IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	**:**	
	:	
v.	**:**	**No. 03-10,342**
	:	**CRIMINAL DIVISION**
JOSEPH JENNINGS, II,	**:**	
Defendant	**:**	**APPEAL**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

The Defendant raises two issues on appeal. First, the Defendant contends that the Court erred in allowing a sexual assault nurse to testify at trial as an expert witness and offer a medical diagnosis during her testimony. Next, the Defendant contends that the jury's guilty verdict as to Counts II – III, sexual assault[1], indecent assault (without consent)[2], indecent assault (forcible compulsion)[3] (the jury found the Defendant not guilty as to Count I, rape[4]), was against the weight of the evidence in that said verdict was inconsistent.

I. Background

The Defendant and the victim initially met in late March 2003 at the home of mutual friends. During the following weeks, the two spoke on the telephone and eventually made plans to get together the night of April 13, 2002. On that date, the victim picked up the Defendant at his home and they proceeded to visit several local bars where they talked, drank alcohol, and danced. Around midnight that evening/early the next morning, the two returned to the victim's apartment so that the Defendant could borrow one of her movies. Upon entering the apartment, the victim went to another room in the apartment while the Defendant put a movie into the VCR

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[1] 18 P.S. § 3124(1).
[2] 18 P.S. § 3126(a)(1).
[3] 18 P.S. § 3126(a)(2).
[4] 18 P.S. § 3121(1).

in the victim's living room. The victim then joined the Defendant in her living room. The victim went on to testify that the Defendant appeared to be intoxicated and that she shunned his intimate advances and asked him to leave. When the Defendant did not leave the victim's apartment, she went into another room in the apartment at which time the Defendant entered her bedroom and fell asleep on her bed. Upon finding the Defendant in her bedroom, the victim testified that she decided to let the Defendant "sleep it off." The victim proceeded to change into a nightgown in her bathroom. After changing, the victim returned to the bedroom where she attempted to awake the Defendant and, as she testified, get him to sleep in another room of the apartment. The Defendant arose from the bed as the victim was crawling in, but instead of leaving the bedroom, he climbed back into bed with the victim. The Defendant began kissing and grabbing the victim despite her repeated protestations for him to stop. The victim attempted to get out of bed, but the Defendant pulled her into bed, held her down, and penetrated her vagina, against her will, from several different angles.

After the assault, the Defendant immediately left the victim's apartment leaving his shirt behind. The victim got dressed and went to a local bar to find a close friend of hers. During the trial, two of the victim's friends testified about their interaction with the victim that evening. Both witnesses testified that the victim appeared distraught and that they encouraged her to report the incident to the police and/or visit the hospital. The victim then returned home that evening, alone. The next day (April 14, 2002), the victim confided in two more friends who also encouraged her to report the incident to the police and/or visit the hospital. Finally, on April 15, 2002, the victim's mother took her to the Williamsport Hospital Emergency Room where Sexual Assault Forensic Nurse Examiner ("SANE") Cathy Brendle performed a rape kit. While at the hospital, the victim also reported the incident to City Police Officer Debra Bachman.

On May 20, 2002, Officer Bachman interviewed the Defendant who claimed the sexual encounter with the victim on April 13-14, 2002 was consensual. Detectives interviewed the Defendant again in July 2002; the Defendant maintained that he sexual encounter between him and the victim on April 13-14, 2002, was consensual. Police eventually arrested the Defendant on March 6, 2003 and after numerous continuances, the trial commenced in January 2004.

At the January 22-23, 2004 trial, the Commonwealth presented testimony from the victim, several of the victim's friends who were with the victim before and after the incident, SANE Nurse Brendle, and Officer Bachman. In addition to himself, the Defendant presented testimony from four individuals he spoke to and/or was in contact with the evening of the incident. After several hours of deliberations, the jury returned a verdict of not guilty on the rape charge and guilty on one count each of sexual assault, indecent assault (without consent), indecent assault (forcible compulsion). On April 14, 2004, the Court sentenced the Defendant to a six to twelve years aggregate sentence.

In September 2004, the Court denied the Defendant's timely filed Post-trial Motion and Petition to Modify Sentence. The Court also granted trial counsel's Motion to Withdraw as Counsel and appointed the Lycoming County Office of the Public Defender to represent the Defendant for appellate purposes. After receiving his September 27, 2007 Notice of Appeal, the Court ordered the Defendant to file a Concise Statement of Matters Complained of on Appeal. The Defendant never filed said statement and on November 29, 2004, the Superior Court of Pennsylvania dismissed the Defendant's appeal for failure to file a docketing statement. This Court did issue an opinion in compliance with Pa.R.A.P. No. 1925; however, because the Defendant failed to file a concise statement of matters complained of on appeal, this Court was forced to anticipate the issues which would be raised – so, the Court opted to focus on the issued

raised in the Defendant's Post-Sentence Motion; specifically, the propriety of the Defendant's sentence. In December of 2004, the Superior Court granted the Defendant's request to reinstate his appeal, but in its January 30, 2006 Memorandum Opinion, the Superior Court found that the Defendant, for failure to file an concise statement of matters complained of on appeal, waived his first two issues on appeal (the two issues currently before the Court) and that the remaining issue (regarding the Defendant's sentence) was without merit. Accordingly, the Superior Court affirmed this Court's sentence.

