

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

<b>ELLEN M. DAVIS</b>	)	
	)	CRIMINAL ACTION NUMBER
Defendant Below	)	
Appellant	)	01-11-3103
v.	)	
	)	SUPERIOR COURT ID NUMBER
<b>STATE OF DELAWARE</b>	)	
	)	0110011512
Plaintiff Below	)	
Appellee	)	

*Submitted: November 1, 2002*

*Decided: January 3, 2003*

***MEMORANDUM OPINION***

*Upon Appeal from Jury Conviction of the  
Court of Common Pleas - **AFFIRMED***

HERLIHY, Judge

Ellen Davis has appealed a Court of Common Pleas jury conviction for offensive touching. She was fined \$125.00.

Her attorney has filed a “Rule 26(c)” brief in this Court. Counsel’s reference to Rule 26(c) in basic terms requires an attorney representing a defendant who is convicted at trial to appeal if the client directs. But the attorney is permitted to withdraw if he or she sees no merit to the appeal. The client is to be notified of this and is given an opportunity to raise issues the client contends should be considered on appeal.

Counsel is confused since it is Supreme Court Rule 26(c), which only governs appeals to that court. This Court has no such rule or any equivalent. Appeals of criminal matters are governed by Superior Court Criminal Rule 39. If the “Rule 26(c)” procedure were to appear anywhere in this Court’s rules that would be the place. Even without such a procedure, however, counsel sent the brief to Davis who has filed no response. The Court has considered alternative ways to handle the current appeal. One, of course, is to require counsel to brief any appropriate issue. That would be an obvious exercise in futility, in light of counsel’s affirmative statement in the “Rule 26(c)” brief that there are no arguable issues. Another alternative is to issue a rule to show cause to Davis. That too would be futile. Counsel sent her “Rule 26(c)” brief on May 30, 2002. Neither counsel nor this Court have received a response from Davis in nearly half a year.

There is another, perhaps more compelling reason why any alternative other than an affirmance is unnecessary. A review of the evidence presented to the jury below demonstrates why.

### *Facts*

On October 16, 2001, apartment manager Danielle Darring (“Darring”) was in the apartment of Ellen M. Davis (“Davis”) for the purpose of a regular, scheduled inspection of the premises. Davis lives in a Section 8 unit which is subject to semi-annual inspections by the State Housing Authority. Darring’s inspection is a separate inspection leading up to the State inspection. According to Darring, after inspecting the kitchen, she went into a hallway in the apartment on the way to the bedroom. When she paused to inspect a smoke detector, Davis charged her and slammed her into a wall. Davis then poked Darring with her finger. Darring called for help and left the apartment. Thereafter, Davis was charged with intentionally touching Darring, either with a member of her body or with any instrument, knowing that she was thereby causing offense and alarm.

Davis denied that the intentional touching ever happened. Instead, she testified that the supposed inspection was pretextual and that the actual purpose of the visit was retaliatory harassment. At the time of the incident, Davis had already commenced a civil action in which Darring was a defendant. That suit sought compensation for injuries suffered by Davis when she slipped and fell on the property. In addition, Davis had filed complaint with the Delaware Housing Authority. Furthermore, Davis emphasized the fact that she was not properly dressed at the time of the inspection and that, despite her several requests of Darring to leave, Darring continued the inspection. Hoping to prevent Darring from entering her bedroom, Davis told Darring that another person was sleeping in the room and blocked the room’s entrance with her body. According to the State, it was at this point that the attack

occurred. Davis, on the other hand, maintained that no physical contact took place. In fact, there was no one in the bedroom. Also, there was a dispute about what David did or did not have on. The jury found Davis guilty of offensively touching Darring and she was sentenced to pay costs and a fine of \$125.00.

### ***Discussion***

There were no legal issues raised during the proceedings in the Court of Common Pleas. The Court has read the trial transcript and can find no legal issues which should have been raised below or issues which should be raised on appeal. This Court's independent review of the transcript and record show that the only issue raised below was factual: Did the incident take place as Darring said or should the jury have believed Davis' denial? That denial was accompanied by testimony from Davis about reasons why Darring would have personal reasons to fabricate the criminal charge.

If the jury believed Darring's testimony there was sufficient factual basis to sustain a conviction for offensive touching. If the jury accepted Davis' denial and/or her testimony about Darring's motives to lie, it would have to find her not guilty. The issue, therefore, was one of credibility for the jury to determine. It is the sole judge of credibility.<sup>1</sup>

The jury, hearing and seeing the only two witnesses to the incident chose to believe Darring and reject Davis' testimony. This Court's independent review of the record below shows that this issue of credibility was all that was involved. Davis has not chosen to raise any other issues in six months. There is no merit to the appeal.

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<sup>1</sup> *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

*Conclusion*

For the reasons stated herein, the judgment of the Court of Common Pleas is affirmed.

**IT IS SO ORDERED.**

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J.