IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 1226 – 2014
	:	
vs.	:	CRIMINAL DIVISION
	:	
DAVID BEAN,	:	
Defendant	:	Post-Sentence Motion

OPINION AND ORDER

Before the Court is Defendant's Post-Sentence Motion, filed March 24, 2017. Argument was heard April 25, 2017, following which the court directed the preparation of several transcripts. The last of those was completed July 31, 2017 and the matter is now ripe for decision.

Following a jury trial on September 12 and 13, 2016, Defendant was convicted of rape of an unconscious person, involuntary deviate sexual intercourse with an unconscious person, two counts of sexual assault, aggravated indecent assault without consent, aggravated indecent assault of an unconscious person, four counts of obscene and other sexual materials and performances, two counts of invasion of privacy, three counts of indecent assault without consent and three counts of indecent assault of an unconscious person, in connection with several sexual assaults on two females while they were unconscious as a result of heroin use, which assaults were video-recorded by Defendant on his cellular telephone.

On March 20, 2017, Defendant was sentenced to 19 to 38 years' incarceration and found to be a sexually violent predator under Meghan's Law.

In the instant post-sentence motion, Defendant contends the court erred in (1) denying his motions to suppress, (2) denying his motion to sever, (3) denying his request for a directed verdict, (4) overruling his objection to certain evidence offered at trial, and (5) excluding certain proffered testimony, that the evidence was insufficient to establish the charges of obscene and other sexual materials and performances, and that the court abused its discretion in imposing consecutive sentences. Each of these issues will be addressed seriatim.

Motions to Suppress

Defendant's motions to suppress, filed January 8, 2015 and March 9, 2015, were denied by the Honorable Marc F. Lovecchio in an opinion and order dated March 25, 2015. Based on the reasoning in that opinion, the court will not grant Defendant any relief on this basis.

Motion to Sever

Defendant filed a motion to sever on June 3, 2016, asking that two separate trials be held as the charges involved two separate victims. Defendant asserted that "Defendant may be prejudiced by a joint trial" because the "issue of consent is crucial to the Defendant's defense against each victim". Defendant never explained how prejudice would result from his assertion of consent in both instances, however. Inasmuch as the defense of consent was similar in both cases, that is, that Defendant claimed that both women had consented to the sexual activity he was accused of having engaged in with them, the court failed to see how a joint trial would prejudice the defense. Following the trial, the court continues to believe that severance was not required.

Request for Directed Verdict

At the conclusion of testimony, defense counsel moved for a judgment of acquittal "of charges involving Laura Kaliszewski based on Miss Kaliszewski not identifying Mr. Bean at the time of her testimony." Ms. Kaliszewski did identify Defendant in her description of the video-recordings which had been introduced into evidence, however:

> Q. Okay. And again, you said in the videos – you said he, you're referring to the Defendant and you?
>
> A. Yeah, David Bean.

N.T., September 12, 2016 at p. 65. Further, Defendant himself testified that he made the video-recordings of Ms. Kaliszewski. N.T., September 13, 2016 at p. 31-34. All of this evidence was sufficient to prove the identity of the person who perpetrated the acts as alleged, including making the video-recordings.

Objection to Evidence

Defense counsel objected to introduction of the video-recordings based on an alleged break in the chain of custody. Gaps in the chain of custody affect only the weight to be given to the testimony, however, not its admissibility. Commonwealth v. Bolden, 406 A.2d 333 (Pa. 1979). "Every individual who came in contact with the evidence does not have to testify, and every minor discrepancy does not have to be explained." Koller Concrete, Inc. v. Tube City IMS, LLC, 115 A.3d 312, (Pa. Super. 2015), citing Commonwealth v. Snyder, 385 A.2d 588, (Pa. Super. 1978).

Here, although one of the state police troopers who extracted information from Defendant's phone did not testify at trial, his extraction had been supervised

by another trooper who did testify at trial. N.T. September 12, 2016 at p. 113. This alone would actually support a finding that there was no gap in the chain of custody but, in any event, admissibility of the evidence was not affected and the objection was properly overruled.

Exclusion of Proffered Testimony

Defendant proposed to offer testimony from one Gale Snook that Ms. Kaliszewski had filed a PFA against him based on allegations that, inter alia, he "would have sex with her – with the Plaintiff when she was passed out…" and that the allegations were not true. Id. at p. 161. Defense counsel argued that "the allegations were strikingly similar to what was testified to here today and also what Ms. Kaliszewski had claimed as far as Mr. Bean", Id. at p. 163, and sought to introduce the testimony to challenge Ms. Kaliszewski's credibility, relying on Commonwealth v. Schley, 136 A.3d 511 (Pa. Super. 2016).

