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RECAP; *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. SUMMARY

At oral argument, the main subject of debate was whether the defendant appellant, James Morris Colburn, was prevented from exercising his constitutional right to a defense by the trial court's application of Montana's rape shield statute. The defendant argued for the implementation of a procedure to balance the constitutional rights of the accused against the public policy implications underlying the rape shield statute when considering what evidence the accused can offer. Specifically, the defendant asserted that he was unable to raise a complete defense by not being able to introduce (1) evidence of a possible alternative source for the victim's sexual knowledge, and (2) evidence of a possible motive for the victim to fabricate her allegations. The exclusion of that evidence and the underlying constitutional implications are the basis of this appeal.

II. MS. JENNIFER HURLEY FOR THE DEFENDANT

Ms. Hurley commenced her argument by asserting the district court should have considered implementing a balancing test of the parties' interests. Facing questions regarding whether she agreed that the rape shield is designed to protect victims, and that allowing evidence of sexualization to be introduced could re-traumatize the young victims the statute is designed to protect. Ms. Hurley agreed with that concern, but argued that by conducting a balancing test, the trial court can determine at its discretion the extent the details are necessary to avoid retraumatization.

The Court then challenged Ms. Hurley on the matter of timing: whether or not the evidence of sexualization has to be first presented by the State before the defendant can present it. After acknowledging that this specific issue has not been litigated in Montana, Ms. Hurley identified that while the State relied heavily on R.W.'s sexual knowledge and the subsequent inference she could only have that knowledge if she was abused by the defendant, the defendant was not allowed to rebut that

inference by introducing evidence of a possible alternative source of that knowledge. The argument then shifted to whether the State “opened the door” with that argument, and whether it was fair to argue that in doing so waived the application of the rape shield.

In examining the proposed balancing test, the Court questioned Hurley on the distinction between the victim’s credibility versus her reputation and character. Specifically, evidence of credibility is potentially admissible, while evidence of the victim’s reputation and character is barred under the rape shield. Ms. Hurley responded that while the State argues that the defendant did not offer sufficient evidence that the alleged abuse R.W. sustained by her father was relevant, the defense was actually not able to make an offer of proof in that respect. The defense sought to offer a forensic interview report where R.W. disclosed the abuse by her father and drew several depictions of the abuse. Ms. Hurley argued that the district court should have assessed to what extent the details of the father’s abuse were necessary, and at the very least that the defendant should have been able to rebut the inference that R.W. could only have the sexual knowledge she did if she had been abused by the defendant.

Ms. Hurley concluded her opening argument by proposing the procedure utilized in *State ex rel. Mazurek v. District Court*,¹ where a balancing test was implemented when the defendant sought to introduce the victim’s alleged prior false accusations of sexual abuse.² Ms. Hurley advocated for a similar balancing test to be applied on remand in the instant case, where the defendant could give notice of his intent to introduce evidence of prior sexual abuse and explain its relevance to a material issue in this case. She further stated that there should then be a hearing outside of the presence of a jury where the Court could conduct the balancing test and “determine the extent and form of the evidence.”

III. MR. MARK FOWLER FOR THE STATE OF MONTANA

The State commenced its argument with the assertion that the defendant failed to offer sufficient proof as to the relevancy of the abuse R.W. sustained by her father. Furthermore, the State attacked the admissibility of the forensic interview the defense sought to introduce, claiming that it is double hearsay and the defendant had multiple opportunities to have a hearing on that evidence but declined to do so. The Court quickly pointed out that there is a statement in that forensic report (referencing R.W.’s disclosure about the abuse by her father) that is “devastating” to the State as it concerns exactly what the defense is arguing—an alternative source of sexual knowledge. Mr. Fowler

¹ *State ex. rel. Mazurek v. District Court*, 922 P.2d 474 (Mont. 1996).

