

COMMONWEALTH

: No. CR-375-2010

:

:

vs.

: CRIMINAL DIVISION

:

**JHALIL MOORE,
Defendant**

:

:

OPINION AND ORDER

On January 28, 2011, following a jury trial, Defendant was found guilty of Count 2, Rape of an Unconscious or Unaware Person. The jury concluded that on January 16, 2010, the Defendant had sexual intercourse with a younger female, D.W., who was either unconscious or unaware that the sexual intercourse was occurring.

On January 15, 2010, D.W. was visiting her friend at her friend's residence in Williamsport. While there, she was drinking beer and became intoxicated. Among several individuals who were at the residence was the Defendant.

According to D.W., she remembered being in the bedroom but did not remember how she got there. She denied being passed out but was in and out of awareness. She realized that the Defendant was on top of her having sex with her. She could not breathe, could not push him off of her and was getting scared. She started calling for her friend, apparently "passed out again" and then woke up when the light was on in the room.

She could not remember if she gave permission to the Defendant or anyone else to have sex with her that night.

Subsequent to the jury's verdict, but prior to sentencing, Defendant filed a Motion for New Trial based on after-discovered evidence. The Court decided to schedule a hearing and address the Motion prior to sentencing.

A hearing was held on July 1, 2011. D.W. was called to testify on behalf of the Defendant.

She admitted writing a letter to this Court as well as to Defendant's attorney specifically stating that both she and the Defendant were intoxicated and that the sexual contact between them was with consent. She further indicated in the letter that she did not want the Defendant to go to jail for something "he didn't do." This letter was marked as Defendant's Exhibit 1 and admitted into evidence.

D.W. noted that on or about April 22, 2011 she got a ride to Shaelynn Stewart's house and wrote the letter addressed to the Court and to defense counsel. She gave the letter to Shaelynn, Defendant's girlfriend, knowing she intended to provide it to the Court and to defense counsel; however she stated Shaelynn told her she had spoken to the Court and defense counsel and they wouldn't tell anybody about the letter. She indicated Shaelynn told her to say some of the things she put in the letter such as the portions indicating that she and Defendant were intoxicated, the sex was with consent and she did not want Defendant to go to jail for something he did not do.

She testified as well that she wrote a similar letter about a month earlier when she was by herself at home, but she ripped it up and threw it away because she did not want to "send it out." She stated she didn't know how Defendant's attorney knew about the first letter, because she didn't want anyone to know about it. She acknowledged the content of the first letter was basically the same as the second letter. She indicated she wrote the first letter after she had talked to Shaelynn.

D.W. also admitted she and Shaelynn visited the courthouse on April 8, 2011 for the purpose of speaking with the undersigned and/or Defendant's attorney in order to "drop the charges," but that it was Shaelynn's idea. D.W. thought all she had to say was drop the charges and "that would be it."

Despite the letter, which D.W. acknowledged writing and signing, she testified that it was "a lie" and that "nothing in the letter" was true. She acknowledged that she wrote the letter to help out her friend Shaelynn.

Shaelynn Stewart next testified. Ms. Stewart contradicted D.W.'s versions of events regarding the writing of the letter. In summary, Ms. Stewart indicated that she did not tell D.W. what to put in the letters; D.W. voluntarily wrote the letters, and D.W. was afraid that her mom and grandma would be mad that the sex was consensual.

Detective William Weber of the Lycoming County District Attorney's office testified on behalf of the Commonwealth. He noted that he visited with D.W. on April 30, 2011 along with the Assistant District Attorney assigned to the case. Detective Weber explained to D.W. why they were visiting with her. The parties talked in the living room. Detective Weber showed her a copy of the letter and asked her if she wrote it and if it was true. D.W. responded that she wrote it but that it was not true and essentially that she was pressured into writing and signing it.

In order for a Defendant to obtain relief based upon after-discovered evidence, the Defendant must prove that the evidence: "(1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of the witness; and (4)

would likely result in a different verdict if a new trial was granted.” Commonwealth v. Pagan, 950 A.2d 270, 292 (Pa. 2008).

Clearly, D.W.’s writing of the first letter and then throwing it out, subsequent visit to the courthouse to request that the charges be dropped, and her writing and signing of the letter on or about April 22, 2011 constitutes new evidence. Further, it could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence and it is not merely corroborative or cumulative. Thus, the first two prongs of the Pagan test have been met.

While at first blush it may appear that the evidence would be used solely to impeach the credibility of the victim in light of her testimony at the hearing that it was a lie, the written statement would also be admissible as substantive evidence, because D.W. put the statement in writing and signed it. Pa. R. E. 803.1; Commonwealth v. Ragan, 538 Pa. 2, 645 A.2d 811, 818 (1994); Commonwealth v. Pitner, 928 A.2d 1104, 1109 (Pa. Super. 2007), appeal denied, 944 A.2d 757 (Pa. 2008). Thus, Defendant has established that the evidence would not be used solely to impeach the credibility of D.W.

The final required element is for Defendant to establish that the after-discovered evidence would likely result in a different verdict if a new trial were granted. Defendant’s conviction was based almost entirely upon the testimony of D.W. Indeed, the Commonwealth sought and obtained an instruction from the Court to the jury that the testimony of D.W. standing alone, if believed by the jury, was sufficient proof upon which to find the Defendant guilty in the matter. The jury was further instructed that the testimony of D.W. did not need to be supported by other evidence in order to sustain a conviction. The jury could find the

Defendant guilty if the testimony of D.W. convinced the jury beyond a reasonable doubt that the Defendant was guilty. Pa.SSJI (Crim) 4.13B.

Given the critical nature of D.W.'s testimony and the fact that her letter can be used as substantive evidence to prove that the sexual intercourse between the Defendant and her was consensual, the Court concludes that the after-discovered evidence would likely result in a different verdict if a new trial were granted. This conclusion is bolstered by the facts that D.W. was intoxicated at the time, made inconsistent statements to others, wrote the letter on more than one occasion and visited the courthouse to urge the Court to "drop the charges." It is likely that a jury hearing these facts, along with the other defense evidence introduced at trial, would conclude that reasonable doubt existed as to Defendant's guilt.

The elements of Rape of an Unconscious, Unaware or Mentally Disabled Person include, among other things, the victim being unaware that the intercourse was occurring and the defendant knowing or recklessly disregarding the fact that the victim was unaware. Pa.SSJI (Crim) 15.3121B. The victim's consent to the intercourse, contrary to what she testified to at trial, would at the very least raise a reasonable doubt with respect to said elements.

Accordingly, the following Order is entered:

ORDER

AND NOW, this _____ day of August, 2011, Defendant's Motion for a New Trial based upon after-discovered evidence is GRANTED. Defendant's guilty verdict is VACATED and the Court Administrator is directed to place this matter on the November 2011 trial list and to forward a notice to Defendant and the Commonwealth directing them to appear

for a pre-trial conference on October 7, 2011 at 9:00 a.m. in Courtroom #1 of the Lycoming County Courthouse.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Don Martino, Esquire
A. Melissa Kalas, Esquire (ADA)
Todd Leta, Esquire
Eileen Dgien, Deputy Court Administrator
Gary Weber, Esquire (Lycoming Reporter)
Work File