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1998 Survey of Rhode Island Law: Cases: Criminal Law

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Criminal Law. *State v. Brown*, 709 A.2d 465 (R.I. 1998). The right to confront witnesses does not operate to allow unfettered trial examination by an accused sex assailant of a purported victim's medical and educational records where adequate assurances of fair process exist otherwise. Nor does a defendant's confrontational right permit cross-examination of a witness regarding matters reasonably concluded to have little or no relevance to the criminal liability of the defendant.

In *State v. Brown*,[1] the Rhode Island Supreme Court was once again faced with the difficult task of weighing an alleged child-molester's constitutional right of confrontation against a purported victim's right to privacy. In *Brown*, a divided court determined that a defendant's right to confront witnesses produced against him has certain limitations, especially when there are other assurances of fair process.[2]

FACTS AND TRAVEL

Danny L. Brown (Brown) was indicted for sexually molesting his stepdaughter Emily Doe[3] (Emily) over an approximately two-and-a-half-year period during which Emily was between eight and ten years old.[4] At trial, Emily's testimony indicated that Brown, the boyfriend of Emily's mother, began fondling her breasts and her vaginal area when Emily was eight years old.[5] Later this activity escalated to oral sex and finally to intercourse.[6] According to Emily, Brown's abuse ended in November 1985, just before Brown married Emily's mother.[7] Emily made no mention of the abuse for several years.[8]

In 1991, however, Emily revealed the abuse to her pastor, Elizabeth Janikuak.[9] Pastor Janikuak later confronted Brown

1. 709 A.2d 465 (R.I. 1998).
2. *Id.* at 473-74.
3. In order to protect the parties identities, the court changed the name of the minor victim and her mother in the opinion. *See id.* at 467 n.1.
4. *See id.* at 467.
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.* at 468.

with Emily's accusations, which Brown denied.[10] Brown did, however, tell Pastor Janikuak that on one occasion, several years earlier, Emily had reached into his underwear and fondled his penis while he was sleeping on the living-room couch.[11] Brown consented to counseling with a Christian psychiatrist in Connecticut, Richard Tanguay, M.D., to whom Brown eventually confessed that he had sexually abused Emily in the past.[12]

Emily revealed the full extent of Brown's sexual abuse to her mother for the first time on April 7, 1992.[13] On April 30, 1992, Emily's mother reported the information to the police, and formal criminal proceedings against Brown commenced.[14] After a three-day trial, a jury returned guilty verdicts against Brown on November 30, 1994.[15] Brown was sentenced to forty years imprisonment, with twenty years suspended, and twenty years probation.[16] Brown moved for new trial and, after Superior Court Judge Sheehan denied the motion, appealed to the Supreme Court.[17]

Brown's appeal raised six issues and culminated in a per curium opinion issued on March 5, 1997, *State v. Brown*[18] (hereinafter "*Brown I*"). A four-justice panel of the supreme court in *Brown I* dismissed two of Brown's issues but was evenly divided on the remaining four issues.[19] Brown then moved for an opportunity to reargue the four issues before a full five-justice panel.[20] The court granted the request.[21]

ANALYSIS AND HOLDING

In the instant case, Brown once again alleges the four unresolved claims of error upon which this court was previously dead-

10. *See id.*
11. *See id.*
12. *See id.* Dr. Tanguay testified at trial that Brown's reaction, although admissive, was "minimizing" the true extent of the sexual contact between Brown and Emily. *See id.*
13. *See id.*
14. *See id.*
15. *See id.* at 467.
16. *See id.*
17. *See id.*
18. 690 A.2d 1336 (R.I. 1997).
19. *See Brown*, 709 A.2d at 467.
20. *See id.*
21. *See id.*

locked.[22] Brown's first unresolved claim of error concerns the motion justice's denial of Brown's motion to compel production of a broad panoply of pediatric medical records pertaining to the juvenile victim.[23] Second, Brown claims that the trial justice's prohibition of cross-examination of Pastor Janikuak concerning Janikuak's possible bias violated the Defendant's right to confront.[24] Third, the defendant contends that the trial justice's restriction of cross-examination of complainant's mother about her failure to notify the Department of Children, Youth, and Families (DCYF) of the abuse allegations represented denial of the confrontation right.[25] And finally, Brown insists that the admission of statements by Pastor Janikuak, which gave assurances of the victim's truthfulness, represented impermissible bolstering testimony.[26]

Issue 1: Production of Pediatric Medical Records Pertaining to a Juvenile Victim

The Rhode Island Supreme Court determined that the denial of Brown's pretrial motion to compel production of various pediatric medical records relating to the victim did not constitute prejudicial error.[27] The court's decision was based, in part, upon a finding that the justice's denial was a mere provisional ruling, since it occurred one year prior to the trial's commencement.[28] Furthermore, the court noted that Brown's counsel had adequate time to resubmit the request in a more limited and timely manner in the months preceding the trial.[29] Brown's motion requested the State to produce the names and addresses of "any and all pediatricians or medical doctors from whom [Emily] may have received treatment or been examined from the period May of 1983 through January of 1987."[30] The court held that Brown was not entitled to obtain this information during routine pretrial discovery according to the well-established precedents of Rule 16 of the Superior Court Rules of

22. *See id.* at 468.
23. *See id.* at 469.
24. *See id.* at 473.
25. *See id.* at 475.
26. *See id.* at 477.
27. *See id.* at 469.
28. *See id.*
29. *See id.*
30. *Id.*

Criminal Procedure,[31] and that the information should have more properly been sought directly from its source at the time of trial.[32] Furthermore, because Brown's counsel failed to seek the information at trial, the court held that the issue was not properly preserved.[33]

"Here," wrote Justice Flanders for the majority, "[Brown] was never improperly denied the ability to confront and to effectively cross-examine any adverse witnesses against him."[34] Rather, the motion court had issued a denial of Brown's motion far in advance of trial due to the motion's overbroad scope and premature nature.[35] Therefore, the trial court's ruling did not violate the constitutional right to confront accusers because Brown had the opportunity to scale back the breadth of his motion and resubmit it before or at trial; or, in the alternative, seek an *in camera* review of the requested information.[36]

Issue 2: Denial of Cross-Examination Concerning Witness' Alleged Bias

Brown asserted that the trial justice had committed reversible error by prohibiting his attorney from cross-examining Pastor Janikuak with regard to her bias due to tensions concerning construction work done on the pastor's church.[37] It seems that defendant Brown was instrumental in securing the construction team employed by Janikuak to build a new church facility in Smithfield, Rhode Island in 1991.[38] Problems had apparently developed between Brown's cousin, who performed excavation work on the project, and Janikuak to the extent that Brown's cousin had filed a civil suit against the church seeking monetary damages.[39] At trial the court quickly ended all questioning of Janikuak concerning this matter when Janikuak denied that Brown's cousin

31. *See id.* (citing State v. Kelly, 554 A.2d 632, 635 (R.I. 1989)).
32. *See id.*
33. *See id.*
34. *Id.*
35. *See id.* at 470 (noting that the hearing justice's denial of the motion had been expressly conditional by the inclusion of the phrase "at this point").
36. *See id.*
37. *See id.*
38. *See id.* at 485 (Weisberger, C.J., dissenting).
39. *See id.*

had ever been involved in the construction of the new church facility.[40]

The supreme court held that the lower court's prohibition of questioning concerning Pastor Janikuak's possible bias fell within the court's reasonable discretion to narrow questioning where the "offer of proof was wholly inadequate to indicate that allowing additional cross-examination would have developed probative evidence of bias."[41] Additionally, the ruling of the trial court would not have been reversible even if it had been beyond the trial court's discretion, according to the supreme court, unless the indiscretionate ruling had been unfairly prejudicial.[42] Thus, according to the majority, "[u]nless all these [prosecution witnesses] were liars and unless defendant himself was lying when he made the admissions about the sexual touching that had occurred, then the trial justice's minor restriction of Janikuak's cross-examination—if error it was—was harmless beyond a reasonable doubt."[43]

Issue 3: Restriction of Cross-Examination of the Victim's Mother Concerning her Failure to Notify the DCYF

Brown also contended that the trial court erred in precluding cross-examination of Emily's mother with regard to her failure to notify state social work authorities of her daughter's alleged sexual abuse.[44] Brown asserted that Emily's mother's violation of Rhode Island General Laws section 40-11-3, which places a duty upon Rhode Islanders to notify the DCYF of any knowledge or suspicion of child abuse, represented clear impeachment evidence indicating that the mother did not herself believe that the sexual abuse was going on.[45]

