

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY GORDON,	§	
	§	No. 210, 2013
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 1109011777
Appellee.	§	

Submitted: September 13, 2013
Decided: December 11, 2013

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 11th day of December 2013, upon consideration of the appellant’s brief filed pursuant to Supreme Court Rule 26(c) (“Rule 26(c)”), his attorney’s motion to withdraw, and the State’s response, it appears to the Court that:

(1) In January 2013, a Superior Court jury found the appellant, Anthony Gordon, guilty of two counts of Rape in the Second Degree and one count of Rape in the Fourth Degree. The victim in the case was the teenage daughter of Gordon’s live-in girlfriend. On April 12, 2013, Gordon was sentenced to a total of thirty-five years at Level V, twenty years minimum mandatory, suspended after twenty-one years for decreasing levels of supervision. This is Gordon’s direct appeal.

(2) On appeal, Gordon’s appellate counsel (“Counsel”) has filed a brief and a motion to withdraw pursuant to Rule 26(c) asserting that there are no arguably appealable issues. Gordon, through Counsel, has submitted several issues for the Court’s consideration.¹ The State has responded to Gordon’s issues and has moved to affirm the Superior Court’s judgment.

(3) When reviewing a motion to withdraw and an accompanying brief under Rule 26(c), the Court must be satisfied that the defendant’s counsel has made a conscientious examination of the record and the law for arguable claims.² The Court must also 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.³

(4) In this case, the record reflects that in July 2009, 44-year old Gordon was living in Wilmington, Delaware, with his girlfriend and her five children, including the 14-year old victim in this case, Arianna Thomas (“Thomas”).⁴ By May 2010, Gordon, his girlfriend, and her children, had moved to New Castle, Delaware.

¹ Gordon also sought to “amend” his Rule 26(c) submission in a “motion for amendment” filed with the Court on December 9, 2013. The “motion for amendment” does not comply with Rule 26(c) and has not been considered by the Court.

² *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).

³ *Id.*

⁴ A pseudonym has been assigned to the victim.

(5) At trial, Thomas testified about a July 2009 incident in the Wilmington home when Gordon pulled down her pants, touched her breast and vagina with his hand, and penetrated her vagina with his finger. Thomas also testified about a May 2010 incident in the basement of the New Castle home when Gordon removed her pants and engaged in vaginal and oral intercourse with her, and a June 2010 incident when Gordon removed her underwear and engaged in vaginal intercourse with her and touched her breasts with his penis.

(6) In November 2010, Thomas learned that she was five months pregnant. On April 6, 2011, Thomas gave birth to a son (hereinafter “the child”). On April 18, 2011, Thomas reported Gordon’s sexual abuse to the New Castle County Police.

(7) In December 2011, Gordon was tried on two counts of Rape in the Second Degree and one count of Rape in the Fourth Degree. At trial, a forensic DNA analyst testified that DNA testing conducted on Thomas, Gordon and the child established to a “greater than 99.9999 percent” probability that Gordon had fathered the child.

(8) On appeal, Gordon has submitted several issues arising from the trial. The Court has summarized the issues as follows. First, Gordon claims that the trial judge demonstrated a “closed mind.” Second, Gordon claims that the prosecutor withheld exculpatory information. Third, Gordon claims that the prosecutor

committed misconduct. Fourth, Gordon alleges that there was insufficient evidence to support the convictions. Fifth, Gordon alleges that there was a broken chain of custody for the DNA evidence. Sixth, Gordon alleges that his right to testify was infringed upon, and seventh, Gordon alleges that his trial counsel was ineffective.

(9) We first consider Gordon’s claim that the trial judge evidenced a “closed mind” during trial. According to Gordon, the judge demonstrated bias when, during the State’s direct examination of Thomas, the judge gave the prosecutor latitude to frame questions in a way that could be perceived as sympathetic to Thomas. Gordon also claims that the trial judge demonstrated bias when she scolded Gordon for not being seated at counsel table when court was ready to begin, and when she denied Gordon’s request to introduce Thomas’ sexual history. Lastly, Gordon contends that judicial bias is indicated because the trial judge did not require additional DNA testing. Having carefully reviewed the record, the Court has found no evidence of judicial bias.

(10) Gordon next claims, under *Brady v. Maryland*,⁵ that the prosecution failed to disclose favorable evidence, consisting of photographs of basement windows, a paternity test of Thomas’ boyfriend, Thomas’ medical records, and a

⁵ *Brady v. Maryland*, 373 U.S. 83 (1963). A *Brady* violation occurs when a prosecutor fails to disclose favorable evidence that is material to either the guilt or punishment of the defendant.

