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2001 Survey of Rhode Island Law: Cases: Criminal Law

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Criminal Law. *Hampton v. State*, 786 A.2d 375 (R.I. 2001). Probation revocation justice did not violate the defendant's right to due process by failing to advise the defendant of his right to appeal the revocation adjudication because Rule 32 of the Superior Court Rules of Criminal Procedure does not apply to probation-violation adjudications. Furthermore, the defendant's attorney was not ineffective because the defendant was not prejudiced when his attorney failed to inform him of his right to appeal.

FACTS AND TRAVEL

In 1991, the defendant Claude E. Hampton ("Hampton") was convicted of assault with intent to commit first-degree sexual assault, which resulted in a fifteen year suspended sentence and fifteen years probation.[1] In August 1992 Hampton was arrested and charged with first-degree sexual assault after a brutal attack on a woman in Newport.[2] At the defendant's probation-violation hearing, Hampton's attorney attempted to persuade the judge to hold off lifting the suspended sentence until the underlying criminal charges were resolved. Hampton's attorney believed that the lack of evidence in the underlying charge would be a mitigating factor in determining the length of the suspended sentence that Hampton would have to serve.[3] Hampton's attorney failed in this attempt and the hearing justice found that Hampton had violated his terms of probation and ordered him to serve the fifteen years of his previous suspended sentence.[4] At no time during the hearing did Hampton's attorney or the hearing justice inform him of his right to appeal the probation-violation adjudication.[5] Hampton was never indicted on the first-degree sexual assault charge.[6]

Six years later the defendant sought to vacate the finding of a probation violation and the fifteen year sentence on the grounds that he was deprived of both due process and effective assistance of counsel because the hearing justice and his attorney failed to advise him of his right to appeal pursuant to Rule 32(a)(2) of the Su-

1. Hampton v. State, 786 A.2d 375, 378 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

perior Court Rules of Criminal Procedure.[7] The post conviction relief ("PCR") hearing justice held that the probation-violation justice had no obligation to inform Hampton of his right to appeal under Rule 32(a)(2), because the rights described in that rule do not apply to probation-revocation hearings.[8] The PCR hearing justice also rejected Hampton's ineffective assistance of counsel claim because the attorney did not have a duty to inform his client of the right to appeal the probation-violation adjudication.[9] Furthermore, the PCR hearing justice was unable to reduce Hampton's sentence because he failed to request such reduction within 120 days of imposition as required by Rule 35 of the Superior Court Rules of Criminal Procedure.[10] Hampton appealed from the PCR ruling.[11]

BACKGROUND

Rule 32(a)(2) of the Superior Court Rules of Criminal Procedure states that after imposing sentence in a case, which has gone to trial on a plea of not guilty, the court shall advise the defendant of his or her right to appeal.[12] In addition, Rule 32(f) of the Superior Court Rules of Criminal Procedure states that the court shall not revoke probation or revoke a suspension of sentence or impose a sentence previously deferred except after a hearing at which the defendant shall be afforded the opportunity to be present and apprised of the grounds on which such action is proposed.[13]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court conducted a *de novo* review of this case because the defendant alleged constitutional violations.[14] The court held that a probation-violation hearing is not part of the criminal-prosecution process, and is instead civil in nature. Thus, all the rights that are normally guaranteed to defend-

7. *Id.* (citing R.I. Superior Ct. R. Crim. P. 32(a)(2)).
8. *Id.* at 378.
9. *Id.* at 379.
10. *Id.*
11. *Id.*
12. R.I. Superior Ct. R. Crim. P. 32(a)(2).
13. R.I. Superior Ct. R. Crim. P. 32(f).
14. *Hampton*, 786 A.2d at 379 (citing Carillo v. State, 773 A.2d 248, 252 (R.I. 2001)).

ants in a criminal case do not apply.[15] To establish a probation violation, Rule 32(f) of the Superior Court Rules of Criminal Procedure only requires a showing that the defendant failed to keep the peace and remain on good behavior.[16] Furthermore, the state's burden of proof is only to adduce reasonably satisfactory evidence of the defendant's violation of one of the terms of his probation, not evidence establishing a violation beyond a reasonable doubt.[17] Also, it is not the hearing justice's duty to determine the defendant's criminal guilt for any of the conduct triggering the violation.[18]

Because a probation-violation hearing is not a criminal proceeding the court held that the rights under Rule 32(a)(2) of the Superior Court Rules of Criminal Procedure are not applicable.[19] Hampton argued that although Rule 32(f) does not specifically provide for notification to the accused of his or her right to appeal from a probation-violation adjudication, the rule should be interpreted to afford a defendant minimal due process.[20] Hampton cited *State v. Lawrence*,[21] where the defendant was held without bail for over ten days while awaiting a probation-violation hearing, violating a statute instituting a 10-day maximum. In that case the court held that the 10-day maximum was clearly within the legislative intent as a requirement of minimum due process.[22] However, in the case at bar there was no statutory violation; therefore the court rejected Hampton's argument that notice of appeal from probation-violation hearings should be a minimal due process right.[23] Furthermore, the court asserted that because a probation-violation hearing is not a criminal proceeding a defendant is not afforded the same due process guarantees.[24] Finally, the court held that the United States Constitution does not provide any such guarantee.[25]

Regarding the defendant's ineffective assistance of counsel claim, the court held that in Rhode Island, a defendant who is

15. *Id.* (citing State v. Znosko, 755 A.2d 832, 834 (R.I. 2000)).
16. *Id.* (citing State v. Gautier, 774 A.2d 882, 887 (R.I. 2001)).
17. *Id.* (citing State v. Kennedy, 702 A.2d 28, 31 (R.I. 1997)).
18. *Id.* at 380 (citing *Gautier*, 774 A.2d at 887).
19. *Id.*
20. *Id.*
21. 658 A.2d 890, 892 (R.I. 1995); *see also* R.I. Gen. Laws § 12-19-9 (2001).
22. *Hampton*, 786 A.2d at 380 (citing *Lawrence*, 658 A.2d at 892).
23. *Id.*
24. *Id.*
25. *Id.*

faced with the possible loss of liberty after a probation-violation hearing at which the court may order him or her to serve all or a portion of a previously suspended sentence, has the right to effective assistance of counsel with respect to this hearing.[26] In determining whether there is ineffective assistance of counsel the United States Supreme Court established a two-prong test.[27] First, the defendant must demonstrate that counsel's performance was deficient to the point that it "so undermined the proper functioning of the adversarial process that the hearing cannot be relied on as having provided a just result."[28] Second, that defendant must show that counsel's deficient performance was prejudicial to the defense and that counsel's errors were so serious that the defendant was deprived of a fair hearing.[29]

The court applied this test to the facts of the case at bar and held that Hampton was not deprived of his right to effective assistance of counsel.[30] Regarding the first prong, the court was not convinced that, in light of the circumstances of the case, failure to disclose the right to appeal was so deficient as to deprive the supreme court of any confidence in the justice of the probation-violation hearing and his decision.[31] However, the court noted that even if this first prong was satisfied, Hampton did not prove the second prong.[32] Hampton did not demonstrate that he was prejudiced by the attorney's actions in failing to notify him of a right to appeal.[33] The court held that even if the probation-violation hearing justice agreed to delay sentence, the outcome of the hearing would have been the same.[34] The lack of indictment on the underlying wrongdoing was not relevant to the applicant's culpability as a probation violator and it would not affect the amount of the suspended sentence that the defendant would be required to

26. *Id.* (citing State v. Chabot, 682 A.2d 1377, 1379 (R.I. 1996) (citing O'Neill v. Sharkley, 268 A.2d 720, 722 (R.I. 1970))). However, this guarantee is not recognized on the federal level. *Id.*

27. *Id.* at 381 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

28. *Id.* (citing Toole v. State, 748 A.2d 806, 809 (R.I. 2000) (quoting Tarvis v. Moran, 551 A.2d 699, 700 (R.I. 1988))).

