

**Commonwealth of Pennsylvania v.
David Joseph Gonzalez, Defendant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Criminal Action
No. 1103-2011

HEADNOTES

Criminal Law; Post-Trial Motions; Sufficiency of the Evidence

1. When ruling on a post-trial motion challenging the sufficiency of the evidence to sustain a verdict, the Court must view all of the evidence admitted at trial in the light most favorable to the verdict winner.
2. The Court must find that the evidence admitted at trial was sufficient to prove each element of the crime “beyond a reasonable doubt.”
3. The Court may not weigh the evidence and substitute its judgment for that of the jury.
4. A rape victim’s uncorroborated testimony is sufficient evidence to sustain a rape conviction.

Criminal Law; Rape by Forcible Compulsion

1. To prove the crime of rape, the Commonwealth must show that the Defendant engaged in sexual intercourse by forcible compulsion or threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.
2. Forcible compulsion includes physical force as well as “moral, physiological, or intellectual force.”
3. Forcible compulsion must be something more than lack of consent, although a rape victim does not need to resist.
4. The Court must examine the totality of the circumstances to determine the existence of forcible compulsion. Several factors should be considered such as the age of the victim and defendant, their mental and physical conditions, the physical setting where the incident occurred, whether the defendant was “in a position of authority, domination or custodial control over the victim,” and whether the victim was under duress.

Appearances:

Stephanie M. Sawyer, Esq., Counsel for Defendant

Eric J. Weisbrod, Esq., Counsel for Defendant

Lauren E. Sulcove, Esq., First Assistant District Attorney

STATEMENT OF THE CASE

Before Van Horn, J.

On September 6, 2013, after a three-day jury trial, the above captioned Defendant was convicted of rape,¹ aggravated indecent assault² and sexual assault.³ On September 16, 2013, the Defendant filed a Motion for Post-Trial Relief requesting a judgment of acquittal on all charges, challenging the sufficiency of the evidence to support his convictions.⁴ Specifically, he argues that his rape conviction cannot stand because the record lacks any evidence of forcible compulsion.⁵ The Commonwealth filed its Answer on October 9, 2013. This Court heard argument on the Motion in an October 22, 2013 hearing. The matter is now ripe for decision, rendered in this Opinion and Order of Court.

¹ 18 Pa.C.S. § 3121 (A)(1).

² 18 Pa.C.S. § 3125 (A)(1).

³ 18 Pa.C.S. § 3124.1.

⁴ Additional issues were raised by the Defendant in his Motion for Post-Trial Relief. First the Defendant requested permission to interview jurors. An alternate juror who was dismissed prior to deliberations contacted defense counsel post-verdict. Additionally, a juror contacted the trial judge’s chambers post-verdict. The Defendant also alternatively requested a new trial as the verdict was clearly against the weight of the evidence. However, during the October 22, 2011 hearing, the Defendant conceded that he only wanted to pursue the sufficiency claim with respect to the rape charge.

⁵ 18 Pa.C.S § 3121 provides: “(a) Offense defined.--A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant: (1) By forcible compulsion. (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.”

BACKGROUND

The above charges arose out of an incident that occurred on March 8, 2011. The victim was twenty-five years old at the time and suffers from cerebral palsy.⁶ Her cerebral palsy causes her to have “stiffness and tightening of the muscles” in her legs and she needs crutches to walk.⁷ She testified that if she were lying on the floor, she could pull herself up if she had something to pull herself up on.⁸ When asked whether she could bend her knees normally, she testified “[n]ot on my own. If I had to bend my knees, I would either need to use my hands or have someone to help me.”⁹ When asked if she could easily spread her legs apart, she responded, “[n]o,” and said “[t]hey have to be pushed apart.”¹⁰ The victim also testified that “I can’t spread my legs far enough to get [a tampon] in,” and has to use pads during her period.¹¹

The victim and Defendant met each other on a Christian dating website in August 2010.¹² They met in person in September of that year, but the Defendant soon left the area to pursue a position as a youth minister in New York.¹³ They reestablished a relationship when he returned in December 2010, and began seeing each other.¹⁴ On March 7, 2011, the Defendant picked up the victim and took her to the mall.¹⁵ They discussed their religious beliefs, and the victim testified that “I had told [the Defendant] that I was a virgin and didn’t plan on having sex before I was married.”¹⁶ She further testified that he responded by saying “something along the lines . . . of praise the Lord.”¹⁷ She also said that he told her he was not a virgin.¹⁸ That evening, they kissed and hugged.¹⁹ The victim also testified that the Defendant asked her to be his girlfriend, and she agreed.²⁰

