COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT DEPARTMENT
CRIM. NO. 2002-

COMMONWEALTH)
)
V.)
)
RICHARD L)

DEFENDANT'S MOTION TO DISMISS COUNT I

Defendant Richard L, pursuant to Commonwealth v. McCarthy, 385 Mass. 160 (1982), hereby moves to dismiss Count I (Attempted Rape of a Child) of the indictment.

Factual Background[1]

It is alleged that on November 26, 2001 the defendant began a series of computer communications with Matthew Murphy, a trooper with the Massachusetts State Police. These communications were exchanged in an on-line chat room called Littlegirlssexchat. Trooper Murphy used the name of "Nikki" and identified Nikki as a 14 year-old girl from Watertown.

Between November 26th and December 19th, Trooper Murphy, using the Nikki persona, engaged in numerous on-line chat room exchanges with "Dickie Boy," the alleged screen name of the defendant.[2] The exchanges were sexual in nature. In addition to exchanging chat, Dickie

[1] As explained hereafter, any allegations and Grand Jury testimony not explicitly referenced in the indictment itself are irrelevant to the court's evaluation of whether the indictment sufficiently alleges a proximate overt act. This factual background, to the extent it goes beyond the specific acts alleged in the indictment, is provided to familiarize the court with the nature of this case and in support of the defendant's contention that the Commonwealth cannot satisfy the elements of the crime of rape of a child because there was no minor. A copy of the Grand Jury minutes will be offered to the Court at oral argument.

[2] The chat exchanges referenced in this motion were a subject of Trooper Murphy's Grand Jury testimony.

boy sent Nikki numerous pornographic pictures, some of which allegedly portray girls under the age of 18 engaged in sex acts.

On November 27th the chat exchanges between Dickie Boy and Nikki included discussion of their engaging in sex at a motel or at Dickie Boy's apartment.

On December 5th the chat exchanges included Dickie Boy suggesting that they go to a closed computer school in an office park in Woburn to which he had the keys.

On December 15th Dickie Boy and Nikki chatted about meeting at the Fleet Center on Thursday or Friday at 10:00 a.m. by the Dunkin' Donuts. Dickie Boy wrote: "I'll walk in and be near the Dunkin' Donuts. When you see me, smile and blow me a kiss. Then I'll walk out and you follow me to where I'm parked."

In a later exchange the same day, Dickie Boy told Nikki that he would bring an air mattress and a blanket.

On December 20th the defendant was placed under surveillance by the State Police, and was observed leaving his home in Framingham and arriving at North Station, where he parked in a garage. He entered the Fleet Center building and was arrested as he walked by the Dunkin' Donuts:

Q And then he entered the Dunkin' Donuts?

A Yeah.

Q Or the vicinity of the Dunkin' Donuts?

A Walked.

Q Walked toward the Dunkin' Donuts, at which point he was placed under arrest?

A He walked by the Dunkin' Donuts and then yes.

Grand Jury, 2/26/02, Testimony of Trooper Murphy, p. 29.

The defendant was indicted on March 13, 2002. A copy of the indictment for Attempted Rape of a Child, Count I, is provided at Attachment A.

ARGUMENT

I. COUNT I OF THE INDICTMENT IS INSUFFICIENT BECAUSE IT DOES NOT ALLEGE A PROXIMATE OVERT ACT

"The Massachusetts law of criminal attempt harks back to Justice Holmes." Commonwealth v. Hamel, 52 Mass.App.Ct. 250, 752 N.E.2d 808 (2001.) In two seminal opinions, Commonwealth v. Peaslee, 177 Mass. 267, 59 N.E. 55 (1901) and Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897), Justice Holmes examined G.L. c. 210, §8, a predecessor of G.L. c. 274, §6. These opinions "have been regularly cited and respected," and are relied upon by the Supreme Judicial Court in its most recent decision reviewing the law of criminal attempt, Commonwealth v. Ortiz, 408 Mass. 463, 560 N.E.2d 698 (1990). Hamel at 259 n.14.

As stated by Justice Holmes in Peaslee, and as recently reaffirmed by the Court in Ortiz, in evaluating the sufficiency of an indictment for criminal attempt the court must focus only upon the allegations which are explicitly stated in the indictment itself. Ortiz, 408 Mass. at 472; Peaslee, 177 Mass. at 274. The court may not consider any other evidence presented to the Grand Jury, nor may the Commonwealth rely upon any other evidence which it could present at trial. Id. Accordingly, the only alleged acts which may be considered by the court in weighing the sufficiency of the indictment are that Mr. L,

> . . . did travel from Framingham to the Dunkin' Donuts at the Fleet Center in Boston with an air mattress and blankets with the intent

> to engage in sexual intercourse with "nikki-mass," whom he believed to be 14 years of age, at an unused school in Woburn . . .[3]
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> Indictment, Count I, 2/13/02.

