

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT JOHNSON,)
) No. 492, 2006
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for New Castle County
)
 STATE OF DELAWARE,) Cr. ID No. 0509005244
)
 Plaintiff Below,)
 Appellee.)

Submitted: May 9, 2007

Decided: May 31, 2007

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 31st day of May 2007, it appears to the Court that:

(1) Defendant-appellant, Albert Johnson, appeals from his Rape Fourth Degree and Unlawful Sexual Contact Third Degree convictions in Superior Court. Following a bench trial, the trial judge convicted him of both charges. On appeal, Johnson contends that the State produced insufficient evidence to establish his guilt beyond a reasonable doubt because, given inconsistencies in the evidence about consent, the State could not prove that the acts occurred “without consent” under 11 *Del. C.* § 761 (h)(1) and (3). It is the fact finder’s role to resolve the conflicts in witnesses’ testimony and weigh their credibility. The trial judge took into account the inconsistencies between Johnson’s and the State’s versions of the events,

ultimately resolving the witnesses' inconsistencies against Johnson. After consideration of the record, we conclude that sufficient evidence supported the fourth degree rape and third degree unlawful sexual contact convictions. Accordingly, we AFFIRM.

(2) Johnson, sixty four years old at the time of the offenses, had been involved in a romantic relationship with Dorothy Gast for about ten years. Gast lived with her allegedly mentally disabled fifty two year old sister, Margaret Casella. On September 7, 2005, Johnson took Casella with him while he ran errands and shopped. Johnson and Casella left Gast's house at about ten o'clock in the morning. They stopped at Johnson's home and went to the basement together.

(3) Casella testified that Johnson then asked her to sit on the couch. Johnson took a picture of Casella's breasts with a camera. Although Casella resisted, Johnson pulled Casella's shirt up and took several pictures. Johnson also touched Casella's breasts. Thereafter, Johnson went into her underwear and inserted two fingers into her vagina. Johnson held Casella down while she was on the couch.¹ Casella screamed, told Johnson to stop and repeated "no" several times, but Johnson reminded Casella that no one could hear her. Casella ran out of the house and into the car.

¹ App. to Appellee's Answering Br. at B-5.

(4) Johnson and Casella then went shopping and ate lunch. Johnson brought Casella back to Gast's house at approximately two o'clock in the afternoon. According to Gast, later that night she became worried about her sister's well being, because Casella had not spent that much time away from her in a very long time. According to Gast, she intuitively knew something was wrong. Gast talked to Casella and asked if Johnson had touched her. Casella replied "oh my god, I'm in trouble."² After Gast questioned Casella a bit more, Casella told her about Johnson's actions.

(5) Gast drove to Johnson's house that night to confront him. On the way to Johnson's house, Gast called the police. Casella directed Gast to Johnson's house, and showed her the sofa where the alleged sexual assault occurred.³ When the police arrived, they took Casella to Christiana Hospital for a Sexual Assault Nurse Exam (SANE).

² At trial, Gast testified that:

But I just remember—I come out of the bathroom and I just looked over. It was like slow motion, you know, and I looked over at Margie and I said, Marge [sic]—because everybody was fine. I said, Marge [sic] come here. And I said sit up on my bed and I said, I want to ask you something and I want you to tell Dorothy the truth, I said had Albert ever touched you. And she says oh, my God, I'm in trouble.

App. to Appellee's Answering Br. at B-10.

³ *Id.* at B-10.

(6) A SANE nurse examined and interviewed Casella. The nurse described Casella as “very sad, upset, difficult to talk to.”⁴ The nurse believed Casella to be “disabled, mentally retarded, which [made it] difficult [to] get a history from her.”⁵ Casella described Johnson’s actions to the nurse.⁶ Based on Casella’s description, the nurse testified that Casella had suffered: (a) pain over the vaginal area; (b) a one centimeter scratch on the vestibule of the clitoris; (c) ecchymosis on the opening to the vagina; (d) scratches on her right and left vaginal walls; and, (e) no bruising on her arms, hands torso or legs.⁷ The nurse clarified that scratches and abrasions are not generally present in those areas where she found them.⁸ The nurse further testified that (a) the injuries she observed on Casella were consistent with Casella’s description of the assault; and, (b) any objective findings that she noted in her examination could have been consistent with consensual sexual contact.⁹

(7) At trial, Johnson testified in his own defense and denied Casella’s accusations of sexual misconduct. Johnson denied having any sexual contact with

⁴ *Id.* at B-12.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at B-13-17.

⁸ *Id.* at B-16.

⁹ App. to Appellant’s Opening Br. at A-21.

Casella, explaining, however, that Casella's breasts had come in contact with his back as Casella followed him down the steps to the basement.¹⁰ Police did not find any photographs of Casella in several cameras that they seized from Johnson's home.