On March 8, 2011, the Defendant picked up the victim from her physical therapy appointment around 2:30 p.m.²¹ They stopped to get food and went to the Defendant’s apartment to watch a movie.²² This was the first time the victim had been to the Defendant’s apartment.²³ They sat down on the couch and began watching the movie.²⁴ The victim testified that she started kissing the Defendant and they both began touching and rubbing one another’s genitals over their clothes.²⁵ This lasted for about half an hour.²⁶ Eventually, the victim noticed that the Defendant was erect.²⁷ Next, the victim testified that the Defendant asked her if she wanted to go to the bedroom, to which she agreed.²⁸ The victim “assumed that we would continue doing what we were doing in the living room in the bedroom. . . . [b]ecause . . . [the Defendant] knew that I didn’t want to have sex before I was married.”²⁹ Before they moved, the victim testified that the Defendant took her phone out of a pouch connected to her jeans and placed it on a TV tray in the living room.³⁰ The victim then got her crutches, got off the couch, and walked to the Defendant’s bedroom.³¹ Once in the bedroom, she noticed a bare mattress against the wall with no furniture surrounding it.³² The Defendant then either helped her sit on the mattress or she sat down herself.³³ The victim testified that the Defendant “took my crutches . . . [and] put them out of reach. I didn’t see exactly where he put them. But I know it was out of reach.”³⁴ The victim lay down by herself.³⁵ When asked “is there any way you could have gotten up from that point?”³⁶ She responded “no.”³⁷

6 Tr. of Proceedings Day 1, September 3, 2013, at 57

7 *Id.* at 58, 77.

8 *Id.* at 58-59.

9 *Id.* at 60.

10 *Id.* at 60.

11 *Id.* at 62.

12 *Id.* at 64.

13 *Id.* at 64-66.

14 *Id.* at 66-68.

15 *Id.* at 68-69.

16 *Id.* at 69.

17 *Id.* at 69.

18 *Id.* at 69.

19 *Id.* at 110.

20 *Id.* at 71.

21 *Id.* at 71.

22 *Id.* at 72.

23 *Id.* at 72.

24 *Id.* at 73.

25 *Id.* at 74, 120, 162.

26 *Id.* at 132.

27 *Id.* at 120.

28 *Id.* at 75, 121.

29 *Id.* at 75-76.

30 *Id.* at 77, 133-34.

31 *Id.* at 76-77, 121.

32 *Id.* at 77-78.

33 *Id.* at 77-78, 122.

34 *Id.* at 78.

35 *Id.* at 79.

36 *Id.* at 79.

37 *Id.* at 79.

The victim testified that the Defendant then removed her jeans and underwear, and lay on top of her.³⁸ The victim did not say anything while the Defendant took off her pants and underwear,³⁹ but when he lay on top of her, she said “no, don’t.”⁴⁰ When he lay on top of her, her legs were flat, straight, and unopened because “I can’t open my legs by myself.”⁴¹

Next, the victim testified that the Defendant got on his knees and forced her legs apart “with his hands and put them on his shoulders. And he had his hands cuffed around my ankles.”⁴² She testified that “[h]e put my ankles around his shoulders.”⁴³ “He bent [her knees] because they were up on his shoulders.”⁴⁴ She then felt his penis inside her, and she “kept saying ow.”⁴⁵ The Defendant told the victim she “had to be quiet.”⁴⁶ The victim testified that at some point the Defendant took her legs off his shoulders and put his finger in her vagina.⁴⁷ He then put her legs back on his shoulders and penetrated her again with his penis.⁴⁸ The victim was asked if she tried at all to kick off the Defendant during the penetration.⁴⁹ She responded, “I couldn’t move my legs. My legs don’t move like that.”⁵⁰ When asked if she tried to push him off, she said, “[n]o. . . . because he’s too big. And I was scared.”⁵¹