29. *Id.* (citing Brennan v. Vose, 764 A.2d 16, 174 (R.I. 2001)).

30. *Id.*

31. *Id.* at 382.

32. *Id.*

33. *Id.*

34. *Id.*

serve.[35] The court found that this was most likely the reason why the delay was denied.[36] Furthermore, the court noted that it was not unreasonable for Hampton's attorney to be primarily concerned about his client facing a potential felony indictment and subsequent criminal trial, and that the failure to indict was not an occurrence that Hampton's lawyer was bound to have anticipated.[37] Finally, the court held that the defendant could still seek relief by petitioning the supreme court for a writ of common-law certiorari.[38] In addition, Hampton failed to advance any arguments that might have been successful in reducing his sentence.[39]

CONCLUSION

The Rhode Island Supreme Court affirmed the superior court's judgment holding that the hearing justice did not violate Hampton's right to due process by failing to notify him of his right to appeal from the order finding him to be a probation violator. Furthermore, Hampton was not the victim of ineffective assistance of counsel at the violation hearing when his counsel failed to inform him of a right to appeal because the defendant was not prejudiced.

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35. *Id.* at 383.
36. *Id.*
37. *Id.* at 382-83.
38. *Id.* at 383.
39. *Id.*

Criminal Law. *State v. Contreras-Cruz*, 765 A.2d 849 (R.I. 2001). The Rhode Island Supreme Court held that a victim's bedroom was a "dwelling" within the meaning of the law of burglary because it had a lock on the door, and defendant can be convicted of burglary after breaking and entering such private dwelling room without permission, despite having permission to enter the home.

FACTS AND TRAVEL

On October 23, 1993, a young woman (Tess) accompanied her boyfriend (Eddie), defendant, who is also Eddie's half-brother (defendant), and several friends on a night of football games, fast-food restaurants, and parties.[1] Tess had been drinking throughout the evening, ultimately succumbing to vomiting, extreme intoxication, and unconsciousness in the back of the car in which she was riding.[2] Defendant was aware that Tess was inebriated, having spoken with her through the night and witnessing her illness.[3] On one occasion he had expressed an interest in leaving the party alone with Tess.[4] While Tess was still in this drunken state, Eddie drove her home, carried her to her room, and put her to bed before returning to the party.[5] Eddie and Tess occupied a bedroom in this Coventry, Rhode Island home, in the context of an intimate relationship. This room was on the first floor of his mother's home, where other siblings also lived; the defendant did not reside here.[6] After spending time back at the party, Eddie returned home, believing Tess would be alone in her room asleep as he had left her.[7] He was alarmed to find the door to their bedroom bolted from the inside. By Tess' account, she was awakened by a banging on the door and Eddie calling her name from outside the locked door.[8] She found defendant engaged in sexual intercourse with her as she came to and realized what was happening.[9] Eddie beat down the door and struggled with defendant before defendant exited

1. State v. Contreras-Cruz, 765 A.2d 849, 850 (R.I. 2001).
2. *Id.*
3. *Id.* at 850-51.
4. *Id.* at 851.
5. *Id.*
6. *Id.* at 850.
7. *Id.* at 851.
8. *Id.*
9. *Id.*

through the window and escaped.[10] Tess denied letting defendant into the room or ever consenting to his acts.[11]

Eddie's testimony confirmed that of Tess', adding that defendant left the party just prior to the sexual assault with an indication that he wished to be alone.[12] Eddie also testified that defendant generally had permission to go to their home, but that Eddie's mother did not want him around.[13]

Throughout the trial for burglary and first-degree sexual assault, defendant moved various times for acquittal or dismissal of the charges.[14] First, following the presentation of the state's case, defendant moved for a judgment of acquittal.[15] Before presentation of the defendant's case, defendant moved to dismiss the sexual assault on the grounds that the statute was unconstitutional.[16] These motions were denied. After defendant's case was argued, he again moved for a judgment of acquittal.[17] At this point, the trial justice denied the motion with respect to sexual assault but reserved ruling on the burglary count until after the jury's verdict.[18] The jury returned a guilty verdict on both charges. The trial justice then denied the motion for judgment of acquittal on the burglary count.[19] Defendant's motion for a new trial was also denied.[20] Defendant was sentenced to forty years, with fifteen years to serve and twenty-five years suspended on each of the sexual assault and burglary convictions, both to be served concurrently.[21]

ANALYSIS AND HOLDING

On appeal, defendant first argued that the trial justice erred in denying his motion for judgment of acquittal on the burglary charge.[22] He argued that the prosecution failed to present legally

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 855-56.
14. *Id.* at 851-52.
15. *Id.* at 851.
16. *Id.* (arguing that R. I. Gen. Law § 11-37-2 (1) (2000) was unconstitutional).
17. *Id.* at 852.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

sufficient evidence to establish beyond a reasonable doubt that he entered Tess' dwelling place with the intent of sexually assaulting her, and that any inference of felonious intent was impermissibly speculative.[23] In rejecting this argument and upholding the denial of the motion, the Rhode Island Supreme Court applied the same standard that the trial justice uses in considering a motion for judgment of acquittal.[24] Therefore, the court viewed the evidence in the light most favorable to the state, without weighing the evidence or assessing credibility of witnesses, but giving full credibility to the state's witnesses, and drawing all reasonable inferences consistent with guilt. If the totality of the evidence and reasonable inferences therefrom would justify a reasonable juror in finding defendant guilty beyond a reasonable doubt, the lower court's denial of such a motion must be upheld, as it was here.[25]

After the court applied the definition of burglary[26] to the facts of this case, it found that the evidence was clear that defendant was aware of Tess' intoxication, was intent on sexually assaulting her, and that Tess in no way gave her consent to entry or to sexual intercourse.[27] A reasonable juror might infer this from the evidence. Despite defendant's contentions that the evidence of intent was too weak to support a conviction, the court found sufficient evidence that defendant had the requisite mental state at the critical time of breaking and entering and that the evidence was compelling.[28] The court discounted defendant's allegations that a finding of guilt would constitute an impermissible pyramiding of inferences.[29] In fact no "pyramid" existed at all here; felonious in-

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23. *Id.*

24. *Id.* at 852 (citing State v. Snow, 670 A.2d 239, 243 (R.I. 1996)).

25. *Id.* (using the same reasoning to uphold the trial justice's denial of defendant's motion for acquittal on the sexual assault count) *Id.* at 856.

