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2001 Survey of Rhode Island Law: Cases: Evidence

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Evidence. *Paolella v. Radiologic Leasing Associates*, 769 A.2d 596 (R.I. 2001). The law-of-the-case doctrine does not apply if two motions for summary judgment do not present the same question in the identical manner to the motion justice. Also, the parol-evidence rule provides that parol or extrinsic evidence is not admissible to vary, alter or contradict a written agreement.

FACTS AND TRAVEL

Plaintiff withdrew from a medical partnership with the defendants.[1] At the same time, the plaintiff was terminated as shareholder in the medical practice of the partners. The plaintiff claimed that the termination was for cause under Article 20 of the partnership agreement (the agreement).[2] As a result, the plaintiff argued that he was entitled to his share of the appraised value of the partnership pursuant to Article 22 of the agreement.[3] The plaintiff subsequently filed a motion for summary judgment arguing that pursuant to Article 19 of the agreement, he was required to offer for sale his share of the partnership to the remaining partners and they were required to appraise the value of the shares and to purchase them.[4] The motion was denied.[5] Seven months later after additional discovery, the plaintiff filed a second motion for summary judgment pursuant to Articles 20 and 22 of the agreement.[6] Using new evidence, the plaintiff showed that he had been terminated under the terms of Article 20 and therefore, the defendants were required to appraise the value of the partnership and to pay him his fair share as required by Article 22 of the agreement.[7] Plaintiff argued that the second motion differed from the first in that the first motion was using Article 19, which dealt with the voluntary sale of his shares to the partners, and the second motion was based on Articles 20 and 22 which dealt with the required purchase of his shares following his termination.[8] The same motion justice who had denied the first motion granted the second

1. Paolella v. Radiologic Leasing Associates, 769 A.2d 596, 598 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

motion for summary judgment.[9] Additionally, the trial court barred the introduction of parol evidence offered by the defendants to show that there was an oral understanding among the partners that shares of the partnership's appraised value would not be received by a terminated partner.[10] By granting summary judgment, the trial court provided for judgment on the issue of liability, and defendants appealed.[11]

ANALYSIS AND HOLDING

On appeal, the defendants argued that the law-of-the-case doctrine prevented the motion justice from granting the plaintiffs second motion for summary judgment.[12] They asserted that the second motion was essentially the same as the first and that the motion justice was bound by the ruling of the first motion.[13] They also argued that the motion justice erred by not allowing affidavits regarding the partners' oral understanding of the agreement.[14] They argued that the affidavits would aid in the interpretation of the agreement.[15]

The Rhode Island Supreme Court found that the law-of-the-case doctrine did not apply because the two motions for summary judgment did not present the same question in the identical manner to the motion justice.[16] The court pointed out that the second motion for summary judgment relied upon a different provision of the agreement and used newly discovered evidence.[17]

The court also ruled that, while evidence can be used to aid in the interpretive process to assist in determining its meaning,[18] parol or extrinsic evidence is not admissible to contradict a written agreement.[19] The court stated that the evidence offered by the de-

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 598-99.
14. *Id.* at 599.
15. *Id.*
16. *Id.* (noting that the law of the case doctrine should also not be used to perpetuate a clearly erroneous earlier ruling even if it otherwise might apply (citing In re Estate of Speight, 739 A.2d 229, 231 (R.I. 1999))).
17. *Id.*
18. *Id.* (citing W.P. Associates v. Forcier, Inc., 637 A.2d 353, 356 (R.I. 1994)).
19. *Id.* (citing Supreme Woodworking Co. v. Zuckerberg, 107 A.2d 287, 290 (R.I. 1954)).

fendants did not aid in determining the intent of the parties, but instead directly contradicted the written agreement.[20] Therefore, the court ruled that based on the clear language of the agreement the motion justice correctly ruled in the plaintiff's favor holding the defendants liable to the plaintiff for the value of his share of the partnership.[21] The court denied the defendant's appeal and affirmed the grant of summary judgment.[22]

CONCLUSION

The law-of-the-case doctrine does not apply when two summary judgment motions, brought before the same judge months apart, presented different questions. The parol-evidence rule barred the use of the alleged partners' oral understanding that directly contradicted the plain language of the written agreement.

Joe H. Lawson II

20. *Id.* at 600.
21. *Id.*
22. *Id.*

Evidence. *Raimbeault et al. v. Takeuchi Mfg. (U.S.), Ltd. et al.*, 772 A.2d 1056 (R.I. 2001). Reaffirming *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1] the supreme court held that the proposed expert witness lacked the requisite knowledge and skill, and that his testimony was irrelevant; thus, the plaintiff failed to establish a negligent design claim. Also, even though the manufacturer had a duty to warn of dangers, the plaintiff assumed the risk when he used the equipment.

FACTS AND TRAVEL

The plaintiff, Ronald Raimbeault (Raimbeault), owned a company that rented construction equipment.[2] On January 14, 1991, Raimbeault demonstrated a track-driven Takeuchi compact excavator, Model TB 800, to a customer.[3] Raimbeault got into the cab of the excavator, which could rotate 360 degrees—independent of the excavator's track-drive system.[4] Raimbeault backed the excavator to the edge of an embankment and rotated the cab several times.[5]

When the demonstration had concluded, the cab of the excavator was facing the backhoe looking out over the embankment. While the cab was in this position, Raimbeault pulled back on the levers that controlled the movement of the excavator, which caused the excavator to move towards the embankment.[6] The excavator became unstable, so Raimbeault jumped out of the excavator to the bottom of the embankment.[7] The excavator then fell down the embankment, landing on Raimbeault's foot.[8]

Raimbeault, together with his wife and son (collectively "plaintiffs"), filed a products liability and negligence action against Takeuchi Manufacturing (U.S.), Ltd., et al.[9] At trial, Raimbeault testified as to the events and admitted that he had told an investi-

