NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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July 27, 2020

James W. Hundley, Esquire
Amy Bradley, Esquire
Briglia Hundley, P.C.
1921 Gallows Rd., Suite 750
Tysons Corner, VA 22182

Kathryn Humphrey, Esquire
Robert Bezilla, Esquire
Office of the Commonwealth's Attorney
4110 Chain Bridge Rd.
Fairfax, VA 22030

Re: Commonwealth v. Raid Ghousheh
MI 2019-1585 and MI 2019-1586

Dear Counsel,

On July 24, 2020 the court heard argument relating to the admissibility of Complainant's statement pursuant to Virginia Code §18.2-67.7. Afterwards, the court took the matter under advisement. The court is now ready to rule.

The defendant is charged with one count of sexual battery and one count of assault and battery. The complainant and the defendant worked together in a retail establishment. The defendant was the General Manager and the complainant worked in sales. The defendant's son met the complainant and they went out on 2 "dates." During the first date, the complainant and the son engaged in mild sexual intimacy in the son's vehicle. On the second date, also in the son's vehicle, they engaged in sexual intimacy and at some point the complainant told the defendant's son that she "…would do anything to help her get ahead at work."

OPINION LETTER

Defendant argues that when sexual contact with his son did not advance her career, she then turned to the defendant to trade sexual favors for career advancement. When this was unsuccessful, she conjured these allegations.

The defendant moves to admit the statement, that she "... would do anything to help her get ahead at work" in the context of sexual activity into evidence at trial. The Commonwealth objects.

It could be argued that the statement which the defendant seeks to admit is less about sexual conduct and more about a statement expressing a willingness to act sexually to further her career. It could further be argued that the statement was made incidental to the conduct of a sexual act, and the issue of sexual intimacy is relevant only for contextual rather than substantive purposes. If that was the case, no rape-shield analysis is necessary. *See Clinebell v. Commonwealth*, 235 Va. 319 (1988).

However, if the statement is intertwined with sexual activity and is sought to be introduced for purposes of showing that the complainant would engage in sexual intimacy to advance her career, that is conduct contemplated by the statute and the analysis therefore must be undertaken in that regard.

The Supreme Court of Virginia first considered these issues in *Winfield v. Commonwealth*, 225 Va. 211 (1983)[1] In that case Winfield was indicted on charges of rape and sodomy. The defendant sought to introduce evidence that the complainant agreed to sexual intercourse with another man in exchange for $20.00. When that man did not pay the money, she threatened to tell his wife, so the $20.00 was paid. This was evidence, the defendant argued, of unchaste conduct. In addition to this evidence, the defendant moved to admit other similar instances of the complainant's prior sexual behavior to show that she was unchaste in her character.

Winfield discusses the history and rationale of the rape-shield law as follows:

> Prior to July 1, 1981, Virginia followed the well-settled rules of the common law that the accused in a rape case, asserting the defense of consent, might introduce evidence of the previously unchaste character of his accuser. *Wynne v. Commonwealth,* 216 Va. 355, 218 S.E.2d 445 (1975). This could only be shown by proof of general reputation of the complaining witness in the community for unchastity or prostitution. *Burnley v. Commonwealth,* 208 Va. 356, 158 S.E.2d 108 (1967); *Powell v. Commonwealth,* 179 Va. 703, 20 S.E.2d 536 (1942). The

[1] Va. Code §18.2-67.7 was enacted in 1981.

reason for the rule was set forth in *Bailey v. Commonwealth,* 82 Va. 107, 110–11 (1886):

> *This offence may be committed as well on a woman unchaste, or a common prostitute, as on any other female. In [the] matter of evidence, however, want of chastity may, within recognized limits, be shown as rendering it more probable that she consented. . . .*

The legislative response was a series of "rape shield" laws, adopted by forty-seven states and by the Congress. Most of these limit or prohibit the admission of general reputation evidence as to the prior unchastity of the complaining witness, but some, like ours, permit the introduction of evidence of specific acts of sexual conduct between the complaining witness and third persons in carefully limited circumstances. *See Tanford* and *Bocchino*, *supra* at 592–602.

Winfield, 225 Va. at 217-18. *Winfield* then addresses the tension between the statute and issues of confrontation:

> The application of these laws has presented the courts with the concomitant problem that no legislation, however salutary its purpose, can be so construed as to deprive a criminal defendant of his Sixth Amendment right to confront and cross-examine his accuser and to call witnesses in his defense. *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), (state law shielding disclosure of juvenile-offender status of a prosecution witness is subordinate to defendants' right of confrontation), and *Washington v. Texas,*388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), (state law barring accomplice testimony is subordinate to defendant's right to offer evidence in his defense.) The analogy of these cases to the "rape shield" laws is plain. *See generally* Annot., 1 A.L.R.4th 283 (1980). Some jurisdictions have held such laws unconstitutional where they purport to preclude the defendant from showing the prior sexual conduct of the complaining witness. *See, e.g., State v. Jalo,* 27 Or.App. 845, 557 P.2d 1359 (1976). Others have, in order to give the statute a constitutional interpretation, implied an exception where the trial court, in an *in camera* hearing, makes a preliminary determination that the proffered evidence would be relevant and probative on the issue of consent. *See, e.g., State v. Howard,* 121 N.H. 53, 426 A.2d 457 (1981).
>
> Instructed by the experience of other jurisdictions, and with the evident purpose of steering a safe course through these shoals, the Virginia General Assembly enacted Code § 18.2–67.7 as a part of a sweeping revision of the general laws pertaining to criminal sexual assault, effective July 1, 1981. *Kneedler's* analysis

> suggests that the specific sanction given by Code § 18.2–67.7 to evidence of the victim's prior sexual conduct, for strictly limited purposes, will accommodate most of the foreseeable constitutional claims which a defendant might legitimately raise. *Kneedler*, *supra,* at 500–02. While the constitutional problems are instructive in determining the legislative intent as to the scope of the exceptions contained in the statute, no constitutional challenge is raised in this case. Indeed, the parties here debate only whether the proffered evidence meets the requirements of the statute—that is, was it *relevant* to show that the complaining witness had a "motive to fabricate" the charge against the accused.

