

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
DOMINIQUE KOSSALLY	:	
	:	
Appellant	:	No. 3099 EDA 2025

Appeal from the Judgment of Sentence Entered October 30, 2025
In the Court of Common Pleas of Montgomery County Criminal Division
at No(s): CP-46-CR-0005431-2024

BEFORE: LAZARUS, P.J., BECK, J., and NEUMAN, J.

MEMORANDUM BY BECK, J.:

FILED OCTOBER 27, 2026

Dominique Kossally (“Kossally”) appeals from the judgment of sentence imposed by the Montgomery County Court of Common Pleas (“trial court”) following his convictions of aggravated indecent assault and indecent assault.¹ On appeal, Kossally challenges the sufficiency of the evidence to support his aggravated indecent assault conviction and the trial court’s instruction to the jury defining “penetration, however slight” in response to the jury’s question during deliberations. After review, we affirm.

On September 14, 2023, the victim, K.M., attended a massage therapy appointment at Spavia, a massage business located in King of Prussia, Montgomery County. K.M. was thirty-seven years old at the time and had

¹ 18 Pa.C.S. §§ 3125(a)(1), 3126(a)(1).

previously booked and attended similar massage therapy sessions three to four times at Spavia without incident.

Upon arriving at her scheduled appointment, K.M. met her masseur, Kossally. Kossally led K.M. to the massage room and instructed her to remove her robe, lie on the massage table, cover herself with a towel, and alert him when she was ready for him to begin the session. K.M. complied. Kossally then returned and began the session.

As the massage progressed, K.M. believed the session was taking longer than usual. Kossally then began to touch K.M.'s vagina. K.M. reported that his fingers went between her labia for several minutes, she heard him lick his fingers, and he then continued touching her vagina. The session ended shortly thereafter, with Kossally asking K.M. if she was interested in any other services and whether she would like any water or tea. K.M. requested water and once Kossally left the room, she put on her robe, dressed in the locker room, paid her bill, and left Spavia.

Thereafter, K.M. called her gym partner to disclose what happened to her, who advised K.M. to report the incident. K.M. then reached out to the owner of Spavia through social media. She told the co-owner, Sonja Byrd ("Byrd"), that Kossally inappropriately touched her during her massage with his hands and fingers and that she felt entirely uncomfortable following the incident. The next day, K.M. and Byrd had a conversation over the phone; K.M. recounted the incident in greater detail and Byrd took contemporaneous

notes of the report. Byrd and Spavia's manager, Stuart Sturrock ("Sturrock"), verified that Kossally was an employee of Spavia, he worked there on September 14, 2023, and he had a scheduled appointment with K.M. that day. After K.M.'s report to Byrd, Spavia fired Kossally.

On June 11, 2024, police arrested Kossally. The Commonwealth charged Kossally with the aforementioned crimes. The case proceeded to trial, after which the jury found Kossally guilty of both charges. On October 30, 2025, the trial court sentenced Kossally to eleven-and-one-half to twenty-three months of incarceration, followed by five years of reporting probation. Kossally was further required to register as a lifetime Tier III offender pursuant to Pennsylvania's Sexual Offender Registration and Notification Act.²

Kossally filed a post-sentence motion, which the trial court denied. Kossally then timely filed the instant appeal and a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

Kossally raises two questions for our review:

1. Was there was insufficient evidence that [Kossally] committed the offense of aggravated indecent assault beyond a reasonable doubt[?]
2. Whether the trial court erred and committed an abuse of discretion by giving the jury a second subsequent conflicting and/or confusing definition of "penetration however slight[?]"

Kossally's Brief at 7.

² 42 Pa.C.S. §§ 9799.10–9799.42.