On December 4, 2006, the Defendant filed a Petition for Relief under the Post Conviction Relief Act. Following several conferences and Defendant's filing of his February 12, 2007 Amended PCRA Petition, the Court, on June 13, 2007, granted the Defendant's Petition and reinstated his appellate rights *nunc pro tunc* limiting the issues the Defendant could raise to the two issues previously waived on appeal due to ineffective assistance of appellate counsel. Pursuant to this Court's June 13, 2007 Order, the Defendant filed his timely Concise Statement of Matters Complained of on Appeal on June 25, 2007.

II. Discussion

A. *The Commonwealth's expert nurse's report and trial testimony were not improper*

At the Defendant's January 2004 trial, the Commonwealth presented SANE Nurse Cathy Brendle as a witness. The Court, over Defense counsel's objection, qualified Nurse Brendle as an expert in the area of sexual assault examination. Nurse Brendle's report indicated that after examining and interviewing the victim, her general findings were "consistent with [the victim's report of] forced vaginal penetration from behind." N.T. 01/23/04, p. 347. During her trial testimony, Nurse Brendle quoted the

aforementioned portion of her report and, in response to Defense counsel's following question, did not rule out other reasons for the results of the victim's exam (specifically, redness in the posterior fourchette and the anterior rectal area):

> Q: Now, although you indicate it could have [sic] been consistent with forced vaginal penetration from behind [the results of the physical exam of the victim; specifically, redness in the posterior fourchette and the anterior rectal area], it could also – your observations could be consistent with other explanations too, am I right?
> A: Correct.

N.T. 01/23/04, p. 355. The cross examination continued:

> Q: It could be consistent with regular sexual relations?
> A: That is not outside the realm of possibility, however, at the time frame that elapsed between the time that she reported to me that the assault occurred and the time that I saw her for there still having been visible redness there would not be what one would consider normal sexual relations.
>
> Q: I understand, but it could be – people have and do get irritated you seen that many times, correct?
> A: That is possible, but not usually not to that degree.
>
> Q: People get infections, am I correct?
> A: Yes, unfortunately.
>
> Q: And your assumption is that there is nothing that occurred between the time of the sexual relations and the time of your report in terms of her – the area where the redness was that you saw, fair statement?
> A: That is one of the things that I cover with the victim and there was no report of any kind of sexual activity between the time of assault and the time that I saw her.
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> Q: I understand. But there was a period of about 36-40 hours between the alleged sexual assault and the time when she finally presented herself to the emergency room and only to your offices to be examined, fair statement?
> A: Correct.
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> Q: So, one of your assumptions has to be as you're observing is that there is nothing that occurred between the time of the alleged incident and the time that you get the rape kit out go to the special room do your examination and observe redness in the vaginal area, fair statement?
> A: Correct, based on the information that I had.

Q: And the only basis of the comments that you said consistent with [the] report of forced vaginal penetration from behind was redness you observed in the vaginal area, fair statement?
A: Posterior fourchette and the anterior rectal area.

Q: There were no other physical observations you made other than that would be consistent with anything correct?
A: That was the only visible physical finding.

N.T. 01/23/04, p. 355-7.

Defense counsel, citing the Professional Nursing Law, 63 P.S. 211, *et seq.*, and *Flanagan v. Labe,* 547 Pa. 254, 690 A.2d 183 (Pa. 1997) for support, argued prior to the trial, during the trial, and now on appeal that the Court should have precluded Nurse Brendle from offering such testimony at trial as it was an impermissible medical diagnosis. Specifically, the Defendant claims that Nurse Brendle's general findings after interviewing and examining the victim (i.e. "consistent with [the victim's report of] forced vaginal penetration from behind"), as indicated in her report, and her aforecited testimony at trial, which the Defendant argues amounts to Nurse Brendle ruling out other possible causes for the redness of the victim's vaginal area, constituted prohibited medical diagnosis.

Section 211 of the Professional Nursing Law states:

> [t]he "Practice of Professional Nursing" means diagnosing and treating human responses to actual or potential health problems through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens as prescribed by a licensed physician or dentist. The foregoing shall not be deemed to include acts of medical diagnosis or prescription of medical therapeutic or corrective measures, except as performed by a certified registered nurse practitioner acting in accordance with rules and regulations promulgated by the Board.

In 1997, the Pennsylvania Supreme Court, noting the absence of a definition of "medical diagnosis" in the Law, utilized the following definition for the term:

> A medical diagnosis is commonly understood to be an identification of a disease based on its signs and symptoms. See Random House Dictionary (2d ed. unabridged 1987) (defining diagnosis for medical purposes as "the process of determining by examination the nature and circumstances of a diseased condition"); Webster's Third New International Dictionary (unabridged 1976) (defining "medical" as "concerned with physicians or the practice of medicine" and defining "diagnosis" as "the art or act of identifying a disease from its signs and symptoms"). See also *Commonwealth v. Green*, 251 Pa. Super. 318, 323, 380 A.2d 798, 801 (Pa. Super. Ct. 1977) ("Medical diagnosis . . . entails a 'conclusion concerning a condition not visible but reflected circumstantially by the existence of other visible and known symptoms.' *Paxos v. Jarka Corp.*, 314 Pa. 148, 153-54, 171 A. 468, 471 (Pa. 1934)").