26. *Id.* (citing State v. O'Rourke, 399 A.2d 1237, 1238 (1979) (stating that the crime of burglary in violation of R.I. Gen. Law § 11-8-1 (2000) incorporates the common law definition of the crime); State v. Hudson, 165 A. 649, 50 (R.I. 1933) (defining burglary at common law as "the breaking and entering the dwelling-house of another in the nighttime with the intent to commit a felony therein, whether the felony be actually committed or not.")).

27. *Id.* at 852-53.

28. The court distinguished the facts of this case with those defendant cited to support his position: State v. Moran, 699 A.2d 20 (R.I. 1997); State v. Williams, 461 A.2d 385 (R.I. 1983); State v. Woods, 821 P.2d 1235 (1991).

29. The use of pyramiding of inferences was present in the following cases: State v. Dame, 560 A.2d 330, 334 (R.I. 1989); *In re* Derek, 448 A.2d 765, 768 (R.I. 1982); State v. Alexander, 471 A.2d 216, 218 (R.I. 1984).

tent could be inferred from unambiguous facts capable of providing proof of guilt beyond a reasonable doubt.[30]

Next, defendant claimed that the trial justice erred in denying his motion for judgment of acquittal because he did not violate the scope of his permission to enter the house and because he could not be convicted of burglary since Tess' room was not a "dwelling house."[31] This argument failed. The court noted that while one may have permission to enter parts of a dwelling, entry into a room within that dwelling that a person does not have permission to enter can constitute burglary.[32] Several courts have held that a room within a house can constitute a "dwelling house" for the purposes of a burglary prosecution.[33] Additionally, this court previously has held a dormitory room to be an "apartment" within the meaning of a burglary statute similar to the one at issue in this case, G.L.1956 § 11-8-3.[34] The policy behind such findings evidences recognition that there are often several dwelling houses, or places of abode, under the same roof and that everyone should be afforded some degree of security in their abode no matter the unconventional nature of the layout.[35] The court found that Tess' bedroom was a "dwelling" within the law of burglary and that this law protects not only the house but the private quarters of each person living there.[36] Evidence that Tess' bedroom door had a lock on the knob and a dead-bolt lock afforded this room the same level of security and protection as a dormitory room or a private apartment.[37]

Defendant's third contention on appeal was that the trial justice erred in permitting hearsay testimony to establish that he did not have permission to enter the premises at the time of the

30. *Contreras-Cruz*, 765 A.2d at 852.

31. *Id.* at 853.

32. *Id.* at 854 (citing United State v. Bowen, 24 F.Cas. 1207 (D.C. Cir. 1835) (No. 14, 629)).

33. *See* State v. Descant, 42 So. 486, 488 (La. 1906).

34. *See* State v. Riely, 523 A.2d 1225 (R.I. 1987).

35. *Contreras-Cruz*, 765 A.2d at 854-55 (citing *Riely*, 523 A.2d at 1226). The same policy was demonstrated recently in State v. Turner, 746 A.2d 700, 703 (R.I. 2000) (finding that a private apartment of an on-site manager within a bed-and breakfast was a 'dwelling house' within the meaning of R. I. Gen. Law § 11-8-2(a) (1956)).

36. *Id.* at 854-55.

37. *Id.* at 855.

crime.[38] Additionally defendant argued that this hearsay was prejudicial in showing him to be a "bad guy."[39] At trial, Eddie had been allowed to testify that his mother didn't want the defendant around their house.[40] The court defended the admissibility of such testimony, finding it to fall under R.I. R. Evid. Rule 803(3), the "[t]hen Existing Mental, Emotional, or Physical Condition" exception to the hearsay rule in which the statement is not excluded under particular circumstances, even when the declarant is available.[41] Here, Eddie described his mother's "state of mind" concerning the scope of defendant's permission to enter the house.[42] The statement was not highly prejudicial because there was ample other evidence to draw the conclusion that defendant was a "bad guy."[43] Also, R.I. R. Evid. 404(a) only limits evidence offered to show action in conformity with character or a particular trait, however this evidence was offered for the purpose of demonstrating the scope of defendant's permission to enter the house.[44]

Defendant's fourth argument attacked the denied motions at trial on the sexual assault charge.[45] Defendant argued that Tess was not "physically helpless" at the time of penetration, and that she consented to sexual intercourse under the mistaken belief that defendant was her boyfriend.[46] He believed this would place him in jeopardy of a crime of sexual assault by concealment, but not first-degree sexual assault as charged. These arguments failed.[47] With respect to defendant's new trial motion, the court noted that the trial justice must exercise independent judgment to decide whether the evidence from trial is sufficient for the jury to conclude guilt beyond a reasonable doubt.[48] The supreme court will

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38. *Id.* at 855-56.
39. *Id.* at 855.
40. *Id.*
41. *Id.* at 856. R.I. R. Evid. 803(3) allows a statement if it is a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . ." *Id.*
42. *Id.* at 855-56.
43. *Id.* at 856.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 856-57 (writing that according to *Snow*, 670 A.2d at 243, the trial justice 'has at least three analyses to perform when ruling on a motion for a new

reverse the ruling on the motion only if it finds that the trial justice overlooked or misconceived material evidence or was otherwise clearly wrong.[49] After looking at the definition of "physically helpless" within the context of the charge against defendant as a violation of section 11-37-2 and section 11-37-3, the court found that the trial justice did not overlook or misconceive material evidence.[50] The trial justice made clear that Tess' state of mind was a question of fact on which the jury could find that Tess was asleep and thus physically helpless during intercourse.[51]

Lastly, defendant claimed that the trial justice erred in restricting his cross-examination of Tess.[52] By precluding defense counsel from questioning Tess about her boyfriend's affair with another woman, defendant claims that the trial justice quashed any chance of establishing that she consented to sex for purposes of revenge.[53] The court found that the trial justice did not abuse his discretion under the circumstances of this case that showed Tess too drunk to carry out such a scheme.[54] Limiting the extent and scope of cross-examination is within the sound discretion of the trial justice and will be left undisturbed absent a showing of abuse of discretion.[55] Defendant's efforts here failed.

CONCLUSION

An appeal of a first-degree sexual assault and burglary conviction was dismissed and judgment was affirmed. The Rhode Island Supreme Court held that the evidence was sufficient to uphold a finding that defendant entered victim's home with the intent of sexually assaulting her, as necessary for a burglary conviction. Victim's bedroom was a "dwelling" within the meaning of the law of burglary and permission to enter the home did not extend to a

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trial . . . . First, the trial justice must consider the evidence in light of the charge to the jury; second, the trial justice must determine his or her own opinion of the evidence; third, the trial justice must determine whether he or she would have reached a different result from that of the jury.').

49. *Id.* at 856 (citing State v. Scurry, 636 A.2d 719, 725 (R.I. 1994)).

50. *Id.* Section 11-37-1(6) defines "physically helpless" as "a person who is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act." *Id.*

51. *Id.* at 857.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (citing State v. Veluzat, 578 A.2d 93, 95 (R.I. 1990)).

private room capable of being locked. The trial judge properly allowed hearsay evidence based upon a "state of mind" exception, and used sound discretion to limit cross-examination. Based upon clear and ample evidence, defendant was not entitled to a judgment of acquittal or a new trial on either charge against him.

Christy Hetherington

Criminal Law. *State v. Gomes*, 764 A.2d 125 (R.I. 2001). Reliable hearsay may be used to established reasonable suspicion or probable cause. A sufficient match between an individual and a description of a suspect broadcast over police radio provides reasonable suspicion. A trial judge has discretion to admit evidence under Rule 404(b) and leading questions.

FACTS AND TRAVEL

At approximately 1 a.m., on November 25, 1997, Robert Wray (Wray), was shot and killed on the doorstep of his mother's apartment in Providence, Rhode Island.[1] Shortly before Wray was killed, Wray and his friend, Tavell Yon (Yon) were watching television in the living room when someone knocked on the rear door of the apartment.[2] Yon answered the door and encountered a man whom he had never seen before.[3] The man asked to speak with Wray.[4] Yon called Wray to the door and then returned to the living room. From the living room, Yon overheard the man ask for "Frankie."[5] Wray replied: "you know who I am, I'm Frankie's cousin."[6] Wray then told the man that Frankie was not there, and the man left.[7]

Several minutes later, Yon answered another knock at the door.[8] Yon observed that it was the same man that was at the door minutes earlier.[9] This time the man asked to speak with Wray.[10] Again, Yon called Wray to the door and went back inside the apartment.[11] Within seconds, Yon heard a gunshot, looked over to the doorway and saw Wray lying on the ground.[12] Wray's younger brother, who was also in the apartment at the time, called 911.[13] When the police arrived, Yon explained what had happened and described the man at the door as: "a short black male with Jerry

1. State v. Gomes, 764 A.2d 125, 129 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

curls and a moustache."[14] He had craters and pimples in his face and he was wearing a black leather jacket."[15] This description, along with a warning that the suspect could be armed and dangerous, was immediately transmitted over the police broadcast system.[16]

Hearing the broadcast, Patrolman Jose Deschamps (Officer Deschamps), responded to the scene of the murder.[17] After assisting in securing the crime scene, Officer Deschamps proceeded to search for the suspect.[18] Approximately ten to fifteen minutes after the shooting, Officer Deschamps went to a nearby convenience store to alert the employees that a murder had just been committed and that the suspect was at large and believed to be dangerous.[19] As Officer Deschamps entered the store, he noticed a man using a pay phone outside the store but could not see his face.[20] As he left the store, Officer Deschamps noticed the same man still using the phone.[21] This time, however, he looked more closely and was able to see the man's face.[22] He observed the man to be a black male, five foot four to five foot six inches in height, with a "crater face, or pimples," and "slicked, very greasy" hair with "Jerry curls."[23] He also observed that the man appeared nervous and, despite the cold weather, was sweating and not wearing a jacket.[24]

Comparing the police broadcast with his observation of the man using the phone, Officer Deschamps' suspicions were aroused.[25] He then approached the man and began asking rapid questions about the man's identity and what he was doing out so late.[26] As Officer Deschamps was asking the questions, the man appeared to become more nervous and began stuttering and mum-

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14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 129-30.
20. *Id.* at 130.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*

bled his words while attempting to answer.[27] Officer Deschamps attempted to place his right hand on the man's left shoulder to initiate a protective pat-down search for weapons.[28] At that point, the man jerked back and Officer Deschamps' arm accidentally slid down the man's side.[29] Believing that he had felt a gun, Officer Deschamps lifted the man's shirt and observed a loaded 9-millimeter pistol in the man's waistband.[30] Officer Deschamps immediately pulled out the pistol and observed it to be cocked and ready to fire.[31] He then placed the gun on the ground, secured it with his foot, and radioed for assistance in placing the man under arrest.[32]

Patrolman Charles Matracia (Officer Matracia), who had just left the murder scene and was driving Wray to the Providence police headquarters to be interviewed, heard Officer Deschamps' call for assistance.[33] Within seconds, Officer Matracia and Wray arrived at the scene where Officer Deschamps was detaining the man.[34] Upon seeing the man, Yon exclaimed: "that's him right there" and, he "was the guy that came to the door."[35] The man, later identified as Gomes, was placed under arrest. Shortly thereafter, Yon was interviewed and reiterated that Gomes was the man that had come to the door.[36]

After a jury trial, Marc Gomes (Gomes), was convicted of first-degree murder and one count of carrying a pistol without a license.[37] Gomes claimed that the trial judge made various evidentiary and constitutional errors by admitting certain pieces of evidence at his trial and appealed to the Rhode Island Supreme Court seeking reversal of his convictions and a new trial.[38]

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27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 130-31.
37. *Id.* at 128-29.
38. *Id.* at 129.

ANALYSIS AND HOLDING

The Police Broadcast

Gomes argued that Yan's description of the murder suspect given to Officer Calabro and broadcast over the police radio was hearsay and its admission into evidence at his trial constituted prejudicial error.[39] The court rejected Gomes' argument for two reasons.[40] First, the description of the suspect was not hearsay because it was used to show why Officer Deschamps apprehended Gomes rather than to prove Gomes' guilt.[41] Reliable hearsay may be used to establish probable cause to arrest or secure a warrant.[42] Thus, the proper inquiry for the court was whether the description was sufficiently reliable when relayed by Officer Calabro to Officers Deschamps and Matracia.[43] In its silence on the issue, the court presumably held that the description was sufficiently reliable.

Second, Rule 801(d)(1) of the Rhode Island Rules of Evidence provides that out-of-court statements are not hearsay "if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the declarant."[44] Yon, the declarant, gave his description of the suspect within minutes of the shooting.[45] He testified under oath and was subject to cross-examination and confirmed the accuracy of the description that was broadcast by Officer Calabro.[46] Accordingly, Yon's statement fell within the purview of Rule 801(d)(1) and was not hearsay.[47]

The Seizure of the Gun

Gomes also argued that that Officer Deschamps lacked reasonable suspicion to approach and detain him outside the conve-

39. *Id.* at 131.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 131-32.
44. *Id.* at 131 (quoting R.I. R. Evid. 801(d)(1)).
45. *Id.*
46. *Id.*
47. *Id.*

nience store.[48] He further argued that Officer Deschamps had no right to conduct a pat-down search before arresting him and that there was no probable cause later to arrest him.[49] Accordingly, Gomes argued that the trial justice erred in allowing Officer Deschamps to testify to the gun seized form Gomes' waistband.[50]

A police officer may conduct an investigatory stop of an individual if specific articulable facts would lead reasonable officer to suspect that the individual is engaged in criminal activity.[51] An officer acting with reasonable suspicion may conduct such a stop to investigate either completed or ongoing crimes.[52] Relevant to the reasonable suspicion inquiry are the time and location at which the suspicious conduct occurred, the suspicious conduct or appearance of the suspect and the personal knowledge or experience of the detaining officer.[53] To establish reasonable suspicion, an officer comparing an individual to a description of a suspect, may take into consideration a change in circumstances or a suspect's attempt to conceal his identity.[54] "'An investigatory stop differs from a full arrest and search both in the duration of the detention and in the quantum of suspicion necessary to conduct it.'"[55] During an investigatory stop of an individual whom the officer reasonably believes is armed and dangerous to the officer or others, the officer may conduct a limited, self-protective patdown search of the suspect's outer clothing.[56]

Officer Deschamps' actions at the convenience store were proper in light of the information available to him.[57] Although Gomes was not wearing a jacket as the subject had been described, Gomes otherwise perfectly matched the description of the suspect that was broadcast over the police radio. When Gomes was questioned by Officer Deschamps, he became nervous and began stuttering and mumbling.[58] The court held that those facts provided

48. *Id.*
49. *Id.* at 132.
50. *Id.*
51. *Id.*
52. *Id.* at 133 (citing United States v. Hensley, 469 U.S. 221, 227 (1985)).
53. *Id.* (citing State v. Abdullah, 730 A.2d 1074, 1077 (R.I. 1999)).
54. *Id.* at 132 at n.2 (citing State v. Clark, 721 So.2d 1202, 1205 n.2 (Fla. Dist. Ct. App. 1998)).
55. *Id.* (quoting *In re* John N., 463 A.2d 174, 176 (R.I. 1983)).
56. *Id.* at 133 (quoting State v. Black, 721 A.2d 826, 829-30 (R.I. 1998)).
57. *Id.* at 133-34.
58. *Id.* at 133.

not only reasonable suspicion to detain Gomes, but also probable cause to arrest and, incidental to that arrest, search him.[59] Thus, Officer Deschamps' testimony regarding the seizure of the gun was proper.[60]

Opinion Evidence

Gomes also argued that the trial judge improperly allowed expert testimony to establish his guilt at trial.[61] At trial, Officer Robert Badessa testified about his investigation of the crime scene and his collection and documentation of evidence.[62] Specifically, Officer Badessa testified as an expert regarding the dissipation of gunshot residue found on certain articles of clothing.[63] For the first time on appeal, Gomes argued that Officer Badessa was not qualified to offer expert testimony in this area. Because Gomes never raised this argument at trial, court considered that argument waived.[64]

Even if Gomes had raised that issue at trial, the decision to qualify an individual as an expert is soundly in the trial justice's discretion.[65] Officer Badessa had been a member of the Providence Police Department for twenty-five years, and of that, he had spent the previous seven years with the BCI unit.[66] He had handled approximately thirty homicides.[67] He had received training regarding bullet holes and impact. He had experience testing gunshot residue on clothing.[68] With this experience, the trial justice would not have abused his discretion by admitting the evidence.[69] Further, even if the admission of Officer Badessa's testimony had been error, it would be harmless beyond a reasonable doubt because another well-regarded expert had testified without objection about the same opinion evidence.[70]

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59. *Id.* at 134.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 135.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*

Rule 404(b) Challenge

Gomes also argued that the trial judge allowed the state to use improper character evidence to obtain his conviction.[71] At trial, a former prison cellmate of Gomes', Ralph Mosley (Mosley), testified that Gomes had referred to his cousins as good "boosters."[72] Thereafter, over Gomes' objection, Mosley defined the term "booster" to mean "thief."[73] Gomes argued that such testimony was both prejudicial and irrelevant and should have been excluded pursuant to Rule 404(b) of the Rhode Island Ruled of Evidence.[74] Rule 404(b) excludes evidence of prior criminal acts only if such evidence is both prejudicial and irrelevant.[75]

Questions of relevance, including whether probative value is outweighed by the danger of undue prejudice, are left to the sound discretion of the trial judge.[76] Trial judge's relevancy determinations will not be disturbed unless that determination was an abuse of discretion and the admission of the irrelevant information was prejudicial to the defendant's rights.[77] When considering whether a remark is prejudicial, the judge must evaluate the potential prejudice of the remark on the outcome of the case by examining the statement in its factual context.[78] Prejudice exists when a remark so enflames the passions of the jury as to prevent their calm dispassionate examination of the evidence.[79] To show prejudice, there must exist a reasonable probability that the improper evidence contributed to a defendant's conviction.[80] To determine whether a reasonable probability exists, a reviewing court must decide what probable impact the improper evidence would have had on an average jury.[81] The admission of prejudicial evidence is harmless if it is not reasonably possible that such evidence would influence an average jury on the ultimate issue of guilt or inno-

71. *Id.* at 136.
72. *Id.* at 135-36.
73. *Id.* at 136.
74. *Id.*
75. *Id.* (citing State v. Garcia, 743 A.2d 1038, 1050 (R.I. 2000)).
76. *Id.* (quoting *Garcia*, 743 A.2d at 1050, quoting State v. Gordon, 508 A.2d 1339, 1347 (R.I. 1986)).
77. *Id.* (quoting State v. Robertson, 740 A.2d 330, 345 (R.I. 1999)).
78. *Id.* (quoting State v. Fernandez, 526 A.2d 495, 498 (R.I.1987)).
79. *Id.* (quoting *Fernandez*, 526 A.2d at 498 (quoting State v. Brown, 522 A.2d 208, 211 (R.I. 1987))).
80. *Id.* (quoting *Robertson*, 740 A.2d at 336).
81. *Id.* (quoting *Robertson*, 740 A.2d at 336).

cence.[82] The admission of impermissible evidence need not be prejudicial in a case in which there is independent overwhelming evidence of a defendant's guilt.[83]

The court held that Mosley's reference to the words "booster" and "thief" were neither irrelevant nor prejudicial.[84] The trial judge's finding of relevance was not an abuse of discretion because the term "boosters" had already been put before the jury without objection and an explanation of the term would assist the jury.[85] Further, Mosley's testimony prejudice Gomes' rights for two reasons.[86] First, Mosley's testimony referred to Gomes' cousins rather than Gomes.[87] Therefore, the challenged testimony did not contribute to Gomes' convictions.[88] Secondly, an eyewitness had identified Gomes as being at the scene of the murder seconds before the gunshots; within ten to fifteen minutes of the murder and within only a few blocks of the scene, the defendant was found in possession of the murder weapon; and, the defendant had confessed that Wray's murder was a "sanctioned hit" and that he went to the door to draw the victim out of the house.[89] Consequently, in light of the overwhelming evidence of Gomes' guilt, even if it was error to admit Mosley's challenged testimony, such error was harmless beyond a reasonable doubt.[90]

Leading Questions

Finally, Gomes argued that the trial justice erred by admitting leading questions over his objection during the State's redirect of Mosley.[91] Leading questions are generally prohibited on direct examinations.[92] However, the trial justice has considerable latitude in ruling on objections to leading questions.[93] Such ruling will be overturned upon an abuse of discretion or substantial injury to de-

82. *Id.* at 136-37 (quoting State v. Burns, 524 A.2d 564, 568 (R.I. 1987) (quoting State v. Poulin, 415 A.2d 1307 1311 (R.I. 1980))).
83. *Id.* at 137 (citing *Robertson*, 740 A.2d at 337).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

fendant.[94] While the State's questions were leading and improper, they merely elicited facts that had already been put in evidence during Mosley's direct examination.[95] Therefore, Gomes was not injured by the leading questions.[96]

CONCLUSION

In *State v.* Gomes, the defendant was denied neither constitutional nor statutory rights at trial. Reasonable suspicion may be based on reliable hearsay or a sufficient match between an individual and a suspect's description broadcast over police radio. Furthermore, the trial judge did not abuse his discretion is allowing certain evidence in or in permitting leading questions. Accordingly, Gomes' appeal was denied and his conviction affirmed.