“taped interview [and] body warrant,” all of which, according to Gordon, was material to his guilt or punishment. Gordon’s *Brady* claim is without merit for the following reasons. First, it is not clear what “taped interview [and] body warrant” Gordon alleges the State withheld, and he makes no argument how that evidence was favorable or material to his defense. Second, to the extent Gordon argues that disclosure of Thomas’ medical records would have established a more precise date of conception, the lack of a specific date was not material to the defense. Similarly, to the extent Thomas testified incorrectly that the basement of the New Castle home was windowless, the mistake does not give rise to a “reasonable probability that, had the evidence [of basement windows] been disclosed to the defense, the results of the proceeding would have been different.”⁶ Finally, to the extent Thomas’ boyfriend took a paternity test, failure to disclose the results of that test was not prejudicial to Gordon given that (i) such information was already excluded by the Superior Court under title 11, section 3508 of the Delaware Code,⁷ and (ii) the DNA testing admitted at trial established to a “greater than 99.9999 percent” probability that Gordon was the child’s father.

(11) Next, Gordon claims prosecutorial misconduct on the basis that the prosecutor “coached” Thomas’ trial testimony, as evidenced by Thomas having

⁶ *Starling v. State*, 882 A.2d 747, 756 (Del. 2005).

⁷ Trial tr. at 5 (Jan. 23, 2013). *See* Del. Code Ann. tit. 11, § 3508 (Del. 2010) (codifying rape shield law).

testified that she met with the prosecutor prior to trial. Gordon's claim is without merit. Preparation with a prosecutor in and of itself does not equal prosecutorial misconduct.⁸

(12) Gordon also contends that the prosecutor's remark during his opening statement, referring to the child as the "spawn of a rapist," was improper because it was made before any evidence was introduced. Gordon's complaint about the prosecutor's comment is without merit. The evidence adduced at trial supported the prosecutor's statement that the child was conceived in a rape.⁹

(13) Gordon next claims that there was insufficient evidence presented at trial to support his convictions. On a claim of insufficient evidence, the relevant inquiry is whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.¹⁰ After a thorough review of the record in this case, we conclude that the State presented sufficient evidence for the jury to conclude, beyond a reasonable doubt, that Gordon committed two counts of Rape in the Second Degree and one count of Rape in the Fourth Degree when he engaged in sexual intercourse and sexual penetration of Thomas.¹¹

⁸ *Webb v. State*, 2006 WL 2959891 (Del. Oct. 18, 2006).

⁹ *Kurzmann v. State*, 903 A.2d 702, 711 (Del. 2006).

¹⁰ *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991).

¹¹ See Del. Code Ann. tit. 11, § 772(a)(1) (Supp. 2013) (providing that "[a] person is guilty of

(14) In his fifth claim on appeal, Gordon challenges the chain of custody of the DNA samples taken of Thomas, the child, and Gordon. Gordon's claim is without merit. The record reflects that a sufficient chain of custody was established from the time the DNA samples were taken until the time the samples were tested.

(15) In his sixth claim, Gordon complains that the trial judge's requirement that Gordon testify before Thomas' mother testified was an infringement of his right to testify. Gordon's claim is without merit. The trial judge's evidentiary ruling as to the order in which Gordon and Thomas' mother would testify did not deprive Gordon of his right to testify or to present a defense.¹²

(16) Finally, Gordon makes several assertions that his trial counsel was ineffective. It is well settled that this Court does not consider ineffective assistance of counsel claims that are raised for the first time on direct appeal.¹³ Absent a full adjudication of a claim by the Superior Court, there is no adequate record for this

rape in the second degree when the person . . . [i]ntentionally engages in sexual intercourse with another person, and the intercourse occurs without the victim's consent.") Under Delaware law, a child under the age of sixteen is deemed "unable to consent to a sexual act with a person more than 4 years older than said child." Del. Code Ann. tit. 11, § 761 (k). *See* Del. Code Ann. tit. 11, § 770(a)(3)a. (providing that a person is guilty of fourth degree rape when the person "[i]ntentionally engages in sexual penetration with another person" and the victim has not yet reached his/her sixteenth birthday).

¹² *See Yelardy v. State*, 2011 WL 378906 (Del. Jan. 31, 2011) (citing *Cooke v. State*, 977 A.2d 803, 842 (Del. 2009)).

¹³ *Collins v. State*, 420 A.2d 170, 177 (Del. 1980).

Court to review.¹⁴ In this case, because Gordon's ineffective counsel claims were not considered by the Superior Court, we decline to consider the claims in this appeal.

(17) The Court concludes that Gordon's appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Counsel made a conscientious effort to examine the record and the law and properly determined that Gordon could not raise a meritorious claim on 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/ Henry duPont Ridgely
Justice

¹⁴ *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).