The supreme court held, however, that the trial justice's prohibition on such cross-examination was not outside the court's discretion.[46] The admission of the statute into the concerns of the trial jury had the likelihood of misleading the jury into discrediting the witness' testimony solely because the witness was in violation

40. *See id.* at 473-74.
41. *Id.* at 474 (citing State v. Doctor, 690 A.2d 321, 327 (R.I. 1997)).
42. *See id.* at 475 (citations omitted).
43. *Id.*
44. *See id.* at 476.
45. *See id.*
46. *See id.*

of a specific statutory obligation.[47] Since, the court noted, the witness may have had no knowledge of the statutory requirement, prohibition of such evidence was well within the trial justice's discretion.[48]

Issue 4: Bolstering

Bolstering occurs when "one item of evidence is improperly used by a party to add credence or weight to some earlier un-impeached piece of evidence offered by the same party."[49] Brown's final challenge was that Pastor Janikuak's testimony regarding the truthfulness of the alleged victim represented bolstering testimony which should have been excluded.[50] The court agreed that a witness should not be allowed to offer an opinion concerning the truthfulness of another witness' testimony.[51] In this case, however, the court concluded that the Pastor's testimony did not serve to bolster the Emily's testimony as much as it expressed concerns about moving cautiously while questioning someone about such sensitive matters.[52]

The court concluded from that Pastor Janikuak's "overall testimony" was not vouching for the credibility of the complainant's sexual-abuse allegations.[53] Indeed, wrote Justice Flanders, "a close look at Janikuak's overall testimony on this point reveals that the pastor herself could not determine whether complainant (in her allegations) or defendant (in his denials) was being truthful."[54] Thus, the supreme court refused to accept any of Brown's arguments as requiring a new trial.

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47. *See id.* at 477.
48. *See id.*
49. Black's Law Dictionary 176 (6th ed. 1990).
50. The pertinent portion of Pasor Janikuak's testimony is as follows:

PROSECUTOR: Upon learning this information, what was your reaction? What was your response?

JANIKUAK: As to what she said to me?

PROSECUTOR: Yes, without saying what she said.

JANIKUAK: I was very cautious to make sure that what she was telling me was the truth because we're trained to be sure that just because someone makes an allegation does not mean it's true.

Brown, 709 A.2d at 478 n.13.
51. *See id.* at 479.
52. *See id.*
53. *Id.* at 481.
54. *Id.* at 480.

Dissenting Opinion

Chief Justice Weisberger and Justice Shea (Ret.) dissented in an emotionally charged opinion drafted by Weisberger. The dissent began by proclaiming that "the history of liberty has largely been the history of the observance of procedural safeguards."[55] Defendant Brown was denied procedural safeguards, according to the Chief Justice, because the denial of his motion to compel production of, among other things, the identity of all physicians who may have treated or examined Emily, "fell squarely within the parameters" of Brown's plausible need for the information.[56] Brown had requested the information in order to glean any inconsistencies between the complainant's allegations and her medical records. Thus, according to the dissent, the two-prong test of both materiality and favorability laid out by the United States Supreme Court in *United States v. Valenzuela-Bernal*[57] was satisfied.[58] Therefore, Brown should have been provided with this information.

Weisberger also disputed the majority's implied holding that the motion justice's denial of Brown's request "at this point" was merely conditional and that Brown's failure to resubmit his request at a later date constituted waiver of the issue.[59] Such a notion, wrote the Chief Justice, "is without support in law and unpersuasive in concept."[60] The dissent further stated "that defendant's request was both reasonable and relevant, given the facts as established at the time of the motion justice's denial."[61]

Concerning the denial of Brown's right to cross-examine Pastor Janikuak regarding her bias concerning the church's difficulties with Brown's cousin, the dissent argued that time-tested principles should have worked to provide Brown with an opportunity to confront the pastor on such subjects.[62] Not only would such cross-examination have "cast a less hospitable light on the totality

55. *Id.* at 481 (citing McNabb v. United States, 318 U.S. 332, 347 (1943)).
56. *Id.* at 483.
57. 458 U.S. 858 (1982).
58. *Brown*, 709 A.2d at 483 (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (recognizing that a defendant must make "at least some plausible showing of how [the requested material] would have been both material and favorable to his defense")).
59. *See id.*
60. *Id.*
61. *Id.* at 484.
62. *See id.* at 486.

of her severely damaging testimony," but denial of such cross-examination violates long-standing doctrine establishing the relevance of pending civil litigation between a witness and a party to the issue of bias.[63]

The dissent likewise concluded that Pastor Janikuak's statements of opinion regarding the truthfulness of Emily should have been either excluded or remedied with a stern jury instruction.[64] According to the dissenters, the pretrial and trial errors in Brown's case, taken together, "undermine confidence that the defendant's conviction was the product of a constitutionally fair process," therefore warranting a reversal.[65]

CONCLUSION

In *State v. Brown*, the Rhode Island Supreme Court denied defendant's four challenges concerning his constitutional right to confront adverse witnesses. The court found that the trial justice's denial of defendant's motion to compel discovery was not reversible error where there existed an adequate opportunity to narrow the scope of his discovery request prior to trial. The court further upheld the trial justice's denial of defendant's request to cross-examine a state's witness regarding possible bias where the defendant's offer of proof was an inadequate showing of the probable existence of such bias. Additionally, the supreme court determined that the trial justice did not err is refusing to admit testimony concerning the victim's mother's failure to notify DCYF concerning defendant's alleged conduct, as such testimony would be likely to mislead the jury. Finally, the court concluded that a witness' statements indicating that the witness was very careful to ascertain the truthfulness of the victim's allegations did not represent improper bolstering.

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63. *Id.* The dissent conceded that Brown himself was not a named party to the civil action, but said that the fact that he was instrumental in assembling the construction team, which included his brother and which was now suing Janikuak and her church, "merited at least some opportunity to probe the issue." *Id.*

64. *See id.* at 487.

65. *Id.* at 490.

Criminal Law. *State v. DiCicco*, 707 A.2d 251 (R.I. 1998). In a prosecution for driving under the influence and driving under the influence, death resulting, a blood alcohol concentration of 0.10% or higher is not an essential element to prove either charge. Rather, the prosecutor may, by other competent evidence, prove beyond a reasonable doubt that the defendant was under the influence of alcohol to a degree which rendered him incapable of safely operating a vehicle.

In *State v. DiCicco*,[1] the Rhode Island Supreme Court was asked to certify two questions of law. First, whether in a criminal prosecution for driving under the influence of alcohol, death resulting, or driving under the influence, "is a blood alcohol level of 0.10 percent or greater, an essential element of the offense or can the state attempt to establish the element of 'under the influence of alcohol' by proof of a blood alcohol level of less than 0.10 percent?"[2] Second, "[i]f the state is entitled to prove that an operator with a blood alcohol level of less than 0.10 percent was nonetheless under the influence, what is the standard to establish this element of 'under the influence of alcohol'?"[3]

FACTS AND TRAVEL

On December 17, 1994, at 9:15 p.m., the defendant was driving his employer's truck on the access road inside Lincoln Greyhound Park in Lincoln, Rhode Island.[4] The defendant was driving about 40 m.p.h. in a 25 m.p.h. zone when he struck a pedestrian, Maria Carlino, who later died from her resulting injuries.[5]

The police arrived and administered three field sobriety tests: 1) the "horizontal gaze nystagmus"; 2) the "walk and turn" and 3) the "finger to nose" tests.[6] Based on the defendant failing these three tests, plus the fact that the police officer observed that the defendant had "glossy eyes" and could smell the odor of alcohol on the defendant's breath, the defendant was placed under arrest.[7] The defendant then took a blood test which resulted in ".00% BAC

1. 707 A.2d 251 (R.I. 1998).
2. *Id.* at 252.
3. *Id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*

or negative."[8] The defendant admited to drinking approximately four beers at about 4:30 p.m.[9]

