IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1931-2007**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
CHARLES RUSSELL GUTHRIE,	**:**	
Defendant	**:**	**1925(a) Opinion**

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

This opinion is written in support of this Court's judgment of sentence dated May 1, 2009 and the Order entered October 5, 2009, which denied Defendant's post sentence motion. The relevant facts follow.

T.W. is a thirty-five year mentally challenged woman with an IQ of 50, who lives with her grandmother in a trailer park in Jersey Shore. Appellant, Charles "Russ" Guthrie, was the handyman who took care of repairs and maintenance at the trailer park.

On July 22, 2007, T.W. and her grandmother came home at about 5:30 p.m. after spending the day having fun with family and friends at a river lot. After taking the dog out, T.W. came inside to get the keys to the shed, because Appellant was there and was going to take a look at the lock or latch on the shed door, which was not working properly. When T.W. had not returned by 6:45 p.m., her grandmother started to become concerned. She looked outside for T.W. around 7:05 p.m., but did not see her or Appellant. Appellant's truck was still parked out front and the shed door was shut. At 7:15, she went outside and called for T.W., but no one answered. She went back inside thinking they may have walked

across the backyard and gone to the garage/shed where the parts were kept. At 7:45 p.m., she looked outside again. This time she saw T.W. and Appellant at the shed door, locking up the shed.

When T.W. finally came inside, her shorts were all dirty and her shirt was not tucked in right. T.W. sat down on the couch and just stared and stared. Her grandmother asked T.W. where she had been; T.W. replied in the shed. She asked T.W. what she had been doing; T.W. answered she was moving her bike. Her grandmother sensed that something was wrong. She asked T.W. if Appellant had touched her; T.W. said no. T.W.'s grandmother called T.W.'s mother and told her she thought something was wrong.

T.W.'s mother then spoke to T.W. on the phone. T.W. said she needed to wash her hand because it was dirty and she hurt. Her mother asked her what she hurt from; T.W. replied it hurt in back and in front. Her mother told T.W. she would be right there and T.W. should not wash her hand. Her mother then called the State Police and told them that something happened to her daughter; she may have been raped.

T.W. was distraught, crying, and regressed when her mother arrived at the trailer. Her clothing was very dirty. There were marks on the back of her shorts and the front of her shirt. The marks on the shirt were close to the breast area and almost looked like hand prints.

They took T.W. to the Jersey Shore Hospital, where they met with Trooper Jennifer Jackson. Trooper Jackson interviewed T.W. As part of her interview, Trooper Jackson asked T.W. to point to various body parts and she did so correctly. T.W. told Trooper Jackson that Russ did bad things to her. T.W. indicated Russ touched her in front and in back with his penis. Trooper Jackson asked T.W. if she had sex with Russ and she

indicated she did. Trooper Jackson also asked if Russ used a condom and T.W. said yes. T.W. also indicated that her arms were against a shed wall and Russ was behind her during the incident.

Jersey Shore Hospital did not conduct rape test kits, so T.W.'s mother took her to Williamsport Hospital, where an exam and rape test kit was conducted by SANE nurse Nancy Steil. Ms. Steil interviewed T.W. before conducting her exam. T.W. told Nurse Steil that Russ did bad things to her. She then got upset and started crying. She said Russ pulled down her pants and did it to her in the front and back. She told him to stop, but he didn't. She indicated Russ was a repairman who did work around her house. She also indicated he used a condom. During the exam, Nurse Steil noticed abrasions on T.W.'s labia minora between the areas representing three o'clock and ten o'clock and white secretions in T.W.'s vaginal vault. Nurse Steil was not able to look closely at T.W.'s vaginal wall, because when she tried to open the speculum T.W. complained of pain and screamed "take it out." The abrasions were consistent with what T.W. told her about the incident. Nurse Steil observed tan clumps around T.W.'s anus, which were probable stool. She did not observe any abrasions in the anal area. Nurse Steil collected T.W.'s clothing and provided it and the rape kit to Trooper Jackson. Trooper Jackson sent the clothing to State Police laboratories for testing.

