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 to Dismiss

OPINION AND ORDER

Before the Court is Defendant's Motion to Dismiss Charges, filed November 26, 2013. Argument on the motion was heard December 23, 2013.

Defendant has been charged with Involuntary Deviate Sexual Intercourse, Sexual Assault, Aggravated Indecent Assault and Indecent Assault. A trial on these charges was commenced October 17, 2013, but ended after a mistrial was declared, at the Commonwealth's request and over the Defendant's objection. In the instant motion, Defendant seeks to dismiss the charges on the grounds that retrial would violate his right not to be subjected to double jeopardy.

Rule of Criminal Procedure 605 governs motions for mistrial, and reads as follows:

> Rule 605. Mistrial
> (A) Motions to withdraw a juror are abolished.
> (B) When an event prejudicial to the defendant occurs during trial only the Defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity.

Pa.R.Crim.P. 605. Defendant argues that no manifest necessity existed such as would justify this court's decision to grant the mistrial.

The court finds helpful reference to the Pennsylvania Supreme Court's opinion in Commonwealth v. Stewart, 317 A.2d 616 (Pa. 1974). Therein, the Court also faced the issue of whether a mistrial had been appropriately granted, and observed as follows:

> The Supreme Court of the United States has frequently addressed the problem of mistrials and the double jeopardy clause, most recently in Illinois v. Somerville, 410 U. S. 458 (1973), and has consistently abjured mechanical or

> per se rules, preferring to rely upon the approach first announced in United States v. Perez, 22 U. S. (9 Wheat.) 579 (1824).
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> Under the Perez analysis a trial court has the authority to abort a trial, and the double jeopardy clause will not prevent retrial, if the trial court takes "all the circumstances into consideration" and in its "sound discretion" finds that "there is a manifest necessity for the act, or the ends of public justice would be otherwise defeated." 22 U. S. (9 Wheat.) at 580. See also Illinois v. Somerville, 410 U. S. at 462; United States v. Jorn, 400 U. S. 470, 480-81 (1971); Gori v. United States, 367 U. S. 364, 367-69 (1961); Wade v. Hunter, 336 U. S. at 691. In Gori v. United States, supra, the Supreme Court emphasized the breadth of a trial court's discretion to declare a mistrial:
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> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." 367 U. S. at 368 (emphasis added). This Court has previously followed the guidelines set forth above by the Supreme Court. E.g., Commonwealth v. Wideman, 453 Pa. 119, 306 A.2d 894 (1973). Hence, the pivotal question presented in this case is whether the trial court properly exercised its discretion in finding that either manifest necessity *or* the ends of public justice required the declaration of a mistrial.
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> In accordance with the scope of our review, we must take into consideration all the circumstances when passing upon the propriety of a declaration of mistrial by the trial court. The determination by a trial court to declare a mistrial after jeopardy has attached is not one to be lightly undertaken, since the defendant has a substantial interest in having his fate determined by the jury first impaneled. United States v. Jorn, 400 U. S. 470 (1971). The Court in Jorn, however, "did not hold that that right may never be forced to yield, as in this case, to 'the public's interest in fair trials designed to end in just judgments.'" Illinois v. Somerville, 410 U. S. at 470.

Id. at 617-18 (emphasis in original). In the instant case, the court believed the "ends of public justice" required the ruling which was made, as explained below.

The charges in this case are based on allegations that Defendant sexually assaulted his granddaughter at approximately 7:30 a.m. on February 14, 2012. As explained to the jury in defense counsel's opening statement, Defendant contended the sexual activity was undertaken with the granddaughter's consent. In a pre-trial motion, Defendant had sought a ruling that he

might 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's motion was denied, by Order dated October 16, 2013, on the basis that such evidence would violate the mandate of the Rape Shield Law.[1]

At trial, in cross-examining the granddaughter, after establishing that she had been at her grandfather's home (where she lived at the time) on the evening of the 13th/morning of the 14th, defense counsel asked her if anyone had come over to visit and, in response to her affirmative response, asked her, "Who was that?" After establishing that it was her ex-boyfriend, that he had arrived at 3:00 a.m., and that he stayed for only an hour, defense counsel asked "What was he doing for that hour?" Although the Assistant District Attorney immediately objected, the witness nevertheless answered "We were having sex." The court immediately interrupted the trial and an in-chambers argument was held, during which the Commonwealth moved for a mistrial.

Despite defense counsel's protestations to the contrary, it was clear at the time, and remains clear to this court, that the question posed by defense counsel was intentionally designed to elicit the testimony which had, by pre-trial order, been prohibited. Whether intentional or not, however, in making that pre-trial ruling, the court relied on the Rape Shield Law, which was designed in an effort to ensure that rape trials would focus on only relevant evidence, the legislature having determined that, except in certain circumstances not applicable here, the victim's sexual history was *not* relevant. See Commonwealth v. Smith, 599 A.2d 1340 (Pa. Super. 1999).[2] When defense counsel elicited evidence which violated the Rape Shield Law, the court believed any verdict would not be based solely on relevant evidence. Further, the court believed a curative instruction would not have been effective in light of the

[1] 18 Pa.C.S. Section 3104.

[2] "At common law, and to some extent even today, a rape victim often suffered secondary abuse at the hands of the judicial system through aggressive defense counsel who 'essentially put the victim on trial.' In response to these abuses, the federal government and the states enacted rape shield laws which 'were intended to end the abuses . . . by limiting the harassing and embarrassing inquires [sic] of defense counsel into *irrelevant* prior sexual conduct of sexual assault complainants.' Commonwealth v. Nieves, 399 Pa.Super. 277, 286, 582 A.2d 341, 346 (1990) (citations omitted)." Commonwealth v. Smith, 599 A.2d 1340, 1342 (Pa. Super. 1999)(emphasis added).

inflammatory nature of the evidence.[3] To ensure that justice would be done, the court felt it necessary to declare the mistrial. As the Court in Smith explained, a fair trial is an interest of not only the defendant, "but also of the public, which has a compelling interest in justice for *all*," which this court believes clearly includes the victim. Id. at 619 (citations omitted, emphasis added).

As the mistrial was granted for reasons of manifest necessity, double jeopardy does not prevent retrial of this matter.

ORDER

AND NOW, this 10th day of January 2014, for the foregoing reasons, Defendant's Motion to Dismiss is hereby DENIED.

Pursuant to Pa.R.Crim.P. 587(B)(4), the court finds the motion is not frivolous, as there is no controlling case law which would make the claim frivolous.

Pursuant to Pa.R.Crim.P. 587(B)(6), the Defendant is advised that this Order is immediately appealable as a collateral order.

BY THE COURT,

Dudley N. Anderson, Judge

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

[3] Defendant contends the court did not consider a curative instruction, but that is incorrect. It was considered. See N.T. November 12, 2013, at p. 44-45, where, in addressing and dismissing the jury, the court explained to them that "the seed has been planted …it is a logical conclusion and you folks were going to jump to it and that may in some way start to influence your decision".