ANALYSIS AND HOLDING

Question 1

First, the supreme court was asked whether a BAC of 0.10 or greater is an essential element to obtain a conviction under either sections 31-27-2 or 31-27-2.2 of the Rhode Island General Laws.[10] Rhode Island General Laws section 31-27-2 provides that "[w]hoever operates . . . any vehicle in the state while under the influence of any intoxicating liquor . . . shall be guilty of a misdemeanor."[11] The statute also provides a BAC of 0.10 or greater is a violation of this statute.[12] However, even without a BAC test, a conviction may be sustained if "*based on other admissible evidence.*"[13] The statute provides a guilty verdict may be obtained if it was "*based on evidence that the person charged was under the influence of intoxicating liquor . . . to a degree which rendered such person incapable of safely operating a vehicle.*"[14] Rhode Island General Laws section 31-27-2.2 provides "[w]hen the death of any person other than the operator ensues as a proximate result of any injury received by the operation of any vehicle, *the operator of which is under the influence of any intoxicating liquor* . . . the person so operating the vehicle shall be guilty of 'driving under the influence of liquor or drugs, resulting in death.'"[15]

In interpreting statutes the court followed the well-settled principle that "when the language of a statute is clear and unambiguous, this Court must interpret the statute literally" in order to give the words "their plain and ordinary meaning."[16] Turning to

8. *Id.*
9. *See id.*
10. *See id.* at 253.
11. *Id.* (quoting R.I. Gen. Laws § 31-27-2(a) (1956) (1994 Reenactment)).
12. *See id.* (citing R.I. Gen. Laws § 31-27-2(b)(1) (1956) (1994 Reenactment)).
13. *Id.* (emphasis added) (quoting R.I. Gen. Laws § 31-27-2(b)(1) (1956) (1994 Reenactment)).
14. *Id.* (emphasis added) (quoting R.I. Gen. Laws § 31-27-2(b)(1) (1956) (1994 Reenactment)).
15. *Id.* (emphasis added) (quoting R.I. Gen. Laws § 31-27-2.2(a) (1956) (1994 Reenactment)).
16. *Id.* (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)).

the statutes before it, the court recognized the wrongs proscribed under both statutes were identical.[17] Both statutes prohibited operation of a motor vehicle while under the influence of an intoxicating liquor.[18] The court noted that section 31-27-2(b)(1) unequivocally provides a conviction may be sustained if based on admissible evidence other than the BAC level.[19] And, recognizing section 31-27-2.2 has no similar language, the court felt it should be interpreted likewise, relying on "the well-known canon of statutory construction *in pari materia* [which] dictates that similar statutes should be interpreted similarly."[20] Other than the plain language of the statute, the court also noted its own precedents which have held a conviction under section 31-27-2.2 may be based on evidence besides the BAC level.[21]

The court rejected the defendant's argument that the State could not convict him based on other evidence when a chemical test was administered and resulted in a BAC of less than 0.10 percent.[22] The court stated that the state may always present all admissible evidence to a judge or jury in a criminal proceeding which "it believes most strongly makes its case."[23] The court did not feel that only drivers with a BAC level of 0.10 or greater were threats to public safety.[24] To hold this would "negate the goal of legislation against drunken driving, which is to reduce the carnage occurring on our highways attributable to persons who imbibe alcohol and then drive."[25]

The court therefore answered Question 1 in the negative, holding "[a] BAC of 0.10 percent or greater is *not* an essential element

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17. *See id.*

18. *See id.*

19. *See id.* at 254.

20. *Id.*

21. *See id.* (citing State v. Benoit, 650 A.2d 1230, 1233 (R.I. 1994) (noting that "[t]o sustain a conviction under § 31-27-2.2(a), the state must produce sufficient evidence for a jury to conclude that the defendant's manner of operating his or her motor vehicle was a proximate cause of the victim's death and that the collision occurred *while the defendant was legally intoxicated*") and State v. Sahady, 694 A.2d 707, 709 (R.I. 1997) (holding evidence showing the defendant's speech was slurred, his eyes were bloodshot, he emitted an odor of alcohol and he failed four field sobriety tests was sufficient evidence to conclude he was "intoxicated")).

22. *See id.*

23. *Id.* at 254-55.

24. *See id.*

25. *Id.* (quoting State v. Bruskie, 536 A.2d 522, 524 (R.I. 1988)).

of the offenses proscribed by sections 31-27-2 and 31-27-2.2."[26] The court concluded "[b]lood alcohol content is but one weapon with which the state can stem the blight of drunk drivers; it is not a shackle."[27]

Question 2

Next, the court had to determine what standard of proof is necessary to establish the element of under the influence of alcohol when a defendant has a BAC level of less than 0.10 percent.[28] The court, citing *State v. Lusi*,[29] began this analysis by stating "the standard necessary for a criminal conviction is proof beyond a reasonable doubt."[30] In *Lusi*, the court held a defendant is entitled to an acquittal under section 31-27-2 of the Rhode Island General Laws if his BAC was less than 0.10 percent and "the state otherwise fail[s] to prove beyond a reasonable doubt that defendant was driving under the influence."[31] However, to obtain a conviction, the state may rely on "evidence other than direct evidence as long as the totality of that evidence constitutes proof of guilt beyond a reasonable doubt."[32]

In *DiCicco*, the court felt it necessary to state explicitly what it had only implied in *Lusi*.[33] That is, "in the absence of a BAC test having been administered *or* if a test results in a BAC of less than 0.10 percent, a conviction under [R.I.G.L.] §§ 31-27-2 or 31-27-2.2 shall be sustained if the totality of other competent evidence establishes beyond a reasonable doubt that a person was under the influence of 'intoxicating liquor . . . to a degree which rendered such person incapable of safely operating a vehicle.'"[34]

CONCLUSION

The Rhode Island Supreme Court applied its precedents and rules of statutory construction in determining that a blood alcohol content of 0.10 or higher is not an essential element to convict a

26. *Id.* at 255-56.
27. *Id.* at 256.
28. *See id.*
29. 625 A.2d 1350 (R.I. 1993).
30. *DiCicco*, 707 A.2d at 256 (quoting *Lusi*, 625 A.2d at 1356).
31. *Id.* (quoting *Lusi*, 625 A.2d at 1357).
32. *Id.* (quoting *Lusi*, 625 A.2d at 1357).
33. *See id.*
34. *Id.* at 256-57.

defendant under Rhode Island General Laws section 31-27-2 or 31-27-2.2. Recognizing the legislature's concern for public safety in enacting these statutes, the court looked to a literal application of the statutes in answering these two questions. Prosecutors in Rhode Island may now attain convictions of "under the influence" crimes on any admissible evidence of intoxication rather than having a BAC test be solely determinative of intoxication.

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Criminal Law. *State v. Parkhurst*, 706 A.2d 412 (R.I. 1998). Under Rule 404(b) of the Rhode Island Rules of Evidence, the fact that evidence of the defendant's criminal conduct was introduced at trial during the prosecutor's case-in-chief rather than in rebuttal is immaterial to its admissibility as other crimes evidence, when there is an obvious attempt by defense counsel to raise the jury's consciousness of the defendant's diminished capacity during cross-examination. Also, jury instructions will be sufficient if they inform the jury of the elements the state has to prove in order to obtain a conviction, even if the instructions are not perfect.

In *State v. Parkhurst*,[1] the Rhode Island Supreme Court addressed the problem concerning admissibility of other criminal conduct. In *Parkhurst*, the court determined that, when defense counsel raises the defense of diminished capacity, the state may introduce evidence of other bad acts which took place just hours following the crime for which defendant is being tried.

FACTS AND TRAVEL

When his parents left for vacation on November 23, 1992, Trevor Ramella (Trevor) hosted several parties over a five day period.[2] On November 23, Trevor hosted a party with several teens and young adults attending.[3] Soon afterward, Trevor got into a confrontation with the defendant, Steven Parkhurst (Parkhurst), concerning an incident with an intoxicated girl.[4] As a result, Trevor ejected the defendant from the party at gunpoint.[5] According to one witness, defendant was angry with Trevor and wanted to get him back.[6] The next night at another party at Trevor's house, the defendant was overheard saying that he was going to kill Trevor on the last night of the party.[7]

Once again on November 27, the defendant and several other individuals arrived at Trevor Ramella's house for another party.[8] By 9:30 p.m., about forty youths had gathered at the Ramella

1. 706 A.2d 412 (R.I. 1998).
2. *See id.* at 415.
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.* at 416.
8. *See id.*

home.[9] Concerned that the party might be getting out of hand, Trevor got a handgun and ordered several people to leave, including the defendant.[10] After leaving Ramella's house, the defendant and others went to another party, before again returning to Trevor's.[11] Eventually, only a handful of people remained. Then, upon hearing noises sounds similar to people running around the house, Trevor went upstairs to investigate.[12] Soon afterward, Trevor shouted, "[t]hey got my guns,"[13] and ran from the room.[14] Charles Mayer (Mayer), a friend of Trevor's, discovered that a revolver was missing from the bedroom, as well as a hunting rifle and some ammunition.[15] Mayer then ran to the front door and saw Trevor lying face down in a pool of blood.[16] He also saw the defendant standing over Trevor with a revolver in his hand.[17] The defendant and an accomplice then stole the Ramella's Toyota Celica and drove away.[18]

Two days later, the defendant and his accomplice were arrested in Indiana.[19] They were driving the Ramella's Celica, and a .22 caliber revolver was found under the driver's seat.[20] The defendant was found guilty of first degree murder, conspiracy to commit murder, breaking and entering, larceny of a firearm and carrying a stolen firearm while committing a crime of violence.[21] The defendant appealed his conviction, arguing that the trial judge improperly admitted evidence of defendant's other criminal acts in anticipation of a defense not yet proffered, and that the second-degree murder jury instructions were so confusing and contradictory that a reversal of his conviction is required.

