NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HERBERT DALE CONAWAY,	:	
	:	
Appellant	:	No. 1320 WDA 2012

Appeal from the Judgment of Sentence May 16, 2012,
Court of Common Pleas, Fayette County,
Criminal Division at No. CP-26-CR-0001863-2011

BEFORE: FORD ELLIOTT, P.J.E, BOWES and DONOHUE, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: February 5, 2013

Appellant, Herbert Dale Conaway ("Conaway"), appeals from the trial court's May 16, 2012 judgment of sentence. We affirm.

The trial court's opinion sets forth the following pertinent facts and procedural history:

> [Conaway] was found guilty on charges of rape, 18 Pa.C.S.A. § 3121, and other offenses as the result of an incident that occurred on August 11, 2011, in Uniontown, Fayette County, Pennsylvania. The evidence presented at trial established that the victim of the crime, A.F., was a twenty-two year old female who had been a resident of Miller's Personal Care Home on Lincoln Street, Uniontown, for more than a year on the day of the crimes. She had been referred to the personal care home because of mental health problems associated with depression and Asperger's syndrome, which necessitate that she have third-party financial management and guidance relative to her daily routines such as reminders to shower, to come out of her room for meals, and to go outside to wait for a van ride when she must go

somewhere. A.F. was enrolled in a program known as 'Club House' which she visits every day to be taught living skills such as answering the telephone and keeping themselves [sic] clean. The manager of the personal care home where A.F. resides told the jury that the victim is not a typical young adult, but is rather easily misled and distracted. The Club House program had arranged for A.F. to be a volunteer with the local Habitat for Humanity and provided transportation for her to its location.

A.F. herself testified that she is a high-school graduate, and had been in the special education program in high school. She takes medication, and is not able to drive a vehicle. On August 11, 2011, she was volunteering with Habitat for Humanity at a warehouse located on Beeson Avenue in Uniontown, [...] and was helping [Conaway] by packing stuff. A.F. had helped him six or more times since she had begun volunteering three weeks earlier. At some point during the day of August 11, [Conaway] told the victim that he and she were going to a second location to help out on the floor. [Conaway] drove a Habitat for Humanity truck to that second site, with the victim as his passenger. When they arrived, no one else was present. They each worked cleaning up the floor for approximately fifteen (15) minutes, when [Conaway] asked A.F. to go with him into an office on the second of [sic] the building to clean the floor there. The victim proceeded to do that, by picking trash up off the floor for another thirty (30) minutes, while at the same time [Conaway] tore out the carpeting. When the floor in the first room upstairs had been cleaned, the victim and [Conaway] proceeded into a second room, which the victim thought they were going to clean. However, when they got into the room, [Conaway] pushed the victim onto the floor flat on her back, but putting his hands on her shoulders. He then got on top of her, and she was very frightened. During these actions, neither party said anything to the other one. [Conaway] first removed the victim's shirt, then her slacks, then her underwear. [Conaway] then took his pants off, but never said anything to her. The victim told

> [Conaway] that she had a boyfriend, and she did not want to have sex with him. Nevertheless, [Conaway] proceeded to put his penis in her vagina, and after about one minute, he withdrew, ejaculating onto the floor. At that point, [Conaway] finally spoke to the victim, telling her that if she didn't tell anybody about the incident, neither would he. The victim did not immediately report the assault, and took a shower after she arrived home later that day. She then went to her boyfriend's residence and told him she had been raped, and later told her friend, Patty Miller, who called the police. The victim was then transported to Uniontown Hospital where a rape kit was performed. The test revealed semen in the victim's vagina, but no DNA analysis was performed because [Conaway] admitted to the sexual intercourse in a statement he gave to the police.

Trial Court Opinion, 8/16/12, at 1-3.

