

11-0282

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
PLAINTIFF

VS.

CASE NO. 10-F-150

JONATHON SCOTT BOURNE,
DEFENDANT

ORDER

On this 13th day of December 2010 came the State of West Virginia by its Prosecuting Attorney, James W. Courier, Jr., and Probation Officer Corey Shoemaker, and came the Defendant in person in the custody of the authorities from the Potomac Highlands Regional Jail and by his Court appointed counsel Gaynor Cosner.

This Court noted that the matter was scheduled for a Sentencing hearing subsequent to the Defendant's pre-sentence investigation. A Guilty verdict was returned by the Jury at the trial held on November 15 and 16, 2010. The Defendant was found guilty on all four counts of the Indictment.

WHEREUPON the Court, having reviewed the pre-sentence report and after conferring with counsel and receiving their comments, as well as those of the Defendant and the Probation Officer, the Court proceeded to sentencing.

WHEREFORE, it is adjudged that the Defendant is hereby committed to the custody of the Commissioner of the West Virginia Division of Corrections or his authorized representative for imprisonment for a term of not less than nineteen nor more than fifty five years as follows: for his felony conviction of Count One of the Indictment, "Second Degree Sexual Assault", the Defendant is sentenced to not less than ten nor more than twenty five years; for his felony

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conviction of Count II of the Indictment, "Incest", the Defendant is sentenced for a term of not less than five nor more than fifteen years; for his felony conviction of Count III of the Indictment, "Detain With Intent to Defile", the Defendant is sentenced to a term of not less than three nor more than ten years, and for his felony conviction of Count IV of the Indictment, "Conspiracy", the Defendant is sentenced to a term of not less than one nor more than five years, with each of the sentences to run consecutive.

The relevant dates for the Defendant are as follows:

Conviction Date: November 16, 2010

Sentence Date: December 13, 2010

Effective Sentence Date: November 15, 2010

Credit for time served: One day for May 2 till May 3, 2010, and Twenty Eight days for November 16, 2010 till December 13, 2010, for a total of 29 days credit.

It is ordered that the Clerk forthwith transmit this record, duly certified, of the judgment and commitment to the Commissioner of the West Virginia Division of Corrections and this record serve as the commitment.

A judgment in favor of the State of West Virginia, against the Defendant, is hereby entered for Court Costs and reasonable attorney fees.

Counsel for the Defendant objected to all rulings adverse to the Defendant.

All the proceedings had this date were taken by the Court Reporter and are a part of this Order as though the same were textually incorporated verbatim herein, but are not to be transcribed unless further ordered by Court.

This case is now concluded, and the Clerk is directed to release the Defendant's bond and place the file amongst the cases ended.

The Clerk is directed to forward a copy of this Order to all counsel of record, to the Probation Office, Potomac Highlands Regional Jail, and the West Virginia Division of Corrections.

Done and Entered this 15th day of December 2010



Phil Jordan
J U D G E

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v.

Criminal Action No.: 10-F-150

JONATHAN SCOTT BOURNE,
Defendant.

ORDER DENYING DEFENANT JONATHAN SCOTT BOURNE'S MOTION
FOR A NEW TRIAL

On this 13th day of December, 2010, the defendant, Jonathan Scott Bourne, came before this Court, the honorable Phil Jordan presiding, for a Post Trial Motions and Sentencing Hearing. Defendant, through counsel, made a Motion for a New Trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. Defendant stated in his argument for a new trial that the evidence presented at trial did not support his conviction. Further, defendant argued that the Court improperly ruled that a notebook, which defendant intended to offer into evidence, was inadmissible. Finally, defendant argued that the Court improperly allowed the introduction of computer files found upon his computer into evidence.

BACKGROUND

Defendant, Jonathan Scott Bourne, was indicted on September 8, 2010, on the charges of (1) Second Degree Sexual Assault, (2) Incest, (3) Detain with Intent to Defile, and (4) Conspiracy. Defendant Bourne was accused of forcefully raping his then thirteen year old half sister in either July or August of 2006 with the help of a co-defendant. This Court held a jury trial upon all four charges on November 15th and 16th of 2010, and the jury found defendant guilty upon all four counts. Defendant

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then moved for a new trial, and this Court held a hearing upon defendant's Motion for a New Trial on December 13, 2010, where this Court denied defendant's Motion for a New Trial in its entirety.