A stain was discovered in the back of the waistband of T.W.'s shorts. A forensic serologist from the Wyoming Regional lab determined the stain contained seminal fluid. She cut out that portion of the waistband and sent it to another lab for DNA testing. A forensic scientist from the DNA lab noted the stain predominantly contained female DNA from the victim and traditional DNA testing could not achieve a result from the sperm

fraction. The scientist then conducted YSTR DNA (hereinafter YDNA) testing on the sample. In YDNA testing, the scientist examines 16 areas on the Y chromosome that only a male has. The scientist got a result on 13 of the 16 areas; there were no results on three of the areas due to insufficient DNA or allele drop out. The YDNA of those 13 areas for which there was a result matched the YDNA of Appellant. None of the 3,561 profiles in the YDNA database matched the results from the stain in the waistband of T.W.'s shorts, but Appellant's YDNA matched all 13 areas where a result was obtained.

On August 18, 2007, Trooper Jackson went to the scene and took pictures of the shed. The pictures depicted grease marks on the floor and what appeared to be finger marks in the dust of a sidewall of the shed.

On or about August 31, 2007, the police arrested Appellant and charged him with: rape of a mentally disabled person, 18 Pa.C.S.A. §3121(a)(5); sexual assault, 18 Pa.C.S.A. §3124.1; indecent assault of a mentally disabled person, 18 Pa.C.S.A. §3126(a)(6); rape by forcible compulsion, 18 Pa.C.S.A. §3121(a)(1); involuntary deviate sexual intercourse (IDSI) by forcible compulsion, 18 Pa.C.S.A. §3123(a)(1); IDSI of a mentally disabled person, 18 Pa.C.S.A. §3123(a)(6); and indecent assault without the complainant's consent, 18 Pa.C.S.A. §3123(a)(5).

The Court conducted a nonjury trial in this case on January 14, 2009. The Court found Appellant guilty of rape of a mentally disabled person, indecent assault of a mentally disabled person, IDSI of a mentally disabled person and indecent assault without the complainant's consent. The Court found Appellant not guilty of rape by forcible compulsion and IDSI by forcible compulsion.

On May 1, 2009, the Court sentenced Appellant to 4-8 years for rape of a

mentally disabled person and a consecutive 3-7 years for IDSI of a mentally disabled person, resulting in an aggregate sentence of 7-15 years incarceration in a state correctional institution.

Appellant filed a timely post sentence motion, which was denied by operation of law on or about October 5, 2009.

On October 7, 2009, Appellant filed his notice of appeal. The Court ordered Appellant to file a concise statement of errors complained of on appeal to clarify what issues he intended to pursue on appeal. To date such a statement has not been filed. In an attempt to avoid a remand of this case pursuant to Rule 1925(c)(3) of the Rules of Appellate Procedure, the Court will address all the issues raised in Appellant's post sentence motion.

I. Competence of the Victim

Appellant first asserts that the Court improperly denied his motion to preclude the victim from testifying. Appellant argued that the victim's testimony should be precluded because she was not competent to testify.

In general, a witness is presumed competent to testify and the burden falls on the objecting party to prove the witness is not competent. Pa.R.E. 601(a); ***Commonwealth v. Harvey***, 571 Pa. 533, 548, 812 A.2d 1190, 1199 (Pa. 2002). When the witness is a child or an adult with the mental capacity of child, the presumption still applies, but the Court must conduct an inquiry to determine "whether the witness had the ability (1) to perceive the occurrence with a substantial degree of accuracy; (2) to remember the event being considered; (3) to understand and communicate intelligent answers about the occurrence; and (4) to be mindful of the need for truthfulness." ***Commonwealth v. King***, 786 A.2d 993, 997 (Pa. Super. 2001); ***Commonwealth v. Anderson***, 381Pa.Super. 1, 552 A.2d 1064, 1068 (Pa.

Super. 1988). Such an inquiry occurred in this case. N.T., January 14, 2009, at 4-10.