These alleged acts are insufficient to support the indictment for attempted rape.

In Commonwealth v. Ortiz, 408 Mass. 463, 560 N.E.2d 698 (1990), the Court evaluated the evidentiary requirements necessary to support a conviction for of an attempted felony. The case involved a feud between the Ortiz family and the Rodriguez family. The evidence established that Eddie and Juan Ortiz, brothers, believed that Jose Rodriguez had come to their father's apartment with a gun intending to shoot Eddie. The Ortiz brothers took a loaded .357 Magnum, additional ammunition, got in a car and went to find Jose Rodriguez. Intending to shoot him, the Ortiz brothers drove around Rodriguez's block six times. When they could not find Rodriguez, they drove back toward their father's apartment. On the way they were stopped by police, and an altercation occurred in which two policemen were killed by Eddie Ortiz.

The Court addressed the question of whether the evidence was sufficient to support a conviction on the charge of attempted assault and battery by means of a dangerous weapon on Jose Rodriguez. The Court noted that the attempt statute, G.L. c. 274, §6, "requires not only an intention to commit the underlying offense . . . but also an overt act toward its commission." Id. at 470 (supporting citations omitted). The Court held that the evidence was insufficient to support the conviction:

> . . . even though the evidence would have warranted a finding that the defendant intended and prepared for an assault and battery by means of a dangerous weapon on Jose Rodriguez, the evidence was insufficient to show a violation of G.L. c. 274, §6, because it

[3] These allegations are contested. At trial the defendant would offer evidence that it is common for individuals participating in sex fantasy chat rooms to use false personas, particularly with respect to their age. In addition, the circumstances of the defendant's arrest indicate that he changed his mind about meeting Nikki, did not attempt to find her, and was walking away from the meeting place when arrested. Trooper Murphy's Grand Jury testimony was that the defendant was arrested after "he walked by the Dunkin' Donuts." Grand Jury, 2/26/02, p. 29.

> did not warrant a finding of an overt act for which the defendant was responsible.
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> Id. at 472.

The facts in Ortiz came far closer to the accomplishment of the intended crime than the allegations against Mr. L. In both cases the defendants got into cars and drove off intending to find their victims. In Ortiz the defendant brought a loaded revolver; Mr. L brought an air mattress and blankets. The efforts made by Ortiz to find his intended victim - - driving around his block six times - - went beyond the efforts of Mr. L, who was arrested not while he was waiting for Nikki, but after he had "walked by the Dunkin' Donuts." Grand Jury, 2/26/02, Testimony of Trooper Murphy, p. 29. Moreover, for the purposes of this motion, the last act of Mr. L's which the Commonwealth may even argue constituted an overt act was his driving from Framingham to the Dunkin' Donuts, as this is the last conduct alleged in the indictment. The planned shooting of Jose Rodriguez failed because he could not be found prior to the defendant's altercation with police; in a light most favorable to the Commonwealth, the planned rape of Nikki failed because Mr. L was arrested before he could find the non-existent girl. If Ortiz had found his victim, he needed only to aim and shoot. Mr. L would have had to speak to Nikki, drive her from Boston to Woburn, decide when confronted with an actual 14 year-old whether or not he wanted to go through with his alleged desire to have sex with her, get her clothes off, and then rape her.

In Commonwealth v. Peaslee, 177 Mass. 267, 59 N.E. 55 (1901), Chief Justice Holmes considered how proximate the overt act must be to the completion of the underlying offense to constitute a criminal attempt. As summarized by the Court in Ortiz, the evidence in Peaslee,

> . . . showed that "the defendant had constructed and arranged combustibles in the building in such a way that they were ready to be lighted, and if lighted would have set fire to the building and its

> contents . . . The defendant offered to pay a young man in his employment if he would go to the building . . . and carry out the plan. This was refused. Later the defendant and the young man drove toward the building, but when within a quarter of a mile the defendant said that he had changed his mind and drove away. This is as near as he ever came to accomplishing what he had in contemplation." Id. at 271, 59 N.E. 55.
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> Ortiz, 408 Mass. at 471.

