IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 00-10,984
	: NO. 00-11,365
	:
vs.	: CRIMINAL DIVISION
	: Post-Trial Motions
NORMAN E. JOHNSON,	:
Defendant	:

OPINION AND ORDER

After a jury trial, completed on April 17, 2001, Defendant was convicted of criminal trespass, possessing an instrument of crime, and intimidation of a witness or victim, but the jury was hung on the remaining counts of rape by forcible compulsion, rape by threat of forcible compulsion, involuntary deviate sexual intercourse by forcible compulsion, involuntary deviate sexual intercourse by threat of forcible compulsion, sexual assault, indecent assault without consent, indecent assault by forcible compulsion, kidnaping to commit a felony, unlawful restraint, false imprisonment, simple assault by physical menace, terroristic threats, recklessly endangering another person, harassment by communication, and stalking. Defendant was acquitted of the charge of kidnaping to inflict bodily injury. Defendant filed the instant post-trial motions on April 25, 2001 and argument thereon was heard May 23, 2001.

First, Defendant contends the conviction of possessing an instrument of crime should be set aside, alleging there was no evidence of a criminal intent since he was not convicted of the underlying crime, i.e., rape, involuntary deviate sexual intercourse, indecent assault or simple assault. In support of this argument, Defendant cites Commonwealth v Gonzalez, 527 A.2d 106 (Pa. 1987). In Gonzalez, the defendant was acquitted of murder and voluntary manslaughter but found guilty of possessing an instrument of crime. The Supreme Court reversed the conviction of possessing an

instrument of crime on the basis that "no crime had been committed with the gun, and there was no other evidence presented to support a finding of criminal intent." Gonzalez at 108. In the instant matter, however, Defendant was not acquitted of the underlying crimes and therefore the Court cannot conclude that no crime was committed. See Commonwealth v Sattazahn, 763 A.2d 359 (Pa. 2000) (a deadlocked jury and an absence of a verdict is not an acquittal).

Second, Defendant contends the conviction of intimidation of a victim should be set aside, alleging there is no evidence that he threatened the victim or that he offered her a pecuniary benefit if she would refuse to testify.[1] Threats are not required, however. In Commonwealth v Brachbill, 555 A.2d 82 (Pa. 1989), the Court analyzed the relevant statute, 18 Pa. C.S. Section 4952, and determined that although the statute uses the word "intimidates" and not the former broader term "induce"[2] it is nevertheless clear that the legislature intended to proscribe any offers of benefit with the intent to interfere with the administration of criminal justice, and that evidence of threats is not necessary. With respect to offers of a pecuniary benefit, the Commonwealth did indeed present such evidence: in the telephone calls Defendant made to the victim, he indicated that if she would drop the charges and allow him to be released from prison, he would be able to pay for the van and the cell phone, give her money, or "anything you want".

Third, Defendant contends he should be awarded a new trial on all charges based on the fact that the jurors were led past him while in the custody of sheriff's deputies at some point during their deliberations. In support of this contention, Defendant cites Commonwealth v Davis, 351 A.2d 642 (Pa. 1976). In Davis, the Court held that a Defendant should be allowed to wear the garb of innocence and should not, absent exceptional circumstances, be physically restrained while before the jury. In the instant matter, Defendant was not physically restrained while he was in the company of

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[1]There is no dispute that Defendant did at least ask (he in fact begged) the victim not to testify.

[2]The prior provision addressing the prohibited conduct, 18 Pa. C.S. Section 4907, proscribed attempts to induce or otherwise cause a witness to withhold any testimony, etc.

sheriff's deputies[3]. Moreover, even if simply being in the company of sheriff's deputies may be considered to be restrained, which the Court specifically does not find, at Defendant's request, the jury, as well as Defendant and his counsel and counsel for the Commonwealth, were taken outside to view a vehicle which had been involved. Seven (7) sheriff's deputies accompanied this party and stationed themselves around the perimeter of the site view. The Court fails to see how the presence of sheriff's deputies in the hallway with Defendant prejudiced Defendant in any manner under such circumstances.

Fourth, Defendant contends that since he was acquitted of kidnaping to inflict bodily injury, he cannot be retried on the kidnaping to commit a felony, unlawful restraint or false imprisonment charges. Defendant contends that all of these are lesser included offenses of kidnaping to inflict bodily injury and thus the principles of double jeopardy prevent retrial. Unlawful restraint is not a lesser included offense of kidnaping. Commonwealth v Ackerman, 361 A.2d 746 (Pa. Super. 1976). False imprisonment is a lesser included offense of unlawful restraint, Commonwealth v Black, 531 A.2d 492 (Pa. Super. 1987), and therefore is also not a lesser included offense of kidnaping. Kidnaping to commit a felony is not a lesser included offense of kidnaping to inflict bodily injury as the element of intent is different. There are numerous felonies which may be intended to be committed by the kidnaper, and in the instant case, the Commonwealth alleged that Defendant's intent was to commit rape and/or other sexual offenses. Retrial of these three (3) charges on which the jury was unable to reach a verdict is thus not barred by double jeopardy principles.

Finally, Defendant contends there was insufficient evidence to support the conviction of criminal trespass, claiming that the evidence showed he was living at the residence or "at least had a significant enough interest to enter the premises" without the victim's permission. The evidence did not show, however, that Defendant lived at the residence, but, rather, that Defendant had not lived at the residence since at least January (the incident occurring in June of the same year). While the telephone bill had remained in Defendant's name, the Court does not believe such gives Defendant "a

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[3]Apparently, Defendant and the deputies were waiting for an elevator when some of the jurors were led past them while on a break from the trial.

significant enough interest" to allow him to enter the residence without the victim's permission. There is thus no basis to overturn the charge of criminal trespass.

ORDER

AND NOW, this day of June, 2001, for the foregoing reasons, Defendant's post-trial motions are hereby denied.

By the Court,

Dudley N. Anderson, Judge

cc: DA
Matt Zeigler, Esq.
Norman Johnson, c/o Lycoming County Prison
Gary Weber, Esq.
Hon. Dudley N. Anderson