

**IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH

v.

**BRETT ROBERT GRAY,
Defendant**

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No.: 04-11,485

OPINION AND ORDER

Before the Court is the Defendant's Omnibus Pretrial Motion filed October 27, 2004 and heard by the Court on December 20, 2004. The Motion to Suppress Evidence was withdrawn at the hearing. The remaining motions are: Motion to Compel Discovery; Petition for Writ of Habeas Corpus; Request for a New Preliminary Hearing; Request for a Site Visit, and; Motion to compel a Bill of Particulars.

(1) Motion to Compel Discovery. The first issue raised in Defendant's motion is a Motion to Compel Discovery, in which twenty-five separate pieces of information are requested. The Commonwealth does not argue that Defendant is not entitled to particular information, rather that they have complied with discovery requests and that the Defendant has any information that has been requested which the Commonwealth has been able to provide. At the

hearing, the Commonwealth agreed to review the information they have and to make certain all requested information be provided to Defendant.

(2) Petition for Writ of Habeas Corpus. Defendant asserts that the Commonwealth failed to set forth a prima facie case on count two of the Information, to wit, Aggravated Indecent Assault. Aggravated Indecent Assault is set forth in 18 Pa.C.S.A. § 3125:

“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 genitals 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; (2) the person does so by forcible compulsion; (3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (4) the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring . . . “

Defendant’s argument begins with the assertion that the crime of Aggravated Indecent Assault does not prohibit nonconsensual sexual intercourse or deviate sexual intercourse. The Court agrees. Reading the statute in conjunction with definitions in § 3101 and the sex crimes cited in the section at issue, the crime of Aggravated Indecent Assault can only be committed through penetration with a body part other than genitalia or tongue. Penetration with genitalia or tongue would in any case meet the requirements not only of § 3125 but also the elements of either Rape, Statutory Sexual Assault, Involuntary Deviant Sexual Intercourse, or Sexual Assault. At least one other Common Pleas Court has interpreted § 3125 similarly; “[p]rovisions defining aggravated indecent assault must be read in conjunction with definitions in section 3101, where ‘deviate sexual intercourse’ is defined to include penetration by a foreign object, and sexual intercourse includes the oral variety. Thus, penetration under section 3125 must be

construed to mean penetration with a body part, such as a finger and not with a tongue.”

Commonwealth v. Hurd, 39 Pa.D. & C.4th 493 (1998), *aff'd*, 557 Pa. 437; 734 A.2d 390 (1999).

The distinction must exist between the crimes requiring sexual intercourse and aggravated indecent assault, which must in turn involve penetration by some other body part.

Defendant’s argument, based on the above assertion, is that the Commonwealth has offered insufficient evidence of Aggravated Indecent Assault to establish a prima facie case at the preliminary hearing. The alleged victim testified only to Defendant engaging her in non-consensual sexual intercourse. Defendant contends that the only evidence of Aggravated Indecent Assault was the testimony of Trooper Simpler. Trooper Simpler presented Defendant’s own admission of digital penetration. Defendant argues that the Commonwealth failed to establish a *corpus delicti*, or essence of the offense, independent of an extrajudicial admission or confession by the accused. Omnibus Pretrial Motion, p. 9.

An extrajudicial admission or confession of one accused of a crime cannot be received in evidence unless and until the corpus delicti of the crime has first been established by independent proof. Failure to comply with this prerequisite will exclude the admission or confession.

Commonwealth v. Rhoads, 225 Pa.Super. 208; 310 A.2d 406 (1973). “The grounds on which the rule rests are the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed” *Commonwealth v. Turza*, 340 Pa. 128, 133-134; 16 A.2d 401, 404 (1940).

“There are two elements to a corpus delicti: the occurrence of an injury or loss; and somebody's criminality as the source of the injury or loss. *Id.* at 134. The corpus delicti may be proved by circumstantial evidence, but that evidence must be "sufficient to convince the jury beyond a reasonable doubt that the crime charged was committed by someone." *Rhoads*, at 213.

However, whether the Commonwealth in the current case was able to establish a corpus delicti as per the Aggravated Indecent Assault charge independent of Defendant's admission need not be determined. An exception to the corpus delicti rule known as the "closely related crime exception" applies in this case. The exception applies when,

an accused is charged with more than one crime, and the accused makes a statement related to all the crimes charged, but the prosecution is only able to establish the corpus delicti of one of the crimes charged. Under those circumstances where the relationship between the crimes is sufficiently close so that the introduction of the statement will not violate the purpose underlying the corpus delicti rule, the statement of the accused will be admissible as to all the crimes charged.

