imperfect. Any communication that is intended to further the commission of one of the crimes listed in Section 6318(a), whether it fits the definition of grooming or not, falls within the prohibition.

352 A.3d 530, 542 (Pa. 2024).

The Complainant testified that Defendant would take him to his mother’s room or downstairs, where he would play these inappropriate games with him. N.T., 2/9/2024 at 9, 12. These games were called the knees game and guess the candy game. *Id.* at 8, 11. During the knees game, Defendant had the Complainant stand at the bed leaning over with his face

and stomach on the bed. *Id.* at 9-10. Defendant would pull down the Complainant's pants and underwear, then Defendant would hump him. *Id.* at 8. During the candy game, the Complainant testified, something squishy that had no bone, with a hole in the middle, would be placed into his mouth. *Id.* at 13, 18. Complainant also testified that a bag with two balls would also be placed into his mouth. *Id.* at 21. Defendant would make him suck, not bite. *Id.* at 12. Complainant testified that when he would try to bite or swallow, Defendant would say "ow". *Id.* at 18, 20. When asked if Defendant said anything to him when they were playing the candy game, the Complainant testified that Defendant told him to lay down at the same place if the Complainant got up and said he was tired. *Id.* at 14. Defendant had the Complainant play the candy game downstairs. *Id.* The Complainant did not like being downstairs because he was scared. *Id.*

Agent Salisbury also testified that during an interview with Complainant and Child Advocacy Center, Complainant described what he thought was Defendant's "wee wee" in his mouth. *Id.* at 26-27.

The testimony presented by the Complainant supports the conclusion that Defendant had contact with the Complainant for the purposes of engaging in a sexual offense. Defendant communicated directly and indirectly with the Complainant by directing the Complainant's movements. For example, he told the Complainant to suck and not to bite and to lay back down when they were playing the candy game. He had the Complainant play the knees game in his mommy's bedroom and he had the Complainant play the candy game downstairs, even though the Complainant didn't like being downstairs because he was scared. He made the Complainant stand at the bed and lean over so his face and stomach

were on the bed for the knees game. Therefore, the testimony at the preliminary hearing establishes *prima facie* evidence for four counts of Unlawful Contact with a minor.

3. *Did the Commonwealth present prima facie evidence of Indecent Assault?*

Defendant is charged with one count of Indecent Assault. A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person for the purpose of arousing sexual desire in the person or the complainant and the person does so without the complainant's consent; the person does so by forcible compulsion; and, the complainant is less than 13 years of age. 18 Pa.C.S.A. § 3126. Indecent contact is defined as any touching of the sexual or other intimate parts of a person for the purpose of arousing or gratifying sexual desire, in any person. 18 Pa. C.S. § 3101. Forcible compulsion is defined as compulsion by use of physical, intellectual, moral, emotional, or psychological force, either express or implied. *Id.*

Complainant testified that he was six years old when the inappropriate games first began and is now seven years old. N.T., 2/9/2024 at 5, 16. The two games were called knees and guess the candy. *Id.* at 8, 11. Complainant testified that the candy game was played every month or every week. *Id.* at 14. When this game was played, he was told to lie down and to stay lying down even when he was tired. *Id.* This game consisted of candy being placed in Complainant's mouth; however, Complainant was unsure it was candy. *Id.* at 11-12. Complainant described something squishy with no bone and a hole in the middle being placed in his mouth. *Id.* at 13, 18. Complaint also described two balls inside a soft bag that could not be unattached being placed in his mouth. *Id.* at 20-21.

Complainant testified that the knees game was played more than once, but on

different days from the candy game. *Id.* at 14. The knees game consisted of the Complainant bending over face down on a bed with his pants and underwear pulled down. *Id.* at 8-10. Defendant would then hump Complainant. *Id.* Complainant testified that his bottom was being touched and that it would hurt. When Defendant was done, he would leave the room and tell Complainant to pull up his pants. *Id.* at 10. Complainant testified that he was made to play the knees game, and he did not like this game. *Id.* at 14.