Flanagan, 547 Pa. at 259, 690 A.2d at 186 (Pa. 1997).

Here, Nurse Brendle's report does not amount to a medical diagnosis. Her report simply indicates that her findings, following a physical exam of the victim, were consistent with the victim's report that she was sexually assaulted – the report does not conclude that the victim was in fact sexually assaulted. Nor did Nurse Brendle's testimony at trial amount to a medical diagnosis. Her testimony was that the results of her physical exam of the victim were consistent with the victim's allegations and that, although not likely to have been the result of other factors, she could not rule out the possibility that the victim's vaginal redness was a result of something other than sexual assault. Accordingly, this Court denied the Defendant's pre-trial request to preclude Nurse Brendle's testimony, denied his mid-trial renewed request to preclude, and now reiterates our belief that Nurse Brendle's report and subsequent testimony were appropriate.

B. ***The jury's verdict was not against the weight of the evidence***

The jury convicted the Defendant on one count each of sexual assault, indecent assault (without consent), indecent assault (forcible compulsion); the jury acquitted the Defendant on one count of rape. Instantly, the Defendant claims that the jury's verdict is

against the weight of the evidence because, as he claims, said verdict is inconsistent because the jury found him "not guilty of forcible compulsion with penetration (i.e. rape), but guilty of forcible compulsion without penetration (i.e. indecent assault) when the evidence of penetration was uncontradicted." Defendant's June 25, 2007 Concise Statement of Matters Complained of on Appeal. For the following reasons, we respectfully disagree.

"The question of weight of the evidence is one reserved exclusively for the trier of fact who is free to believe all, part, or none of the evidence and free to determine the credibility of witnesses. *Commonwealth v. Champney*, 574 Pa. 435, 832 A.2d 403, 408 (Pa. 2003)." *Commonwealth v. Solano*, 588 Pa. 716, 726, 906 A.2d 1180, 1186 (Pa. 2006). The test to determine whether the jury's verdict was against the weight of the evidence is not whether the trial judge, based on the same facts, would have arrived at the same conclusion, but rather, "whether the jury's verdict is so contrary to the evidence so as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Commonwealth v. Edwards*, 588 Pa. 151, 168903 A.2d 1139, 1148 (Pa. 2006) (citations omitted).

First, we do not believe that the jury's verdict was inconsistent. Case law is clear that "when an indecent assault conviction is predicated upon an act separate from the act of forcible intercourse, the indecent assault conviction does not merge with a conviction for rape. This is true whether the act which constitutes indecent assault is committed immediately prior to, or concurrently with the rape." *Commonwealth v. Richter*, 450 Pa. Super. 383, 391, 676 A.2d 1232, 1236 (Pa. Super. Ct. 1996). Instantly, there was evidence presented at trial that, in addition to the alleged forced penetration by the

Defendant upon the victim (i.e. rape), the Defendant "by the use of physical, intellectual, moral, emotional or psychological force, either express or implied touched the sexual or other intimate parts of the victim for the purpose of arousing or gratifying his sexual desires in another person," 18 P.S. § 3101 (i.e. indecent assault- forcible compulsion). Pointedly, the victim testified at trial that the Defendant ". . . touched my left shoulder and started kissing the back of my neck and shoulder"; ". . . he proceeded to start using both hands and grabbing at my left hip and my left breast"; ". . . he started to pull down the covers and was starting to grab more at my legs. . .". N.T. 01/22/04, p.95-8. Therefore, we believe that the jury's decision to convict the Defendant of, *inter alia*, the indecent assault (forcible compulsion), and not on the charge of rape, was supported by the evidence and at best, a compromised verdict to the benefit of the Defendant.

Second, even if the jury's verdict was inconsistent, "mere facial inconsistency in verdicts is not a valid basis upon which to upset a conviction which is otherwise proper, since consistency in verdicts is not required." *Commonwealth v. Magliocco*, 584 Pa. 244, 266, 883 A.2d 479, 492 (Pa. 2005) (citations omitted). Here, although the jury found the Defendant not guilty of rape, even in light of the fact that evidence of penetration was uncontradicted, and guilty of, *inter alia,* indecent assault with forcible compulsion, the Court believes, as previously stated, that this is evidence of a compromised verdict *in the Defendant's favor*.

III. Conclusion

As neither of the Defendant's contentions appear to have merit, it is respectfully suggested that the Defendant's conviction be affirmed.

By the Court,

Dated: _____

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Nancy L. Butts, Judge

xc: DA
Ernest D. Preate, Jr., Esq., 507 Linden Street, Suite 600, Scranton, PA 18503
Judges
Honorable Nancy L. Butts
Gary L. Weber, Esq.
Laura R. Burd, Esq. (Law Clerk)