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9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *Id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.* at 417.
19. *See id.*
20. *See id.*
21. *See id.* at 418.

ANALYSIS AND HOLDING

R.I. Rule of Evidence 404 (b)

The defendant first argues that the trial judge erred by admitting evidence, pursuant to Rule of Evidence 404(b), concerning other crimes he committed, in anticipation of a defense not yet proffered.[22] Although evidence of other crimes is not admissible to prove the defendant's propensity to commit the crime, it is admissible to establish motive, intent, common plan or scheme or the identity of the perpetrator.

In the present case, while cross-examining a state's witness, defense counsel asked more than thirty questions relating to alcohol consumption and the defendant's participation therein.[23] This, according to the court, clearly showed that the defense raised the issue of intoxication before presenting the defendant's case to the jury.[24] Therefore, the state then had the burden of negating intoxication in order to prove defendant's premeditated intent to kill.[25]

Thus, the state's introduction of evidence concerning defendant's robbery four hours after the killing of Trevor Ramella, and his use of the revolver to commit that crime, tended to rebut the claim of an accidental shooting caused by intoxication.[26] The court determined that the fact that this evidence was introduced during the prosecutor's case in chief, rather than in rebuttal, is immaterial in light of defense counsel raising the defense of intoxication during cross-examination.[27]

Furthermore, the robbery was evidence of defendant's intent to kill Trevor Ramella and finance his flight from authority.[28] During the course of the trial, the state presented evidence that prior

22. Rule 404(b) of the Rhode Island Rules of Evidence states in part that:
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.

Id.

23. *See Parkhurst*, 706 A.2d at 424.
24. *See id.*
25. *See id.* (citing State v. Sanden, 626 A.2d 194, 199 (R.I. 1993)).
26. *See id.*
27. *See id.* at 425.
28. *See id.*

to the shooting, the defendant and his accomplice talked about how they planned to kill Trevor and leave the state.[29] Therefore, the robbery is corroborating evidence of a conspiracy between the defendant and his accomplice to kill Trevor and leave Rhode Island.[30] The state introduced this evidence, not to prove propensity, but to prove premeditation and consciousness of guilt.[31]

Improper Jury Instructions

The defendant's next argument was that the trial judge's instructions to the jury regarding second degree murder were so confusing and contradictory that a reversal of his conviction was required. According to the court, defendants, except in rare circumstances not present in this case, cannot challenge jury instructions on appeal unless a proper objection exists on the record.[32] Therefore, defense counsel's failure to object constituted a waiver of the right to challenge imperfections in the instructions on appeal.[33] However, even if the defense had preserved this issue on appeal, no prejudice to the defendant occurred to warrant a reversal of his conviction.[34]

A conviction of first-degree murder requires the state to prove, beyond a reasonable doubt, that a defendant possessed a premeditated intent to kill of more than a momentary duration. Whereas, if the intent to kill was merely momentary, the accused shall be guilty of second-degree murder.[35] Thus, if the trial judge instructs the jury on both of these charges, the judge must set forth the determinative factors that distinguish first and second degree murder.[36] In the present case, the judge instructed the jury that "premeditation and deliberation are not elements of murder in the second degree,"[37] but then subsequently instructed that "the distinction between first- and second-degree murder is the length of time of the premeditation."[38] Although these instructions are not

29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.* at 422 (citing State v. Vargas, 420 A.2d 809, 815-16 (R.I. 1980)).
33. *See id.*
34. *See id.*
35. *See id.* at 421 (citing State v. Grabowski, 644 A.2d 1282, 1285 (R.I. 1994)).
36. *See id.* (citing State v. Fenik, 121 A. 218, 221 (R.I. 1923)).
37. *Id.* at 421.
38. *Id.*

perfect, the court said, the instructions in its entirety adequately set forth for the jury the elements of first and second degree murder, and the factors distinguishing them.[39]

Furthermore, the jury found that the defendant harbored, for more than a mere moment, a premeditated intent to kill Trevor Ramella in convicting the defendant of first-degree murder.[40] Therefore, any uncertainty caused by the jury instructions on second-degree murder are irrelevant.[41]

CONCLUSION

In *State v. Parkhurst*, the Rhode Island Supreme Court determined that Rhode Island Rule of Evidence 404(b) permits the prosecution to introduce evidence of other crimes committed by the defendant during its case in chief, rather than in rebuttal, when the defense counsel has attempted to raise the jury's consciousness of defendant's diminished capacity during cross-examination. Also, potentially confusing jury instructions are sufficient if they adequately set forth the distinctions between first- and second-degree murder.

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39. *See id.* at 422.
40. *See id.*
41. *See id.*

Criminal Law. *State v. Pena-Lora*, 710 A.2d 1262 (R.I. 1998). Defendants who obtain an owner's permission to operate the owner's automobile have standing to challenge the legality of a subsequent automobile search.

In *State v. Pena-Lora*,[1] the Rhode Island Supreme Court determined whether a defendant, driving an automobile with the owner's permission, has standing to challenge the legality of a search.[2] The defendant has the burden of establishing his or her standing to challenge the search.[3] To do so, the defendant must produce evidence that he or she permissively operated the owner's vehicle.[4] Such evidence of permission is crucial because, if it is accepted by the trial judge, it establishes the defendant's claim of standing.[5] Since the trial judge is not bound by the evidentiary rule regarding hearsay during a preliminary suppression hearing, a defendant may introduce evidence of out-of-court statements tending to prove that he operated the owner's automobile with the owner's permission.[6]

FACTS AND TRAVEL

In the early morning hours of April 15, 1992, two State Police Troopers, Eric L. Croce (Croce) and James E. Swanberg (Swanberg), driving in a marked police cruiser, were patrolling Eddy Street in Providence, Rhode Island.[7] As the officers approached the intersection of Eddy Street and Thurbers Avenue, they noticed the defendant, Juan Pena-Lora (Pena-Lora), driving a

1. 710 A.2d 1262 (R.I. 1998).
2. *Id.* at 1264.
3. *See id.* at 1265.
4. *See id.*
5. *See id.* at 1264, 1266.
6. *See id.* at 1264 (stating that "[i]t is clear that the rules of evidence do not apply to '[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the trial justice under Rule 104'") (quoting R.I. R. Evid. 101(B)(1)); *see also* R.I. R. Evid. 104(b) (stating that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition"). In *Pena-Lora*, the court held that, based on Rule 104(b), "the trial justice is not bound by the rules of evidence when resolving preliminary questions concerning the admissibility of evidence. The only exception to this general rule is with respect to questions of privilege." *Pena-Lora*, 710 A.2d at 1264.
7. *See Pena-Lora*, 710 A.2d at 1262.

compact automobile.[8] The defendant proceeded through the intersection, failing to stop for a red traffic light.[9] The officers turned on the police cruiser's lights and followed Pena-Lora, who pulled over to the side of the road.[10]

While Swanberg approached Pena-Lora from the driver's side, Croce approached from the passenger side.[11] To ensure their personal safety, both officers directed their flashlights into the backseat of the vehicle.[12] When Swanberg asked to see Pena-Lora's driver's license and the car's registration, the defendant complied.[13] The registration indicated that the car belonged to Sonia Lora (Lora) of Massachusetts.[14] Meanwhile, Croce noticed "a brown paper bag wrapped in a white plastic bag on the vehicle's rear floor adjacent to the back seat."[15] The bag contained irregularly shaped packages wrapped in duct tape.[16] Based on his experience and training, Croce believed that such packages indicated drug trafficking.[17] As a result, Pena-Lora was handcuffed and placed in the police cruiser.[18]

Croce then commenced to search the bag.[19] Inside, he found four bundles, one of which was not wrapped in duct tape.[20] This bundle, consisting of only clear plastic packaging, revealed "a white fluffy substance."[21] The defendant was subsequently arrested; the contents of two of the bundles later tested positive as cocaine.[22] Thus, the defendant was charged with possession of more than one kilogram of cocaine.[23]

Pena-Lora denied any connection to the cocaine.[24] He stated that, after midnight, he had received an anonymous telephone call

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8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.* at 1262-63.
14. *See id.*
15. *Id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *Id.*
22. *See id.*
23. *See id.*
24. *See id.*

from a woman who implored Pena-Lora, a mechanic, to repair her car.[25] He agreed to help and, after obtaining a ride from a friend, he proceeded to the location along the highway where the car broke down.[26] After his friend helped him jump-start the vehicle, Pena-Lora drove off toward Thurbers Avenue.[27] Soon after, he encountered the officers.