When asked how the penetration felt, the victim responded, “It felt like someone was mutilating me with a sharp object.”⁵² At some point, the Defendant suddenly stopped, and the encounter ended.⁵³ There was blood on the mattress and blood on the victim’s underwear after she put them back on.⁵⁴ The victim testified that after she got dressed, the Defendant said to her, “I’m sorry. I have a weakness.”⁵⁵

During cross-examination, defense counsel inquired into the victim’s mobility. The victim attended Lancaster Bible College and when asked if she could walk around the campus independently, she responded, “with crutches, yes.”⁵⁶ The victim later testified on redirect that she has “people to help me carry” books and things, and she needs assistance to open doors.⁵⁷ Defense counsel further inquired into the victim’s relationship with the Defendant, asking her about a Facebook post she had made on March 7, 2011 which read, “I went out with an awesome guy tonight. I have known him since August. We’ve chatted off and on for months. And he officially asked me to be his girlfriend this evening. We are going out again tomorrow. And I’m in like with David Gonzalez.”⁵⁸ Furthermore, when asked if she had any bruises from the incident the victim responded, “No, I don’t think I did.”⁵⁹ The victim also testified that the Defendant did not hit, kick, grab, push, gag, or punch her, or use his fists or a weapon.⁶⁰ Defense counsel asked why the victim and the Defendant moved to the bedroom when they were already making out in the living room.⁶¹ The victim responded, “[t]here was no purpose. I didn’t think I was in any danger with David. I saw him—I thought he was an honest person.”⁶² Defense counsel asked, “So for the record, it never crossed your mind that at that point, you were moving to the bedroom for sex. It never crossed your mind?”⁶³ The victim responded, “No, ma’am.”⁶⁴

Alternatively, the Defendant testified that the encounter was consensual. He said that when he and the victim went out on March 7, 2011 and he confessed he was not a virgin, she told him she was not a virgin either, and was not proud of that fact.⁶⁵ On the day of the incident, March 8, 2011, the Defendant agreed that while they were in the living room, Katy started kissing him and he kissed her back.⁶⁶ He also agreed that they both started

38 *Id.* at 79-80.

39 *Id.* at 123.

40 *Id.* at 80, 82.

41 *Id.* at 80.

42 *Id.* at 82.

43 *Id.* at 82.

44 *Id.* at 82.

45 *Id.* at 83.

46 *Id.* at 83.

47 *Id.* at 84, 125.

48 *Id.* at 83, 84, 125.

49 *Id.* at 83.

50 *Id.* at 83.

51 *Id.* at 84.

52 *Id.* at 84-85.

53 *Id.* at 133.

54 *Id.* at 85, 94; At trial, the Commonwealth and the Defendant produced experts to testify about the source of the blood; whether it was caused by injury or menstrual blood. *See* Tr. of Proceedings Day 2, September 4, 2013, at 4-48; Tr. of Proceedings Day 3, September 5, 2013, at 4-63.

55 *Id.* at 88.

56 *Id.* at 100.

57 *Id.* at 163.

58 *Id.* at 108.

59 *Id.* at 158.

60 *Id.* at 158-59.

61 *Id.* at 162.

62 *Id.* at 162.

63 *Id.* at 162.

64 *Id.* at 162.

65 Tr. of Proceedings Day 2, September 4, 2013, at 151, 187.

66 *Id.* at 157.

touching each other intimately over their clothes,⁶⁷ and then he “asked Katy if she wanted to go to the bedroom.”⁶⁸ She agreed.⁶⁹ “Katy got up, and she went first. I went behind Katy. I followed after her. Then we went into the bedroom together.”⁷⁰ The Defendant testified about the events in the bedroom in the form of a narrative:

We were kissing each other. . . . We stood—we were kissing. Katy was still fondling my penis. . . . Katy then sat down on the bed.

Katy then asked me to take my pants off. She asked me—she leaned back. And she asked me to help her with her jeans. She also with her motions, as well as asking me verbally, to help her with her pants. I did that and her panties.

Katy laid her canes on the other side of the bed flat on the bed. And so I asked Katy if I can—well, I was going to lay next to Katy. Katy was on one side of the bed the canes were on the other side of the bed. I asked Katy if I can move the canes towards the right or the left. Katy said fine. I laid next to Katy.