(8) The trial judge convicted Johnson of Rape Fourth Degree and sentenced him to thirteen years at Level V, suspended after ten years for Level IV, followed by probation. He sentenced Johnson for Unlawful Sexual Contact Third Degree for one year at Level V, suspended for one year at Level III. Johnson appealed.

(9) Johnson's sole argument on appeal is that the State produced insufficient evidence to establish his guilt beyond a reasonable doubt. Specifically, he points to the definition of "without consent" under 11 *Del. C.* § 761 (h)(1) and (3).¹¹ He contends that there was no evidence in the record that Johnson

¹⁰ *Id.* at A-7.

¹¹ 11 *Del. C.* § 761 (h):
"Without consent" means: (1) The defendant compelled the victim to submit by any act of coercion as defined in § 791 and § 792 of this title, or by force, by gesture, or by threat of death, physical injury, pain or kidnapping to be inflicted upon the victim or a third party, or by any other means which would compel a reasonable person under the circumstances to submit. It is not required that the victim resist such force or threat to the utmost, or to resist if resistance would be futile or foolhardy, but the victim need resist only to the extent that it is reasonably necessary to make the victim's refusal to consent known to the defendant[.]

* * *

“compelled” Casella by force or threat to submit to the alleged acts. Further, Johnson contends that, the State, with the burden to prove the element of “without consent,” offered no evidence that Casella suffered from a mental defect that rendered her incapable of comprehending the nature of sexual conduct.¹²

(10) “Where a defendant argues that the evidence is insufficient to support the verdict against him, we inquire whether, after reviewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the

(3) The defendant knew that the victim suffered from a mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct[.]

¹² Johnson moved for judgment of acquittal at the conclusion of the State’s case based on these two arguments. The trial judge did not reach the issue based on 11 *Del. C.* § 761 (h)(3). The trial judge denied Johnson’s motion and stated:

I think looking at the “without consent” definition first in Subsection (1), there is sufficient evidence in here of the physical actions of the alleged victim’s arms being crossed against her chest and being held down in a relatively slight way, but in an affirmative determined way by the defendant, if that was to be believed. That results to sufficient force or gesture that would compel a reasonable person under the circumstances to submit.

And I looked further into the second sentence of Subsection (1) which says that the victim need only resist to the extent that it is reasonably necessary to make the victim’s refusal to consent known to the defendant. And in this case the victim had severe intellectual and mental limitations. And for such a person I think a lesser showing of refusal to consent would satisfy[.] [T]hat might not carry the day in a case where a victim has no intellectual limitations.

So looking at the consent issue under Sub (1) in the light most favorable to the state, given the nature of the victim’s mental limitations, coupled with her testimony about the actions he took, including the lifting up of her blouse—her shirt, excuse me, compels a denial of the motion on that ground, no I need not reach the issues in Subsection (3).

State, ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’”¹³

(11) In determining witness credibility and weighing evidence, the trial judge sitting as fact finder is not required to accept entirely either party’s account of the facts.¹⁴ That is, the trial judge had discretion to disbelieve Johnson’s testimony and to reject the inferences he asked the trial judge to draw.¹⁵ Here, before finding Johnson guilty of the two charges, the trial judge took into account the inconsistencies between Johnson’s and the State’s versions of the events, ultimately resolving the State’s witnesses’ internal inconsistencies and inconsistencies with Johnson’s version of the facts.¹⁶ More specifically, the trial

¹³ *Guinn v. State*, 894 A.2d 406 (Del. 2005), (quoting *Dixon v. State*, 567 A.2d 854, 857 (Del.1989)).

¹⁴ *Knight v. State*, 690 A.2d 929, 932 (Del. 1996).

¹⁵ *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982).

¹⁶ The trial judge stated:

I studied as careful as I could the demeanor of both the complaining witness and the defendant, and everybody who testified. It does seem to me that despite the specific mental limitations of [Casella], that her testimony was essentially consistent in her out-of-court statement to [police], to the SANE nurse, and in court here.

I don’t know much about what the nature of her limitations are because there was not any testimony from any professional, or psychiatric reports, or diagnoses introduced. But she’s—while she certainly has mental limitations, she seemed to think carefully, as best I could observe her, about each question and think carefully about each answer, and that seems to be the case on the tape, as well as in her in-court testimony.

* * *

I’ve studied the demeanor of the defendant as carefully as I could, and he has denied emphatically that it happened. But when I look at the essential

judge found that Casella's version of the events was internally consistent and that other witnesses' testimony supported her version.