At the preliminary suppression hearing prior to trial, Pena-Lora attempted to challenge the legality of the automobile search and subsequent seizure of the cocaine.[28] In order to prevail on the suppression motion, Pena-Lora had to establish his standing to challenge the search.[29] Thus, he testified that the owner gave him permission to drive her automobile so that he could perform repair work at his garage.[30] The trial judge determined that mere possession of the vehicle's keys, coupled with Pena-Lora's testimony, did not establish the defendant's standing.[31] Therefore, since he lacked standing, Pena-Lora could not challenge the legality of the search.[32]

Although the case proceeded to trial, the trial judge, on motion of the defendant, passed the case so that the defendant could investigate newly revealed evidence.[33] The evidence, in part, consisted of a telephone conversation between Lora, the owner of the automobile, and Croce.[34] Also, Lora had signed a transcript of her telephone conversation with Croce and provided two additional statements to the police.[35]

Prior to the second trial, Pena-Lora, at the second suppression hearing, attempted to establish his standing to challenge the search.[36] He wished to introduce Lora's out-of-court recorded statements to Croce.[37] Those statements, although contradicting the time and place that Pena-Lora took possession of the automo-

25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.* at 1264.
35. *See id.*
36. *See id.*
37. *See id.*

bile, tended to prove that Lora, the owner of the vehicle, did in fact give the defendant permission to operate her car.[38] The trial judge refused to allow the statements into evidence, determining that they were hearsay and not subject to any exception.[39] Therefore, the trial judge once again determined that Pena-Lora was not in legitimate possession of the automobile and thus lacked standing to challenge the search.[40] After the subsequent jury trial, the "defendant was convicted on one count of possession of more than one kilogram of cocaine."[41] He was placed on probation for twenty-five years after receiving a suspended prison sentence of twenty-five years.[42]

ANALYSIS AND HOLDING

On appeal, the supreme court determined that the trial justice's exclusion of Lora's out-of-court statements, on the basis that they were hearsay and did not fall within a requisite exception, was reversible error.[43] Rhode Island Rule of Evidence 804, the basis for the trial judge's determination, did not apply during the preliminary suppression hearing.[44] The court went on to conclude that the trial judge's error prejudiced the defendant.[45] By refusing to consider the out-of-court statements, the trial judge prevented Pena-Lora from "adequately addressing [his] assertion that a non-owner automobile operator can establish standing to challenge a search of the vehicle on the basis of permission from the owner to use the vehicle."[46] The automobile owner's out-of-court statements, if accepted by the trial judge, could have established the defendant's standing to challenge the legality of the search. Thus, if the search was illegal, the trial judge could suppress the cocaine evidence seized from the vehicle.[47] Therefore, when the trial judge later admitted the cocaine evidence at the defendant's jury trial,

38. *See id.*
39. *See id.*; *see also* R.I. R. Evid. 804 (defining hearsay exceptions involving unavailable declarants).
40. *See Pena-Lora*, 710 A.2d at 1264.
41. *Id.*
42. *See id.*
43. *See id.*
44. *See id.*; *see also supra* notes 6 & 39.
45. *See Pena-Lora*, 710 A.2d at 1264.
46. *Id.*
47. *See id.* at 1265.

the admission prejudiced the defendant "[b]ecause the cocaine evidence was the only evidence that could support the state's case . . . ."[48]

The supreme court relied on case law supporting the defendant's proposition that one driving an automobile with permission from the owner has standing to challenge a police search of the vehicle.[49] In particular, the court cited *United States v. Garcia*[50] and *United States v. Lampkins*.[51] In *Garcia*, the defendant possessed standing based solely on the fact that he was driving the owner's automobile with the owner's permission.[52] In *Lampkins*, although the defendant had permission to perform repair work, the owner never gave the defendant permission to drive the automobile.[53] The defendant claimed that he had standing to challenge the vehicle search and the court agreed, stating that "the defendant had a legitimate expectation of privacy in the searched vehicle absent any evidence from the government to prove that the automobile had in fact been stolen."[54]

In *Garcia*, the Seventh Circuit determined that, when the issue is whether the defendant stole the automobile or borrowed it with permission from the owner, the government has the burden of proving by a preponderance of the evidence that the vehicle in question is not being used with the owner's permission.[55] Similarly in *Lampkins*, the United States District Court held that the defendant had standing because the government did not offer any evidence to contradict the defendant's testimony that he had permission to perform repair work on the owner's car.[56] Therefore, the defendant had a legitimate expectation of privacy and thus the requisite standing to contest the search of the automobile.[57]

The Rhode Island Supreme Court disagreed with the contention in both *Garcia* and *Lampkins* that the state has the burden of

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48. *Id.*
49. *See id.*
50. 897 F.2d 1413, 1417-18 (7th Cir. 1990), *aff'd*, 22 F.3d 304 (3d Cir. 1994), *cert. denied*, 513 U.S. 949 (1994).
51. 811 F. Supp. 164, 169 (D. Del. 1993).
52. *See Pena-Lora*, 710 A.2d at 1265 (citing *Garcia*, 897 F.2d at 1418).
53. *See Pena-Lora*, 710 A.2d at 1265 (citing *Lampkins*, 811 F. Supp. at 168-69).
54. *Id.*
55. *See Pena-Lora*, 710 A.2d at 1265 (citing *Garcia*, 897 F.2d at 1418).
56. *See Lampkins*, 811 F. Supp. at 169.
57. *See id.*

disproving an automobile operator's standing by introducing evidence that the operator stole or wrongfully possessed the owner's vehicle.[58] The court stated that:

> We do not agree that in the absence of any evidence of automobile theft or wrongful possession presented by the state, a nonowner automobile operator has standing to challenge a search therein. We believe those statements in *Garcia* and *Lampkins* are contrary to the well-settled rule in this jurisdiction that a defendant assumes the burden of establishing his or her standing to challenge the admissibility of seized evidence.[59]

Rather, the court cited *Garcia* and *Lampkins* merely to illustrate the important role of "permissive use" in the standing inquiry.[60]

The Rhode Island Supreme Court held that Lora's out-of-court statements tended to prove that the defendant had permission to drive the owner's automobile.[61] If the pretrial suppression hearing judge accepted such evidence, then the judge could have determined that Pena-Lora possessed the necessary standing to challenge the legality of the vehicle search. If seized during an illegal search, the trial judge may have suppressed the cocaine evidence.[62] Therefore, the court remanded the case to the trial judge so that, in light of the court's findings, he may further consider the defendant's motion to suppress in light of those out-of-court statements.[63]

CONCLUSION

Establishing the link between "permissive use" of an automobile and one's ability to challenge the legality of an vehicle search, the Rhode Island Supreme Court clarified the standing inquiry. The court relied on precedent from federal courts to support the

58. *See Pena-Lora*, 710 A.2d at 1265.

59. *Id.* (citing Rakas v. Illinois, 439 U.S. 128, 130-31 n.1 (1978) (holding that the proponent of a motion to suppress has the burden of proving that the challenged search violated his or her Fourth Amendment rights); State v. Bertram, 591 A.2d 14, 18 (R.I. 1991) (holding that defendants have the burden of establishing their standing to challenge the legality of the search and the admissibility of the seized evidence); State v. Porter, 437 A.2d 1368, 1371 (R.I. 1981) (same); State v. Cortellesso, 417 A.2d 299, 301 (R.I. 1980) (same)).

