

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARNELL A. DAVIS,	§
	§ No. 478, 2004
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr.A. Nos. 03-08-0287; 0290
	§
Plaintiff Below-	§
Appellee.	§

Submitted: July 26, 2005
Decided: September 19, 2005

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 19th day of September 2005, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Darnell A. Davis, was found guilty by a Superior Court jury of the lesser-included offenses of Rape in the Second Degree and Unlawful Sexual Contact in the Third Degree. He was sentenced to a total of 26 years incarceration at Level V, with credit for 436 days previously served, to be suspended after 20 years for decreasing levels of probation. This is Davis' direct appeal.

(2) Davis' trial counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to 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) Davis' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Davis' counsel informed Davis of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Davis also was informed of his right to supplement his attorney's presentation. Davis responded with a brief that raises one issue for this Court's consideration. The State has responded to the position taken by Davis' counsel as well as the issue raised by Davis and has moved to affirm the Superior Court's judgment.

(4) Davis raises one issue for this Court's consideration. He claims that the Superior Court failed to fully instruct the jury on the lesser-included

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).

rape and unlawful sexual contact charges. His argument is that the judge should have instructed the jury on Rape in the First, Second, Third and Fourth Degrees and Unlawful Sexual Contact in the First, Second and Third Degrees.

(5) The evidence presented at trial was as follows. On July 12, 2003, 17 year-old Yalisha Joynes was visiting her cousin at the Hollybrook Apartments on the west side of Laurel, Delaware. Yalisha lived in Wexford Village Apartments on the east side of Laurel, about one and a half miles away. At about 10:00 p.m., after unsuccessfully attempting to contact her mother for a ride home, Yalisha walked to the home of her friend, Charlotta Hughes. Still unable to find a ride home, Yalisha finally agreed to go with Nakeama Davis, who had driven into Hughes' apartment complex and volunteered to give her a ride. Darnell Davis, Nakeama's 37 year-old cousin, was in the car with her.

(6) Rather than taking Yalisha home, however, Nakeama went to an apartment complex in Concord, Delaware, to check on her children. Following an argument between Nakeama and the babysitter, Davis told Yalisha that he had another cousin close by who would drive her home. Davis and Yalisha walked to the home of Davis' cousin, but no one was available to drive Yalisha home. As a result, Yalisha spent the night at the

house. She slept in the same room with Davis, but there were no sexual relations between the two. Davis fell asleep immediately. Yalisha did not sleep all night.

(7) In the morning, Yalisha went into the living room and took a short nap on the couch. Davis woke her up and she went outside and waited for Davis to find her a ride home. Becoming increasingly impatient, Yalisha decided to walk to the home of a friend who lived nearby. Davis accompanied her. As they walked by a vacant building, Davis shoved Yalisha inside. He led her to a futon and told her to remove her clothes. Davis had a stick in his hand and pointed it at Yalisha in a threatening manner. He then forced her to perform oral sex and fondled her. When he was finished, Davis told Yalisha to put her clothes back on. Wanting to leave something behind as evidence of where the incident occurred, Yalisha threw her broken bracelet under the futon. She then walked to the home of her friend, Shaneice Showell.

(8) Yalisha told Shaneice what had happened. She also telephoned her cousin Tremaine, her brother Ty, and the Delaware State Police. Officer Scott Workman and Detective John Messick arrived in response to her phone call. Detective Messick interviewed her and tape-recorded the interview. The officers then took Yalisha to Nanticoke Memorial Hospital

in Seaford, Delaware, for an examination and tests. The examination by Nurse Debra Holbrook did not reveal any bruises or marks on Yalisha's body. A dried secretion on Yalisha's left breast and secretions from Yalisha's mouth were swabbed for DNA testing and were later found to be a genetic match to Davis. Yalisha would not consent to a blood test. Nurse Holbrook determined that, because there was no vaginal penetration, no vaginal examination was necessary. Subsequently, the police found Yalisha's broken bracelet under the futon where she stated she had placed it, but did not find the stick with which Yalisha said Davis threatened her.

(9) Davis testified in his own behalf at trial. He denied forcing himself upon Yalisha and claimed that Yalisha willingly performed oral sex on him in the back seat of a car at Nakeama's house. Davis' brother testified that he observed Davis and Yalisha hugging and kissing each other that night at Nakeama's house.

(10) The record reflects that Davis initially was charged with Rape in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, Aggravated Menacing, Unlawful Sexual Contact in the First Degree, Unlawful Imprisonment in the First Degree, Possession of a Deadly

Weapon by a Person Prohibited, and Endangering the Welfare of a Child.² At the beginning of the third day of trial, the State took the position that lesser-included rape and unlawful sexual contact charges should be included in the jury instructions. At the close of the case, the judge ruled on the State's application. Because the jury might not believe that Davis displayed a deadly weapon during the attack, the judge ruled that instructions would be given on Rape in the Second Degree³ and Unlawful Sexual Contact in the Third Degree,⁴ neither of which involves the use of a deadly weapon. The judge also ruled that an instruction would be given for Rape in the Fourth Degree,⁵ because Davis was over 30 years old and Yalisha was under 18 years old at the time of the incident. The defense did not object to the judge's rulings.

(11) Under Delaware's lesser-included offense statute,⁶ a trial judge is not required to instruct a jury with respect to a lesser-included offense "unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting him of the included offense

² The charge of Possession of a Deadly Weapon by a Person Prohibited was severed from the other charges and the charge of Endangering the Welfare of a Child was dismissed. Davis was found not guilty of Possession of a Deadly Weapon During the Commission of a Felony, Aggravated Menacing and Unlawful Imprisonment.

³ Del. Code Ann. tit. 11, § 772(a) (1) (2001).

⁴ Del. Code Ann. tit. 11, § 767 (2001).

⁵ Del. Code Ann. tit. 11, § 770(a) (2) (2001).

⁶ Del. Code Ann. tit. 11, § 206(c) (2001).

[instead].”⁷ In this case, there was a rational basis in the evidence for the judge to instruct the jury on the lesser-included offenses of Rape in the Second and Fourth Degrees and Unlawful Sexual Contact in the Third Degree. There was, however, no rational basis in the evidence for the judge to instruct the jury on the additional lesser-included offenses of Rape in the Third Degree⁸ and Unlawful Sexual Contact in the Second Degree.⁹ Both of these charges require that the victim be less than 16 years old and, at the time of trial, it was undisputed that Yalisha was 17 years old. As such, we find no error or abuse of discretion on the part of the Superior Court in instructing the jury as it did.

(12) This Court has reviewed the record carefully and has concluded that Davis’ appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Davis’ counsel has made a conscientious effort to examine the record and has properly determined that Davis could not raise a meritorious claim in this appeal.

⁷ *State v. Cox*, 851 A.2d 1269, 1274 (Del. 2003).

⁸ Del. Code Ann. tit. 11, § 771(a) (1) (2001).

⁹ Del. Code Ann. tit. 11, § 768 (2001).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice