COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-564

COMMONWEALTH

vs.

DARRYL MCCLURE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A hearing judge found that the defendant, Darryl McClure, violated his probation by disseminating harmful material to a minor, in violation of G. L. c. 272, § 28, and by enticing a child under sixteen with the intent to disseminate harmful material to a minor, in violation of G. L. c. 265, § 26C. The defendant argues that the hearing judge erred in denying the defendant the opportunity to subpoena the victim. He also argues that the Commonwealth failed to prove that he committed the offenses. We affirm.

Discussion. 1. Subpoena. "[A] probationer has a presumptive due process right to call witnesses in his or her defense, but . . . the presumption may be overcome by countervailing interests." Commonwealth v. Hartfield, 474 Mass. 474, 481 (2016). In determining whether the presumption has

been overcome, a judge should consider "(1) whether the proposed testimony of the witness might be significant in determining whether it is more likely than not that the probationer violated the conditions of probation, . . . (2) whether, based on the proffer of the witness's testimony, the witness would provide evidence that adds to or differs from previously admitted evidence rather than be cumulative of that evidence . . . ; and (3) whether, based on an individualized assessment of the witness, there is an unacceptable risk that the witness's physical, psychological, or emotional health would be significantly jeopardized if the witness were required to testify in court at the probation hearing." Id. The judge properly weighed these factors here.

He considered that between the police report (which provided a detailed account of the victim's allegations) and the defendant's admissions, there was sufficient evidence regarding the details of the allegations and, further, that any attempt by the defendant to elicit helpful testimony from the victim was purely speculative.

The police report indicated that the defendant called the victim over to him (purportedly seeking help with directions), offered her money, asked her to sit next to him, and showed her pornographic videos. The defendant's admissions, albeit offering innocent explanations for these actions, essentially

corroborated the victim's claims. The defendant admitted to (1) calling the victim over to him (although he said he believed her to be a sex worker), (2) offering her money (although he claims in exchange for help with directions), and (3) watching pornography on his cellular phone in her presence.

The judge also balanced the risk that the victim's testimony would have an adverse effect on her emotional and psychological well-being. The judge considered that this was a child witness who had been sexually accosted and whose mother, through the prosecutor, had indicated that the victim was unwilling to testify in the related criminal proceedings because "there was a lot of stress, and upheaval in the family." The judge factored that this emotional strain was grave enough to prompt the Commonwealth to forgo criminal prosecution of the defendant on serious child sex offenses by taking the extreme measure of entering a nolle prosequi on the underlying charges. On this record, therefore, we see no abuse of discretion in the judge's determination that the potential risk of emotional harm to the victim and her family outweighed the minimal value her testimony could offer to the defendant. The defendant's reliance on Hartfield is misplaced. In that case, where the physical evidence conflicted with a potentially biased victim's claims, the right to confront the witness outweighed the minimal risk of emotional harm. Hartfield, 474 Mass. at 483. There is

no suggestion in this record that the victim, a stranger to the defendant, harbored any such motive to fabricate.

2. Sufficiency of the evidence. To revoke a defendant's probation, the Commonwealth must produce sufficient reliable evidence to warrant a finding of a violation. See Commonwealth v. Morse, 50 Mass. App. Ct. 582, 594 (2000). It must prove the allegations of criminal conduct which form the basis of the violation by a preponderance of the evidence. Commonwealth v. Holmgren, 421 Mass. 224, 226 (1995). The defendant asserts the evidence failed to establish that (1) the victim was enticed; (2) he knew the victim was a minor under the age of sixteen; (3) the materials were harmful to a minor; and (4) he intended their dissemination. We disagree.

"The crime of child enticement is complete when an individual, possessing the requisite criminal intent . . . , employs words . . . to entice (or lure, induce, persuade) someone who is under the age of sixteen, or whom the actor believes is under the age of sixteen, to enter or remain in a[n] . . . outdoor space." Commonwealth v. Disler, 451 Mass. 216, 222 (2008).[1] Here, the Commonwealth established that the

[1] Contrary to the defendant's assertions, there is no requirement that the defendant make arrangements to lure the victim to a location or that the location must be a nonpublic space. See Disler, 451 Mass. at 222 ("the statute does not require . . . any type of agreement, reliance, or other action on the part of the person who receives the enticement"); G. L. c. 265, § 26C

defendant repeatedly asked the victim to sit next to him, offered her money, and requested that she stay. These facts amply supported the element of enticement. Id.

The evidence also sufficiently established that he knew the victim was under the age of sixteen. The Commonwealth introduced photographs of the victim depicting her youthful appearance at the time of the incident. This evidence alone sufficed to establish the defendant's knowledge of her age. See Commonwealth v. Pittman, 25 Mass. App. Ct. 25, 28 (1987) (additional evidence of age is not required in cases where age is made apparent by physical appearance). Here, however, there was additional evidentiary support for that element. The defendant referred to the victim as "niña," (meaning a female child in the Spanish language)[2] and after showing the victim the pornographic material, he questioned whether she was "too young for that, right?" See Disler, 451 Mass. at 230-231 (finder of fact permitted to use defendant's comments and questions towards victim to conclude that defendant believed victim was underage).

The record also supported a determination that the material was harmful to a minor, and that the defendant intentionally displayed them to the minor victim. The victim reported that

---

(criminalizing enticing a child to "enter, exit or remain within any . . . outdoor space" [emphasis added]).

[2] Concise Oxford Spanish Dictionary 964 (C.S. Carvajal, J. Horwood & N. Rollin eds., 2004).

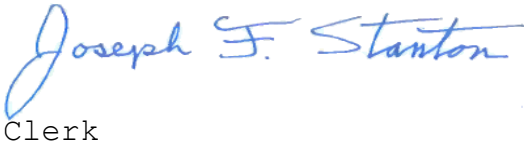
the images and videos depicted naked women, whom the victim described as "prostitutes" doing "serious stuff." The defendant also admitted to watching pornography during his encounter with the victim. This sufficiently established that the material was harmful to a minor. See Commonwealth v. Belcher, 446 Mass. 693, 694 (2006) (affirming conviction where victim testified that defendant had shown her "adult" videotapes and photographs depicting sexual activity). Last, the defendant repeatedly asked the victim to sit and tried to prolong the encounter, admitted that he was playing the video while he was talking to her, said she was "too young for that," and later texted "my bad." The judge was free to credit this evidence over the defendant's claim of accident. Therefore, we conclude the element of intent was also factually supported. See Commonwealth v. LaPerle, 19 Mass. App. Ct. 424, 427 (1985) ("Intent is a factual matter that may be proved by circumstantial evidence"). Accordingly, we see no abuse of discretion in the judge's finding of a violation of probation.[3]

[3] For all the same reasons, the defendant's challenge to a violation based upon proof of his dissemination of harmful material to a minor also fails.

Commonwealth v. Bukin, 467 Mass. 516, 521 (2014).

Order revoking probation affirmed.

By the Court (Rubin, Maldonado & Shin, JJ.[4]),



Clerk

Entered: September 9, 2020.

[4] The panelists are listed in order of seniority.