Michael J. Daly

94. *Id.*
95. *Id.*
96. *Id.*

Criminal Law. *State v. O'Brien*, 774 A.2d 89 (R.I. 2001). The audio portion of a videotape recorder is "an intercepting device" under statute prohibiting willful interception of wire or oral communications. Jury instructions are not improper when the jury finds facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the omitted element. This exercise amounts to the functional equivalent of the omitted element. Therefore, the trial justice's failure to define for the jury the term "intercept" is not reversible error.

FACTS AND TRAVEL

During the early morning of May 11, 1996, defendant, Jeffrey O'Brien, invited codefendant and fraternity brother Jordan Smith to videotape O'Brien and his girlfriend (hereinafter, the victim) having sex at the Alpha Epsilon Pi fraternity house at the University of Rhode Island.[1] O'Brien instructed Smith to borrow a video camera and then wait in his bedroom closet.[2] Smith waited in the closet for approximately a half hour until defendant reentered his room with his unsuspecting victim.[3] Smith activated the camera when the couple moved from defendant's couch onto the bed and began removing their clothing.[4] At some point during the lovemaking, the victim suddenly observed "a camera lens coming from [the] closet" and a "bluish light coming from the camera itself."[5] The victim screamed, "Oh, my God, somebody is taping us!" and the defendant tried to calm her down by saying that she was seeing things.[6] The victim pulled the curtain open revealing Smith squatting on a chair with the video camera in his hand.[7] Smith and the victim struggled for possession of the camera and she ultimately gained control of it.[8] The defendant denied having any prior knowledge of the videotaping.[9] Smith made several attempts to

1. State v. O'Brien, 774 A.2d 89, 92 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 93.

retrieve and destroy the tape, but these efforts were thwarted by the heroic efforts of the victim.[10]

Both defendant and Smith were indicted for conspiring to unlawfully intercept an oral communication and for intercepting an oral communication.[11] Smith pled *nolo contendere* to the charges in the indictment and received an eighteen-month suspended sentence and probation.[12] The defendant, however, opted for a trial and was found guilty on both of the counts charged in the indictment.[13] The defendant was sentenced to a five-year suspended sentence with a concurrent probationary term.[14] The defendant then filed this appeal.[15]

BACKGROUND

In order to convict a defendant under the state's wiretapping statute, section 11-35-21, the state must prove that the defendant wilfully intercepted, attempted to intercept, or procured any other person to intercept or attempt to intercept, any wire or oral communication.[16] Section 12-5.1-1(5) of the Rhode Island General Laws defines the term "intercept" to mean "to acquire aurally the contents of any wire or oral communications through the use of any intercepting device."[17] Section 12-5.1-1(6) defines an "intercepting device" as "any device or apparatus which can be used to intercept wire or oral communications." Section 12-5.1-1(8) defines "oral communications" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying [such] expectation."[18]

ANALYSIS AND HOLDING

On appeal, defendant argued that the mere surreptitious recording of private oral communications does not constitute an "interception of a communication" under the Rhode Island's

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 94.
17. *Id.*
18. *Id.*

wiretapping statute.[19] The defendant argued that the audio recorder built into the video camera that Smith used was not an "intercepting device" as defined by section 12-5.1-1(5).[20] Defendant contended that because the audio recorder was integrated into the video camera, it recorded only what already could be overheard by the hidden cameraman's invited naked ear.[21] Defendant further contended that because that audio recorder did not amplify the recorded sounds to make them more audible, it cannot be considered an "intercepting device."[22] Lastly, Defendant claimed that the trial justice erred by failing to instruct the jury that it had to find that defendant had procured an interception of an oral communication through the use of an intercepting device.[23]

In 1969, the Rhode Island General Assembly adopted the broad language of the federal wiretapping statute and adopted it as state law.[24] The original version of the statute, which defendant relies on for his argument, provided that "it shall not be unlawful for a party to any wire or oral communication or a person given prior authority by a party to a communication to intercept such communication."[25] However, the amended statute, also adopted by the Rhode Island General Assembly, renders illegal one-party consensual recordings, like the one in this case, when they are intercepted "for the purpose of committing any criminal or tortuous act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."[26] By adopting the language of the federal statute, the General Assembly appreciated the significant difference between a third party merely overhearing private communications and the surreptitious tape recording of that same overheard conversation.[27] The General Assembly apparently intended to protect an individual's expectation of privacy, not only from the technological innovations that increasingly expose our private communications to the uninvited bionic ear through the use of wiretapping,

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 96.
25. *Id.* at 94.
26. *Id.* at 95.
27. *Id.* at 96.

sound amplifying, and bugging devices, but also from those unseen devices such as tape recorders and other hidden transmitters.[28] Therefore, the defendant's first argument, that the mere surreptitious recording of private oral communications does not constitute an "interception of a communication" under the Rhode Island's wiretapping statute, failed.

In deciding what constitutes an "intercepting device," the Rhode Island Supreme Court construed the federal and state wiretapping statutes to include a tape recorder or other recording devices.[29] As a result, the audio portion of a video recorder is covered by the scope of the federal and state wiretap statutes.[30] The video image captured by the surveillance camera is not what violates the wiretap laws, rather it is the interception of an oral communication that subjects the interceptor to liability.[31] This broad interpretation of "intercepting device" gives effect to the General Assembly's evident desire to protect individuals from "any device or apparatus" that might be used then or in the future to invade their privacy.[32]

The Rhode Island Supreme Court also did not find merit in Defendant's argument that there was no "intercepting device" used in this case because the "simple, unadulterated [video] camera" used in this case was analogous to *State v. Delaurier*[33] where an "ordinary, unadulterated AM radio" was used by police to overhear private cordless telephone conversations.[34] However, the *Delaurier* court based its decision on an interpretation of the federal wiretapping statute and not on Rhode Island's wiretapping statute and its decision is therefore, not controlling in this case.[35]

Defendant next argued, without success, that the trial judge committed reversible error by failing to include the statutory definitions of "intercept" and "intercepting device" in the jury instructions.[36] Defendant claimed that the trial justice should have given jury instructions defining the term "intercept" to mean "to acquire

28. *Id.*
29. *Id.* at 96-97.
30. *Id.* at 97.
31. *Id.*
32. *Id.* at 99.
33. 488 A.2d 688 (R.I. 1985).
34. *O'Brien*, 774 A.2d at 99.
35. *Id.*
36. *Id.* at 100.

aurally the contents of any wire or oral communication through the use of any intercepting device."[37] In this case, the trial justice read the statute verbatim and attempted to summarize the elements in his own words, a practice that the Rhode Island Supreme Court has approved of for a long time.[38] The trial judge also instructed the jury that the defendant could not be convicted of this crime unless there was an interception of an "oral communication."[39] "When the jury finds facts that 'are so closely related' to the omitted element 'that no rational jury could find those facts without also finding the omitted element', this exercise amounts to the functional equivalent of the omitted element."[40] Therefore, the trial justice's failure to define for the jury the term "intercept" is not reversible error.

