**STATE’S OPPOSITION TO DEFENDANT’S MOTION FOR ADMISSION**

**OF VICTIM’S PRIOR SEXUAL HISTORY (RAPE SHIELD)**

##### State of Colorado

**ISSUE**

Whether the defendant’s offer of proof is sufficient under § 18-3-407, 8 C.R.S. (1978 Repl. Vol.), to require a rape shield hearing.

**I. THE PERTINENT STATUTE**

Section 18-3-407, hereinafter referred to as the “rape shield statute,” is here reproduced in its entirety for the convenience of the court.

**Victim’s prior history—evidentiary hearing.**

1. Evidence of specific instances of the victim’s prior or subsequent sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct shall be presumed to be irrelevant except:
2. Evidence of the victim’s prior or subsequent sexual conduct with the actor;
3. Evidence of specific instances of sexual activity showing the source of origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.
4. In any criminal prosecution under section 18-3-402 to 18-3-405, if evidence, which is not excepted under subsection (1) of this section, or specific instances of the victim’s prior or subsequent sexual conduct, or opinion evidence of the victim’s sexual conduct, or reputation evidence of the victim’s sexual conduct, or evidence that the victim has a history of false reporting of sexual assaults is to be offered at trial, the following procedure shall be followed:
5. A written motion shall be made at least thirty days prior to trial, unless later for good cause shown, to the court and to the opposing parties stating that the moving party has an offer of proof of the relevancy and materiality of evidence of specific instances of the victim’s prior or subsequent sexual conduct, or opinion evidence of the victim’s sexual conduct, or reputation evidence of the victim’s sexual conduct, or evidence that the victim has a history of false reporting of sexual assaults which is proposed to be presented.
6. The written motion shall be accompanied by an affidavit in which one offer of proof shall be stated.
7. If the court finds that the offer of proof is sufficient, the court shall notify the other party of such and set a hearing to be held *in camera* prior to trial. In such hearing, the court shall allow the questioning of the victim regarding the offer of proof made by the moving party and shall otherwise allow a full presentation of the offer of proof including, but not limited to, the presentation of witnesses.
8. An *in camera* hearing may be held during trial if evidence first becomes available at the time of the trial or for good cause shown.
9. At the conclusion of the hearing, if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim is relevant to material issue in the case, the court shall order that evidence may be introduced and prescribe the nature of the evidence or questions to be permitted. The moving party may then offer evidence pursuant to the order of the court.

**LEGAL ARGUMENT**

**Defendant has Failed to Tender a Sufficient Offer of Proof to Require a Rape Shield Hearing.**

Prior to the enactment of the rape shield statute, the defendant was allowed wide latitude in cross-examining a victim in a sexual assault case. Section 18-3-407, however, reflects the public policy aimed at preventing sexual assault victims from being cross-examined about their past sexual conduct either as part of a general credibility attack or to raise an inference that the victim is somehow partly culpable because she may have consented with others in the past. “[T]he state’s policy is that victims of sexual assaults should not be subjected to psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders.” *People v. McKenna*, 585 P.2d 275, 278 (Colo. 1978).

Colorado’s rape shield statute requires the defendant, by way of offer of proof, to state the relevancy and materiality of evidence concerning the victim’s sexual conduct. Only if the court finds that the offer of proof is sufficient should an *in camera* hearing be held.

The affidavit submitted by defense counsel is manifestly insufficient to trigger the *in camera* hearing provided for by the rape shield statute.

First, defense counsel, in paragraph 3 of his affidavit, speculates that the People intend to offer physical evidence showing that the victim has been exposed to sexual intercourse, inferring that she has only had sex with her father. The People, however, have no intention of introducing such evidence and do not contend that the victim’s only sexual experiences have been with the defendant. This court, therefore, should not consider that ground.

In paragraph 4 of counsel’s affidavit, counsel points out that the victim told Dr. D. that she had never had intercourse with anyone other than her father. The statement relied on by defense counsel is contained in a somewhat ambiguous report and may relate to a time when the victim denied any intercourse because her father was in the room when the doctor inquired. Regardless of whether the victim did in fact make that statement, the introduction of testimony about the victim’s sexual activity with others is clearly inadmissible under other legal grounds. Rule 613 of the Colorado Rules of Evidence, provides:

(a) **Examining witness concerning prior inconsistent statements for impeachment purposes.** Before a witness may be examined for impeachment by prior inconsistent statements, the examiner must call the attention of the witness to the particular time and occasion when, the place where, and the person to whom he made the statement. As part of that foundation, the examiner may refer to the witness’ statement to bring to the attention of the witness any purported prior inconsistent statement. The exact language of the prior statement may be given.

Where the witness denies or does not remember making the prior statement, extrinsic evidence, such as a deposition, proving the utterance of the prior evidence is admissible. However, if a witness admits making the statement, additional extrinsic evidence that the prior statement was made is inadmissible.

