

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**DAVID ALLEN JOHNSON,
Defendant**

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**No. 1763-2012
CRIMINAL**

OPINION AND ORDER

The Defendant filed a Petition for Habeas Corpus on November 27, 2012. By agreement of both parties, the Court will decide the Petition based on the transcripts of the Preliminary Hearing held in this matter on October 18, 2012 before Magisterial District Judge Allen Page III.

Background

Based on the testimony at the Preliminary Hearing, Rachel Lewis (Lewis) attended a party at 765 West Third Street on October 6, 2011. During the party, Lewis consumed a 40 ounce “Hurricane” and played three (3) games of beer pong. After the third game, Lewis could not remember anything besides a “curtain of black.” The next thing that Lewis remembers is waking up around 9 AM the next morning in the attic of David Johnson’s (Defendant’s) residence. Lewis got up from the bed and realized she was only wearing underwear and an undone bra. She began to put on her jeans and noticed grass stains on the front and little spurs stuck on them. As she was getting dressed, the Defendant appeared from underneath a white comforter located across the room. Lewis asked Defendant whether they had sex and he stated “I tried to but you wouldn’t let me.” Lewis did not know or recognize the Defendant and had never been to the residence. The Defendant then led Lewis down the stairs from the attic and outside where she began to panic. Defendant’s neighbors observed her reaction and police were called. Lewis was taken to the hospital and a sexual assault examination was performed.

Agent Kevin Stiles (Stiles) of the Williamsport Bureau of Police testified at the Preliminary Hearing. According to his testimony, Lewis would have walked five (5) to six (6) blocks from the party on West Third Street to the Defendant's residence in the six hundred block of Spruce Street. Based on their respective locations, Lewis would have had to have crossed several streets to have arrived at the Defendant's residence. In his first interview prior to arrest, the Defendant told Stiles that Lewis knocked on his door and he let her into the residence. The Defendant led her to his room in the attic and then went downstairs to get a cigarette. The Defendant said that when he got back to the attic Lewis's pants and boots were off. The Defendant smoked his cigarette, laid in bed, and Lewis came over and starting hugging and kissing him. The Defendant told Stiles that they did not engage in any conversation. Further, the Defendant indicated that Lewis never consented to sexual intercourse. In fact, the Defendant stated that Lewis told him she did not want to have sex and that he replied that he did not either and that there was no sexual intercourse.

Approximately a year later, Stiles received the results of a DNA test, which confirmed that the Defendant's DNA/semen was found in Lewis's sexual assault examination kit. Stiles obtained an arrest warrant for the Defendant, took him into custody, and advised him of his Miranda rights prior to interviewing him a second time. The Defendant stated that they had sexual intercourse and near its completion Lewis told the Defendant that she did not want to engage in sexual intercourse. The Defendant stated that he also told her he did not want to have sex either but ejaculated sometime afterwards. As stated by Stiles: "they were engaging in sexual intercourse and then she said I don't want to have sex with you anymore and he said I don't want to have sex with you either but unfortunately it was too long in the process and then

he ejaculated.”¹ N.T., October 18, 2012, 2012, p.22. The Defendant told Stiles that he thought Lewis was “somewhat intoxicated” and that her breath smelled of alcohol and vomit. *Id.* at 21, 23. Stiles also acknowledged that based on the height difference of the Defendant and Lewis, Lewis would have had to have walked up the stairs to the attic of the Defendant’s residence; the Defendant would not have been able to carry her upstairs.

The Defendant was charged with Rape – Unconscious, a felony of the first degree;² and Sexual Assault, a felony of the second degree.³ The Defendant alleges in the Petition for Writ of Habeas Corpus that the Commonwealth failed to establish a *prima facie* case for both charges. Specifically, the Defendant argues that Lewis was conscious based on her actions and that she cannot remember if she consented to sexual intercourse.

Discussion

The principal function of a preliminary hearing is to protect an individual’s right against an unlawful arrest and detention. Commonwealth v. Mullen, 333 A.2d 755 (Pa. 1975). A preliminary hearing is not a trial and the Commonwealth only bears the burden of establishing at least a *prima facie* case that a crime has been committed. Commonwealth v. Prado, 393 A.2d 8 (1979).

A *prima facie* case exists ‘when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury.’

¹ The testimony is unclear as to whether Lewis said she did “not want to have sex” with the Defendant or that she did “not want to have sex anymore” with the Defendant. N.T., October 18, 2012, p.20. The exact language would be indicative of whether Lewis was aware of the sexual intercourse.

² 18 Pa.C.S. § 3121(3).

³ 18 Pa.C.S. § 3124.1.

Commonwealth v. Weigle, 997 A.2d 306, 311 (Pa. 2010) (citing Commonwealth v. Karetny, 880 A.2d 505, 513 (Pa. 2005)). The Commonwealth need not establish guilt beyond a reasonable doubt.

Rape – Unconscious

A person commits the offense of Rape under 18 Pa.C.S. § 3121(3) if s/he “engages in sexual intercourse with a complainant who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.” “A person is unconscious for purposes of the statute when they lack the conscious awareness they would possess in the normal waking state.” Commonwealth v. Widmer, 744 A.2d 745 (Pa. 2000).