Examining the scope of the criminal attempt statute, Chief Justice Holmes stated:

> The statute does not punish every act done toward the commission of a crime, but only such acts done in an attempt to commit it. The most common types of an attempt are either an act which is intended to bring about the substantive crime and which sets in motion natural forces that would bring it about it the expected course of events but for an unforeseen interruption, as in this case if the candle had been set in its place and lighted but had been put out by the police, or an act which is intended to bring about the substantive crime and would bring it about but for a mistake of judgment in a matter of nice estimate or experiment, as when a pistol is fired at a man but misses him, or when one tries to pick a pocket which turns out to be empty. In either case the would-be criminal has done his last act . . . That an overt act although coupled with an intent to commit the crime commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations many amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor although there is still a *locus penitenitae* [opportunity to withdraw] in the need of a further exertion of the will to complete the crime.
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> Peaslee, 177 Mass. at 271-272.

In reversing the conviction, the Court in Peaslee held that although the evidence established the defendant's intent to set a fire, it was insufficient for conviction because it did not show that he had that intent "at a time and place where he was able to carry it out." Id. at 273-274. The circumstances of Mr. L's arrest were similar. Even if it was his intent to meet and rape Nikki at the time he was arrested at the Fleet Center, it was not a time or a place where he

would have been able to carry out the crime. See also, Commonwealth v. Dixon, 34 Mass. App. Ct. 653, 657, 614 N.E.2d 1027 (1993) ("The overt act required for an attempt must, after all, be more than preparation and must come very near to accomplishment of the result."); Commonwealth v. Gosselin, 356 Mass. 116, 121, 309 N.E.2d 884 (1974) ("The overt acts alleged must approach the achievement of the substantive crime near enough to warrant criminal liability in view of such circumstances as the gravity of the crime, the uncertainty of the result, and the seriousness of any threatened danger.); Commonwealth v. Kennedy, 170 Mass. 18, 20-22, 48 N.E. 770 (1897).

The Court in Peaslee noted that in some circumstances an indictment for an attempt could be viable where the defendant's last act did not occur at the time and place of the substantive crime. However, in such a case the Commonwealth must explicitly allege in the indictment a final overt act "sufficient to accomplish the [criminal] end." Id. at 274. Thus, Holmes wrote that the defendant properly could have been charged with attempted arson if the indictment had alleged that he had solicited someone else to set the fire after he had prepared the room with an accelerant. Such an indictment would have identified the last overt act necessary to accomplish the arson. Having dispersed turpentine in the room, and obtained the agreement of someone else to set the fire, there was nothing more the defendant needed to do to accomplish the crime. Holmes contrasted this example with those cases "when further acts on the part of the person who has taken the first steps are necessary before the substantive crime can come to pass . . . [and] there is still a chance that the would-be criminal may change his mind." Id. at 271-272.

The last act alleged in the indictment is that Mr. L traveled to the Dunkin' Donuts intending to have sex with Nikki. Unlike the man who spreads an accelerant and hires an

arsonist, Mr. L's act of driving to meet Nikki did not set "in motion natural forces that would bring . . . about [the substantive crime] in the expected course of events . . ." Id. at 271. Rather, Mr. L had much more to do and many more decisions to make if he was going to carry out the crime. He would have had many chances and lots of time to "change his mind." See, id. at 272.

The analogies employed by Chief Justice Holmes further evince the inadequacy of the allegations against Mr. L. When a man fires a gun, intending to shoot someone, he has committed an overt act sufficient to achieve the harm. The fact that he misses does not negate this intent. Similarly, when a pickpocket puts his hand into the intended victim's pocket, he has begun the ultimate physical act necessary to complete the crime. If he withdraws an empty hand because the victim has no wallet, this failure to complete the crime does not throw into doubt the pickpocket's criminal intent. Compare these examples to the allegations against Mr. L. There is no similar proximity in time or place. When the shooter pulls the trigger, or the pickpocket reaches into his victim's pants, we know that they have decided to go through with the crime. Do we know what Mr. L would have done if he had met a 14 year-old at Dunkin' Donuts? The distance in place, time and state of mind between wanting to have sex with a minor, making plans to have sex with a minor, going to meet a minor hoping to have sex with her, and then actually being confronted with a 14 year-old girl, driving her from Boston to Woburn, and raping her is enormous.

In Hamel, 52 Mass. App. Ct. 250, 752 N.E.2d 808 (2001), the Appeals Court questioned whether the allegation that a defendant had solicited someone else to commit a crime could be sufficient to support an indictment for criminal attempt. The court theorized that Holmes in Peaslee may have meant that such an allegation could support an indictment only for criminal solicitation. Hamel at 258 n.9.

