NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DUSTY ERRON FULKERSIN	:	
Appellant	:	No. 1591 MDA 2025

Appeal from the Judgment of Sentence Entered July 25, 2025
In the Court of Common Pleas of Luzerne County Criminal Division at No(s): CP-40-CR-0002338-2024

BEFORE: PANELLA, P.J.E., NICHOLS, J., and NEUMAN, J.

MEMORANDUM BY NICHOLS, J.: **FILED: NOVEMBER 19, 2026**

Appellant Dusty Erron Fulkersin appeals his convictions of criminal solicitation to commit statutory sexual assault, criminal attempt of unlawful contact with a minor, criminal solicitation to commit involuntary deviate sexual intercourse (IDSI), and criminal use of a communication facility.[1] On appeal, Appellant challenges the sufficiency of the evidence. After careful review, we affirm.

> The trial court set forth the following factual and procedural history:
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> At 9:58 am on May 19, 2024, Eric Robinson [Robinson] received a message from [Appellant] on his Grindr account. [Robinson] described Grindr as an application for gay individuals to meet and have sex. [Appellant] identified himself as Dusty and provided [Robinson] with a photograph of himself. The profile name used by [Appellant] was "w****s*****f***". [Appellant] was interested in meeting [Robinson] that morning. Although

[1] ***See*** 18 Pa.C.S. §§ 902(a), 901(a), 902(a), and 7512(a), respectively.

> [Robinson] advised [Appellant] that he was 15 years old, that did not deter [Appellant]. [Appellant] requested nude photographs so [Robinson] sent him a picture of a decoy who was more than 18 years of age but appeared to be younger. [Robinson] was[, in fact,] 31 years of age on May 19, 2024.
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> After receiving the photograph, [Appellant] requested the location of [Robinson] and whether [Robinson] would perform oral sex on him. [Appellant] then asked [Robinson] to come to Edwardsville, Pennsylvania[,] near Ono's[,] which is a bar and restaurant located in Kingston, Pennsylvania. [Appellant] then told [Robinson] he was on Zerby Avenue and he live[d] right next to Ono's. [Appellant] told [Robinson] he wished he could see his [penis] and to let him know when [Robinson] arrived. [Appellant] . . . asked if [Robinson] wanted to [engage in specific sex acts.] [Appellant] then sent three photographs of his anal area to [Robinson] and indicated that the sex could not occur in the house where [Appellant] was located but [Appellant] had a wooded place between the railroad tracks where they could go.
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> After [Appellant and Robinson] discuss[ed] several meeting locations, [Robinson] located [Appellant] sitting on the porch of a house on Zerby Avenue. [Robinson] used his phone to record the confrontation he had with [Appellant]. Later that evening, [Robinson] proceeded to the Kingston Police Department and provided an officer with the information he possessed regarding the [Appellant's] desire to engage in sexual activity with a 15 year old child.
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> A criminal complaint was filed against [Appellant] on June 12, 2024. [Appellant] maintained his innocence and proceeded to trial. Following a one day trial held on March 11, 2025, the jury found the [Appellant] guilty of all four charges.

Trial Ct. Op., 3/7/25, at 1-2 (some formatting altered).

On July 17, 2025, Appellant was sentenced to an aggregate sentence of 136 to 272 months of incarceration. ***See id.*** at 2-3. Appellant filed a motion for post-verdict relief which the trial court denied on November 3, 2025. ***See id.*** at 3. Appellant filed a timely notice of appeal and both Appellant and the trial court complied with Pa.R.A.P. 1925.

On appeal, Appellant raises the following issues for our review:

1. Criminal Solicitation - Statutory Sexual Assault: Appellant alleges that the Commonwealth failed to submit evidence that he requested another person to engage in specific conduct or made an [] attempt to commit such crime, or the alleged victim was under the age of 1[6], and there was no attempt to actually communicate with a minor.

2. Criminal Attempt - Unlawful Contact with a Minor: Appellant alleged that the Commonwealth failed to submit sufficient evidence to prove that [] Appellant committed a substantial step towards the commission of a crime when in fact, [] Appellant renounced his alleged criminal attempt by refusing to meet with the "vigilante victim" and was actually pursued by the vigilante.

3. Criminal Solicitation - IDSI Person Less Than 16 Years of Age: Appellant alleges the Commonwealth failed to submit sufficient evidence to prove that he either intended or requested another person that he believed to be a minor, to engage in the crime of [IDSI]. Any contact initiated by [] Appellant was made on Grindr, a platform intended for persons over the age of 18.

4. Criminal Use of a Communication Facility: Appellate alleges that the Commonwealth failed to submit sufficient evidence that he had any intention to communicate with a minor, and that he renounced any alleged criminal activity by refusing to meet with the alleged "vigilante victim."

