

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

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 v. : NO. 662-CR-2016  
 :  
 ROBERT COOK, :  
 :  
 Defendant :

Brian B. Gazo, Esquire Counsel for the Commonwealth  
Asst. District Attorney

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

**MEMORANDUM OPINION**

Serfass, J. - May 25, 2017

On February 24, 2016, Defendant, Robert Cook, (hereinafter "Defendant"), was arrested by the Pennsylvania State Police and charged with the following offenses:

1. Rape of a Child, 18 Pa.C.S.A. §3121 §C;
2. Statutory Sexual Assault: 11 Years Older, 18 Pa.C.S.A. §3122 §§B;
3. Involuntary Deviate Sexual Intercourse with Child, 18 Pa.C.S.A. §3123 §§B;
4. Aggravated Indecent Assault of Child, 18 Pa.C.S.A. §3125 §§B;

5. Endangering Welfare of Children - Parent/Guardian/Other Commits Offense, 18 Pa.C.S.A. §4304 §§A1;
6. Corruption of Minors - Defendant Age 18 or Above, 18 Pa.C.S.A. §6301 §§A1ii; and
7. Indecent Assault Person Less than 13 Years of Age, 18 Pa.C.S.A. §3126 §§A7.

Defendant filed a "Petition for Writ of Habeas Corpus" on September 2, 2016, averring that the Commonwealth failed to produce sufficient evidence to establish a *prima facie* case against him for the charges of Rape of a Child, Statutory Sexual Assault: 11 Years Older, Involuntary Deviate Sexual Intercourse with a Child, and Aggravated Indecent Assault of a Child. For the reasons set forth hereinafter, we will deny Defendant's petition.

#### **FACTUAL AND PROCEDURAL HISTORY**

On September 20, 2015, Heather Diaz placed her children, M.D. and R.D. (then age three), in the care of Defendant while she attended to a family emergency. After several hours, Diaz retrieved her children from Defendant's residence and, while driving back to the hospital, where she had spent most of the afternoon, R.D. told her mother about a new game she played with Defendant. R.D. proceeded to explain that Defendant had rubbed his penis against various parts of her body. Diaz immediately took R.D. to Miners' Memorial Hospital in Coaldale where a physical examination was conducted.

Within the next two or three days, Diaz took her daughters to the Children's Advocacy Center of Northeast Pennsylvania in Scranton, where the staff conducted a physical examination of R.D. and took the clothes she had been wearing on September 20<sup>th</sup>. Either R.D. was wearing the same clothes when she arrived at the Children's Advocacy Center (hereinafter "C.A.C."), or Diaz had put them in a bag prior to arriving at the C.A.C. Either way, neither R.D., nor the clothes she was wearing on September 20<sup>th</sup>, had been washed since the alleged incident occurred.

The video recording of the C.A.C. interview, conducted by Child Forensic Interviewer Kristen Fetcho, was played at the preliminary hearing, but no transcript was made. During this interview, R.D. said that Defendant put his "private" on her, and when asked if she could point to where Defendant's penis was located on a drawing, she pointed to and circled his genital area. When asked where Defendant touched her with his penis, R.D. indicated, by pointing to a picture of a little girl, that his penis touched her vaginal area and buttocks. When asked if Defendant's penis touched her face, she nodded in the affirmative. Additionally, R.D. noted that his penis looked red with black and pink around it, and that nothing came out of it.

On or about November 10, 2015, Pennsylvania State Police Trooper Christopher Zukowsky received a serology report generated by the PSP Wyoming Regional Laboratory based upon testing performed

on the clothing R.D. was wearing on September 20, 2015. The report indicates that no spermatozoa were identified on the inside crotch panel of R.D.'s underwear. However, a DNA analysis report from the PSP Greensburg Forensic DNA Laboratory obtained a partial Y chromosome DNA haplotype from the sperm fraction of the cutting from inside the crotch panel of R.D.'s underwear. The report indicates a ninety-five (95%) percent confidence level that this DNA matches a DNA sample provided by Defendant. This report also indicates that a Y chromosome DNA profile, consistent with a mixture of at least two (2) individuals, was obtained from the non-sperm fraction of the cutting of the inside crotch panel of R.D.'s underwear, and that the major component of this Y chromosome DNA matches the DNA provided by Defendant.

On February 24, 2016, Defendant was arrested and charged with the offenses listed hereinabove. On May 18, 2016, a preliminary hearing was held before Magisterial District Judge Edward M. Lewis and all charges were bound over to this Court.

