

COUNTY COURT EAGLE COUNTY, COLORADO 885 E. Chambers Road P.O. Box 597 Eagle, Colorado 81631	FILED IN THE COMBINED CLERKS OFFICE OCT 20 2003 EAGLE COUNTY, COLORADO BY <u>MS</u> σ COURT USE ONLY σ
Plaintiff: PEOPLE OF THE STATE OF COLORADO. Defendant: KOBE BEAN BRYANT.	
	Case Number: 03 CR 204 Div.: 1
ORDER RE PROBABLE CAUSE DETERMINATION	

THIS MATTER having come before the Court on October 9, 2003 and as continued on October 15, 2003 for a preliminary hearing, and the Court having heard the testimony of the witness and arguments of counsel, finds and concludes as follows.

I. Preliminary Hearing Standards

“The purpose of a preliminary hearing is ‘to determine if there is probable cause to believe that an offense has been committed and that the person charged committed it.’” *People v. Fisher*, 759 P.2d 33, 36 (Colo. 1988)(citations omitted). C.R.S. § 16-1-104(14); Crim. P. 5(a)(4). “The probable cause standard requires ‘evidence sufficient to induce a person of ordinary prudence and caution conscientiously to entertain a reasonable belief’ that an accused person committed a particular crime.” *People v. Jensen*, 765 P.2d 1028, 1030 (Colo. 1988)(citations omitted).

“The prosecutor shall have the burden of establishing probable cause.” Crim. P. 5(a)(4)(II). “Probable cause must be established as to each element of the crime charged.” *Fisher*, 759 P.2d at 36 (citation omitted). “It is unnecessary for the prosecution to show beyond a reasonable doubt that the defendant committed the crime, or even the probability of the defendant’s conviction.” *People v. District Court*, 926 P.2d 567, 570 (Colo. 1996)(citation omitted). “The test is whether the prosecution’s evidence, taken alone and in a light most favorable to the prosecution, is sufficient to induce a reasonable belief that the defendant committed the crime with which [he] has been charged.” *Fisher*, 759 P.2d at 37.

“In light of its limited purpose, evidentiary and procedural rules in the preliminary hearing in Colorado are relaxed. Crim. P. [5(a)(4)(II)].” *Hunter v. District Court*, 543 P.2d 1265, 1267 (Colo. 1975). “Hearsay and other incompetent evidence may properly comprise the bulk of the evidence at a preliminary hearing.” *Fisher*, 759 P.2d at 36. “The prosecution may not totally rely on hearsay to establish probable cause where competent evidence is readily available. The prosecution need not produce all of its evidence against the defendant at the preliminary hearing, but only that quantum necessary to establish probable cause.” *Hunter*, 543 P.2d at 1267 (citations omitted). “The process is best served when at least one witness is called whose direct perception of the criminal episode is subject to evaluation by the judge at the preliminary hearing.” *Blevins v. Tihonovich*, 728 P.2d 732, 734 (Colo. 1986)(citation omitted). “Better prosecutorial practice entails the presentation of a residuum of competent, non-hearsay evidence at the preliminary hearing to support probable cause.” *People v. Maestas*, 541 P.2d 889, 892 (Colo. 1975)(citations omitted).

“[T]he defendant need not testify, while he has the right to cross-examine the witnesses called by the People.” *Hunter*, 543 P.2d at 1267 (citation omitted). A trial court “must not reject the testimony of a witness unless that testimony is implausible or incredible as a matter of law.” *People v. Leidner*, 597 P.2d 1040, 1042 (Colo. 1979)(citation omitted). “When there is a mere conflict in the testimony, a question of fact exists for the jury, and the judge must draw the inference favorable to the prosecution.” *Hunter*, 543 P.2d at 1268. “[I]t is not for the trial judge at a preliminary hearing to accept the defendant’s version of the facts over the legitimate inferences which can be drawn from the People’s evidence.” *Fisher*, 759 P.2d at 36. “In Colorado ... the preliminary hearing is not a ‘mini-trial,’ and the judge in such a role is not a trier of fact. Rather, his function is solely to determine the existence or absence of probable cause.” *Hunter*, 543 P.2d at 1268.

II. Motions

1. In the Court’s prior Order Re Preliminary Matters entered on October 2, 2003, the Court reserved the right to close all or a portion of the preliminary hearing at the conclusion of the scheduled *in camera* proceedings which preceded the preliminary hearing on October 9, 2003. The Court heard additional argument on closure including that of counsel for the Media. The Court, later in the proceedings, granted Defendant’s request to close that portion of the hearing pertaining to Defendant’s statements.

2. On October 14, 2003, the People filed People’s Request for *In Camera* Proceedings Pursuant to 18-3-407 and 16-5-301(2). The Court reviewed the request and Defendant’s response, also filed on October 14, 2003. Both motions included offers of proof under seal. The Court addressed the offers of proof and heard argument on the motions *in camera* the morning of October 15, 2003. The Court then denied the People’s request that Defendant’s cross-examination of Detective Winters be conducted in a closed hearing.

3. On October 15, 2003, the People filed under seal an Objection to Deny the Use of Victim’s Past Medical Problems in the Preliminary Hearing. The Court heard argument on the motion *in camera* and granted the motion only for purposes of the preliminary hearing. Any determinations of relevance and admissibility at trial are to be made by the District Court.

4. The portion of the transcript pertaining to the *in camera* proceedings shall remain sealed. The transcripts of the proceedings in open court shall be made public after the Court has had the opportunity to certify the record and after the parties have had the opportunity to file errata sheets.

III. Testimony and Physical Evidence

1. The only testifying witness was Detective Doug Winters of the Eagle County Sheriff's Office ("ECSO"). He testified as to the alleged victim's statement, Defendant's statement (in closed proceedings), the collection of evidence, the scope of the investigation, the demeanor of the alleged victim and Defendant, and the significance of the physical evidence as relayed to him by the SANE (Sexual Assault Nurse Examiners) nurse and the Colorado Bureau of Investigation ("CBI"). His testimony included the following.

2. On July 1, 2003, he received a call from Deputy Marsha Rich regarding a possible sexual assault on June 30, 2003. He and Deputy Rich proceeded to the alleged victim's residence where Detective Winters met with the alleged victim and her parents and conducted a brief interview. Prior to leaving the residence, he collected the dress, jacket, shoes, bra and underwear the alleged victim was wearing the night of June 30, 2003. After some discussion, the alleged victim agreed to go to the ECSO for a videotaped interview. When they arrived at the ECSO, he set up an interview room for the alleged victim and proceeded to obtain her videotaped statement. At the conclusion of the interview she agreed to a sexual assault examination and was taken to Valley View Hospital where she was examined by two SANE (Sexual Assault Nurse Examiners) nurses and a doctor.

3. On direct examination, Detective Winters presented the following hearsay testimony of the victim's statement. The alleged victim went to work at the Lodge at Cordillera on the afternoon of June 30, 2003 at approximately 2:00 p.m. The alleged victim was scheduled to work at 11:00 a.m., but was late due to car problems. While at work, she received a call from a travel agent for reservations under the name of Javier Rodriguez. During that conversation, the alleged victim was informed that the reservation was actually for the Defendant. She was excited that Defendant was coming to the Lodge and wanted to meet him. She assigned and set up the reserved rooms. At approximately 10:00 p.m., Defendant and two other persons arrived at the Lodge. She escorted Defendant and the other two persons to Defendant's room which is located on the southwest end of the main floor. While in the room, Defendant pulled her aside and asked that she return to give him a tour of the Lodge. She then returned to the front desk to retrieve the keys for the other two rooms and escorted the other two individuals to their rooms. She returned to Defendant's room by proceeding the "back way" which was out the front entrance of the Lodge and through the employee entrance. She chose this route because the other two individuals that were traveling with Defendant were not allowing anyone to approach Defendant's room. She then took Defendant on a tour of the Lodge, including the pool and spa area where the Jacuzzi is located. She indicated there was mutual flirtation during the tour. While on the tour, the individual referred to as the bellman had a brief conversation with the alleged victim and Defendant. The conversation ended when Defendant wanted the alleged

victim to show him back to his room. They both then returned to his room and he invited her to come into the room, which she did.

