

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

THE STATE OF OHIO,

:

Plaintiff,

:

vs.

:

Case No. 16 CR I 07 0349

WESLEY P. HADSELL,

:

Defendant.

:

**MEMORANDUM CONTRA DEFENDANT'S MOTION IN LIMINE
TO ADMIT 2907.02(D) EVIDENCE**

2018 JAN 17 PM 12:32

CLERK OF COURTS
DELAWARE COUNTY, OHIO
COMMON PLEAS COURT
FILED

Now comes the State of Ohio, by and through Assistant Delaware County Prosecutor Douglas Dumolt, respectfully requesting this Court deny defendant's motion and *limine* in part. The defendant's motion requests he be permitted to admit three types of evidence relating to the victim's sexual activity. 1) The defendant intends to introduce evidence of his sexual activity with the victim prior to August 21, 2005. 2) The defendant intends to introduce evidence of his subsequent sexual activity with the victim occurring between August 21, 2005 and September 10, 2005. 3) The defendant intends to introduce evidence of alleged extra marital sexual activity of the victim occurring in the days leading up to her rape on August 21, 2005.

It would not be proper to offer evidence, or argue, that because the victim had previously consented to prior sexual conduct with the defendant, she must have consented on this occasion. Such "propensity" evidence and argument is inadmissible in Ohio. However, assuming the defendant can establish the relevance of his prior sexual activity with the victim, occurring before August 21,

2005, the State will not object to the admission of this evidence unless it becomes unnecessarily cumulative, results undue delay, or risks misleading and confusing the jury. However, the State would object to admission of the other potential evidence identified by the defendant for the reasons set forth below.

The rape shield law in Ohio, R.C. 2907.02(D), essentially prohibits the introduction of any extrinsic evidence pertaining to the victim's sexual activity.¹ The exceptions to this prohibition are evidence of the origin of semen, pregnancy, or disease, or of the victim's past sexual activity with the offender. However, even when defendant satisfies the threshold issue of offering potential evidence falling within a recognized exception to R.C. 2907.02(D), the evidence is *only admissible to the extent the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.* R.C. 2907(D) (emphasis added)

With respect to evidence of consensual sexual activity occurring between the defendant and the victim occurring after August 21, 2005, the State is unaware of any such conduct. According to the victim, the only sexual conduct occurring between she and the defendant after August 21, 2005 was nonconsensual. If questioned regarding her sexual conduct with the defendant after August 21, 2005 the State believes the victim would describe multiple instances of rape and sexual battery.

Under certain circumstances, evidence of additional uncharged rapes perpetrated by the defendant would be admissible under Evid. R. 404(B). The State is skeptical that the defendant wishes to admit evidence for any of the

¹ *State v. Williams*, 21 Ohio St.3d 33, 34 (1986).

permissible purposes under that rule (i.e. demonstrating he was the one who committed this rape). Instead, the defendant seems determined to question the victim regarding these collateral matters in hope that he can impeach her. The State foresees several problems with this approach.

First, the defendant would be eliciting substantial quantiles testimony regarding his own uncharged misconduct. Under the circumstances, the State cannot see how such evidence is material to fact at issue in this case unless he is offering it to demonstrate he committed the charged offense. If he wishes to argue that because the victim consented to sexual intercourse on a later date, she must have consented on the date of the rape, such offensive propensity arguments are not permitted in Ohio. If instead he merely wants to elicit testimony on the defendants post-rape "consensual" sexual encounters with the victim, to impeach her credibility, he would be bound by her answers pursuant to Evid. R. 613(C).

Assuming, as the State anticipates, the victim will deny any post-rape consensual sexual activity with the defendant the State cannot see how testimony regarding other rapes (or denial of post-rape consensual sex) would be material to a fact at issue. Accordingly, it should be precluded under R.C. 2907.02(D).

However, even if it were material, the alleged conduct would have occurred within the context of her alleged kidnapping. Such evidence would be highly inflammatory and most assuredly prejudicial to the defendant. It would give rise to a question by the jury as to why the defendant is not charged with all of

the misconduct they heard occurred on and after August 26, 2005. Given that 2907.02(D) requires that the probative value of the proposed evidence outweigh its prejudicial value, the Court should find it inadmissible in this case.

The last type of evidence the defendant has indicated he intends to introduce relates to her alleged extramarital sexual activity. The medical records reflect that the victim engaged in consensual sexual activity, with a male who was not her spouse, in the days leading up to her rape. When a swab from the victim's sexual assault kit was analyzed, the defendant's DNA and the DNA of another male was identified.