Kossally's first issue challenges the sufficiency of the evidence to support his conviction of aggravated indecent assault. We review this claim according to the following standard:

Because a determination of evidentiary sufficiency presents a question of law, our standard of review is de novo and our scope of review is plenary. In reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as the verdict winner, were sufficient to prove every element of the offense beyond a reasonable doubt. The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. It is within the province of the [factfinder] to determine the weight to be accorded to each witness'[] testimony and to believe all, part, or none of the evidence. The Commonwealth may sustain its burden of proving every element of the crime by means of wholly circumstantial evidence. Moreover, as an appellate court, we may not re-weigh the evidence and substitute our judgment for that of the [factfinder].

Commonwealth v. Rosario, 307 A.3d 759, 764-65 (Pa. Super. 2023) (citation and brackets omitted).

Pennsylvania law defines aggravated indecent assault, in relevant part, as follows:

Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse), and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genital or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if:

- (1) the person does so without the complainant's consent[.]

18 Pa.C.S. § 3125(a)(1). Digital penetration of the vagina is sufficient evidence for a conviction under this provision. **Commonwealth v. Kelley**, 801 A.2d 551, 557 (Pa. 2002). Additionally, this Court has held that “penetration, however slight’ is not limited to penetration of the vagina; entrance in the labia is sufficient.” **Commonwealth v. Hunzer**, 868 A.2d 498, 505-06 (Pa. Super. 2005) (citation omitted).

Kossally contends that K.M.’s testimony did not definitively describe penetration, whether to her vagina or labia, and was rather “generalized assertions of contact without specific anatomical detail establishing penetration.” **Id.** at 13. He further asserts the Commonwealth failed to satisfy its burden of proving that the contact alleged was not incidental and/or in good faith for medical or hygienic purposes. **Id.** at 13, 16. Kossally contends that in the absence of this evidence, the jury was left to base its verdict on nothing but speculation and that “[n]o evidence of an element cannot be proof beyond a reasonable doubt.” **Id.** at 15-16.

The trial court found the Commonwealth satisfied its burden of proof for the charge of aggravated indecent assault. Trial Court Opinion, 1/6/2026, at 8, 10. It reasoned that K.M. testified credibly, establishing that Kossally rubbed his fingers between the “lips” of her vagina for approximately five minutes, licked his fingers, and then returned to rub her vagina a second time, all without her consent. **Id.** The trial court acknowledged that “the Commonwealth may not have elicited testimony from its witnesses that the

contact by [Kossally] was not done for a good faith medical or hygienic procedure,” but found “the circumstances surrounding this incident could not possibly lend itself to such an interpretation.” **Id.** at 8-9.

The record reflects that K.M. testified she had been to several massages at Spavia and elsewhere before the incident in question. N.T., 5/12/2025, at 34-35. She did not know Kossally prior to this incident, only meeting him in the waiting area before he took her back for her massage. **Id.** at 35, 37. K.M. recalled that the massage was “way over the time that we were supposed to finish,” and as Kossally began to massage her legs, he slid his hands further up until he began to touch her vagina. **Id.** at 39. According to K.M., the touching of her vagina lasted approximately five minutes, during which she felt Kossally slide his fingers between her vaginal “lips.” **Id.** at 39-41; **see also id.** at 71-72 (K.M. testifying that Kossally “went further down, like not in the hole, but like in between my lips. So, yes, I consider that penetration.”). She testified to hearing a slurping sound that she understood to be Kossally licking his fingers before he resumed touching her vagina. **Id.** at 40-41; **see also id.** at 55-56, 60, 69 (K.M. stating that she had massages in the past where oil was used but never had a massage therapist lick their fingers in the midst of the experience to clean them). K.M. identified the second incident as shorter than the first. **Id.** at 41-42. Although she initially stated she had “blacked out” during the incident, K.M. later clarified that her mind had gone blank but she was still fully conscious throughout the ordeal. **Id.** at 41, 61-

62, 69-70. K.M. further indicated that the intimate contact from Kossally was unwanted, unsolicited, and unpermitted. **Id.** at 41. Byrd testified that Spavia has a zero-tolerance policy if its massage therapists inappropriately touch customers in their private areas during their massages. **Id.** at 102.