1. 509 U.S. 579 (1993).
2. Raimbeault v. Takeushi Mfg., 772 A.2d 1056, 1058 (R.I. 2001).
3. *Id.*
4. *Id.*
5. *Id.* at 1059.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

gator that "the accident was caused solely by my losing control of [the excavator] due to the icy conditions."[10]

Marc Richman (Richman) testified as the plaintiffs' expert witness.[11] Richman was a retired professor from Brown University, where he had taught courses dealing with warnings on the operation of equipment.[12] Richman held a doctor of science from MIT, where he had been an instructor in the metallurgy department.[13] Richman testified that he had experience with track-driven machinery when he was in the army.[14] Richman testified that he had driven the TB 800 in 1998 and stated that the TB 800's warnings and instructions were inadequate and that the design of the TB 800 was flawed because it did not take into account memory lapses.[15]

The trial judge, however, decided to exclude Richman's testimony. Moreover, the trial judge found that Raimbeault's negligence in operating the excavator was the proximate cause of his injuries.[16] The defendants then moved for a judgment as a matter of law, which the trial judged granted.[17] The plaintiffs appealed the final judgment arguing that the trial judge erred both by excluding Richman's testimony and by granting the defendants' motion.[18]

ANALYSIS AND HOLDING

The court first tackled the issue of the exclusion of the proposed expert's testimony. Under Rule 702 of the Federal Rules of Evidence[19] and as interpreted by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, trial justices are to act as "gatekeepers," ensuring that proposed experts are qualified and that all scientific testimony is both relevant and relia-

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1060.
16. *Id.*
17. *Id.*
18. *Id.*
19. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702.

ble.[20] *Daubert* is applicable in Rhode Island state courts in conjunction with Rhode Island Rule of Evidence 702.[21]

The court stated that scientific material may only be admitted if it is "relevant, appropriate, and of assistance to the jury."[22] The expert testimony must reflect scientific knowledge that is testable by scientific experimentation and it must materially advance some aspect of the plaintiff's case.[23] The court "will not disturb a trial justice's ruling on the admissibility of expert testimony absent an abuse of discretion."[24]

Here, the court found no such abuse of discretion.[25] Regarding Richman's "knowledge, skill, experience, training, or education," the court stated that he had no experience with track-driven machinery, no experience designing cabs for track-driven machinery, and only limited experience with warnings and instructions in general.[26] The court also stated that Richman had never designed a warning for a commercially marketed product, nor had he any training in the area of human factors.[27]

Furthermore, the court stated that Richman's testimony was not "relevant, appropriate, [or] of assistance to the jury."[28] Richman failed to elucidate any specific scientific reasons that supported his finding that the excavator was unreasonably dangerous, but rather testified in a conclusory manner as to those findings.[29] Thus, the court found that the trial judge did not abuse his discretion.

Regarding the issue of the judgment as a matter of law, the court stated that it must consider the evidence in the light most

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20. *Raimbeault*, 772 A.2d at 1061.

21. *Id.* (citing DiPetrillo v. Dow Chemical Co., 729 A.2d 677 (R.I. 1999)). R.I. R. Evid. 702 reads:

> Testimony by experts—If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of fact or opinion.

R.I. R. Evid. 702.

22. *Raimbeault*, 772 A.2d at 1061 (quoting *DiPetrillo*, 729 A.2d at 686).

23. *Id.*

24. *Id.* at 1061 (quoting Gallucci v. Humbyrd, 709 A.2d 1069 (R.I. 1998)).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (quoting *DiPetrillo*, 729 A.2d at 686).

29. *Id.*

favorable to the nonmoving party.[30] The court may not weigh the evidence or evaluate the credibility of witnesses, but the court must consider all reasonable inferences supporting nonmoving party.[31] If reasonable persons could reach different conclusions about factual issues then the motion must be denied.[32] The court stated that in reviewing the trial justice's decision, the court must abide by the same rules and standards as the trial justice.[33]

In order to succeed in a products liability action the plaintiff must prove that there was a defect in design or construction; that the defect existed when left possession of defendant; that the defect caused the product to be unreasonably dangerous (strong likelihood that one unaware of danger would get injured by normally using product); that the product was used as intended at time of accident; and, that the product was the proximate cause of the accident and injuries.[34]

Here, the court noted that Raimbeault's testimony seems to suggest that the excavator was not in the same condition as it was when it left the defendants' hands; it had been rented and had scrapes and dents.[35] The court stated that the plaintiffs failed to produce any evidence indicating that the absence of warnings in the cab was the proximate cause of the accident/injuries.[36] Furthermore, Raimbeault told an investigator that he was responsible for the accident.[37]

Regarding the plaintiffs' negligent design claims, the fact that Richman's testimony was properly excluded meant that the plaintiffs had not put forth any evidence that showed that the defendants had not met there standard of care—that the defendants had reason to know of a defective design or failed to adequately test the product.[38]

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30. *Id.* (citing DeChristofaro v. Machala, 685 A.2d 258, 262 (R.I. 1996)).

31. *Id.* (citing *DeChristofaro*, 685 A.2d at 262).

32. *Id.* (citing *DeChristofaro*, 685 A.2d at 262).

33. *Id.* at 1063 (citing Hoffman v. McLaughlin Corp., 675 A.2d 404, 405 (R.I. 1996)).

34. *Id.* (citing Crawford v. Cooper/T.Smith Stevedoring Co., 14 F. Supp. 2d 202, 211 (D.R.I. 1998)).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* (citing Thomas v. Amway Corp., 488 A.2d 716, 721 (R.I. 1985)).

The court stated that under strict liability the seller must warn buyer only of reasonably foreseeable dangers.[39] Here, the court found that using the excavator on hills or near embankments was foreseeable, as was the fact that one might get disoriented in the rotating cab.[40] However, Raimbeault assumed the risk. Raimbeault testified that he was aware that the levers were oriented towards the dozer blade; that he had given demonstrations with the excavator previously; and, that he knew he was on the edge of an embankment.[41] Thus, the trial justice did not err in granting the motion.

