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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 181

ROBERT C. HALTER,

Appellant.

20 Eagle Street
Albany, New York 12207
September 13, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Halter.
2 Counselor, do you want any rebuttal time?

3 MR. DAVIS: Two minutes, please.

4 CHIEF JUDGE LIPPMAN: Two minutes. Sure.
5 Go ahead.

6 MR. DAVIS: Timothy Davis appearing for Mr.
7 Halter. In this case, Robert Halter called the
8 police and asked for help in locating his thirteen-
9 year-old daughter. And at trial, the People used the
10 Rape Shield Law in an effort not to protect the
11 complainant from questions about her sexual conduct,
12 but in an effort to prevent Mr. Halter from
13 introducing evidence of her sexualized behavior - - -

14 JUDGE CIPARICK: Well, how is this - - - at
15 trial, there was a lot of evidence and a lot of
16 testimony about her Myspace page, about her dad
17 lecturing to her about staying out late, about boys,
18 about having run away from - - - running away from
19 home, about the police coming to get her at the boy's
20 house. There's even testimony that her father had
21 told her she had turned into a whore and that she was
22 angry at her dad.

23 So all - - - most of what you're asking for
24 was there at this bench trial before this judge. So
25 what more do you want? You would have liked him to

1 be specific about sexual encounters with this boy or
2 with other boys?

3 MR. DAVIS: No. What essentially the court
4 allowed Mr. Halter to do was introduce half a
5 defense. The defense here was that the daughter,
6 [name redacted], had a motive to fabricate. She was
7 angry that her father had told her she couldn't
8 behave in a certain fashion and was also angry that
9 she - - -

10 CHIEF JUDGE LIPPMAN: So how did the
11 Myspace and the - - - how she dressed, relate to that
12 defense?

13 MR. DAVIS: Two ways. First, it makes her
14 motive to fabricate stronger. If her father has a
15 valid reason to be concerned that her behavior is
16 inappropriate for any thirteen-year-old, such that a
17 father would be concerned about this, that
18 strengthens his case because then she would have
19 knowledge, or at least belief, there's a chance she
20 could be removed from her mother's home.

21 But also what it does is it shows that her
22 father is not acting like you might expect a jealous
23 husband might, or he's acting like a pervert, with
24 his thumb over her, saying you can't dress in this
25 fashion, you can't do these things, because he's the

1 one who wants to have a sexual relationship with her.

2 JUDGE GRAFFEO: Well, the evidence got in
3 that she was at this boy's house all night, I take
4 it, correct, because the police found her there.

5 MR. DAVIS: Well - - -

6 JUDGE GRAFFEO: So it seems to me, the only
7 thing that's missing is that you wanted to introduce
8 that apparently either she did or perhaps she had sex
9 with this particular boy. But you've got quite a few
10 other instances that would certainly - - - could
11 contribute to her fabricating this. So - - -

12 MR. DAVIS: But the problem is that all
13 that - - -

14 JUDGE GRAFFEO: - - - I mean, do we need to
15 cast aside the Rape Shield Law in this type of case?

16 MR. DAVIS: First of all, the Rape Shield
17 Law, I would argue, doesn't apply to the Myspace
18 postings and her photograph and her statements. The
19 Rape Shield Law would only apply to what happens at
20 the boy's house.

21 JUDGE GRAFFEO: Right.

22 JUDGE CIPARICK: And that's all that was
23 precluded.

24 JUDGE GRAFFEO: That's what we're talking
25 about.

1 JUDGE CIPARICK: Everything else came in.

2 MR. DAVIS: No. The actual content of the
3 Myspace page didn't come in. What came in was the
4 fact that the father said that he was disgusted by
5 what came into the - - - what she had posted on her
6 Myspace page, was disgusted by the way she dressed.
7 But the actual way she dressed never came in.