The parties stipulated that the victim had an IQ of 50. The areas where the victim had some difficulty were with discussing abstract concepts such as a truth and lie and terminology such as penis and condom, but this was not surprising given her mental functioning. She knew that saying the prosecutor's jacket was black was a lie and saying it was gray was the truth. N.T., January 14, 2009, at 5. She answered in the affirmative to the prosecutor's questions "Do you know that it's important to tell the truth in court?" and "Do you promise to tell the truth in court today?" ***Id***. She knew her name, where she lived and where she had gone to school. ***Id.*** at 6. Although she could not tell the defense attorney what the truth is or what a lie is (***Id.*** at 8-9), when the Court asked the victim if she said something happened that didn't happen whether that would be the truth or that would be a lie, the victim indicated that would be the lie. ***Id***. at 9. She also indicated to the Court that it would be bad if what she told was not the truth and that she would tell the truth to the Court. ***Id***. at 7. During her testimony, she was able to recall the events and answer questions appropriately. She testified that Russ had sex with her in the shed. ***Id***. at 13. He had her against the wall. ***Id***. at 14. He put it (his penis) in front and back. She indicated by pointing the front was her crotch area and the back was her anal area. ***Id***. at 15-16, 24. Although she indicated on cross-examination that she didn't know what a penis is and she thought the prosecutor told her to use that word (***Id***. at 18), the prosecutor followed up on redirect with questions about private parts and what the front of Russ looked like. ***Id***. at 20-21. Although she had difficulty with abstract concepts, the Court found, based on the totality of the victim's testimony, that she had the ability to perceive and remember events, the ability to communicate answers to questions about the incident, and she was mindful of the need to tell

the truth.

II. The victim's failure to identify Appellant at trial

Appellant next contends he was denied his right to a fair trial because the victim could not identify him in the courtroom and instead identified the Trooper. The Court cannot agree. The victim could not identify Appellant because he changed his appearance; Appellant shaved off his beard and cut his hair. N.T., January 14, 2009, at pp. 88-89, 138-140.

III. The victim's use of words such as penis and condom

Appellant asserts he was denied his right to a fair trial when the victim used words such as penis and condom during direct examination, but on cross-examination she indicated she did not know what those words were and the assistant district attorney told her what to say. Defense counsel did bring out these things in cross-examination. N.T., January 14, 2009, at 18. The Court considered this evidence along with all the other evidence presented in this case, including the testimony of Nurse Steil and Trooper Jackson that the victim used the words penis and condom in her statements to them on the date of the incident. ***Id.*** at 63, 73, and 85. There is nothing in the record to indicate or even suggest that the prosecuting attorney spoke to the victim prior to her making statements to Nurse Steil and Trooper Jackson. Moreover, other evidence in the case corroborated the victim's statement that Appellant had sex with her in the shed including the following: (1) Nurse Steil found abrasions on the victim's labia minora; (2) there was a stain containing seminal fluid in the waistband of the victim's shorts; (3) the YDNA in the seminal fluid matched the YDNA of Appellant; and (4) Appellant admitted he was alone with the victim for 1 ½ to 2 hours on the date of the incident. Therefore, based on all the evidence presented, the Court

finds Appellant's trial was fair and his assertions would not entitle him to a judgment of acquittal or a new trial.

IV. Court questioning of the victim and Jeffrey Zachetti

Appellant alleges he was denied a fair trial when the court questioned the victim to help the Commonwealth's case and when it asked Commonwealth's expert, Jeffrey Zachetti, for a conclusion when the Commonwealth failed to ask for such information. The Court cannot agree.

Case law in this Commonwealth has consistently held that the trial judge has the right to question witness; however questioning from the bench should not show bias or feeling or be unduly protracted. ***Commonwealth v. Seabrook***, 475 Pa. 38, 379 A.2d 564 (Pa. 1977)(suppression hearing); ***Commonwealth v. Miller***, 442 Pa. 95, 97, 275 A.2d 328, 329 (Pa. 1971)(jury trial); ***Commonwealth v. Manuel***, 844 A.2d 1, 9 (Pa. Super. 2004)(jury trial). A new trial is required only when the trial court's questioning is prejudicial, that is when it is of such nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial. ***Manuel***, supra.

The Court's questioning did not show bias or feeling nor was it unduly protracted. The Court's questioning of the victim comprised three pages in the transcript. N.T., January 14, 2009, at 22-25. The Court asked questions to clarify the victim's testimony. Several of the Court's questions dealt with who Russ was and how the victim knew him. ***Id.*** at 23-24. These were general questions that did not expressly deal with the incident in question. Other questions merely confirmed or clarified testimony the victim gave in response to questions posited by the assistant district attorney. For example, the Court asked the victim where the incident happened and the victim answered, "In the shed."