60. *Id.*

61. *See id.*

62. *See id.*

63. *See id.* at 1266.

proposition that one who drives an automobile with the owner's permission has standing to challenge a search of that vehicle. However, the court contradicted the federal case law, instead adhering to the precedent in its own jurisdiction, by holding that the state does not have the burden of disproving an automobile operator's standing. Rather, the court emphasized the defendant's burden of proving his or her standing to challenge the legality of the vehicle search and the admissibility of evidence seized therein.

Neal R. Pandozzi

Criminal Law. *State v. Peterson*, 722 A.2d. 259 (R.I. 1998). When a defendant attempts to cross-examination a witness, the defendant is granted reasonable latitude to explore and establish any possible bias, prejudice, or ulterior motive that might affect the witness' testimony. A criminal defendant must be given timely notice of the states intent to adjudicate the defendant pursuant to the habitual offender statute, Rhode Island General Laws section 12-19-21.

In *State v. Peterson*,[1] the Rhode Island Supreme Court determined two important issues. First, the court decided that the trial justice did not err in limiting defendant's cross-examination of a crucial state witness regarding possible bias. Second, a majority of the court determined that, pursuant to Rhode Island's habitual criminal statute,[2] the state did not have to notify the defendant within forty-five days of the arraignment.[3]

FACTS AND TRAVEL

The defendant, Bradley Peterson (Peterson), was charged with the crime of robbery in the second degree, in violation of Rhode Island General Laws section 11-39-1, and was considered a habitual offender pursuant to Rhode Island General Laws section 12-19-21.[4] At trial before the superior court, Joseph Kaiser, the complaining witness, testified to the following narrative. On March

1. 722 A.2d 259 (R.I. 1998).

2. The habitual criminal statute, Rhode Island General Laws section 12-19-21, provides in pertinent part:

> (b)Whenever it appears a person shall be deemed an 'habitual criminal,' the attorney general, within forty-five (45) days of the arraignment, but in no case later than the date of the pretrial conference, may file with the court, a notice specifying that the defendant, upon conviction, is subject to the imposition of an additional sentence in accordance with this section; provided, however, that in no case shall the fact that the defendant is alleged to be a habitual offender be an issue upon the trial of the defendant, nor shall it be disclosed to the jury. . . . If it appears by a preponderance of the evidence presented that the defendant is a habitual criminal under this section, he or she shall be sentenced by the court to an additional consecutive term of imprisonment of not exceeding twenty-five (25) years; and provided further, that the court shall order the defendant to serve a minimum number of years of the sentence before he or she becomes eligible for parole.

R.I. Gen. Laws § 12-19-21(b) (1956) (1994 Reenactment).

3. *See Peterson*, 722 A.2d at 265.

4. *See id.* at 260.

18, 1993, as Joseph Kaiser (Kaiser) drove from work to his home in Newport, Peterson suddenly entered the roadway directly in front of his vehicle.[5] Peterson acted as if he had been struck by the car, and proceeded to lay face-down on the sidewalk about six to ten feet away.[6]

Kaiser, doubting that he had struck and injured Peterson, nevertheless stepped out of his truck, leaving the driver's door open, and called for the pedestrian to get up, to which there was no response.[7] After Kaiser called out for the third time, the man got up, brushed himself off, and ran straight towards Kaiser.[8] The two exchanged words and a struggle ensued. Eventually, Kaiser was pushed to the ground and lay there as he watched the defendant steal his truck.[9] Kaiser's vehicle was found the next day, abandoned in Providence, with some expensive items missing.[10]

Subsequently, on April 8, 1993, Peterson was arrested on an outstanding domestic assault warrant, after Susan Rosa (Susan), his live-in girlfriend, contacted the Middletown Police and informed them of Peterson's carjacking.[11] The following day, Kaiser identified Peterson from a photographic array presented to him by the police.[12]

At trial, Susan testified that Peterson told her about his carjacking of Kaiser's vehicle.[13] Furthermore, Susan testified that she was pregnant, had a new boyfriend, and that she wanted Peterson to stay in jail and out of her life.[14] The trial justice limited Peterson's defense counsel from cross-examining Susan regarding her relationship with her new boyfriend.[15]

In his appeal to the supreme court, Peterson argued that his constitutional rights were violated because he was not permitted to question Susan regarding her relationship with another man.[16] Such examination, according to Peterson, may have revealed a mo-

5. *See id.* at 261.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.* at 262.
16. *See id.*

tivation for Susan to lie, and that she and her lover were conspiring to frame Peterson.[17]

Peterson also argued that the state failed to notify him of its intent to seek adjudication pursuant to the habitual offender statute.[18] He claimed that the trial justice's determination that the defendant was well-informed of the state's intent to adjudicate him pursuant to the habitual offender statute was clear error, and therefore warranted a vacation of the enhanced sentence.[19]

BACKGROUND

Recently, the Rhode Island Supreme Court held that "[e]ffective cross-examination is an essential element of the presentation of a full and fair defense and is guaranteed by both the State and the Federal Constitutions."[20] The supreme court, in *State v. Veluzat*,[21] noted that "the cross-examiner must be given a reasonable opportunity to explore and to establish any possible bias, prejudice, or ulterior motive that a witness may possess that might affect the witness' testimony."[22] However, in *State v. Eckhart*,[23] the court held that a defendant may not use cross-examination to "harass, annoy, or humiliate the witness, or [ask] questions that are irrelevant or contain no probative value."[24]

Rhode Island's habitual offender statute provides for enhanced penalties for persons previously convicted of two or more felonies.[25] The state is required to notify the defendant, within forty-five days of the arraignment date, that it intends to proceed under the statute.[26]

ANALYSIS AND HOLDING

The *Peterson* court first addressed the defendant's contention that his constitutional rights were violated because he was not permitted to question/probe into witness' bias or prejudice toward the

17. *See id.*
18. *See id.*
19. *See id.* at 265.
20. *Id.* at 262 (quoting State v. Doctor, 690 A.2d 321, 327 (R.I. 1997)).
21. 578 A.2d 93 (R.I. 1990).
22. *Peterson*, 722 A.2d at 262 (quoting *Veluzat*, 578 A.2d at 94-95).
23. 367 A.2d 1073 (R.I. 1977).
24. *Peterson*, 722 A.2d at 262 (citing *Eckhart*, 367 A.2d at 1076).
25. *See* R.I. Gen. Laws § 12-19-21 (1956) (1994 Reenactment).
26. *See id.* § 12-19-21(b).

defendant on cross-examination.[27] The court agreed with the defendant's contention that he should be allowed to demonstrate bias in the witness.[28] However, the court was unwilling to allow the defendant to "harass, annoy, or humiliate the witness, or [ask] questions that are irrelevant or contain no probative value."[29] The court stated that "counsel for defendant was given reasonable latitude to explore the elements of bias," and "even allowing counsel . . . unlimited cross-examination . . . would have no effect on the outcome of the trial."[30]

The supreme court next addressed the defendant's contention that the state failed to notify him of its intent to seek adjudication pursuant to the habitual offender statute within the statutorily imposed forty-five day time limit.[31] The court, confronted with an ambiguous statute, had to examine the statute in order to "glean the intent and purpose of the Legislature."[32] The court determined that the language in section 12-19-21 does not allow a defendant to avoid the adjudication as a habitual offender solely because the pretrial conference was continued.[33]

Dissenting from the majority on this issue, Justice Goldberg did not agree that the Legislature intended the state to have "the option of presenting notice either within forty-five days at the arraignment *or* at some point before the pretrial conference is held."[34] Therefore, Justice Goldberg would vacate the habitual offender sentence.[35]

CONCLUSION

In *Peterson*, the Rhode Island Supreme Court clearly follows established state and federal law. A defendant, attempting cross-examination, must be granted reasonable latitude "to explore and establish any possible bias, prejudice, or ulterior motive that might affect the witness' testimony."[36] Also, timely notice of states intent

27. *Peterson*, 722 A.2d at 262.
28. *See id.* at 263.
29. *Id.* at 262 (citing *Eckhart*, 367 A.2d at 1076).
30. *Id.* at 263.
31. *See id.*
32. *Id.* at 264.
33. *See id.* at 265.
34. *Id.* at 267.
35. *See id.* at 268.
36. *Id.* at 262.

to adjudicate the defendant pursuant to the habitual offender statute, Rhode Island General Laws section 12-19-21, must be given to the criminal defendant.[37] Under the facts of the case the defendant clearly had ample opportunity to cross-examine adverse witnesses and was granted timely notice of the states intent to adjudicate the defendant pursuant to the habitual offender statute.