The testimony at the preliminary hearing established a *prima facie* case for one count of Indecent Assault.

4. *Did the Commonwealth present prima facie evidence of Endangering the Welfare of a Child?*

Defendant is charged with one count of Endangering the Welfare of a Child. To establish the offense of endangering the welfare of a child, the Commonwealth must establish that the Defendant is (1) A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support. As used in this subsection, the term “person supervising the welfare of a child” means a person other than a parent or guardian that provides care, education, training, or control of a child. 18 Pa. Stat. and Cons. Stat. Ann. § 4304.

Those who voluntarily reside with a minor child and “violate a duty of care, protection or support” are contemplated within the scope of the endangering statute.

Commonwealth v. Brown, 721 A.2d 1105, 1108 (Pa. Super. 1998). While such persons are contemplated within the statute, not all adults residing with minor children are automatically

criminally liable under this law; rather, they are not outside the scope of the statute. *Id.*

Complainant testified that Defendant was staying at the house for three or five years. N.T., 2/9/2024 at 7. Complainant testified that Defendant was living there because he knew Complainant's sister, and Complainant and Defendant had known each other for four years. *Id.* at 7, 19. Defendant was at home with the child when the mother was not home. *Id.* at 17. Defendant would play inappropriate games with Complainant and would even dangle Complainant under the stairs, acting like he was going to drop the Complainant. *Id.* at 7, 16. Complainant testified that he was almost dropped. *Id.* at 17.

The testimony presented at the preliminary hearing established a *prima facie* case for one count of Endangering the Welfare of a Child. Complainant, who is a minor, testified that Defendant was living with him, inappropriate games were played, and Defendant would dangle Complainant, almost dropping him. *Id.* at 7, 16. Those who voluntarily reside with a minor child and "violate a duty of care, protection or support" are contemplated within the scope of the endangering statute. *Brown*, 721 A.2d at 1107. Therefore, the evidence was sufficient to establish a *prima facie* case.

5. *Did the Commonwealth present prima facie evidence of Statutory Sexual Assault?*

Defendant is charged with one count of Statutory Sexual Assault. "A person commits a felony of the first degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is 11 or more years older than the complainant, and the complainant and the person are not married to each other. 18 Pa. C.S.A. § 3122.1. Sexual intercourse includes intercourse per os or per anus. 18 Pa. C.S.A. §3101.

As previously discussed in this Opinion, the Commonwealth presented *prima facie* evidence that Defendant engaged in oral and anal intercourse with Complainant. Complainant testified that there was no relation to Defendant, just that the Defendant knew the Complainant's sister. N.T., 2/9/2025 at 6-7. It can be reasonably inferred from the testimony presented that Complainant and Defendant were not married. Furthermore, Complainant testified that he was seven years old, and Agent Salisbury testified that Defendant was 23 years old. *Id.* at 7, 26. Persons under the age of 18 years of age cannot marry in Pennsylvania. *See* 23 Pa. C.S.A. §1301(a) (“No person shall be joined in marriage in this Commonwealth until a marriage license has been obtained.”); 23 Pa. C.S. §1304(b)(1) (“No marriage license may be issued if either of the applicants for a marriage license is under 18 years of age.”). Thus, the Court rejects Defendant's arguments that the Commonwealth failed to establish that Defendant and Complainant were not married and finds that the testimony at the preliminary hearing did establish *prima facie* evidence for one count of Statutory Sexual Assault.

ORDER

AND NOW, this 27th day of June, 2025, after hearing on the Defendant's Omnibus Pretrial Motion in the nature of a Habeas Corpus claim, the same is hereby DENIED. The court will GRANT the motion to reserve right as provided by the Rules of Criminal Procedure 579 (A) and 581(B)..

By The Court,

Nancy L. Butts, President Judge

cc: Phoebe Yates, Esquire (ADA)
 Tyler Calkins, Esquire
 Abigail McCoy
 Jerri Rook