

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAHIM SMITH,	§
	§
Defendant Below-	§ No. 441, 2007
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0610004197A
Plaintiff Below-	§
Appellee.	§

Submitted: May 21, 2008
Decided: August 28, 2008

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

ORDER

This 28th day of August 2008, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) A Superior Court jury found the defendant-appellant, Rahim Smith (Smith), guilty of three counts each of second degree rape and third degree unlawful sexual contact. The Superior Court sentenced Smith to a total period of seventy-eight years at Level V incarceration, to be suspended after serving thirty-five years for six months at Level IV work release followed by ten years at Level III probation. This is Smith's direct appeal.

(2) Smith's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Smith's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Smith's attorney informed him of the provisions of Rule 26(c) and provided Smith with a copy of the motion to withdraw and the accompanying brief. Smith also was informed of his right to supplement his attorney's presentation. Smith has raised several issues for this Court's consideration. The State has responded to Smith's points, as well as to the position taken by Smith's counsel, and has moved to affirm the Superior Court's judgment.

(3) 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) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this 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).

(4) The testimony at trial fairly established that, in April 2006, Smith, his wife and three children moved in with Lisa Flowers.² Smith and Flowers were not related, but Flowers, who had known Smith since he was a teenager, thought of him as a nephew. Flowers' disabled adult son, Ben, also lived with her. Ben, who suffers from cerebral palsy, is confined to his bed and wheelchair. He has a severe speech impediment and is emotionally delayed. In August 2006, Flowers went to visit her newborn grandson for a week. She could not locate a handicap-accessible van to accommodate Ben, so she left him at home in the care of Smith, as well as her sister, Pat, and her friend, Charlotte, both of whom also lived with her. Ben, through the aid of an interpreter, testified at trial that, while his mother was away, Smith sexually assaulted him multiple times. Ben did not immediately tell anyone about the assaults because Smith had threatened to assault him again if he told anyone. Several weeks later, Ben told his mother what happened. Flowers then reported the assaults to the police.

(5) Smith presented an alibi defense at trial. He testified in his own defense and denied the allegations. Smith's mistress also testified at trial and stated that Smith was with her at all times when the assaults were alleged to have occurred. The jury convicted Smith of all counts.

² Throughout this order, the Court has used pseudonyms to identify the victim and his mother.

(6) In response to his counsel’s Rule 26(c) brief, Smith presented four pages, consisting of fifty-one unnumbered paragraphs, citing his “Reasons for Appeal.” His points fall into the following general categories of claims: (i) incompetency of the victim to testify at trial and the improper use of a translator to aid the victim’s testimony; (ii) insufficiency of the evidence/credibility of the witnesses; (iii) prosecutorial misconduct; (iv) prejudicial outburst by a member of the gallery; (v) sentencing error; and (vi) ineffective assistance of counsel. With respect to the latter issue, it appears that Smith faults his trial counsel for failing to properly investigate prior drug use by the victim’s mother and for failing to discredit the State’s witnesses by impeaching them with their prior criminal history. To the extent Smith is asserting a claim for ineffective assistance of counsel, this Court will not consider such a claim for the first time on appeal.³

(7) The record reflects that, defense counsel raised concerns at trial about the victim’s cognitive abilities and his competency to testify. The Superior Court concluded that the victim understood his oath and was competent to testify. The trial court also recognized, however, that a balance needed to be achieved between offering a reasonable accommodation, in the form of an interpreter, to permit the victim to testify despite his disability

³ *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

and the defendant's constitutional right to confront the witnesses against him. The interpreter, therefore, was instructed only to translate what the victim actually said and not to fill in any gaps in his testimony. Defense counsel was given the opportunity to conduct a complete cross-examination.

(8) Delaware Rule of Evidence 601 provides that every “person is competent to be a witness except as otherwise provided in these rules.”⁴ This Court has interpreted Rule 601 to mean that any witness can testify as long as they have personal knowledge of the matter, can distinguish the difference between the truth and a lie, and understand the importance of telling the truth under oath.⁵ Issues concerning a witness' mental or moral capacity go to the weight to be given to that particular testimony, which is a matter for the jury to decide.⁶ Under the circumstances, we find no abuse of the Superior Court's discretion in determining that Ben was competent to testify and in allowing the jury to opportunity to determine the weight to be given to his testimony.

(9) Furthermore, we find no error in the Superior Court's decision to accommodate Ben's disability by allowing him to testify with the aid of an interpreter. Defense counsel initially objected to the State's motion to

⁴ Del. R. Evid. 601 (2008).