Appellant's Brief at 1-2 (some formatting altered).

In his sufficiency arguments related to his convictions for inchoate crimes, Appellant identifies three factors that he argues the jury was required to consider: 1) that Robinson was not, in fact, a 15-year-old boy, but rather a 31-year-old man; 2) whether Appellant took a "substantial step" towards the commission of the charged offenses; and 3) whether Appellant's conduct established that he had "renounced" his criminal intent. ***See id.*** at 7-10.

First, Appellant argues that the Commonwealth failed to submit evidence that he requested a minor to engage in specific conduct, that Robinson was a minor, or that Appellant intended to actually communicate with a minor. ***See id.*** at 7. Because Robinson was, in fact, a 31-year-old man, Appellant argues that no minor was involved and therefore his conduct was excepted from the offense of criminal solicitation pursuant to 18 Pa.C.S. § 904(b). ***See id.*** at 7-8. Appellant notes that the contact he initiated and which ensued with Robinson all occurred while on the platform/application Grindr, which is meant for individuals at least 18 years of age. ***See id.*** at 10. Appellant contends that, although there "may have been random mention of [Robinson] being a 15-year-old boy," Appellant believed at all times he was communicating with an adult due to Robinson's profile citing an age of 18. ***See id.*** at 10-11. Appellant further contends that because he refused "to provide Robinson with his address, refused "to meet Robinson," and that Robinson "pursued the meeting some one and a half hours" after their last contact on Grindr, he did not take a substantial step towards the commission of the offenses and also that he had renounced any possible criminal intent. ***See id.*** at 8, 10.

Lastly, Appellant argues that his conviction for criminal use of a communication facility was not supported by sufficient evidence because the Commonwealth had failed to establish that he had communicated with a minor. ***See id.*** at 11.

A challenge to the sufficiency of the Commonwealth's evidence presents a pure question of law for which our standard of review is *de novo* and our scope of review is plenary. ***See Commonwealth v. Boyer***, 347 A.3d 689, 699 (Pa. Super. 2025). We view the evidence in the light most favorable to the Commonwealth as verdict winner, drawing all reasonable inferences in the Commonwealth's favor, to determine whether the evidence was sufficient to enable the fact-finder to find every element of the offense beyond a reasonable doubt. ***See Commonwealth v. Widmer***, 744 A.2d 745, 751 (Pa. 2000). In reviewing a sufficiency claim, however, we need only address the elements of the crime specifically challenged by the appellant. ***See Commonwealth v. Cain***, 906 A.2d 1242, 1244 (Pa. Super. 2006). Further, we may not weigh the evidence and substitute our judgment for the fact-finder. ***See Commonwealth v. Cahill***, 95 A.3d 298, 300 (Pa. Super. 2014).

A person commits criminal solicitation when, "with the intent of promoting or facilitating its commission[,] he commands, encourages or requests another person to engage in specific conduct which would constitute [a] crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission." 18 Pa.C.S. § 902(a). Our Supreme Court has stated that "[t]he purpose of the solicitation statute is to hold accountable those who would command, encourage, or request the commission of crimes by others." ***Commonwealth v. Hacker***, 15 A.3d 333, 336 (Pa. 2011). "The statute requires proof of such encouragement, but with the intent to accomplish the acts which comprise the crime, not necessarily

with intent specific to all the elements of that crime, much less those crimes with elements for which scienter is irrelevant." ***Id.***

In evaluating whether criminal solicitation occurred, Section 904 of the Crimes code provides:

> **Incapacity, irresponsibility or immunity of party to solicitation or conspiracy**
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> **(a) General rule**.--Except as provided in subsection (b) of this section, ***it is immaterial to the liability of a person who solicits*** or conspires with another to commit a crime that:
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> > (1) ***he or the person whom he solicits*** or with whom he conspires ***does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them doe*****s**; or
> >
> > (2) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.
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> **(b) Exception.--**It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under section 306(e) of this title (relating to status of actor) or section 306(f)(1) or (2) of this title (relating to exceptions).

18 Pa.C.S. § 904 (emphasis added).

This Court discussed Section 904(b)'s applicability in ***Commonwealth v. John***, 854 A.2d 591, 596 (Pa. Super. 2004), finding the exception did not apply. In our analysis, we distinguished ***John*** from ***Commonwealth v. Fisher***, 627 A.2d 732, 734 (Pa. Super. 1993), in which the Court relied upon the exception to overturn a conviction. In ***John***, a defendant convicted of criminal solicitation to commit several sexual offenses with a minor argued for

application of the Section 904 exception to his convictions because the defendant, under the belief he was in communication with a 13-year-old minor, had, in fact, been communicating with an adult law enforcement officer. ***See id.*** The Court distinguished the applicability of the exception as follows:

