

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :

v. :

No. CR-076-2016

ERIC WAYNE JOHNSTON, :  
Defendant :

Cynthia A. Dyrda-Hatton, Esquire Counsel for the Commonwealth  
First Assistant District Attorney

Paul J. Levy, Esquire Counsel for the Defendant  
First Assistant Public Defender

MEMORANDUM OPINION

Serfass, J. - November 17, 2020

Eric Wayne Johnston (hereinafter "the Defendant") is charged with Corruption of Minors- Defendant Age 18 or Above (18 Pa. C.S.A. § 6301(a)(1)(ii)); Unlawful Contact with a Minor (18 Pa. C.S.A. § 6318(a)(1)); and Indecent Assault of a Person Less than 13 Years of Age (75 Pa. C.S.A. § 3802(d)(1)(ii)). On February 7, 2020, Defendant filed a "Motion for Writ of Habeas Corpus" alleging that there was insufficient evidence introduced at the preliminary hearing to support the victim's identification of the Defendant as the assailant and that the testimony and evidence do not support the crimes charged. When the matter was called for a hearing on the Defendant's motion, the above-referenced counsel submitted the preliminary hearing transcript and Children's Advocacy Center (CAC) interview disk in lieu of additional testimony. Both parties

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then filed briefs in support of their respective positions on the Defendant's habeas corpus motion and this matter is now ripe for disposition. For the reasons which follow, we will deny the Defendant's motion.

**FACTUAL AND PROCEDURAL BACKGROUND**

On November 10, 2015, Pennsylvania State Trooper Shaun M. Flynn was contacted by a Carbon County Children and Youth caseworker who had been investigating a report of sexual abuse involving a 7-year-old female victim (hereinafter "P.S.") (Affidavit of Probable Cause). On November 18, 2015, P.S. was interviewed by Child Forensic Interviewer Kristen Fetcho at the Children's Advocacy Center in Scranton, Pennsylvania (Affidavit of Probable Cause and CAC Interview Disk).

The video of the interview depicted P.S. in an interview room with Ms. Fetcho. During the interview, P.S. stated that she now lives in Lehighton with her "nana," whose name is Barbara. She later explained that Barbara is her father's mother. She further explained that she previously lived with her mother and her mother's fiancé, the Defendant. P.S. stated that her mother, Sara, lives in Jim Thorpe, but that she is not able to see her due to a series of incidents at her mother's house in which someone, who P.S. believes to be the Defendant, was touching her while she was attempting to sleep.

Ms. Fetcho asked P.S. to elaborate on how these incidents had happened. P.S. described how someone, who she suspected was the Defendant, would come into her room, stand next to her bed, pull down her bed covers, remove her pajama pants, and touch the inside and outside of her "private spot" with his hands/fingers. P.S. stated that while this was happening, she would attempt to pull her pants back on and pull the covers back up so that she could go back to sleep. She would hear a man's voice say "shh," which was how she knew that it was the Defendant. Ms. Fetcho reported to Trooper Flynn that she believed the interview with P.S. was valid, and that the events described by P.S. had occurred (Affidavit of Probable Cause).

On January 20, 2016, a preliminary hearing was held before District Justice Edward M. Lewis. At the preliminary hearing, P.S. testified consistently with her interview at the Children's Advocacy Center. She once again stated that prior to moving in with her "nana" in Lehighton, she had lived in Jim Thorpe with her mother, the Defendant, her aunt Patty, and her uncle Shawn when these incidents were occurring (N.T. 1/20/16, p. 11). P.S. was able to make an in-court identification of the Defendant (N.T. 1/20/16, p. 10). P.S. also testified consistently that someone, who she believed to be the Defendant, had entered her room at night, and touched the inside of her "private spot" with his finger while saying "shh." She stated that when these events would

happen, she would attempt to pull her pants back up, roll over, and go back to sleep (N.T. 1/20/16, pp. 24-28).

Additionally, P.S. elaborated that the height and stature of the person who initiated these incidents was most consistent with the Defendant, as compared to anyone else living in the Jim Thorpe residence at the time that these crimes were taking place (N.T. 1/20/16, pp. 27,).

P.S. was asked by counsel for both the Commonwealth and the Defendant how she knew that it was not her uncle who had touched her. P.S. explained that her uncle had never come into her room or tucked her in (N.T. 1/20/16, pp. 23, 39). Moreover, P.S. stated that her uncle looks different from the Defendant (N.T. 1/20/16, p. 60). Further, P.S. described the Defendant as having larger hands than her uncle, and that the hand touching her was more consistent with the Defendant's larger hands (N.T. 1/20/16, pp. 61-62).