⁵ *Ricketts v. State*, 488 A.2d 856, 857-58 (Del. 1985).

⁶ *Id.* at 857.

have Ben's mother act as his interpreter at trial. In light of the objection, the State located an expert in speech pathology who had worked with Ben for six years when he was a student. Defense counsel raised no objection about the interpreter and, on appeal, Smith offers no specific objection to the accuracy of the interpreter's translation of Ben's testimony. Under the circumstances, we find no error.

(10) We next review Smith's challenge to the credibility of the witnesses and the overall sufficiency of the evidence to sustain his convictions. In reviewing such a claim on appeal, this Court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.⁷ A victim's testimony alone is sufficient evidence to support a guilty verdict concerning a sexual assault so long as the testimony establishes every element of the offense charged.⁸ We already have determined that the victim in this case was competent to testify. His testimony regarding Smith's actions was sufficient to establish the elements of the charged offenses beyond a reasonable doubt. To the extent Smith

⁷ *Word v. State*, 801 A.2d 927, 929 (Del. 2002)

⁸ *Farmer v. State*, 844 A.2d 297, 300 (Del. 2004).

challenges the credibility of the testimony, it was for the jury to determine the weight of the evidence and to resolve any conflicts in the testimony.⁹

(11) Smith next contends that the prosecutor unfairly belittled defense witnesses and exhibited bias toward Smith when she called him “a cheater.” To the extent Smith is asserting a claim of prosecutorial misconduct, we find no colorable claim in this case. The State’s cross-examination of the defense witnesses established that Smith was engaged in a romantic relationship with Laquashia Snow, even though he was married. The prosecutor cross-examined Snow, who was Smith’s alibi witness, about her romantic relationship with Smith in order to establish bias. Bias is a fair subject of cross-examination.¹⁰ The prosecutor also cross-examined Snow’s sister, who testified as a defense witness, about her prior criminal conviction for theft. It is entirely permissible to attack the credibility of witness through evidence of a prior conviction of a crime of dishonesty, such as theft.¹¹ The prosecutor pointed out the bias of the defense witnesses during her closing argument and asked the jury to assess their credibility. Under the

⁹ *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

¹⁰ *See* Del. R. Evid. 616 (2008); *Weber v. State*, 457 A.2d 674, 680 (Del. 1983).

¹¹ *See* Del. R. Evid. 609(a); *Archie v. State*, 721 A.2d 924, 928 (Del. 1998).

circumstances, we find the prosecutor's remarks to be fair comments on the evidence and did not constitute misconduct.¹²

(12) Smith next appears to contend that he was prejudiced by an alleged outburst from a member of the gallery during trial. The record reflects that someone in the audience began crying during Flowers' testimony, though no words apparently were spoken. The person was removed from the courtroom very quickly and taken outside. Defense counsel requested a mistrial. The Superior Court denied the motion because the incident was dealt with promptly and did not result in substantial prejudice to Smith. The trial court, however, did give the jury a curative instruction and admonished members of the audience against future displays of emotion. In light of the trial court's prompt response to the incident and the curative instruction given to the jury, we find no abuse of discretion in the Superior Court's denial of the motion for mistrial.¹³

(13) Smith's final discernible argument appears to be that the Superior Court erred in not offering in-patient treatment for substance abuse and mental health treatment as part of his sentencing. The record reflects

¹² See *Swan v. State*, 820 A.2d 342, 356 (Del. 2003).

¹³ *Taylor v. State*, 690 A.2d 933, 935-36 (Del. 1997). But see *Ashley v. State*, 798 A.2d 1019, 1021-22 (Del. 2002) (holding that mistrial should have been declared after a member of the gallery stood up at the end of closing arguments and shouted to the jury, "Don't think he's not guilty, he stabbed me in the back 14 times. Don't think he's not guilty. He's nothing but a coward. Stabbed me in the back.")

that defense counsel, at sentencing, pointed out Smith's substance abuse and mental health issues in requesting the imposition of a minimum mandatory sentence for his client. The Superior Court, however, noted the victim's vulnerability and Smith's lack of remorse as aggravating factors when it imposed a longer sentence than defense counsel requested. Despite its severity, however, the sentence was within the statutory limits. Accordingly, there is no basis for appellate review of Smith's sentence.¹⁴

(14) The Court has reviewed the record carefully and has concluded that Smith's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Smith's counsel has made a conscientious effort to examine the record and the law and has properly determined that Smith 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/ Myron T. Steele
Chief Justice

¹⁴ *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989).