

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

No. 1216-CR-2021

GEROME MCCULLOUGH,
Defendant.

Jennifer L. Rapa, Esquire
Assistant District Attorney
Brian J. Collins, Esquire

Counsel for Commonwealth

Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – December 28, 2022

Defendant is charged with rape - forcible compulsion,¹ aggravated indecent assault - forcible compulsion,² and indecent assault - without consent.³ In his Petition for Writ of Habeas Corpus now pending before us, Defendant challenges the sufficiency of the evidence with respect to the elements of forcible compulsion and without consent.⁴

FILED IN OFFICE
2022 DEC 28 PM 2:50
TYRAL BONI
CARBON COUNTY
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¹ 18 Pa.C.S.A. §3121(a)(1).

² 18 Pa.C.S.A. §3125(a)(2).

³ 18 Pa.C.S.A. §3126(a)(1).

⁴ On February 11, 2022, Defendant filed an Omnibus Pre-Trial Motion consisting of a Petition for Writ of Habeas Corpus, Motion to Suppress Evidence, Motion to Suppress Statement, and Motion to Compel Discovery. In this Opinion, we address only Defendant's Petition for Writ of Habeas Corpus, Defendant's other Motions having been addressed separately.

FACTUAL AND PROCEDURAL BACKGROUND

On October 29, 2021, at about 4:30 p.m., J.D. (hereinafter the victim), was assisting the Defendant, Gerome McCullough, in installing a microwave oven above the stove in the kitchen of her home in Summit Hill which she shared with her roommate/landlord, Karen Hariu, who was vacuuming in the adjacent living room. (N.T., pp. 5-7, 19-20).⁵ They had taken down the old microwave oven and were in the process of mounting a new one when Defendant said he needed a level to properly align the bracket supporting the microwave. (N.T., pp. 7, 20-21). Defendant told the victim there was a level in the garage and asked her to accompany him there to find it. (N.T., p. 7).

The garage referred to was a detached garage, approximately fifteen to twenty feet from the home. (N.T., pp. 18-19). Once Defendant and the victim entered the garage, Defendant closed the door and locked it. (N.T., p. 7). As the victim was looking for the level on some shelving and dressers, she heard Defendant approach her from behind. (N.T., pp. 21-24). As she turned to talk to Defendant, he immediately started kissing her. (N.T., pp. 8, 24). The victim put her hands on Defendant's chest and said "no, we shouldn't." (N.T., pp. 9, 24).

Defendant ignored victim's request, continued to kiss her, then shoved his hand down the front of her pants and inserted his fingers in her vagina. (N.T., pp. 8-9, 24). Next, Defendant removed his hand while continuing to kiss the victim. (N.T., p. 9). The

⁵ Unless otherwise indicated, reference to the notes of testimony refers to the transcript of the preliminary hearing held on November 10, 2021, before Magisterial District Judge Casimir T. Kosciolek.

victim again said "no, we shouldn't." (N.T., p. 9).⁶ At this point, Defendant pulled the victim's pants down, turned her around with one hand, bent her over a dog crate, and penetrated her vagina with his penis. (N.T., pp. 9, 25). As Defendant completed intercourse, he pulled out and ejaculated on the victim's butt. (N.T., p. 9).

The victim estimated she and Defendant were in the garage a total of fifteen minutes and that what she characterized as the "sex acts," from beginning to end, took approximately ten minutes. (N.T., pp. 7, 25, 33). The victim testified the only thing she said to Defendant this entire time was "no, we shouldn't," that she made no other sounds or noises, and that she did not "fight or anything," or tell him to get off. (N.T., pp. 9, 24, 26).

After Defendant had ejaculated, the victim testified Defendant "put himself away," she pulled up her pants, and they both walked out of the garage back to the home. (N.T., pp. 10, 26). Back in the home, the victim helped Defendant a little longer with the microwave, then went into the downstairs bathroom next to the kitchen where she remained until Defendant left the home a little after 5:00 p.m. (N.T., pp. 26-27, 29).

After the victim had returned to the home from the garage, she said nothing to Ms. Hariu about what had happened. Several hours later when the victim and Ms. Hariu were at a local club playing pool, drinking beer, and waiting for a pizza, the victim told Ms. Hariu

⁶ Although the victim clearly identified two times when she told Defendant "no, we shouldn't," in describing the sequence of what occurred in the garage, at the conclusion of the victim's direct examination by the District Attorney, in response to the question how many times would she approximate she told Defendant to stop, the victim testified "Once. I didn't say stop though, I said, 'no, we shouldn't,' when he was kissing me." (N.T., p. 12).

she had been raped. (N.T., pp. 10, 27-28, 29-30). Ms. Hariu told the victim she needed to go to the hospital and took her to St. Luke's Miners Memorial Hospital in Coaldale where they arrived a little after 8:00 p.m. (N.T., p. 10). The police were contacted by the hospital. (N.T., p. 36).

