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NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RASHID LEWIS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1762 EDA 2010

Appeal from the Judgment of Sentence March 25, 2010
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0001996-2009

COMMONWEALTH OF PENNSYLVANIA Appellee v. JAMEL CLAY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1835 EDA 2010

Appeal from the Judgment of Sentence March 25, 2010
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0001997-2009

COMMONWEALTH OF PENNSYLVANIA Appellee v. JASON SALE CLAYBROOK Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1926 EDA 2010

Appeal from the Judgment of Sentence March 25, 2010
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0001998-2009

BEFORE: BENDER, J., LAZARUS, J., and STRASSBURGER, J.*

MEMORANDUM BY LAZARUS, J. **FILED SEPTEMBER 27, 2013**

This matter comes before us on remand from the Pennsylvania Supreme Court for "reconsideration of [Appellants'] weight of the evidence claims under the appropriate abuse of discretion standard." ***Commonwealth v. Clay***, 64 A.3d 1049, 1057 (Pa. 2013). After careful review, we affirm the judgments of sentence imposed on Appellants by the Court of Common Pleas of Chester County.

The Supreme Court summarized the facts and procedural history of the case as follows:

> On February 7, 2009, at around 1:30 a.m., Jamel Clay, [Jason] Claybrook, and Rashid Lewis (collectively, "[Appellants]") visited R.B. at her college dormitory in West Chester, Pennsylvania. Upon their arrival at the dormitory, [Appellants] signed in and provided the security officer with photo identification. [Appellants] spent the next several hours socializing with R.B. and her friend, H.S., who lived in the same hall. Eventually, at approximately 3:30 a.m., the group discussed sleeping arrangements, and, according to [Appellants], H.S. invited them to stay in her room. At trial, H.S. testified that [Appellants] "ended up" in her room because it was the one nearest to where the group was gathered at the time the socializing concluded, but she did not dispute that she allowed them to stay. There also was testimony at trial that H.S. had engaged in

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* Retired Senior Judge assigned to the Superior Court.

approximately 18 telephone calls with her friend Richard earlier in the evening, during which H.S. informed him that she was planning to allow [Appellants] to stay in her room, and Richard warned her not to do so.

When Claybrook and Lewis first entered H.S.'s room, Lewis sat on her bed and Claybrook sat on H.S.'s roommate's bed. Clay either entered the room at the same time as Claybrook and Lewis, or shortly thereafter. At trial, H.S. testified that she asked Lewis to get off her bed, but he refused, and so she laid down next to him, back to back. H.S. stated that, after five to ten minutes, Lewis attempted to kiss her, and when she said no and attempted to get off the bed, he pulled her towards him, kissed her, and fondled her breasts. H.S. testified that, at some point, she scratched Lewis in an effort to resist him.

Lewis testified that, after he sat on H.S.'s bed, H.S. never asked him to get off the bed, and it was she who attempted to kiss him. At some point, after Clay entered the room and laid down in H.S.'s roommate's bed, Claybrook got into H.S.'s bed with H.S. and Lewis. Over the next hour, all three [Appellants] engaged in vaginal intercourse and oral sex with H.S., some of which involved all three of the men at the same time. H.S. also testified that each of the three men engaged in anal intercourse with her, although both Claybrook and Lewis denied having anal intercourse with H.S. Clay did not testify at trial. The hospital examination revealed ejaculate in H.S.'s rectum.

H.S. testified that [Appellants] initially restrained her, but conceded she was not held down the entire time. [Appellants] denied restraining H.S. at any time. Midway through the incident, Lewis and Clay left the room to obtain more condoms while Claybrook remained in the room with H.S. H.S. testified at trial that, during this time, Claybrook "was forcing me to have oral sex with him.... He had his hands on the side of my head and he forced his penis into my mouth." N.T. Trial, 10/26/09, at 162. When asked what kept her from leaving the room at that point, H.S. testified "I was just scared. I was really scared. I didn't know what was going to happen." ***Id.*** at 162–63. H.S. further testified that "they were three strangers that I didn't know, and they were forcing me to do these things with them." ***Id***. at 163.

When Lewis and Clay returned, they each engaged in further sexual acts with H.S. H.S. testified that, except for the first time she told Lewis "no" when he tried to kiss her, she did not tell [Appellants] to stop, did not cry out for help, and did not attempt to leave the room. She explained in her trial testimony, when asked why she did not scream, that "[m]ost of the time I had somebody restrained over me, or I had somebod[y's] penis in my mouth." ***Id.*** at 165.

Thereafter, [Appellants] indicated they wanted to smoke, but H.S. asked them smoke outside so they would not set off the smoke alarm and get her in trouble. While [Appellants] were outside smoking, H.S. went down the hall to the bathroom and brushed her teeth. She then returned to her room and left the door open while she changed her sheets and picked up condoms from the floor. [Appellants] returned to the doorway of H.S.'s room[1] and Lewis asked for a clean shirt to wear, as the shirt he was wearing had blood on it. H.S. gave him a clean shirt.

[1] There was a dispute at trial as to whether [Appellants] actually entered H.S.'s room when they returned from smoking, or merely stood in the doorway to her room.

