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1995 Supreme Court of Rhode Island Survey: Criminal Law

William T. Carline III
Roger Williams University School of Law

Heather L. Pearlman
Roger Williams University School of Law

Whitney A. Curtis
Roger Williams University School of Law

Kenneth K. McKay IV
Roger Williams University School of Law

Criminal Law. *In re Advisory Opinion to the Governor*, 666 A.2d 813 (R.I. 1995). The Rhode Island Constitution article I, section 10 does not mandate that the State provide free counsel to indigent defendants when incarceration will not actually be imposed on the defendant.

The Rhode Island Constitution, article I, section 10 provides that "[i]n all criminal proceedings, accused persons shall . . . have the assistance of counsel in their defense."[1] This is the state counterpart to the Sixth Amendment right to counsel guarantee in the United States Constitution.[2] In an effort to clarify the constitutional requirements under the Rhode Island Constitution, the Rhode Island Supreme Court, in *In re Advisory Opinion to the Governor*,[3] agreed to answer the question presented by the Governor regarding indigent defendants' right to counsel. In its opinion, the Rhode Island Supreme Court answered that, absent potential imprisonment, article I, section 10 of the Rhode Island Constitution does not require that the state provide counsel to indigent defendants.

FACTS AND TRAVEL

The Governor of the State of Rhode Island is under a constitutional obligation to "prepare and present to the General Assembly an annual, consolidated operating and capital improvement state budget."[4] Additionally, the Governor has the obligation to make certain modifications to balance the budget during any given fiscal year[5] which may include the allocation of state funds for providing indigent defendants with counsel for their defense.[6]

In light of the Supreme Court of Rhode Island's Executive Order No. 94-02-E.O. dated June 27, 1994[7] and in accordance with

1. R.I. Const. art. I § 10.
2. U.S. Const. amend. VI.
3. 666 A.2d 813, 816 (R.I. 1995).
4. R.I. Const. art. IX § 15.
5. R.I. Gen. Laws § 35-3-16 (1994).
6. *Id.*
7. *Advisory Opinion*, 666 A.2d at 815 (The Chief Justice of the Supreme Court issued an executive order "prohibiting appointment of counsel to assist indigent litigants 'save where constitutionally required' ").

article I, section 3 of the Rhode Island Constitution,[8] the Governor of the State of Rhode Island requested an advisory opinion from the supreme court. Presented before the court was the following question:

> In view of the historical development of the law relating to the right of appointed counsel under the federal and state constitutions, and the more recent developments in federal case law, is the State of Rhode Island required by the Rhode Island Constitution to provide free legal counsel to indigents notwithstanding that the trial court justice determined that no incarceration will be imposed?[9]

BACKGROUND

The Sixth Amendment to the United States Constitution mandates that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[10] In *Gideon v. Wainwright*,[11] the Supreme Court held that the constitutional right to counsel requirement was applicable to the states through the Fourteenth Amendment,[12] yet did not outline the actual boundaries of the right.[13] Subsequently, in *Argersinger v. Hamlin*,[14] the Supreme Court determined that the right to counsel extended to all indigent misdemeanor defendants when faced with a potential jail sentence. Seven years later, in *Scott v. Illinois*[15] the Court addressed the question of whether an indigent facing no term of imprisonment was entitled to appointed counsel. The *Scott* court held that the Sixth Amendment requires "only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to the assistance of appointed counsel in his defense."[16] The Supreme Court recently re-

8. The Rhode Island Constitution article X, section 3, provides that "[t]he judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly." R.I. Const. art. X § 3.

9. *Advisory Opinion*, 666 A.2d at 814.

10. U.S. Const. amend. VI.

11. 372 U.S. 335 (1963).

12. *See* U.S. Const. amend. XIV, § 1.

13. *Gideon*, 372 U.S. at 335.

14. 407 U.S. 25 (1972).

15. 440 U.S. 367 (1979).

16. *Id.* at 374.

affirmed the holdings of *Argersinger* and *Scott* in *Nichols v. United States*.[17]

The Rhode Island Constitution, article I, section 10 provides that "[i]n all criminal proceedings, accused persons shall . . . have the assistance of counsel in their defense."[18] In 1971, the Rhode Island Supreme Court examined the right to counsel provision of the Rhode Island Constitution in *State v. Holliday*.[19] In *Holliday*, the court interpreted the state constitutional right to counsel more broadly than its federal counterpart so as to require the appointment of counsel to indigent defendants charged with misdemeanors that carry a potential imprisonment in excess of sixth months, even where no such imprisonment was to be actually imposed.[20] After its decision in *Holliday*, the Rhode Island Supreme Court twice again confronted the right to counsel issue, in *State v. Moretti*[21] and in *State v. Medeiros*.[22] In both instances, the court followed the *Holliday* decision "uncritically."[23]

ANALYSIS AND HOLDING

Although the federal standard may represent a minimum threshold requirement of protection, in that states may impose greater protection under their own constitutions, the Rhode Island Supreme Court has generally interpreted other Rhode Island Constitutional guarantees to be coextensive with the United States Constitution.[24] In *Advisory Opinion*, the court cautioned that anytime a Rhode Island constitutional provision is to be interpreted as providing more protection than the federal counterpart, such deci-

17. 114 S.Ct. 1921 (1994).

18. R.I. Const. art. I § 10.

19. 280 A.2d 333 (R.I. 1971).

20. *Id.* at 336-37.