Officer Brian Horos of the Summit Hill Police Department was dispatched to the hospital where he met with the victim and took a statement from her. (N.T., p. 35). While at the hospital, Officer Horos collected all of the victim's clothing. (N.T., pp. 35-37). When Officer Horos examined the victim's panties, he testified there was a white chalky substance with what appeared to be a little blood, however, neither substance had been tested as of the date of the preliminary hearing. (N.T., pp. 37, 41).

A hearing on Defendant's Omnibus Pre-Trial Motion was held before the court on April 5, 2022. At this hearing, the only person to testify was Officer Horos. A transcript of the preliminary hearing held before the Magisterial District Judge on November 10, 2021, at which the victim and Officer Horos testified was also admitted and made part of the record.

DISCUSSION

In describing what constitutes rape by forcible compulsion, the Pennsylvania Superior Court in Commonwealth v. Gonzalez, stated:

The Crimes Code defines rape in pertinent part as follows: "A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant ... by forcible compulsion." 18 Pa.C.S. § 3121(a)(1). The Crimes Code defines "forcible compulsion" in relevant part as "compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa.C.S. § 3101. This Court has observed "forcible compulsion" as

the exercise of sheer physical force or violence and has also come to mean an act of using 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. Ables*, 404 Pa.Super. 169, 590 A.2d 334, 337 (1991). A determination of forcible compulsion rests on the totality of the circumstances, including but not limited to this list of factors:

the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, *domination* or custodial control over the victim, and whether the victim was under duress.

Commonwealth v. Rhodes, 510 Pa. 537, 510 A.2d 1217, 1226 (1986) (emphasis added). It is not mandatory to show that the victim resisted the assault in order to prove forcible compulsion. *Id.* The victim's uncorroborated testimony is sufficient to support a rape conviction. *Commonwealth v. Wall*, 953 A.2d 581, 584 (Pa.Super.2008).

The distinction between forcible compulsion and lack of consent is important to remember. With regard to consent, the Crimes Code states: "The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense." 18 Pa.C.S. § 311(a). "Forcible compulsion" means "something more" than mere lack of consent. *Commonwealth v. Smolko*, 446 Pa.Super. 156, 666 A.2d 672, 676 (1995). "Where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the 'forcible compulsion' requirement ... is not met." *Id.*

109 A.3d 711, 720-21 (Pa.Super. 2015), appeal denied, 125 A.3d 1198 (Pa. 2015).

At the time of the incident the victim was 29 years old and the Defendant 45. (N.T., p. 13; N.T., 4/5/22, pp. 17, 50, Commonwealth Exhibit 3 (Application for Search Warrant)). The victim had moved to Summit Hill approximately one month earlier and knew the Defendant from meeting him during this period on approximately ten separate occasions when Defendant visited her and Ms. Hariu at their home to "hangout," play with the dog and chitchat. (N.T., pp. 6-7, 14). The alleged assault occurred within feet of the victim's

home – not in a remote or unfamiliar location – at a time when the victim's roommate was in the home. No evidence was presented of any physical, mental, emotional, or psychological limitations or disabilities of the victim. Nor was any evidence presented that Defendant held a position of authority, domination or control over the victim. As noted by the trial court in Gonzalez and equally applicable here, this is "not a case of moral, psychological, or intellectual forcible compulsion that has often been found in circumstances involving a young, vulnerable victim and a perpetrator who is in a position of authority and trust." Gonzalez, 109 A.3d at 721. Nor is there any evidence that the victim was under duress at the time of the incident.

With regard to physical force, the evidence is scanty and limited. Defendant "shoved" his hands down the victim's pants, spun her around with one hand, and bent her over a dog crate. A small amount of what might be blood was observed by the investigating officer in the victim's panties.

In Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994), the defendant was convicted of one count of rape by forcible compulsion and one count of indecent assault without consent. The victim was a female college student and the defendant was a roommate of one of the victim's friends. The assault occurred in the dormitory room of the roommate. After lifting up the victim's shirt and bra and massaging her breasts, the defendant stood up, locked the door, pushed the victim onto the bed, removed her undergarments from one leg, penetrated her vagina with his penis, and ejaculated on her stomach. The victim testified that when the defendant pushed her onto the bed, it wasn't

violent, that defendant never verbally threatened her, that defendant's hands never restrained her in any manner during the actual penetration, and that she repeatedly said "no" throughout the encounter. On these facts, the Pennsylvania Supreme Court affirmed the Superior Court's reversal of Defendant's conviction of rape holding that the victim's testimony was "devoid of any statement which clearly or adequately describes the use of force or threat of force against her," and that the victim's testimony failed to establish defendant forcefully compelled her to engage in sexual intercourse as required under 18 Pa.C.S.A. §3121.⁷

The degree of force required to constitute rape is relative and depends on the facts and particular circumstances of the case. Similar to Berkowitz, there is no evidence here that Defendant actually used force or threatened to use force to compel the victim to engage in sexual intercourse.