CONCLUSION

The supreme court held that the proposed expert witness lacked the requisite knowledge and skill, and that his testimony was irrelevant; thus, the plaintiff failed to establish a negligent design claim. Also, even though the manufacturer had a duty to warn of dangers, the plaintiff assumed the risk when he used the equipment.

Stan Pupecki

39. *Id.* (citing *Thomas*, 488 A.2d at 722).
40. *Id.*
41. *Id.*

Evidence. *State v. Barrett*, 768 A.2d 929 (R.I. 2001). The Rhode Island Supreme Court held that the determination of a defendant's alleged insanity or diminished capacity is a legal rather than a medical question that is left to the fact-finder or jury. The jury, in determining a defendant's responsibility, is to consider volitional as well as cognitive impairments. The court also held that a lay witness may not offer an opinion on mental state, but may describe observed facts and descriptions of events upon which the witness has proffered his opinion and allow the jury to draw its conclusion from the recitation of those observations.

FACTS AND TRAVEL

On July 14, 1995, David Barrett, the defendant, (Barrett or defendant) had an altercation at a service station with the clerk, Michael Glynn, ending with Barrett's threat to kill Glynn.[1] On July 17, Barrett and two friends, decided to drive to the station where Glynn worked so Barrett could check out Glynn because he was "pissed off" at him.[2] Barrett and his friends, upon arriving at the station, parked at a gas pump facing the inside of the station with his high-beaming lights shinning in at Glynn.[3] Glynn came outside and apologized to Barrett for the previous altercation and Barrett told him to get away from his car.[4] Barrett and his friends remained outside.[5]

Shortly thereafter, Joseph Silvia, while visiting Glynn at the station, learned of Barrett's behavoir and subsequently drove his van along side of Barrett's car.[6] Silvia threatened to kill Barrett if he continued to bother Glynn, he and Barrett engaged in a heated verbal exchange and Barrett drew his gun.[7] Barrett pointed his gun at Silvia and began to chase him around the station parking lot telling him at least thirty times to leave or he will shoot him.[8]

Silvia then drove in front of Barrett's car, put his van in reverse, and crashed into the front of Barrett's car.[9] Barrett then

1. State v. Barrett, 768 A.2d 929, 932 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.* at 932-33.
5. *Id.* at 933.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

walked up to the van and shot Silvia point blank in the cheek through his open driver's side window.[10] Barrett then fired a second shot into Silvia, backed away from the van to see if there were any witnesses, and returned to the van to shoot Silvia a third time.[11]

Barrett then went to the front window of the station, emptied the remaining bullets from his gun, and placed the gun and bullets on the windowsill.[12] He told one of his friends to go inside the station and call the police and Barrett returned to his car.[13] Barrett then placed his gun on the dash of his car so it would be in plain view of the police so they would not shoot him when they arrived.[14] He also removed his outer shirt so the police would not think that he was carrying a concealed weapon.[15] He then took a bag of marijuana from his shirt pocket and told his friend to get rid of it because he was afraid the police would think that the marijuana use played a role.[16] The police came shortly thereafter and took Barrett to the station, at which point he gave a detailed written statement regarding the shooting.[17]

At trial, a total of four medical experts testified to Barrett's mental state; two expert opinions supported the defense's theory while only one supported the state's position.[18] In addition to the medical experts, the defense offered three lay witnesses , Barrett's father and two friends not involved in the incident, to testify about their personal opinions regarding Barrett's mental condition.[19] The trial justice refused to allow their opinion testimony as to Barrett's mental condition.[20] Barrett was convicted of second-degree murder.[21]

Barrett appealed his conviction contending that at the time of the shooting "he was of such diminished mental capacity as to be incapable of having formed the required intent and premeditation

10. *Id.*
11. *Id.* at 933-34.
12. *Id.* at 934.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 937-38
19. *Id.* at 938-39.
20. *Id.*
21. *Id.* at 934.

necessary for conviction of murder."[22] Barrett also contended that the trial court erred in barring testimony from his lay witnesses regarding his mental state.[23]

ANALYSIS AND HOLDING

Diminished Capacity

The Rhode Island Supreme Court held that Barrett's claim that the trial jury erred in not accepting the defense's expert medical opinions was without merit.[24] In *State v. Johnson*,[25] the court adopted the Model Penal Code standard for determining one's ability to form the intent required to make one criminally culpable.[26] The court found merit in the Model Penal Code test because it recognizes that the issue of determining a defendant's mental capacity or insanity is an issue that is left to the jury.[27] The test also recognizes that the issue is a legal question and not a medical question and the jury is permitted "to consider volitional as well as cognitive impairments in determining a defendant's responsibility."[28] The court noted that "the Model Code permitted 'a reasonable three-way dialogue between the law trained judges and lawyers, the medical trained experts and the jury.' [And] [i]n Barrett's trial in the Superior Court, that three-way dialogue was played out."[29]

The court held that the trial jury had before it the various expert opinions presented by each side and the mere fact that two of the opinions supported Barrett's defense of diminished capacity and only one expert opinion supported the state's position is not "in itself dispositive of the issue of Barrett's mental condition at the time of the shooting."[30] The court pointed out that the jurors are reminded that their evaluation of expert testimony should not depend on the number of experts that testify for one position or the other, but rather the quality of the testimony concerning that fact

22. *Id.*
23. *Id.*
24. *Id.* at 938.
25. 399 A.2d 469 (R.I. 1979).
26. *Barrett*, 768 A.2d at 934-35 (citing *Johnson*, 399 A.2d. at 476).
27. *Id.* at 935.
28. *Id.*
29. *Id.* (quoting *Johnson*, 399 A.2d at 476).
30. *Id.* at 937-38.

issue.[31] The court went on to point out that it was obvious that the jurors chose to accept the testimony offered by one medical expert and to reject the testimony offer by two others.[32] The court wrote, "that was the trial jury's choice to make."[33]