21. State v. Moretti, 521 A.2d 1003 (R.I. 1987).

22. State v. Medeiros, 535 A.2d 766 (R.I. 1987).

23. In re Advisory Opinion to the Governor, 666 A.2d 813, 816 (R.I. 1995).

24. *See* State v. Werner, 615 A.2d 1010 (R.I. 1992) (holding the protection of article I, section 6 of the Rhode Island Constitution was identical in scope to the federal counterpart); Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734 (R.I. 1992) (the equal protection guarantees of article I, section 2, of the Rhode Island Constitution are like that of the U.S. Constitution); State v. Diaz, 521 A.2d 129 (R.I. 1987) (holding the same for the double jeopardy clause of the Rhode Island Constitution article I, section 7 and the Fifth Amendment).

sion "should be made guardedly and supported by a principled rationale."[25]

The court explained that at the time when *Holliday* was decided, the court "had no means of ascertaining the direction [of] the Supreme Court."[26] However, by the time of the writing of the *Advisory Opinion*, the *Argersinger* and *Scott* cases made clear the United States Supreme Court's position that the Sixth Amendment affords free legal counsel only where an indigent defendant faces a potential jail sentence. In light of these decisions, the Rhode Island Supreme Court held that the Rhode Island Constitution does not afford an indigent defendant any greater protection than the United States Constitution, thus overruling its decisions in *Moretti* and *Medeiros*.

CONCLUSION

Given that this is an advisory opinion to the Governor, the precedential value of the opinion may be limited. Nevertheless, the opinion remains instructive as to whether the Rhode Island Constitutional provision for the right to counsel is coextensive with the United States Constitution as interpreted by the Supreme Court in *Scott*. Accordingly, the State of Rhode Island is not required under the Rhode Island Constitution article I, section 10 to provide free counsel to indigents when incarceration will not actually be imposed on the defendant. The right to counsel guarantee under the Rhode Island Constitution is to be interpreted according to the United States Supreme Court's holdings in *Gideon, Argersinger, Scott*, and *Nichols*.

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25. *Advisory Opinion*, 666 A.2d at 816 (quoting State v. Benoit, 417 A.2d 895, 899 (R.I. 1980)).

26. *Id.*

Criminal Law. *State v. Beeley*, 653 A.2d 722 (R.I. 1995). An intervenor is justified in using reasonable force to defend another as long as the intervenor reasonably believes that the other is being attacked.

Prior to the decision of *State v. Beeley*, an intervenor was excused for his actions in defense of another only if the person he was aiding would have been justified in acting. Under the rule adopted in *Beeley,* Rhode Island now allows the finder of fact to consider the intervenor's subjective perception of the circumstances instead of limiting the inquiry to an entirely objective analysis.

FACTS AND TRAVEL

The defendant, James Beeley, (Beeley) was tried and convicted of breaking and entering and of simple assault in the Rhode Island Superior Court for an incident that occurred on May 19, 1991.[1] At approximately 4:00 a.m. on that day, Beeley drove his friend John Perry to an apartment where Perry had told Beeley he lived. The two had just finished playing cards at another friend's house, and Perry invited Beeley to spend the night because it was so late. Beeley agreed, dropped Perry off, and went to park the car.[2] Beeley testified that when he arrived at the apartment, he waited outside because he could hear Perry and his wife yelling.[3] He banged on the apartment door, which opened, and Beeley could see Perry being grabbed around the waist by a naked man. Beeley did not know who this man was or what he was doing in the apartment. According to Beeley, Perry was crying and yelled "[t]his is the guy."[4] Beeley then hit the man once to break his hold on Perry.[5] Perry's wife then called the police and Beeley took Perry outside until the police arrived.[6]

Beeley was convicted of breaking and entering and simple assault by a jury in Rhode Island Superior Court.[7] On appeal, Beeley first contended that the trial justice erred in denying his motions

1. State v. Beeley, 653 A.2d 722, 723 (R.I. 1995).
2. *Id.*
3. *Id.* at 724.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 723.

requesting judgment of acquittal with respect to the charge of breaking and entering.[8] Beeley averred that he was entitled to a judgement of acquittal on the breaking and entering charge based on four theories.[9] The supreme court concluded that after viewing the evidence in the light most favorable to the State, a judgment of acquittal was improperly denied because the record was "wholly lacking any evidence that Beeley exerted force to effectuate a break-in."[10]

Beeley next argued on appeal that he was entitled to a new trial on the charge of simple assault.[11] The court examined the principal question of "whether an intervenor in an altercation between private individuals should be judged by his or her own reasonable perceptions or whether he or she stands in the shoes of the person that he or she is defending?"[12]

BACKGROUND

While the court had addressed the issue of defense to third parties on several occasions, most of those cases have involved a defendant-intervenor aiding another in the context of an arrest situation.[13] The first case in Rhode Island to address this issue was *State v. Small.*[14] In *Small,* the court held that a defendant does not have the right to use force against a police officer in circumstances in which it is obvious that the third person had no such right.[15] The Rhode Island Supreme Court adopted this rule from *United States v. Davis,*[16] wherein the 5th Circuit held that a defendant was not entitled to be acquitted of a charge of assaulting a

8. *Id.*

9. *Id.* at 724. Beeley's four theories were 1) that he did not break in, but merely entered the apartment though an open doorway; 2) there was no evidence that Beeley had any awareness of how Perry entered the apartment; 3) Perry had a right to enter the apartment which was still legally his marital domicile and, therefore, Perry's invitation to Beeley to enter the apartment constituted consent in law, and 4) there was no trespass because the evidence demonstrates that Beeley believed that Perry and his wife had been living together as husband and wife. *Id.*

10. *Id.* at 725.