8 And that's significant, because what
9 happened at the end of direct examination of [name
10 redacted] and also at the end of redirect, she said
11 specifically, I was never sexual with any guys. I
12 was tired of being accused of things I didn't do. So
13 what happens is, the People, then, are allowed to
14 present Mr. Halter as basically this controlling
15 pervert who's trying to manipulate his daughter and
16 argue - - - and the People argue in closing and say
17 do you really believe that he was trying to parent
18 this girl. They were able to argue that because they
19 hadn't been able - - -

20 JUDGE CIPARICK: I mean, we may agree with
21 you and say that the evidence would have been
22 relevant. But he certainly was able to put before
23 the judge - - - because this was a bench trial - - -
24 to put before the judge his claim that her anger may
25 have caused her to fabricate this, because she wanted

1 to get rid of her father, because she was afraid that
2 she was going to be put away at the Villa, or
3 someplace, where she was - - - for wayward girls, or
4 whatever.

5 MR. DAVIS: Yes.

6 JUDGE CIPARICK: So - - -

7 MR. DAVIS: But the problem is that her
8 actual behavior never actually came in. Why he was
9 angry never actually came in.

10 JUDGE SMITH: Well, let me - - - could I -
11 - - if I could go back to Judge Graffeo's question?

12 MR. DAVIS: Yes.

13 JUDGE SMITH: Did you - - - I mean, what
14 was - - - as I understand it, she testified - - - she
15 was permitted to ask and she testified that they
16 found her at noon the next day at the boy's house.
17 They didn't actually say that she spent the night - -
18 - I mean, he asked the question, didn't you spend the
19 night in his room, and the judge sustained an
20 objection, right?

21 MR. DAVIS: Yes.

22 JUDGE SMITH: Now, you might - - - in a
23 nonjury trial, you might think the judge figured it
24 out. Does that matter? Does it matter that it's a
25 nonjury trial; obviously he knew?

1 MR. DAVIS: No. First of all, the court
2 was - - - we presume that the judge follows the law
3 in a bench trial.

4 JUDGE SMITH: Yes. So - - -

5 MR. DAVIS: So if the judge is saying - - -

6 JUDGE SMITH: - - - you're saying we have
7 to presume that even if he knew it, he also
8 instructed himself to disregard it and did disregard
9 it?

10 MR. DAVIS: That's correct.

11 JUDGE SMITH: Yes.

12 MR. DAVIS: And in everything that the - -
13 - what's very significant in this case is that
14 everything that the defense tried to introduce, the
15 photograph where she was wearing revealing clothing
16 on the Myspace page, and her sexualized comments on
17 the Myspace page, none of it actually - - - not only
18 did it not come in; the judge never even allowed
19 defense counsel to give an offer of proof as to
20 actually what it should have been or what it actually
21 was. So there's no way to presume that this court
22 had any knowledge of what - - - how bad this Myspace
23 page actually was.

24 JUDGE SMITH: Do we - - - is there - - - do
25 we decide this exactly as we would at a jury trial,

1 if it were a jury trial?

2 MR. DAVIS: In this case, yes.

3 JUDGE SMITH: It's - - - I guess I'm
4 struggling with that. If the evidence gets in - - -
5 if evidence that shouldn't get in gets in, and it's a
6 bench trial, there are a lot of cases that say well,
7 the judge knows the law, so it doesn't matter. But
8 does it work in reverse when the evidence is kept
9 out?

10 MR. DAVIS: It has to.

11 JUDGE CIPARICK: And when there's been an
12 offer of proof to the judge. The judge does know
13 what the evidence is that you want to put in there.

14 MR. DAVIS: Right. But in this case, the
15 judge doesn't know that.

16 JUDGE SMITH: Okay. But suppose he did. I
17 mean, suppose - - - I mean, even if there's an offer
18 of proof, you still have the argument, don't you?
19 The judge is supposed to do what you're supposed to
20 do. He knows the evidence, but he's supposed to
21 disregard it.

22 MR. DAVIS: Well, the problem here in this
23 case goes back to the Williams case I discussed in my
24 brief, where the court never actually states why it
25 is he's keeping out the evidence. You have to sort

1 of parse and look at the statements actually made by
2 the court to determine whether the court was saying
3 this is actually protected by the Rape Shield Law, or
4 this is not protected, but is not relevant.

