

COMMONWEALTH

: No. CR-375-2010

:

:

vs.

: CRIMINAL DIVISION

:

:

**JHALIL MOORE,
Defendant**

: Post-Sentence Motion

OPINION AND ORDER

On January 28, 2011, following a jury trial, Defendant was found guilty of Rape of an Unconscious or Unaware Person, a Felony 1 offense, but not guilty of Rape by Forcible Compulsion or Sexual Assault. 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 October 31, 2011, the Court sentenced the Defendant to undergo incarceration in a State Correctional Institution for an indeterminate period of time, the minimum of which was three (3) years and the maximum of which was six (6) years.

On November 3, 2011, Defendant filed a Post-Sentence Motion which included a Motion for New Trial on the ground that the verdict was against the weight of the evidence, a Motion for Judgment of Acquittal on the ground that the Commonwealth failed to offer sufficient evidence to support the conviction, and a Motion for Reconsideration of Sentence.

On November 7, 2011, Defendant filed a Supplemental Post-Sentence Motion, which consisted of a Motion for Judgment of Acquittal on the general ground that the jury's verdict was inconsistent.

Oral argument was held before the Court on November 29, 2011 and the parties subsequently submitted letter briefs in support of their respective positions.

On January 15, 2010, D.W. was visiting her friend at her friend's residence in Williamsport. While there, she was drinking brandy provided by Defendant and became intoxicated. Several other individuals were also at the residence, including the Defendant, who also was drinking that night. According to D.W., she remembers being in the bedroom, but she did not remember how she got there. She 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. D.W. became very upset and began yelling and crying. Someone entered the room and turned on the light. The Defendant and other boys quickly left the residence.

Defendant first asserts that the verdict of the jury is against the weight of the evidence and accordingly should be overturned.

A weight of the evidence challenge concedes that the evidence is sufficient to sustain the verdict, but submits that the jury verdict should be reversed as being so contrary to the evidence as to shock one's sense of justice. In the Interest of D.Y., 2011 PA Super 267, at 8-9 (Pa. Super. Dec. 13, 2011), citing Commonwealth v. Brown, 23 A.3d 544, 577 (Pa. Super. 2011). The trial court has only narrow authority to grant relief on a weight claim. Commonwealth v. Sanchez, 2011 Pa. LEXIS 3095, at 22 (Dec. 21, 2011), citing Commonwealth v. Blakeney, 946 A.2d 645, 652-53 (Pa. 2008). Relief on a weight claim is limited to "extraordinary circumstances, when the jury's 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." Sanchez, supra. at 22-23, citing Blakeney, supra. at

653. Defendant asks this Court to reassess the credibility of the testimony and other evidence and determine that the overall weight of that evidence is contrary to the verdict of guilty.

In order for the Defendant to be convicted of rape of an unconscious or unaware person, the evidence would need to prove beyond a reasonable doubt that the Defendant engaged in sexual intercourse with the victim who was either unconscious, or where the Defendant knew that the victim was unaware that the sexual intercourse was occurring. 18 Pa. C.S.A. § 3121 (a) (3).

A person is “unconscious” under this statute when they lack the conscious awareness they would possess in the normal waking state. Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 753 (2000).

In reviewing a weight claim, this Court must “do more than reassess the credibility of the witnesses.” Widmer, supra. at 752 Even if this Court, sitting as a juror, may not have agreed with the verdict, it cannot conclude that certain facts are so clearly of greater weight, that to not overturn the verdict would be to deny justice. This Court cannot conclude that the verdict was “irreconcilably contradictory to incontrovertible facts, human experience, the laws of nature or based on mere conjecture.” Id., citing Commonwealth v. Thompson, 538 Pa. 297, 648 A.2d 315 (1994).

The jury was free to believe all, part or none of the evidence. In the Interest of D.Y., supra. The jury chose to believe the testimony of D.W., which clearly supported her contention that at the time the intercourse occurred, she lacked the conscious awareness that she would normally possess in a waking state.

On the night in question, she was visiting her friend Tyrae Nichols who lived with his mother, brothers and sisters on Diamond Street in Williamsport. She had gone out with her friends but returned to the Diamond Street house after receiving a call that the Defendant and his friends were there and had brought a bottle of alcohol.

The Defendant provided her with “the alcohol” which was a bottle of E&J Brandy. D.W. and some of her friends then drank the bottle, although she admitted drinking “most of it.”

At first it made her feel dizzy. After drinking for a few hours, D.W. started feeling drunk or intoxicated. Her awareness of the events that subsequently occurred was partial at best.