Commonwealth v. Bardo, 551 Pa. 140, 147; 709 A.2d 871, 874 (1998). The underlying purpose of the rule, to prevent the admission of a confession where no crime has been committed, has not been violated. The Commonwealth has demonstrated a prima facie case that the crime of Rape has been committed. The crime of Aggravated Indecent Assault is closely related to the crime of Rape.

(3) Request for a New Preliminary Hearing. Defendant argues that the District Justice denied his right to cross-examine witnesses at the Preliminary Hearing. Defendant relies primarily on *Commonwealth ex rel. Buchanan v. Verbonitz*, 525 Pa. 413; 581 A.2d 172 (1990) for the proposition that a criminal defendant has the right to cross-examine witnesses against him at a preliminary hearing. However, "[w]hile the *Buchanan* plurality suggests a right to confront and cross-examine at a preliminary hearing, citing United States and Pennsylvania constitutions in support thereof, the precise holding in *Buchanan* is that hearsay testimony alone is insufficient to establish a prima facie case at a preliminary hearing." *Commonwealth v. Fox*, 422 Pa.Super. 224, 233-4; 619 A.2d 327, 332 (1993). The Defendant in *Fox* attempted a practically identical

argument to the one presently at issue. The *Fox* Court went on to explain, “[t]he fact that several of Fox’s questions during cross were objected to and such objections were sustained did not deny Fox his right of cross examination at the preliminary hearing stage.” *Id.* at 234. The preliminary hearing serves a limited function; “to avoid the incarceration or trial of a defendant unless there is sufficient evidence to establish a crime was committed and the probability the defendant could be connected with the crime.” *Id.*, (quoting *Commonwealth v. Wodjak*, 502 Pa. 359; 466 A.2d 991 (1983)). “Since the Commonwealth merely bears the burden of establishing a prima facie case against the defendant, credibility is not an issue at a preliminary hearing.” *Id.* Since the sustained objections presently at issue dealt with the credibility of the witness, Defendant was not denied his opportunity to cross-examine. *See* Tr. 8/26/04 pp. 35-38.

(4) Petition for a Site Visit. Defendant requests the Court grant him permission to conduct a site visit of the alleged crime scene. Pursuant to Rule of Criminal Procedure 573, the parties are to make a good faith effort to resolve all questions of discovery informally. Until there is a dispute, failure or refusal to disclose, the Court will refrain from decision on formal requests to compel discovery.

(5) Motion to Compel a Bill of Particulars. Defendant filed a request for a Bill of Particulars on September 28th, 2004 in accordance with Rule 572 of Criminal Procedure. The Commonwealth responded to this request primarily by asserting that Defendant was already provided the information sought by the Bill of Particulars through Discovery.

“The purpose of bill of particulars is to give notice to the accused of the offenses charged in the bill of indictment so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the bar of the statute of limitations . . . It is not designed to perform the function of a discovery device and the Commonwealth's evidence is not a proper subject to

which a petition for a bill may be directed.” *Commonwealth v. Mervin*, 230 Pa.Super. 552; 326 A.2d 602 (1974); See also *Commonwealth v. Sabo*, 83 Pa.Super. 166 (1924) (motion for a bill of particulars “will only be granted to prevent surprise or injustice, never to specify the evidence to be adduced by the Commonwealth.”)

Based on the above, the Court will grant Defendant’s motion only as per those requests in the Bill of Particulars that are poised to give Defendant clarification of the offenses charged, to wit: the time and date of the alleged crimes, the location of the alleged crimes and the conduct specifically and personally committed by Defendant which led to the charges. Defendant’s Request for Bill of Particulars nos. 1,2, and 4. The Commonwealth must respond to these requests only insofar as the response serves to clarify the offenses charged to the Defendant.

ORDER

AND NOW, this ____ day of January, 2005, after hearing on the Defendant’s Omnibus Pretrial Motion, and for the reasons set forth above, it is ORDERED and DIRECTED that

1. With respect to Defendant’s Motion to Compel Discovery, the Commonwealth will review information and confirm to the Court in writing by January 18, 2004 that Defendant’s requests for information have been satisfied.
2. The Defendant’s Petition for Writ of Habeas Corpus is DENIED
3. The Defendant’s Request for a New Preliminary Hearing is DENIED.
4. The Defendant’s Petition for a Site Visit is not presently ripe for this Court’s determination.

5. The Defendant's Motion to Compel a Bill of Particulars is GRANTED with respect to Defendant's requests nos. 1, 2, and 4 in the Request for Bill of Particulars filed September 28, 2004 by Defendant. The Commonwealth shall confirm to the Court in writing by January 18, 2004 that the responses have been supplied to Defendant. With respect to Defendant's remaining requests the Motion is DENIED.

By the Court,

Nancy L. Butts, Judge

xc: DA
E. Linhardt, Esq.
Judges
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esq.