[Appellants] then left, at which point H.S. called her friend Richard and assured him that everything was fine. Several minutes later, however, she sent Richard a text message telling him that she had lied, that everything was not okay, and that she had been raped. H.S. then told her friend, R.B., that [Appellants] had raped her. At R.B.'s suggestion, H.S. contacted her Resident Assistant and Resident Director about the incident. The Resident Director reported the incident to campus police on H.S.'s behalf. H.S. then went to the hospital to be examined. Karen Dougherty, a registered nurse in the Crozier Emergency Department, examined H.S. Nurse Dougherty testified that she is a forensic nurse examiner and a sexual assault nurse examiner ("SANE") who had practiced nursing for 30 years and had conducted approximately 200 sexual assault exams. N.T. Trial, 10/27/09, at 484–86. Nurse Dougherty stated that, upon examining H.S., she observed a "suction mark" on her neck, a light scratch on her arm, a small abrasion on her inner elbow, and redness on her inner thighs. ***Id.*** at 491. The nurse also noted that H.S. told her she had scratched Lewis in self-defense.

> Ultimately, [Appellants] were charged with rape, involuntary deviate sexual intercourse, criminal conspiracy, sexual assault, indecent assault, and false imprisonment. On October 29, 2009, following a three-day joint jury trial before the Honorable James MacElree, at which H.S. testified that she was sexually assaulted by all three [Appellants], and Claybrook and Lewis testified that the sexual encounters with H.S. were consensual, all three [Appellants] were convicted of sexual assault,[2] indecent assault,[3] and false imprisonment.[4] On March 25, 2010, each [Appellant] was sentenced to two to four years[’] incarceration and two years[’] consecutive probation. [Appellants] filed a timely joint motion for post-sentence relief, arguing the evidence was insufficient to sustain their convictions on all of the charges and that the jury's verdicts were against the weight of the evidence.
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> [2] 18 Pa.C.S.A. § 3124.1.
> [3] 18 Pa.C.S.A. § 3126.
> [4] 18 Pa.C.S.A. § 2903(a).
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> On May 25, 2010, following a hearing, the trial court granted [Appellants’] motion for judgment of acquittal on the false imprisonment charges but denied [Appellants’] motion for judgment of acquittal and/or a new trial on the sexual assault and indecent assault charges. In reviewing [Appellants’] challenge to the weight of the evidence, the trial court, without citing to specific evidence in the record, opined that the case was “extremely close,” and, although the court was “surprised and taken aback” by the jury’s guilty verdicts on the sexual assault and indecent assault charges, the verdicts were not so contrary to the evidence as to shock the court’s conscience. Trial Court Opinion at 6. The court, therefore, declined to grant [Appellants] a new trial, but noted “the jury’s verdicts might shock the conscience of the Superior Court, in which case the Superior Court may vacate the judgment of sentence and remand the case for a new trial on the Sexual Assault and Indecent Assault charges.” ***Id.*** at 6–7. [Appellants] each filed appeals, which were consolidated.

Clay, ***supra*** at 1051-53.

On appeal, this Court held that “guilty verdicts based on the record before us should shock the conscience of *anyone* seeking to reach a

dispassionate conclusion." ***Commonwealth v. Lewis***, No. 1762 EDA 2010, No. 1835 EDA 2010, No. 1926 EDA 2010, unpublished memorandum at 11 (Pa. Super. filed May 24, 2011). Accordingly, we vacated the judgments of sentence and remanded the matter for a new trial on the sexual assault and indecent assault charges.

The Commonwealth filed a petition for allowance of appeal, which the Supreme Court granted. Upon review, the Supreme Court determined that this Court "stepped into the shoes of the trial judge and revisited the underlying question of whether the verdict was against the weight of the evidence, an analysis that is not appropriate under the appellate standard of review." ***Clay***, ***supra*** at 1056.

With respect to this issue, the Supreme Court held:

> An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:
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> > Appellate review of a weight of the evidence claim *is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence.* [***Commonwealth v. Brown***, 648 A.2d 1177, 1189 (Pa. 1994)]. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. ***Commonwealth v. Farquharson***, 354 A.2d 545 (Pa. 1976). One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

> [***Commonwealth v. Widmer***, 744 A.2d 745, 753 (Pa. 2000)] (emphasis added).
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> This does not mean that the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is unfettered. In describing the limits of a trial court's discretion, we have explained:
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> > The term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused where the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will.
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> ***Widmer***, 744 A.2d at 753 (quoting ***Coker v. S.M. Flickinger Co.***, 625 A.2d 1181, 1184-85 (Pa. 1993).

Clay, ***supra*** at 1055.

Applying this deferential standard to the matter before us, we conclude that the trial court properly exercised its judgment, wisdom and skill in determining that the verdict was not against the weight of the evidence. There is nothing in the record indicating that the trial court acted in an unreasonable or arbitrary manner. Nor has there been any allegation that the trial court acted with partiality, prejudice, bias or ill-will. ***See Clay***, ***supra***.

Judge MacElree observed the witnesses and heard the testimony. While he noted that this was a close case and that he was "taken aback" by

the guilty verdicts, his determination that the jury's verdicts should stand was a proper exercise of discretion.

In light of our limited standard of review, as delineated by our Supreme Court in this very case, we affirm the decision of the Court of Common Pleas of Chester County.

Judgments of sentence affirmed.

STRASSBURGER, J., files a Concurring Statement.

Judgment Entered.

Prothonotary

Date: 9/27/2013