

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. 00-11190  
VS :  
ANTHONY J. GENNARELLI, JR. : Motion for new trial

OPINION AND ORDER

The Defendant filed a motion for a new trial based on after discovered evidence. The Defendant was found guilty by a jury on April 19, 2001 of involuntary deviate sexual intercourse, indecent assault and corruption of a minor pertaining to his son, Matthew Stetts, a minor.

In the motion based on after discovered evidence, the Defendant claims that, he discovered evidence after the trial in this case from an individual who will testify that the mother of the child had pornography and a sexual instrument in her home (a dildo) which the child may have been exposed to before the alleged crime in this case.<sup>1</sup> The Defense contends that the testimony would explain the knowledge of the child as to pornographic videotapes and sexual instruments.

The Court held an evidentiary hearing on the motion on May 9, 2001 The Defendant called Joseph Dowling as a witness at the hearing Mr. Dowling, age 30, is employed with C&E Manufacturing and has resided in the Lycoming County area throughout his life. He testified that in 1997 and 1998 he resided for approximately a year with Kimberly Sherwood, and the victim Matthew Stetts. This would be a time frame before the alleged crime, which would have occurred in April 1999. Mr. Cowling testified that he resided in the Penn Vale project with the child's mother and that he shared a bedroom with the child's mother. He testified the child had a nearby bedroom. Mr. Dowling testified on one occasion in the time frame that he resided with the child's mother he noticed a videotape in the VCR, which was in the parties' bedroom. He

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<sup>1</sup>The Commonwealth at trial presented evidence that the Defendant showed his minor son a pornographic videotape and used a vibrator in his sexual contact with his son. The child at trial described what he saw on the videotape and he described the sexual instrument. The child's mother, Kim Sherwood, testified at trial that she never had pornographic tapes or sexual instruments in her home at any time.

claims Kimberly Sherwood was not present at this time. Mr Dowling testified that he played the tape and that the tape was of a pornographic nature with adults having sexual intercourse. He testified that the movie was not part of an R rated type film and rather was of a pornographic nature. He also testified that on one occasion he saw a sexual instrument, a dildo, on the dresser in the bedroom. Mr. Cowling claims that he only saw these items on one occasion and that he never asked Miss Sherwood about the items. Mr. Dowling testified that he does not know if the child ever saw either the tape or the sexual instrument and his testimony indicates that he never saw the child exposed to this kind of material in the home in the one year period that he was present.

Mr. Dowling testified that shortly after the jury verdict against the Defendant in this case he had a happenstance contact with the Defendant at a mutual friend's home, Arthur Smith. He testified the Defendant recognized him. When he lived with Miss Sherwood, the child's mother, the Defendant would have had regular visitation contacts with the child and would come to the home to pick up the child. Thus, Mr. Cowling, saw the Defendant numerous times, although he claims they were not friends and had no relationship. Mr. Dowling testified that the recent contact with the Defendant occurred a few weeks ago and that the Defendant told him about the verdict and then asked him if he had ever seen pornographic material at the home of the mother, Kimberly Sherwood. Mr. Cowling testified that he immediately confirmed to the Defendant that he had seen the videotape and dildo on one occasion as described in his testimony. He claims the Defendant then asked him if he would be willing to testify to that fact in court and Mr, Cowling agreed.

The testimony also revealed that Mr. Dowling had a falling out with Miss Sherwood and was kicked out of that residence in 1998 and, as a result, he harbors some ill feelings towards her. He also admitted on cross-examination that he has a conviction from 1994 for aggravated

sexual battery of a child. The Defense presented no other witnesses.

The Commonwealth called Kimberly Sherwood. Miss Sherwood denied Mr. Cowling's testimony that she ever had a pornographic video or a dildo in her home. She testified Mr. Cowling never mentioned this incident to her. She testified that tile Defendant knew Mr. Cowling by virtue of picking up the child at her home during the 10 months that she claims Mr. Cowling lived with her. She testified that she broke up with Mr. Dowling because he physically abused her. She then kicked him out of her residence and he is angry with her. She also claims the Defendant knows Mr. Dowling's last name, although she acknowledges that she never saw him speaking with Mr Dowling.

The Defense acknowledges they were aware in the early stages of the case that the Commonwealth was alleging that the child victim obtained knowledge of sexual matters from the Defendant's alleged conduct.

#### DISCUSSION OF LAW

The standard for the grant of a new trial based on after discovered evidence is a four prong test. A new trial will be granted only if: (1) the evidence could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) the evidence is not merely corroborative or cumulative; (3) the evidence would not be used soley for impeachment purposes; and (4) the evidence is of such a nature and character that a different verdict will likely result in a new trial were granted by the Court. (Commonwealth vs. Valderrama, 47 Pa. 500 (1978).

It is clear to the Court that the fourth prong of the test for the grant of a new trial based on after discovered evidence is not met in this case. The Court finds Mr. Cowling's testimony is not of such a nature and character that a different verdict would likely result if a new trial were granted. The evidence, even if believed, only indicates one occasion where the items in

question were seen and does not indicate who controlled or possessed the items in question. Mr. Dowling acknowledged that he never saw the mother expose the child, Matthew, to any such material and that he had been in the home almost a year's time frame. Thus it is unlikely that the jury would have given considerable credit to the evidence in question. Further, there is an obvious credibility dispute between Mr. Cowling and Miss Sherwood about the items in question. While it is difficult for the Court to assess the jury's potential reaction to the credibility of witnesses, we note that Mr. Cowling has some motive and hostility to Miss Sherwood and some potential bias against the Commonwealth because of his conviction for the sexual abuse of a child. In all probability if Mr. Cowling testified at trial, the Commonwealth would be able to elicit the prior conviction on the basis of showing some motivation or bias on the part of the witness against the Commonwealth. In light of all these circumstances, the Court does not believe that the proffered testimony of Joseph Dowling is of such nature and character that a different verdict would likely result if a new trial would be granted.

The Court notes that there is some possibility that the Defendant could have discovered this witness prior to the trial as he had incentive to find witnesses like Mr. Dowling. Accordingly, the following is entered.

ORDER

AND NOW, this 9th day of May, 2001 the Court DENIES the Defendant's motion for new trial based on after discovered evidence.

By The Court,

Kenneth D. Brown, Judge