

11-25-2015

## **Precap: *State of Montana v. James Morris Colburn*; When the Sole Defense is Precluded by Montana's Rape Shield Law**

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### **Recommended Citation**

Caitlin S. Williams, Oral Argument Preview, *Precap: State of Montana v. James Morris Colburn; When the Sole Defense is Precluded by Montana's Rape Shield Law*, 76 Mont. L. Rev. Online 214, [https://scholarship.law.umt.edu/mlr\\_online/vol76/iss1/27](https://scholarship.law.umt.edu/mlr_online/vol76/iss1/27).

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**PRECAP; *State of Montana v. James Morris Colburn*: When the Sole Defense is Precluded by Montana's Rape Shield Law**

**Caitlin S. Williams**

No. DA 14-0181 Montana Supreme Court

Oral Argument: Wednesday, December 2, 2015 at 9:30 AM in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana.

I. QUESTION PRESENTED

Did application of Montana's rape shield law, excluding evidence of the victim's motive to fabricate and source of sexual knowledge, violate the Defendant's constitutional right to present a complete defense?

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellant James Morris Colburn was charged with two counts of incest of his daughter, "C.C.", age eleven, and sexual intercourse without consent and two counts of sexual assault of his neighbor "R.W.", age eleven.<sup>1</sup> Colburn was found guilty on all counts and sentenced to Montana State Prison for 100 years.<sup>2</sup> Although Colburn initially appealed each of these charges, the issue on appeal was ultimately narrowed to the charges regarding the sexual abuse of R.W.<sup>3</sup>

During a forensic interview, R.W. described two separate incidents in which Colburn molested her in various ways.<sup>4</sup> R.W. was interviewed about these incidents by Nurse Mary Pat Hanson at the First STEP Resource Center at St. Patrick's Hospital.<sup>5</sup> Based on the interview, Hanson concluded that R.W. possessed sexual knowledge consistent with that of a child who experienced sexual abuse.<sup>6</sup> The video of Hanson's interview with R.W. was played for the jury at trial.<sup>7</sup>

Prior to trial, Colburn filed a motion in limine seeking to introduce evidence of an alternative source for R.W.'s sexual knowledge,

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<sup>1</sup> Appellee's Response Br. at 1, *State of Montana v. James Morris Colburn*, (Mont. June 15, 2015)(DA 14-0181).

<sup>2</sup> *Id.* at 5.

<sup>3</sup> Appellee's Supplemental Reply Br. at 1, *State of Montana v. James Morris Colburn*, (Mont. Oct. 9, 2015)(DA 14-0181).

<sup>4</sup> Appellee's Response Br. at 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.*

specifically alleged sexual abuse by her biological father.<sup>8</sup> However, the introduction of evidence of prior sexual abuse is inadmissible under Montana’s “rape shield” statute.<sup>9</sup> The district court reserved ruling on the motion until trial, where it was ultimately deemed inadmissible.<sup>10</sup> Colburn appeals this determination.<sup>11</sup>

### III. ARGUMENT

#### *A. Whether the application of the rape shield violated Appellant’s constitutional right to a defense?*

Montana’s rape shield statute states:

Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions . . . except evidence of the victim’s past sexual conduct with the offender or evidence of specific instances of the victim’s sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.<sup>12</sup>

Colburn argues the application of the rape shield deprived him of his constitutional right to present a defense<sup>13</sup> “as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, Section 24 of the Montana Constitution.”<sup>14</sup> He proposes that the Court employ a case-specific balancing test to weigh “the interests expressed in the statute against the force of the defendant’s constitutionally-protected right to a defense . . . to determine whether the particular exclusion of evidence under the rule was unconstitutional.”<sup>15</sup> More specifically, Colburn argues that the exclusion of evidence of a possible alternative source of R.W.’s sexual knowledge and the exclusion of evidence of R.W.’s alleged motive to fabricate her allegations against him prevented him from presenting a complete defense.<sup>16</sup>

The State argues the district court did not err in applying the rape shield to this case, as “Montana’s Rape Shield Law was designed to

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<sup>8</sup> Br. of Appellant at 2, *State of Montana v. James Morris Colburn*, (Mont. Dec. 9, 2014)(DA 14-0181).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 10–11.

<sup>11</sup> Appellant’s Supplemental Reply Br. at 2, *State of Montana v. James Morris Colburn*, (Mont. Oct. 23, 2015)(DA 14-0181).

<sup>12</sup> MONT. CODE ANN. § 45–5–511(2).

<sup>13</sup> Appellant’s Supplemental Reply Br. at 7.

<sup>14</sup> Br. of Appellant at 11.

<sup>15</sup> Appellant’s Supplemental Reply Br. at 2.