While the court recognized that there was evidence of Barrett's mental illness, that evidence alone did not require the jury to conclude that Barrett did not have the mental capacity to conform his conduct to the requirements of the law.[34] The court found "more than sufficient evidence" in the trial record to support the jury's finding Barrett was not legally insane at the time he shot Silvia.[35]

Lay Witness Opinion

The Rhode Island Supreme Court ruled that there were no "transgressions on the part of the trial justice in his rulings precluding the defendant's attempt to elicit expert opinions from lay witnesses who were clearly not qualified to proffer those opinions."[36] Barrett contended that the trial justice erred by not allowing his lay witnesses to testify on his behalf regarding their opinions on the state of Barrett's mental health.[37] He claimed that state courts have traditionally allowed lay witnesses to testify regarding their opinion of a person's mental health.[38]

The court found that the lay opinions of Barrett's father and two friends who were not present at the time of the incident would not be rationally based upon their opinions of Barrett on the day of the shooting since they had not seen him that day.[39] Barrett also asserted that the trial court erred by sustaining the prosecutor's objections to questions posed during cross-examination by his defense counsel seeking to elicit lay opinions from two prosecution witnesses.[40]

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31. *Id.* at 938.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 943-44.
37. *Id.* at 938-39.
38. *Id.* at 939.
39. *Id.* at 940.
40. *Id.*

Evidence by lay witnesses regarding a defendant's nonconforming or bizarre behavior is allowed when it is asserted that the defendant's alleged diminished capacity prevented the formation of his intent to commit murder in the first or second degree.[41] However, the court has interpreted that rule as permitting an opinion on a matter as it was observed by the witness, but generally, only when the witness is not able to describe the event or events as they appeared when the events took place.[42] Where the lay witness is able to describe to the jury the events that took place from which the lay witness's opinion was formed, the court has "generally precluded the lay opinion."[43]

The court concluded that there is less justification to allow testimony from a lay witness regarding another sanity or diminished capacity at a time when that person was not being observed by the lay witness.[44] The court pointed out that such lay witness opinions could "invade the fact-finding province of the jury and serve only to inject confusion into their deliberations."[45] The court wrote that the jury was as capable as the lay witnesses to draw their own opinions from the witnesses' descriptions of Barrett's behavior.[46] The court ruled that there was no error or abuse of discretion on the part of the trial court in precluding defense counsel from eliciting lay opinions from the witnesses.[47]

CONCLUSION

In *State v. Barrett*, the Rhode Island Supreme Court held that a jury's decision to reject the two medical opinions in support of the defense's theory and accept one medical opinion in support of the state's position is entirely within the jury's power so long as there is evidence to support that finding. Furthermore, the court found that a lay witness my not offer an opinion on mental state, but may describe observed facts and descriptions of events upon which the

41. *Id.* at 940.
42. *Id.*
43. *Id.*
44. *Id.* at 941.
45. *Id.* (pointing out that while Federal Rule 704(b) precludes both lay and expert witness opinion on a defendant's mental condition, Rhode Island Rule 704 does not preclude all such opinions. Their admission is usually left to the discretion of the trial judge).
46. *Id.*
47. *Id.*

witness has proffered his opinion and allow the draw its conclusion from the recitation of those observations.

Joe H. Lawson II

Evidence. *State v. Dorsey,* 783 A.2d 947 (R.I. 2001). Evidence to impeach a complaining witness needs to be probative, relevant and cannot be remote in time.

FACTS AND TRAVEL

This is an appeal from a criminal conviction for rape.[1] The defendant wanted to use three separate facts about the complainant's past to impeach her during cross-exam.[2] These included: the paternity of the complainant's oldest child, the complainant's claim that she was raped when she was a teenager and her mental health history.[3] The defendant claimed that the trial court's refusal to allow such information constituted a violation of his Sixth Amendment rights, or in the alternative an abuse of the courts' discretion.[4]

The complainant's first child resulted from a relationship that happened before she and the defendant started dating.[5] The complainant filed three paternity suits.[6] She dropped two of these suits because blood tests have proven that it was impossible for two of the three men to be the biological father of the child.[7] The third suit was still pending at the time of this criminal trial.[8]

The next fact that the defendant wanted to use occurred while the complainant was a teenager.[9] When the complaining witness was fifteen years old, she alleged that a fourteen-year-old paperboy had raped her when she was seven years old.[10] She did not tell the doctor, whom she told of the incident, the name of the paperboy.[11] Her mother, upon hearing this, called the complaining witness a liar.[12]

The last set of facts that the defendant wanted to impeach the complaining witness with was her mental health history.[13] The

1. State v. Dorsey, 783 A.2d 947, 949 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 949-50.
10. *Id.* at 950.
11. *Id.* at 953.
12. *Id.* at 950.
13. *Id.*

complaining witness was hospitalized for several weeks when she was fifteen years old due to a suicide attempt.[14] Also, when the complaining witness was twenty-one years old, she was treated for depression.[15] The defendant was married to the complaining witness in 1994; they separated in 1996 and divorced in 1997.[16] The alleged rape occurred after the separation but before the divorce.[17]

The state filed, and was granted, a motion *in limine* to exclude each of these pieces of evidence.[18] Defendant appealed stating that the trial court granted each of these motions in error.[19] He argues that the facts should have been allowed in order to allow the jury to determine the credibility of the witness.[20]

The constitutional issue in the case is whether the exclusion of the evidence violated the defendant's right to cross-examine the witness.[21] If this constitutional right was not violated, the next issue is whether the trial justice abused his discretion by excluding the evidence.[22]

BACKGROUND

The Sixth Amendment to the United States Constitution is made applicable to the states through the Fourteenth Amendment.[23] The Rhode Island Constitution in Article 1, Section 10, has the same guarantees.[24] These provisions guarantee an individual accused of a crime the right to confront and cross-examine all adverse witnesses.[25] This right is not completely unlimited, if the defendant is allowed to cross-examination the witness to test his or her credibility, the trial justice has discretion to limit the cross-examination in light of concerns for relevance, evidentiary and trial management.[26] The standard used to determine the appropriateness of the exclusion is the clear abuse of discretion stan-