ANALYSIS

A. The Evidence Presented at Trial does Support the Conviction.

This Court **FINDS** that the uncorroborated testimony of the victim alone was enough evidence with which to support defendant's conviction. "A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." *State v. Beck*, 167 W.Va. 830, 830, 286 S.E.2d 234, 236 (1981). The jury judged the victim's testimony in this case to be credible. Further, the jury also heard the testimony of the defendant's Father, defendant's Grandmother, and defendant himself, all of whom testified in support of defendant. And, after weighing the entirety of the testimony, the credibility of the witnesses, and the evidence presented, the jury found defendant guilty upon all four counts.

The Court also **FINDS** the victim's testimony to be credible and defendant and his witnesses to not be credible. Defendant did eventually admit that he could offer no good reason for his half sister to fabricate such allegations. The Grandmother attempted to claim that the crime could not have happened because she was aware of everything that occurs in her house. Her testimony was refuted by the defendant's own testimony that he and the co-defendant did "party" with the victim in the Grandmother's house during the time frame in question and that the Grandmother was unaware of these activities and of the co-defendant's presence in her residence.

B. The Notebook was Inadmissible.

This Court **FOUND** on November 12, 2010, at a final Pre Trial Hearing and again **FINDS** that the notebook which defendant sought to introduce into evidence was in violation of West Virginia's Rape Shield law: West Virginia Rule of Evidence 404(a)(3) and W. Va. Code § 61-8B-11.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except: . . . as to the victim's prior sexual conduct with persons other than the defendant, where the court determines at a hearing out of the presence of the jury that such evidence is specifically related to the act or acts for which the defendant is charged and is necessary to prevent manifest injustice.

West Virginia Rules of Evidence, Rule 404(a)(3). According to West Virginia Code § 61-8B-11,

In any prosecution under this article, evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

W. Va. Code § 61-8B-11(b).

The Court, in a Pre Trial hearing on November 12, 2010, found that the information within the notebook was not specifically related to the acts for which the defendant was charged. The notebook was a medium of communication exchanged between the victim and a friend of the victim. Both would communicate information back and forth to each other through this notebook. Some of the information exchanged between the victim and her friend spoke of the victim's sexual history with another person, not defendant. The Court found that the information within the

notebook was not related to the acts for which the defendant was charged. The notebook did not relate to the victim's statement to the police at all, and the notebook was not related to the victim's testimony about defendant. Thus, the notebook was inadmissible under Rule of Evidence 404(a)(3).

Further, in accordance with West Virginia Code § 61-8B-11(b), this Court found the notebook and its contents inadmissible evidence. Because the notebook contained reputation evidence of the victim's sexual conduct, the notebook and its contents were deemed inadmissible evidence except for impeachment purposes should the victim have made her prior sexual behavior with others an issue. However, the victim never made any of her previous sexual conduct with persons other than the defendant an issue at trial. As such, the notebook could not be used for impeachment purposes. Thus, since the information in the notebook was (1) inadmissible under Rule of Evidence 404(a)(3) because it was not specifically related to the acts for which defendant was charged and (2) clearly inadmissible under West Virginia Code § 61-8B-11(b), this Court **FOUND** at the November 12, 2010, hearing that the notebook was inadmissible evidence at trial and still **FINDS** that this Court did not err by ruling that the notebook was inadmissible evidence.

C. The Computer Files were Admissible.

This Court **FOUND** on November 12, 2010, at a final Pre Trial Hearing and again **FINDS** that the files of pornographic films found upon defendant's computer were relevant, more probative than prejudicial, and admissible in accordance with West Virginia Rule of Evidence 404(b).

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion

of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

West Virginia Rules of Evidence, Rule 403. Although evidence may be relevant and probative,

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

West Virginia Rules of Evidence, Rule 404(b). In cases involving child sexual assault or sexual abuse, the West Virginia Supreme Court of Appeals has stated that

[c]ollateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment.

Syl. Pt. 2, *State v. Edward Charles L.*, 398 S.E.2d 123, 125 (W. Va. 1990).

