

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
v.	)	ID No.: 0705019531
	)	
PARIS L. WATERS,	)	
	)	
Defendant.	)	

**Submitted: April 7, 2008**  
**Decided: May 30, 2008**

**ORDER**

**Upon Defendant’s Motion for Judgment of Acquittal/Motion to Dismiss –  
DENIED**

1. On March 11, 2008, after a non-jury trial, the court convicted Defendant of one count of rape in the second degree.

2. Basically, Defendant had a brief, sexual encounter with an underage female in an upstairs bedroom of his mother’s house. The victim testified that she was a reluctant participant. In short, the case involved what is commonly called “statutory rape.”

3. Before, during and after trial, Defendant, through counsel, argued that the proper charge is fourth degree rape.

4. As they apply to the facts in this case, which involves a victim below the age of consent, the elements of second degree rape<sup>1</sup> and fourth degree rape<sup>2</sup> are identical. Accordingly, Defendant contends that as a matter of statutory and constitutional law, he should have been convicted for the less serious offense.

5. The State principally relies on *Johnson v. State*.<sup>3</sup> Johnson, like Defendant, was charged with second degree rape.<sup>4</sup> Johnson asked the court to instruct the jury on rape fourth degree, which Johnson argued was a lesser-included offense of second degree rape.<sup>5</sup> The court declined. Affirming the conviction, *Johnson* held that, “[a] lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both lesser and greater offenses.”<sup>6</sup> Further, where the lesser-offense is “‘completely encompassed by the greater,’ the defendant is not entitled to a lesser included offense instruction.”<sup>7</sup>

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<sup>1</sup> 11 *Del. C.* § 772.

<sup>2</sup> 11 *Del. C.* § 770.

<sup>3</sup> 925 A.2d 504 (Del. 2007) (TABLE).

<sup>4</sup> *Id.* at \*1-2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*2.

<sup>7</sup> *Id.* (Citing *Sansone v. United States*, 380 U.S. 343, 85 S.Ct.1004, 13 L.Ed.2d 882 (1965)).

6. Although *Johnson*'s facts more readily support the State's charging decision there, *Johnson*'s holding applies here. It follows, therefore, that where the facts support either charge, the decision to prosecute for fourth or second degree rape is a matter addressed to the prosecutor's discretion.

7. Defendant attempts to distinguish *Johnson* because force was present there. Defendant, however, offers no authority supporting his argument that, where more than one criminal statute applies to a case's facts, the State may only prosecute the less serious offense. In other words, *Johnson*'s holding does not turn on the fact that Defendant used force.

8. *Johnson* does not consider prosecutorial discretion. The court here, therefore, assumes without deciding that the prosecutor's discretion is not completely unfettered. The charging decision cannot be based on discriminatory or other improper motive.

9. Although the court did not require the State to account for the charging decision here, it appears that Defendant has prior criminal convictions and he was on probation when he committed this offense. Those facts would support the harsher charging decision. Accordingly, the court cannot reduce Defendant's conviction for rape in the second degree, as a matter of law.

10. *Johnson*'s holding that fourth degree rape is not a lesser-included

offense is particularly significant here, because it means the court may not exercise lenity to justify finding Defendant guilty of fourth degree rape. Reducing the conviction would entail finding Defendant guilty of a crime with which he was not charged.

11. In simplest terms, this case was all-or-nothing. Taking the indicted charge and the evidence into account, the court had to decide if the victim was credible, beyond a reasonable doubt. Once the court decided she was, the outcome here was fated.

For the foregoing reasons, Defendant's Motion for Judgment of Acquittal / Motion to Dismiss is **DENIED**.

**IT IS SO ORDERED.**

/s/ Fred S. Silverman  
Judge

Cc: Prothonotary (Criminal)  
Josette Manning, Deputy Attorney General  
Raymond Radulski, Esq.