> In ***Fisher***, police set up a sting operation by using the beeper of a known drug dealer. When police received a call from the dealer's customer, they pretended to arrange a drug sale. Once the customer arrived at a hotel room to make his purchase, police arrested him and charged him with solicitation to deliver a controlled substance. On appeal, a panel of this court held that [Section] 904(b) precluded the conviction because even if things were as the customer believed and the drug deal had proceeded as he had planned, the customer would not have been guilty of drug delivery, but only of possession. The panel vacated the judgment of sentence for solicitation to deliver drugs.
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> This case presents the opposite scenario. **If things were as** [**the defendant**] **believed**, that is, if a 13[-]year-old girl had been waiting for him at the convenience store in Delaware County and the two then proceeded, as he had requested, to engage in sex, he indeed would have been guilty of sexual abuse of a child, IDSI[,] and statutory sexual assault.

Id. (citations omitted, some formatting altered, emphasis added). This Court rejected the defendant's argument for applying the exception and affirmed the defendant's solicitation conviction, stating: "Clearly, the fact that the person [defendant] solicited was not a 13[-]year[-]old girl, as he believed, affords him no defense. The statute is unambiguous and [defendant] simply is not entitled to relief on his claim." ***Id.*** at 597 (some formatting altered).

In addressing renunciation of a solicitation offense, Section 902 of the Criminal Code states:

> **Renunciation.--**It is a defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.

18 Pa.C.S. § 902(b).

The offense of statutory sexual assault occurs when a 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." ***See*** 18 Pa.C.S. § 3122.1(b). Appellant was also charged with solicitation referencing IDSI, which the Crimes Code defines, in relevant part, as follows:

> **(a) Offense defined.**--A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant:
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> * * *
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> (7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.

18 Pa.C.S. § 3123(a)(7).

The trial court summarized the evidence presented by the Commonwealth at trial as follows:

> [Appellant] was in contact with an individual [who] he believed was a 15 year old boy. [Appellant] indicated the type of sexual activity they would engage in and set up a meeting at a location near his residence. [Appellant] was present at the location when the individual he believed to be a 15 year old boy arrived.
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> * * *

> The fact that the contact initiated by [Appellant] was made on Grindr[,] which is a platform for persons over 18 years of age[,] was irrelevant once [Appellant] was told he was communicating with a 15 year old boy.

Trial Ct. Op., 1/12/26, at 6, 8 (some formatting altered).

Here, like the defendant in ***John***, the evidence reflects that Appellant was in contact with Robinson on Grindr; that Robinson informed Appellant that he was a minor, specifically a 15-year-old boy; and, after receiving this information, Appellant made arrangements to meet with Robinson for the purpose of engaging in sexual intercourse. ***See*** N.T. Trial, 8/14/25, at 45-47. Had Appellant achieved his intent – an intent established by the Commonwealth's evidence of Appellant's own conduct – Appellant would have engaged in sexual intercourse with a 15-year-old boy. Section 904(b) excludes from the offense of criminal solicitation conduct that, even if successfully executed, would not be a crime. ***See*** 18 Pa.C.S § 904(b). Accordingly, the jury had sufficient evidence to find that Appellant believed Robinson to be below 16 years of age when Appellant invited Robinson to engage in sexual intercourse; therefore, there was sufficient evidence for the jury to convict Appellant of criminal solicitation of statutory sexual assault and criminal solicitation of IDSI. ***See*** Pa.C.S. §§ 904(a), 3122.1(b), 3123(a)(7); ***Widmer***, 744 A.2d at 751; ***Cain***, 906 A.2d at 1244; ***see also John***, 854 A.2d at 596.

Next, in considering whether there was sufficient evidence of criminal attempt of unlawful contact with a minor, we note that a person commits

criminal attempt "when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." 18 Pa.C.S. § 901(a). An attempt offense has two elements: (1) the actor intended to commit an offense; and (2) the actor took a substantial step toward completion of the offense. ***See Commonwealth v. Henley***, 474 A.2d 1115, 1118 (Pa. 1984). The substantial step test "concentrat[es] on the acts the defendant has done and does not . . . focus on the acts remaining to be done before the actual commission of the crime." ***Commonwealth v. Zingarelli***, 839 A.2d 1064, 1069 (Pa. Super. 2003) (citation omitted). Further, "[t]he defendant need not actually be in the process of the crime . . . in order to be guilty of criminal attempt." ***Id.*** (citation omitted). "[I]mpossibility (factual or legal) is not a defense if the completed offense could have occurred had the circumstances been as the accused believed them to be." ***Henley***, 474 A.2d at 1118; ***see also*** 18 Pa.C.S. § 901(b)(a) (providing that an attempt offense may still be found even if the defendant misapprehended the circumstances such that "it would have been impossible for the accused to commit the crime attempted").