On May 10, 2012, jury found Conaway guilty of rape by forcible compulsion (18 Pa.C.S.A. § 3121(a)(1)) and related offenses. On May 16, 2012, the trial court sentenced Conaway to 96 to 200 months of incarceration. Conaway filed a timely post-sentence motion on May 21, 2012, and the trial court denied that motion on August 16, 2012. Conaway filed this timely appeal on August 27, 2012. He raises four issues for our review:

> 1. [Conaway] should be granted a new trial since the Commonwealth failed to disclose material exculpatory evidence and there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different.
>
> 2. The Commonwealth failed to present sufficient evidence that [Conaway] committed the crime of rape since there was no physical evidence of

> an assault kind [sic] and no threat of force presented.
>
> 3. [Conaway's] motion for new trial and/or judgment of acquittal should be granted because the verdict in this case was against the weight of the evidence.
>
> 4. [Conaway's] motion for judgment of acquittal and/or new trial should be granted since the Commonwealth failed to establish *prima facie* evidence of [Conaway's] guilt at the omnibus pretrial hearing.

Conaway's Brief at 8.

Conaway first asserts that he is entitled to a new trial because the Commonwealth failed to produce the records of the victims' emergency room examination until trial was underway. The hospital records showed that the examination of the victim did not reveal any observable physical injury. Upon receipt of the records from the Commonwealth, Conaway moved for a mistrial.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Commonwealth v. Willis***, ___ Pa. ___, 46 A.3d 648, 653 (2012) (*quoting* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963)). The prosecution must disclose material exculpatory evidence regardless of any request from the defense. ***Id.*** "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** at 654 (*quoting* ***United States v. Bagley***, 473 U.S. 667, 682 (1985).

Thus, a defendant seeking to establish a ***Brady*** violation must show that:

> (1) evidence was suppressed by the state, either willfully or inadvertently; (2) the evidence was favorable to the defendant, either because it was exculpatory or because it could have been used for impeachment; and (3) the evidence was material, in that its omission resulted in prejudice to the defendant.

Id. at 656.

Conaway argues that the hospital records were exculpatory because they support his contention that the sexual encounter with the victim was consensual. Conaway also argues that he was deprived of the opportunity to call hospital personnel as witnesses.

At trial, the trial court admonished the Commonwealth for its failure to provide the hospital records sooner. Nonetheless, the trial court noted that the victim admitted that she did not suffer any observable physical injury such as cuts, bruises or scrapes. N.T., 5/9-10/12, at 73-75. Further, Conaway and the Commonwealth agreed to the following stipulation, which the prosecutor read into the record in the presence of the jury:

> The victim was examined at the Uniontown Hospital by Dr. Debinito Pasqual, on August 11th,

> 2011. The victim denied any headache or blurred vision. No neck pain. No chest pain. And no shortness of breath. She had no bruises or pelvic pain. The examination of her vagina was unremarkable. There was no bleeding. There was no tear. There was no active bleeding. No redness noted.
>
> The Sexual Assault Nurse Examiner who examined the victim on August 11th, 2011, at the Uniontown Hospital is no longer employed there. And counsel has agreed to stipulate to her testimony, as follows:
>
> There is no internal or external vaginal injury, based on the examination.

Id. at 177.

Based on the foregoing, the trial court reasoned that the hospital records were not necessarily exculpatory, and that Conaway did not suffer any prejudice as a result of the Commonwealth's delayed production. We agree. The Commonwealth did not allege and did not need to prove that Conaway's sexual assault of the victim resulted in an observable physical injury. Thus, we do not believe the hospital records were exculpatory in this case. Further, since the victim admitted that she did not suffer any observable physical injury, Conaway could not use the records for impeachment evidence. Finally, Conaway agreed to the stipulation set forth above, which detailed the results of the victim's medical examination and establish that she did not present with observable physical injury. For all of these reasons, the trial court did not err in finding that Conaway failed to establish a ***Brady*** violation.

For his second argument, Conaway asserts that the Commonwealth failed to produce sufficient evidence in support of his conviction for rape by forcible compulsion, pursuant to § 3121(a)(1). Conaway argues that the record is devoid of any evidence of forcible compulsion.

Our standard of review is well-settled:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [finder] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Haight, 50 A.3d 137, 140 (Pa. Super. 2012).

