

BERNARD A. BALICK  
JUDGE

April 29, 2010

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**Re: *State of Delaware v. George Homich***  
**Cr. A. No. 0706012343**

**OPINION AND ORDER**

Dear Counsel,

This is the opinion on Defendant's pretrial motions.

Defendant is charged with unlawful imprisonment second degree, unlawful sexual contact third degree, and resisting arrest. The first trial ended in a mistrial because the jury was unable to agree. The State has elected to proceed with a second trial.

The charges arise from events at St. Anthony's Festival. They happened at an area where portable toilets are provided for patrons. The complaining witness testified that she was leaving one of the toilets when Defendant pushed her back in and tried to lock the door with both inside, which she was able to prevent, and that he touched her breast during the course of the incident. She reported the incident to a nearby police officer, who had just greeted Defendant as someone he knew slightly from military

service. When the officer called to Defendant, he ran and was stopped by other officers within one block.

Defendant testified that he was threatened by other patrons, that he was pushed into the complaining witness, and that he did not touch her breast or try to lock the door of the portable toilet.

The defense motions relate to a subject that came up during an interview of the complaining witness by the investigating officer recorded on a DVD. The interview has not been transcribed, so I rely on counsels' arguments that the complaining witness said she has complained about being stalked, was not satisfied about how the matter was pursued, and has received counseling as a result of that experience.

One of the motions seeks a hearing under the rape shield statute. 11 *Del. C.* §3508. At trial, the prosecution argued the defense failed to comply with the statute and the defense countered that the statute does not apply. I ruled that evidence of the complaining witness's complaint of stalking is not "evidence of the sexual conduct of the complaining witness," as provided in the statute, and the statute therefore does not apply. Nor is consent at issue in this case. 11 *Del. C.* §3509. I remain of that opinion and therefore will deny Defendant's motion for a hearing under the statute.

Defendant also seeks dismissal for violation of the State's discovery obligations under Rule 16 and *Brady*. *Brady v. Maryland*, 373 U.S. 83 (1963). The complaining witness' statement to the police is not covered by Rule 16 or by *Brady*. Production of the complaining witness' statement is governed by *Jencks*. *Jencks v. United States*, 353 U.S. 657 (1957). The statement must be produced for use in cross-examination at the

conclusion of direct examination. *Rose v. State*, 542 A.2d 1196 (Del. 1988). This was done during the first trial and the statement was used by defense counsel during cross-examination. I therefore need not address counsel's disagreement as to whether the complaining witness's statement was made available to the defense before trial. Since there was no discovery violation, Defendant's motion to dismiss will be denied.

Although not described as such, the defendant is really seeking to pursue an issue that was ruled upon at trial. The defense sought to question the complaining witness about her earlier complaint of stalking. I sustained the State's objection to this line of inquiry based on D.R.E. 403, which says as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The defense argues that examination into the details of the stalking complaint might show that the complaining witness is unduly fearful of being sexually assaulted and, although not phrased this way, might suggest that she is unduly inclined to interpret accidental events as being sexually motivated. The complaining witness may be questioned on this issue directly without going into the details of the stalking complaint, as I recall was done to some extent in the first trial.

There is no question in this case that there was physical contact between the defendant and the complaining witness. The issue is whether the Defendant intentionally touched or tried to restrain the complaining witness. A ruling under D.R.E. 403 is best made in the context of the evidence at trial. Since the defense is pursuing the issue, I will add the following to the ruling at the first trial.

Evidence of the complaining witness's earlier, unrelated complaint of stalking is not, strictly speaking, relevant at all, and it seems unlikely that any new evidence at the second trial would make it relevant. The defense wants to explore the details of the complaint of stalking in the hope that something raising doubt about the complaining witness's testimony comes up. Going into the details of an unrelated incident is likely to confuse the issues or mislead the jury. Moreover, although the rape shield statute does not apply, it is based upon a policy that the complaining witness in a case of alleged sexual assault should not be subjected to embarrassing examination unless it would be clearly relevant. For these reasons, I conclude that the defense should not be allowed to question the complaining witness about the details of her unrelated complaint of stalking.

It is ORDERED that the defendant's pending pretrial motions are DENIED.

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Judge