And we were kissing. Katy, we were laying next to each other. We were kissing. Katy was still fondling me. Katy then asked me if I could rub my penis against her vagina. And I did that. While I was doing that, I was kind of—went on the side. I was basically with my hand trying to rub my penis against her vagina.

After that, I moved over kind of almost on top of her. I started grinding. I started rubbing my penis without my hands. Before I was—before I did that, I did touch Katy with my finger while I was rubbing.

Katy got—she got aroused. She started saying my name. And I asked her if she was okay. She said she was fine. After I was on top of Katy, Katy asked me to spread her legs a little bit. That’s what I did.

And I was rubbing my penis without my hands on her vagina. After that, I then asked Katy if I could penetrate her. . . . the word I used, Can I come inside you. Katy said yes. I slightly penetrated Katy with my penis. Katy, again she got very aroused, she started saying my name again loudly.

And while I paused and I said, Are you okay? While I said that, at the same time, Katy said, I’m tight, I’m tight, don’t stop, don’t stop, come into me slowly. I took her direction. I started coming into her slowly with my penis. I penetrated her at least three or four times, no more than four and deeper than the first time. I knew what we were doing with—Katy and I were doing was wrong.

I smelled blood. Well, I smelled an odd smell, I noticed the blood. When I noticed the blood, I took it as it was an opportunity to stop. And that’s what I did. I stopped. I thought it was the Lord giving me an opportunity to stop because I didn’t want to continue what we were doing.

In my heart, that’s not what I wanted to do even though I was doing it, what we were doing. So I stopped. I told Katy I think we need to stop. Katy got a little shy. She got a little embarrassed. She sat up, she noticed the blood. And she got quiet.

Tr. of Proceedings Day 2, September 4, 2013, at 158-160. The Defendant denied ever putting the victim’s legs on his shoulders, or having his hands around her ankles.⁷¹ He also denied every apologizing to the victim or admitting that he had a “weakness.”⁷² He testified further that she never said “no, don’t.”⁷³ He said:

The whole time we were in the bedroom, Katy was giving me direction to what to do. I was following her—after her direction. She told me to take her pants off. She told me to . . . rub my penis against her vagina. Katy was the one that told me not to stop. She gave me direction, instruction, you know, to come into her slowly. That’s exactly what I did.

Tr. of Proceedings Day 2, September 4, 2013, at 183-84.

⁶⁷ *Id.* at 157.

⁶⁸ *Id.* at 157.

⁶⁹ *Id.* at 157.

⁷⁰ *Id.* at 157.

⁷¹ *Id.* at 180.

⁷² *Id.* at 182-83.

⁷³ *Id.* at 182.

DISCUSSION

I. Legal Standard

As noted above, in his Post-Trial Motion, the Defendant requests a judgment of acquittal, challenging the sufficiency of the evidence to support his rape conviction because the record lacks any evidence of forcible compulsion. The standard of review regarding the sufficiency of the evidence is well established:

The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.

Commonwealth v. McClendon, 874 A.2d 1223, 1228 (Pa. Super. 2005) (citations omitted). When applying this standard, this Court “may not weigh the evidence and substitute our judgment” for that of the jury. *Commonwealth v. Mack*, 850 A.2d 690, 693 (Pa. Super. 2004) (citations omitted). Moreover, “[a]ny doubts regarding a defendant’s guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.” *Commonwealth v. Eckrote*, 12 A.3d 383, 386 (Pa. Super. 2010) (citing *Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa. Super. 2001)). Importantly, “facts and circumstances established by the Commonwealth need not preclude every possibility of innocence.” *Mack*, 850 A.2d at 693 (citations omitted). However, “guilt must be based on facts and conditions proved,” and the evidence is insufficient if guilt is based on “suspicion or surmise.” *Eckrote*, 12 A.3d at 386 (citing *Commonwealth v. Swerdlow*, 636 A.2d 1173 (Pa. Super. 1994)). A conviction may be based entirely on circumstantial evidence as long as the “evidence links the accused to the crime beyond a reasonable doubt.” *Commonwealth v. Chmiel*, 639 A.2d 9, 11 (Pa. 1994) (citations omitted). Finally, when deciding whether the evidence is sufficient to sustain the verdict, “the entire record must be evaluated and all evidence actually received must be considered.” *Mack*, 850 A.2d at 693 (citations omitted).

