

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 308 – 2012
	:	
vs.	:	CRIMINAL DIVISION
	:	
DENNIS R. STEELE,	:	
Defendant	:	Motion for In-Camera Hearing

OPINION AND ORDER

Before the Court is Defendant's Motion for In-Camera Hearing, filed October 14, 2013. Argument on the motion was heard October 16, 2013.

Defendant has been charged with Involuntary Deviate Sexual Intercourse, Sexual Assault, Aggravated Indecent Assault and Indecent Assault and is scheduled to go to trial on those charges on October 17, 2013. The charges are based on allegations that Defendant sexually assaulted his granddaughter at approximately 7:30 a.m. on February 14, 2012. In the instant motion, Defendant seeks a ruling that he may introduce evidence that the granddaughter had sexual intercourse with her ex-boyfriend at 3:00 a.m. on that date and that she had sexual intercourse with her current boyfriend at 7:30 p.m. on that date. Defendant argues that the proffered evidence is relevant to attack the credibility of the granddaughter (specifically arguing that the encounter was consensual). The Commonwealth argues that the proffered evidence is precluded by the Rape Shield Law.

The Rape Shield Law provides in pertinent part as follows:

§ 3104. Evidence of victim's sexual conduct.

(a) General rule. --Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S. Section 3104. In spite of this statute, in order to accommodate a defendant's right to confrontation, our appellate courts have allowed evidence of specific instances of sexual conduct with persons other than a defendant, but only where it is relevant to show bias against the defendant or a motive to fabricate the allegations.¹ See Commonwealth v. Fink, 791 A.2d 1235 (Pa. Super. 2002); Commonwealth v. Black, 487 A.2d 396 (Pa. Super. 1985); Commonwealth v. Holder, 815 A.2d 1115 (Pa. Super. 2003), citing Commonwealth v. Boyles, 595 A.2d 1180 (Pa. Super. 1991). It has also been made clear that evidence of sexual conduct with persons other than the defendant is irrelevant to prove consent. Black, *supra*.

In the instant case, none of the proffered evidence would show bias against the defendant or a motive to fabricate the allegations. And, as far as Defendant's argument that the evidence is relevant to the issue of consent, that is, that the fact that she had sexual relations only twelve hours after the alleged attack shows that the granddaughter was not upset and therefore must be lying about not having consented, evidence of the 3:00 a.m. conduct has absolutely no bearing on that issue, and under Black, is inadmissible. While evidence of the 7:30 p.m. conduct may have slightly more probative value, occurring after the alleged attack,²

¹ Although the court in Black appeared to state that evidence which simply attacked the victim's credibility could not be excluded under the Rape Shield Law, the court in Holder clarified that attacks on credibility by the use of such evidence are limited to those cases where the victim's credibility was allegedly affected by bias against or hostility toward the defendant

² None of the cases forming this Commonwealth's law on the matter addresses the situation found herein, where the proffered evidence is of sexual conduct which occurs shortly after the alleged rape. The issue was addressed by the Court of Common Pleas of Delaware County, in a 1925(a) Opinion, in Commonwealth v. Dickerson, 2 Pa. D&C4th 297 (Delaware County 1989), and the court concluded that the evidence's minimal probative value was far outweighed by its prejudicial effect. The court expressed its reasoning so well that it bears repeating here: "Defendant suggests that the fact that the victim made love to her boyfriend on the morning following the attack is inconsistent with her testimony that she was raped. In essence, defendant is asserting that anyone who has suffered the trauma of rape in the evening would be incapable of engaging in voluntary consensual sexual intercourse the following morning. Although at first blush this assertion might appear to have some validity, upon closer scrutiny, it must be rejected. Our legislature has determined that in two specific areas, evidence of a victim's immediate reaction to the trauma of rape may be sufficiently predictable so as to make it admissible. The Crimes Code, in section 3106, provides that although a victim is not required to make a prompt complaint, defendant may introduce evidence of failure to make a prompt complaint under appropriate circumstances. The code also provides, in section 3107, that although the victim of rape need not resist her attacker, defendant may introduce evidence of failure to resist on the issue of consent. These provisions are a legislative recognition of the fact that failure to make a prompt complaint and failure to resist may be inconsistent with the accusation of sexual assault and may, therefore, be logically relevant evidence for impeachment purposes. We are satisfied, however, that beyond these areas, one's continuing reaction to the trauma of sexual assault is not readily capable of prediction. Such reaction is a very personal thing which will vary from victim to victim. It is dependent upon the sensibilities and sensitivities of the individual involved, her lifestyle, how she views matters of morals, sex and sexual intercourse, and a multitude of other factors not easily capable of identification or evaluation. We could reasonably expect the

the court nevertheless finds that it is too speculative. To allow such evidence would invite considerable testimony about all the circumstances surrounding the granddaughter's relationship with her boyfriend and why the sexual encounter occurred, shifting the focus of the trial and derailing the prosecution, the very thing the Rape Shield Law seeks to prevent. It therefore must also be precluded as its probative value is outweighed by its prejudicial effect.

ORDER

AND NOW, this 16th day of October 2013, for the foregoing reasons, the Defendant's request to admit evidence of the alleged victim's prior sexual conduct, contained in the Motion for In-Camera Hearing, is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
Peter Campana, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

reaction of a prostitute or one who regularly engages in a smorgasbord of sexual activity on a recreational basis to be quite different from one who would find such activity morally offensive and shocking. In order to attempt to ascribe evidentiary value to a victim's reaction, you should know the victim. Obviously, such an inquiry at trial is inappropriate and is exactly what the Rape Shield Law was designed to prevent." Id. at 308 (footnotes omitted).