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 951.
22. *Id.*
23. *Id.* at 950.
24. *Id.*
25. *Id.*
26. *Id.*

dard.[27] If there is clear abuse, the harmless error rule will apply, meaning that if the error is harmless beyond a reasonable doubt, the trial justice will not be overturned.[28]

Analysis and Holding

The court first looked at the Constitutional issue. It held that the exclusion of the evidence was not violative of defendant's rights to cross-examination because the defendant was allowed to cross-examine the witness with respect to the present charges, as well as the events leading up to these charges.[29]

The court went on to say that evidence of the witness's credibility is also protected by the Constitution.[30] The evidence submitted to test the credibility must be related to the current charges against the defendant.[31] Allegations of similar charges, even if later proven false, would be related to the current charges.[32] The court determined the paternity test charges were irrelevant because the charges were substantially different from the current rape charges.[33] The allegation of rape by the paperboy was so remote in time, so different in events, and potentially misleading to the jury, as to be prejudicial to the complaining witness.[34] The defendant's constitutional rights could not be infringed by exclusion of these pieces of evidence.[35]

The court next looked to determine if the trial justice abused his discretion by limiting the cross-examination.[36] To determine if there was abuse, the court first looked at the earlier paternity suits.[37] In concluding that these cases were irrelevant the court determined the similarity of the charges, if there was a history of intentionally false accusations, and if there were a pattern of falsely charging sexual assault or rape.[38] As the paternity suits

27. *Id.* at 951.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 952.
37. *Id.*
38. *Id.*

did not contain allegations of non-consensual sexual conduct, they could be excluded as irrelevant.[39] The court held that the defendant had no right to impeach the witness through specific examples of bad character or bad acts.[40]

The court next reviewed the allegation that the fourteen-year-old paperboy raped the witness when she was seven.[41] The court held that the trial justice did not err in excluding this evidence.[42] The factors that led to this conclusion included: the remoteness in time, the difference in events surrounding the allegations, the difference in age of the complaining witness (i.e. tender age versus being an adult), and the possibility of consent as a defense in adulthood that would not have been available to the child molestation charge.[43] The law applicable to such a determination is that the evidence rules are set up to allow victims to come forward without fear that their entire sexual history would be needlessly exposed to all in the courtroom.[44] However, if the defense makes an offer of proof and the evidence is relevant, the trial justice must weigh the probative value against the prejudicial effect of the testimony.[45] If the probative value outweighs the prejudicial, the evidence should be admitted; if the prejudicial outweighs the probative, then the evidence should be excluded.[46]

Lastly, the court analyzed the specific incidents of the complaining witness's mental health.[47] The first incident occurred when the complaining witness was fifteen, the second occurred when she was twenty-one.[48] The court held that in order for mental health to be relevant it must indicate the mental health of the complaining witness at the time of the alleged rape, or at the time of the testimony of the witness.[49] Since neither of these applies, the court held that the trial justice did not err in excluding the evidence.[50]

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39. *Id.*
40. *Id.*
41. *Id.* at 953.
42. *Id.*
43. *Id.*
44. *Id.* at 954.
45. *Id.*
46. *Id.* at 955.
47. *Id.*
48. *Id.*
49. *Id.* at 955-56.
50. *Id.* at 956.

CONCLUSION

In a criminal suit that alleged rape, the defendant has a right to cross-examine any adverse witnesses. The right extends to the ability to impeach the complaining witness's testimony. The evidence offered to impeach must be relevant, probative, and based on similar events or indicative of the mental health of the complaining witness at the time of the alleged crime, or at the time of the testimony of the complaining witness.

Marjorie A. Connelly

Evidence. *State v. Medina*, 767 A.2d 655 (R.I. 2001). The Rhode Island Supreme Court sustained an appeal by the state, holding that although both the United States Constitution and the Rhode Island Constitution affords a criminal defendant the right to confront witnesses offered against him, hearsay evidence that falls within a well recognized exception can be used in lieu of a witness's actual appearance without violating the defendant's right to confrontation. The court also held that the trial justice erred in holding the complaining witness unavailable merely because she refused to testify.

FACTS AND TRAVEL

On May 25, 1998, Officer Scott Salois (Officer Salois) responded to a domestic dispute at 312 Middle Street in Pawtucket involving Alice Bigelow (Bigelow) and David Medina (Medina or Defendant).[1] According to a Domestic Violence/Sexual Assault Reporting Form, Medina had had assaulted Bigelow several times over the previous four to five months.[2] Based on Officer Salois' statements, Bigelow met him at the door yelling and crying, stating that after pouring out the defendant's beer, Medina threw the beer bottle at her, striking her in the back.[3] Bigelow further told the officer that Medina threw her against the wall, causing her to strike the back of her head against the kitchen wall.[4] Bigelow then told Officer Salois that subsequent to her hitting her head, she picked up a bat and swung at Medina.[5] As a result of Bigelow's statements, the defendant was charged with two felony counts; count one alleging that the defendant assaulted Bigelow after having been previously convicted of domestic assault and count two alleging that the defendant had assaulted Bigelow with a dangerous weapon.[6]

At the start of the trial, the trial justice conducted a personal *voir dire* of Bigelow at which time she informed the judge that she did not wish to testify and also recanted several of the statements

1. State v. Medina, 767 A.2d 655, 656 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

she had previously made to Officer Salois.[7] Bigelow told the judge that though the defendant had thrown the beer bottle at her, it did not hit her as she stated earlier.[8] She also told the judge that she assaulted Medina as well, and that she only called 911 to get the defendant in trouble, not because she feared him.[9] After the examination of Bigelow, the trial justice granted defendant's oral motion to dismiss.[10]

Analysis and Holding

On appeal, the state argues that the trial justice erred in not ordering Bigelow to testify on pain of contempt for purposes of determining her unavailability.[11] Rule 804 of the Rhode Island Rules of Evidence provides in part that an unavailable witness includes a witness who persists in refusing to testify despite an order of the court to do so.[12] The supreme court stated that it is essential for a trial justice to apply all appropriate judicial pressures and exhaust the remedies available to compel a witness to testify in order to avoid the necessity of relying on out-of-court statements.[13]Accordingly, the supreme court held that the trial justice should have ordered to witness to testify for purposes of determining her unavailability.[14]

The State also contested the trial justice's dismissal of Bigelow's statements on the basis that the defendant would not have the opportunity to confront the witness presented against him.[15] The supreme court stated that although the Sixth Amendment to the United States Constitution and article 1, section 10, of the Rhode Island Constitution affords a criminal defendant the right to confront the witness offered against him, hearsay evidence that falls within a well recognized exception can replace a witness's actual appearance without violating the defendant's Sixth Amendment right.[16] The court noted that it had rejected the Sixth

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 657.
13. *Id.* (citing United States v. Oliver, 626 F.2d 254, 261 (2d Cir. 1980)).
14. *Id.*
15. *Id.*
16. *Id.* (citing State v. Scholl, 661 A.2d 55, 58 (R.I. 1995)).

Amendment claim of a defendant in a case factually similar to the instant case, holding that admissions of the wife's excited utterances pursuant to Rule 803(2) did not violate the defendant's right of confrontation under either the state or federal constitution.[17] In the instant case, the court acknowledged that "any decision made by a trial justice concerning the admission of excited utterances shall not be overturned unless clearly wrong."[18] The court concluded that the trial justice erred in not determining whether Bigelow's statements to Officer Salois constituted an excited utterance and whether they were sufficiently reliable and trustworthy to be admitted pursuant to Rule 803.[19]

CONCLUSION

The Rhode Island Supreme Court sustained the state's appeal, holding that a complaining witness who refuses to testify cannot be deemed unavailable unless the witness maintains her refusal after she has been ordered to testify by the trial justice. In addition, the court held that the trial justice erred in not making a determination as to whether the statements made by Bigelow to Officer Salois constituted an excited utterance.

Michelle M. Alves

17. *Id.* at 658.
18. *Id.* (quoting State v. Perry, 574 A.2d 149, 151 (R.I. 1990)).
19. *See id.* at 658-59.

Evidence. *State v. Pacheco*, 763 A.2d 971 (R.I. 2001). The Rhode Island Supreme Court held that the defendant's constitutional right to cross-examination was not offended by the admission of hearsay under Rule 804 since there were indicia of reliability despite the lack of confrontation. The supreme court also affirmed the sentence of life imprisonment without the possibility of parole because the evidence was sufficient to show that the victim suffered torture and aggravated battery.

FACTS AND TRAVEL

On November 18, 1995, the body of Jenny-Lee M. Bailey (Bailey or victim) was found on the shore of Gorton's Pond in Warwick.[1] John R. Pacheco, Jr. (Pacheco or defendant) had hired Jonathan Tretton (Tretton) to murder the victim.[2] The defendant, Tretton, friend Christopher King (King) and the prosecution's prime witness, Tretton's girlfriend Tanya Casala (Casala) all resided together in West Warwick.[3] Casala testified that on the evening before the victim's body was found, the defendant had arrived at the house and asked whether Tretton was ready.[4] She also testified that she watched for several minutes as the defendant sharpened a knife, and that the defendant told her that a window weight he was holding was "to bonk people over their heads."[5] Casala further testified that the defendant asked King for the victim's phone number, which he called twice, once to instruct her to meet him where he fished, and the other to tell her not to tell anyone about their meeting.[6] In addition, Casala testified that Tretton had told her that he had been hired to kill someone in return for $1,000, a car, and employment, but that he "intended only to 'beat the person up.'"[7] She also testified that she heard the defendant state that he would drop Tretton off at Gorton's Pond while he visited his girlfriend. Moreover, she testified that the defendant and Tretton returned to their home approximately an hour later, at which point she noticed that Tretton was now wearing the pink jogging

1. State v. Pacheco, 763 A.2d 971, 974 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

pants that he had been carrying when he left the house, and heard the defendant ask King whether he had seen the blood on Tretton's hands.[8] She testified that she was very upset by the events and that after communicating those concerns to the defendant and Tretton, the defendant told her not to view Tretton as a murderer, that he was just doing a favor for a friend.[9] She also testified regarding the conversation she had with Tretton that night detailing the murder.[10]

The defendant filed a motion to be tried separately from Tretton, which was granted.[11] A jury found the defendant guilty of first-degree murder and was sentenced to life imprisonment without the possibility of parole.[12]

ANALYSIS AND HOLDING

On appeal, the defendant argued that the trial justice erred in allowing Casala to testify about statements made by Tretton; specifically, that Tretton's statements regarding what the defendant and Tretton had discussed before the murder and Casala's testimony as to what Tretton said following the murder, were not against his penal interest and therefore should not have been admitted under Rule 804(b)(3) of the Rhode Island Rules of Evidence.[13] In addition, the defendant also challenged Tretton's statements to Casala after the conspiracy had ended on the basis that he was denied his right to cross-examination guaranteed by the Confrontation Clause of the United States Constitution and article 1, section 10, of the Rhode Island Constitution.[14] The Rhode Island Supreme Court stated that this issue was not raised at trial and thus could not be raised on appeal for the first time.[15] Nonetheless, the supreme court did comment on the issue, stating that Tretton's statements made in Casala's presence were clearly against his own interest, and that although statements made by Tretton to Casala before the murder did not clearly inculpate the defendant when viewed individually, the defendant's own state-

8. *Id.* at 975.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 974.
13. *Id.* at 976.
14. *Id.* at 977.
15. *Id.* (citing State v. Bettencourt, 723 A.2d 1101, 1107 (R.I. 1999)).

ments and actions that evening provided more than sufficient evidence to support his conviction.[16]