She recalled going down to the second floor to the bathroom but the next thing she remembered was the Defendant being on top of her and having sex with her in a different room from where she had been with her friends drinking. She was on a bed, on her back and her pants and underwear were pulled down.

She did not know where she actually was, couldn’t “really breath” and remembered pushing. She did not “know what was going on” and did not remember how she got there. She remembered another individual putting his penis in her face but could not remember if he had his pants on.

Prior to realizing that the Defendant was having sex with her, she did not remember if she had any discussion with him about sex or consented to sex. After she started pushing the Defendant away, she started crying and screaming. Someone came in and turned on the light and “they all left.” She could not remember what she told those who then came

into the room. D.W. did not remember anyone else having sex with her although D'Andre Morrison testified that he had intercourse with D.W. after she had sex with Defendant and while she was passed out.

Despite a very thorough and vigorous cross-examination by defense counsel, D.W.'s testimony about her condition on the evening in question did not change. She remained consistent. There were substantial lapses of time when she did not have an awareness of what was happening. She was clearly in and out of awareness. Of particular import is that D.W. specifically testified that she did not have "any idea" and "did [not] know anything about sex going on between [her] and the Defendant until [she] woke up." Moreover, she clearly testified about going in and out of consciousness.

While the evidence cited in support of Defendant's Motion contradicts, at least in part, the testimony of the victim, that evidence can certainly not be characterized as determinative or incontrovertible. While D.W. may have been talking with others, walking up and down the stairs and interacting with Defendant prior to or during the sexual assault, this does not mean that she possessed the same conscious awareness that she would have had in a normal waking state. Indeed, nothing that she said or did prior to the sexual assault conclusively establishes that she was conscious of what occurred. Moreover, in believing the victim's testimony, which the jury was certainly free to do, the verdict does not shock the Court's sense of justice.

Alternatively, Defendant claims that the Commonwealth failed to produce sufficient evidence to support the verdict.

When reviewing challenges to the sufficiency of the evidence, the Court must evaluate the record in a light most favorable to the Commonwealth as the verdict winner, giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Commonwealth v. Taylor, 2011 PA Super 270 (Dec. 14, 2011), citing Commonwealth v. Yasipour, 957 A.2d 734, 745 (Pa. Super. 2008).

Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Taylor, supra. Furthermore, the Commonwealth may sustain this burden by wholly circumstantial evidence. Commonwealth v. Ramtahal, 2011 Pa. LEXIS 3089 (Dec. 21, 2011); Commonwealth v. Laird, 988 A.2d 618, 624 (Pa. 2010).

In this case, the Commonwealth clearly carried its burden with respect to the charge for which the Defendant was found guilty. The testimony alone of the victim establishes that the Defendant had intercourse with her and at the time he was having intercourse with her, she was unconscious.

Indeed, this case is quite similar to the case of Commonwealth v. Erney, 548 Pa. 467, 698 A.2d 56 (1997) wherein sufficient evidence was found to support the conclusion that the intoxicated victim was unconscious. In that case, the victim was intoxicated, had the ability to perceive some aspects of the incident, displayed no awareness of external events, believed she shouted for Defendant to stop but in fact merely mumbled, offered no response when a friend questioned her during the assault, was unaware of statements the friend made during the assault and was unaware of the duration of the assault.

In this case, the victim was intoxicated, was in and out of awareness, only realized the Defendant was having sex with her after they were apparently in the midst of such, offered no resistance, could not remember if she even gave permission and did not come to greater awareness until the light came on in the room.

Defendant next argues that the sentence should be reconsidered and that the Court should exercise its discretion and impose a sentence below the mitigated guideline range to be served in the County prison.

It is clear that Defendant's argument implicates the discretionary aspects of the Court's sentence. Pennsylvania law provides the Sentencing Court with discretion in imposing a sentence as long as the sentence is not inconsistent with the specific provisions of the Sentencing Code or contrary to the fundamental norms which underlie the sentencing process. Commonwealth v. Prisk, 13 A.3d 526 (Pa. Super. 2011), citing Commonwealth v. Pass, 914 A.2d 442 (Pa. Super. 2006); Commonwealth v. Sierra, 752 A.2d 910 (Pa. Super. 2000).

While sentencing courts clearly have discretion to sentence outside the guidelines based on relevant factors not specifically contemplated by the criminal statutes, such a sentence must nonetheless be reasonable. Commonwealth v. Perry, 2011 Pa.LEXIS 2821 (Nov. 23, 2011).