11. *Id.*

12. *Id.* at 726.

13. *Id.*

14. 410 A.2d 1336 (1980).

15. *Id.*

16. United States v. Davis, 423 F.2d 974, 975-76 & n.1 (5th Cir. 1970), *cert. denied*, 400 U.S. 836 (1970).

federal officer, despite the fact that he was acting to prevent death or injury to his father.[17]

In the same year *Small* was decided, the Rhode Island Supreme Court, in *State v. Gelinas*,[18] adopted the rule that "one who comes to the aid of an arrestee must do so at his own peril and should be excused only when the individual would himself be justified in defending himself from the use of excessive force by the arresting officer."[19] In other words, "the defendant may use such force to prevent injury to the person he aids as defendant would use in self-defense."[20] The conclusions reached in *Small* and *Gelinas* were affirmed in 1982 in *State v. Aptt*.[21]

ANALYSIS AND HOLDING

The court first noted that there are two rules followed by American jurisdictions in determining whether a defendant is justified in defending a third party.[22] The first rule is a purely objective standard called the "alter ego rule," which holds that the right to defend another is coextensive with the other's right to defend himself or herself.[23] This is the rule which the trial court applied in the instant case.[24]

Other jurisdictions follow the Model Penal Code, which infuses a subjective element into the defense.[25] The Model Penal Code states that as long as the defendant-intervenor reasonably believes that the other is being unlawfully attacked, he or she is justified in using reasonable force to defend him or her.[26]

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17. *Id.*
18. 417 A.2d 1381 (R.I. 1980).
19. *Id.* at 1386.
20. *Id.* (citing Model Penal Code § 3.05 (Tent. Draft No. 8, 1958)); *See infra* note 21.
21. 441 A.2d 824 (R.I. 1982).
22. *Beeley*, 653 A.2d at 726.
23. *Id.*
24. *Id.* at 727.
25. *Id.* at 726.
26. Model Penal Code § 3.05, entitled "Use of Force for the Protection of Other Persons" provides:

> (1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:
>
> (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and

The supreme court concluded that the Model Penal Code's approach is the better view.[27] The court stated that it "favors the doctrine which judges a defendant upon his or her own reasonable perceptions as he or she comes to the aid of the apparent victim."[28] This reasoning is "predicated on the social desirability of encouraging people to go to the aid of third parties who are in danger of harm as a result of unlawful actions of others."[29] The court concluded that not only as a matter of justice should one "not be convicted of a crime if he selflessly attempts to protect the victim of an apparently unjustified assault, but how else can we encourage bystanders to go to the aid of another who is being subjected to assault?"[30] Moreover, the court believed that to impose liability upon the defendant-intervenor in these circumstances is to impose liability upon him without fault.[31]

In the instant matter, the court adopted the rule that an intervenor is justified in using reasonable force to defend another as long as the intervenor reasonably believes that the other is being attacked.[32] However, the court reserved the *Gelinas* rule solely for defendant-intervenors in an arrest situation.[33] Accordingly, the court vacated the judgements of conviction against Beeley and remanded the case to superior court for a new trial on the assault charges.[34]

CONCLUSION

Prior to *Beeley*, an intervenor was excused for his actions only if the person he was aiding would have been justified in acting in self defense. In *Beeley*, the court infused a subjective element into the defense of using force for the protection of other persons. The court acknowledged in *Beeley*, that the new rule is "predicated on

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(b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
(c) the actor believes that his intervention is necessary for the protection of such other person. Model Penal Code § 3.05(1) (Adopted 1962).

27. *Beeley*, 653 A.2d at 726.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 727.
34. *Id.*

the social desirability of encouraging people to go to the aid of third parties who are in danger of harm as a result of unlawful actions of others."[35]

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35. *Beeley*, 653 A.2d at 727 (quoting Commonwealth v. Monico, 366 N.E.2d 1241, 1244 (Mass. 1977)).

Criminal Law. *State v. Griffith*, 600 A.2d 704 (R.I. 1995). A trial justice must instruct the jury on mens rea unless there is strict liability via the statutory language.

A trial justice must instruct a jury on all elements of an offense, including the mens rea of the defendant. Mens rea is defined as a guilty knowledge and wilfulness.[1] In *State v. Griffith*, the Supreme Court of Rhode Island determined that a trial justice is under a specific duty to instruct the jury on the mens rea, despite the fact that the statute did not specifically address intent.[2]

FACTS AND TRAVEL

Ralph Griffith was convicted of first degree child molestation sexual assault under Rhode Island General Laws section 11-37-8.1.[3] During jury instructions, the trial judge read the statute to the jury as well as the standard of proof required in order for a jury to convict the defendant under section 11-37-8.1.[4] The standard of proof is that the jury must find, beyond a reasonable doubt, that the defendant engaged in sexual penetration and the victim was under fourteen years of age.[5] However, the trial judge did not describe the intent or mens rea required to convict a defendant under the first degree child molestation sexual assault charge.[6] The jury returned a guilty verdict against the defendant on one count of first degree child molestation sexual assault.[7]

The defendant appealed, alleging the trial judge erred as a result of his failure "to instruct the jury that the state must prove beyond a reasonable doubt that defendant's acts were for the purpose of his own sexual arousal or gratification."[8] In other words, the defendant alleged the trial judge erred in failing to instruct the

1. United States v. Greenbaum, 138 F.2d 437, 438 (3rd Cir. 1943); *See* Model Penal Code § 2.02.

2. State v. Griffith, 660 A.2d 704, 706-07 (R.I. 1995).

3. *Id.* R.I. Gen. Laws § 11-37-8.1 1956 (1981 Reenactment) *as amended by* 1984 R.I. Pub.Law ch. 5, § 2 which provides: A person is guilty of first degree sexual assault if he or she engages in sexual penetration with a person fourteen (14) years of age or under.