(12) First, in order to convict Johnson of Rape in the Fourth Degree, the trial judge was required to find beyond a reasonable doubt that Johnson had intentionally penetrated Casella sexually without her consent.¹⁷ After consideration of the record, we conclude that the evidence supports the trial judge's findings. Casella's testimony that Johnson had put his two fingers in her vagina is sufficient evidence from which the trial judge could infer that sexual penetration took place. The trial judge heard direct testimony from Casella that Johnson touched her vaginal area beneath her underwear causing her pain. Casella said that she cried out in pain and was crying during the entire incident. Casella's testimony was consistent with the statements that she gave to the nurse, who found physical evidence in Casella's vaginal area supporting Casella's description of the sexual assault. The nurse also testified that the scratches and abrasions she observed are not normally present in that area. Although Johnson asserted that the

consistencies of the victim's testimony, although there were some issues, particularly when she got toward the end of her testimony, and she did seem to be fatigued, and it does seem to be that this was quite stressful for the victim, but she was remarkably consistent with what was on tape, with what was said to the SANE nurse.

¹⁷

11 *Del. C.* § 770(a)(3) a (2001).

(a) A person is guilty of rape in the fourth degree when the person:

(3) Intentionally engages in sexual penetration with another person under any of the following circumstances:

a. The sexual penetration occurs without the victim's consent[.]

plastic speculum used during the examination could have caused the injuries, the nurse adamantly disagreed. The nurse explained that during the examination, the speculum is inserted into a different area – not the vagina.

(13) Second, there was sufficient evidence for the trial judge to find that Johnson intentionally assaulted Casella. Casella testified that Johnson told her to sit on the couch, and then placed his two fingers into her vagina. That testimony establishes that Johnson voluntarily and consciously inserted his fingers into Casella’s vagina. Although Johnson repeatedly insisted that he never touched Casella in a sexual way, the fact that Johnson’s testimony conflicts with Casella’s does not render the evidence as a whole insufficient. To the contrary, Casella’s statements to the nurse and the detective, coupled with Gast’s and the nurse’s testimony, constituted sufficient evidence from which a rational fact finder could determine that Johnson intentionally committed sexual assault.

(14) Finally, there was sufficient evidence to find that the sexual assault took place without Casella’s consent. Our law defines “without consent” as follows: “[T]he defendant compelled the victim to submit by any act of coercion ... by force ... or by any other means which would compel a reasonable person under the circumstances to submit.”¹⁸ The victim is not required to resist any more than “to the extent that it is reasonably necessary to make the victim’s refusal to

¹⁸ 11 *Del. C.* § 761(h)(1) (2001).

consent known to the defendant.”¹⁹ Here, Casella testified that she told Johnson “no” several times during the incident, that she cried out in pain, and that she was crying during the sexual assault. Based on Casella’s testimony, the trial judge expressly found that Johnson held Casella’s arms against her chest, and that Casella “was held down in a relatively slight way, but in an affirmative determined way.” Although Casella did not have any bruising on her arms or torso, “the absence of outcries or serious wounds or injuries does not make a [rape] conviction unsupportable.”²⁰ Viewing the evidence in a light most favorable to the State, there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that sexual penetration had occurred in this instance without Casella’s consent. Accordingly, we affirm Johnson’s conviction for Rape Fourth Degree.

(15) To convict Johnson of Unlawful Sexual Contact in the Third Degree, the State had to prove, beyond a reasonable doubt, that Johnson intentionally had sexual contact with Casella, knowing that the contact was either offensive to her or was without her consent.²¹ Johnson claims that the evidence could not have

¹⁹ *Id.*

²⁰ *State v. Stettina*, 635 P.2d 75, 77 (Utah 1981), *citing State v. Herzog*, 610 P.2d 1281 (Utah 1980).

²¹ 11 *Del. C.* § 767 (2001). Unlawful sexual contact in the third degree.

supported his conviction on this charge, because his DNA was not found when Casella's breasts were swabbed and tested, nor did the police find photographs of Casella when they executed the search warrant at Johnson's house. Even so, "[t]he victim's testimony concerning the alleged unlawful sexual contact was sufficient to support the [fact finder's] guilty verdict."²² Although Johnson denied Casella's accusations and testified that no sexual contact had occurred, it is the fact finder's role to resolve the conflicts in the testimony and to weigh the credibility of the witnesses. As earlier noted, it is entirely appropriate for the trial judge to exercise his discretion by accepting one witness's testimony and rejecting the conflicting testimony of the same witness or that of other witnesses.

(16) The trial judge weighed the credibility of the witnesses and concluded that Johnson's version of the events was not credible. The trial judge accepted Casella's testimony that Johnson lifted up her shirt, touched her breasts and took photographs of her breast, even though she did not want him to do so. Viewing the evidence in a light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Johnson had committed the crime of

A person is guilty of unlawful sexual contact in the third degree when the person has sexual contact with another person or causes the victim to have sexual contact with the person or a third person and the person knows that the contact is either offensive to the victim or occurs without the victim's consent.

²² *Mghirbi v. State*, 757 A.2d 1278, at *2 (Del. 2000), citing *Styler v. State*, 417 A.2d 948, 950 (Del. 1980).

unlawful sexual contact. Accordingly, we affirm the Unlawful Sexual Contact conviction.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice