

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-369-2024
v.	:	
	:	
ANTONIO CRACCHIOLO,	:	
Defendant	:	

OPINION AND ORDER

This matter is before the Court on an Omnibus Pretrial Motion filed by the Defendant on April 1, 2024. For the reasons set forth below, the Motion is **granted**.

Background

Defendant was charged on November 20, 2023 for an incident occurring on April 2, 2023. Defendant was charged with one Count of Indecent Assault, a misdemeanor of the second degree, in violation of 18 Pa.C.S. §3126(A)(1). A preliminary hearing regarding this matter was held on February 26, 2024 before District Justice Gary A. Whiteman. Prior to the preliminary hearing, the Commonwealth moved, without objection from the Defense, to add a second charge pursuant to 18 Pa.C.S. §2709(a)(1), Harassment, a misdemeanor of the third degree. Following testimony from one witness, the charges were held for court. On March 15, 2024, Defendant waived his formal arraignment scheduled for April 1, 2024, and entered a plea of not guilty to the charged offenses.

Defendant filed his Omnibus Pretrial Motion on April 1, 2024, requesting a Motion for Notice of the Commonwealth’s Intent to Introduce any Evidence Pursuant to Pennsylvania Rule of Evidence 404(b), a Motion to Petition for Writ of Habeas Corpus on Count One, and a Motion to Correct the Grading of Count Two Charging Harassment. A hearing on the Omnibus Pretrial Motion was held on June 25, 2024, at which time, Eric Birth, Esquire,

appeared on behalf of the Commonwealth, and Donald Martino, Esquire, represented the Defendant.

Discussion

Defendant's motions will be addressed individually.

a. Motion for Notice in Advance of Trial of any Evidence the Commonwealth Intends to Introduce Pursuant to Pennsylvania Rule of Evidence 404(b)

In his Motion, Defendant requests that the Court order the Commonwealth to provide notice thirty (30) days in advance of trial of all evidence it intends to introduce pursuant to Rule 404(b). Pennsylvania Rule of Evidence 404(b)(1) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show a conforming action thereof. An exception is found in Pennsylvania Rule of Evidence 404(b)(2) which permits introduction of evidence of other crimes, wrongs, or acts for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when the Commonwealth is able to demonstrate that the probative value of the evidence outweighs its potential for unfair prejudice. The Commonwealth is directed to provide reasonable written notice in advance of trial regarding the general nature of any such evidence it intends to introduce at trial. *PA. R. Evid. 404(b)(4)*. The Court hereby orders the Commonwealth to provide notice to the Defendant pursuant to Pennsylvania Rule of Evidence 404(b) thirty (30) days in advance of trial. The Defendant's request for Notice is **granted**.

b. Motion to Correct the Grading of Count Two of the Information Charging Harassment

Preceding the preliminary hearing on February 26, 2024, the Commonwealth, and without objection from the Defendant, amended the Complaint to add Count Two,

Harassment, a misdemeanor of the third degree pursuant to 18 Pa.C.S. § 2709(a)(1). The Defendant's Motion to Request the Correct Grading for Count Two comes before the Court because 18 Pa.C.S. §2709(a)(1) provides that, "a person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person: (1) strikes, shoves, kicks or otherwise subjects the other person to physical contacts, or attempts or threatens to do the same." Further, 18 Pa.C.S. §2709(c)(3) provides that, "[e]xcept as provided under paragraph (3), an offense under subsections (a)(1), (2) or (3) shall constitute a summary offense." Pursuant to 18 Pa.C.S. §2709(c)(3) an offense under subsection (a)(1) is a misdemeanor of the third degree if the person charged previously violated an order issued under 23 Pa.C.S. §6108 involving the same victim, family or household. The Commonwealth has not alleged that an Order has been entered under 23 Pa.C.S. §6108 involving protection orders. Additionally, the Defendant avers that no protection order has been applied to the captioned matter, and he has not been accused or convicted of any prior offense involving the Complainant. Accordingly, the Defendant's pretrial motion requests the Court to amend the Information filed in this matter to reflect the correct grading of Count Two, Harassment pursuant to the language in 18 Pa.C.S. §2709.

At the time set for a hearing on the Omnibus Pretrial Motion on June 25, 2024, the Commonwealth, without objection from the Defendant, requested to amend Count Two of the Information to Disorderly Conduct under 18 Pa.C.S. §5503(a)(4), a misdemeanor of the third degree. The Court granted the motion and issued the Order to amend Count Two to a Disorderly Conduct on June 25, 2024.

c. Petition for Writ of Habeas Corpus on Count One of Indecent Assault

Defendant is charged with one count of Indecent Assault in violation of 18 Pa.C.S. §3126(A)(1), which states that a person commits a misdemeanor of the second degree if the

“person has 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 purposes of arousing sexual desire in the person or the complainant and (1) the person does so without the complainant’s consent.” A conviction for a charge under 18 Pa.C.S. §3126(A)(1) requires the convicted to register as a Tier I Sexual Offender for fifteen (15) years under the provisions of 42 Pa.C.S. §9799.14(b)(6). An individual perpetrates indecent contact if “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 occurs. At the hearing for the Omnibus Pretrial Motion, the Commonwealth indicated its intent to rely on Witness testimony from the preliminary hearing transcript and legal argument.

Here, Defendant is charged with Indecent Assault for an incident that occurred on April 2, 2023. At the preliminary hearing on February 26, 2024, the Alleged Victim testified that Defendant and she were both employed in the same restaurant at the time of the incident. On April 2, 2023, on a closing shift at Filippo’s Restaurant in South Williamsport, Pennsylvania, the Alleged Victim was standing in front of the dishwashing machine when the Defendant approached her from behind and began massaging her shoulders for about one (1) minute. (Preliminary Hearing Transcript, February 26, 2024, pages 5-6, 13-14). The Alleged Victim testified that the Defendant then moved his hands around her ribs and positioned his hands underneath her breasts, with the inside of his fingers gripping underneath her breasts while the palms of his hands remained on her stomach. (Tr. 02/26/2024, pages 6, 14-15). Defendant then walked away from the Alleged Victim. (Tr. 02/26/2024, page 6). Approximately five (5) minutes after the initial contact, the Defendant beckoned the Alleged Victim over with open arms, and as an embrace ensued, the Defendant kissed the Victim on

the cheek. (Tr. 02/26/2024. Page 6, 17-19). The Alleged Victim testified that she “did not think anything of [the interactions.]” The Alleged Victim further testified that approximately five (5) to ten (10) minutes later, the Defendant called the Alleged Victim over with his arms open and proceeded to kiss her on the mouth. (Tr. 02/26/2024, page 7). The Alleged Victim testified that the mouth-to mouth kiss lasted “just a second, (Tr. 02/26/2024, page 7), and she “backed away in shock immediately.” (Tr. 02/26/2024, page 8). The Alleged Victim testified to feeling saliva on her when the kiss occurred, but that she did not open her mouth during the one (1) second kiss. (Tr. 02/26/2024, page 23). She also testified that at the time both of the Defendant’s hands were on her cheeks and as she pulled away he dropped his hands to his sides. (Tr. 02/26/2024, page 23). The Alleged Victim had already finished her closing duties, she collected her payout for the evening, and left immediately after the incident. (Tr. 02/26/2024, page 24).

The Defendant conceded that “the kissing of a complainant’s mouth may establish the indecent contact element for indecent assault.” *Commonwealth v. Haahs*, 289 A.3d 100 (Pa. Super. 2022), citing *Commonwealth v. Evans*, 901 A.2d 528 (Pa. Super. 2006), *Commonwealth v. Provenzano*, 50 A.3d 148, 2012 (Pa. Super. 2012), *Commonwealth v. Capo*, 727 A.2d 1126 (Pa. Super. 1999).

In *Commonwealth v. Evans*, the appellant, an adult male, confronted the eleven (11) year old victim and told her he had something to tell her that needed to stay between the two. Further, the appellant asked, and insisted that the victim “liked him” and told her things he would do to her but could not because her mom was around. Appellant also told the victim that she was sexy. Appellant Evans hugged the girl and put one of his arms behind her back and his other arm around her neck and proceeded to kiss her and stick his tongue in her mouth. *Evans* at 531. The Pennsylvania Superior Court held that “the act of wrapping one’s

arms around another person and inserting one's tongue into another's mouth clearly involves the touching of an intimate part of that person." *Id* at 533. Moreover, the Court found that the comments made to the victim by the appellant allowed the fact-finder to infer appellant's actions occurred for the purpose of gratifying or arousing his sexual desire. *Id*. In *Commonwealth v. Evans*, the Court held that a kiss on the mouth qualifies as indecent contact, and rises to the level of conduct necessary for a charge of Indecent Assault.

In *Commonwealth v. Provenzano*, the Pennsylvania Superior Court held a kiss on the mouth as sufficient to support an indecent assault offense when a fifteen (15) year old mentally disabled girl with an I.Q. of fifty (50) and functioning at a third-grade level was observed with an adult male in a car. The male was observed passionately French kissing the girl. *Provenzano* at 151. Observations consistent with oral sex occurred shortly thereafter and eventually the fifteen-year-old girl was sitting on the adult defendant's lap. *Id*. The Pennsylvania Superior Court addressed the appellant's issue that the evidence was insufficient to sustain the finding of indecent contact between the appellant and the victim.

