

Franklin County Legal Journal
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Commonwealth v. Rosenberry

COMMONWEALTH OF PENNSYLVANIA v.
ANTHONY ROSENBERRY, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action, No. 1155-2002

Impeachment; Pa.R.E. 607

1. If a proper foundation is laid, a cross-examiner may try to show that a witness's ability to perceive an event was impaired by drug intoxication.
2. A proper foundation is laid where there is some factual basis from which to conclude or suspect that the witness was indeed intoxicated.
3. Without the proper foundation, cross-examination about intoxication constitutes improper character impeachment and may be more prejudicial than probative.

Appearances:

Franklin County District Attorney's Office

R. Paul Rockwell, Esq., *Counsel for Defendant*

OPINION

Herman, J., July 17, 2003

Introduction

A jury found the defendant guilty of simple assault at a December 17, 2002 trial. After the court sentenced him, he filed a notice of appeal and a concise statement of matters complained of on appeal.

Background

The Commonwealth presented evidence to prove the defendant assaulted his 15-year-old daughter Jessica at their home in Chambersburg on June 4, 2002. The defendant, Jessica, and her boyfriend Clayton spent that day at the house. The defendant left the house at approximately 5:00 p.m. and went to a local bar where, as he admitted, he consumed alcohol. Jessica and Clayton testified that when he returned home at 10:30 p.m., they observed signs of intoxication, particularly, slurred speech and the odor of alcohol.

Jessica and Clayton sat at the large wooden kitchen table as the defendant fixed himself something to eat. Jessica and the defendant began arguing about the defendant's refusal to provide her with a front door

key. Jessica also let her father know that she was upset about his drinking. The defendant became progressively angrier as the argument continued. He approached her and picked up the kitchen table, pushing it hard into Jessica's upper thighs and pinning her against the refrigerator. He then punched her in the face with his fist, which caused her head and right eye to slam into the edge of the windowsill. The defendant then picked up the chair she was sitting on, throwing her to the ground. As she fell, she struck her head on the floor, which caused her nose to bleed profusely. The defendant then left the room. When he returned a while later, he looked closely at Jessica and repeatedly expressed regret at having "messed up" again. Jessica, shaken and fearful, asked her father several times if she and Clayton could leave the house. When he failed to answer, she and Clayton left and went to a nearby store and called police.

The investigating officer noted lumps, bruises, swelling and redness on Jessica's face, head and nose. He also noted a large amount of blood on her shirt. Jessica also suffered large bruises on her upper thighs from the impact of the table and being pinned between the table and the refrigerator. The officer went to the defendant's house to speak with the defendant about the incident. When the officer could not get anyone to come to the door, he looked through the back door and saw blood on the floor and that the kitchen table was overturned.

Discussion

The defendant raises the following issue on appeal:

Appellant should have been permitted to cross-examine the Commonwealth's witness Jessica Rosenberry regarding her intoxication resulting from the use of controlled substances on the night of the alleged attack and Appellant should have been permitted to testify that he believed that his daughter was under the influence of a controlled substance. Appellant's position is based on Pa.R.E. 607 and cases ruling admissible evidence of intoxication or drug use at the time of the event for purposes of impeachment of the witness.

If a proper foundation is laid, a cross-examiner may try to show that the witness's ability to perceive the event was impaired by drug intoxication. This is a permissible method of impeachment under Pennsylvania Rule of Evidence 607.

During cross-examination, defense counsel asked Jessica whether the argument between herself and the defendant included the defendant expressing concern about her having used marijuana earlier that day. The Commonwealth objected and, after a sidebar discussion, the court sustained the objection and instructed the jury to disregard defense counsel's question. (N.T. Proceedings of Jury Trial, December 17, 2002, p. 28.)

The court took up the matter more fully outside the jury's presence later on and before the defendant took the stand. (N.T. pp. 61-69.) The Commonwealth renewed its objection that the proposed testimony constituted improper character impeachment and was more prejudicial than probative. In addition, the Commonwealth maintained that the proposed evidence was irrelevant to whether an assault took place. Defense counsel responded that his intention was to show that Jessica had been using marijuana that day and was intoxicated when the defendant returned home, which distorted her perception of the incident. Defense counsel told the court that the defendant believed she had been using marijuana because she was uncharacteristically arrogant and argumentative toward him during the incident. However, the court noted that the defendant's allegation that Jessica was more arrogant and argumentative than usual was **insufficient foundation** for his belief that she was under the influence of marijuana. Defense counsel was to consult with the defendant before the defendant took the stand to learn if other factual grounds existed to support his belief, such as his observation of physical signs of intoxication and/or the odor of marijuana on her person. The defendant did not testify about such observed facts, so the court's previous ruling remained in place.

Inquiry into a witness's intoxication at the time of the event in question may indeed be appropriate to test his ability to accurately perceive the event, but only where there is first some factual basis from which to conclude or suspect that the witness was intoxicated. In the Interest of M.M., 690 A.2d 175 (Pa. 1997). In the case at bar, the defendant was unable to offer specific factual observations about Jessica's demeanor that evening to support his belief that she was under the influence of marijuana. Under that circumstance, allowing that line of inquiry would have been error.

We submit that no error was committed in any aspect of this proceeding, and respectfully request that the defendant's conviction be affirmed.

ORDER OF COURT

Now, on July 17, 2003, pursuant to Pennsylvania Rules of Appellate Procedure 1931(c), it is hereby ordered that the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior

Court the record in this matter along with the attached Opinion Sur Pa.R.A.P. 1925(a).