Kossally did not testify at trial. He did, however, present seven character witnesses, each of whom testified to his reputation for being law-abiding and for peacefulness. **Id.** at 118-19, 121-22, 125; **see also** N.T., 5/13/2025, at 5, 7, 9.

Viewing the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the Commonwealth as the verdict winner, we conclude that there was sufficient evidence to support Kossally's aggravated indecent assault conviction. K.M.'s description of Kossally inserting his fingers between the lips of her vagina (labia) established the element of "penetration, however slight." **See** N.T., 5/12/2025, at 40, 42, 60, 71-72; **Hunzer**, 868 A.2d at 505-06; **see also Commonwealth v. Diaz**, 152 A.3d 1040, 1047 (Pa. Super. 2016) (stating "the uncorroborated testimony of a sexual assault victim, if believed by the trier of fact, is sufficient to convict a defendant").

The evidence of record also supports a finding that Kossally touching K.M.'s vagina and inserting his fingers between her labia was not incidental or for good faith medical or hygienic purposes as part of the massage. **See Rosario**, 307 A.3d at 765. K.M. testified that the contact occurred twice and lasted more than five minutes in total, which establishes the contact was not

accidental or incidental. Byrd's testimony that Spavia has a zero-tolerance policy for any sexual touching of its clients, shows that the massages provided by its therapists do not include the touching of genitals as a legitimate medical practice.

Thus, the evidence presented was sufficient to establish that Kossally penetrated K.M.'s vagina without her consent and it was not done for good faith medical or hygienic purposes. **See Gilliam**, 249 A.3d at 269 (concluding evidence was sufficient to support aggravated indecent assault conviction where the victim testified that a massage therapist penetrated her vagina by pushing her underwear inside).

Kossally next contends that the trial court abused its discretion "by giving the jury a second, subsequent conflicting and/or confusing definition of 'penetration, however slight'" in response to the jury's question during deliberations. Kossally's Brief at 17 (capitalization omitted). While acknowledging the trial court accurately stated the law in the supplemental instruction, he argues that the two instructions given to the jury—one at the start of the trial as to the general charge of aggravated indecent assault and one approximately six hours into deliberations on the definition of "penetration, however slight"—confused the jury. **Id.** at 18. According to Kossally, the evidence did not support a finding of penetration, as K.M. testified only to "mere rubbing" of the vagina or labia and thus, the additional jury instruction clarifying "penetration, however slight" was improper. **Id.** at

18-19. He asserts that “[v]erdicts cannot stand where jurors are left to deliberate under conflicting or confusing legal standards on an essential element of the offense.... The trial court’s second instruction deprived [Kossally] of a fair determination under the correct standard.” ***Id.***

We review this claim, mindful of the following:

In reviewing a jury charge, we are to determine whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case. In so doing, we must view the charge as a whole, recognizing that the trial court is free to use its own form of expression in creating the charge. Our key inquiry is whether the instruction on a particular issue adequately, accurately and clearly presents the law to the jury, and is sufficient to guide the jury in its deliberations.

Commonwealth v. Scott, 73 A.3d 599, 602 (Pa. Super. 2013) (cleaned up).

Under the Pennsylvania Rules of Criminal Procedure, “[a]fter the jury has retired to consider its verdict, additional or correctional instructions may be given by the trial judge in the presence of all parties[.]” Pa.R.Crim.P. 647(D). “Instructions will be upheld if they adequately and accurately reflect the law and are sufficient to guide the jury properly in its deliberations.”

Commonwealth v. Vucich, 194 A.3d 1103, 1111 (Pa. Super. 2018) (citation omitted). The scope of supplemental instructions given in response to a jury’s request rests within the sound discretion of the trial judge. ***Commonwealth v. Davalos***, 779 A.2d 1190, 1195 (Pa. Super. 2001).