Denial or failure to remember the prior statement is a prerequisite for the introduction of extrinsic evidence to prove that the prior inconsistent statement was made.

Proper impeachment, therefore, would entail calling the victim’s attention to the statement first. If she admits making such a statement, no extrinsic evidence on that point is admissible. If she were to deny the statement, the proper extrinsic evidence as proposed by defendant is clearly inadmissible.

There is another separate legal basis for the exclusion of this evidence. When impeaching a witness, the relevancy of the impeaching evidence must be clear, must not raise collateral issues, and must be directed only at the witness’ credibility, and not at the witness’ moral character. *People v. Taylor*, 545 P.2d 703 (Colo. 1976).

The People submit that the statements in paragraph 5 and the two following unnumbered paragraphs are exactly the kind of speculation meant to be avoided by the provisions of the rape shield statute. There are no dates on the notes to support defendant’s wife’s theory on what happened between the victim and W.L. Furthermore, assuming *arguendo* that the defendant’s wife’s contention is true, the defense has failed to demonstrate any relevance that this information has, or any logical nexus between the victim’s sexual contact with W.L. and the allegations of incest against her father.

Rule 401 of the Colorado Rules of Evidence defines “relevant evidence” as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

As evidence of the victim’s past sexual activity is presumed irrelevant, defendant must rebut that presumption. The issue to which defendant’s proffered evidence is claimed relevant is credibility. Since consent is not a defense, credibility is the only point the defense can assail. But the Colorado Supreme Court has recognized that evidence of prior sexual acts is rarely relevant to the issue of credibility. In *People v. McKenna*, 585 P.2d 275 (Colo. 1978j), the court stated:

[I]n many instances a rape victim’s past sexual conduct may have not bearing at all on either her credibility or the issue of consent. In fact, in many cases cross-examination probing into her sexual history has served only to put her on trial instead of the defendant. 585 P.2d at 277, 288.

The court goes on to state:

The basic purpose of § 180-3-407, therefore, is one of public policy: to provide rape and sexual assaults victims greater protection from humiliating and embarrassing public “fishing expeditions” into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. *Id.* at 278.

The People submit that the introduction of evidence sought by the defendant would be in contravention to the rape shield statute and would authorize exactly the kind of “fishing expedition” condemned by the Colorado Supreme Court.

Finally, in paragraph 1 of counsel’s affidavit, he alleges that the victim made a false report of sexual assault. The People would first assert that the statement by the victim does not constitute “reporting.” The victim was attempting to deal with a variety of issues at a conference. A list was written for purely therapeutic purposes with no expectation by the victim that the list would ultimately be available for public scrutiny. She did not report any sexual assault to law enforcement authorities, school authorities, or to anyone with the intention of making the accusation public. Hence, it was not a “report.” This is completely different from the manner in which she reported the incest which is the subject of the case at hand. The victim went to the proper authorities and made the allegations public with the understanding that the matter would ultimately end up in a court of law.

Assuming *arguendo* that her statement/list did constitute “reporting,” S.M.’s self-serving denial that he perpetrated a rape upon the victim hardly establishes that the report was false.

In *People v. Shepherd*, 551 P.2d 210 (Colo. Ct. App. 1976), citing *People v. Simbolo*, 532 P.2d 962 (Colo. 1975), the court states:

Evidence of prior false accusations (made by the prosecutrix) may by admitted as affecting her credibility…. Cross-examination regarding the earlier accusation must be allowed if the contention that the accusation was false is supportable.

Other states have held similarly. In *Little v. State*, 413 N.E.2d 639 (Ind. Ct. App. 1980), that court held that evidence of false accusations of similar sexual misconduct is admissible on the issue of the victim’s credibility. The accusation must, however, be demonstrably false. Admission of true accusations of sexual misconduct is prohibited.

In the instant case, the defendant has fallen far short of showing that the victim’s statement is demonstrably false. Without litigating this issue at another sexual assault trial, this court cannot find, merely upon S.M.’s bald denial, that the victim’s statement is false. To do so would risk harmful error by allowing the admissions of true accusations. This would unduly prejudice the People’s case and subject the victim to further psychological and emotional abuse.

*In sum*, the procedures mandated by the statute are not optional. The statute embodies the policy judgement that even preliminary inquiry into a victim’s past sexual conduct—with the humiliations, embarrassment, and invasion of privacy necessarily accompanying such inquiry—shall not take place unless and until the defendant *fully* complies with its procedural demands. The People submit that defendant has failed to tender a sufficient offer of proof to require a rape shield hearing and accordingly, urge this court to so hold.

WHEREFORE, based on the foregoing authorities and argument, the People request the court to deny the defendant’s motion for admission of the victim’s prior sexual history.