

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NICHOLAS W. BALKO,	§
	§
Defendant Below-	§ No. 621, 2001
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN00-09-0225
Plaintiff Below-	§ IN00-09-0226
Appellee.	§

Submitted: May 29, 2002

Decided: July 18, 2002

Before **HOLLAND, BERGER** and **STEELE**, Justices

ORDER

This 18th day of July 2002, 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, Nicholas W. Balko, was found guilty by a Superior Court jury of Unlawful Sexual Contact in the First Degree and Assault in the Third Degree. On the first conviction, Balko was sentenced to 3 years incarceration at Level V. On the second conviction, Balko was sentenced to 1

year incarceration at Level V, to be suspended for 1 year at Level III probation.

This is Balko's direct appeal.

(2) Balko's trial 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

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).

(3) Balko's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Balko's counsel informed Balko 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. Balko was also informed of his right to supplement his attorney's presentation. Balko responded with a brief that raises several issues for this Court's consideration.² The State has responded to the position taken by Balko's counsel as well as the issues raised by Balko and has moved to affirm the Superior Court's judgment.

(4) The issues Balko raises may fairly be summarized as follows: a) the evidence presented at trial was insufficient to support the convictions; b) the prosecutor engaged in misconduct in his behavior towards the victim, the jurors and the defendant; c) the jury instructions were improper; d) the Superior Court ruled improperly on various evidentiary issues; e) the Superior Court abused its discretion in hurrying the testimony of the witnesses; and f) the trial was tainted by the victim's communication with a social worker employed by the State of

²Balko presents over 200 separate questions for consideration by this Court, which may fairly be categorized as 6 separate issues.

Delaware before she had finished her testimony in violation of the Superior Court's order.

(5) At trial, Carolina Collins, the victim's mother, testified as the first witness for the State. She stated that, on the evening of August 22, 2001, her daughter Sheila ran, crying, into their house at Brownleaf Road, Newark, Delaware, and said she had been raped by "Nick." According to Mrs. Collins, Sheila's back was dirty, her pants had grass stains, her lip was cut and she had an injury to her eye. Mrs. Collins testified she knew who "Nick" was because he had appeared at their front door drunk one day and her husband had ordered him off their property. On cross examination by the defense, Mrs. Collins agreed that her husband had told her about this incident and that she was not present when it occurred.

(6) Following Mrs. Collins' testimony, defense counsel requested that all references to Mr. Collins' encounter with Nick Balko be stricken as prejudicial hearsay or, in the alternative, that a mistrial be granted. After a lengthy discussion outside the presence of the jury, the judge resolved the issue by giving the jury the following cautionary instruction: "Any observation and/or conclusion as to the sobriety of the defendant prior to the date of the offense in

question by individuals other than those who are present in court and testifying are not relevant for purposes of resolving these charges or the charges with which the defendant is charged with having committed. Such statements are to be disregarded by you as a result and I so instruct you.”

(7) Sheila Hitchcock, the victim, testified next for the State. Sheila stated that she was 39 years old, had graduated from Christiana High School and had been a special education student. She stated that she suffers from depression and was taking several medications for that condition at the time of the incident with Nick. Sheila testified that, on the evening of the incident, she was in Nick’s trailer for an hour or two talking about a mutual friend who had recently died. She got up to leave, but Nick stopped her. He knocked her down and undid his pants; she screamed and he punched her in her left and right jaw; she bit him twice on the face. Sheila testified that Nick penetrated her vaginally, but was unable to ejaculate. When asked if she told Detective Bond of the New Castle County Police Department on the evening of the incident that she had used “psychology” on Nick, she said she did not remember. Without objection by the defense, the prosecutor then played a tape of Sheila’s interview with

Detective Bond on the evening of the incident, which confirmed that she had made that remark.

(8) On cross examination, Sheila testified that she and Nick were just friends, but that she drank beer with him, did errands for him and sometimes ended up alone with him. She stated that Nick was already drunk when she arrived at his trailer and confirmed that the “psychology” she used on Nick was to suggest that, if he left her alone, she would have sex with him some other time. Because Sheila’s cross examination was not completed by the end of the first day of trial, the judge instructed her that she would remain under oath until the next day and could not speak to anyone about her testimony in the meantime. The following morning, out of the presence of the jury and the witnesses, the prosecutor notified defense counsel that, in violation of the Superior Court’s order, Sheila had spoken to a social worker employed by the State of Delaware about her testimony the previous day. She was apparently concerned that she had mischaracterized the extent of the penetration that had occurred on the night of the incident. The prosecutor offered to have Sheila and the social worker testify about their communication, but defense counsel preferred to leave the issue alone, noting that any such testimony might bolster

Sheila's credibility with the jury. Observing that there would be no reason for the prosecutor to raise the issue on redirect if defense counsel did not raise it first, the judge then instructed Sheila to be brought into the courtroom and defense counsel to continue his cross examination.

(9) Miriam Denny, an emergency room nurse and sexual assault nurse at Christiana Hospital, testified as the next witness for the State. Denny stated that she examined Sheila at about 1:00 a.m. following the incident. She testified that Sheila looked disheveled and was upset. She had bruises on her face, a bruise on the inside of her top lip, and abrasions and scratches all over her back and both knees. Denny testified that the internal examination conducted on Sheila was unremarkable and did not indicate the presence of sperm. During direct examination, Denny referred to a questionnaire that she had completed during her initial interview with Sheila. While Sheila reported initially that there was a "long knife," she subsequently clarified that Nick had not threatened her with a knife. Following lengthy voir dire and argument outside the presence of the jury, the judge refused to allow the defense to ask Denny questions about the interaction of depression medication and alcohol because no evidence had been presented establishing Denny's qualifications in that area.

