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VICTIM TESTIMONY IN SEX CRIME PROSECUTIONS: AN ANALYSIS OF THE RAPE SHIELD PROVISION AND THE USE OF DEPOSITION TESTIMONY UNDER THE CRIMINAL SEXUAL CONDUCT STATUTE

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INTRODUCTION

South Carolina has recently joined other states in framing a more comprehensive statutory law of sexual offenses.[1] The new law has replaced the crime of "rape" with the broader concept of "criminal sexual conduct" and has significantly changed the evidentiary rules in such prosecutions. This article examines recent case developments affecting the procedural standards for admitting certain types of testimony in sex crime prosecutions in South Carolina. This article also explores the boundaries which have emerged in balancing the right of a criminal defendant to confront his accusor and the right of a victim to a trial that focuses on the issues and which does not, in effect, "try the prosecutrix instead of the defendant."[2]

I. THE RAPE SHIELD PROVISION AND TESTIMONY ON THE VICTIM'S CHARACTER

There is perhaps no more controversial issue in the prosecution of sexual offenses than the admissibility of evidence about

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1. *See* S.C. CODE ANN. §§ 16-3-651 to -730 (Supp. 1981). Gray, *Rape Reform in South Carolina*, 30 S.C.L. REV. 45 (1979) is a good primer on the statute and the changes it has effected in the law of sexual offenses.

2. State v. McCoy, 274 S.C. 70, 72, 261 S.E.2d 159, 160 (1979).

the victim's reputation and character. The position of the defense is that reputation and character bear on the issue of consent,[3] since it is reasonable to conclude that one of "loose morals" would have given freely that which the state asserts was taken by force. The state counters that one individual's relationship with another person on another occasion has little or no bearing on the voluntariness of sex with the particular defendant on the occasion in issue. Controversy over this issue appears to have motivated the decision to draft the new law[4] as well as the first serious challenge to its constitutionality.[5]

The "rape shield" provision of the criminal sexual conduct statute[6] provides that evidence of sexual conduct by the victim with others, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct are generally inadmissible in a prosecution. The statute also sets forth several exceptions. Evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant that is introduced to show the source or origin of semen, pregnancy, or disease and about which evidence has been previously introduced at trial is admissible provided the judge finds that the evidence is relevant to a material fact at issue and that its inflammatory or prejudicial nature does not outweigh its probative value. However, evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach credibility is not inadmissible under the provision. Should the defendant propose to offer this type of evidence, or should such evidence be revealed in other testimony during the course of trial, the statute requires an in-camera hearing to determine whether the proposed evidence is admissible.

In *State v. Gunter*,[7] the defendant was convicted of crimi-

3. Under the supreme court's decision in State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980), the state is no longer required to prove lack of consent to intercourse as a specific element of the crime. *See* S.C. CODE ANN. § 16-3-630 (1976).

4. *See generally*, H. KALVEN & H. ZEISEL, THE AMERICAN JURY 249-51 (1966); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 396, 399 (1975); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 934-36 (1973).

5. State v. McCoy, 274 S.C. 70, 261 S.E.2d 159 (1979).

6. S.C. CODE ANN. § 16-3-659.1 (Supp. 1981).

7. 273 S.C. 347, 256 S.E.2d 317 (1979).

nal sexual conduct in the first degree and sentenced to twenty-five years. According to the testimony of the victim, the defendant came to her door early in the morning and asked to see the victim's boyfriend. When told the boyfriend was not there, the defendant asked to use the bathroom. Once inside, he forced the woman into the bedroom and raped her at knifepoint. On cross-examination, defense counsel attempted to question the woman about her venereal disease. The solicitor objected and the jury was sent out. At the hearing, defense counsel demonstrated that the purpose of the questioning was to show that the victim had given a venereal infection to the defendant in prior intercourse. The testimony was therefore evidence of the victim's sexual conduct with the defendant and was admissible under the shield statute. When the jury returned, the solicitor questioned the victim about the venereal infection and defendant's counsel was then allowed to cross-examine fully on the issue. On appeal the defendant contended that the trial judge committed reversible error by requiring him to comply with the provisions of Section 16-3-651(2) of the South Carolina Code before questioning the prosecutrix about whether she had venereal disease, thereby compelling him to disclose his theory of defense prior to presenting his case.

The supreme court affirmed the conviction, concluding that the defendant had failed to demonstrate that he was prejudiced by the procedure followed at trial.[8] Because the procedure was required by the statute under such circumstances and had been ushered in by defense counsel's own questioning, a contention of reversible error was without merit. Further, defense counsel's cross-examination on the issue blunted any argument that the procedure had denied defendant his right of confrontation.

Some additional aspects of the *Gunter* case and the court's decision warrant further discussion. The opinion is among those which have begun to map out a doctrine of "invited error" in review of criminal cases in South Carolina.[9] Under this doctrine,

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8. The appellant bears the burden of establishing prejudice on review. State v. McPhail, 115 S.C. 333, 339, 105 S.E. 638, 640 (1920).

9. In three recent decisions, the court has clearly indicated that the doctrine is one on which it will rely when defendant's chosen strategy or conduct has provided his ground of review. State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981); State v. Faulkner, 274 S.C. 619, 622, 266 S.E.2d 420, 422 (1980); State v. Gilbert, 273 S.C. 690, 697, 258 S.E.2d 890, 894 (1979).

a defendant who brings about or secures a ruling at trial will not be permitted to profit on appeal from the court's acceding to the defendant's strategy. The rule arises out of the basic tenet of fairness in the proceedings; a defendant may not, by his own conduct, "build in" the reversal of his conviction on appeal.

Furthermore, the *Gunter* case demonstrates, as does the rape shield provision itself, that the presence of a venereal infection can be important circumstantial evidence in a prosecution for criminal sexual conduct. It can be probative as to prior contacts between the defendant and the prosecutrix, or it can indicate that the disease was contracted by the victim near the time the attack occurred. The evidentiary value of an infection depends upon the medical records which record the dates and other information about medical treatment. These pertinent records would normally be admissible in court,[10] and it is at this point that a serious gap exists in current legislation.

Presently, by statute, all information and records held by the Department of Health and Environmental Control and its agents relating to a known or suspected case of venereal disease are deemed strictly confidential and may not be released, under subpoena or otherwise, except under special circumstances.[11] The exceptions include release of nonidentifying information for statistical purposes, release with the consent of all persons named in the records, release necessary to enforce other provisions and regulations concerning venereal disease, and release in cases involving a minor if a report is required under the Child Protection Act.[12] The omission of an exception for release in criminal proceedings leaves both the state and the defendant without the means for securing the records of an unconsenting party. While the state could choose not to prosecute when a victim refused to consent to disclosure of records possibly exculpatory of the defendant,[13] the defendant can not be compelled to

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See also State v. McCrary, 242 S.C. 506, 509, 131 S.E.2d 687, 688 (1963); Shearer v. Deshon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962).

10. *See, e.g.* State v. Duncan, 274 S.C. 379, 383, 264 S.E.2d 421, 423 (1980); S.C. Code Ann. § 19-5-510 (Supp. 1981).

11. S.C. Code Ann. § 44-29-135 (Supp. 1981).

12. 1977 S.C. Acts 488.

13. *Compare* Brady v. Maryland, 373 U.S. 83 (1963) *and* State v. Cox, 274 S.C. 624, 629, 266 S.E.2d 784, 787 (1980) *with* Model Code of Professional Responsibility, EC 7-13; EC 7-14.

release his records, even though divulging such information would not violate his privilege against self-incrimination.[14] In some instances, the closed record statute poses a troublesome obstacle to the truth-seeking function of significant criminal proceedings. It should be amended by the legislature in the interests of the defendant, the victim, and society.

In *State v. McCoy*,[15] the defendant alleged that the rape shield provision violated the confrontation clauses of the State and Federal Constitutions.[16] At trial, the defendant contended that he had been having a secret affair with the victim and that she shot him during an argument. The victim testified that the defendant had surprised her at knife-point in her home, forced her into the bedroom, and cut off her clothing. While he performed an act of oral sex on her, she pulled a pistol from under the pillow of her bed and shot him. The defendant was apprehended by police shortly after he ran from the house.[17] At the beginning of the trial, defense counsel unsuccessfully moved to dismiss the indictment on grounds that the rape shield provision unconstitutionally restricted the evidence and procedure in the case. On appeal, the defendant argued that his right of confrontation had been denied. The State contended that the statute was constitutional since it merely struck a balance between minimally relevant evidence and the clear probability of undue prejudice.

In its opinion, the South Carolina Supreme Court acknowledged that the right to cross-examine a prosecuting witness is generally of constitutional dimensions. The court noted, however, that the recent trend in cases of rape or sexual assault of trying the victim instead of the defendant was a major concern of the legislature in revising the law. Moreover, "[t]he State has a legitimate interest in encouraging victims to report crimes and to present testimony against offenders," and this "interest is served by discouraging the oftentimes pointless and sometimes cruel treatment of victims who testify."[18]

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14. *Compare* Schmerber v. California, 384 U.S. 757 (1966) (privilege against self-incrimination does not apply to evidence of a "nontestimonial" nature) *with* State v. Jones, 268 S.C. 227, 232, 233 S.E.2d 287, 288 (1977).

15. 274 S.C. 70, 261 S.E.2d 159 (1979).

16. U.S. CONST. amend VI; S.C. CONST. art. I, §14

17. Record at 17-25, 145.

18. 274 S.C. at 73, 261 S.E.2d at 160.

Referring to the judge-made rule that evidence of sexual conduct with others is relevant to the issue of consent,[19] the court focused on the rule's rationale that sexual conduct with one person tends to prove consent to sex with another person. The court concluded that the rule's logic was anachronistic and that the probative value of such evidence has diminished in a "modern era of more fluid morals."[20] The provision does not prohibit all evidence of the victim's past sexual conduct, but merely strikes a proper balance between the interests of society and victim on the one hand, and the constitutional rights of the defendant on the other. The court cited decisions from Colorado, Michigan, and Ohio in support of its interpretation of the provision.[21]

The "interest balancing" which underlies the supreme court's reasoning in *McCoy* is no different than the task any court faces in ruling on the admissibility of evidence that is relevant but potentially prejudicial. The balancing process is a reflection of the fact that, notwithstanding its adversarial nature, the central purpose of a criminal trial is "the disposition of the charge in accordance with the truth."[22] Thus, a trial judge must carefully weigh relevance against the potential for prejudice when he rules on the admissibility of evidence of the *defendant's* character.[23] Similarly, the rape shield provision places the victim on an equal footing with the defendant by limiting the question of the victim's character to the issues at trial.

II. The Use of Deposition Testimony

The defendant's right of confrontation gives rise to one of the greatest concerns of the victim's testimony at trial. The *McCoy* decision recognized that the humiliation of publicly describing a sexual attack is a deterrent to the victim's reporting the crime and testifying at trial. Fortunately, a recent decision of

19. *See* State v. Taylor, 57 S.C. 483, 485, 35 S.E. 729, 729 (1900).

20. 274 S.C. at 73, 261 S.E.2d at 160.

21. *Id.* at 74-75, 261 S.E.2d at 161-62 citing People v. McKenna, 196 Colo. 367, 369-70, 585 P.2d 275, 278 (1978); People v. Thompson, 76 Mich. App. 705, 711, 257 N.W.2d 268, 272 (1977); State v. Gardner, 59 Ohio St. 2d 14, 18, 391 N.E.2d 337, 340-41 (1979).

22. Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965).

23. *See*, State v. Griffin, ___ S.C. ___, 285 S.E.2d 631 (1981); State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

the South Carolina Supreme Court indicates that the public embarrassment of the ordeal might be minimized under certain circumstances.

In *State v. Sinclair*,[24] the defendant was charged with committing a lewd act on a nine-year old girl. Prior to the victim's testimony, the trial judge excluded the public from the courtroom. The child stated that on the day in question, she went to a neighborhood park with her younger brother. At the park, she was accosted by a freckled, nervous, middle-aged man attired in a tan shirt, green shorts, green socks, and black boots. This description substantially matched the defendant. The identification issue was an important one at trial, because the defendant asserted an alibi defense, contending he was at his wife's place of employment on the afternoon in question. He was convicted and, on appeal, argued that the trial judge deprived him of his rights to a public trial and due process of law by excluding the public during the child's testimony. He also argued that the exclusion caused the jury to place undue significance on the witness's testimony.

The supreme court affirmed the conviction and rejected the contention that the court closure had prejudiced the defendant's right to a fair trial. The court concluded that the facts of *Sinclair* were governed by two recent decisions of the United States Supreme Court, *Gannett v. DePasquale*[25] and *Richmond Newspapers, Inc. v. Virginia*.[26] Both cases addressed the issue of courtroom closure. The *Gannett* decision expressly held open the possibility of excluding some members of the public in cases of violent crimes against minors.[27] The *Richmond Newspapers* case indicated that the trial of a criminal case must be open to the public unless there are articulated findings by the trial judge demonstrating a sufficient overriding interest.[28] In *Sinclair*, the South Carolina Supreme Court found that the interest in the testifying child's well-being overrode the defendant's right to a public trial, but that closure of the proceeding was not the only

24. 275 S.C. 608, 274 S.E.2d 411 (1981).
25. 443 U.S. 368 (1979).
26. 448 U.S. 555 (1980).
27. 443 U.S. at 388 n. 19 (dictum).
28. 448 U.S. at 2830 (plurality opinion). *Compare* Globe Newspaper Co. v. Superior Court for the County of Norfolk, 102 S. Ct. 2613 (1982).

alternative the trial judge could have considered:

> The trial judge properly weighed the various competing interests. There was no abuse of discretion under these circumstances despite the fact that the *better, statutorily prescribed practice could have been used whereby the deposition of the victim would be taken, subject to the appellant's right of confrontation, and then simply be read to the jury.*[29]

The "statutorily prescribed practice" is a provision from prior rape laws.[30] Its retention in the new legislation and *Sinclair's* implicit sanction of its use open the door to the deposition procedure in future prosecutions. The unanswered question is whether the deposition statute in effect deprives the defendant of his fundamental right of confrontation, guaranteed by both State and Federal Constitutions.

The decisions of the United States Supreme Court in *Chambers v. Mississippi*[31] and *Davis v. Alaska*[32] have established that the defendant's right to confront and cross-examine is not absolute and, in appropriate cases, may bow to accommodate other legitimate interests in the criminal trial process. Where cross-examination has been limited, the Court has weighed the various interests of the state and the victim in excluding certain testimony against the defendant's purpose in seeking to elicit the testimony, its probative value, and its probable impact or potential prejudice.[33] The Supreme Court's decisions in *Mancusi v. Stubbs*[34] and *Ohio v. Roberts*[35] indicate that the guarantee of confrontation does not mandate an in-court opportunity to cross-examine. Thus, these decisions reinforce the validity of the deposition procedure suggested by the South Carolina Supreme Court in *Sinclair.*

In *Mancusi,* the defendant filed a petition for federal habeas corpus. He had previously been convicted, but was released for retrial after obtaining post conviction relief. At the

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29. 275 S.C. at 614, 274 S.E.2d at 414 (emphasis added).

30. S.C. CODE ANN. §§ 16-3-660 to -720 (1976). *See* State v. Harris, 268 S.C. 117, 232 S.E.2d 231 (1977).

31. 410 U.S. 284 (1973).

32. 415 U.S. 308 (1974).

33. *See id.* at 319.

34. 408 U.S. 204 (1972).

35. 448 U.S. 56 (1980).

second trial, the State was unable to produce a witness, then living in Sweden, who had testified against the defendant at his first trial. Instead, the transcript of the earlier testimony of the witness was read to the jury, giving rise to the defendant's habeas corpus contention that he had been deprived of his right to confront a key State's witness.

In its opinion, the Supreme Court rejected the defendant's assertion that use of the transcript denied his right of confrontation. The Court concluded that, notwithstanding the existence of certain procedures to secure out-of-state witnesses in some instances, a witness who was out of the country was sufficiently "unavailable" to warrant the substitution of his previously transcribed testimony, provided the testimony bore "indicia of reliability."[36] The Court found that the prior testimony was sufficiently reliable and intimated that, under certain circumstances, even cross-examination at a preliminary hearing might satisfy confrontation requirements.

In *Roberts*, the Supreme Court adopted the *Mancusi* dictum and held that the preliminary hearing testimony of an absent State's witness was admissible at trial for substantive purposes when tested by the "equivalent of significant cross-examination." The defendant was charged with forgery and possession of stolen credit cards. At the preliminary hearing, defense counsel called the defendant's daughter to the stand[37] and attempted to elicit an admission that she had given the defendant checks and credit cards without telling him that she had no permission to use them. The girl denied this and, although questioned extensively, defense counsel at no point asked to have the witness declared hostile and placed under cross-examination.[38] At trial, the daughter failed to respond to the State's subpoena and the court admitted the preliminary hearing testimony into evidence. The Ohio Court of Appeals and the Ohio Supreme

36. *Mancusi*, 408 U.S. at 212-13.