In the instant case, the Commonwealth charged Appellant with criminal attempt—unlawful contact with a minor. A person is guilty of 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 following provisions under this title, and either the person initiating the contact or the

person being contacted is within this Commonwealth[.]" ***See*** 18 Pa.C.S. § 6318(a).

Section 901 of the Crimes Code defines renunciation in the context of the attempt offense as:

> (1) In any prosecution for an attempt to commit a crime, it is a defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if the mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.
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> (2) A renunciation is not "voluntary and complete" within the meaning of this subsection if it is motivated in whole or part by:
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> > (i) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose; or
> >
> > (ii) a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective.

18 Pa.C.S. § 901(c).

Here, the trial court summarized the Commonwealth's evidence of the attempt offense as follows:

> [Appellant] attempted to intentionally be in contact with a minor for the purpose of engaging in oral sex. Although [] Robinson was 31 years old, [Appellant] believed he was a 15 year old boy. [Appellant] alleges he renounced his alleged criminal attempt by refusing to meet with [Robinson]. However, . . . [Appellant] was waiting on his porch when [] Robinson confronted him.

Trial Ct. Op., 1/12/26, at 7-8 (some formatting altered).

After our review of the record, we conclude that the Commonwealth presented sufficient evidence to allow the jury to find beyond a reasonable doubt that Appellant was guilty of attempting to commit unlawful contact with a minor. ***See Henley***, 474 A.2d at 1118; ***Zingarelli***, 839 A.2d at 1069. The Commonwealth's evidence established that Appellant had been in contact with Robinson, whom he believed to be a 15-year-old boy, and proposed to engage in specific sex acts with Robinson, exchanged explicit photos with Robinson, and provided his whereabouts with enough specificity for Robinson to find him sitting on his front porch next to Ono's. The jury, as fact finder, was free to believe this evidence to determine that Appellant's conduct constituted a substantial step towards the objective of contacting a minor for the purpose of engaging in sexual acts. ***See Zingarelli***, 839 A.2d at 1069; ***Henley***, 474 A.2d at 1118; 18 Pa.C.S. § 901(a). The record further reflects that Appellant failed to affirmatively raise a defense of renunciation at trial; accordingly, he has not preserved this claim for appeal and it is therefore, waived. ***See Commonwealth v. Wanner***, 158 A.3d 714, 717 (Pa. Super. 2017) (finding waiver when the defendant failed to present an affirmative defense at trial); Pa.R.A.P. 302(a) (providing that "[i]ssues not raised in the trial court ae waived and cannot be raised for the first time on appeal").[2] Accordingly,

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[2] Even if not waived, we would conclude that the record reflects that the Commonwealth presented sufficient evidence for the jury to conclude that Appellant's conduct – namely, Appellant's lack of engagement on Grindr for one and a half hours following hours of communication and declining to give
(Footnote Continued Next Page)

Appellant's sufficiency claim challenging his attempt conviction is without merit.

Appellant's final claim on appeal is that the evidence was insufficient to sustain his conviction for criminal use of a communication facility. ***See*** Appellant's Brief at 11. Section 7512 of the Crimes Code defines criminal use of a communication facility as:

> (a) Offense defined.--A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title[.]
>
> * * *
>
> (c) Definition.--As used in this section, the term "communication facility" means a public or private instrumentality used or useful in the transmission of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part, including, but not limited to, telephone, wire, radio, electromagnetic, photoelectronic or photo-optical systems or the mail.

18 Pa.C.S. § 7512(a)(c).

Appellant contends that "the Commonwealth failed to submit sufficient evidence that he communicated with a person he believed to be a minor." ***See*** Appellant's Brief at 11. As explained above, however, the record reflects that the Commonwealth proffered evidence that Appellant was informed that

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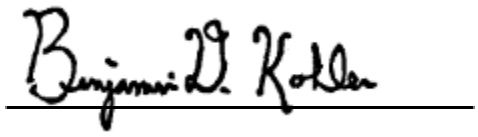
Robinson his home address – fell short of the "voluntary and complete" standard required to find renunciation under the statute. ***See*** 18 Pa.C.S. § 901(c); Trial Ct. Op., 1/12/26, at 7-8.

Robinson was a minor and, accordingly, Appellant's challenge to the criminal use of a communication facility conviction is without merit.

After our review of the evidence presented at trial, viewed in the light most favorable to the Commonwealth as verdict winner, we conclude that the jury had sufficient evidence to find, beyond a reasonable doubt, the elements of all four offenses challenged herein. ***See Widmer***, 744 A.2d at 751; ***see also Boyer***, 347 A.3d at 699; ***Cahill***, 95 A.3d at 300; ***Cain***, 906 A.2d at 1244. For these reasons, Appellant is not entitled to relief, and we affirm the judgment of sentence.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/19/2026