Id. at 218-19. The Virginia Supreme Court, in agreeing with Winfield and reversing the trial court held:

> We agree with Winfield, however, that evidence tending to show that Sandra had a distinctive pattern of past sexual conduct, involving the extortion of money by threat after acts of prostitution, of which her alleged conduct in this case was but an example, is relevant, probative, and admissible in his defense. The proffered testimony of Leon Moore appears to contain elements of this kind. If, upon an evidentiary hearing conducted pursuant to Code § 18.2–67.7(C), it tends to show such a pattern, and otherwise meets the rules of evidence, it should be admitted. *See Kneedler*, *supra,* at 501. Its exclusion as a matter of law, based only upon the description contained in the notice, is error requiring reversal.

Id. at 220 (emphasis added). The *Winfield* court concluded:

> Evidence of past sexual conduct, to be admissible under the "motive to fabricate" provisions of Code § 18.2–67.7(B), however, must show a pattern of behavior which directly relates to the conduct charged against the complaining witness in the case on trial. Thus there is a sufficient nexus between Sandra's alleged efforts to extort money by threats from others, after acts of prostitution, and Winfield's version of her conduct in the present case, to render such evidence relevant and probative of a motive to fabricate. On the other hand, the proffered evidence of most of the witnesses to the effect that Sandra had engaged in sexual acts with others for money, is a mere attack on her character, related only indirectly to the theory of the defense. It attempts to show her reputation, by specific acts, as a prostitute, but it does not directly establish a motive to fabricate any charge against the accused. Such evidence was inadmissible at common law and the new statutory scheme does not open the door to its admission.

Id. at 220-21.

In this case, the defendant wishes to introduce one statement in the context of a single sexual encounter. While there may have been one prior incident of mild intimacy between the complainant and the defendant's son, there is no argument, nor could one be made, that this was part of a pattern of conduct. Rather, this is one statement contained within one act. This statement exists in an evidentiary vacuum.

The Virginia Supreme Court revisited the issue in *Ortiz v. Commonwealth*, 276 Va. 705 (2008). In that case, the Supreme Court affirmed a trial court's ruling that evidence of the victim's prior sexual conduct with a third party was inadmissible. In *Ortiz*, the defense contended that the child withdrew an allegation against one man (the first defendant) and then made the allegation against the defendant to appease the child's mother, who was unhappy that the child was making accusations against the first defendant.

Relying upon *Winfield*, the Supreme Court held:

> To be admissible under the "motive to fabricate" exception, the proffered evidence of sexual conduct must show a pattern of behavior by the victim that directly relates to the conduct charged in the case on trial. There must be a "sufficient nexus" to render such evidence relevant and probative of a motive to fabricate. The proffered evidence tended to show that the complaining witness in *Winfield* had a "distinctive pattern of past sexual conduct" wherein she extorted money by threat after acts of prostitution.

Ortiz v. Commonwealth, 276 Va. 705, 718 (2008) (internal citations to *Winfield* omitted).

In Ortiz, like the case at bar, there was neither a nexus or a pattern of past sexual conduct or, more specifically, the use of sexual favors for purposes of career advancement. If the complainant made a statement to the defendant in the context of sexual intimacy similar to the statement made by her to the defendant's son, the analysis might change, although it is an open question as to whether or not two instances constitute a pattern, but that did not happen. It occurred once. One time is not a pattern and under any circumstances, any nexus between the sexual activity with and statement to the defendant's son and the subsequent intimacy between the defendant and the complainant is either tenuous or non-existent.

For these reasons, the defendant's motion is denied. An order is attached to this letter.

Very truly yours,

[redacted]

Thomas P. Mann
Circuit Court Judge

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	CRIMINAL NUMBER MI-2019-0001585
VERSUS	)	
RAID GHOUSHEH	)	APPEAL – SEXUAL BATTERY

ORDER

On July 24, 2020, Kathryn Humphrey, the Assistant Commonwealth's Attorney, RAID GHOUSHEH, the Defendant, and James W. Hundley, Counsel for the Defendant, appeared before this Court. The Defendant is charged with the misdemeanor of SEXUAL BATTERY and he appeared while on bond.

This case came before this Court today for argument on the Defendant's motion for hearing to determine the admissibility of evidence pursuant to Virginia Code §18.2-67.7.

The Court **ORDERED**, for the reasons stated in the accompanying letter opinion, that the Defendant's motion be denied.

The Defendant was continued on bond.

Entered on July 24, 2020.

[redacted]

JUDGE THOMAS P. MANN

1/27/20

[redacted]

TPM / amc
MI-2019-0001585

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	CRIMINAL NUMBER MI-2019-0001586
VERSUS	)	
RAID GHOUSHEH	)	APPEAL – ASSAULT & BATTERY

ORDER

On July 24, 2020, Kathryn Humphrey, the Assistant Commonwealth's Attorney, RAID GHOUSHEH, the Defendant, and James W. Hundley, Counsel for the Defendant, appeared before this Court. The Defendant is charged with the misdemeanor of ASSAULT & BATTERY and he appeared while on bond.

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The Court **ORDERED**, for the reasons stated in the accompanying letter opinion, that the Defendant's motion be denied.

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Entered on July 24, 2020.

[redacted]

JUDGE THOMAS P. MANN

1/27/20 [redacted]

TPM / amc
MI-2019-0001586