

HILLSBOROUGH, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JEFFREY H.

DOCKET NO. 07-S-557

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR DISCOVERY OF MATERIALS PERTAINING TO
ALLEGATIONS OF PRIOR SEXUAL ABUSE**

I. INTRODUCTION

The Defendant is charged with aggravated felonious sexual assault against Adriana P. The indictment alleges that the charge of sexual assault arose from the Defendant's conduct on or between August 26, 2006 and August 27, 2006 in Hollis, New Hampshire. The Defendant has filed a Notice of Consent. The Defendant has also filed a Motion for Discovery in the above captioned matter with respect to the any and all records pertaining to any and all allegations made by complaining witness regarding prior sexual abuse.

II. FACTUAL BACKGROUND

The allegations made by Adriana P., which form the basis for the charges in this case, were first made on September 19, 2006 to Detective Richard R. Mello of the Hollis Police Department who conducted a recorded interview of the complainant that same day.

During the course of said interview, a transcript of which is attached to the Motion, the complainant made an allegation of sexual assault against Defendant, which allegedly took place on or between August 26, 2006 and August 27, 2006, while the parties were in bed together after

an evening of drinking with friends at a mutual friends' home. Adriana P. indicated in the interview that she was intoxicated during the alleged sexual assault. Interview Transcript, 9/19/06, p. 23. Additionally, Adriana P. stated that she suffers from bipolar disorder and depression which requires her to take medication that can make her depressed and irrational when mixed with alcohol. Transcript, pp.3-4. Adriana P. also stated that she went to see her therapist, Sarah Hart, on August 28, 2006, and gave Dr. Hart her recitation of the events of the prior weekend. Transcript, p. 54.

Moreover, during the interview with Detective Mello, Adriana stated that she does not know how to say no because she was raped before when she was five years old. Transcript, p 19. Additionally, in an e-mail sent by the Complainant to the Defendant subsequent to the date of the alleged assault, the complainant indicated that she had been raped four (4) times previously. Facebook.com E-mail to Jeffrey H., 8/29/06, 4:21 PM.

III. LEGAL ANALYSIS

“In accordance with the increasingly expansive view of discovery, the rule in this State is a flexible one allowing the trial court to determine what matters are discoverable.” State v. Superior Court, 106 N.H. 228, 230 (1965). In State v. Booton, 114 N.H. 750, 753-754 (1974), the court stated that “[d]iscovery in criminal cases has been increasingly expanded to afford the accused some means of tapping the investigative resources of the state.” Additionally, in State v. Howard, 121 N.H. 53 (1981), the court held that a criminal defendant has a fundamental right under the State and Federal Constitutions to meet proof against him and to cross-examine witnesses to impeach their testimony.

The Defendant seeks discovery of any and all records pertaining to any and all allegations made by complaining witness regarding prior sexual abuse. RSA 632-A:6, commonly referred to

as the “rape shield statute”, provides that “prior consensual sexual activity between the victim and any person other than the [defendant] shall not be admitted into evidence in any prosecution [under RSA 632-A]. RSA 632-A:6. The protection from undue harassment afforded to the complainant by RSA 632-A:6, however, must yield to the Defendant’s right to confront the evidence against him under certain circumstances. State v. LeClair, 121 N.H. 743, 746 (1981); *see also* State v. Goulet, 129 N.H. 348,351 (1987)(A defendant’s right to due process and to confront witnesses limits the probative sweep of the rape shield statute when the probative value of that evidence outweighs the prejudicial effect of its introduction). Thus, when evidence of prior consensual sexual activity is sought to be introduced by the defendant, State v. Howard allows the Defendant, by motion, to request a hearing so that the trial court may “evaluate the strengths of the competing interests in privacy and effective confrontation. State v. Howard, 121 N.H. at 57-59.

It is important to note, that the discovery requested by the Defendant in the instant matter does not request information as to instances of prior *consensual* sexual activity, but rather, Defendant requests information with respect to prior allegations of sexual abuse. “The rape shield doctrine does not apply, however, when prior *non* -consensual conduct is at issue.” State v. Frost, 141 N.H. 493, 501 (1996). *See also* State v. Cox, 133 N.H. 261, 265 (1990).

“Logically, evidence ruled admissible by a trial court as a consequence of a Howard hearing must be of a *consensual* sexual behavior. State v. Cox, 133 N.H. 261, 264-265(1990) (emphasis in original). Additionally, in State v. Dukette,, 127 N.H. 540, 548 (1986), the court held that the applicability of the rape shield law could not be determined on the facts before the court because the court did “not know whether the supposed earlier ‘rape’ was forceable or was consensual in

fact but not in law.” State v. Dukette, 127 N.H. at 548. However, the Court did opine that “[i]f the earlier incident was forceable, the shield law would not apply.” Id.

Thus, as the Defendant is requesting evidence of prior non-consensual, forced sexual abuse, the rape shield statute would not apply and could, therefore, not prevent discovery of such materials. Instead, evidence of prior non-consensual sexual conduct would be subject to evidentiary standards for admissibility, including New Hampshire Rule of Evidence 403, which would exclude the evidence if the probative value of the evidence would be substantially outweighed by its prejudicial effect. State v. Frost, 141 N.H. 493, 501 (1996). Using this standard for admissibility, the discovery requested by the Defendant is certainly likely to lead to the discovery of admissible evidence.

During the course of the complainant’s statement to the Hollis Police Department, she told the Detective Mello was raped before when she was five years old. Transcript, p. 19. However, in an e-mail sent by the complainant to the Defendant subsequent to the date of the alleged assault, the complainant indicated that she had been raped four (4) times previously. (August 29, 2006, 4:21 PM e-mail). Thus, disclosure of any and all allegations of prior sexual assault is relevant and admissible with respect to the credibility of the complainant, as the conflicting statements indicate that she was either lying to Defendant in her e-mail or lying to the Hollis Police Department. In State v. LeClair, 121 N.H. 743 (1981), the court found that where the complainant had told the investigating officer that she had been a virgin prior to the alleged rape and at a later deposition indicated that she had not been a virgin prior to alleged rape, the Defendant should be allowed an opportunity to cross examine the witness on these statements, as the complainant either lied to the officer who was investigating her complaint of rape or lied under oath during her deposition. State v. LeClair, 121 N.H. at 745. The court went on to find

that such inconsistent statements cast at least some doubt on credibility of the witness, regardless of which statement was true. Id. “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility may violate due process.” Id. *Citing State v. Dedrick*, 135 N.H. 502, 508 (1992).

III. CONCLUSION

_____The requested discovery items concerning Adriana P.’s prior allegations of prior sexual abuse are not included within the protections of the rape shield statute. As a result, Defendant’s requested discovery should be disclosed as the materials are likely to lead to admissible evidence. The materials requested relate directly to the complaining witnesses credibility, which is especially important in the instant matter, as only the complainant and the Defendant have actual knowledge of the events which led to the allegations of assault.

Respectfully submitted,
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