5 JUDGE SMITH: But did - - - I see that
6 point. But trial counsel never said, Judge, look at
7 that subsection. You have discretion. I want you to
8 admit it under that subsection.

9 MR. DAVIS: Well, I think it's clear from
10 the - - - there's two applications here. And they -
11 - - or two - - - or at least two or three. And the
12 first application before trial is I want to get into
13 what happens at this boy's house while she's
14 supposedly there from 7 p.m. till 10 a.m.

15 JUDGE SMITH: I mean, it's perfectly clear
16 that he wanted to get it in, and the judge kept it
17 out.

18 MR. DAVIS: Yes.

19 JUDGE SMITH: I'm not saying that's not
20 preserved. I'm saying you make a subtler argument,
21 which says that he never - - - he didn't act as
22 though he had discretion. Wasn't the lawyer supposed
23 to say, Judge, you've got discretion? If the lawyer
24 was thinking he's not exercising his discretion,
25 isn't he supposed to say, Judge, you're missing

1 something. This is a discretionary ruling?

2 MR. DAVIS: Well, I think one thing that's
3 clear from this record is that every time defense
4 counsel tried to make it clear to the court why this
5 should come in, the court says I'm not going to argue
6 it; I made my ruling.

7 JUDGE PIGOTT: He, yeah, he was a little
8 bit of a sword of Damocles. But if I understand what
9 you're saying, just making it a little simpler, if
10 the defendant wanted to say she retaliated against me
11 because I told her she had to be in by 7 and she
12 wasn't in by 7, no one's going to buy that. They're
13 going to say no kid's going to be that upset that
14 they would do that.

15 If, on the other hand, you say well, I
16 didn't like what was on her Myspace page, and me and
17 as an ignorant dad thinks we're talking about a game
18 of Angry Birds, but you wanted to bring in - - - the
19 defense wanted to bring in the fact of the way she
20 was dressed, that she was apparently soliciting older
21 - - - whether she had sex with them or not, she was
22 soliciting older boys; she was doing things that any
23 parent would have been really upset about and any kid
24 could conceivably be really upset about if he or she
25 were being prevented from doing what she wanted, and

1 that never got to the trier of fact.

2 MR. DAVIS: That's correct. And what
3 happened then was the defense - - - excuse me, the
4 People, then, were able to take advantage of that and
5 say - - - blame all of her behavior on the abuse,
6 instead of the fact that she was simply an out-of-
7 control thirteen-year-old.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MR. DAVIS: Thank you.

10 CHIEF JUDGE LIPPMAN: Let's hear from your
11 adversary.

12 JUDGE CIPARICK: Is the issue of the
13 recantations before us in any way? That motion was -
14 - -

15 MR. KAEUPER: No, no, Your Honor.

16 JUDGE CIPARICK: - - - denied. That's not
17 before us?

18 MR. KAEUPER: That's correct, Your Honor.
19 And - - -

20 JUDGE CIPARICK: Did that play a factor
21 here? Is that a factor for us to consider here at
22 all?

23 MR. KAEUPER: I don't think so. I mean, I
24 think there's an obvious reason for a daughter to
25 want her father out of prison. And it was very clear

1 in this case that although she wanted to - - - she
2 felt she needed to make these accusations to get him
3 to stop the abuse, but she didn't want him to go to
4 prison.

5 JUDGE PIGOTT: Well, you say that. And
6 that really gets down to the nub of it. And you
7 know, I get Rape Shield. I know you don't want to
8 denigrate a victim and use that to somehow absolve
9 the defendant. You don't want to say this is a slut,
10 this is a pig, this is a whore, or anything like
11 that. I get that.

