IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAMUEL LAYTON,	§	
	§	No. 74, 2003
Defendant Below,	§	
Appellant,	§	Court Below-Superior Court
	§	of the State of Delaware, in
v.	§	for Sussex County.
	§	C.A. No. IS02-07-0397; IS02-
STATE OF DELAWARE	§	07-0398; IS02-07-0399; IS02-
	§	07-0400; IS02-05-0693; IS02-
Plaintiff Below,	§	05-0694; IS02-05-0703; IS02-
Appellee.	§	05-0713; IS02-05-0723; IS02-
	§	05-0728; IS02-05-0733; IS02-
	§	05-0738.

Submitted: July 15, 2003
Decided: August 4, 2003

Before **BERGER**, **STEELE** and **JACOBS**, Justices.

ORDER

This 4th day of August, 2003, upon consideration of the briefs of the parties, it appears to the Court as follows:

(1) Samuel Layton, the defendant-appellant ("Layton") appeals from his conviction of four counts of first-degree rape in violation of 11 *Del. C.* § 773(a)(5), six counts of second degree unlawful contact in violation of 11 *Del. C.* §772(a)(2)g, and continuous sexual abuse of a child in violation of 11 *Del. C.* §778(a). Layton was sentenced to serve eighty-four (84) years of imprisonment at Level 5, and after serving seventy-two (72) years, the balance to be suspended for probation at Level 3.

(2) Layton advances two arguments on appeal. The first is that the trial court committed reversible error by denying his Motion to Dismiss Counts 1 & 2 of the Indictment (the four counts of first degree rape). His second argument is that the trial court abused its discretion by permitting witness testimony about his possession and use of a purple dildo. For the reasons next discussed, neither argument has merit.

Background Facts

(3) Between December 1999 and June 2001, Virginia Lewis and her two daughters, Crystal and Brandi Lewis, [1] lived with Samuel Layton at Layton's home in Georgetown Delaware. Crystal, who was born in November 1990, experienced genital bleeding in January 2001, when she was 10 years old. At that time, Crystal told her mother that Samuel Layton "had been messing with her." On May 15, 2002, finally believing her daughter, Crystal's mother took Crystal to the Children's Advocacy Center in Milford for an examination and interview. That examination confirmed what Crystal had told her mother.

(4) At the trial, Crystal, then twelve years old, testified as follows: Layton touched her private parts while her family lived at Layton's home in Georgetown. Layton would lick her breasts, anus and vagina and touch them

with his penis and hands; and he would also try to insert his penis in the child's vagina and anus. Layton also touched Crystal's vagina with a pinkish purplish rubber penis, and he would also insert his penis in Crystal's mouth. The testimony of Brandi Lewis, Crystal's younger sister, corroborated Crystal's testimony.

(5) Crystal and Brandi also testified that Layton forced them to perform oral sex on each other while he watched. Brandi testified that she touched her sister's vagina with her mouth because Layton told her to do it, and because she feared that she would be punished if she did not. Crystal confirmed that Layton was present when Brandi, her little sister, licked her vagina and that Layton told Brandi that she had to do it. Layton also told Crystal that she had to lick Brandi's vagina. At the time of the December 2002 trial, Crystal was 12 years old, and her sister, Brandi, was 8 years old.

(6) Virginia Lewis confirmed Crystal's recollection that Layton possessed a dildo that was purplish and had sparkles. Another girl, who was fifteen years old at the time of trial, testified that in her presence Layton had opened a desk drawer in his office and showed her a purple dildo with sparkles. Thirty-eight year old Layton testified in his own defense at trial, denying the accusations. The jury disbelieved Layton's testimony.

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[1] The use of a pseudonym has been provided when necessary to protect the identity of

Vicarious Liability for First-Degree Rape

(7) Samuel Layton was charged and convicted of rape in the first degree of Brandi Lewis, by causing Crystal Lewis to have oral sex with Brandi Lewis in violation of 11 *Del. C.* §773(a)(5), and vice versa. Layton claims that because 11 *Del. C.* §776 encompasses the crime of "sexual extortion," a crime that (he contends) more aptly describes his conduct, he should have been charged with sexual extortion under § 776, and not with first-degree rape under § 773. This argument has no merit. To be sure, Layton could have been charged with sexual extortion in addition to rape in the first degree, but the State was not legally required to charge him with the lesser crime of sexual extortion, in place of the charge of rape.