Once in the room, the alleged victim showed him where bears can be viewed from the window and then proceeded to sit on the couch at his request. Defendant sat in an adjacent chair and they were "chitchatting" about his impending surgery and her tattoos. She then showed him the tattoo on her ankle. Bryant then invited her to join him later in the Jacuzzi and she declined, stating she wanted to go home at the end of her shift. She began to feel uncomfortable at this time but indicated she wanted his autograph. He indicated he wanted her to return later and would give her an autograph at that time. They both then stood up and she agreed to give him a hug. They then began kissing which was consensual. Defendant then began to "grope" her in the breast and buttock area. She did not consent to this and told him that she needed to leave. She attempted to move toward the front door, but her movements were blocked by Defendant and he then grabbed her with both hands by the neck while she was facing him. She could breathe but was afraid that he was going to choke her. Defendant thereafter forced her toward the chairs and "turned her around" while keeping his hands on her neck. He then forced her to bend over the chair at which time he freed one hand. He then lifted her skirt and pulled her underwear down despite her having said "no" to both actions. Defendant then proceeded to have sexual intercourse with her. She was then upset and started to cry. She indicated she felt pain and had bled during the intercourse. Defendant then inquired several times whether she intended to tell anyone and she responded "no" out of fear of physical harm. She then grabbed his hand or hands that were around her neck and he then stopped. She then went into the bathroom to clean her face at his request. He then again indicated he didn't want her to tell anybody and she agreed so she could leave. She then returned to the front desk to close up and advised the bellman she was ready to leave. Once outside, she told the bellman what had happened. After the sexual assault examination, the alleged victim also told Detective Winters that right after the intercourse Defendant forced her to kiss his penis despite having said "no."

4. On cross examination, the following testimony was elicited as to the victim's statement. The bellman arrived at the Lodge for work at 2:28 p.m. and the alleged victim arrived at work at approximately 2:00 p.m. The alleged victim, after some inquiry, learned at approximately 4:00 p.m. that Defendant would be arriving later that evening. The alleged victim was supposed to get off work at 7:00 p.m., but stays late because she was excited to meet Defendant and also wanted to make up her lost hours from the car trouble. Defendant, his two security guards and his trainer arrived later that evening and the alleged victim is waiting in the lobby with Defendant's room key. The Lodge contains 56 rooms of which only 4 were occupied on June 30, 2003. The alleged victim assigned Room 35 to Defendant. Room 35 was located at the very end of the first floor hall, "as far way from the front desk and lobby area as you could get." The security guards and trainer were assigned to Rooms 18 and 20 which were on the other end of the Lodge. After escorting Defendant to his room, she later returns through the employee entrance in order to avoid a hassle with the bodyguards. She then takes him on a tour during which flirtation ensues. Defendant asks whether she has a boyfriend to which she responds no. The alleged victim indicates she is flattered by his attention and was excited that he was showing an interest in her. While on the tour, they meet with the bellman on the terrace and chat for a while. She then takes Defendant back to his room which she entered willingly. The alleged victim states that she expected Defendant to "put a move on her." After some chitchat, the

conversation turns to her tattoos, one on her ankle and a second on her back. The alleged victim had not disclosed the second tattoo on her back in the initial interview. The conversation then turns to the Jacuzzi which is located in a public area of the Lodge. Defendant indicated an interest in going to the Jacuzzi with her and despite having said she was uncomfortable, she declines to proceed to the public Jacuzzi. The alleged victim did not indicate to Defendant that she had become uncomfortable. She then stood up and they began hugging and kissing with her arms draped around his neck. She does not dispute that this is consensual. She then attempted to leave by the door to the hallway. She made no attempt to exit the sliding glass doors to the ground floor patio. During the sexual intercourse, the alleged victim moved Defendant's hand from her neck and he then stopped. Detective Winters' report indicates he asked her why she never said "no"? When asked the question, the alleged victim did not "protest" or indicate that she had said no. When the alleged victim returned to the front desk after the sexual intercourse, the night auditor was the first person to see her. In a statement provided to the ECSO, the night auditor observed that the alleged victim was very excited that Defendant was coming to the Lodge and that when the alleged victim returned to the front desk after giving the tour, she was asked to finish her cash sheet which she did prior to leaving. The night auditor opined that the alleged victim did not "look or sound as if there had been any problem." The closed testimony pertaining to Defendant's statement presents evidence which contradicts the hearsay testimony of the victim's statement as to the events preceding the sexual intercourse and the actual sexual intercourse. However, closure precludes the Court from reciting the particulars of the testimony.

5. Detective Winters described the alleged victim's demeanor while at her residence as "very serious, flat-faced" and that he "sensed a crackle in her voice." He further opined that the victim did not appear to be confused. As to the videotaped statement, Detective Winters described her demeanor as a normal voice tone, clear and concise, but began to be a "little more upset" when describing the events immediately preceding the intercourse. Again, closure of the portion of the preliminary hearing pertaining to Defendant's statements precludes recitation of the particulars of Detective Winters' observations as to Defendant's demeanor during his interview.

