

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

COMMONWEALTH OF PA,	:	
Plaintiff	:	
	:	
v.	:	No. 1129-2005
	:	
NOAH SMITH,	:	
Defendant	:	

**OPINION**  
**Issued Pursuant to Pa. R.A.P. 1925(a)**

The defendant has appealed his judgment of sentence, entered on August 31, 2006. After a jury trial held on April 4, 2006 and April 5, 2006, the defendant was convicted of Statutory Sexual Assault and Corruption of the Morals of a Minor.

The defendant's first three issues in his Statement of Matters Complained of on Appeal relate to the victim's testimony regarding incidents of sexual intercourse with the defendant other than the single incident charged. The general rule is that evidence of similar sexual crimes committed on or with persons other than the victim of the crime then being prosecuted is inadmissible to show a propensity for illicit conduct. Commonwealth v. Bradley, 364 A.2d 944 (Pa. Super. 1976). However, it is proper for the Commonwealth to introduce evidence of prior illicit relations *between the parties*, even when such evidence discloses other uncharged offenses. *See* Commonwealth v. Stansbury, 640 A.2d 1368 (Pa. Super. 1994); Commonwealth v. Rodriguez, 495 A.2d 569 (Pa. Super. 1985) and Commonwealth v. Niemetz, 422 A.2d 1369 (Pa. Super. 1980).

Our courts have long recognized the significance of evidence providing jurors with the *res gestae*, or complete history of the crime. In Commonwealth v. Paddy, 800 A.2d 294, 308 (Pa. 2002), the Pennsylvania Supreme Court stated that trial courts are not required to "sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand and form part of the

history and natural development of the events and offenses for which the defendant is charged.”

In trials involving sexual assault, *res gestae* evidence is of particular importance and significance to the fact-finder because of the dearth of independent witnesses and lack of physical evidence. Commonwealth v. Dillon, 863 A.2d 597 (Pa. Super. 2004). For this reason, it was proper for the Commonwealth to introduce evidence of prior illicit relations between the victim and the defendant, even though such evidence disclosed other uncharged offenses.

And finally, these incidents of sex between the victim and defendant are admissible under Pa.R.E. 404(3)(b)(2), evidence of other crimes, wrongs, or acts. The purpose of the evidence was not to disparage the defendant’s character, but to establish the defendant’s intentions to have sex with the victim on June 11, 2005, and also to show his common scheme or plan to do so.

It is true the Assistant District Attorney failed to provide the defense with evidence of any other incidents of sexual intercourse than the one charged, which occurred on or around June 11, 2005. In a sidebar, the Assistant District Attorney stated that he had only recently learned about other two incidents, as the victim had never disclosed them previously.

R.Crim.P. 573(E) addresses the remedy for discovery violations:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

A court has broad discretion in choosing an appropriate remedy for a discovery violation. Had defense counsel requested a continuance to prepare a response to these other allegations of sexual intercourse, the court could have done so. When defense counsel raised the issue of these two prior incidents of sex, however, he merely

requested the court to limit the jury issue to whether sexual intercourse occurred on June 11, 2005. N.T. p. 66-67. The court agreed to give the jury such an instruction, and requested defense counsel to submit a proposed point for charge. N.T. April 4, 2006, p. 56.; N.T. April 5, 2006, pp. 43, 44. Defense counsel never did so, nor did he object to the charge after it was given without such a point. Thus this issue was waived.

Moreover, a defendant seeking relief from a discovery violation must demonstrate prejudice in order to be entitled to a new trial. Commonwealth v. Williams, 863 A.2d 505, (Pa. 2004). There is no evidence the victim's testimony regarding these two additional incidents of sex prejudiced the defendant. Defense counsel vigorously cross-examined the victim about these incidents and in fact impeached her by showing that at the preliminary hearing she only testified of one instance of sex, which allegedly took place on June 11, 2005. N.T. pp. 48-51. The victim admitted at trial that she had not mentioned any other instances of sex during her testimony at the preliminary hearing.

The defendant was not charged with multiple counts of sexual assault. He was charged with only one count. The victim testified that although she had sex more than once with the defendant, the only date she remembered for certain when the sex occurred was June 11, 2005. It was this testimony the jury found to be credible.

The defendant next objects to the court's decision to permit the Commonwealth to present during its case-in-chief prior consistent statements of the victim regarding sex with the defendant. Specifically, the court permitted Jennifer Arno, Katherine Barclay, and Kimberly McPherson to testify the victim told them she had sex with the defendant shortly after the sex occurred.