² *Id.* at 480.

countered that the Court is not permitted under the Constitution to admit irrelevant evidence, regardless of whether or not the State opened the door. Focusing on that specific point, the Court asked if Mr. Fowler really considered evidence of an alternative source of sexual knowledge as irrelevant in a child rape case. Mr. Fowler argued that it was not relevant because the defense never demonstrated the nexus between the incidents of sexual abuse R.W. sustained from her father and from the defendant, to which the Court pointed out the defendant was precluded from raising that defense.

Mr. Fowler next argued the forensic interview report was not even introduced to the trial judge until after the jury verdict was delivered, despite ample opportunities to introduce it earlier. He posited that the defense likely waited to introduce the report for strategic reasons: the defense recognized that the incidents of sexual abuse are two totally separate acts and likely feared the relevancy challenge. The Court was again skeptical of that theory, and pushed Mr. Fowler on his stance that the jury should not have been able to hear about a possible alternative source of R.W.'s sexual knowledge. Mr. Fowler conceded that the evidence was only marginally relevant, because R.W. was able to distinguish between the two incidents of sexual assault.

The Court then considered the reasoning behind excluding the details the attacks have in common and allowing the jury to subsequently conclude that R.W. possessed sexual knowledge only from the attack by the defendant. Mr. Fowler responded by stressing the important public policy implications underlying the rape shield, including the risk of confusing or misleading the jury and violating the victim's privacy. The Court then pointed out that there were many details specific to the alleged attack by the defendant that were not shared by the alleged attack by the father, and the State could have introduced that evidence without "opening the door" to the source of R.W.'s sexual knowledge.

The Court further questioned the State's position on Ms. Hurley's proposed use of the balancing test under *Mazurek*. Mr. Fowler argued that the instant case is distinguishable from *Mazurek* in that there was no proffered evidence that R.W. fabricated her allegations, while there was evidence of fabrication in *Mazurek*. The Court then countered that the fabrication was not the point, but rather the admissibility of such evidence, to which the State argued that it was incumbent on defense counsel to proffer that evidence.

The State concluded its argument by pointing out that the prosecutor instructed the jury to make its determination of the defendant's guilt based on R.W.'s in-court testimony, and therefore any error the trial court may have made in excluding evidence was harmless.

IV. HURLEY REBUTTAL BY MS. HURLEY

Before Ms. Hurley began to rebut the State's arguments, she was asked by the Court for a statement of the rule regarding the exception to the rape shield that she proposes under the Constitution. Ms. Hurley responded by stating that while there is no plain rule statement that can be applied, even if the State doesn't make the inference explicit (namely, the inference that R.W. could only possess this sexual knowledge if she had been abused by the defendant), it would still naturally be inferred by a jury, which is sufficient on its own to violate the defendant's constitutional rights. Therefore, the Court should implement a balancing test to allow the defendant to rebut that inference.

Regarding the State's argument that the defense did not make a sufficient offer of proof regarding the relevance of the abuse R.W. sustained by her father, Ms. Hurley strongly denied that assertion and stated the District Court had a copy of the forensic interview where that information was disclosed, it was a proposed exhibit, and it was cited to in the defendant's motion in limine. The final question from the Court was whether the defense objected to the testimony of Nurse Hanson on direct examination, to which Ms. Hurley said that the testimony was not objectionable under the rules of evidence, and yet the defendant did not have an opportunity to rebut that testimony either.

V. PREDICTIONS

The fact that the Justices asked much more critical questions of the State than of the defendant suggests that this will not be an open-and-shut case. The defendant faced an uphill battle going into oral argument considering the unpleasant nature of the accusations against him and the potential consequences of loosening the standards surrounding the rape shield. However, the Court appeared far more skeptical of the State's apparent willingness to completely dismiss the defendant's constitutional right to raise a defense. There is a very real possibility that the appellant could be successful in having this case remanded with instruction that allows him to introduce certain evidence, but regardless of which way the Court rules, this case will have far-reaching implications on the future litigation of child rape cases.