<sup>16</sup> *Id.*

protect the privacy and dignity of the victims of sexual crimes.”<sup>17</sup> Further, the State argues the two exceptions present in the statute, (1) allowing evidence of past sexual conduct between the victim and the offender, and (2) allowing evidence of the origin of semen, pregnancy, or disease, are not applicable in this case.<sup>18</sup> As to the first exception, Colburn’s defense does not stem from prior sexual activity between himself and R.W., but rather is directed at R.W.’s prior sexual activity with another offender.<sup>19</sup> Regarding the second exception, pregnancy and disease are not at issue and Colburn did not present any proof of R.W.’s sexual activity, which is the requirement for showing the origin of semen.<sup>20</sup> Based on these conclusions, the State argues the application of the rape shield is appropriate, and notes that, where the exceptions are not met, the Montana Supreme Court “has repeatedly rejected arguments that application of the rape shield law violates a defendant’s constitutional rights to confrontation or to present a defense.”<sup>21</sup>

Specifically, Colburn raises two separate theories he was unable to present at trial due to the application of the rape shield law.

### *1. Motive to Fabricate*

Colburn argues the preclusion of evidence pointing towards the victim’s motive to fabricate evidence of sexual assault violated his right to present a complete defense.<sup>22</sup> He asserts that R.W. used her allegedly false allegations against him to “test the waters” with her mother and gauge her reaction to those allegations before revealing the allegedly true incident of sexual abuse imposed by her biological father.<sup>23</sup> Colburn argues that after her mother believed her allegations toward Colburn, R.W. felt “safe” enough to disclose the “higher-stakes” abuse by her father.<sup>24</sup> However, since Colburn was not allowed to introduce the alleged sexual assault of R.W. by her father, he argues the jury was unable to consider R.W.’s motive to fabricate the allegations against him.<sup>25</sup> Colburn states “the Constitution protects a defendant’s right to introduce and argue a motive to fabricate . . . without a court having to find the jury necessarily would have believed the theory.”<sup>26</sup>

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<sup>17</sup> Appellee’s Response Br. at 19.

<sup>18</sup> *Id.* at 20.

<sup>19</sup> *Id.* at 20–21.

<sup>20</sup> *Id.* at 21.

<sup>21</sup> Appellee’s Supplemental Br. at 4.

<sup>22</sup> Appellant’s Supplemental Reply Br. at 7.

<sup>23</sup> *Id.* at 14–15.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 16–17.

<sup>26</sup> *Id.*

Conversely, the State argues that Colburn's theory of R.W.'s motive to fabricate was unsubstantiated absent expert testimony.<sup>27</sup> Similarly, the State contends Colburn's attempt to use Nurse Hanson's testimony that "children can sometimes lie" to prove that R.W. had motive to fabricate her allegations was also unfounded, as the "testimony by Hanson left Colburn's fabrication theory merely a theory, an unsubstantiated guess, an argument at best that rests only upon a platitude, no expert was required to assert, that children can sometimes lie."<sup>28</sup>

## 2. Source of Knowledge

Additionally, Colburn argues the exclusion of evidence pointing to an alternative source of R.W.'s sexual knowledge violated his right to present a complete defense,<sup>29</sup> as "the State at trial chose to use R.W.'s sexual knowledge to bolster her credibility and prove its case, then used the rape shield to exclude relevant rebuttal evidence."<sup>30</sup> Further, Colburn asserts that since jurors would "naturally infer" that R.W. must have been sexually abused to have such "graphic sexual knowledge," he should "be permitted to rebut the inference" that the victim was sexually abused and could not have fabricated the allegations.<sup>31</sup> As Colburn initially sought to introduce R.W.'s statements to Nurse Hanson regarding sexual abuse by her father,<sup>32</sup> Colburn now argues this evidence was necessary to presenting a complete defense, as "[t]he evidence of abuse by R.W.'s father was relevant to rebut the powerful inference of Colburn's guilt from R.W.'s sexual abuse knowledge and Nurse Hanson's assessment of R.W.'s credibility based on R.W.'s sexual abuse knowledge."<sup>33</sup>

In response, the State cites a prior case, *State of Montana v. Van Pelt*,<sup>34</sup> arguing the Court had previously rejected the very argument Colburn now asserts:

Appellant cannot argue . . . that he does not seek to attack [the victim's] credibility but rather seeks to demonstrate that [the victim] could have gained her knowledge of sex outside of her contact with the defendant . . . Whether under the guise of showing the jury how [the victim] may have obtained her knowledge

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<sup>27</sup> Appellee's Supplemental Br. at 9–10.

<sup>28</sup> *Id.* at 10.

<sup>29</sup> Appellant's Supplemental Reply Br. at 7.