The defendant also disputed the admission of testimony regarding a phone call received by Tretton.[17] Pacheco argued that Casala's testimony regarding the phone call violated his Sixth Amendment rights because Tretton had refused to testify at the defendant's trial.[18] The supreme court held that the trial justice, in considering the motion for mistrial, appropriately admitted the statement, concluding that "the reference to 'Chico' was not sufficiently inflammatory to distract the jury from the overwhelming evidence that defendant was directing Tretton's actions on that evening."[19]

The defendant also contested the trial justice's instructions to the jury on statements made in furtherance of the conspiracy.[20] The defendant did not object to these instructions at trial and, accordingly, cannot be argued for the first time on appeal.[21] However, the supreme court did comment that if a timely objection had been made, it would have concluded that the trial justice did appropriately instruct the jury on the law of conspiracy.[22]

Also on this appeal, the defendant argued that the doctrine of collateral estoppel precluded the state from seeking a term of life imprisonment without the possibility of parole once the jury in the Tretton (defendant's coconspirator's) case had not made a finding of aggravating circumstances. On this issue, the court held that the defendant's theory of collateral estoppel could not satisfy the requirement of identity of the parties, finding that Tretton and the defendant were distinct and separate parties with interests in opposition to each other.[23] The court also found that the state had met the required burden of proving to the jury beyond a reasonable doubt that aggravating circumstances were present and therefore the defendant suffered no prejudice as a result of the trial justice allowing the jury to find aggravating circumstances.[24]

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16. *Id.* at 976-77.
17. *Id.* at 979.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* (citing State v. Bertoldi, 495 A.2d 247, 250 (R.I. 1985)).
22. *Id.* at 980.
23. *Id.* at 980-81.
24. *Id.* at 981.

The defendant also sought a reduction of his life-without-parole sentence pursuant to Rhode Island law "which allows for a direct appeal in cases in which a life sentence without the possibility of parole has been imposed."[25] Although not objected to at trial, the defendant alleged that the trial justice erred in charging the jury on the aggravating factor of murder for hire.[26] The defendant also argued that the jury erred in finding that aggravating factors existed because the record did not reveal any evidence that the purpose of the conspiracy was to torture or abuse the victim.[27] In reviewing a sentence imposing life without the possibility of parole, the supreme court must exercise independent judgment and discretion in reviewing the appropriateness of the sentence.[28] The court stated that once a jury has found at least one aggravating circumstance as required by state law, the trial justice may impose a sentence of life imprisonment without parole.[29] The supreme court found that the record disclosed ample evidence of cruelty and brutality to support the jury's finding of aggravated battery and torture and a sentence of life without parole.[30]

The Dissenting Opinion

Chief Justice Weisberger dissented.[31] He argued that the trial justice's charge of aggravating circumstances to the jury was erroneous because the defendant did not participate in the acts of torture or aggravated battery because he was not at the scene of the crime.[32]

CONCLUSION

The Rhode Island Supreme Court denied and dismissed the defendant's appeal, finding no error with the trial justice's admittance of hearsay statements or with his instructions to the jury. In addition, the court found that because there existed at least one

25. *Id.* (citing R.I. Gen. Laws § 12-19.2-5 (2001)).
26. *Id.* at 982 (citing R.I. Gen. Laws § 11-23-2 (2001)).
27. *Id.* at 981.
28. *Id.* (citing State v. Tassone, 749 A.2d 1112, 1119 (R.I. 2000)).
29. *Id.* (citing State v. Travis, 568 A.2d 316, 323 (R.I. 1990); R.I. Gen. Laws § 11-23-2 (2001)).
30. *Id.* at 982-83.
31. *Id.* at 984. (Weisberger, C.J., dissenting).
32. *Id.*

aggravating circumstance, the trial justice did not err in imposing a sentence of life imprisonment without the possibility of parole.

Michelle M. Alves

Evidence. *State v. Oliveira*, 774 A.2d 893 (R.I. 2001). The Rhode Island Supreme Court held: (1) exclusion is not an excessive sanction for evidence that is entirely a surprise; (2) counsel for a co-defendant is prohibited from commenting on the failure of the accused to testify since the prejudice to the accused is the same regardless of the identity of the party making the comment; (3) non-experts may state their opinions in cases where those opinions are based on a number of indescribable facts; and (4) an out-of-court statement may be admitted into testimony as probative of guilt.

FACTS AND TRAVEL

Gahil Oliviera (Oliveira), Robert McKinney (McKinney), Jason Ferrell (Ferrell), and Pedro Sanders (Sanders) were charged with two conspiracies, the murder of John Carpenter, and assault and attempted murder of Lorenzo Evans (Evans).[1] Four of the issues raised on appeal were particularly noteworthy.

Ferrell stated during discovery that Debra Baptista (Baptista) would testify that she saw and spoke to him between 10:45 a.m. and 11:15 a.m. on the day of the shooting.[2] During the trial, she also attempted to testify that Ferrell had returned to her house shortly after 11:15 a.m. and stayed until 11:35 a.m.[3] The trial justice ruled the additional testimony a Rule 16[4] violation as the defendant had not given the required notice of the alibi testimony.[5]

Evans was charged with a separate murder and held in the Intake Center at the Adult Correctional Facility (ACI).[6] A witness that was planning to testify against Evans was also housed at the ACI at that time.[7] While at the ACI, the witness allegedly told Evans that if Evans did not testify in the Carpenter murder trial, the witness would not testify against Evans in his murder trial.[8] The defense objected on hearsay grounds to the testimony of this conversation being admitted into the trial at issue.[9]

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1. State v. Oliveira, 774 A.2d 893, 901-02 (R.I. 2001).
2. *Id.* at 907.
3. *Id.* at 908.
4. Super. Ct. R. Crim. P.
5. *Oliveira*, 774 A.2d at 908.
6. *Id.* at 917.
7. *Id.*
8. *Id.*
9. *Id.*

