

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FARHAT MGHIRBI,

Defendant-Below,
Appellant,

v.

STATE OF DELAWARE,

Plaintiff-Below,
Appellee.

No. 47, 2000

Court Below: Superior Court of the
State of Delaware in and for Sussex
County in Cr. A. Nos. IS99-07-0546.

Def. ID. No. 9907008866

Submitted: June 2, 2000

Decided: June 30, 2000

Corrected: July 10, 2000

Before **VEASEY**, Chief Justice, **HARTNETT and BERGER**, Justices.

ORDER

This 30th day of June, 2000, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In August 1999, Farhat Mghirbi was indicted by a grand jury and charged with having committed Unlawful Sexual Contact in the Second Degree and Indecent Exposure in the First Degree. In November 1999, after a two-day jury trial in the Superior Court, the jury found Mghirbi guilty of Unlawful

Sexual Contact in the Second Degree and not guilty of Indecent Exposure in the First Degree. On January 7, 2000, the Superior Court sentenced Mghirbi to two years at Level V supervision, with credit for time served, suspended for eighteen months at Level III supervision. This is Mghirbi's direct appeal.

(2) Mghirbi's defense counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(3) Mghirbi's defense counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, counsel informed Mghirbi of the provisions of Rule 26(c) and provided Mghirbi with a copy of the motion to withdraw, the accompanying brief, and the complete trial transcript. Mghirbi also was informed of his right

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

to supplement his counsel's presentation. Mghirbi submitted points to his counsel, raising claims of insufficient evidence and ineffective assistance of counsel. The State has responded to the position taken by Mghirbi's counsel as well as to the points raised by Mghirbi and has moved to affirm the conviction.

(4) The victim in this case was a 15-year-old girl who worked as a cashier, dishwasher and bus person at Porky Pete's, a diner on Long Neck Road in Sussex County, Delaware. Mghirbi worked in the same diner as a cook and manager. The victim testified that during her shift, Mghirbi would walk behind her, grab her hips, and pull her toward his penis. According to the victim, Mghirbi would rub his penis against her backside, kiss her on the neck and talk to her about sex. Once, according to the victim, Mghirbi pulled out his penis and put the victim's hand on it. The victim testified that she was scared by Mghirbi's actions and quit work after only a few weeks. The victim told her mother and another employee what Mghirbi had done to her. She also contacted the Delaware State police and gave a statement. Mghirbi was arrested and charged. At trial, Mghirbi denied the victim's claims, leaving the jury with a determination of credibility.

(5) Mghirbi alleges that his counsel was ineffective at trial.² In addition, Mghirbi alleges that his trial counsel is ineffective on appeal.

(6) This Court will not consider on direct appeal any claim of ineffective assistance of counsel that was not raised below.³ Accordingly, we will not consider Mghirbi's claims of ineffective assistance of trial counsel, as those claims have been raised for the first time in this direct appeal.

(7) Mghirbi claims that his counsel is ineffective for having filed a Rule 26(c) brief when there are meritorious issues that counsel could have raised on appeal. Mghirbi's claim is without merit. Mghirbi's counsel has followed the requirements of Rule 26(c). Furthermore, Mghirbi has taken the opportunity to submit issues for this Court's consideration. Mghirbi's counsel cannot be held to be ineffective for failing to raise other unidentified issues that Mghirbi had the opportunity to raise, but did not.⁴

(8) Mghirbi complains that the prosecution's evidence was based on "total hearsay." Mghirbi fails, however, to direct this Court to any specific

² Mghirbi alleges that his counsel failed to: (i) obtain defense witnesses; (ii) object to the State's rebuttal witness; (iii) discuss discovery with Mghirbi; (iv) cross-examine key witnesses; and (v) establish that the real motive for the victim's complaint against Mghirbi was that she was angry because she was fired from her job at the diner.

³ *Wing v. State*, Del. Supr., 690 A.2d 921, 923 (1996).

⁴ *Getz v. State*, Del. Supr., No. 301, 1994, Veasey, C.J., 1994 WL 622022 (Oct. 31, 1994) ORDER.

references in the record to support his claim, and our review of the record does not reveal any hearsay violations.⁵

(9) Mghirbi claims that the prosecution's "entire case was circumstantial." Mghirbi is mistaken.⁶ The record indicates that there was direct testimony from the victim concerning the alleged sexual offenses. The victim's testimony concerning the alleged unlawful sexual contact was sufficient to support the jury's guilty verdict.⁷ Although Mghirbi denied the victim's accusations and testified that the victim quit because Mghirbi refused to give her money, this conflict in testimony and the credibility of the witnesses were for the jury to resolve.⁸ It is entirely within the discretion of the jury to accept one witness's testimony and reject the conflicting testimony of the same witness or that of other witnesses.⁹ After giving careful consideration to the record, we are satisfied that there was sufficient evidence

⁵ The record reflects that a Delaware State Police detective testified as to the victim's out-of-court statement. The statement was admitted under 11 *Del. C.* § 3507 which creates a hearsay exception for "the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination."

⁶ Furthermore, it is settled law in Delaware that direct evidence is not necessary to establish guilt; circumstantial evidence is sufficient. *Seward v. State*, Del. Supr., 723 A.2d 365, 369 (1999).

⁷ See *Styler v. State*, Del. Supr., 417 A.2d 948, 950 (1980).

⁸ *Chao v. State*, Del. Supr., 604 A.2d 1351, 1363 (1992) (citing *Pryor v. State*, Del. Supr., 453 A.2d 98, 100 (1982)).

⁹ *Pryor v. State*, 453 A.2d at 100.

for any rational trier of fact to have found the essential elements of the crime of Unlawful Sexual Contact in the Second Degree, beyond a reasonable doubt.¹⁰

(10) We are further satisfied that defense counsel made a conscientious effort to examine the record and correctly concluded that Mghirbi could not raise a meritorious claim on appeal. Having independently reviewed the record, we find that Mghirbi's appeal is wholly without merit and devoid of any arguably appealable issue. Our finding that the appeal is without merit renders defense counsel's motion to withdraw moot.

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rule 26(c), that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

¹⁰ See 11 *Del. C.* § 768 (providing that a person is guilty of unlawful sexual contact in the second degree when the person intentionally has sexual contact with another person who is less than 16 years of age or causes the victim to have contact with the person or a third person).