<sup>30</sup> *Id.* at 7–8.

<sup>31</sup> *Id.* at 8–9.

<sup>32</sup> *Id.* at 11–12.

<sup>33</sup> *Id.* at 13.

<sup>34</sup> 805 P.2d 549 (Mont. 1991).

of sex, or not, the fact is appellant wished to convince the jury that [the victim] fabricated charges against him.<sup>35</sup>

The State further argues evidence of R.W.'s alleged abuse by her father lacked relevance and is therefore inadmissible pursuant to Rule 401 of the Montana Rules of Evidence.<sup>36</sup> Similarly, the evidence is insufficient under Rule 403 because "the details related to the proposed evidence were so sketchy that the district court could easily have concluded that the prejudicial effect of the evidence outweighed the purported probative value."<sup>37</sup>

Notably, the State did concede that "some of Colburn's criticisms are justified, as the State did overlook the fact that Colburn asserted matters shown in other court records of the father's alleged sexual abuse of R.W."<sup>38</sup> However, the State then takes the opportunity to further its own argument by identifying "that Colburn never tied the father's sexual abuse of R.W. to drawing and depictions R.W. reported was Colburn's rape of her."<sup>39</sup> Additionally, "Colburn had the ability to develop . . . more specific information regarding the father's prior sexual assault . . ." but failed to.<sup>40</sup>

#### IV. ANALYSIS

##### *A. Applicability of the Rape Shield*

The Court is likely to first address the overarching issue of whether or not the rape shield is applicable in this case. Although the State acknowledged that this Court has regularly upheld application of the rape shield as constitutional,<sup>41</sup> the fact that the law precludes Colburn's sole defense suggests the Court may question the State on this matter. Setting aside the horrific nature of the allegations against him, one cannot quickly dismiss the fact that Colburn was essentially prevented from presenting a defense. Given Colburn's constitutional right to present a complete defense, the State must show a clear and compelling reason behind its argument if it is to prevail.

The two defense theories Colburn was prevented from asserting will be included within the discussion of whether it was appropriate to apply the rape shield in this case: (1) R.W.'s alleged motive to fabricate

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<sup>35</sup> Appellee's Supplemental Br. at 11–12 (citing *Van Pelt*, 805 P.2d at 552).

<sup>36</sup> *Id.* at 16–17; *see also* Mont. R. Evid. 401.

<sup>37</sup> *Id.* at 17; *see also* Mont. R. Evid. 403.

<sup>38</sup> Appellee's Supplemental Br. at 16.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4.

the allegations against him, and (2) R.W.'s alleged alternative source of sexual knowledge.

### *1. Motive to Fabricate*

The issue of whether the jury should have been able to hear Colburn's theory that R.W. had reason to fabricate the allegations against him will likely be the main subject of debate between the parties. The State admitted that it failed to sufficiently address that Colburn raised some degree of evidence that R.W. had been sexually abused by her father.<sup>42</sup> This admission gives Colburn some momentum in his argument that R.W. had reason to fabricate her allegations against him as a means of "testing the waters" with her mother before disclosing the "higher stakes" allegations against her father. However, the State still has a strong case that the evidence of R.W.'s alleged sexual abuse by her father is inadmissible under the rape shield for public policy reasons. There is a significant interest in protecting victims from scrutiny surrounding their character, and the State argues for heightened protections for victims who are minors.<sup>43</sup> The Court will likely address the legitimate public policy concerns that would arise if victims were subject to greater attack on cross-examination, particularly considering the sensitive nature of the allegations and the inherent hesitancy to come forward with allegations in the first place.

### *2. Source of Knowledge*

The Court will likely dismiss this argument fairly quickly. The fact that Colburn relies primarily on out-of-state cases<sup>44</sup> while the State presents Montana case law discussing the exact issue in question<sup>45</sup> suggests that the Court will quickly affirm its own previous ruling. Public policy concerns are again at issue here, in that if the Court were to rule that a potential alternative source of R.W.'s sexual knowledge was admissible, it would open the door to a myriad of defendants asserting that their accuser obtained his or her sexual knowledge from an alternative source. Given the fact that Montana's rape shield statute is designed to protect victims from having their sexual histories examined by juries in excruciating detail, the Court is very likely to dismiss Colburn's argument.

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<sup>42</sup> *Id.*

<sup>43</sup> Appellee's Response Br. at 19.

<sup>44</sup> Appellee's Supplemental Br. at 20.

<sup>45</sup> *Id.* at 11–12.

### V. PREDICTION

The Montana Supreme Court will likely agree that the application of the rape shield did not violate Colburn's constitutional right to a defense, and even if it did, the State's legitimate interest in protecting victims of sexual assault outweighs Colburn's interests.