4. *Griffith*, 660 A.2d at 706-07; R.I. Gen. Laws § 11-37-8.1 (G.L.1956).

5. *Griffith*, 660 A.2d at 706.

6. *Id.* at 707; R.I. Gen. Laws § 11-37-8.1 (G.L.1956); *See supra* note 3.

7. *Griffith*, 660 A.2d at 706.

8. *Id.*

jury that the state had to prove the defendant's intent or mens rea.[9] The issue on appeal was whether a trial judge is required to instruct a jury on intent/mens rea in cases of first degree sexual assault where the statute does not speak to intent or mens rea of the defendant.

BACKGROUND

The Rhode Island Supreme Court held in *State v. Tobin*[10] that the second degree sexual assault statute did not contain an express intent or mens rea requirement, and if the statute were read literally, it would permit criminal liability without any proof of mens rea.[11] In *Tobin*, the defendant was convicted of second degree sexual assault.[12] There, the supreme court determined that when a defendant is charged with second degree sexual assault a trial judge must instruct the jury that in order for them to convict the defendant on this particular crime, "one must find that the defendant acted with the intent of 'sexual arousal, gratification, or assault.' "[13] In addition, the Court explained that the existence of a mens rea is the rule and not the exception in American jurisprudence, and is a principle deeply rooted in our legal system.[14] Moreover, the absence of the mens rea requirement in a statute does not indicate that the Rhode Island legislature did not require a specific mental state, but that the legislature "recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation."[15]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court, basing its decision on the reasoning of the United States Supreme Court in *Morissette v. United States*, determined that the first degree child molestation statute carried an implied intent requirement.[16] The supreme

9. *Id.*
10. State v. Tobin, 602 A.2d 528 (R.I. 1992).
11. *Id.*
12. *Id.*
13. *Id.* at 535.
14. *Id.* at 534.
15. *Id.* (quoting Morissette v. United States, 342 U.S. 246, 252 (1952))(mere omission of any mention of intent is not to be construed as eliminating that element from the crimes defined).
16. *Griffith*, 660 A.2d at 706 (citing *Morissette*, 342 U.S. at 252.).

court stated that section 8-2-38 of the Rhode Island General Laws requires a trial justice to instruct the jury on all elements of a criminal charge.[17] When a judge fails to carry out this statutory requirement, the "ensuing conviction must be vacated."[18] The court held that the first degree child molestation statute has an implied mens rea element that requires the state to prove a defendant acted with the intent of sexual arousal or gratification in order to be convicted of the offense, just as the second degree child molestation statute was interpreted in *Tobin*.[19] The court further determined that while the Rhode Island legislature is perfectly within its purview to "enact strict liability statutes devoid of any mens rea," the first degree child molestation statute is not such a statute.[20] Because the trial judge failed to give the jury the proper instruction regarding the defendant's mens rea, the conviction was vacated and remanded for a new trial.[21]

CONCLUSION

As a general rule, a trial judge must instruct the jury on all elements of a criminal offense, including the mens rea of the defendant in committing the crime charged.[22] When the statute does not specifically address intent, the intent is deemed implicit within the statute. As a result, the state has the burden of proving the intent was present when the defendant committed the crime and the trial judge is under an obligation to instruct the jury that the state has such a burden.

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17. *Id.*; R.I. Gen. Laws § 8-2-38 1956 (1985 Reenactment).

18. *Griffith*, 660 A.2d at 706, (citing *Tobin*, 602 A.2d at 534-35); *See also* State v. Lima, 546 A.2d 770, 772 (R.I. 1988).

19. *Griffith*, 660 A.2d at 706.

20. *Id.*

21. *Id.* at 707.

22. *Id.*

Criminal Law. *State v. Hartley*, 656 A.2d 954 (R.I. 1995). Jurors involved in unauthorized experiments will be permitted to testify whether these alleged actions took place, but will not be permitted to testify as to the process itself.

Generally, jurors are not permitted to testify regarding the jury deliberations in order to impeach the verdict.[1] In *State v. Hartley*, the Rhode Island Supreme Court determined that if a trial judge determines that extraneous information was improperly brought before the jury and such information would influence a reasonable juror, then that information will be considered prejudicial and the defendant will be granted a new trial.[2]

FACTS AND TRAVEL

Richard Hartley was convicted in superior court of robbery.[3] At trial, the defendant tried to show that the victim had mistaken him for a man named Louis Marchetti, who was a friend of both the defendant and an accomplice in the robbery.[4] The defendant also presented eight alibi witnesses that testified he was at his grandmother's home in Providence, celebrating her birthday at the time of the robbery.[5] The defendant was convicted and thereafter filed a motion for a new trial on the ground that the verdict went against the weight of the evidence.[6] He later supplemented the motion with another claim that a new trial was required based on newly available evidence.[7] The trial judge denied the motion for a new trial.[8]