In Schley, the Superior Court ruled that the trial court had committed error in precluding evidence of false sexual assault allegations previously made by the complainant against someone else. In addition to affecting the witness' credibility, the Court found the evidence probative of whether the defendant (accused of endangering the welfare of the witness, a child) actually was aware that the child was in circumstances that could have threatened her physical or psychological welfare. Id. at 518. Significantly, however, the false allegations in Schley had been *already proven false* because the witness had recanted the allegations. Id. at 513.

In the instant case, there is no such recantation evidence. Instead, Defendant proposed to offer the accused's testimony that the allegations were not

true. This testimony is clearly not sufficient to support a finding that the allegations were false, such as would dictate the matter be controlled by Schley. Therefore, the court finds that the proffered evidence here was properly excluded.

Sufficiency of the Evidence

Defendant contends the evidence was insufficient to establish the charges of obscene and other sexual materials and performances. Those charges are based on Section 5903 of the Crimes Code, which provides in relevant part as follows:

> § 5903. Obscene and other sexual materials and performances.
> (a) Offenses defined. — No person, knowing the obscene character of the materials or performances involved, shall:
> …
> (5) (i) produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity… .

18 Pa.C.S. Section 5903(A)(5)(i).

Defendant is charged with having committed this offense on four occasions: July 14, 15, August 8 and 10, 2013. The Commonwealth introduced video-recordings made on each of those four dates which were described in testimony as follows:[1]

> July 14, 2013 – Defendant is "standing over Jennifer Marie Deparasis wearing a gray tank top, he was masturbating, she was sleeping or unconscious." N.T., September 12, 2013 at p. 142.
>
> July 15, 2013 – "Kaliszewski, yellow T-shirt lying on a bed clearly unconscious being vaginally raped. Video pans between Kaliszewski's vagina and her face as Bean inserts his penis into her vagina." Id. at p. 143.

[1] The videos were played for the jury as well as described in testimony.

> August 8, 2013 – "Kaliszewski in white T-shirt with semen on her face." Bean can be heard to say "That's what happens to you." Id. at p. 137, 145.
>
> August 10, 2013 – "Kaliszewski wearing a purple T-shirt lying on the bed unconscious with Bean kneeling over her head slapping his penis off the side of her face, inserting his penis into her mouth at times." Id. at p. 144-45.

Defendant argues that the evidence failed to show that (1) the videos meet the definition of obscene, (2) Defendant participated in a performance and (3) Defendant knew that the videos were obscene.

While the obscenity of the material can hardly be questioned, the court agrees there was no evidence that Defendant produced, presented or directed any obscene performance or participated in any performance *as that term is defined in the statute*: "Performance means any play, dance or other live exhibition performed before an audience." 18 Pa.C.S. Section 5903(b). Here, the evidence showed only that Defendant video-recorded sexual encounters between himself and the two victims and that no one else was present; there was no audience. Therefore, arrest of judgment on these charges is appropriate.

Excessiveness of sentence

Defendant contends that by sentencing him to consecutive terms of incarceration the court has imposed an excessive sentence. Defendant argues that concurrent terms should have been imposed based on the fact that he had a prior relationship with the victims and the "lack of public interest and need for protection".

The consecutive terms of incarceration were imposed for two different assaults on the victim while she was unconscious. By making the terms concurrent, the court would in essence eliminate the punishment for one of the assaults. Such a result is not justified by the fact that Defendant had a prior relationship with the victim;[2] that relationship did not equate to consent to be violated in the manner she was by the assaults as they happened. As for "lack of public interest", if Defendant means by that that no one cares that he assaulted this victim, Defendant is wrong. The victim may have been a heroin addict, and may have been a prostitute, but the law extends its protections to even those who make extremely bad choices. Consecutive terms, while resulting in a significant period of incarceration, are not excessive in this instance and the court does not believe it has abused its discretion in imposing such a sentence.

ORDER

AND NOW, this day of August 2017, for the foregoing reasons, Defendant's Motions for New Trial and for Reconsideration of Sentence are DENIED.[3] Defendant's Motion for Judgment of Acquittal is GRANTED. A judgment of acquittal is hereby entered on Counts 7, 8, 9 and 10 of the Information and the Sentence imposed on those counts by Order dated March 20, 2017 is hereby VACATED.

[2] The victim testified that Defendant would give her money for sex.

[3] By Order dated August 3, 2017, the court modified the sentence on counts 5 and 6 as the prior sentence exceeded the statutory maximum and was thus an illegal sentence. That modification is unrelated to the issues presented in the instant motion.

Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of entry of this Order; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the right to appeal in forma pauperis and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
PD
APO
SCI- Camp Hill
PaBPP
Gary Weber, Esq.
Hon. Dudley Anderson