#### DISCUSSION

The Defendant is charged with one (1) count of Corruption of Minors- Defendant Age 18 or Above (18 Pa. C.S.A. § 6301(a)(1)(ii)); Unlawful Contact with a Minor- Sexual Offenses (18 Pa. C.S.A. § 6318(a)(1)); and Indecent Assault Person Less than 13 Years of Age (18 Pa. C.S.A. § 3126(a)(7)). The Defendant challenges whether the record supports a finding that P.S. has identified him as the

assailant to an extent that can support a prima facie case of all charges.

Corruption of Minors- Defendant Age 18 or Above is defined as "[w]hoever, being of the age of 18 years and upwards, by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 commits a felony of the third degree." 18 Pa. C.S.A. § 6301(a)(1)(ii).

Unlawful Contact with a Minor- Sexual Offenses is defined as being "intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth: (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses)." 18 Pa. C.S.A. § 6318(a)(1).

Indecent Assault of a Person Less than 13 Years of Age is defined as having "indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and: ... (7) the complainant is less than 13 years of age." 18 Pa. C.S.A. § 3126(a)(7)).

Pennsylvania caselaw has expanded on when a court may consider a victim's identification of an alleged perpetrator sufficient. "Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross-examination, positive and unqualified, the testimony need not be received with caution—indeed the cases say that this positive testimony as to identity may be treated as the statement of fact." Commonwealth v. Grahame, 482 A.2d 255, 259 (Pa. Super 1984). We note that "[i]dentification testimony does not need to be positive and certain in order to convict, it only needs to constitute proof beyond a reasonable doubt. Any indefiniteness and uncertainty in the identification testimony goes to its weight." Commonwealth v. Orr, 38 A.3d 868, 876 (Pa. Super. 2011).

The Pennsylvania Superior Court held that the victim's identification of the perpetrator was sufficient in Commonwealth v. Orr, where the victim did not identify the defendant in court, but explained that he was able to identify the person who robbed him a few blocks from where the robbery had occurred in Philadelphia, by his age, facial hair, height, and clothing. Id. at 875-876.

However, the Pennsylvania Superior Court refused to uphold a robbery victim's identification of a defendant in Commonwealth

v. Grahame, where the victim was unable to identify one of the defendants in a lineup, and admitted on the stand that she did not get a good look at him during the robbery. Grahame, 482 A.2d at 257. The victim's testimony was further weakened by the statement "all blacks look the same." Id. at 259.

In this case, P.S. has maintained throughout both her C.A.C. interview and her preliminary hearing testimony, while being subjected to cross-examination, that the Defendant was the person who touched her. The factors that P.S. used to conclude that the Defendant was the person who assaulted her are similar to the identification factors used by the victim in Orr. Additionally, even at eight years old, P.S. never testified to being unsure of who she saw or tried to use an overly broad description, such as the perpetrator's skin color.

At this stage in the proceedings, the Commonwealth is merely burdened with proving a prima facie case of the offenses with which the Defendant is charged. "A prima facie case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime." Commonwealth v. Black, 108 A.3d 70, 77 (Pa. Super. 2015). Unlike Orr and Grahame, the standard is not beyond a reasonable doubt. Of the four adults living in the home at the time of the incident, P.S. used the perpetrator's height,

stature, hand size, voice, and past experience to identify the Defendant. The testimony and evidence in this case, when viewed in the light most favorable to the Commonwealth, are sufficient to establish that a prima facie case exists as to each of the elements of the offenses charged and that the Defendant was the assailant of the minor victim.

#### CONCLUSION

For the reasons set forth hereinabove, the Defendant's "Motion for Writ of Habeas Corpus" will be denied and we will enter the following



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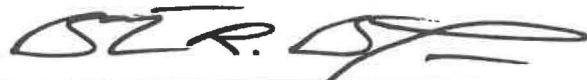
ORDER OF COURT

AND NOW, to wit, this 17<sup>th</sup> day of November, 2020, upon consideration of Defendant's "Motion for Writ of Habeas Corpus" and upon review of the notes of testimony of the preliminary hearing held on January 20, 2016, the Children's Advocacy Center interview disk, and the post-hearing briefs of counsel, and in accordance with our memorandum opinion bearing even date herewith, it is hereby

ORDERED and DECREED that the aforesaid "Motion for Writ of Habeas Corpus" is DENIED.

IT IS FURTHER ORDERED AND DECREED that the parties shall appear for a pre-trial conference at 9:00 a.m. on December 3, 2020 in the office of the District Attorney on the second floor of the Carbon County Courthouse at Jim Thorpe, Pennsylvania.

BY THE COURT:



Steven R. Serfass, J.