Seven and a half months after the verdict, defense counsel received sworn affidavits from two members of the jury alleging acts of juror misconduct in that evidence not presented at trial had been brought to the jury's attention.[9] Allegedly, an unnamed juror had driven from the defendant's grandmother's house to the scene of the robbery, timed the trip, and told the other jurors that the

1. R.I. R. Evid. 606(b); *See* Palmigiano v. State, 387 A.2d 1382 (R.I. 1978).
2. State v. Hartley, 656 A.2d 954 (R.I. 1995).
3. *Id.* at 955.
4. *Id.* at 956.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

defendant had time to leave the party, commit the robbery and return.[10] This was referred to as the "unauthorized view/experiment."[11] After receiving these affidavits, defendant filed another motion for a new trial, alleging that such juror misconduct denied him his constitutional right to a fair trial.[12] The trial judge denied this motion for a new trial, stating that the juror affidavits contained "hearsay within hearsay" and did not constitute sufficient grounds to conduct an evidentiary hearing or to support the granting of a new trial.[13] Defendant appealed his conviction and the denial of his motions for a new trial.[14]

BACKGROUND

The Sixth Amendment of the United States Constitution, as well as the Constitution of the State of Rhode Island, guarantees a criminal defendant the right to confront witnesses against him.[15] It has been well established under Rhode Island law that the use of juror affidavits about juror conduct either before or during their deliberations is not permissible to impeach the jury verdict.[16] The rationale of this policy is to maintain the public interest in the finality of jury verdicts.[17] To reach this end, jury verdicts are accorded a conclusiveness that will preserve the stability of the jury trial as an instrument for doing substantial justice."[18] The court in *Palmigiano v. State*[19] stated one exception to the rule prohibiting the use of juror affidavits regarding the jury's conduct from being used to impeach the verdict.[20] Juror affidavits can be used "for the

10. *Id.* at 957.
11. *Id.*
12. *Id.* at 956-957.
13. *Id.* at 957.
14. *Id.*
15. U.S. Const. amend. VI; R.I.Const. art. 1, sec. 10.
16. Palmigiano v. State, 387 A.2d 1382, 1385 (R.I. 1978). The supreme court, prior to the adoption of Rule 606(b) of the Rhode Island Rules of Evidence, used the federal approach regarding juror impeachment with the use of juror affidavits. This was essentially the same approach that Rule 606(b) advocated after its adoption, except in regards to the unauthorized view/experiment of jurors. *Id.*; R.I. R. Evid. 606(b).
17. Palumbo v. Garrott, 188 A.2d 371 (R.I. 1963). Another case regarding the prohibition of juror affidavits detailing juror misconduct to impeach the verdict decided prior to the adoption of Rule 606(b). *Id.*
18. *Id.* at 374.
19. *Palmigiano*, 387 A.2d at 1385.
20. *Id.*

sole purpose of demonstrating that matters not in evidence reached the jury through outside communications . . . ."[21] Rule 606(b) of the Rhode Island Rules of Evidence codified this general rule regarding the inquiry into the validity of the jury verdict.[22]

ANALYSIS AND HOLDING

Based upon these principles, the Rhode Island Supreme Court determined that the jurors who allegedly engaged in outside conversations about the case should be permitted to testify as to whether such conversations actually occurred.[23] The remaining jurors should be allowed to testify as to whether any extraneous information was conveyed to them and under what circumstances it was done.[24] However, no juror would be allowed to testify about any portion of the deliberative process, including the effect, if any, the extraneous information may have had on them.[25]

Following the adoption of Rule 606 of the Rhode Island Rules of Evidence, questions arose as to "whether juror testimony regarding an unauthorized juror view should be admitted under the exception that allows juror testimony to show that extraneous prejudicial information was improperly brought to the jury's attention."[26] In this case, the Court held that juror testimony regarding unauthorized juror views falls within the exception specified in Rule 606(b) of the Rhode Island Rules of Evidence.[27] The court's holding in this instance answered the question left open by its previous decision in *State v. Drowne*.[28]

In *Drowne*, Joseph Drowne was convicted of burglary and simple assault after a jury trial.[29] During the polling of the jury, one

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21. *Id.*

22. R.I. R. Evid. 606(b) provides: ". . . a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

23. State v. Hartley, 656 A.2d 954, 959 (R.I. 1995).

24. *Id.*

25. *Id.*

26. *Id.* at 960.

27. *Id.* The court agreed with the advisory committee note to Rule 606 that said evidence of an unauthorized juror view falls within the exception of Rule 606. The court further regarded juror experiments to fall within the same exception. *Id.*

28. *Id.*; State v. Drowne, 602 A.2d 540, 542 n.1 (R.I. 1992).

29. *Drowne*, 602 A.2d at 541.

juror gave an equivocal response regarding one of the charges.[30] A hearing was conducted in order to interview the juror.[31] Following the hearing, the trial judge refused to grant the defendant's motion for a mistrial and defendant appealed.[32] Rule 606(b) of the Rhode Island Rules of Evidence prohibits a juror from impeaching a verdict.[33] While relying on cases decided prior to the adoption of Rule 606(b), the court in *Drowne* determined that the use of juror affidavits regarding jurors actions both before and during their deliberations is impermissible to impeach the jury verdict.[34] What *Drowne* left unanswered was whether to include evidence of an unauthorized juror view as falling within the exception to the rule of exclusion of juror testimony with regard to juror misconduct.[35] The court resolved this issue in *Hartley*.