The court permitted this evidence to be introduced under Pa.R.E. 613(c)(1), which allows the introduction of prior consistent statements to rebut an express or implied charge of "fabrication, bias, improper influence or motive, or faulty memory." At a sidebar, defense counsel stated he would be introducing evidence the victim told

another person that she had fabricated the sexual intercourse allegation. N.T. April 4, 2006, p. 9. The defense did in fact introduce such evidence. N.T. April 4, 2006 p. 216.

Normally, evidence of a prior consistent statement is rebuttal evidence, to be introduced after a witness has testified and been accused as stated in Rule 613(c)(1). However, in cases involving sexual assault, the Commonwealth is permitted to present in its case-in-chief evidence of a prompt complaint by the victim because the victim's testimony is automatically vulnerable to attack by the defendant as a recent fabrication in the absence of evidence of a hue and cry on her part. Commonwealth v. Bryson, 860 A.2d 1101 (Pa. Super. 2004); Commonwealth v. Dillon, 863 A.2d 597 (Pa. Super. 2004). The court duly gave a charge instructing the jury to consider these prior statements only for the purpose of assessing the credibility of the victim, and not for the truth of whether or not the victim and the defendant had sex. N.T. April 5, 2006, pp. 76-77.

The defendant next complains that the court permitted Kimberly McPherson to testify the victim told her about an incident regarding a sexual encounter at the defendant's house which did not occur on June 11, 2005. This appears to be a combination of the two issues already discussed above, which have both been already addressed in this opinion.

The defendant's next two issues concern the court's decision to permit the Commonwealth to re-open its case to permit the victim to testify that she and the defendant were not married. The court granted the Commonwealth's motion after a demurrer from the defense on this point. N.T. April 4, 2006, p. 154. A decision to permit a party to re-open its case is within the sound discretion of the trial court. Commonwealth v. Griffin, 412 A.2d 897 (Pa. Super. 1979). In Commonwealth v. Burton, 63 A.2d 508 (Pa. Super. 1949) the trial court permitted the Commonwealth to re-open its case after the defense had interposed a demurrer. The Superior Court stated, "Rules of procedure are intended to aid, not hamper, the ascertainment of the truth.

Every court has the power to open a case prior to its final submission to the jury in order to prevent either a failure or a miscarriage of justice.” Id. at 510. *See also* Commonwealth v. Derembeis, 182 A. 85 (1935).

Whether the victim and defendant were married was not an issue in dispute. It would have been a miscarriage of justice to grant the demurrer simply because no witness explicitly stated this fact.

Moreover, the Commonwealth’s argument presented at the time has merit, namely that the victim testified regarding all the contacts she had with the defendant, and none of them included marriage. In addition, the victim was in high school and lived with her parents, and the defendant lived with his mother. Therefore, the jury could certainly have concluded from the evidence presented by the Commonwealth that the victim and the defendant were not married. In any event, there was absolutely no prejudice caused to the defendant by permitting the Commonwealth to re-open its case on this technical issue.

The defendant next complains that the court erred in permitting the Commonwealth to introduce evidence of the juvenile record of defense witness Ryan Bates for impeachment purposes. This evidence was in the form of a consent decree on the charge of Theft by Unlawful Taking. Commonwealth’s Exhibit #2. The admission of juvenile adjudications for impeachment purposes is governed by Pa.R.E. 609(d), which states,

In a criminal case only, evidence of the adjudication of delinquency for an offense under the Juvenile Act, 42 Pa.C.S. §§ 6301 et seq., may be used to impeach credibility of a witness if conviction of the offense would be admissible to attack the credibility of an adult.

As this was a consent decree rather than an adjudication of delinquency, perhaps the defendant is correct that this should not have been admitted. However, the court would note that the consent decree specifically states that the court finds the charge of Theft by Unlawful Taking is established beyond a reasonable doubt.