II. Forcible Compulsion

Turning now to the issue of forcible compulsion, 18 Pa.C.S § 3121 provides:

(a) Offense defined.--A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant:

- (1) By forcible compulsion.
- (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.
- (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.
- (4) Where the person has substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.
- (5) Who suffers from a mental disability which renders the complainant incapable of consent.

18 Pa.C.S § 3121 (emphasis added). The Defendant argues that the record is completely devoid of any evidence of forcible compulsion. Therefore, because forcible compulsion is a necessary element of the crime of rape, he contends that a judgment of acquittal is appropriate because the Commonwealth failed to meet its burden beyond a reasonable doubt.

The Supreme Court of Pennsylvania has held that “‘forcible compulsion’ as used in section 3121[a](1) includes not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person’s will.” *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986). Determining whether evidence is sufficient beyond a reasonable doubt to prove forcible compulsion requires an examination of the totality of the circumstances of each case. *Id.* at 1226. The *Rhodes* court provided a non-exhaustive list of factors to be considered:

the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress.

Id. Although a rape victim need not resist, as discussed by defense counsel at the hearing, “forcible compulsion”

means “something more than lack of consent.” *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1163, 1165 (Pa. 1994). Courts have gone on to state “where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the ‘forcible compulsion’ requirement . . . is not met.” *Commonwealth v. Smolko*, 666 A.2d 672, 676 (Pa. Super. 1995) (quoting *Berkowitz*, 641 A.2d at 1164).

It is important to note that pursuant to the finding of guilt in the instant case, the jury obviously found the victim’s testimony more credible than the Defendant’s. As stated above, this Court “may not weigh the evidence and substitute our judgment” for that of the jury unless “the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.” *Eckrote*, 12 A.3d at 386 (citing *DiStefano*, 782 A.2d at 582); *Mack*, 850 A.2d at 693. “The uncorroborated testimony of a rape victim, if believed by a jury, is sufficient to support a rape conviction.” *Commonwealth v. Gabrielson*, 536 A.2d 401, 409 (Pa. Super. 1988) (citation omitted); *see also Commonwealth v. W.H.M., Jr.*, 932 A.2d 155, 160 (Pa. Super. 2007). Therefore, we will determine, viewing the evidence in the light most favorable to the Commonwealth, whether the victim’s testimony was sufficient to prove forcible compulsion.

Over time, the Supreme and Superior Courts have developed a body of case law in an attempt to define the bounds of physical, psychological, intellectual, and moral forcible compulsion. For example, compare (in chronological order) *Commonwealth v. Biggs*, 467 A.2d 31 (Pa. Super. 1983) (no evidence of forcible compulsion or threat thereof when father told 17-year old daughter the Bible mandated her to have sex with him when her mother would not and threatened to show people nude pictures of her); *Commonwealth v. Rhodes*, 510 A.2d 1217 (Pa. 1986) (forcible compulsion found when a 24-year old defendant took the 8-year old victim to an abandoned building, told her to lay down and put her legs up, and laid on top of her to assault her); *Commonwealth v. Mlinarich*, 542 A.2d 1335 (Pa. 1988) (plurality) (no forcible compulsion when incident was induced by adult guardian’s threats to 14-year old victim that she would be returned to a juvenile detention center if she did not comply with his sexual advances); *Commonwealth v. Meadows*, 553 A.2d 1006 (Pa. Super. 1989) (forcible compulsion found where the victim was 15-years old, deaf, had difficulty communicating, the incident occurred in a secluded spot, and the victim had a crush on the 24-year old defendant); *Commonwealth v. Titus*, 556 A.2d 425 (Pa. Super. 1989) (parent-child relationship is not enough to establish forcible compulsion when victim is 13-year old daughter and she only pushed him away after the sexual encounter); *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994) (no forcible compulsion when incident occurred between two co-eds, the defendant locked the door, pushed the victim onto the bed, engaged in sex without the victim resisting and only applying the force of his body weight, and the victim said “no” throughout); *Commonwealth v. Smolko*, 666 A.2d 672, 674 (Pa. Super. 1995) (forcible compulsion found when victim was severely physically disabled yet mentally competent, the defendant was his caretaker for six hours a day, the victim and the victim’s parents trusted the defendant, and the victim was so physically deficient he could not resist, choose to avoid the encounter, or communicate his will); *Commonwealth v. Jones*, 672 A.2d 1353 (Pa. Super. 1996) (forcible compulsion found when the victim was pregnant, the defendant had hit her in the face with a pillow, pinned down the victim’s shoulders and threatened that his girlfriend would beat her up).