The State sought to introduce at trial evidence of pornographic files found upon defendant's computer. The evidence was to be introduced by a witness reading the titles from a property receipt, not through any visual medium. The titles of the files include, (1) XNXX.Brother_fucks_younger_sister_-_XNXX.com; (2) XNXX.Dani_and_pepper_fucking_the_big_cock_of_the_family_-_XNNX.com; (3) XNXX.Hot_horny_taboo_-_XNXX.com; (4) XNXX.Sibling_rivalry_-_XNXX.com; (5) XNXX.Taboo_2_bro_and_sis_-_XNXX.com; and (6) XNXX.Wild_kinkey_family_sex_-_XNXX.com. This Court ruled on November 12, 2010, that said evidence was relevant and that its probative value outweighed any danger of unfair prejudice. Further, this Court determined that the files were

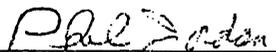
admissible under West Virginia Rule of Evidence 404(b) and *State v. Edward Charles* because this evidence tended to show defendant's lustful disposition toward family members, specifically the victim.

When this evidence was introduced at trial, the officer/witness who read the titles of the files to the jury subdued the effectiveness of the files by indicating the dots, dashes, and underscores within the titles of the files. By saying "dot," "dash," or "underscore," the officer dramatically minimized the effect of the files upon the jury. Counsel for the State even downplayed the effectiveness of the files in his closing argument. Finally, the jury was provided a limiting instruction to consider the evidence strictly for the purpose of showing the defendant's lustful disposition toward family members, specifically the victim. Thus, because the files upon defendant's computer were (1) relevant evidence, (2) more probative than prejudicial, and (3) admissible as 404(b) evidence, this Court **FOUND** that the files were admissible evidence and **FINDS** that this Court did not err in admitting the evidence at trial.

THEREFORE, based upon the above findings, this Court **DENIES** defendant's Motion for a New Trial in its entirety.

The CLERK shall forward an attested copy of this Order to Mineral County Prosecutor Jay Courier and Defendant's Counsel Gaynor Cosner.

DONE and **ENTERED** this 16th day of December 2010.



The Honorable Phil Jordan, Circuit Judge
21st Judicial Circuit

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IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v.

Criminal Action No.: 10-F-150

JONATHAN SCOTT BOURNE,
Defendant.

ORDER DENYING DEFENANT JONATHAN SCOTT BOURNE'S MOTION
FOR PROBATION

On this 13th day of December, 2010, the defendant, Jonathan Scott Bourne, came before this Court, the honorable Phil Jordan presiding, for a Post Trial Motions and Sentencing Hearing. Defendant, through counsel, made a Motion for Probation. Defendant stated in his argument for probation that he is only 24 years of age and did not have an extensive criminal record. Also defendant has resided in Mineral County for the majority of his life, and if released, he could continue to live in his Grandmother's home. Mr. Cosner, defendant's counsel, indicated that defendant would be willing to submit to a psychiatric evaluation to determine his eligibility for probation.

Defendant, Jonathan Scott Bourne, was indicted on September 8, 2010, on the charges of (1) Second Degree Sexual Assault, (2) Incest, (3) Detain with Intent to Defile, and (4) Conspiracy. Defendant Bourne was accused of forcefully raping his then thirteen year old half sister in either July or August of 2006 with the help of a co-defendant. This Court held a jury trial upon all four charges on November 15th and 16th of 2010, and the jury found defendant guilty upon all four counts. The Court held its hearing on December 13, 2010, where defendant made his Motion for

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Probation, and the Court denied said motion.

The Court noted that defendant had testified during the trial and denied the offense. During the presentence evaluation, defendant not only continued to deny the offense, but he also continued to blame the victim for this crime. Any treatment program would require at least some admission of culpability on the part of the defendant. Furthermore, in view of the seriousness of this particular crime, the Court would not find it appropriate to grant probation even if defendant was eligible for probation.

THEREFORE, based upon the above findings, this Court **DENIES** defendant's Motion for Probation.

The CLERK shall forward an attested copy of this Order to Mineral County Prosecutor Jay Courier and Defendant's Counsel Gaynor Cosner.

DONE and **ENTERED** this 17th day of December 2010.



The Honorable Phil Jordan, Circuit Judge
21st Judicial Circuit