12 But when you've got a father who says what
13 he wanted to put in, what's the problem? What's the
14 problem with saying she's on Myspace doing this
15 stuff, when it's a fact? I mean, it's not a
16 characterization. I mean, you can see the Myspace
17 page. You can see the stuff where she has
18 photographs of herself posted, where she's trying to
19 attract older boys, that she's lying about her age
20 and things like that.

21 What's wrong with letting a court, a trier
22 of fact, know, as Mr. Davis said, you've got an out-
23 of-control teen here? This is what I'm trying to do,
24 and she's fighting tooth and nail not to. I mean,
25 why is that Rape Shield?

1 MR. KAEUPER: Well, I think first of all,
2 there's a lot of evidence in here about her being an
3 out-of-control young woman. I don't think that's
4 really an issue - - -

5 JUDGE PIGOTT: No, no. But you want to get
6 to her motive to lie.

7 MR. KAEUPER: Right.

8 JUDGE PIGOTT: And so it's - - -

9 MR. KAEUPER: So her motive to lie has to
10 do with her subjective state of mind. She testifies:
11 I knew he would put me in the Villa. He made that
12 threat to me, and I knew he'd make good on it.

13 JUDGE SMITH: She also testified,
14 "Question: Why did you tell her on that date?" This
15 is the date she disclosed the abuse. "Answer:
16 Because my dad called me yelling at me and he was,
17 like, accusing me of being sexual with guys when I
18 wasn't."

19 Why didn't that open the door?

20 MR. KAEUPER: Well, there was no objection;
21 there was no - - -

22 JUDGE SMITH: No objection? Nothing
23 objectionable about the testimony. But why didn't
24 that open the door?

25 MR. KAEUPER: There was no claim that it

1 opened the door. I mean, maybe the defense could
2 have - - -

3 JUDGE SMITH: Isn't his whole point that
4 because - - - that it was critical in this case what
5 her conduct was that led him to yell at her and that
6 it may have motivated the criticism?

7 MR. KAEUPER: I don't think that was ever
8 the claim made at trial. The claim at trial was that
9 she was trying to protect this boy from a charge of
10 statutory rape. I think defense counsel makes that
11 very - - -

12 JUDGE SMITH: He did say that. But - - -
13 or she, I guess, was the trial counsel. But wasn't
14 she also saying that it goes to her motive to
15 fabricate?

16 MR. KAEUPER: Yes. The protecting him from
17 a potential charge of statutory rape - - -

18 JUDGE SMITH: Nothing about his being angry
19 at her because - - - her being angry at him because
20 he accused her falsely of being sexual? That's
21 exactly what she said.

22 MR. KAEUPER: Well, I mean, she - - - I
23 guess maybe I don't understand the question. But
24 it's - - -

25 JUDGE SMITH: I mean, it's a simple - - -

1 put aside preservation for a moment. Maybe it's
2 preserved, maybe it's not. Assume it's preserved.

3 MR. KAEUPER: Okay.

4 JUDGE SMITH: Victim is asked: "Why did
5 you accuse him on that date of raping you" Answer:
6 "Because he falsely accused me of having sex."

7 How can the defendant not be allowed to
8 litigate the question of whether the accusation was
9 false?

10 MR. KAEUPER: Well, I mean, I think her
11 motive to fabricate doesn't change whether it's - - -

12 JUDGE SMITH: So you're saying even apart
13 from preservation, when she says I wasn't having sex
14 with - - - I wasn't being sexual with guys, and she
15 says that that was part of her motive for making the
16 charge, the defendant may be barred from disproving
17 the statement?

18 MR. KAEUPER: Well, I don't know how she's
19 going to disprove that statement. I mean, the
20 request by the defense was to ask her - - -

21 JUDGE SMITH: Well, you could start with,
22 weren't you spending the night with Joey in his room.

23 MR. KAEUPER: Right, well - - -

24 JUDGE SMITH: That's a question that was
25 asked and objected to.

1 MR. KAEUPER: That's correct. Right. That
2 question was - - - the objection was sustained as to
3 whether she'd spent the entire room in his room.