In answering the question left open in *Drowne,* the court determined that the juror who conducted the experiment should be allowed to testify as to its occurrence as well as the findings that were given to the fellow jurors.[36] The court further determined that even if the trial judge finds that such information did reach the jury, that is not in and of itself enough to grant a new trial.[37] The judge must also determine that the defendant was prejudiced by this information.[38] To determine the prejudicial effect of extraneous information the trial judge must consider the probable effect that the information would have on an average reasonable juror.[39] If the information would probably influence the decision of an average reasonable juror, then the information is prejudicial and relief should be granted.[40] As a result of its holding, the court remanded the case.[41]

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30. *Id.*

31. *Id.*

32. *Id.* at 542.

33. *Id.*; R.I. R. Evid. 606(b).

34. *Drowne,* 602 A.2d at 543; *See also,* State v. Palamigiano 341 A.2d 742, 743 (R.I. 1975); Palumbo v. Garrott, 188 A.2d 371 (R.I. 1963).

35. *Drowne,* 602 A.2d at 542 n.1.

36. *Hartley,* 656 A.2d at 960.

37. *Id.* at 960-961.

38. *Id.*

39. *Id.* at 962.

40. *Id.*

41. *Id.*

CONCLUSION

Hartley clarifies Rhode Island law in the area of juror testimony impeaching a jury verdict. If a trial judge determines that extraneous information was improperly brought before the jury which would probably influence the decision of an average reasonable juror then that information is prejudicial and the defendant must be granted a new trial.

Whitney A. Curtis

Criminal Law. *State v. Lamphere*, 658 A.2d 900 (R.I. 1995). A trial judge must sua sponte provide a limiting instruction when evidence of prior bad acts is admitted.

Evidence of a defendant's commission of prior bad acts are only admissible at trial to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove that defendant feared imminent bodily harm and that the fear was reasonable."[1] They may not be used to show that the defendant was likely to commit the act with which he is charged.[2] In *State v. Lamphere*, the Supreme Court determined that the use of such acts, without a limiting instruction to the jury, constitutes reversible error as it prejudices the defendant.[3]

FACTS AND TRAVEL

David Lamphere was convicted of second degree child molestation in Superior Court.[4] At trial, evidence was introduced regarding previously alleged, but uncharged, acts of sexual assault against the child victim.[5] The trial judge, while charging the jury, did not give a limiting instruction regarding the use of the above evidence.[6] Following deliberation, the jury convicted the defendant on all six counts of second degree child molestation.[7]

On appeal, the defendant claimed the trial judge committed reversible error in six particular instances,[8] the first being the

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1. R.I. R. Evid. 404(b): *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove that defendant feared imminent bodily harm and that the fear was reasonable.

2. *Id.*

3. State v. Lamphere, 658 A.2d 900, 906 (R.I. 1995).

4. *Id.* at 901.

5. *Id.* at 903. (These uncharged acts were testified to by the victim, at trial.) *Id.*

6. *Id.* at 904.

7. *Id.* at 903.

8. (1) failing to give a limiting instruction regarding several uncharged acts of sexual assault testified to at trial, (2) refusing to limit the jury's deliberations to the bill of particulars, (3) impermissibly limiting defense counsel's cross examination of certain state witnesses, particularly with respect to their prejudices and biases, (4) refusing to allow defense counsel to inquire into the whereabouts of Teddy Lamphere during a cross-examination, (5) denying defendant's motion in

judge's failure to give a limiting instruction with respect to various "uncharged acts of sexual assault testified to at trial" by the victim.[9] Defendant admitted that the evidence was properly admissible to show his "lewd disposition or design" towards the victim, but contended that the failure to give a limiting instruction allowed the jury to use the evidence impermissibly.[10] Conversely, the state conceded that although a limiting instruction should have been given, the defendant was not prejudiced by this failure because defense counsel had opportunity to inquire into these "uncharged acts" during the cross examination of the victim.[11]

BACKGROUND

Rhode Island has taken the view that "evidence of prior uncharged acts of misconduct" cannot be used "to demonstrate a defendant's propensity to commit the crime charged."[12] However, Rule 404(b) of the Rhode Island Rules of Evidence permits evidence of "prior bad acts" to be admitted to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove that defendant feared imminent bodily harm and that the fear was reasonable."[13] Similarly, the court in *State v. Jalette*[14] held, prior to the adoption of the Rhode Island Rules of Evidence that, "evidence of other not too remote" uncharged sexual crimes against the victim of the current sexual assault being tried can be admitted into evidence to show the "lewd disposition . . . or intent" of the defendant toward the victim.[15] Fol-

limine which sought to preclude the use of his prior criminal convictions by the prosecution if he chose to testify, and (6) refusing to conduct a voir dire of the jury for potential prejudice arising from some members' possible observation of the victim crying in the hallway of the court house while being comforted by a relative. *Id.* at 903.

9. *Id.*

10. *Id.* at 903.

11. *Id.*

12. *Id.* at 904; *See also* State v. Tobin, 602 A.2d 528, 531 (R.I. 1992)(evidence of other acts not admissible to prove defendant's criminal disposition); State v. Pignolet, 465 A.2d 176, 179 (R.I. 1983)(evidence of independant, past criminal behavior unconnected with crimes for which defendant is on trial may not be used to show commission of crime); State v. Jalette, 382 A.2d 526, 531-32 (R.I. 1978)(evidence which tends to indicate accused has committed another crime independent of that for which he is on trial is generally inadmissible); R.I. R. Evid. 404.