B. Jason Erb

37. *See id.* at 265.

Criminal Law. *State v. Tevay*, 707 A.2d 700 (R.I. 1998). An attorney is precluded from arguing in a closing argument that a witness' testimony is inconsistent with a prior statement made to the police unless evidence in the record establishes the inconsistency. In order to evaluate whether a trial judge presented a jury with proper legal principles in the judge's jury instructions, one must look at the jury instructions in their entirety to determine if they are appropriate for an ordinary jury.

In *State v. Tevay*,[1] the Rhode Island Supreme Court held that a reference made in the opposing side's opening statement does not constitute sufficient evidence to argue inconsistencies in a closing argument.[2] Therefore, an attorney must find evidence in the record supporting the inconsistencies of a witness' statements in order to argue the inconsistency in the attorney's closing argument.[3]

FACTS AND TRAVEL

The defendant, Nolan R. Tevay (Tevay), was tried and convicted of one of two counts of second-degree sexual child molestation in violation of section 11-37-8.3 of the Rhode Island General Laws.[4] Tevay was charged with one count of touching a child's vagina with his hand (Count One) and one count of forcing a child to touch his penis (Count Two).

According to the twelve year old female victim (Jody), one afternoon in the summer of 1994, Jody entered her mother's bedroom to wake Tevay at the request of her mother.[5] Once Jody entered the room she began to shake Tevay to wake him at which time the defendant grabbed Jody and pulled her into his bed.[6] Tevay allegedly touched her buttock and forced the young girl to touch his penis.[7] According to Jody, Tevay's eyes were partially open during the incident and, when the incident was over, Tevay told Jody he

1. 707 A.2d 700 (R.I. 1998).
2. *Id.* at 702.
3. *See id.*
4. *See id.* at 701.
5. *See id.*
6. *See id.*
7. *See id.*

would beat her if she told anyone what happened.[8] Soon after this incident, Tevay moved out of the house for unrelated reasons.[9]

In February of 1995, after being informed that Tevay would be moving back into their house, Jody told her mother about the incident with Tevay from the summer of 1994.[10] Jody later gave a statement to the police and told them that Tevay forced her to touch his penis and he touched her vagina.[11] However, when the victim testified at trial she stated that Tevay never touched her vagina.[12] She did, however, confirm that he forced her to touch his penis.[13]

Tevay's attorney succeeded in having Count One dismissed in superior court, however Tevay was convicted of Count Two.[14] Defendant's attorney was successful in keeping out the police report which alleged the touching of the victim's vagina.[15] Since the victim failed to provide any evidence of the touching of her vagina, Count One was dismissed.[16] During the trial, Tevay testified that he was a "heavy sleeper" and that there was a "ten percent chance" that the incident occurred without his knowledge.[17] The trial judge prohibited defense counsel from mentioning in his closing argument that Jody's trial testimony, regarding the touching of her vagina by the defendant, was wholly inconsistent with her police statement that the defendant had touched her vagina.[18]

The trial judge submitted Count Two to the jury and instructed the jury that "they must find beyond a reasonable doubt that Tevay's conduct was intentional and had as its purpose sexual arousal or gratification."[19] Defense counsel objected to this instruction and the failure of the judge to instruct on the defense of accident or mistake-of-fact.[20] After this objection, the trial judge amended his instruction to state that the prosecution must prove

8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.* at 701-02.
15. *See id.* at 702.
16. *See id.*
17. *Id.* at 701.
18. *See id.* at 702.
19. *Id.*
20. *See id.*

the defendant's conduct was intentional "beyond a reasonable doubt and 'that [Tevay] may not be found guilty of conduct which you feel from the evidence, causes you to conclude that the conduct was accidental.'"[21] Defense counsel again objected and repeated the request for a mistake-of-fact instruction which was denied.[22] The jury deliberated and convicted the defendant of Count two.[23] The defendant appealed his conviction to the supreme court.[24]

BACKGROUND

In *Avarista v. Aloisio*,[25] Rhode Island's Supreme Court considered the issue of the evidentiary nature of references made in an attorney's opening statement. The court held in *Avarista* that references made in an opening statement do not constitute evidence.[26]

The court addressed the issue of the sufficiency of jury instructions in *State v. Grabowski*.[27] The *Grabowski* court stated that a "jury charge must cover the law adequately" in order to withstand an appeal.[28] Jury instructions should be examined "in their entirety to determine the manner in which a jury of ordinary, intelligent lay persons would have comprehended them."[29] In *Grabowski*, the court held that one must read all of the "allegedly inadequate instructions in the context as a whole" to determine if a judge's jury instructions were adequate.[30]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court held a defense attorney is not entitled to argue in his closing argument that the victim's in-court testimony was inconsistent with a prior police statement.[31] Furthermore, the court stated that a jury instruction by a trial

21. *Id.*
22. *See id.*
23. *See id.*
24. *See id.*
25. 672 A.2d 887, 892 (R.I. 1996).
26. *Tevay*, 707 A.2d at 702 (citing *Avarista*, 672 A.2d at 892).
27. 672 A.2d 879, 882 (R.I. 1996).
28. *Tevay*, 707 A.2d at 702 (quoting *Grabowski*, 672 A.2d at 882).
29. *Id.*
30. *See id.*
31. *See id.*

court judge must cover the law adequately.[32] Since the judge covered the law adequately the instruction was acceptable.[33]

The defendant's presented two issues for appeal: first, whether the trial judge's prohibition of the topic of the victim's inconsistent statements was appropriate, and second, if the trial court judge's jury instructions were sufficient.[34]

Rhode Island's highest court held that the trial court's prohibition of the discussion of the victim's inconsistent statement was appropriate.[35] Defense council suggested they were entitled to argue on this topic since the victim had contradicted herself on the stand.[36] Defense council hoped to "draw a negative inference regarding whether Jody testified truthfully to having been force to touch Tevay's penis" since she contradicted herself on the other count.[37] The court held that unless "evidence was presented concerning vaginal touching, the trial justice properly prohibited defense counsel's closing argument that Jody's trial testimony was inconsistent."[38] The court further stated that although the prosecutor referred to the alleged vaginal touching in the opening statement, an "opening statement does not constitute evidence."[39] Therefore, due to this lack of evidence, defendant was not allowed to argue regarding the inconsistencies in the closing argument and, thus, the court denied this portion of the defendant's appeal.[40]

The supreme court also addressed the issue of the sufficiency of the trial judge's jury instruction.[41] Defense counsel suggested that the trial judge's instructions failed to inform the jury regarding the mens rea requirement and the accident and mistake-of-fact defenses.[42]

The court disagreed with defense counsel and found that the trial judge's instructions were sufficient.[43] The court stated that jury instructions must be viewed "'in the context as a whole'" to

32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*
37. *Id.*
38. *Id.*
39. *Id.* (citing Avarista v. Aloisio, 672 A.2d 887, 892 (R.I. 1996)).
40. *Id.*
41. *See id.*
42. *See id.*
43. *See id.*

determine if the instruction has "'fairly set forth for the jury the legal principles controlling a crucial factual issue.'"[44] The court noted that although the trial judge denied the defendant's request to specifically instruct on mistake-of-fact, the court was "of the opinion that both accident and mistake-of-fact in the context for this case relate to the same defense theory."[45] Specifically, the court saw the defense to be that the "accident was the mistaken belief that Jody was Tevay's wife."[46] The court reasoned that the jury had been informed as to this defense by the trial judge's instructions adequately and, thus, the instructions were sufficient.[47] Therefore, since the court felt that the trial judge's instruction to the jury and the prohibition on the defense counsel's argument were appropriate, the court denied the defendant's appeal.[48]

CONCLUSION

Ordinarily, if an attorney wishes to discuss the inconsistencies of a witness' testimony in closing argument, the attorney must be able to point to evidence in the record displaying this inconsistency. The result of this ruling is that a defendant may be unable to discuss the falsity of an alleged victim's statement unless the defendant allows the prosecution to bring in otherwise potentially damaging evidence. The court in *Tevay* also decided that one must look at a judge's allegedly insufficient jury instructions as a whole in order to properly determine if the instructions are sufficient for an ordinary jury to use in its mission as finders of fact.