4 JUDGE PIGOTT: But who are we shielding
5 there, I guess? I mean, I'm missing it. I mean,
6 you've got to - - - I mean, let's presume this guy is
7 innocent until he gets convicted. I mean, he's
8 saying I'm a father who wants to protect my daughter.
9 And there's these big, grizzly guys out there that
10 are five and six years older than she is, taking
11 advantage of her, and she doesn't get it. And I'm
12 trying to impress upon her that she should get it.
13 She gets mad and attacks me.

14 MR. KAEUPER: Right. And I think all of
15 that motive to fabricate gets out. She testified
16 he's threatening me to put me in the Villa. He says
17 this over and over again. I know he's going to make
18 good on it.

19 JUDGE PIGOTT: And there's reason - - - and
20 there's no basis for it. That's what she's saying.
21 She's saying he's making all these threats, and there
22 was no basis for it whatsoever. In fact, he was
23 probably doing that because he was sexually abusing
24 me and wanted to keep me from talking. And he wants
25 to say no, there's all this other stuff.

1 If she had put nude pictures of herself on
2 Myspace, would they get in?

3 MR. KAEUPER: I think those would be
4 protected by the Rape Shield Law.

5 JUDGE PIGOTT: And yet, if my daughter did
6 that, when I came down off the ceiling, I'm not sure
7 what I would do.

8 MR. KAEUPER: Well, but again I think - - -

9 JUDGE SMITH: Well, how - - - why does the
10 - - - I thought the Rape Shield Law, just as it
11 applies to clothing, is just for her dressing
12 provocatively to - - - you're not allowed to say
13 anymore, she was wearing a short skirt so it was fine
14 for me to rape her. That's - - - but here, that has
15 nothing to do with what happened here.

16 MR. KAEUPER: Well, but I think the claim -
17 - - and it's very clear, when she tries to get into
18 it in cross-examination, the claim here is this
19 Myspace page is a come-on to older men. She says
20 this is - - -

21 JUDGE SMITH: Yes, but not - - - no claim
22 that it was a come-on to the defendant.

23 MR. KAEUPER: No, no, no. Certainly not.

24 JUDGE PIGOTT: That's the point. The point
25 is he's got a - - - is he's got a motive to do what

1 he does in terms of trying to punish her. And she's
2 saying it's not true. She doesn't - - - he doesn't
3 have a motive, except that he abused me. And so he
4 was - - -

5 MR. KAEUPER: Well, but he - - - but he
6 doesn't know it either. I mean, he has no more
7 information about whether she's actually having sex
8 with this boy than - - -

9 JUDGE PIGOTT: And he doesn't care. He
10 doesn't care. He wants to say I saw the Myspace
11 page. I saw the - - - her pretending to be older
12 than she is, soliciting older boys, and none of that
13 could come in.

14 MR. KAEUPER: Right. So whether he's right
15 or not makes no difference, because he's the - - -

16 JUDGE PIGOTT: The judge - - - the judge
17 doesn't know that that's what he's doing. All he
18 thinks is, okay, she's got a Myspace page; so does
19 every other kid in the world. And they're all out
20 there playing Angry Birds and sending notes to each
21 other. I'm not going to let that in if you're going
22 to talk about sex.

23 MR. KAEUPER: Well, he doesn't - - - he
24 doesn't let the actual photos in. But the general
25 contents of this page are very clear from the record.

1 JUDGE PIGOTT: Well, if I got my notes
2 right, he wouldn't let it in.

3 MR. KAEUPER: Well, he wouldn't let in a
4 particular photo, but it's clear that the Myspace
5 page contains provocative photos of her. He refers
6 to it as disgusting and so forth. And I think this,
7 in some ways, goes maybe to Judge Smith's question
8 about - - -

9 JUDGE PIGOTT: Let me interrupt you just
10 for a minute. It says - - - my note says, however
11 defense counsel was not allowed to elicit whether the
12 Myspace page contained content about sex or about
13 boys, the nature of the photographs of herself that
14 [name redacted] had posted on Myspace, whether she
15 was trying to attract older people, i.e., boys on
16 Myspace, whether she had boyfriends who were older
17 than she was, whether she posted on Myspace that she
18 had three boyfriends, whether she spent the night at
19 Joey's, whether she had told her mother that she had
20 been out all night with a sixteen-year-old, or how,
21 precisely, she dressed. None of that came in.