There is no evidence that Defendant held the victim down or restrained her in any manner. There is no evidence as to how or what Defendant did to turn the victim around, except that it was done with one hand. There is no evidence that the victim physically resisted or attempted to push Defendant away from her, or that the Defendant did anything to overcome or prevent resistance by the victim.

⁷ At the time Berkowitz was decided, "forcible compulsion" required a showing of physical and/or psychological force. Since then, the legislature has broadened the definition of forceable compulsion to include intellectual, moral and emotional force. Notwithstanding this broadening of the type of force which will support a conviction of rape by forcible compulsion, the only relevant force at issue in this case appears to be physical force, and, as to this issue, we find Berkowitz to still be good law.

The degree of physical force or the threat of physical force needed to establish rape is defined not by the magnitude of the force or by physical injury to the victim, but by its effect on the victim's volition. See Rhodes, 510 A.2d at 1226. Here, there is no evidence of anything the Defendant said or did during the encounter to force the victim to submit to his advances. There is no evidence that Defendant said or did anything that made the victim believe that Defendant would hurt her if she resisted or refused his advances, or that the effect of Defendant's conduct was to force her to engage in sexual intercourse against her will. There is no evidence that the victim was injured or in pain during the encounter, and nothing offered to explain the cause of the blood in the victim's panties, if there even was blood.

Because we find that the evidence fails to establish that Defendant forcefully compelled the victim to engage in sexual intercourse against her will as required under 18 Pa.C.S.A. §3121(a)(1), the charge of rape in count one of the information will be dismissed. For the same reason, the failure to establish the element of forcible compulsion, the charge of aggravated indecent assault under 18 Pa.C.S.A. §3125(a)(2), will be dismissed.⁸

⁸ The Crimes Code defines this offense in pertinent part as follows:

§3125. Aggravated indecent assault

(a) Offenses defined. - Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if:

(1) ...;

(2) The person does so by forcible compulsion;

In contrast to the charges of rape and aggravated indecent assault under 18 Pa.C.S.A. §§3121(a)(1) and 3125(a)(2), respectively, the offense of indecent assault without consent does not include the element of "forcible compulsion." This crime is defined as follows:

§ 3126. Indecent assault

(a) Offense defined. – A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:

(1) The person does so without the complainant's consent;

18 Pa.C.S.A. §3126(a)(1).

At the preliminary hearing, the victim testified that she did not want to have sex with Defendant. (N.T., p. 12). She further testified that twice she told the Defendant "no, we shouldn't," and that when Defendant first started kissing her she extended her hands in a gesture telling him to stop. This testimony, when viewed in the light most favorable to the Commonwealth,⁹ is sufficient to establish the victim did not consent to the indecent contact. See Berkowitz, 641 A.2d at 1166.

CONCLUSION

Forcible compulsion is something more than lack of consent; and while lack of consent is necessarily implicit in forcible compulsion, the evidence is insufficient to sustain

18 Pa.C.S.A. §3125(a)(2).

⁹ In deciding a petition for writ of habeas corpus filed by a defendant to challenge whether a *prima facie* case has been established, the court "must view the evidence and its reasonable inferences in the light most favorable to the Commonwealth." Commonwealth v. Predmore, 199 A.3d 925, 928-29 (Pa.Super. 2018), appeal denied, 208 A.3d 459 (Pa. 2019).

a *prima facie* case of either rape by forcible compulsion or aggravated indecent assault by forcible compulsion without forcible compulsion. Such is the case here on the facts of record.

In contrast, the offense of indecent assault requires only that the assault is without the consent of the complainant, not that it be accompanied by forcible compulsion. This distinction in the elements of indecent assault from rape and aggravated indecent assault by forcible compulsion is critical in our finding that the evidence is sufficient to sustain a *prima facie* showing of indecent assault. Here, the victim's statements to Defendant in response to his advances that "no, we shouldn't," the raising of her hands conveying the message to stop, and her testimony that she did not want to engage in sexual relations with Defendant meets the evidentiary standard of establishing *prima facie* her lack of consent.

BY THE COURT:

A handwritten signature in black ink, consisting of a large, stylized 'Q' followed by a horizontal line and a small flourish.

P.J.