Similarly, the trial judge did not commit reversible error for failing to define for the jury the term "intercepting device." The trial justice ruled *in limine* that the video camera was an "intercepting device" as a matter of law and its use indisputably "acquire[d] aurally" the surrounding sounds and communications captured on the videotape.[41] Therefore, it was not necessary for the trial judge to define the term "intercepting device" for the jury.

The defendant also contended that the court erred by permitting the jury to view the videotape showing the sexual activity between the defendant and the victim because the videotape's probative value was outweighed by its prejudicial value.[42] However, the state had the burden under section 11-35-21(c)(3) of proving to the jury that the communications in question were "intercepted for the purpose of committing [a]*** tortuous act."[43] In this case, the tortuous act was the defendant's invasion of the victim's privacy.[44] Therefore, it was necessary for the jury to view the videotape so that it could determine whether or not the defendant had intercepted the communications between the victim and

37. *Id.* at 101.

38. *Id.* (citing State v. Durfee, 666 A.2d 407, 409 (R.I. 1995) (holding that "'this court has long approved' of the practice by which a trial justice 'read[s] the statute and *** attempt[s] to summarize the elements in his own words'")).

39. *Id.*

40. *Id.* (citing State v. Hazard, 745 A.2d 748, 753 (R.I. 2000)).

41. *Id.*

42. *Id.* at 106.

43. *Id.*

44. *Id.*

himself for the purpose of violating the victim's right to privacy.[45] The court concluded that the defendant's remaining arguments were without merit and affirmed the judgment of conviction.

CONCLUSION

In order to convict a defendant under the state's wiretapping statute, the state must prove that the defendant wilfully intercepted, attempted to intercept, or procured any other person to intercept or attempt to intercept, any wire or oral communication through the use of any intercepting device. The audio portion of a video recorder is covered by the scope of the state wiretap statutes. This broad interpretation of "intercepting device" gives effect to the General Assembly's evident desire to protect individuals from "any device or apparatus" that might be used then or in the future to invade their privacy. The video image captured by the surveillance camera is not what violates the wiretap laws, rather it is the interception of an oral communication that subjects the interceptor to liability. In this case, the defendant was found guilty under the state's wiretapping statute because his use of the video camera to videotape a sexual encounter was as a wilful interception of an oral communication through the use of an intercepting device that caused the victim harm.

Mark P. Gagliardi

45. *Id.*

Criminal Law. *State v. Smith*, 766 A.2d 913 (R.I. 2001). The Rhode Island Supreme Court held: (1) There was sufficient evidence that defendant's oral, written, and taped statements to police were voluntary. (2) The record supported a sentence of life imprisonment without possibility of parole. (3) The predicate sentences for the imposition of the habitual criminal penalty must occur sequentially, not on the same day as in the defendant's case; thus the state failed to show that the defendant had two prior convictions and sentences that would qualify him for sentencing as a habitual criminal.

FACTS AND TRAVEL

On April 13, 1997 defendant Charles Smith was living in an apartment in Newport with Margaret Rose Benard, their three-year-old daughter, Samantha, and two of Benard's daughters from a previous marriage, Kristen and Toni Jorge, sixteen and fourteen years old, respectively.[1] After an argument, Benard asked Smith to leave and give her the keys.[2] Defendant left, but returned at approximately 5:00 a.m. the following morning to ask Benard for cigarette money.[3] She gave him two dollars and he left again.[4] Sometime around 1:00 p.m. the same day, after Benard and the children had gone out, defendant returned to the apartment via a kitchen window to "change his clothing"; he reentered the apartment shortly after 1:30,[5] taking a knife from the kitchen. Shortly thereafter Kristen returned to the apartment.[6] Defendant hid in a bedroom until Kristen went out to walk the dog; he then attempted to leave but was surprised by Kristen who had returned.[7] She said she was going to call the police on defendant; before she had a chance, defendant grabbed her, dragged her into a bedroom, and stabbed her to death.[8] After he thought she was dead, he "'had sex with her.'"[9]

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1. State v. Smith, 766 A.2d 913, 915 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 916.
6. *Id.*
7. *Id.*
8. *Id.* at 917.
9. *Id.*

Smith was convicted in Superior Court of first degree murder, committed by means of torture and aggravated battery. His motion for a new trial was denied.[10] He was sentenced to life imprisonment without the possibility of parole, and also sentenced to a consecutive fifteen-year sentence as a habitual offender.[11]

On appeal, defendant argued that the trial justice erred by admitting statements he made to police; that because of mitigating factors, the sentence of life imprisonment without parole was not warranted; and that it was error to impose the habitual criminal sentence upon him.[12]

ANALYSIS AND HOLDING

The court first addressed defendant's argument that his constitutional right against self-incrimination was violated by the admission at trial of both his oral and written confessions to police.[13] The issue was raised for the first time on appeal, and no attempt had been made by defendant to suppress this evidence at trial.[14] The general rule is that the court will not consider issues not raised at trial.[15] However, under limited circumstances the court will review issues concerning basic constitutional rights.[16] Those circumstances include, *inter alia*, whether the issue is "'based upon a novel rule of law, of which counsel could not reasonably have known at the time of trial.'"[17] Here, the issue of whether or not a confession had been made voluntarily is regularly considered in other courts.[18] Thus, defendant's counsel should have preserved the issue below for appeal.[19] However, even if the issue had been properly presented below, it would have been "wholly without merit."[20] "The impeccable conduct of the Newport officers, [including proper reading and explanation of *Miranda* warnings] would have precluded any finding of inadmissibility."[21]

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10. *Id.* at 915.
11. *Id.*
12. *Id.* at 918.
13. *Id.* at 918-19.
14. *Id.* at 919.
15. *Id.* at 919 (quoting State v. Burke, 522 A.2d 725, 731 (R.I.1987)).
16. *Id.* (citing *Burke*, 522 A.2d at 731).
17. *Id.* (quoting *Burke*, 522 A.2d at 731).
18. *Id.* (citations omitted).
19. *Id.*
20. *Id.*
21. *Id.* at 920 (citing Colorado v. Connelly, 479 U.S. 157, 107 (1986)).

The court next addressed defendant's contention that the trial justice erred in finding that none of the mitigating factors defendant asserted outweighed the aggravating factors established by the evidence and that a life sentence without the possibility of parole was not warranted in this case.[22] The mitigating factors defendant asserted included an abusive father, absentee mother, mental illness, defendant's failure to take his anti-psychotic medication, and that the murder was not premeditated.[23] The court defined first-degree murder as "'murder . . . perpetrated from a premeditated design unlawfully and maliciously to effect death of any human being. . . . '"[24] The penalty for that crime is life imprisonment.[25] Additionally, "every person guilty of murder in the first degree committed in a manner involving torture or an aggravated battery'" shall be sentenced to life in prison without possibility of parole.[26] Furthermore, the trial judge has discretion to weigh aggravating and mitigating circumstances when determining whether to give a life sentence with or without possibility of parole.[27] Moreover, the Rhode Island Supreme Court may ratify or reduce the sentence imposed by the trial court[28] after exercising their "'independent judgment in respect to the aggravating circumstances . . . together with any matter in mitigation . . . including personal history and character.[29] The court began its analysis by quoting extensively from the record below: the trial justice imagined the murder from the point of view of Kristen Jorge, and the horror of her last few minutes; reviewed evidence that the defendant had made statements weeks in advance about exactly how he was going to kill Kristen Jorge; and a review of the defendant's self-indulgent and parasitic existence.[30] "[T]he murder of Kristen Jorge was one of premeditated and unmitigated violence and brutality."[31] The trial justice found defendant's act of sexual intercourse on his victim after she was dead "'disgustingly

22. *Id.*
23. *Id.*
24. *Id.* at 921 (quoting R.I. Gen. Laws § 11-23-1 (2000)).
25. *Id.* (citing R.I. Gen. Laws § 11-23-2 (2000)).
26. *Id.* (quoting R.I. Gen. Laws § 11-23-2 (2000)).
27. *Id.* (quoting R.I. Gen. Laws § 12-19.2-1 (2000)).
28. *Id.* (quoting R.I. Gen. Laws § 12-19.2-5 (1984)).
29. *Id.* (quoting State v. Travis, 568 A.2d 316, 325 (R.I.1990)).
30. *Id.* at 921-22.
31. *Id.* at 922.