22 MR. KAEUPER: Right. But all of those
23 questions were asked, and then objections were
24 sustained. Which - - -

25 JUDGE SMITH: But does it matter - - -

1 JUDGE PIGOTT: I see what you're saying.

2 JUDGE SMITH: - - - what does it matter
3 that it was a nonjury trial?

4 MR. KAEUPER: Well, because I think here we
5 have the judge making a discretionary call. So the
6 judge, as both controller of the law and as fact-
7 finder is in the perfect position to say, okay, you
8 just told me what the evidence is going to be. Now,
9 is it important to my decision as fact-finder - - -

10 JUDGE SMITH: Okay, well, maybe. But - - -
11 I see that point. And it probably describes the
12 reality very much. I can see logically he's saying,
13 look, I understand this girl was not absolutely the
14 most Victorian of children, and I don't want you
15 harassing her for a half an hour on the subject. I
16 get it.

17 But technically, isn't your adversary right
18 when he says we have to assume that if he kept it out
19 of evidence, he paid no attention to it, whether he
20 knew it or not?

21 MR. KAEUPER: Right. But we also have to
22 assume that he's considering that potential evidence
23 and its effect on - - -

24 JUDGE PIGOTT: Well, that would be - - -

25 MR. KAEUPER: - - - the defense of motive -

1 - -

2 JUDGE PIGOTT: - - - that would be error.

3 JUDGE SMITH: I think not. If he thinks
4 it's barred by the Rape Shield Law, he should not be
5 considering its effect on him at all.

6 MR. KAEUPER: But not in the sense of
7 determining the facts, but in terms of making the
8 decision of whether it comes in. If he's looking at
9 this evidence and says boy, if that comes in, I'm
10 going to find that she fabricated - - -

11 JUDGE SMITH: What about - - -

12 MR. KAEUPER: - - - he's going to let it
13 in.

14 JUDGE SMITH: - - - what about the - - -
15 how's the Appellate Division supposed to review the
16 facts if he keeps it all out because he doesn't think
17 it's - - - he says maybe it's admissible, but it
18 doesn't do it for me, and I'm the fact-finder, so I'm
19 keeping it out. What about the Appellate Division?

20 MR. KAEUPER: I think you judge it based
21 upon the specific request made. And here, what we
22 have is maybe she was having sex with this boy, and
23 if she was having sex with this boy, maybe she was
24 afraid of a statutory rape charge for no reason.

25 JUDGE PIGOTT: No, no, no, no, no. No. He

1 was that upset because of all of this stuff, and
2 that's why he got so angry with her, and that's why
3 she reacted the way she did, because she knew what he
4 knew was true. And he - - - and she may end up in
5 Villa. And the way to operate to prevent that is to
6 get him out of the house. That's what the - - -

7 MR. KAEUPER: I see the red light, but can
8 I answer the question?

9 CHIEF JUDGE LIPPMAN: Go ahead. Go ahead.

10 MR. KAEUPER: I think that would be true if
11 - - - I mean, if he knew that she was having sex,
12 that might be a different case. He doesn't know
13 whether she's having sex. He's thinking she may be
14 having sex. And we get out the fact that he thinks
15 she may be having sex. He says after she comes back,
16 I told her we need to go to Planned Parenthood. All
17 this stuff about what he's thinking comes out. And
18 everything comes out about what he's threatening her
19 and what she thinks about the reality of those
20 threats.

21 JUDGE SMITH: What he says he's thinking
22 comes out. She says he's lying. I was not having -
23 - - I was not being sexual with boys. In fact, he's
24 just an abuser trying to cover up. Shouldn't the
25 finder of fact have all the evidence that's relevant

1 to decide whether that's true or not?