Kevin B. Hylton

44. *Id.* (quoting State v. Grabowski, 672 A.2d 879, 882 (R.I. 1996)).
45. *Id.* at 702.
46. *Id.*
47. *See id.*
48. *See id.*

Criminal Law. *State v. Yanez*, 716 A.2d 759 (R.I. 1998). In a prosecution for child-molestation sexual assault, the defendant's mistaken belief of the victim's age is not a defense. As this is a strict liability offense, a defendant's due process rights are not violated if the prosecution does not prove the defendant knew the victim's age.

FACTS AND TRAVEL

In *State v. Yanez*,[1] a jury convicted the defendant, Alejandro Yanez (Yanez), of first-degree child-molestation sexual assault.[2] Yanez was eighteen at the time and the victim, Allison, was thirteen-years old.[3] The two met briefly in August 1992.[4] There was almost no further contact between them until July 1993, when Yanez gave Allison a ride to a park in his automobile where she was meeting some friends.[5] Yanez gave Allison his telephone number then talked to her on the telephone later that night.[6]

The next day Allison again spoke to Yanez on the phone and they agreed to meet in a parking lot behind St. Joseph's Church in West Warwick.[7] After meeting there, they went to a house owned by one of Yanez's friends where they engaged in consensual sexual intercourse.[8] Allison then returned home and was confronted by her mother.[9] Her mother asked if she had engaged in sexual intercourse.[10] Allison denied it at first but later admitted she had sexual intercourse with a partner named Derek.[11] Allison explained she did not want her mother to know she had sex with Yanez.[12] Yanez admitted having sex with Allison but claimed she told him

1. 716 A.2d 759 (R.I. 1998).
2. *Id.* at 762.
3. *See id.* at 760 (stating that Allison is a fictitious name).
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.* at 760-61.
8. *See id.* at 761.
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*

that she was sixteen.[13] Allison denied this and claimed she told Yanez two or three times that she was only thirteen.[14]

Yanez was indicted under Rhode Island General Laws sections 11-37-8.1 and 11-37-8.2., first-degree child-molestation sexual assault.[15] At trial, the judge refused to admit evidence demonstrating Yanez's mistaken belief of Allison's age and evidence concerning Allison's apparent maturity based on her appearance and demeanor.[16] The trial judge denied Yanez's request that the jury be instructed on the mistake-of-fact defense and instead instructed the jury that it did not matter that Yanez wrongly believed Allison was over the age of consent.[17] The jury found Yanez guilty of first-degree child molestation sexual assault.[18] Yanez appealed claiming the judge erred in refusing to allow him the opportunity to present a mistake-of-age defense.[19]

BACKGROUND

The origins of the crime of statutory rape date back to thirteenth-century England.[20] The offense was meant to protect those in society that were too young to understand the consequences of engaging in sexual intercourse.[21] The mistake-of-fact defense in regard to the victim's age in a statutory rape prosecution was originally rejected in England and the United States.[22] Statutory rape was regarded as a strict liability offense until California became the first state to recognize the mistake-of-fact defense in 1964.[23] Most courts, however, have continued to reject the reasonable mistake of a victim's age as a defense to statutory rape.[24]

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13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.* at 762.
17. *See id.*
18. *See id.*
19. *See id.* at 766.
20. *See id.* at 763.
21. *See id.*
22. *See id.*
23. *See id.* (referring to People v. Hernandez, 393 P.2d 673 (Cal. 1964)).
24. *See id.*

ANALYSIS AND HOLDING

Yanez argued that the Rhode Island Supreme Court must imply a mens rea requirement with respect to the age of the victim based on its previous interpretation of the terms "sexual penetration" and "sexual contact."[25] The court rejected this argument by interpreting the first-degree child-molestation sexual-assault statute according to its plain words and meaning.[26] The court recited section 11-37-8.1, which provides "[a] person is guilty of first degree child molestation sexual assault if he or she engages in sexual penetration with a person fourteen (14) years of age or under."[27] The court then noted the definition of "sexual penetration" in section 11-37-1(8) as "sexual intercourse, cunnilingus, fellatio, and anal intercourse or any other intrusion, however slight, by any part of a person's body . . . ."[28]

The court held that section 11-37-8.1, according to its plain words, prohibits sexual penetration of any underaged person while making no reference to a defendant's state of mind, knowledge or belief as to the victim's age.[29] The court felt the legislature had intentionally deleted any reference to mens rea so that a person charged with sexual penetration of a child fourteen years or younger would not escape the consequences of his actions by using consent or mistake-of-age as a defense.[30] The court refused to include a mens rea requirement in the statute when one was not intended by the legislature.[31]

Yanez argued he was deprived of his due process rights because he was convicted under a criminal statute which did not include a mens rea element.[32] In order for Yanez to prevail on this argument the court noted, he would have to demonstrate this statute "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[33] The

25. *See id.* at 764 (referring to State v. Griffith, 660 A.2d 704 (R.I. 1995); State v. Tobin, 602 A.2d 528 (R.I. 1992)).

26. *See id.*

27. *Id.* (quoting R.I. Gen. Laws § 11-37-8.1 (1956) (1994 Reenactment)).

28. *Id.* (quoting R.I. Gen. Laws § 11-37-1(8) (1956) (1994 Reenactment)).

29. *See id.*

30. *See id.* at 765.

31. *See id.* at 766.

32. *See id.*

33. *Id.* at 767 (quoting United States v. Ransom, 942 F.2d 775, 777 (10th Cir. 1991)).

court felt Yanez could not prevail because although a mens rea requirement exists for every crime, the United States Supreme Court has recognized several exceptions to this rule.[34] Included as an exception were "sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent."[35] The Rhode Island Supreme Court rejected Yanez's due process challenge and noted the state must only prove beyond a reasonable doubt the act occurred; meaning that Yanez engaged in sexual intercourse with a person fourteen years old or younger.[36]

Dissenting Opinion

Justice Flanders expressed his disagreement with the majority's conclusion in a lengthy dissent.[37] He stated that section 11-37-8.1, which carries a mandatory minimum jail sentence of twenty years, does not bar a defendant from presenting a reasonable mistake-of-age defense.[38] He referred to the majority's holding as "a draconian interpretation of this law" which imposed an "undeserved punishment that is so out of whack with reality that it is virtually without parallel in any jurisdiction of the United States."[39]

Justice Flanders stated that the intent of the General Assembly, in enacting section 11-37-8.1, was to severely punish adults who molest children.[40] He did not feel this severe punishment should be directed to situations where "two teenage lovers engage in a fully consensual act (or acts) of sexual intercourse in the mistaken belief on the part of one of them that they are both of a legal age to do so."[41] Justice Flanders called for a rational interpretation of the statute which would distinguish between these two sce-

34. *See id.* (referring to Morissette v. United States, 342 U.S. 246 (1952)).

35. *Id.* (quoting *Morissette*, 342 U.S. at 251 n.8).

36. *See id.*

37. *See id.* at 771-87.

38. *See id.* at 771. Yanez was sentenced to twenty years in prison with eighteen years suspended. *See id.* at 772 n.10.

39. *Id.* at 771-72.

40. *See id.* at 772.

41. *Id.* Justice Flanders interpreted the facts differently from the majority's belief that this case arose from a single encounter between Allison and Yanez. He reasoned that, based on Allison's testimony at trial, she and Yanez had been dating. *See id.* at 772 n.12.

narios.[42] He stated he would hold that the General Assembly had intended for a jury to sort out cases of actual child molestation from situations where two teenagers engage in consensual sexual intercourse.[43] In order for a jury to do this the defendant must be allowed to present evidence showing he had a reasonable and good-faith mistake concerning his partner's age.[44]

CONCLUSION

In *State v. Yanez*, the Rhode Island Supreme Court determined that statutory rape is a strict liability crime; that is, the state need not prove mens rea on the part of the defendant. All that is required to be found guilty of statutory rape in Rhode Island is for the prosecution to prove beyond a reasonable doubt that the act, sexual intercourse with a person fourteen years old or under, had occurred. The defendant's knowledge, belief and state of mind are all inadmissible to prove he reasonably believed the victim had reached the age of consent.

Thomas M. Robinson

42. *See id.* at 772.
43. *See id.* at 773.
44. *See id.*