The defendant in Hamel, an inmate, wanted to kill several people. He solicited two undercover officers posing as hitmen. He directed them to a field containing $20,000 of marijuana where they could harvest partial advance payment. He sent them a bill of sale for his motorcycle. He provided detailed drawings of the homes and rooms where the intended victims lived. He provided their schedules. And he repeatedly confirmed that he wanted the "hitmen" to go through with the murders. Yet, the Appeals Court concluded that its reversal of the attempt conviction was not even a close call: "It is hardly necessary to say that there was nothing in the conduct of the defendant . . . that could be found to reach the level of overt act" required. Id. at 260.

The Hamel court approved of the model jury instruction used by the trial judge which required the Commonwealth to prove,

> "[t]hat the defendant took an overt act toward committing the crime, which was part of carrying out the crime and came reasonably close to actually carrying out the crime . . ." The overt act must also be a real step toward **carrying out** the crime. Preliminary preparations to commit a crime are not enough. The overt act has to be more of a step toward actually committing the crime, after all the preparations have been made. It must be the sort of act that you could reasonably expect to trigger a natural chain of events that will result in the crime, unless some outside factor intervenes."
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> Id. at 259-260 (emphasis in original) (quoting Instruction 5.02 and Supplemental Instruction of the Model Jury Instructions (1995)).

The court concluded that the defendant's soliciting, conspiring with and paying the "hitmen" did not come "close to or [form] part of any physical perpetration of any murders." Id. at 256, 260. It is equally clear that Mr. L's driving to the Dunkin' Donuts with the intention of meeting and having sex with a minor, did not come close to or form part of the physical act of rape.

Commonwealth v. Dixon, 34 Mass.App.Ct. 653, 614 N.E.2d 1027 (1973), similarly establishes that Mr. L's alleged desires and preparations did not constitute an overt act sufficient to support the charge of attempted statutory rape. The court considered whether assault and battery is a lesser included offense within the crime of attempted murder by strangulation, and whether such an attempt charge could be proven without evidence of physical force. The court stated that, "it is very difficult to hypothesize overt conduct that would not involve an offensive touching." Id. at 657-58. The court concluded that an attempt charge might be viable where strangulation was "plainly imminent" and a battery was interrupted by an external event. As an example, the court imagined "a case in which a perpetrator, intending to cause a person's death, sneaked up behind the person with a garroting cord and, just as the perpetrator reached his arms over the person's head, someone burst into the room and interrupted the attempt." Id. at 657 n.3. The imminence of harm and proximity to the completed crime in this example stand in sharp contrast to the remote allegations of preparations made against Mr. L.

II. THE EXISTENCE OF A VICTIM UNDER THE AGE OF 16 IS AN ESSENTIAL ELEMENT OF THE CRIME OF RAPE OF A CHILD AND WITHOUT SATISFYING THIS ELEMENT THERE CAN BE NO ATTEMPT

The offense of statutory rape, G.L. c. 265, §23, has two elements. The Commonwealth must prove "(1) sexual intercourse or unnatural sexual intercourse, with (2) a child under sixteen years of age." Commonwealth v. Miller, 385 Mass. 521, 522, 432 N.E.2d 463 (1982),

An attempt charge may be brought when there is a proximate overt act towards the commission of a crime, and the crime is not accomplished through failure or interruption. Commonwealth v. Dixon, 34 Mass.App.Ct. 653, 655, 614 N.E.2d 1027 (1993). In this case, however, the crime of statutory rape could never have occurred, regardless of Mr. Landau's arrest, because there was no potential victim. Where the intended crime is a legal impossibility,

the act alleged to be the attempt has no likelihood of realizing the object and no criminal attempt can be found. See, Perkins and Boyce, Criminal Law, 3d Ed. (Foundation Press, Inc. 1982), Ch. 6, § 3(A)(5), p. 632.

In Hamel, 52 Mass. App. Ct. at 260, the court noted that a defendant who attempts to solicit a hitman may still be convicted of attempt even if the hitman was an undercover officer and the intended murder was never a risk, so long as there was a sufficient overt act. But this example is distinguishable. The common-law crime of solicitation to commit a felony does not contain any element relating to the nature of the person solicited. It is a crime to solicit anyone to commit a felony, whether the defendant is speaking to a real hitman or an imposter. In contrast, statutory rape can only occur if there is a victim under the age of 16. Since there was no potential victim, an essential element of the crime of statutory rape was missing and completion of the crime was impossible.

CONCLUSION

For the foregoing reasons, Count I of the indictment should be dismissed.

Richard L
By his Attorney,

____
Keith S. Halpern
4 Longfellow Place, 37th Floor
Boston, Ma 02114
(617) 722-9952

Certificate of Service

I hereby certify that I have this date served the above by causing a true copy thereof to be delivered in hand of all counsel of record.

Dated:_______

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