In any event, if the admission of the consent decree was an error, it was a harmless error. As in most sexual assault trials, this case boiled down to whether the jury believed the victim. The jury did believe the victim, and there was overwhelming evidence upon which to find her credible. Ryan Bates was not a crucial witness. His primary purpose was to bolster the testimony of the defendant, whom the jury did not find credible. Moreover, Mr. Bates blatantly contradicted himself. After adamantly insisting the defendant and victim never had sexual relations, he testified on cross-examination, “It was before the 11<sup>th</sup> because I guess they also had sex on the 11<sup>th</sup> too but I’m not sure.” N.T. April 4, 2006, p. 218. After this slip, he went on to again deny knowing of any sexual relations between the victim and the defendant. These contradictions were far more harmful to Mr. Bates’ credibility than the introduction of the consent decree.

For these reasons, the court concludes beyond a reasonable doubt that the impact of the admission of the consent decree was so insignificant, and the prejudicial impact was so slight, that the alleged error could not have contributed to the jury’s verdict.

The defendant next alleges three incidents of ineffective assistance of trial counsel. The three elements of a valid claim of ineffective assistance are: whether the underlying claim is of arguable merit; if so, whether counsel had any reasonable basis for the questionable action or omission which was designed to effectuate his client’s interest; and if not, whether the defendant has shown that counsel’s improper course of conduct worked to his prejudice, that is, had an adverse effect upon the outcome of the proceeding. Commonwealth v. Coleman, 664 A.2d 1381 (Pa. Super. 1995).

The first allegation of ineffectiveness relates to trial counsel’s failure to object to Jennifer Arno’s testimony that she and the victim watched part of a pornographic movie with the defendant on two occasions. The defendant alleges this testimony should not have been permitted, as neither of the incidents occurred on June 11, 2005, the alleged date for the corruption of minors charge.

The viewing of pornography was not the basis of the Corruption of Minors charge, and when trial counsel requested this be made clear to the jury, this court granted the request, N.T. April 5, 2006, pp. 44-46. The court therefore charged the jury that the Corruptions Charge was based solely upon the allegation of sexual assault. April 5, 2006 N.T. pp. 80-81.

The evidence of the pornographic films was admissible under Pa.R.E. 404(3)(b)(2), evidence of other crimes, wrongs, or acts. The purpose of the evidence was to show the defendant's sexual intentions toward the victim, as well as his preparation and plan to have sex with her. It was not admitted as character evidence of the defendant. As discussed earlier, the entire history of the relationship between the victim and the defendant is highly relevant in a sexual assault case, and it was particularly important in this case. For these reasons, the court finds the underlying claim as to ineffectiveness of counsel has no merit.

The second allegation of ineffectiveness involves trial counsel's failure to object to testimony of any sexual encounter other than that of June 11, 2005. The defendant points out that the criminal complaint only alleged that date, the testimony of the victim at the preliminary hearing alleged only that date, and the defendant presented notice of an alibi defense and intended to present alibi witnesses for June 11, 2005 but did not because of the additional allegations. The issue of the other sexual encounters has already been addressed in this opinion. Regarding the alibi notice, defense counsel's statements were somewhat unclear as to why he did not present the witnesses he had intended to present whom would have stated the defendant had not even been in his residence on June 11, 2006. April 5, 2006 N.T., pp. 41-42. However, the court notes that the defendant's mother, Deborah Snyder, testified the defendant was at home on June 11, 2005. N.T. April 4, 2006, p. 187. Likewise, defense witness Ryan Bates testified the defendant was at home on Jun 11, 2005, and that the victim was there as well. N. T. April 4, 2006, p. 226. Therefore, it is likely defense counsel abandoned his

alibi testimony because it would have contradicted other defense witnesses. For these reasons, the court finds that the underlying claim to this ineffectiveness allegation is without merit.

The final basis for ineffectiveness of counsel is for failure to object to the relevancy of the testimony regarding contact between the defendant and victim at the community pool. As part of the history of the relationship between the defendant and the victim, this is relevant. Moreover, the fact that the defendant intended to intimidate the victim after the charges were filed is also relevant. Additionally, the defendant had a full opportunity to cross-examine the witnesses who testified about this encounter, as well as to give his version, which he did. Therefore, the court finds no merit in this underlying claim of ineffectiveness.

And finally, the court does not believe that any of the ineffectiveness issues had an effect on the verdict. As stated earlier, this case turned upon whether the jury believed the testimony of the victim or the defendant. The jury believed the victim, and given the strong testimony of the victim, the jury had a firm basis for reaching its verdict.

Date: \_\_\_\_\_ BY THE COURT,

\_\_\_\_\_  
Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk  
Hon. Richard A. Gray  
District Attorney  
Kyle Rude, Esq.  
Gary Weber, Esq.