6. Defendant submitted to a sexual assault exam which included a full body examination for marks on his body. Other than the surgical incisions, no marks evidencing a struggle with another person were found on Defendant.

7. The alleged victim submitted to a sexual assault exam. Detective Winters testified that he spoke with one of the two SANE nurses. She told him that there were several lacerations in the alleged victim's posterior fourchette between the vaginal and anal openings. Two of the lacerations were one centimeter in length and there were several one millimeter lacerations. Photographs of the larger lacerations were admitted into evidence. Both photographs were magnified and one was taken after the application of toluidine blue dye and after the alleged victim had a speculum exam. The SANE nurse concluded the lacerations were consistent with "penetrating genital trauma" and not consistent with consensual sex. The SANE nurse also stated the injuries were recent, but it could not be determined how recent.

Testimony was elicited during cross examination that no trauma was observed as to the labia majora, bilateral redness, but no cuts, tears or lacerations were noted for the labia minora,

no trauma was observed as to the vagina, clitoris and hymen, redness was observed as to the cervix, and no trauma was observed as to the rectum. No medical treatment was rendered for the lacerations. The alleged victim also disclosed that she had engaged in sexual intercourse on June 28, 2003 and that her partner had used a condom.

The alleged victim's yellow underwear, worn to and collected during the sexual assault examination, contained the alleged victim's blood, and semen that the CBI determined did not match Defendant's DNA profile. No tests have been performed to identify the source of the semen despite Defendant's request to do so. Requests for samples from two individuals believed by Detective Winters to possibly be responsible for the semen in the yellow underwear have not been provided although requested. Pubic hair combings taken from the alleged victim at the sexual assault examination were determined by the CBI to be of Caucasian origin and thus, not that of Defendant. The source of the pubic hairs is also unidentified, despite Defendant's request for testing.

Additional swabs were taken from the alleged victim's body which contained semen and sperm. The swabs have not yet been tested, despite requests by the Defendant. Upon receipt of this additional information, Detective Winters had not inquired of the SANE nurse prior to October 9, 2003 if her opinion was affected in any manner by this information. Although Detective Winters indicated he spoke with the SANE nurse on October 9, 2003, he stated that they discussed some of the additional facts but not all. He did ask the SANE nurse whether prior acts could cause the lacerations and was told it would be unlikely if it occurred over two or three days. The SANE nurse also opined that the injuries had occurred within 24 hours.

8. The SANE nurse also told Detective Winters that a small bruise of one centimeter by two centimeters was detected on the alleged victim's left jaw. A photocopy of the photograph of the bruise was entered into evidence. During voir dire, it was elicited that Detective Winters had not observed the bruise during the interview at the alleged victim's home or during the videotaped interview. It was also elicited during cross-examination that Detective Winters did not detect any physical evidence on the alleged victim's neck. He did not see any marks, scratches, bruises or finger marks. Upon questioning based on review of the diagram prepared in conjunction with the sexual assault examination, Detective Winters confirmed that there were no other marks on the alleged victim's neck or arms and no bruises on the front or back of her body or her legs.

9. Detective Winters observed what appeared to be blood on the underwear worn by the alleged victim on June 30, 2003. Detective Winters testified that he observed blood streaks on the inside front of the T-shirt Defendant was wearing on June 30, 2003. He gave the T-shirt to the CBI for analysis. The blood excretions were found to be transfers from another source. CBI determined that the DNA profile of the blood transfer was consistent with the alleged victim. On cross-examination, it was elicited that Detective Winters did not notice the blood stains during his interview of Defendant or at the time he collected the T-shirt. The blood was not discovered until CBI conducted its forensic evaluation and thus, Detective Winters' observations were not made until the evidence was returned from the CBI. Detective Winters acknowledged that there were no rips or tears on any of the alleged victim's clothing worn on June 30, 2003.

10. No efforts were made to collect fingerprints or other forensic evidence from the bathroom and other than casual observation, no efforts were made to check for blood in the hotel room. No samples of carpeting were taken from the area where the sexual intercourse occurred.

