

## State v. Shepherd, Supreme Court of New Hampshire

**977 A.2d 1029 (2009)**

**Topic:**

Discovery/Production, Evidence, Privacy

**Nature of the case:**

Aggravated sexual assault.

**Facts and Issues on Appeal:**

The defendant was convicted of aggravated felonious sexual assault. After the conviction, it was discovered that the doctor who did the sexual assault examination omitted a page and a half of her report, believing that the information was not subject to disclosure because it was confidential. However, the omitted pages would have revealed the existence of mental health records. The defendant argued that the doctor's failure to disclose certain pages of the sexual assault report violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Laurie*, 653 A.2d 549 (N.H. 1995) because the mental health records showed that the victim had behaviors consistent with Oppositional Defiance Disorder (ODD). The defendant argued that this disorder was relevant because patients with ODD may have a tendency to blame others for mistakes. However one of the victim's psychologists stated in his assessment that the victim's diagnosis did not include criteria related to such a tendency. Nevertheless, the defendant argued the information was relevant to credibility and should have been disclosed prior to trial. The appellate court agreed, reasoning as follows:

**Ruling & Rationale:**

The information could have affected the verdict by allowing substantial impeachment of the victim. The defendant showed that evidence of the victim's disorder would have been both favorable and material to the defendant's case. The evidence in this case was considered favorable because it could be used to impeach the witness at trial as to her mental health and credibility. The court noted that it was irrelevant whether the evidence would actually be admissible at trial.

The court then determined that the state knowingly withheld this information from the defendant and that the evidence would have affected the verdict. Thus, the defendant was entitled to a new trial under the Due Process Clause.

**EDITORIAL COMMENT:** This decision is noteworthy for its lack of respect for the privacy rights of the victim, and for its poor analysis regarding the nature of the victim's "disorder". Despite evidence directly from the victim's treatment provider that she had no tendency to blame others, the court concluded that the defendant's proffer in this regard was sufficient not only to justify disclosure but also to require reversal of the defendant's conviction. The ruling effectively

stands for the proposition that any victim or witness involved in a criminal matter in New Hampshire who has been diagnosed with Oppositional Defiance Disorder must anticipate judicial disrespect for the psychologist-patient privilege based solely on the fact that "blaming others" is a symptom of the disorder for some people. Mental health practitioners should be mindful of this ruling and exercise caution in diagnosing people with ODD given the extent to which this ruling vitiates the privilege of confidentiality. Likewise, SANE nurses and other medical professionals who treat sexual assault victims in hospital settings may want to consider not reducing to writing any psychiatric history and should, instead, limit all note-taking to facts related to the crime - with as narrow a scope as possible in terms of time and subject matter parameters. When a psychiatric history is necessary in order to provide proper medical care for the assault, which will be the case infrequently, the victim should be referred elsewhere and warned that disclosures regarding sensitive and private information will likely be disclosed to the accused. This Miranda-like warning will enable the victim to achieve fairer justice by allowing her to choose not to reveal information that has nothing to do with the facts legitimately in dispute during the trial of her assailant.

**Submitted By:** Kathryn Schwartz -- Law Student