2 MR. KAEUPER: Well, I mean, that's what
3 would have come out if he had been able to ask the
4 question. He would have asked the question, and she
5 would have said no. It would have been the same.

6 CHIEF JUDGE LIPPMAN: Okay.

7 JUDGE SMITH: But how do we know that?

8 CHIEF JUDGE LIPPMAN: Judge Smith, go
9 ahead.

10 JUDGE SMITH: How do we - - - I mean, yeah.
11 Actually, if he asked the question, did you spend the
12 night in Joey's room, she might not have said no.
13 She might very well have said yes.

14 MR. KAEUPER: I could be wrong, but I think
15 there may be an indication in the record that she
16 denies that - - -

17 JUDGE SMITH: Okay. But I guess what I'm
18 really saying is, isn't he allowed to make her say no
19 and see how believable it is and test it and - - -
20 look, for all we know, he's Perry Mason who in seven
21 questions on cross-examination, she could be saying
22 oh, I lied, I made up the whole thing.

23 MR. KAEUPER: I don't think so. I think
24 here the Rape Shield has to protect this. He gets
25 out enough of the motive to lie; the fact that this

1 would have been relevant to that is not, I think, the
2 standard for the Rape Shield. And if that were the
3 standard, the result would have been different - - -

4 JUDGE SMITH: So you're - - -

5 MR. KAEUPER: - - - in Williams or Halbert.

6 JUDGE SMITH: - - - so you say the Rape
7 Shield does keep out relevant evidence?

8 MR. KAEUPER: Absolutely.

9 JUDGE SMITH: There's got to be a limit to
10 that. It can't keep out very relevant evidence, can
11 it?

12 MR. KAEUPER: Absolutely. And if he had
13 actually been deprived of being able to really mount
14 this defense - - - but I submit that he did mount
15 this defense of motive to fabricate.

16 CHIEF JUDGE LIPPMAN: Okay, thank you.

17 MR. KAEUPER: Thank you.

18 CHIEF JUDGE LIPPMAN: Thanks, counselor.
19 Counselor?

20 MR. DAVIS: Just two things. First, this
21 court decided in 1979 in Mandel that a swinger
22 photograph was not protected by the Rape Shield Law.
23 So a person posting even a completely naked
24 photograph of themselves on Myspace, even engaged in
25 some sort of autoerotic behavior, would not be

1 early on about the 440. And what's the relevance
2 there? I mean, she did recant. I mean, is it part
3 of your argument that maybe a better cross-
4 examination, she wouldn't have had to, because she
5 would have told a different story at the trial?

6 MR. DAVIS: Well, yes. I mean, in this
7 particular case, where had defense counsel been able
8 to cross-examine her as to what actually happened
9 during those fifteen hours with Joey - - - and in
10 this case, this is distinguishable from Halbert which
11 the People cite, because in that case, this court
12 said that there was both an emotional and a sexual
13 relationship with this third party, and the defendant
14 was allowed to get into the emotional relationship.
15 So she was allowed to - - - defense counsel was
16 allowed to cross-examine the person that she moved
17 out of her mother's house because she was in love
18 with this nineteen-year-old boy. All that was
19 precluded was the sexual aspect.

20 Here, for most of the day, whatever her
21 activities were, the court refused to allow defense
22 counsel to get into it at all. This is a case, just
23 like Davis v. Alaska and Olden v. Kentucky, where the
24 defendant - - -

25 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

1 Finish your thought.

2 MR. DAVIS: - - - where the defendant,
3 knowing that she's protected by the statutory shield,
4 says stuff that is - - - if either is not ridiculous
5 on its face, certainly could be probed through cross-
6 examination and be shown to - - -

7 CHIEF JUDGE LIPPMAN: Okay, thanks.

8 MR. DAVIS: - - - marginally. Thank you.

9 CHIEF JUDGE LIPPMAN: Appreciate it. Thank
10 you both.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Robert C. Halter, No. 181 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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