Campbell's attorney stated during the trial that none of the defendants had testified as to whether they personally knew Carpenter.[10] The trial justice instructed the jury to disregard the statement.[11] Campbell's attorney continued, stating that "[there was] no testimony that my client knew John Carpenter. No one has testified how they knew Lorenzo Evans."[12] Oliveira's counsel requested a cautionary instruction and counsel for Ferrell and Sanders requested a motion to pass.[13] The trial justice denied the motion to pass, stating that it was not made at the appropriate time.[14] The trial justice reminded the jurors that no defendant may be compelled by the state to testify and that guilt or innocence may not be inferred, as it is the right of the defendant alone to choose to testify.[15]

Finally, the prosecution asked a defense lay witness to identify shoe prints made in the snow when Evans ran away from his attackers.[16] At issue was whether Evans ran to a chain link fence (as he originally stated), or a wooden picket fence (as he later testified).[17] The significant difference was that he would only have been able to see his pursuers from the top of the picket fence.[18] The trial justice permitted the state, over the defendants' objection, to ask a defense lay witness to identify the type of shoe that had made footprints in the snow leading to the chain link fence.[19]

The defendants were convicted of two conspiracies.[20] Three of the defendants were also convicted of murder and assault.[21] One defendant was convicted of assault and acquitted of murder.[22] The defendants appealed.[23]

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10. *Id.* at 911.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 915.
17. *Id.* at 916.
18. *Id.* at 901 n.3.
19. *Id.* at 915.
20. *Id.* at 903.
21. *Id.*
22. *Id.*
23. *Id.*

ANALYSIS AND HOLDING

The defendant Ferrell argued that the trial justice erred in precluding him from offering alibi testimony from Baptista for events after 11:15 a.m.[24] Rule 16(c) requires that the defendant must give written notification to the State detailing with specificity the place that the defendant claims to have been.[25] Baptista attempted to testify that she had seen Ferrell after 11:15 a.m. on the day of the shooting, though she had not provided that information to the State. The supreme court held that exclusion was not an excessive sanction for evidence that is entirely a surprise, when the defendant had not given any explanation for non-disclosure of additional alibi testimony.[26]

Next, the defendants argued on appeal that the trial justice erred by refusing to grant a mistrial after Campbell's attorney stated in closing argument that there was no testimony that any of the defendants knew Carpenter.[27] The Fifth Amendment prohibits adverse comments by the prosecution or the trial justice on the decision of an accused not to testify.[28] The supreme court held that counsel for a co-defendant is prohibited from commenting on the failure of the accused to testify, noting that the prejudice to the accused is the same regardless of the fact that defense counsel made the comment.[29] To rectify the error, an adequate cautionary instruction must be immediately delivered to the jury in an easily understandable manner that clearly informs the jury that the defendant has a constitutional right to choose not to testify in his own defense.[30]

The supreme court held that the three separate instructions given were adequate to ameliorate any possible damage that occurred.[31]

The defendants also argued on appeal that the trial justice erred when she permitted the state, over the defendants' objection,

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24. *Id.* at 907.
25. *Id.*
26. *Id.*
27. *Id.* at 911.
28. *Id.* (citing State v. Gibbons, 418 A.2d 830, 835 (R.I. 1980) (citing Griffin v. California, 380 U.S. 609, 615 (1965))).
29. *Id.* at 911-12 (citing *Gibbons*, 418 A.2d at 835-36 (citing United States v. Kaplan, 576 F.2d 598, 600 (5th Cir. 1978), *cert. denied*, 439 U.S. 1078 (1979))).
30. *Id.* at 912 (citing State v. Sherman, 317 A.2d 445, 448 (1974)).
31. *Id.*

to ask a defense lay witness to identify the type of shoe that had made footprints in the snow.[32] Rule 701 of the Rhode Island Rules of Evidence governs lay witness testimony.[33] Opinion testimony may be used when the subject matter of the testimony cannot be reproduced or described to the jury precisely as it appeared to the witness at the time.[34] The court noted that non-experts may state their opinions in cases where those opinions are based on a number of indescribable facts.[35] In the issue at hand, it would be extremely difficult to detail conclusively the entire pattern of observed details in the shoe print in the snow.[36] Describing the prints as "probably made by sneakers" allows a summation of all the observed details into one comprehensible observation, and might be properly denoted as a statement of "composite fact."[37]

Finally, the defendants argued on appeal that the trial justice erred by allowing Evans to testify about the out-of-court statement made to Evans in the ACI.[38] The supreme court held that the statement at issue could not be admitted as an exception to the hearsay rule.[39] Instead, the court held that the statement was not hearsay since it was not offered to prove that if Evans did not testify in the Carpenter case, the other inmate would not testify against Evans in his trial for murder.[40] The supreme court found that the statement could be admitted because it was offered as probative of the defendants' guilt: the statement was made to Evans because the defendants knew that his testimony would be damaging to their case.[41]

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32. *Id.* at 915.

33. R.I. R. Evid. 701. The rule provides that:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions is limited to those opinions which are (A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

34. *Id.* (citing State v. Bettencourt, 723 A.2d 1101, 1111 (R.I. 1999) (citing State v. Bowden, 473 A.2d 275, 280 (R.I. 1984))).

35. *Id.* (citing State v. Hairston, 396 N.E.2d 773, 775 (1977)).

36. *Id.*

37. *Id.*

38. *Id.* at 916-17.

39. *Id.* at 917-18.

40. *Id.* at 918.

41. *Id.*

CONCLUSION

The Rhode Island Supreme Court held: (1) exclusion of alibi testimony is not an excessive sanction for testimony that is entirely a surprise; (2) the Fifth Amendment prohibits adverse comments by the prosecution or the trial justice on the decision of an accused not to testify; the supreme court also prohibits counsel for a co-defendant from commenting on the failure of the accused to testify since the prejudice to the accused is the same; (3) in determining whether lay witness testimony is admissible, non-experts may state their opinions in cases where those opinions are based on a number of indescribable facts; and (4) an out-of-court statement may be admitted if non-hearsay and probative of guilt.

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