The record reflects that the trial court initially provided the following instruction to the jury regarding aggravated indecent assault:

Ladies and gentlemen, the defendant has been charged with aggravated indecent assault. To find the defendant guilty of this offense, you must find that the following four elements have been proven to you beyond a reasonable doubt: First, that the defendant penetrated, however slightly, the genitals of another person with the defendant's finger. The other person in this case is alleged to be [K.M.]; second, that the defendant did not do so for a good faith medical, hygienic or law enforcement purpose; third, that [K.M.] did not consent to the penetration; and, fourth, that the defendant acted knowingly or at least recklessly with regard to the person's nonconsent.

A defendant acts recklessly with regard to an alleged victim's nonconsent if he consciously disregards a substantial and unjustifiable risk that the victim is not consenting to penetration. The risk disregarded must be the sort of risk that it is grossly unreasonable for the defendant to disregard.

What do I mean by requiring a fourth element that the defendant acted knowingly or at least recklessly? Again, the defendant acts recklessly with regard to a defendant's [sic] nonconsent if he consciously disregards a substantial and unjustifiable risk that the victim is not consenting to the penetration. That's the first offense. That's the four elements that must be proven.

N.T., 5/13/2025, at 53-54. Although the court did not initially define "penetration, however slight" based upon its omission from the standard jury instructions, it informed counsel that it would reconsider if a question arose. ***Id.*** at 63.

Approximately six hours into their deliberation, the jury returned with two questions, inquiring as to the legal definitions of genitals and "penetration, however slight." ***Id.*** at 62. Of relevance here, the trial court provided a definition of the latter:

I am prepared to instruct the jury on the second issue consistent with [***Hunzer***]. ... We have reviewed the case and this portion of

the case that dealt with this issue is still good law So the instruction that will be given to the jury is as follows: The Pennsylvania Superior Court has held that the phrase, "penetration, however slight" is not limited to penetration of the vagina. Entrance in the labia is sufficient. While this is a response that is acceptable to the Commonwealth, defense wishes to place an objection to this instruction on the record.

Id. at 63-64. Counsel for Kossally objected to the supplemental instruction, asserting that only the standard charge may be read to answer the jury's question and no changes may be made several hours into deliberations. **Id.** at 64-65.

In its Rule 1925(a) opinion, the trial court stands by its decision that the supplemental instruction was appropriate in light of case law from this Court. Trial Court Opinion, 1/6/2026, at 9-10. It reasons that this instruction was proper despite Kossally's objection, noting K.M.'s testimony established that Kossally had engaged in penetration during the assault. **Id.** at 10.

We agree. Where, as here, a jury expresses confusion during deliberations, the court is empowered to give additional instructions on the law that the court determines is necessary or useful. **Davalos**, 779 A.2d at 1195. It is uncontested that the supplemental jury instruction was a correct statement of the law, **see** Kossally's Brief at 18, and it squarely answered the jury's question by providing the legal definition of "penetration, however slight." **See Hunzer**, 868 A.2d at 505-06.

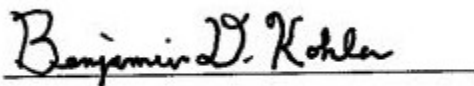
Kossally's contention that the definition was unsupported by K.M.'s testimony is belied by the record. As our discussion of the sufficiency of the

evidence makes clear, K.M. expressly testified that he inserted his fingers between her labia. **See** N.T., 5/12/2025, at 40, 42, 60, 71-72.

We find no abuse of discretion in the trial court's decision to provide an accurate statement of the law as a supplemental instruction to the jury in direct response to its question during deliberations. **See *Commonwealth v. Washington***, 418 A.2d 548, 552 (Pa. Super. 1980) (holding that there was no abuse of discretion when a jury returned from deliberations on its own accord with two questions specifically to negate confusion regarding the facts, whereupon it was re-charged and had the law briefly reviewed for them). No relief is due.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 10/27/2026