In determining the reasonableness of a sentence, the following factors must be considered:

- (1) The nature and circumstances of the offense and the history and characteristics of the Defendant;

- (2) The opportunity of the Sentencing Court to observe the Defendant, including any pre-sentence investigation;
- (3) The findings upon which the sentence was based; and
- (4) The guidelines promulgated by the Commission.

Perry, supra.; 42 Pa. C.S.A. § 9781 (d).

This Court considered all of those factors and imposed a sentence most appropriate under the circumstances.

Defendant supplied alcohol to a minor female. Upon the victim becoming obviously intoxicated, Defendant has sexual intercourse with her. At the time of the intercourse, the victim was unconscious. Defendant committed an extremely seriously Felony offense. Defendant has never accepted one iota of responsibility for the offense, opting instead to blame the victim or argue that his accomplice received the deal of a lifetime. The Court addressed all of the Defendant's arguments at sentencing and fully considered all of the relevant factors. The Court's sentence was imminently reasonable. While the Court understands that the sentence Defendant received is far more severe than that received by his accomplice, his dismay should be directed at the Commonwealth and not the Court. Defendant's accomplice pled guilty to a misdemeanor offense and was sentenced within the applicable guidelines. Following a jury trial, Defendant was convicted of a Felony 1 offense and sentenced to the bottom end of the mitigated range.

Finally, Defendant argues that the verdict was inconsistent and therefore must be vacated. More specifically, Defendant argues that because he was acquitted of sexual assault, the Court must direct a verdict in his favor on the rape of an unconscious person

charge. Defendant argues that sexual assault is a lesser included offense of rape of an unconscious or unaware person and accordingly, the verdicts are impermissibly inconsistent.

In Commonwealth v. Buffington, 828 A.2d 1024 (Pa. 2003), the Supreme Court concluded that the offense of sexual assault constituted a lesser included offense of rape of an individual who is unconscious or unaware. This conclusion was based on the reasoning that sexual intercourse was common to the offenses and that a lack of consent is assumed from the state of the victim in connection with the rape of an unconscious or unaware individual. Id. at 1032.

The fact that statutory sexual assault is a lesser included offense of rape of an unconscious or unaware person, however, does not require that the Court vacate the verdict solely because the jury found the Defendant not guilty of the lesser included offense. Inconsistent verdicts do not constitute reversible error even where the acquitted offense is the lesser included offense. Commonwealth v. Petteway, 847 A.2d 713, 718 (Pa. Super. 2004).

Consistency in verdicts in criminal cases is not required. “The Court looks upon the acquittal as no more than the jury’s assumption of a power which they had no right to exercise but to which they were disposed through lenity.” Commonwealth v. DeLong, 879 A.2d 234, 238, citing Commonwealth v. Petteway, *supra*.

The determinative issue is whether there was sufficient evidence on the count that the jury returned a guilty verdict. Petteway, *supra*. As referenced above, the Court concludes that there was sufficient evidence to support the verdict of guilty on the rape of an unconscious or unaware person charge.

Defendant argues nonetheless that the inconsistent verdict must be overturned because the weight of the evidence is clearly in favor of the Defendant. Indeed, it appears the Defendant argues the inconsistent verdict as evidence of the lack of weight. Again, and as discussed above, the Court cannot agree.

Defendant argues that the Court should reverse the finding of the jury for a variety of reasons related to the weight of the evidence. Defendant argues that the victim had at least some sense of awareness of what was occurring, the victim made sounds consistent with sexual activity, the victim voluntarily placed herself in the situation, and that the victim laid down on the bed and took her own clothes off.

Contrary to what Defendant claims, however, the facts of this case and as stated above are quite similar to those found in Erney, supra. When the sexual intercourse began, she displayed little awareness of the external events. She was unable to perceive how she was communicating. She offered no response when confronted. She lacked an awareness of the duration of the incident and had little knowledge of much of what occurred. There was ample evidence from which the jury could find that the victim “during at least portions of assault, lacked knowledge or awareness of both her own sensations and external events, and was not in the normal waking state.” Erney, supra. at 59. Merely because she could perceive to some degree what had occurred, does not mean that she was legally capable of consenting.

ORDER

AND NOW, this _____ day of January 2012, following a hearing, argument and the submission of Briefs, the Court **DENIES** Defendant's Post-Sentence Motion.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Don Martino, Esquire
A. Melissa Kalas, Esquire (ADA)
Gary Weber, Esquire (Lycoming Reporter)
Work File