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Case Number 150,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES SIMMERS,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	No. 150, 2015
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On March 13, 2013, James Simmers ("Simmers") was arrested and subsequently indicted by a New Castle County grand jury for two counts of Rape Fourth Degree and Indecent Exposure Second Degree. A1 at D.I. 1, 2. Simmers proceeded to a Superior Court jury trial on October 29, 2014. A4 at D.I. 25. On October 29, 2014, the jury found Simmers guilty as charged. A4 at D.I. 27. Superior Court ordered a Presentence Investigation. A4 at D.I. 27.

On November 5, 2014, Simmers filed a motion for a new trial asserting the existence of newly discovered evidence. A4 at D.I. 29, A53-60. The State replied on November 21, 2014. A4-5 at D.I. 32, B1-11. Superior Court denied the motion in a written opinion on February 18, 2015.[1] Ex. A to Op. Brf.

On March 20, 2015, Simmers was sentenced to a total of 20 years and 30 days at Level V, suspended after 6 years and 30 days for decreasing levels of supervision. Ex. B. to Op. Brf.

Simmers has appealed his convictions and sentence. This is the State's Answering Brief.

[1] *See State v. Simmers*, 2015 WL721292 (Del. Super. Ct. Feb. 18, 2015).

SUMMARY OF THE ARGUMENT

I. DENIED. Superior Court did not abuse its discretion in denying Simmers' motion for new trial because Simmers knew the information he claimed was "newly discovered," prior to opening statements in his trial. Thus, the information at issue does not meet the definition of "newly discovered evidence" – evidence that has been 'discovered since trial, and could not have been discovered before trial with due diligence. The Court can affirm Superior Court's decision on this basis alone. However, Simmers also cannot show that the information about the complaining witness would probably have changed the outcome of his case had a new trial been granted or that the information was not merely cumulative or impeaching.

STATEMENT OF THE FACTS

On March 12, 2013, B.A.,[2] a 27-year-old, intellectually challenged woman,[3] left the home she shared with her mother on Lynch Farm Drive in Newark, Delaware, to take one of her usual walks around her neighborhood. A9-10. Because B.A. was gone longer than her usual hour, her mother became concerned and asked their renter, Dwayne, to look for B.A., but he was unable to find her. A10-11. B.A. returned by herself about a half-hour later.

When B.A. entered the house, her head was down. A11. She spoke to Dwayne, who encouraged her to speak to her mother. A11. B.A., upset and crying, told her mother that "Jimmy," later identified as James Simmers, wanted to walk in the woods with her, and had sexually assaulted her in the woods. A14.

B.A.'s mother called the police immediately. A12. B.A. told the police that "Jimmy" had been riding a bike and was wearing a camouflage outfit that consisted of a black shirt and dark pants. A16, A24. The police located Simmers' bike and found that he lived in the neighborhood. A24.

A sexual assault nurse examiner attempted to conduct a sexual assault examination in the early morning hours of March 13, 2014, after B.A. had already urinated, bathed and changed clothes. A19, A24. Because B.A. could not tolerate

[2] In this appeal, the State has referred the the victim as B.A.

[3] B.A.'s mother testified that B.A.'s intellectual development was mostly that of a ten-year old child, but sometimes she said things that teenagers would say. A10, 12.

much of the exam, the nurse only performed an exterior exam for injuries and took some swabbings. A21. The nurse noted that B.A. did not have any visible injuries. A21. Officer Matthew DiSabatino of the New Castle County Police Department was present for B.A.'s interview at the Child Advocacy Center on March 13, 2014. At that time, B.A. was frightened, crying, and hesitant but gave a description of "Jimmy" and his bike. A24. Approximately two weeks before trial, Officer DiSabatino took B.A. to the woods where she stated the crime occurred. A25. B.A. was fearful of going back to the location and insisted that a female officer accompany them. A25. B.A. pointed Officer DiSabatino of the location where Simmers assaulted her and then immediately left the area. A25. B.A. was positive about the location, which was approximately 300 yards south of the intersection Pearson and Anderson Streets in B.A.'s development. A25-6.