Id. at 22. The victim also said this in her direct examination. ***Id.*** at 13-14. The Court asked if Russ was in the courtroom today and the victim replied, "No." ***Id.*** at 24. This information was helpful to the defense and was consistent with the victim's testimony during direct examination. During her testimony the victim indicated Russ put his penis in front and in back and the prosecutor had her point to the areas in question, but defense counsel and the Court were having some difficulty seeing where the victim was pointing (***Id.*** at 15-16), so the Court asked the victim to stand up and point again during its questioning (***Id.*** at 24). The Court does not believe this limited questioning of the victim deprived Appellant of a fair and impartial trial.

Similarly, the Court asked questions of Jeffrey Zachetti to clarify what the YDNA results meant in this case. In his testimony on direct examination, Mr. Zachetti testified that he obtained an YDNA result from the stain on 13 of the 16 areas he tested, and those results matched Appellant's YDNA profile. He also testified that when he compared the results to the 3,561 profiles in the YDNA database Appellant's YDNA profile is the only one that matched. N.T., at 107, 108. When the Court asked Mr. Zachetti what, if anything, he could conclude from that result, the Court was trying to make sure it understood what the YDNA results meant. N.T., at 113-114. Mr. Zachetti explained that YDNA was new and the statistical interpretation was very limited. Unlike traditional STR DNA testing where one would expect the statistics to be one in one quadrillion or some obscene number like that, YSTR's were in their infancy so to infer how rare this profile would be he had to use the counting method. The most he could say was that this profile matched Appellant's profile and did not match any profile of the 3,561 profiles taken before this case. N.T., at 114. The Court was not trying to prove the Commonwealth's case. Rather, the Court was trying to

make sure it did not put undue emphasis on a newer type of DNA evidence that did not have the rarity or statistical interpretation of traditional DNA evidence. Based on the foregoing, the Court does not believe asking Mr. Zachetti what, if anything, he could conclude from the YDNA results deprived Appellant of a fair and impartial trial.

V. Admission of Photographs

Appellant also claims he was denied his right to a fair trial when the court allowed the admission of photographs of the alleged crime scene that were taken three weeks after the incident. The Court cannot agree. Although Trooper Jackson took the pictures of the shed approximately three weeks after the incident, T.W.'s grandmother testified that no one was in the shed between the date of the incident and the date Trooper Jackson took the pictures. Therefore, the testimony presented showed that the photographs fairly and accurately depicted the scene of the incident. The Court believes counsel's argument that somebody could have entered the shed during that three week period without T.W.'s grandmother's knowledge goes to the weight of this evidence, but would not preclude its admissibility.

VI. Admission of YDNA evidence

Appellant contends the court erred when it permitted the testimony about the Y strand test over his counsel's objection. The Court has reviewed the record of the trial in this case and has not found any place in the record where defense counsel objected to Mr. Zachetti's testimony about YDNA in this case. There were only two objections made by defense counsel during Mr. Zachetti's testimony: defense counsel objected to his report (Commonwealth's Exhibit 14) being admitted into evidence, N.T., at 104; and he objected to the Court asking Mr. Zachetti for a conclusion, N.T. at 113. The Court also did not see any

pre-trial motion in the file to preclude this type of DNA evidence. Instead, from the discovery motions, it appears defense counsel was attempting to obtain his own DNA expert to rebut the Commonwealth's evidence. Since it appears defense counsel never objected to the YDNA testimony, the Court did not err in admitting this evidence.

VII. Sufficiency and Weight of the Evidence

Appellant asserts a judgment of acquittal or a new trial should be awarded because the verdict was based on insufficient evidence or the verdict was against the weight of the evidence.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that can be drawn from the evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the fact-finder to have found every element of the crime beyond a reasonable doubt. ***Commonwealth v. Davido***, 582 Pa. 52, 60, 868 A.2d 431, 435 (Pa. 2005); ***Commonwealth v. Murphy***, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004).

To convict Appellant of rape of a mentally disabled person, the Commonwealth needed to prove the following elements beyond a reasonable doubt: (1) Appellant had sexual intercourse with T.W.; (2) at the time of the intercourse, T.W. was suffering from a mental disability that made her incapable of consent; and (3) Appellant knew or recklessly disregarded T.W.'s mental disability. 18 Pa.C.S. §3121(a)(5); Pa.SSJI §1521B. Sexual intercourse occurs if a man's penis penetrates the female sexual organ, or the mouth or anus of a person. The slightest degree of penetration is sufficient, and no emission of semen is required.