37. In South Carolina, the accused may not offer such testimony or other evidence in his behalf at a preliminary hearing but is allowed only to cross-examine the witness presented by the state in its attempt to show probable cause. *See* State v. White, 243 S.C. 238, 242, 133 S.E.2d 320, 321 (1963); S.C. CODE ANN. § 22-5-320 (Supp. 1981).

38. Under South Carolina law, upon a showing by counsel that he has been both surprised and hurt by the testimony of his own witness, counsel may have the witness declared hostile and subject to cross-examination. State v. Bendoly, 273 S.C. 47, 49, 254 S.E.2d 287, 288 (1979).

Court reversed the conviction, the latter concluding that the lack of actual cross-examination violated the defendant's constitutional rights. The United States Supreme Court disagreed with the conclusion.

In reversing the Ohio appellate courts, the Supreme Court retraced earlier decisions, including *Mancusi*.[39] The Court outlined a rule of necessity for introducing such evidence. Thus, in the usual case, the prosecutor must demonstrate the unavailability of a declarant whose transcribed testimony he wishes to use against the defendant. The prosecution must establish that it has made a "good faith" effort to produce an absent witness.[40] The second prerequisite to introduction of the material is that it satisfy the "indicia of reliability" standard of *Mancusi*. In *Roberts*, the Court concluded that the questioning by defense counsel complied with both the form and purpose of cross-examination. Regardless of how the questioning might be categorized under state law, the defendant was afforded both opportunity for and substantial equivalent of cross-examination.

Chambers, *Davis*, *Mancusi*, and *Roberts* lay a foundation for the constitutionality of the deposition procedure discussed in *Sinclair*. The primary issue before a court considering the use of a deposition is whether the defendant's right of confrontation overrides the potential trauma engendered by the child's giving testimony in open court. Moreover, as the court in *Sinclair* noted, the public's first amendment interest in open proceedings argues against closure as the means of protecting the child's well-being[41] and supports the use of the deposition procedure. While it might be argued that the actual presence of the child leaves the "nonavailability" requirement unsatisfied, prosecutorial "good faith" in conjunction with a standard of "reasonableness" effectively counter the point. For the purposes of obtaining testimony at trial, severe emotional stress in a minor child could render her as "unavailable" as the witnesses were in *Mancusi* and *Roberts*. Allowing substantially more than the "equivalent" of cross-examination through the deposition procedure will further minimize the risk that the balancing of

39. *See also* California v. Green, 399 U.S. 149 (1970).

40. Ohio v. Roberts, 448 U.S. at 74.

41. *See also* Globe Newspaper Co. v. Superior Court for the County of Norfolk, 102 S. Ct. 2613 (1982).

interests has deprived the defendant of his right of confrontation.[42]

CONCLUSION

The South Carolina Criminal Sexual Conduct Statute is part of a significant trend in the law to accord victims of serious crimes the basic fairness which is guaranteed to defendants. In deciding *Gunter* and *McCoy*, the South Carolina Supreme Court balanced the interests of the victim, the defendant, and society, while upholding a legislative determination of what is relevant in the proceedings. That determination has struck a balance between the right of confrontation on the one hand and the requirement of relevance or probative worth on the other.

Under the *Sinclair* decision, the court has opened the door to a procedure which would minimize trauma for particularly young victims of sexual attacks. The dictum of that decision is, apparently, a cautious step toward addressing the needs of victim-witnesses while satisfying the guarantees of confrontation and cross-examination. The United States Supreme Court's decisions in *Mancusi* and *Roberts* lend authoritative support for the deposition procedure's eventual acceptance, in limited instances, as an alternative to the trauma of courtroom testimony.

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42. It appears that the procedure would only be acceptable if the defendant's right of confrontation had been sufficiently protected. *See* State v. Latham, 275 S.C. 550, 273 S.E.2d 772 (1981)(affidavit as to allegations of offense is hearsay and admission deprived defendant of rights of confrontation and cross-examination). The South Carolina Supreme Court appears to have further accorded the defendant the right to *personally* confront and question the victim in court, *see* State v. Lynn, ___ S.C. ___, 284 S.E.2d 786 (1981), although it is not clear that this would have been the case had the state opposed the procedure at trial or on appeal. *See* State v. Sanders, 269 S.C. 215, 237 S.E.2d 53 (1977). It should be noted that the United States Supreme Court has indicated that it will not interpret the United States Constitution as guaranteeing such a literal right of confrontation between defendant and witness. *See* Ohio v. Roberts, 448 U.S. at 63.