[J-48-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 167 MAP 2005
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered 03-30-2005 at No. 1596
	:	EDA 2003 which Reversed the Judgment
v.	:	of Sentence of the Montgomery County
	:	Court of Common Pleas Criminal Division
	:	entered 04-23-2003 at No. 5863-02.
TERRENCE GALLAGHER,	:	
	:	874 A.2d 49 (Pa. Super. 2005)
Appellee	:	
	:	SUBMITTED: August 17, 2006

DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: June 1, 2007**

While I agree the "child" means a person under 18 years of age, Majority Slip Op., at 4, I cannot support the application of 18 Pa.C.S. § 302(c) to that element of this crime.

Section 2910 states: "A person who lures a child into a motor vehicle without the consent, express or implied, of the child's parent or guardian, unless the circumstances reasonably indicate that the child is in need of assistance, commits a misdemeanor of the first degree." 18 Pa.C.S. § 2910. Section 2910 does not state an express mens rea requirement, and generally, "[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto." 18 Pa.C.S. § 302(c). However, § 302(c) is not automatically applied when a statute contains no mens rea requirement. In such circumstances, courts must conduct a threshold inquiry to determine whether the Legislature intended to impose strict liability for an offense. "Whether a given statute is to

be construed as requiring criminal intent is to be determined by the court, by considering the subject matter of the prohibition as well as the language of the statute, and thus ascertaining the intention of the legislature." Commonwealth v. Mayfield, 832 A.2d 418, 427 (Pa. 2003) (quoting Commonwealth v. Black, 380 A.2d 911, 913 (Pa. Super. 1977)). Mayfield held the application of § 302(c) is appropriate where an express mens rea element is absent, but only after the court determines the Legislature did not intend an offense to be a strict liability crime. Id.

The Majority dismisses the possibility of luring a child as a strict liability offense, because there was nothing in the plain language of § 2910 explicitly indicating the Legislature's intent to dispense with the mens rea requirement. Majority Slip Op., at 5-6. This does not account for the fact the legislature did dispense with it.

Further, the Majority fails to consider the subject matter of the prohibition and language of the statute. See Mayfield, at 427. This Court has found strict liability when a statute was a means of protecting children. See Commonwealth v. Robinson, 438 A.2d 964, 966 (Pa. 1981) (imposition of strict liability for statutory rape was constitutional based on "the legislative desire to protect those who are too unsophisticated to protect themselves."). As with other offenses, such as providing alcohol to minors, 18 Pa.C.S. § 6310.1, or some sexual assaults, 18 Pa.C.S. § 3121, proof of actual age, not the defendant's perception of age, is very properly the only proof needed for that element.

The Majority recognizes the Legislature enacted the luring statute to prevent kidnapping, Majority Slip Op., at 7, but incorrectly distinguishes this case from Commonwealth v. Figueroa, 648 A.2d 555, 558 (Pa. Super. 1994). Figueroa applied § 302(c) to the luring element of the crime and strict liability to the intent to harm, holding "it is a legitimate exercise of the legislature's discretion, to prohibit persons from offering rides to children under any invitational pretext." Id. In spite of this, the Majority here decides the crime requires proof of appellee's knowledge of age. This I find to be in error, as the

Legislation's clear and unambiguous purpose, protecting children, is undermined by such a requirement.

As Justice Saylor noted in a dissenting opinion in Commonwealth v. Scolieri, 813 A.2d 672, 679 (Pa. 2002) (Saylor, J., dissenting), which Justice Castille and I joined, requiring proof beyond a reasonable doubt that a defendant knew the age of a minor is virtually unenforceable. I find no purposeful requirement of a case-by-case analysis of claims based on the appearance of a child. Some children may look older than they are, some younger, but if one intentionally lures them into a vehicle, appearance should not give the lurer absolution. Such an interpretation does not support the Legislature's aim of protecting children from being lured or their need for protection from predators such as appellee.

Besides, this is not truly a strict liability crime. Only as to the element of the victim's age is the accused's knowledge immaterial, as strict liability does not apply to all its elements. Luring, the affirmative act which triggers liability, still requires proof of overt purposeful action. The Commonwealth must prove mens rea as to the overt act of luring. However, if the person lured is in fact a child, the Commonwealth must prove that fact, and as to age it need not prove more. Because the statute is clear, this Court should again uphold the application of strict liability to the age elements of statutes protecting children, and I would reverse.