IV. Conclusions of Law

Defendant has been charged with sexual assault (F3) pursuant to C.R.S. § 18-3-402(1)(a) and 4(a). The elements, as charged in the Complaint, include (1) that Defendant; (2) on or about June 30, 2003 in the County of Eagle, State of Colorado; (3) knowingly inflicted sexual intrusion or sexual penetration on a person; (4) caused submission of the person by means of sufficient consequence reasonably calculated to cause submission against the person's will; and (5) caused submission of the person through the application of physical force or physical violence. C.R.S. § 18-3-402. Defendant contends that consensual sexual intercourse occurred with the alleged victim on June 30, 2003 in Eagle County, which in effect, established sufficient evidence of probable cause on elements one through three on the aforementioned charge. The contested issues (elements four and five) are whether that sexual intercourse was the result of submission against will or the application of force.

The totality of the evidence, whether that presented in closed proceedings, open proceedings or under seal, leaves no doubt that there are a considerable number of issues to be determined by the trier of fact. The People presented, despite the Court's consistent comments and admonitions concerning the amount and the nature of the evidence to be presented at the preliminary hearing, what can only be described as a minimal amount of evidence, relying substantially on the use of hearsay evidence, particularly on those elements of submission against will or application of force. This Court understands that the People have no obligation to present all, or even the best of, its evidence at a preliminary hearing, however, the Court can rule only on what was presented and admitted into evidence. Each side made offers of proof and supplemented such offers of proof in closed portions of the preliminary hearing. Those offers and supplemental materials are not evidence and as such, are not considered by the Court for determination of probable cause.

Almost all of the evidence introduced at the preliminary hearing permits multiple inferences which, when viewed either independently or collectively, and upon reasonable inference, do not support a finding of probable cause. Simply put, this Court could not make a finding of probable cause in the instant matter absent reliance upon those inferences supportive of the People's case.

Although Defendant presented evidence attacking the credibility of the alleged victim, the Court cannot conclude that the hearsay statements of the alleged victim should be disregarded as either implausible and/or incredible as a matter of law, notwithstanding inconsistencies in her statements and the other evidence. The Court did not, for purposes of determining the existence or absence of probable cause, examine the credibility of any testimony (direct or hearsay).

The Court, also, does not agree that the evidence is entirely hearsay. The nonhearsay evidence includes Defendant's statements, Detective Winters' observations of the Defendant and

alleged victim in giving their statements, and Detective Winters' observation of the blood on the alleged victim's underwear and Defendant's T-shirt.

The photographs of the lacerations and bruise, although direct evidence, were introduced and explained on the basis of hearsay evidence. The identification of the alleged victim's blood on Defendant's T-shirt was also made by hearsay evidence. The vaginal photographs, absent interpretative hearsay explanation of the significance of microscopic lacerations, have limited evidentiary value to the Court. Further, what evidentiary value was elicited from the photographs was further diluted by the fact that the SANE nurse lacked potentially significant information when venturing an opinion as to "penetrating genital trauma." No testimony was elicited, either on direct or cross-examination, regarding the source of the bruise on the alleged victim's cheek. The testimony elicited on that topic disclosed that the bruise was not discovered by the investigating officers, but rather by the SANE nurse.

The People contend Defendant's own statements are direct evidence and corroborate other evidence supportive of probable cause. In fact, the corroboration offered by Defendant's statements pertains only to two specific facts (presented at the bench), and which offer corroboration only when viewed in the light most favorable to the People.

Although Defendant offered evidence which suggested factual alternatives as to the cause of the alleged injuries, the photographs demonstrate some injury to the genital area and a bruise to the cheek. This demonstrative evidence, when construed in the light most favorable to the People, are evidence of submission and force. The presence of blood on the victim's underwear and Defendant's T-shirt are further evidence of submission and force based on the opinions of the SANE nurse. The alleged victim's statement, not having been shown to be incredible and implausible as a matter of law, cannot be rejected by the Court. Her statement presents evidence of sexual intercourse against her will and subject to the application of force, resulting in pain and injury.

Accordingly, in compliance with *Fisher* and the other authority cited above, the Court finds that the evidence, taken in a light most favorable to the prosecution, is sufficient to "induce a reasonable belief" that Defendant committed sexual assault as charged. The People have therefore established sufficient probable cause to bind this matter over to District Court for trial.

IT IS THEREFORE ORDERED,

Pursuant to Crim. P. 5(a) (4) (III), this matter is bound over to Eagle County District Court for trial. Bond is continued and Defendant shall appear in the District Court on November 10, 2003 at 9:00 a.m. for First Appearance.

DATED THIS 20 DAY OF October, 2003.

BY THE COURT:


County Court Judge