While this Court clearly finds these cases useful, their guidance is limited because the facts of the instant case are unique. First, this is not a case of moral, psychological, or intellectual forcible compulsion that has often been found in circumstances involving a young, vulnerable victim and a perpetrator who is in a position of authority and trust. *See Rhodes*, 510 A.2d 1217, 1227 (Pa. 1986) (some form of forcible compulsion is innate in “the situation in which an adult who is with a child who is younger, smaller, less psychologically and emotionally mature, and less sophisticated than the adult, instructs the child to submit to the performance of sexual acts. This is especially so where the child knows and trusts the adult.”); *Commonwealth v. Dorman*, 547 A.2d 757, 762 (Pa. Super. 1988) (the defendant “was the [thirteen-year old] victim’s uncle, [he] occupied a position of authority and trust such that the victim would feel coerced to submit to his demands out of a sense of duty or obedience.”); *Commonwealth v. Frank*, 577 A.2d 609, 619 (Pa. Super. 1990) (defendant was the 17- year old victim’s therapist and “occupied a position of authority such that it may be reasonably inferred that the victim would feel coerced to submit to appellant’s demands.”).

Here, we have two competent adults who formed a dating relationship. Prior to the incident in question, they had engaged in some consensual intimacy (i.e. kissing, hugging). Moreover, the incident occurred during a planned date. Considering the totality of the circumstances pursuant to the *Rhodes* factors, there is nothing about the respective ages of the victim and the Defendant, or the mental conditions of the victim and the Defendant that would support a finding of forcible compulsion. *See Rhodes*, 510 A.2d at 1226. Also, there is no evidence that shows the Defendant was in a position of authority or custodial control over the victim, or that she was under duress. *Id.*

It is undisputed that the victim initiated kissing and touching with the Defendant on the couch in his living room, willingly walked herself to his bedroom upon the Defendant's request, and did not protest when he removed her pants and underwear.

However, other *Rhodes* factors such as the respective physical condition of the victim, the extent to which the Defendant may have been in a position of domination over the victim, and the atmosphere and physical setting in which the incident took place are relevant to a finding of forcible compulsion. See *Rhodes*, 510 A.2d at 1226. *Commonwealth v. Berkowitz* and *Commonwealth v. Smolko* can be compared to provide this Court with more direction.

Berkowitz is a Supreme Court case involving two co-eds. *Berkowitz*, 641 A.2d at 1163. After unsuccessfully attempting to engage the victim in oral sex, the defendant locked the door of his dormitory, pushed the victim onto his bed, and removed her pants from one leg. *Id.* He then had sex with her, ejaculated on her stomach, and said “[w]ow, I guess we just got carried away.” *Id.* She responded, “[n]o, we didn’t get carried away, you got carried away.” *Id.* The court revisited the victim’s testimony and concluded that although the victim tried to leave the room and said “no” throughout the encounter, the defendant did not restrain her during the intercourse, and “the weight of his body on top of her was the only force applied.” *Id.* at 1164. Also, the defendant never verbally threatened the victim. *Id.* The court further determined that although the door was locked, the victim never tried to unlock it even though she knew she could have done so from the inside. *Id.* The court found the evidence insufficient to support a finding of forcible compulsion, arriving at its decision because “[i]n regard to the critical issue of forcible compulsion, the complainant’s testimony is devoid of any statement which clearly or adequately describes the use of force or the threat of force against her.” *Id.* The fact that the victim said “no” throughout the encounter is relevant to the question of consent, not force. *Id.*