At trial, B.A. testified that "Jimmy" did "nasty stuff" to her in the woods that included kissing her, touching her "boobs," and putting his fingers inside her "bottom" and "pussy." A14, A16. B.A. testified that what "Jimmy" did physically hurt and she told him to stop. A14. B.A. said that "Jimmy" showed her his penis. A14. B.A. said that what Jimmy did made her sad and upset and "everything" and that she did not want him to touch her anymore. A14, A16.

ARGUMENT

I. SUPERIOR COURT PROPERLY DENIED SIMMERS' MOTION FOR A NEW TRIAL

QUESTION PRESENTED

Whether Superior Court erred in denying Simmers' motion for a new trial asserting newly discovered evidence ?

STANDARD AND SCOPE OF REVIEW

This Court reviews a trial court's denial of a motion for a new trial for an abuse of discretion.[4] Alleged violations of a constitutional right are reviewed *de novo*.[5]

MERITS

Simmers contends that Superior Court should have granted him a new trial under Superior Court Rule 33 because just prior to opening statements, the State provided defense counsel with information that the complainant, B.A., had made a prior sexual assault accusation against an intellectually challenged individual that the police never investigated. He is mistaken.

On the morning of jury selection, October 28, 2014, B.A.'s mother told the State's social worker that B.A., who is intellectually challenged, told her that

[4] *Jones v. State*, 940 A.2d 1, 19 (Del. 2007); *Hicks v. State*, 913 A.2d 1189, 1193 (Del. 2006).
[5] *Williams v. State*, 56 A.3d 1053, 1055 (Del. 2012); *Bentley v. State*, 930 A.2d 866, 871 (Del. 2007).

another intellectually challenged individual touched B.A.'s breast over her clothing. B5. B.A.'s mother said that B.A. was not upset by it and did not mention it again. B5. B.A.'s mother did not report the incident to the police because, based upon her daughter's demeanor, she did not think anything of it. B5. The State, upon learning of the information, out of a great abundance of caution, reported the information to defense counsel that very same morning prior to opening statements. B5. The State took the position that the information was inadmissible and irrelevant. B5. Defense counsel did not take any action on this information during trial, making no mention of it whatsoever, despite Superior Court's repeated questioning as to whether counsel had any issues to be discussed. A32, A40; B2, B5. Seven days after the trial, Simmers filed a motion for new trial based on this information. Superior Court correctly determined that the information provided prior to trial was not "newly discovered" and that a new trial was not warranted in the interest of justice.[6]

"Newly discovered evidence is evidence that has been 'discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence.'"[7] To obtain a new trial based upon newly discovered evidence under Delaware Superior Court Criminal Rule 33, a

[6] *See State v. Simmers*, 2015 WL 721292, at *5.
[7] *Lloyd v. State*, 534 A.2d 1262, 1267 (Del.1987), citing *State v. Lynch, Del. Oyer & Term.*, 128 A. 565, 568 (Del. 1925).

defendant must establish that the evidence at issue "(1) could not have been discovered before trial by the exercise of due diligence, (2) would probably change the outcome if a new trial is granted, and (3) is not merely cumulative or impeaching.[8]

Simmers admits that he knew the information he claims was "newly discovered" prior to opening statements.[9] Simmers did nothing. As Superior Court noted, "[t]he Court could have addressed the issue and conduct a hearing at any point (including the several recesses and each invitation to inform the Court of any issues) during the two-day trial. [10] Indeed, at Simmers' request, just prior to opening statements, the court conducted a hearing to determine B.A.'s competency to testify. B1. Superior Court properly determined that Simmers offered no evidence that meets the definition of "newly discovered" evidence and therefore, properly denied his motion for new trial.[11] The Court can affirm on this basis alone.