13. R.I. R. Evid. 404; *Jalette*, 382 A.2d at 532; *See supra* note 1.

14. *Jalette,* 382 A.2d 526.

15. *Jalette*, 382 A.2d at 533.

lowing the adoption of the Rhode Island Rules of Evidence, the rules enunciated in *Jalette* were reaffirmed.[16]

Finally, in *State v. Toole,* the court stated that during a sexual assault case the trial judge has a *sua sponte* obligation "to offer a limiting instruction when admitting evidence of other sexual acts despite the general principle enunciated in Rule 105 of the Rhode Island Rules of Evidence[17] that a limiting instruction is to be given upon request."[18]

ANALYSIS AND HOLDING

In the instant matter, due to the state's concession that a limiting instruction should have been given, the sole issue before the court was whether the failure to give the instruction constituted reversible error.[19] The court relied on *Toole* to determine whether the actions of the trial judge in this instance constituted reversible error.[20] In *Toole*, the trial judge's failure to issue a limiting instruction after uncharged acts of sexual assault were admitted did not cause reversible error. This was so because numerous times during the trial "defense counsel [had] utilized and referred to the evidence that [defendant] call[ed] objectionable. . ."[21] In addition, the defendant in *Toole* never filed a motion in limine seeking to exclude the evidence, nor did defense counsel ever seek a limiting instruction be given to the jury.[22] Finally, in *Toole*, defense counsel used this evidence to the defendant's advantage during the cross-examination of the victim.[23] As a result of the defendant's never complaining about the admission of the evidence, the Supreme Court in *Toole* held that the trial judge's failure to grant a limiting instruction did not constitute reversible error.[24]

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16. State v. Toole, 640 A.2d 965, 971 (R.I. 1994).

17. R.I. R. Evid. 105. *Limited Admissibility.* "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

18. *Toole*, 640 A.2d at 971.

19. *Lamphere*, 658 A.2d at 904.

20. *Id.* at 904-05; *See* Toole *supra* note 16.

21. *Lamphere,* 658 A.2d 904, (citing *Toole*, 640 A.2d at 971).

22. *Toole*, 640 A.2d at 971.

23. *Id.*

24. *Id.*

In *State v. Lamphere*, the number of uncharged acts admitted into evidence far exceeded the amount in *Toole*.[25] Additionally, defendant in this case filed a motion in limine to preclude testimony of certain uncharged acts, which was denied by the trial judge.[26] Following the judge's denial of the motion, defense counsel requested a cautionary instruction be given to the jury when the witness would testify regarding these specific uncharged acts, but the judge also denied this request.[27] It was only after the denial of the motion and the cautionary instruction that defense counsel used this evidence in cross-examination.[28] Based upon the distinguishable facts of *Toole*, the Rhode Island Supreme Court determined in the instant matter that the trial judge's failures to provide a limiting instruction to the jury constituted reversible error as it was "reasonably possible that such [unrestrained] evidence would influence an average jury on the ultimate issue of guilt or innocence."[29]

CONCLUSION

This case makes clear that when any evidence of "prior bad acts" is admitted into evidence under Rule 404(b) of the Rhode Island Rules of Evidence, the trial judge must *sua sponte* give the jury a limiting instruction regarding the use of such evidence in their deliberations. Here, where evidence was admitted regarding other uncharged sexual acts by the defendant against the victim, the judge had a *sua sponte* obligation to issue a limiting instruction. Accordingly, the judge's failure to give such instruction constituted reversible error.

Whitney A. Curtis

25. *Lamphere*, 658 A.2d at 904.
26. *Id.* at 905.
27. *Id.*
28. *Id.*
29. *Id.* at 906.

Criminal Law. *State v. Stewart*, 663 A.2d 912 (R.I. 1995). A felony must be inherently dangerous to human life, based on the attendant circumstances of the particular case, in order to serve as the predicate to a second-degree felony-murder charge.

In *State v. Stewart*,[1] the Rhode Island Supreme Court held that permitting a child to be a habitual sufferer pursuant to section 11-9-5 of the Rhode Island General Laws,[2] a felony not enumerated in the murder statute, is inherently dangerous to human life where a mother's neglect over a three day "cocaine marathon" caused her infant son's death.[3]

FACTS AND TRAVEL

Tracy Stewart (defendant) and Edward Young had their third child Travis Young (Travis) on August 31, 1988.[4] On October 21, 1988, fifty-two days after birth, Travis died from dehydration.[5] Travis spent the days prior to his death in the company of his mother and father, and their friend, Patricia McMasters (McMasters), all of whom were regular cocaine abusers.[6] The three used cocaine in the presence of Travis by intravenous injection and by inhaling smoke from its base form,[7] which allowed the threesome to spend three sleepless days intoxicated by cocaine.[8] During that time Travis's mother never held Travis nor changed his clothes and, on one occasion, she fed Travis by propping a bottle up on his walker using a rolled up towel.[9]

After the trial court's denial of defendant's motions for dismissal and for acquittal, the jury convicted her of second-degree fel-

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1. 663 A.2d 912 (R.I. 1995).

2. R.I. Gen. Laws § 11-9-5 (1994) states: "Every person having the custody or control of any child under the age of eighteen (18) years . . . who shall wrongfully cause or permit that child to be an habitual sufferer for want of food, clothing, proper care, or oversight, . . . shall be guilty of a felony."

3. *Stewart*, 663 A.2d at 915.