Commonwealth v. Smolko alternatively involved a victim who was severely physically disabled yet mentally competent. *Smolko*, 666 A.2d at 677. The victim suffered from Pelizaeus-Merzbacher Syndrome which “causes [him] to have the inability to speak, control his motor movements, restricts him to a wheel chair, and has left him with very little strength.” *Id.* at 674 (citation omitted). The defendant, who took care of the victim throughout the day and assisted him with all of his daily needs, performed oral sex on him. *Id.* The court ultimately found the evidence sufficient to support a finding of forcible compulsion. *Id.* at 677. Although the court arrived at its holding based partially upon the custodial, authoritative, and trusting relationship the defendant had with the victim, the court also examined, pursuant to *Rhodes*, how the victim’s severe physical limitations factored into the determination. The court found the victim to be “so physically deficient as to be unable to exert his will to resist the sexual demands of another.” *Id.* Importantly, the court distinguished the victim from *Berkowitz* where, “the victim, a college student, was physically able to resist, to call out for help, or to attempt to flee.” *Id.* The *Smolko* victim, alternatively, lacked “the physical strength to resist, or the ability effectively to communicate his will.” *Id.*

Returning to the instant case, this Court is not implying that the victim was as physically disabled as the victim in *Smolko*, that she completely lacked the physical strength to resist, or was unable to effectively communicate her will. However, returning to the *Rhodes* factors and viewing all the evidence in the light most favorable to the Commonwealth, her cerebral palsy was a physical condition that caused her to have stiff legs with limited movement and walk with crutches. See *Rhodes*, 510 A.2d at 1226. During the encounter, she was in a physical setting where she was lying on her back, away from her crutches and her cell phone, away from any objects she could use to help lift herself up, and ultimately was unable to get up. See *Id.* Also, the Defendant was initially lying on top of her, and then forced her legs apart and cuffed her ankles on his shoulders. He also told the victim to be quiet when she repeatedly said “ow” during the penetration. These facts imply that he was in a position of domination over the victim during the encounter. *Id.*

Furthermore, the victim in this case can be distinguished from the able-bodied victim *Berkowitz*. Here, the victim was limited in her ability to “physically . . . resist” with her legs, and definitely could not “attempt to flee.” *Smolko*, 666 A.2d at 677. Admittedly, she did not call out for help or try to push the Defendant away with her arms, but resistance is not necessary to prove forcible compulsion. *Berkowitz*, 641 A.2d at 1165. Therefore, we cannot and should not begin to hypothesize why the victim did not resist more than she did. We do know that she was scared, and thought the Defendant was too big to push off her body. She was in an apartment she had never been in before and due to her cerebral palsy, was unable to use her legs to kick off the Defendant or try to run away.

The instant case is further distinguishable from *Berkowitz* where “[i]n regard to the critical issue of forcible compulsion, the complainant’s testimony [was] devoid of any statement which clearly or adequately describes the use of force or the threat of force against her.” *Berkowitz*, 641 A.2d at 1164. Here, despite the Defendant’s contention otherwise, the record does contain evidence of physical force.

This Court first notes that the victim's statement of "no, don't" is irrelevant to the finding of force because such a statement is only relevant to lack of consent. *Id.* As stated above, forcible compulsion is "something more than lack of consent." *Id.* at 1165. Here, that "something more" was the Defendant forcing the victim's legs apart, bending her knees, moving her ankles up to his shoulders and cuffing her ankles while he penetrated her. The victim was unable to open her legs or bend her knees by herself. The Defendant repositioned her legs when he penetrated her with his finger, and then again placed her legs back on his shoulders when he penetrated her with his penis a second time. Again, the victim was unable to move her legs to resist or prevent the Defendant's actions.

Although the force used was not extreme, it was certainly unique to the factual circumstances of this case and sufficient to establish forcible compulsion by the Defendant on this particular victim. In examining the totality of the circumstances and viewing all the evidence in the light most favorable to the Commonwealth, the force used was sufficient to establish the necessary element of forcible compulsion beyond a reasonable doubt and uphold the Defendant's rape conviction.

CONCLUSION

This Court concludes that the evidence of forcible compulsion presented at trial, viewed in a light most favorable to the Commonwealth as the verdict winner, was sufficient to support the Defendant's conviction of rape. The Defendant's Motion for Post-Trial Relief is denied.

ORDER OF COURT

AND NOW this 5th day of November, 2013, upon review of the Defendant's Motion for Post-Trial Relief, the Commonwealth's Answer, arguments at the hearing, and the Court having conducted a thorough review of the relevant law;

IT IS HEREBY ORDERED THAT the Defendant's Motion is **DENIED**.

Pursuant to the requirements of Pa. R. Crim. P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.