

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2018-069

JANUARY TERM, 2019

State of Vermont v. Kyle Evans*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1067-4-16 Cncr
		Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction of sexual assault on the ground that the evidence presented to the jury at trial was insufficient to establish his guilt by a reasonable doubt. We affirm.

In April 2016, defendant was charged with one count of sexual assault under 13 V.S.A. § 3252(a)(1). A jury trial took place in July 2017 at which the State presented the following evidence.

Around midnight on March 6, 2016, a Burlington police officer noticed the complainant sobbing on the sidewalk outside the Burlington Police Department. She was hunched over and yelled to him that she had been raped. The officer escorted the complainant over toward the front of the building and asked her to sit down. She did so, then stood back up and said it was too painful to sit down. The officer arranged for an ambulance to bring the complainant to the hospital for a physical examination. While at the hospital, the officer took pictures of the complainant’s upper arm, which had red marks near the shoulder. The complainant told the officer that someone named “Kyle” had pushed her down and raped her in the woods near the waterfront. She specifically said that “Kyle” had placed his penis in her vagina.

The officer asked a colleague to go to the waterfront to locate defendant. Defendant told the second officer that he had been sleeping for three to four hours and had not heard anything. He denied knowing the complainant. The officer asked if anyone else had been in the area. Defendant told the officer that earlier that evening, he had heard a girl near his tent yelling “Chris,” “I’m leaving,” and “Chris, I love you.”

The following morning, a detective with the Chittenden Unit for Special Investigations interviewed the complainant. She was crying and distraught throughout the interview, and reported pain in her vagina, right shoulder and arm, and upper back. She told the detective that the previous evening she had been searching for her boyfriend Chris in the homeless encampment in the woods near the waterfront, where they had previously been staying in a tent. A man, whom the complainant knew as Kyle, walked out of the woods and greeted her.. He led her into the

woods, then pushed her to the ground, pulled her pants down, and inserted his penis into her vagina. She managed to push him off and ran to the police station. She estimated that the rape lasted approximately three minutes. She could not recall if the man ejaculated. The detective testified that no sperm or seminal fluid was recovered from the complainant's body during the physical examination at the hospital, so police were unable to conduct a DNA analysis.

The complainant testified that on the evening of March 5, she was at her parents' home with her boyfriend Chris. She and Chris had an argument and her parents asked Chris to leave. She later went to look for him down at the waterfront. It was dark and she couldn't find her way to their tent, so she sat on a rock and called out his name. Defendant came out of the woods and said, "It's me, Kyle." The complainant knew Kyle because he lived in a tent near hers. He offered to show her to the tent and led her into the woods. The next thing she knew, she was on the ground and her pants were down. Defendant pinned down her arms and placed his penis inside her. She struggled, broke free, pulled up her pants, and ran.

After the State finished presenting the above evidence, defendant moved for judgment of acquittal, arguing that there was no corroborating evidence to support the complainant's testimony. The court denied the motion. Defendant did not testify or call any witnesses. The jury found defendant guilty. In February 2018, he was sentenced to serve twenty years to life. This automatic appeal followed.

In reviewing a trial court's decision on a motion for judgment of acquittal, "we view the evidence in the light most favorable to the State, excluding any modifying evidence, and determine whether it is sufficient to fairly and reasonably convince a trier of fact that the defendant is guilty beyond a reasonable doubt." State v. O'Dell, 2007 VT 34, ¶ 4, 181 Vt. 475. "A jury is in the best position to weigh facts and deliver a verdict, particularly in close fact-dependent cases. Thus, courts should grant a judgment of acquittal only when there is no evidence to support a guilty verdict." State v. Cameron, 2016 VT 134, ¶ 5, 204 Vt. 52 (citation omitted).

Viewing the evidence in the light most favorable to the State, it was sufficient to support the verdict. The complainant testified that defendant pulled down her pants, pinned her arms down, and put his penis inside her, and that she could feel it. She also testified that she felt pain in her vagina afterward and that defendant was on top of her for three to five minutes. The complainant's testimony was consistent with her statements to police officers immediately after the incident that defendant inserted his penis in her vagina. The complainant's credibility "was ultimately for the jury to determine and is not for this Court to weigh on appeal." State v. Hammond, 2012 VT 48, ¶ 16, 192 Vt. 48.

Defendant argues that the above was insufficient to prove beyond a reasonable doubt that he engaged in a sexual act with the complainant because there was no physical evidence to corroborate the complainant's allegations, even though a physical examination was performed. Defendant had the opportunity, through cross-examination, to point out this perceived weakness in the State's case. If the jury found the complainant to be credible, her statements at trial and to the police were sufficient to support defendant's conviction. Id. (holding that if credited by jury, complainant's testimony that defendant inserted one or two fingers into her vagina was sufficient evidence to support convictions for sexual assault and lewd and lascivious conduct).

Defendant also argues that the complainant's statement that "he had his penis inside me" was insufficient to show beyond a reasonable doubt that he committed a sexual act as defined by the statute. See 13 V.S.A. § 3251(1) (defining "sexual act" as "contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion,

however slight, by any part of a person’s body or any object into the genital or anal opening of another”). Defendant did not raise this argument in his motion for a judgment of acquittal and therefore has forfeited it on appeal. See State v. Davis, 2018 VT 33, ¶ 18 (holding that defendant forfeited argument that State presented no evidence regarding intent element of statute by failing to raise it in motion for judgment of acquittal, which raised different argument); State v. Jackson, 2008 VT 71, ¶ 21, 184 Vt. 173 (holding defendant failed to preserve argument that State presented insufficient evidence on one element of offense because defendant’s motion for judgment of acquittal argued only that State presented insufficient evidence on different element of offense). Even so, the complainant’s testimony, that she could feel defendant’s penis inside her and that she felt vaginal pain afterward, was sufficient to establish that a sexual act occurred.

Affirmed.

BY THE COURT:

---

Marilyn S. Skoglund, Associate Justice

---

Beth Robinson, Associate Justice

---

Karen R. Carroll, Associate Justice