

FRESH COMPLAINT¹

In this case, you heard testimony that sometime after the alleged sexual offense, (name) complained to _____ about what had taken place. More particularly, there was testimony that... (The court should specify for the jury the particular testimony to which the fresh complaint rule applies.²)

The law recognizes that people might assume that anyone subjected to a sexual offense would complain within a reasonable time to someone whom (he/she) would ordinarily turn for sympathy, protection or advice. If there was no evidence that (name) made such a complaint, some might conclude that no sexual offense occurred.

As a result, in cases involving an allegation of a sexual offense, the State is permitted to introduce evidence of the complaint.³ The only reason that the evidence is permitted is to negate the inference that (name) failed to confide in anyone about the sexual offense. In other words, the narrow purpose of the fresh-complaint rule is to allow the State to introduce such evidence to negate any inference that (name) failed to tell anyone

¹ See State v. Hill, 121 N.J. 150 (1990) and State v. Bethune, 121 N.J. 137 (1990). In State v. Hill, *supra* at 166 and 170, the Supreme Court recognized that the fresh-complaint doctrine was “rooted in sexist notions of how the “normal” woman responds to rape.” It acknowledged that a woman might, in fact, “respond to rape in a variety of ways, including silence.” In State v. Bethune, *supra* at 148, the Court noted that a young child might, also, “not tell anyone of sexual abuse for a myriad of reasons, including fear, ignorance, or confusion.” The Court, nonetheless, concluded “that women victims are better served by the continuance of the fresh-complaint doctrine than by its elimination.” State v. Hill, *supra* at 170. It served to neutralize jurors’ negative inferences concerning the woman’s silence after having been raped. This model charge provides instructions on “fresh-complaint” based on the state of the law as it is set forth in these two cases.

The Supreme Court also referred “to the Court’s standing Committee on the Rules of Evidence and the Court’s Criminal Practice Committee the task of recommending proposed procedures relating to the admissibility in the State’s case of fresh-complaint evidence, defendant’s right to elicit and rely on the absence of fresh-complaint, and the desirability of special instructions dealing with the issue.” *Ibid* at 166. The Committee issued its report for the Court’s consideration on March 22, 1996.

² State v. J.S., 222 N.J. Super. 247, 257 (App. Div. 1988).

³ See State v. Balles, 47 N.J. 331, 339 (1966), where the Court found acceptable, “she said Mr. Balles had put his hands down her panties and had touched here.” See also State v. Gambutti, 36 N.J. Super 219, 228 (App. Div. 1955) and State v. Saccone, 7 N.J. Super. 263, 266 (App. Div. 1950), “enough may be given in evidence to show the nature of the complaint, even though it involves to some extent the particulars thereof, and that the rule is not violated by evidence as to the time and place where the complaint was made, the circumstances under which it was made, and the person to whom made, the condition of the victim when making the complaint, the conduct of the prosecutrix at the time she made complaint, and that she exhibited, if such was the fact, marks of violence and other like indications...” See also State v. J.S., 222 N.J. Super. 247, 254 (App. Div. 1988) where the court concluded that the fresh-complaint testimony in that case improperly contained “highly provocative” details not otherwise supported in the record.

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about the sexual offense, and that, therefore, (his/her) later assertion could not be believed.⁴

A fresh-complaint is not evidence that the sexual offense actually occurred, or that _____ (name) _____ is credible. It merely serves to negate any inference that because of (his/her) assumed silence, the offense did not occur.⁵ It does not strengthen (his/her) credibility. It does not prove the underlying truth of the sexual offense. A fresh-complaint only dispels any negative inference that might be made from (his/her) assumed silence.⁶

In determining whether a complaint was in fact made, you may consider all the relevant factors in evidence. You may consider your observations of the age and demeanor of _____ (name), your evaluation of (his/her) background, including (his/her) relationship, if any, with the defendant and the nature of (his/her) relationship with _____ (the person to whom the complaint was made). In this context, you may consider the timeliness of the complaint and the likelihood that _____ (name) _____ would complain under the circumstances described. If there was a delay in making the complaint, you may consider whether any circumstances existed which would explain the delay. You may consider the conduct and demeanor of _____ (name) _____ at the time of the complaint as well as (his/her) physical or mental condition (including any evidence of physical injury).

You may also consider whether the complaint was volunteered by _____ (name) _____ or whether it was the result of interrogation. If you find that _____ (name) _____ made the complaint after being questioned, you may consider what prompted the questioning, whether the questions were in response to some conduct, emotional or physical condition, statement or pattern of behavior of _____ (name) _____, or whether they were initiated by the questioner without any provocation. You may also consider the nature and extent of the questions themselves and any motive on the part of the person who asked them in determining whether the complaint was truly that of _____ (name) _____ or was the product of suggestion by others.

It is, of course, up to you to determine what the facts are with regard to the circumstances of the complaint and what weight to give to these facts in determining whether or not a complaint was made.

⁴ State v. Hill *supra* at 159.

⁵ State v. Bethune, *supra* at 149.

⁶ Id. at 148.

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As I have indicated earlier, this testimony was permitted for a limited purpose. The making of a complaint is not an element of the offense. Proof that a complaint was made is neither proof that the sexual offense occurred nor proof that _____ (name) _____ was truthful. It merely dispels any negative inference that might arise from (his/her) assumed silence. It eliminates any negative inference that (his/her) claims of having been sexually assaulted are false because of (his/her) assumed failure to have confided in anyone about the sexual offense.