The Court found that the evidence was sufficient to establish each of these

elements. There really wasn't any issue in this case concerning the second and third elements. The parties stipulated that T.W. had an I.Q. of 50 that made her incapable of consent. N.T., January 14, 2009, at p. 2-3. Furthermore, it was readily apparent that T.W. did not have the mental capacity to fully understand the nature of sexual intercourse or to exercise reasonable judgment about engaging in sexual intercourse. The only real issue in this case was whether Appellant had sexual intercourse with T.W. The Court believes there was ample evidence to prove Appellant had sexual intercourse with T.W. T.W. was fine when she came home from the river lot. Appellant admitted he spent a couple of hours with T.W. T.W.'s grandmother could not locate T.W. during this time. When she finally located T.W., she and Appellant were exiting the shed. Thereafter, T.W. was not fine; she was acting strangely, her clothes were dirty, and her family thought she may have been sexually assaulted. T.W. testified that Appellant put his penis in front and back and she indicated by pointing that the front was in her vaginal area and the back was in her anal area. T.W. also indicated in her direct testimony that she was up against the shed wall and Appellant was behind her. Photographs showed marks in the dust on one of the shed walls. Her family took her to the hospital for an examination. The SANE nurse discovered abrasions on T.W.'s labia minora, the internal lips of the vagina. T.W.'s clothes were sent to various State Police labs for testing. A stain containing seminal fluid was discovered in the back waistband of T.W.'s shorts. DNA testing was conducted. The YDNA profile from the seminal fluid stain matched Appellant's YDNA profile. None of the 3,561 YDNA profiles in the database matched. In light of all the evidence presented, the Commonwealth proved beyond a reasonable doubt that Appellant committed the offense of rape of a mentally disabled person.

To prove the crime of involuntary deviate sexual intercourse with a disabled

person in this case, the Commonwealth had to prove beyond a reasonable doubt that: (1) Appellant had deviate sexual intercourse with T.W.; (2) at the time of the intercourse, T.W. was suffering from a mental disability that made her incapable of consent; and (3) Appellant knew or recklessly disregarded T.W.'s mental disability. Deviate sexual intercourse occurs if a man's penis penetrates the anus of a person. As with sexual intercourse, the slightest degree of penetration is sufficient, and no emission of semen is required. The Court believes the evidence set forth above also proves this charge beyond a reasonable doubt. Although the SANE nurse did not find any abrasions or other injuries in the anal area, the abrasions in T.W.'s vagina, the seminal fluid stain in the back waistband of T.W.'s shorts, the YDNA evidence, and Appellant's admission that he spent approximately two hours with T.W. after she came home from the river lot all corroborated T.W.'s testimony that Appellant put his penis in the front and in the back. From all the evidence presented, the Court concluded beyond a reasonable doubt that Appellant's penis penetrated T.W.'s vagina and her anus.

Appellant also asserts the verdict was against the weight of the evidence. An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. ***Commonwealth v. Sullivan***, 820 A.2d 795, 805-806 (Pa. Super. 2003). A new trial is awarded only when the verdict is so contrary to the evidence 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. ***Id***. at 806. The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. ***Id***.

Appellant seems to argue that the victim's failure to identify him at trial, her use of the terms penis and condom which she could not define, and Appellant's denials outweigh the evidence presented by the Commonwealth. The Court cannot agree. The Court

did not find Appellant's denials credible in light of the Commonwealth's evidence. The fact that the victim could not identify Appellant at trial was not surprising given the victim's mental disability and the fact that Appellant changed his appearance. The Court also did not find that the victim's inability to define terms such as penis and condom fatal to the Commonwealth's case. The Court considered all these things before rendering its verdict. The victim had some difficulty testifying due to her mental disability. If the sole evidence in this case was the victim's testimony, perhaps the verdict would have been different. However, given the corroborating evidence including, but not limited to, the abrasions found by the SANE nurse, the seminal fluid stain found in the back waistband of the victim's shorts and the YDNA evidence, the verdict was not against the weight of the evidence.

DATE: _____ By The Court,

_____
Kenneth D. Brown, Senior Judge

cc: Mary Kilgus, Esquire (ADA)
Michael Rudinski, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)