The origin of the second male DNA profile present in the sexual assault kit is entirely irrelevant at trial. The defendant has repeatedly admitted he had sexual conduct with the victim on the date in question and his DNA was found on the sexual assault collection kit. The presence of additional male DNA doesn't make any disputed fact more or less likely to be true.² Because the presence or absence of additional DNA speaks nothing as to consent, testimony regarding the second DNA profile should be excluded and inadmissible under Evid. R. 402 and the second prong of R.C. 2907.02(D).

Relatedly, the defendant has also asked to introduce evidence of the victim's prior sexual activity with another man (K.E.) to support an argument that the injuries the victim she sustained were potentially caused by the other male. However, such possibility is mere speculation and would be unsupported by any facts in evidence.

² In his jail calls, the defendant has discussed he intends to introduce evidence of this extra marital sexual conduct in order to paint the victim as adulterous to undermine her credibility.

Shortly after this case was re-indicted, the State contacted K.E and the victim regarding their sexual encounter occurring shortly before August 21, 2005. Both parties denied any physical altercation occurred between them. Both denied any type of activity, sexual or otherwise, that could have caused the injuries documented in the report. Moreover, the victim's mother will testify the victim did not have the injuries in question several on the morning of August 21 2005. This would have been after the last time the victim and K.E had seen one another.

Because the victim, and her male partner, would deny he was the cause of the injury, the jury would be presented with no evidence from which they could conclude the injuries were sustained during sexual activity with K.E. Faced with those denials, the jury would merely be presented with irrelevant evidence regarding her extramarital sexual activity. This is precisely the type of evidence the rape shield statute intends to keep out. Such evidence is highly inflammatory and amounts to nothing more than an impermissible attempt to impeach the credibility of the victim. Evidence of sexual activity inadmissible for attacking the credibility of a witness. See *State v. Gardner*, 59 Ohio St. 2d 14 (1979) (syllabus paragraph 2); *State v. Ferguson*, 21 Ohio St. 3d 33 (1983).

If the defendant seriously intended to offer evidence of the victim's sexual activity with another male, he needed to file his motion sufficiently in advance of trial to allow the Court to comply with the statute. Prior to taking any testimony on these subject matters, the Court is required to hold an in chambers hearing. The hearing must occur at least three days before trial. At that hearing, the Court and the parties would question the victim and K.E. regarding the alleged sexual

activity. However, because the defendant chose to until so close to the time of trial to file his motion and request a hearing that cannot happen.

The defendant has known of the victim's sexual activity with the K.E for years. Moreover, even before the defendant was transported back to Ohio to face these charges he had lengthy conversations with his mother about impeaching the victim by introducing evidence of her extramarital sexual conduct with K.E. The defendant's motion offers no reasons why the Court should entertain this motion filed so close to trial.

The hearing must be held at least three days before trial. This would necessitate a hearing occurring in the next 48 hours. Counsel for the State has numerous meeting with witnesses for this trial scheduled during that time and the Court has its own busy docket. While the victim lives in Central Ohio, securing her appearance on such short notice will undoubtedly create hardship upon her and her employer. Additionally, K.E. no longer lives in Delaware County and the State has not had contact with him for approximately one year. The State is skeptical it could secure the appearance of either on such short notice without undue hardship.

It was incumbent upon him to provide reasonable notice to the Court and State so that a hearing could be held. That did not occur, so any portions of this motion on which the Court feels it should hear testimony should be denied as untimely (in addition to being predicated mere speculation). While the R.C. 2907.02(D) does allow exceptions to the rule requiring hearings to occur in advance of trial, such an exception requires good cause to be shown. The

defendant has shown, and can show, no good cause for the late hour of this motion. However, even if a hearing were held there is no reason to believe it would identify any relevant admissible evidence.

Regarding the defendant's prior consensual sexual conduct with the victim (prior to August 21, 2005), the State would not object to the extent the defendant can first establish its relevance outside the presence of the jury. While the State does not see its relevance, it appears neither disputed nor inflammatory. However, the State would object to questioning and testimony on any allegedly consensual sexual activity between the defendant and victim occurring after August 21, 2005 unless the defendant and Court complies with R.C. 2907.02(D),(E), and (F).

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing memorandum delivered to Brian Jones, attorney for the defendant, on this, the 17th day of January, 2018 via courthouse mail.



Douglas N. Dumolt (0080866)