

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 1226 – 2014

vs.

: CRIMINAL DIVISION

DAVID BEAN,

Defendant

: Motion in Limine

**OPINION AND ORDER**

Before the Court is the Commonwealth's Motion to Preclude Defense, filed May 10, 2016. Argument on the motion was heard May 20, 2016.

Defendant has been charged with rape of an unconscious person, involuntary deviate sexual intercourse with an unconscious person, sexual assault, aggravated indecent assault, indecent assault and various other related charges as a result of certain incidents of sexual behavior; the Commonwealth contends the acts were criminal in nature (as defined by statute) and the Defendant contends they were consensual, that the alleged victims were not unconscious but instead in a voluntarily heroin-induced state of altered consciousness. The Commonwealth filed the instant motion in limine seeking to preclude Defendant from introducing evidence of consent, arguing that consent is not an element of the crime of rape of an unconscious person, and that intoxication to the point of unconsciousness rendered the alleged victims incapable of providing effective consent. The Commonwealth also seeks to preclude Defendant from introducing evidence of the alleged victims' prostitution activities. Each of these issues will be addressed in turn.

Because consent is an element of *some* of the crimes with which Defendant is charged, the court will not preclude Defendant from introducing evidence of consent. Furthermore, Section 311 of the Crimes Code permits evidence of consent “if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.” 18 Pa.C.S. Section 311(a). With respect to the crimes of rape of an unconscious person and involuntary deviate sexual intercourse with an unconscious person, “the absence of consent is assumed from the state of the victim”. Commonwealth v. Buffington, 828 A.2d 1024, 1032 (Pa. 2003). Thus, evidence which rebuts that assumption would be relevant. And, although consent is ineffective if given by a person who by reason of “intoxication is manifestly unable ... to make a reasonable judgment as to the nature or harmfulness of the conduct”, 18 Pa.C.S. Section 311(c)(2), Defendant contends he will offer evidence that the victims provided consent prior to becoming drug-affected, which consent acknowledged that they would later be in an altered state of consciousness. Whether this consent is effective will be for the jury to decide.

With respect to the proposed evidence of the victims’ prostitution activities, Defendant agrees that under the Rape Shield Law, 18 Pa.C.S. Section 3104, he cannot introduce evidence of their prostitution activities with other people, including mere references to the victims as “prostitutes”. Defendant instead contends the evidence he seeks to offer is (1) that of the prior relationship he had with the victims, which allegedly involved prostitution (Defendant claims sex was exchanged for drugs or money), to prove consent, and (2) that the police know that these women are engaging in prostitution but are not pressing charges in exchange for their cooperation in prosecuting Defendant, to attack their

credibility. This type of evidence may be permissible, as the Law allows “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.” Id., subsection (a).

To determine whether Defendant’s proposed evidence is admissible, the Rape Shield Law requires the court to hold an in camera hearing, Id., subsection (b), and to determine (1) whether the proposed evidence is relevant to show bias or motive or to attack credibility, (2) whether the probative value of the evidence outweighs its prejudicial effect, and (3) whether there are alternative means of proving bias or motive or to challenge credibility. Commonwealth v. K.S.F., 102 A.3d 480 (Pa. Super. 2014). Therefore, the court will schedule a further hearing in this matter.

**ORDER**

AND NOW, this            day of May 2016, for the foregoing reasons, the Commonwealth’s motion to preclude defense is granted in part and denied in part, as more particularly described above, and a further hearing is scheduled for **June 3, 2016 at 3:30 p.m.** in Courtroom number 2.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA  
Michael Morrone, Esq.  
Gary Weber, Esq.  
Hon. Dudley Anderson