(10) The State's next witness was Robyn Quinn, a forensic DNA analyst from the Medical Examiner's Office. She testified that in December 2001 the Medical Examiner's Office received the sexual assault evidence collection kit, sealed envelope and sealed paper bag in this matter from Detective Bond and was asked to analyze the items for the presence of sperm and/or bodily fluids. Quinn analyzed the underpants in the bag and vaginal and rectal swabs. The underpants contained no semen. While the swabs tested positive for the enzyme found in semen, there was no semen found.

(11) The State's next witness was Detective Bond of the Criminal Investigations Unit of the New Castle County Police Department. Bond was the chief investigating officer for the incident. He testified that he received the evidence from Nurse Denny and delivered it to the Medical Examiner's Office for analysis. He also testified that Sheila took him to Nick Balko's trailer at about 5:20 a.m. the morning after the incident. At that time, he and two other police officers woke Balko up and explained to him that he had been accused of sexually assaulting Sheila Hitchcock. Balko told them that he remembered Sheila coming to the trailer for a drink, but could not remember anything else. His lip was cut and he had marks on his face. On cross examination, Bond

agreed that no pubic hairs belonging to Balko were found on the victim or the victim's clothing. On redirect examination, Bond testified that Balko stated he had not had sex with Sheila in the past and that, a month or two prior to the incident, he had asked her to have sex with him and she said she just wanted to be friends.

(12) Balko's claim that the evidence was insufficient to convict him is without merit. When a defendant claims that the evidence against him was insufficient to support a jury verdict, the proper standard of appellate review requires this Court to determine "whether any rational trier of fact, viewing the evidence in the light most favorable to the [prosecution], could have found the essential elements of the charged offense beyond a reasonable doubt."³ In this case, Balko was convicted of Unlawful Sexual Contact in the First Degree⁴ and Assault in the Third Degree.⁵ Our review of the trial transcript reflects that a reasonable juror clearly could have found the essential elements of these charged

³*Morrissey v. State*, 620 A.2d 207, 213 (Del. 1993).

⁴DEL. CODE ANN. tit. 11, § 769 (2001) ("A person is guilty of unlawful sexual contact in the first degree when, in the course of committing unlawful sexual contact . . . the person causes physical injury to the victim . . .").

⁵DEL. CODE ANN. tit. 11, § 611(1) (2001) ("A person is guilty of assault in the third degree when . . . [t]he person intentionally or recklessly causes physical injury to another person . . .").

offenses beyond a reasonable doubt by relying on the testimony of the State's witnesses.

(13) Balko's next claim, which was raised for the first time on appeal and which we, therefore, review for plain error,⁶ is that the prosecutor engaged in misconduct with respect to his treatment of the victim, the jurors and the defendant. Specifically, he complains that the prosecutor placed his hand over Balko's head when asking Sheila Hitchcock to identify him, asked improper questions, had an overly friendly relationship with Sheila Hitchcock and had an inappropriate contact with a juror. We have reviewed carefully the transcript of the trial in this case. We find no basis for Balko's claim of prosecutorial misconduct, no indication that any conduct of the prosecutor resulted in prejudice to Balko and no plain error.

⁶SUPR. CT. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (To warrant reversal, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process).

(14) Balko’s claim of improper jury instructions is also without merit.⁷ A trial court’s jury instruction may serve as a basis for reversal only if the deficiency had the effect of undermining the ability of the jury to perform its duty to return a verdict.⁸ Moreover, the language of jury instructions will not serve as grounds for reversible error if they are “reasonably informative and not misleading, judged by common practices and standards of verbal communication.”⁹ We have reviewed carefully the jury instructions given by the Superior Court in this case and, judged by these standards, there is nothing in the instructions warranting a reversal and no indication of any prejudice to Balko in any case.

(15) Balko next claims that the Superior Court judge ruled improperly on evidentiary issues throughout the trial. The record does not support Balko’s

⁷At the prayer conference, the Superior Court granted the defense request for instructions on the lesser included offenses of Rape in the Second Degree, Unlawful Sexual Contact in the First Degree, and Unlawful Sexual Contact in the Third Degree. The Superior Court denied the defense request for an instruction on Rape in the Third Degree.

⁸*Flamer v. State*, 490 A.2d 104, 128 (Del. 1983).

⁹*Id.*

claim of error. In fact, the bulk of the judge's evidentiary rulings were in favor of the defense, not the prosecution. To the extent that there were any erroneous evidentiary rulings, Balko has failed to show any prejudice as a result.

(16) Balko's next claim, which we review for plain error, is that the Superior Court judge hurried the testimony of the witnesses. The trial transcript reveals that, on a few occasions, the judge reminded counsel to move their questioning along expeditiously. The judge also asked the jury whether it wished to deliberate past 5:00. These actions were well within the judge's discretion in overseeing the trial proceedings.¹⁰ Moreover, Balko has failed to show that any such actions on the part of the judge resulted in any prejudice to him and there is no evidence of plain error.

(17) Balko's final claim, which we also review for plain error, is that Sheila Hitchcock's communication with the social worker employed by the State of Delaware tainted the trial. The record reflects that the communication was the result of concern by a witness of limited mental capacity that she had mischaracterized the nature of the defendant's sexual misconduct. The scope of the communication with the social worker was narrow and there is no indication

¹⁰*Styler v. State*, 417 A.2d 948, 951 (Del. 1980).

that the Superior Court abused its discretion in disposing of the issue as it did. Moreover, Balko has failed to show that he was prejudiced by the communication or the manner in which the issue was resolved by the judge and there was no plain error.¹¹

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

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

¹¹To the extent Balko attempts to raise any claims of ineffective assistance of counsel, this Court will not decide any such claims since they were raised for the first time in Balko's direct appeal. *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