4. *Id.* at 915.

5. *Id.*

6. *Id.*

7. *Stewart*, 663 A.2d at 915. Ironically, most of the money supporting this cocaine binge came from recently cashed Aid to Families with Dependent Children (AFDC) checks designed to help care for Travis. *Id.* at 916.

8. *Id.* at 916.

9. *Id.*

ony-murder.[10] The question rising from the defendant's appeal was whether wrongfully permitting a child to be a habitual sufferer is an inherently dangerous felony and therefore sufficient to be the predicate for a conviction of second-degree felony-murder.[11]

BACKGROUND

At common law, "one whose conduct brought about an unintended death in the commission or attempted commission of a felony was guilty of murder."[12] This is known as the "felony-murder" rule. To limit the broad sweep of the felony-murder rule as it existed at common law, some American jurisdictions, such as Rhode Island, enumerated the specific felonies that give rise to first-degree murder.[13] To insure accountability when death results from the perpetration or attempted perpetration of a felony not enumerated, the murder statute classifies any other felony-murder as second degree murder.[14]

Rhode Island's murder statute lists certain crimes which may serve as the predicate felonies for a charge of first degree murder.[15] Additionally, death resulting from a felony not listed in the statute may give rise to second-degree murder but only when that felony is inherently dangerous.[16]

Generally, there are two ways for a court to decide whether a felony is inherently dangerous. One way is to examine the ele-

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10. *Id.*

11. *Stewart*, 663 A.2d at 917.

12. Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law, § 7.5 at 206, (1986).

13. R.I. Gen. Laws § 11-23-1 (1994). *See infra* note 15 for a list of the felonies that give rise to first degree murder.

14. *Id.* After the list of enumerated felonies the statute simply reads, "[a]ny other murder is murder in the second degree." *Id.*

15. R.I. Gen. Laws § 11-23-1 (1994) states: "Every murder . . . committed in the perpetration of, or attempt to perpetrate, any arson or. . . rape, any degree of sexual assault or child molestation, burglary or breaking and entering, robbery, kidnapping, or committed during the course of the perpetration, or attempted perpetration, of felony manufacture, sale, delivery, or other distribution of a controlled substance, . . . or while resisting arrest by, or under arrest of, any state trooper or police officer in the performance of his or her duty. . . ."

16. *Stewart*, 663 A.2d at 918. The inherent danger necessity provides the basis for transferring the malice from the intended felony to the unintended homicide. See 2 Charles E. Torcia, Wharton's Criminal Law § 148 at 304 (15th ed. 1994).

ments of the felony in the abstract.[17] Another way is to take into account the circumstances of the particular case.[18] This approach takes into consideration that many felonies may be committed in a manner which is not inherently dangerous but were committed in a predictably life threatening manner.[19]

ANALYSIS AND HOLDING

In *Stewart*, the court announced how to determine whether a felony is inherently dangerous for purposes of the felony-murder rule. The defendant urged the court to look at the elements of the felony in the abstract as California does.[20] This method requires the court to find insufficient danger if the underlying felony can be perpetrated or attempted in any way not dangerous to human life.[21] The court declined to adopt that approach because "a number of felonies at first glance would not appear to present an inherent danger to human life but may in fact be committed in such a manner as to be inherently dangerous to life."[22] Rather, in *Stewart*, the court reasoned that the proper method in Rhode Island "is to present the facts and circumstances of the particular case to the trier of fact to determine if a particular felony is inherently dangerous in the manner and circumstances in which it was committed."[23]

The court buttressed its rejection of the California approach by noting a recent amendment to the Rhode Island murder statute,[24] whereby, homicide involved with the delivery of PCP is murder in the first degree.[25] Conversely, in California, it was recently held that furnishing PCP was not an inherently dangerous felony be-

17. *Stewart*, 663 A.2d at 918.

18. *Id.* at 919. Torcia, *supra* note 16, § 148 at 305. This approach stems from a general reluctance to apply the felony-murder rule because the number of felonies has increased and many of them are for minor offenses. Lafave *supra* note 12, § 7.5 at 207.

19. *Id.* at 304. Therefore the malice, with which the felony was committed, is transferred from the felony to the homicide. *Id.*

20. *Stewart*, 663 A.2d at 918.

21. *Id.*

22. *Id.* at 919.

23. *Id.*

24. R.I. Gen. Laws § 11-23-1 (1994).

25. *Id.*

cause it does not carry a high enough probability of death to serve as an underlying felony for felony-murder.[26]

The evidence in *Stewart* showed that the defendant did not change or feed her baby more than once during her three day cocaine binge.[27] The evidence further proved that this neglect was the cause of the Travis' dehydration resulting in his death.[28] Ultimately, the court held that the manner and circumstances of the defendant's neglect were sufficient to establish that the child was wrongfully permitted to be a habitual sufferer in a manner inherently dangerous to human life.[29]

CONCLUSION

In *Stewart* the court held that under the felony-murder rule in Rhode Island, inherent danger must be gauged in the light of the attendant circumstances of the felony committed, rather than by looking at the felony in the abstract, in order to deter the commission of dangerous felonies or dissuade co-felons from participating in a crime dangerous enough to result in death.

Kenneth K. McKay, IV

26. People v. Taylor, 6 Cal. App. 4th 1804, 8 Cal. Rptr. 2d 439 (Cal. 1992).
27. *Stewart*, 663 A.2d at 916.
28. *Id.* at 927.
29. *Id.* at 920.