On September 2, 2016, Defendant filed a "Petition for Writ of Habeas Corpus" arguing that the Commonwealth failed to produce sufficient evidence to establish a *prima facie* case against him for the charges of Rape of a Child, Statutory Sexual Assault: 11 Years Older, Involuntary Deviate Sexual Intercourse with a Child, and Aggravated Indecent Assault of a Child. Defendant's central contention is that the Commonwealth did not satisfy the sexual

intercourse and/or penetration element of each of the aforementioned offenses. A hearing on Defendant's petition was scheduled for February 13, 2017. When called for hearing on that date, counsel jointly introduced the preliminary hearing transcript and the digital video disc of the C.A.C. interview. It was agreed that no additional testimony would be presented for the Court's consideration.

### **DISCUSSION**

For this Court to find that the Commonwealth has met its burden of proof at the preliminary hearing, we must find sufficient probable cause to believe that Defendant committed the offenses charged; it is not necessary that the Commonwealth prove Defendant's guilt beyond a reasonable doubt. Commonwealth ex rel. Scolio v. Hess, 27 A.2d 705, 707 (Pa. Super. 1942). The Commonwealth's burden at a preliminary hearing is to establish at least *prima facie* evidence that a crime has been committed and that the accused is the one who committed it. Commonwealth v. Mullen, 333 A.2d 755 (Pa. Super. 1975). In determining the presence or absence of a *prima facie* case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such. Commonwealth v. Packard, 767 A.2d 1068, 1071 (Pa. Super. 2001). We note that the weight and

credibility of the evidence is not a factor at this stage. See Commonwealth v. Patrick, 933 A.2d 1043 (Pa. Super. 2007).

The Pennsylvania Superior Court has held on numerous occasions that penetration may be established through circumstantial evidence. Commonwealth v. Grassmyer, 352 A.2d 178 (Pa. Super. 1975). Defendants have been convicted of similar crimes based solely on circumstantial evidence and, in at least one instance, where the Commonwealth only sufficiently proved that the defendant merely intended to penetrate the victim. See Commonwealth v. Donahue, 7 A.2d 13, 13 (Pa. Super. 1939) (where eyewitness testimony regarding the position and proximity of the defendant and victim was sufficient evidence to prove that penetration had occurred.); see also Commonwealth v. Bowes, 74 A.2d 795, 796 (Pa. Super. 1950) (where a jury found no penetration occurred, but found the defendant guilty of the crimes charged against him because they were convinced he intended some slight penetration).

As the respective statutes for each of the contested charges indicate, the penetration of the victim's vagina, anus, or mouth need only be slight. Even a juvenile victim's testimony that a defendant forced her to kiss his penis was sufficient evidence for a jury to infer that the defendant penetrated the victim's mouth. Commonwealth v. McIlvaine, 560 A.2d 155 (Pa. Super. 1989). Additionally, a victim's uncorroborated testimony is sufficient to

sustain a conviction, even in situations where a medical examination determines penetration had not been successful. Id., 560 A.2d at 159.

Turning to the case at bar, we do not have an express statement from the victim claiming that Defendant penetrated her vagina, anus, or mouth. However, there is strong circumstantial evidence which demonstrates that Defendant penetrated R.D., including: a statement from R.D. that Defendant touched her face, genital area, and buttocks with his penis; R.D.'s description of Defendant's penis; and two separate DNA analyses that show Defendant's DNA was found in a cutting from the inside crotch panel of R.D.'s underwear.

Bearing in mind that the Commonwealth need only establish sufficient probable cause to show that a crime has been committed and that Defendant is the one who committed the crime, we are satisfied that, based on the circumstantial evidence listed hereinabove, the Commonwealth has met its burden. The fact that R.D., a three-year-old child, indicated that Defendant's penis touched her vaginal area is adequate, in and of itself, to meet the minimal standard which the Commonwealth must satisfy at this preliminary stage. Even if this Court were to conclude that R.D.'s statement alone is insufficient to meet this burden, when considering the statement together with the DNA found in R.D.'s underwear, which matched a buccal swab provided by Defendant, we

find sufficient evidence to demonstrate that the Commonwealth has met its *prima facie* burden.

**CONCLUSION**

For the foregoing reasons, Defendant's "Petition for Writ of Habeas Corpus" is denied.

**BY THE COURT:**

---

**Steven R. Serfass, J.**

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	NO. 662-CR-2016
	:	
ROBERT COOK,	:	
Defendant	:	
Brian B. Gazo, Esquire		Counsel for the Commonwealth
Asst. District Attorney		
Paul J. Levy, Esquire		Counsel for the Defendant
First Asst. Public Defender		

**ORDER**

**AND NOW**, to wit, this 25<sup>th</sup> day of May, 2017, upon consideration of Defendant's "Petition for Writ of Habeas Corpus" and the brief in support thereof, and following our review of the preliminary hearing transcript and the digital video disc submitted by the above-referenced counsel, and for the reasons set forth in our Memorandum Opinion bearing even date herewith, it is hereby

**ORDERED and DECREED** that Defendant's "Petition for Writ of Habeas Corpus" is **DENIED**.

**BY THE COURT:**

\_\_\_\_\_  
Steven R. Serfass, J.