The Pennsylvania Superior Court noted that:

The separate crime of indecent assault was established because of a concern for the outrage, disgust, and shame engendered in the victim rather than because of physical injury to the victim. Due to the nature of the offenses sought to be proscribed by the indecent assault statute, and the range of conduct proscribed, the statutory language does not and could not specify each prohibited act.

Commonwealth v. Hawkins, 614 A.2d 1198, 1201 (Pa. Super. 1992). In *Provenzano*, when a witness did intervene with the contacts between the appellant and the victim, the victim was apologetic and upset. *Commonwealth v. Provenzano*, 50 A.3d 148, 152 (Pa. Super. 2012).

In *Commonwealth v. Capo*, an offense of indecent assault was found to have occurred where the facts demonstrated the sixty-one (61) year old defendant leered and stalked a fifteen (15) year old girl for several days and tried to convince her to let the defendant draw

the girl. While showing her the completed sketch, the defendant forcibly grabbed her by the upper arm, repeating several times that he was not finished, and as she struggled to get away attempted to kiss her on the mouth, but rather kissed her face and neck until she was able to escape his hold. *Capo* at 1127.

In *Commonwealth v. Haahs*, the case in which the aforementioned decisions were found determinative, the complainant was retrieving an item from her office when she stopped into the defendant's office where he was working. Multiple times over the course of the interaction, the defendant hugged the complainant; and, at one point, the defendant "hugged so tightly that she grew uncomfortable." *Id.* During that hug, the defendant maintained his arm wrapped around her, asked her if she wanted another hug, raised his left arm up and around her neck and shoulders and "strong armed" the complainant preventing her from pulling away. He proceeded to rub his fingers over her lips and shoved his fingers in her mouth, and then he held her face in a firm grasp to further prevent her from pulling away while slathering "his lips and tongue all over her closed mouth." When the complainant finally escaped the defendant's hold she informed him that he made her uncomfortable and that the incident was traumatic. His response was to keep the incident secret.

The Defendant argued that the facts here are distinct and distinguishable from the facts set forth in the aforementioned cases which meet the requirements for the offense of Indecent Assault by setting forth conduct that fits the definition of indecent contact. Here, the Defendant argued that he and the Alleged Victim are both adults with normal mental and physical capacity and of three (3) total contacts there was no coercion, restraint, grabbing or forcing. Moreover, only the third interaction involved behavior other than reciprocation on behalf of the Alleged Victim. In the aforementioned cases, complainants were commonly held so tight and forced into the contacts, even after protesting or expressing their discomfort

and discontent, the defendants would hold tightly or held the victims in restraining positions. Whereas, here, as soon as the unwanted contact occurred the Alleged Victim was able to pull away freely and the Defendant did not attempt to restrain the Alleged Victim or make any further advances. The unwanted contact lasted only one second, as testified to by the Alleged Victim. The Defendant argued that none of the three interactions described by the Alleged Victim reach the levels found by the Superior Court of Pennsylvania as conduct adequate to establish a kiss on the mouth to be sufficient to establish Indecent Assault.

Additionally, the Defendant argued that unlike the facts in the proffered cases and required as a necessary element in 18 Pa.C.S. § 3126 §§(A)(1), the charged offense, none of the contacts described between the Alleged Victim and the Defendant were performed without the complainant's consent. The Alleged Victim testified to her passivity in receiving the Defendant's invitations by referencing the commonality of contacts between the Defendant, herself, and at times other employees at the establishment. (Tr. 02/26/2024, page 9). Moreover, the Alleged Victim testified she thought of the Defendant as family. (Tr. 02/26/2024, page 7).

The Defendant avers that the Commonwealth failed to establish a *prima facie* case to charge him with Count One, Indecent Assault by failing to produce evidence adequate for a showing that indecent contact occurred without the complainant's consent. Based on the facts alleged at the preliminary hearing and the legal arguments produced by both parties, the Court agrees with the Defendant that the Commonwealth failed to produce the evidence necessary to establish a *prima facie* case against the Defendant for Count One, Indecent Assault. Defendant's Petition for Writ of Habeas Corpus is hereby **granted**.

ORDER

And now, this 5th day of November, 2024, upon consideration of the Defendant's Omnibus Pretrial Motion and for the reasons set forth above, the Court orders the following:

1. Motion for Notice in Advance of Trial of any Evidence the Commonwealth Intends to Introduce Pursuant to Pennsylvania Rule of Evidence 404(b) is **GRANTED;**
2. Motion to Correct the Grading of Count Two of the Information Charging Harassment is **GRANTED;**
3. Petition for Writ of Habeas Corpus on Count One, Indecent Assault is **GRANTED.**

By the Court,

Ryan M. Tira, Judge

RMT/asw

CC: Eric Birth, Esq.
Donald Martino, Esq.
Gary Weber, Esq.-Lycoming Reporter