



First step in showing defendant is gay rejected, for now

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With jurors out of the courtroom during the trial of two defendants in the 2006 Michael J. Sandy homicide, Gerald J. Di Chiara, the attorney for one defendant, 21-year-old Anthony Fortunato, said he should be allowed to show the jury a billing document from his client's Internet service provider.

Di Chiara sought to put the document into evidence on September 18 one day after he asserted in his opening statement that Fortunato, who is charged with an anti-gay hate crime, is gay.

The document, which had Fortunato's screen name, stabthebeast, on it would show a very active Internet account and Di Chiara might link the screen name, if he can introduce the billing document, to his client's secret trysts with other men. Police seized homoerotic pictures and content from Fortunato's computer.

"It's relevant on a very basic level because it's on my client's computer," Di Chiara told Jill Konviser, the judge in the case. She agreed with the prosecution's objection and would not allow the record to come in, but permitted Di Chiara to seek to introduce it later.

"I'm still confused as to the relevance of your client's sexuality in this case," Konviser said.

The gay revelation in Di Chiara's opening was the featured element in press coverage of the trial's first day, but what impact it may have in the case is entirely unclear. Obviously, the defense thinks it's important, but others agree with Konviser.

"I think it's absolutely immaterial to the decisions and planning that they made that night," said Clarence Patton, executive director of the New York City Gay and Lesbian Anti-Violence Project. "Certainly Fortunato could be gay, we don't know that... That has no bearing on the fact that they selected Michael because he was gay and they thought he would be an easy mark."

Fortunato and the second defendant, John Fox, 20, are charged with two counts of second-degree murder, one as a hate crime, four counts of attempted robbery with two as hate crimes, two manslaughter counts, one as a hate crime, and two assault counts, one as a hate crime. They are being tried together, but with separate juries.

Allegedly, Fox, Fortunato, and Gary Timmins, 17, contacted Sandy, a gay African American, on October 8 through an online gay chatroom for an encounter. They were later joined by Ilya Shurov, 21, when they went to meet Sandy.

The Brooklyn prosecutor has charged that they planned to rob Sandy and that selecting a gay man thinking he would be easier to rob made this a hate crime. During that robbery they allegedly caused Sandy's death after they chased him onto a highway near Plumb Beach, the prosecutor charged.

Shurov faces the same charges as Fox and Fortunato, but will be tried later. Timmins pleaded guilty last year to one count of attempted robbery as a hate crime and is cooperating with the prosecution in exchange for a four-year sentence.

A hate crime under New York law occurs when a person "intentionally selects" a victim based on a "belief or perception regarding" the victim's membership in a protected class, including sexual orientation.

"The law is quite clear that you are guilty of a hate-motivated offense if you intentionally select a victim because of their race, religion, sexual orientation, etc." said Matt Foreman, executive director of the National Gay and Lesbian Task Force. "A gay person can be guilty of an anti-gay crime, of course."

Foreman headed the Empire State Pride Agenda, the statewide gay lobbying group, from 1997 to 2003 and was involved in passing the 2000 state hate crime law.

The prosecution will introduce evidence that Fortunato had robbed gay men before and the defense may argue that those were, in fact, sexual encounters. The defense may also argue that a gay man would be less likely to commit a hate crime against another gay man to negate the hate crime tag.

On the murder count, the hate crime label increases the minimum sentence from 15-to-life to 20-to-life. According to the state corrections department, the average time served for murder is just under 25 years which suggests that, at least on the top count, the hate crime label may not impact their prison time should Fox and Fortunato be convicted of murder.

For Patton, Di Chiara's assertion that his client is gay may suggest that the prosecution has a very strong case and the defense is struggling.

"I do think the decision to disclose it at this point reflects the somewhat desperate nature of the defense," he said.

Foreman said it would not work.

"It sounds to me like this defendant wants to worm his way out of his involvement in a hate crime by saying he's gay, which just doesn't wash," he said.