The Defendant relies upon Breakiron, an unreported Federal District Court opinion. Breakiron v. Horn, No. 00-300 (W.D.Pa. Sept. 24, 2008). The case discusses the expert testimony that an individual may be blacked out/have no memory but they are not considered unconscious. In fact, an individual who has blacked out may still appear to be conscious and be acting as if they were conscious. This testimony submitted to the Federal District Court is not law and has never been used by any Pennsylvania Court to define “unconscious.” While such testimony would appear to be relevant at trial to assist the trier of fact to determine whether the Defendant knew Lewis was unconscious, this evidence is not controlling on the element of unconsciousness to establish a *prima facie* case on the Rape charge.⁴

Relevant to the issue of unconscious is Erney, where the Pennsylvania Supreme Court examined the definition of “unconscious.” Commonwealth v. Erney, 698 A.2d 56, 59 (Pa. 1997). The Supreme Court did not accept the defendant’s argument that “3121(3) protects only

⁴ The Federal Court applied the expert testimony to determine whether the defendant in the case had a specific intent to kill. In addition, under 18 Pa.C.S. § 3121(3), a person may also be found guilty if the victim was unconscious, irrespective of what the Defendant knew.

those individuals who were completely unaware of the event throughout the duration of the sexual assault upon them.” The Supreme Court stated that:

In considering the legislative intent, we are mindful that the ‘essence of the criminal act of rape is involuntary submission to sexual intercourse.’ The term “conscious” includes “having a feeling or knowledge (of one’s own sensations, feelings, etc. or of external things); knowing or feeling (that something is or was happening or existing); aware; cognizant ...[;] able to feel and think; in the normal waking state”

Id. at 58-59 (citations omitted). In that case, the victim had consumed alcohol and marijuana and became incoherent. The defendant began to engage in sexual intercourse with the victim, while a friend witnessed the incident. The victim made unintelligible mumbling sounds during the assault but believed she was telling the defendant to stop in her loudest possible voice. The friend present asked the victim if she was “okay” during the sexual intercourse and she did not respond. The defendant was found guilty of Rape under 18 Pa.C.S. § 3121(3). The Supreme Court stated that “the jury could properly find that the victim, during at least portions of the assault, lacked knowledge or awareness of both her own sensations and external events, and was not in the normal waking state, the evidence was sufficient to support the finding that she was unconscious within the meaning of the statute.”⁵ Id. at 59.

The Court’s mission is to determine whether the Commonwealth has established a *prima facie* case on the charge of Rape. The trier of fact ultimately must determine the credibility of Lewis. Any expert testimony, if introduced at trial, is also for the trier of fact to consider in making the determination as to whether the Commonwealth has met its burden of proof beyond a reasonable doubt. However, based on a review of the statute and the presence of physical evidence that sexual intercourse did in fact take place, the questions before the Court are whether Lewis was unconscious or whether the Defendant knew that the Lewis was unaware of the

⁵ The Pennsylvania Supreme Court made this determination of the evidence in the light most favorable to the verdict winner, which was the Commonwealth.

sexual intercourse. A *prima facie* finding of either would support the charge of Rape under 18 Pa.C.S. § 3121(3).

Whether the Defendant knew that Lewis was unaware of the sexual intercourse is unclear. Lewis walked five (5) to six (6) blocks to the Defendant's residence and climbed stairs to the attic with him. The Defendant told police that she began hugging and kissing him once they were in the attic. On the other hand, circumstantial evidence exists that the Defendant knew that Lewis was unaware. The Defendant initially told Lewis and the police that he did not engage in sexual intercourse with Lewis. After physical evidence established that the Defendant had engaged in sex with Lewis, he changed his rendition of the facts. Not only does this establish that the Defendant's story may not be credible but it more importantly shows a consciousness of guilt. Moreover, based on what the Defendant told Stiles, Lewis appeared "somewhat intoxicated," smelled of alcohol and vomit, never engaged in conversation, and never explicitly consented to sex. As the Defendant and Lewis did not know each other and first met that night, the circumstances appear enough to establish a *prima facie* case.

The Court, however, must determine the critical element, whether Lewis was in fact unconscious. In Pennsylvania generally and under this statute specifically, a person is deemed unconscious if they lack the conscious awareness they would possess in normal waking state. Pennsylvania case law focuses on the mental state of the complainant, not how they appear to others. As Lewis has no recollection of what occurred with the Defendant that night, the Court can find a *prima facie* case that the Defendant was unconscious. Lewis's testimony is bolstered by her reaction when she woke up the next morning not knowing where she was and became so upset that neighbors came to her aid. In addition, police were called while Lewis was still outside the Defendant's residence and her testimony has never changed since the moment she

woke up that morning. As Lewis appeared to have lacked knowledge and awareness of the sexual intercourse, she was not in a normal waking state. Therefore, this Court must find that the Commonwealth established a *prima facie* case for Rape – Unconscious.

Sexual Assault

A person commits Sexual Assault if s/he “engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant’s consent.” 18 Pa.C.S. § 3124.1. The Pennsylvania Supreme Court has determined that Sexual Assault is a lesser included offense of Rape. Commonwealth v. Buffington, 828 A.2d 1024, 1032 (Pa. 2002). “[W]hile neither rape involving an unconscious person nor involuntary deviate sexual intercourse with an unconscious person references a lack of consent as an element, in either circumstances, the absence of consent is assumed from the state of the victim.” Id. As determined by its analysis of the evidence presented by the Commonwealth for the charge of Rape – Unconscious, the Court finds that the Commonwealth has also established a *prima facie* case for the charge of Sexual Assault.

ORDER

AND NOW, this _____ day of January, 2013, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Petition for Habeas Corpus is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc. DA (MK)
PD (NI)