"In order to prove the 'forcible compulsion' component of these charges, the Commonwealth was required to establish beyond a reasonable doubt that appellant used either physical force, a threat of physical force, or

psychological coercion, since the mere showing of a lack of consent does not support a conviction for rape and/or IDSI by forcible compulsion." ***Commonwealth v. Brown***, 556 Pa. 131, 136, 727 A.2d 541, 544 (1999). "[F]orcible compulsion includes not only physical force or violence, but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will. Further, the degree of force required to constitute rape is relative and depends on the facts and particular circumstances of a given case." ***Commonwealth v. Eckrote***, 12 A.3d 383, 387 (Pa. Super. 2010). A defendant commits rape by forcible compulsion where he uses "superior force – physical, moral, psychological, or intellectual – to compel a person to do a thing against that person's volition and/or will." ***Commonwealth v. Rhodes***, 510 Pa. 537, 553, 510 A.2d 1217, 1225 (1986).

As set forth above, the record reveals that Conaway drove the victim to a warehouse where only the two of them were present. Eventually, Conaway led the victim into a second floor room, locked the door, pushed the victim to the ground, got on top of her, removed her clothing and had sexual intercourse with her. The victim testified that she told Conaway she did not want to have sex with him, but she was afraid that Conaway would injure her if she physically resisted because the two were alone and he is much larger than she is. N.T., 5/9-10/12, at 63-68.

Thus, the record, read in a light most favorable to the Commonwealth, reveals that Conaway lured a physically smaller victim to an abandoned warehouse under apparently false pretenses, and forcibly pushed her to the ground, removed her clothing and had sex with her, despite her protestation. Furthermore, the victim suffers from mental difficulties that impair her ability to care for herself and require her to live in a personal care home. She is easily misled and distracted and requires training in basic living skills. Under these circumstances, we conclude that the record contains sufficient evidence that Conaway employed superior physical, intellectual, and psychological force to compel the victim to have sex against her will. Conaway's second argument lacks merit.

Next, Conaway argues that the jury's verdict is contrary to the weight of the evidence. Conaway preserved this issue in a timely post-sentence motion pursuant to Pa.R.Crim.P. 607. We review a challenge to the weight of the evidence as follows:

> The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses.
>
> As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. A verdict is said to be contrary to the evidence such that it shocks one's sense of justice when the figure of Justice totters on her pedestal, or when the jury's verdict, at the time of its rendition, causes the trial judge to

> lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience.
>
> Furthermore, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Foley, 38 A.3d 882, 891 (Pa. Super. 2012).

Conaway's argument is that "all the physical evidence presented in this case supports only [Conaway's] testimony that his interactions with the alleged victim were consensual." Conaway's Brief at 20. This is so, according to Conaway, because the victim was uninjured. As discussed above, the Commonwealth needed to prove that Conaway used superior physical, intellectual, or psychological force to coerce the victim to have sexual intercourse against her will. The Commonwealth was not required to prove that the victim suffered bruises, cuts, or any other observable physical injury. Thus, the absence of any observable physical injury on the victim does not render the verdict so contrary to the evidence as to shock one's sense of justice. The trial court did not abuse its discretion in denying Conaway's motion for a new trial based on weight of the evidence.

Finally, Conaway argues that he is entitled to a new trial because the Commonwealth failed to present *prima facie* evidence of his guilt at the preliminary hearing. Well-settled precedent holds that once a defendant is

tried and found guilty beyond a reasonable doubt, any defect in the defendant's preliminary hearing is rendered immaterial. ***Commonwealth v. Jacobs***, 640 A.2d 1326, 1330 (Pa. Super. 1994), *appeal denied*, 542 Pa. 661, 668 A.2d 1125 (1995); ***see also Commonwealth v. McCullough***, 501 Pa. 423, 427, 461 A.2d 1229, 1231 (1983) ("Appellant also argues that a conviction of murder of the second degree must fail because the Commonwealth did not establish a *prima facie* case of robbery at the preliminary hearing. This fact is clearly immaterial where at the trial the Commonwealth met its burden by proving the underlying felony beyond a reasonable doubt."). Since Conaway's trial and conviction render the pretrial hearing immaterial, he cannot obtain relief on this argument.

In summary, we have concluded that each of Conaway's arguments lacks merit. We therefore affirm the judgment of sentence.

Judgment of sentence affirmed.