(8) Under § 776, "a person is guilty of sexual extortion when; he . . . intentionally compels . . . another person to engage in any sexual act . . . with another . . . by instilling in her a fear that, if such sexual act is not performed, the defendant . . . will: (1) cause physical injury to anyone . . ." Although Layton's conduct violated § 776, it also constituted rape in the first degree. Given the ages of the victims and the specific legislative

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minor children pursuant to Supreme Court Rule 7(d).

authorization in 11 *Del. C.* § 271,[2] the State violated no legal precept by charging him under § 773 with rape in the first degree.

(9) *Morrisey v. State*,[3] decided by this Court in 1993, interpreted § 773, Delaware's rape statute, to permit holding an individual defendant criminally culpable for causing an intermediary to commit a criminal act, even if the intermediary has no criminal intent and does not directly engage in the conduct constituting the substantive crime. In *Morrisey*, the defendant held up couples, robbed them, ordered them to disrobe, and forced them to have sex with each other while he watched. He was convicted of rape in the first degree for each sexual act performed by each individual victim acting under his control. The individuals in *Morrisey* were adults. Here, because both parties performing the sexual acts were children, they were manifestly "innocent and irresponsible" persons within the meaning of § 271.

(10) Under *Morrisey*, it is no defense to argue that as between the two individuals who committed the sexual acts, those acts would not have been criminal or would have amounted to a crime of less severity. The law views a defendant who orders others to commit sexual acts as the person who actually performed the sexual acts. Thus, Layton's conduct should be

[2] 11 Del. C. §271 states that, "a person is guilty of an offense committed by another person when: (1) acting with the state of mind that is sufficient for commission of the

evaluated as if he, a 38 year-old man, was having sex with a 6 year old and a 10 year old, and was forcing those minor children to have sex with him.

(11) Finally, there is no indication that the General Assembly intended the sexual extortion statute to supersede the rape statute. Moreover, the Defendant never argued that the jury should have been instructed on sexual extortion as a lesser-included offense. He did not ask for that jury instruction at trial. That omission by itself is fatal to the position that Layton now argues on appeal.

Admission into Evidence of Testimony Regarding the Dildo

(12) Second, the defendant argues that the Superior Court's decision to admit evidence that he possessed a purple dildo was an abuse of discretion.[4]

(13) At trial Crystal Lewis testified that Samuel Layton had molested her with a "pinkish, purplish rubber penis." Virginia Lewis, Crystal's mother, confirmed that Layton possessed a dildo that " . . .was purplish-pink [in] color with glitter in it." Another child, who did not know the Lewis family, testified that while she was in the back office of Layton's Georgetown coffee shop, she looked into an open desk drawer and observed

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offense, the person causes an innocent or irresponsible person to engage in conduct constituting the offense . . ."

[3] 620 A.2d 207 (Del. 1993).

" . . .a purple dildo with sparkles on it." Layton testified, in his own defense, that he had never owned a purple dildo and that the only dildo he owned was a red one that he kept under his bed.

(14) Layton argued at trial, and argues again on appeal that the trial judge erred in allowing that testimony into evidence. The trial judge admitted the testimony under D.R.E. 403, which allows relevant evidence to be excluded if its relevance is outweighed by the danger of unfair prejudice. Layton argues that that ruling was error, because the evidence that he "had a dildo in his desk drawer at his place of employment or the testimony that he possessed a dildo in his bedroom which was used when he and his wife had consensual sex is not relevant to whether the crime of sexual penetration occurred upon Crystal Lewis."[5]

(15) The State responds that even though the actual glittery purple dildo belonging to Layton was never found and thus, could not be introduced as a trial exhibit, the witnesses' testimony about the dildo was properly admitted as evidence of identification. Moreover, the State argues, no prejudice resulted, because the trial court's limiting instructions were

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[4] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994); *Pope v. State*, 632 A.2d 73, 78-79 (Del. 1993).

[5] Defendant-appellant's Opening Brief at page 15.

sufficient to apprise the jury of the purpose of that testimony, and the extent the jury was allowed to consider it.[6]

(16) There was no abuse of discretion in receiving into evidence the testimony regarding Layton's ownership of such a distinctive item. Contrary to Layton's argument, D.R.E. 404(b) is not implicated, because in Delaware ownership of a dildo is not illegal, nor is it a prior bad act. The evidence was clearly relevant, because proving that Layton possessed such a distinctive object tended to identify him as the perpetrator.[7] The trial judge's admission of that testimony into evidence was well within his discretion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[6] *See generally Pope v. State*, 632 A.2d at 78-79.
[7] *Kiser v. State,* 769 A.2d 736, 739 (Del. 2001). Under D.R.E. 401, evidence is relevant if it "[has] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." The trial judge determined that this evidence was not so inflammatory as to have its probative value substantially outweighed by the danger of unfair prejudice to the accused.