In any case, Simmers cannot show that that the evidence, had he even been allowed to present it, would probably have changed the outcome if a new trial had been granted and that the information was anything more than cumulative or

[8] *Shockley v. State*, 2006 WL 1277809, *2 (Del., May 8, 2006) (citing *Hicks v. State*, 1991 WL 78451 (Del. Apr. 24, 1991); *Lloyd*, 534 A.2d at 1267.
[9] Op. Brf. at 7.
[10] *Id.* at *4 ("the defense has not shown that the receipt of the information during jury selection prevented the defense from raising the issue.").
[11] *See Simmers*, 2015 WL 721292, at *3, *State v. Weber*, 2007 WL 165132, *3 (Del. Super. Ct. May 31, 2007).

impeaching.[12]

B.A. told her mother on one occasion that an intellectually challenged individual touched her breast over her clothes. According to B.A.'s mother, B.A. seemed unaffected by it. To the extent Simmers argues that the contested information constitutes an allegation of unprosecuted sexual assault, the record, as it stands, provides no such evidence.[13] Moreover, it is difficult to imagine a scenario where this information provided by B.A.'s mother translates into admissible,[14] impeachment material in Simmers' prosecution for non-consensual forcible digital penetration of B.A. in the woods. As Superior Court stated:

> the defense has failed to show how a recent groping incident by a developmentally challenged man occurring at least a year after Defendant was accused of digitally penetrating the Complaining witness' vagina would tend to exculpate the Defendant. The unreported groping incident is temporally distant from Defendant's charges and is factually dissimilar to the case at hand. The "recent incident" involved a different person, a different type of act, at a different location, did not visibly upset the Complaining Witness when she told her mother about the incident, and did not prompt her or her mother to contact the police or file a report. Thus, Defendant's unsubstantiated assertion that "the admission of the unrelated

[12] *See Shockley*, 2006 WL 1277809 at *2.
[13] *See* Op. Brf. at 7.
[14] To the extent Simmers argues that he would have been permitted to explore B.A.'s sexual history on cross-examination, he would have been precluded from doing so under 11 *Del. C.* §§ 3508- 09, Delaware's Rape Shield Statute, the purpose of which is to ensure that victims of rape are not discouraged from coming forward by facing a threat that intimate details of their prior sexual history will be exposed to the community in a public trial. *See Cooke v. State*, 97 A.3d 513, 543 (Del. 2014). A defendant does not have a constitutional right to present irrelevant evidence at trial. *See Jenkins v. State*, 2012 WL 36371236, *2 (Del. Aug. 23, 2012); *see also Simmers*, 2015 WL 721292, at *4 fn 23 (discussing Simmers' ability to comply but lack of compliance with 11 *Del. C.* § 3508 procedural requirements).

accusation of sexual assault is likely to change the result of trial" lacks merit.[15]

Simmers cannot show that the claimed "newly discovered" evidence is not merely cumulative or impeaching. The evidence of B.A.'s prior statement that an intellectually challenged individual touched her breast, if admissible at all, is at most impeachment material, and therefore, insufficient to warrant a new trial.[16] Simmers argues that the information *could have been* relevant "had a [criminal] investigation determined that the complaining witness had falsely accused the other suspect," or "had the facts been similar to the facts of the case at bar."[17] Nothing in the record suggests a criminal investigation was warranted or that the facts were similar to Simmers' case. Simmers does nothing more than draw possible inferences from the known information.

Simmers vague and conclusory allegations have manifestly failed to satisfy any of the requirements for newly discovered evidence.[18] Superior Court did not abuse its discretion in denying Simmers motion for new trial.

[15] *Simmers*, 2015 WL 721292, at *2.
[16] *See O'Neal v. State*, 247 A.2d 207, 210 (Del. 1968) (newly discovered evidence that serves only to impeach the credibility of a witness was insufficient ground to warrant new trial.).
[17] Op. Brf. at 8.
[18] *See Truitt v. State*, 1996 WL 637912 at *2 (Del. Oct. 31, 1996).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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CERTIFICATE OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on July 23, 2015, she caused the attached document to be served electronically via Lexis/Nexis File and Serve upon:

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