[reprehensible]. . . an act worthy only of the predatory vulture who satisfies their [sic] needs by feeding on dead flesh.'"[32] The Rhode Island Supreme Court found the evidence "overwhelmingly supports the finding that the murder was committed in a manner involving torture and aggravated battery to the victim."[33] In addition, the court found evidence of premeditation: defendant "grabbed the large kitchen knife with which he would butcher Kristen not *when* he saw Kristen in the apartment, but *immediately upon entering the home*; and that he "had told at least two individuals, months prior to the murder, that he wanted to slice Kristen's throat."[34] The court held that "defendant's unfortunate childhood" could not override the aggravating factors in the case and it affirmed the lower court's imposition of life imprisonment without parole.[35]

Lastly, the court addressed defendant's contention that the imposition of the habitual criminal sentence was error because the predicate sentences had been imposed on the same day. The habitual criminals statute mandates that any person convicted of two or more felony offenses "'arising from separate and distinct incidents and *sentenced on two or more such occasions* to serve a term in prison'" shall be deemed a habitual criminal if he is convicted in Rhode Island of another felony.[36] Defendant had been previously convicted in Utah of two separate offenses, but the sentences were imposed together on the same date and he was ordered to serve those sentences concurrently.[37] The court found 12-19-21(a) to be ambiguous and held that the predicate sentences for the imposition of the habitual criminal penalty must "occur sequentially."[38] Thus, because the predicate sentences in defendant's case were imposed on the same day, they would not trigger 12-19-21(a).[39] However, defendant also had previous convictions in Rhode Island, but the state had failed at trial to properly authenticate the docket face

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 923.

36. *Id.* at 923-24 (quoting R.I. Gen. Laws § 12-19-21(a) (2000)) (emphasis in original).

37. *Id.* at 923.

38. *Id.* at 924.

39. *See id.*

sheets as required in 12-19-21(b).[40] The state argued on appeal that the trial justice should have taken the Rhode Island convictions into account.[41] The Rhode Island Supreme Court held that the trial justice was not in error as 12-19-21(b) required authenticated copies of former judgments, and that the imposition of the habitual offender sentence must be vacated.[42] However, the state was not precluded from again seeking a sentence under 12-19-21(a) and the matter was remanded back to the Superior Court.[43]

CONCLUSION

In *State v. Smith*, the Rhode Island Supreme Court held there was sufficient evidence that defendant's oral, written, and taped statements to police were voluntary, and that the record supported a sentence of life imprisonment without possibility of parole, but that the state failed to show that defendant had two prior convictions and sentences that would qualify him for sentencing as a habitual criminal.

Joseph M. Proietta

40. *Id.* at 925.
41. *Id.*
42. *Id.*
43. *Id.*

Criminal Law. *State v. Spencer,* 783 A.2d 413 (R.I. 2001). Standard for determining if waiver of counsel is knowing, intelligent and voluntary is a totality of the circumstances in light of the stage of the proceedings.

FACTS AND TRAVEL

On June 15, 1998 the owner of ABC Travel in Pawtucket, Rhode Island was robbed at gunpoint by a person subsequently identified as Lee Spencer.[1] During the robbery, the victim's screams alerted an occupant of a nearby shop who then attempted to help the victim.[2] Though the victim was unable to positively identify Spencer, a person who came to the victim's aid confirmed his identification from a photo array of six people.[3]

On December 11, 1998 a grand jury indicted Spencer with one count of first-degree robbery and two counts of felonious assault.[4] On May 12, 1999 defense counsel entered appearance on Spencer's behalf and the trial commenced on September 9, 1999.[5] At the trial, following the state's case in chief and during cross-examination of the victim, defense counsel informed the court that defendant Spencer wished to complete the rest of the victim's cross-examination himself and desired to represent himself for the rest of the trial.[6] A colloquy between the court and the defendant Spencer ensued.[7]

Spencer represented himself for the remainder of the trial with defense counsel remaining as standby counsel to assist and advise.[8] Following Spencer's conviction, defense counsel resumed representation of the defendant at a hearing on a motion for a new trial and at the sentencing.[9] Motion for new trial was denied and Spencer was sentenced to thirty years at the Adult Correctional Institutions for robbery, fifteen to serve.[10]

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1. State v. Spencer, 783 A.2d 413, 415 (R.I. 2001)
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 416.
9. *Id.*
10. *Id.*

Defendant appealed the conviction alleging that the trial justice had failed to properly inquire as to the waiver of counsel and failed to determine that his waiver was made knowingly, intelligently and voluntarily.[11] Additionally, defendant argued that the grand jury indictment should be dismissed for prosecutorial misconduct.[12]

ANALYSIS AND HOLDING

The Sixth Amendment to the Constitution of the United States permits a defendant to represent himself at trial, provided he has made a knowing and voluntary waiver of counsel.[13] "The defendant must be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."[14]

After briefly citing several accepted methods for determining when a waiver of counsel is knowing, voluntary and intelligent, the court held that its preferred method is to view the waiver in light of the totality of the circumstances with consideration given to which stage of the proceeding the waiver occurred.[15]

In finding that the trial judge correctly found Spencer's waiver knowing, intelligent and voluntary, the court cited Spencer's detailed pre-trial testimony reflecting his awareness of the gravity of his crime, his familiarity with the criminal justice system and his affirmative, assertive responses to questions of his capability to represent himself pro se.[16] Additionally, the court found it important that Spencer had the benefit of counsel before his trial, during a significant portion of his trial, and following his trial during the sentencing phase.[17] Lastly, noting the fact that defense counsel was directed to act as standby counsel following Spencer's waiver provided the defendant the benefit of using standby counsel to advise him on matters of law with which he was not familiar.[18]

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11. *Id.*
12. *Id.*
13. *Id.* (citing Faretta v. California, 422 U.S. 806, 819 (1975)).
14. *Id.* (citing *Faretta*, 422 U.S. at 835 (quoting Adams v. United States, 317 U.S. 269, 279 (1942)(internal citations omitted))).
15. *Id.* at 417.
16. *Id.*
17. *Id.*
18. *Id.*

The court was mildly critical of the trial justice for several reasons. First, the court felt the trial justice should have engaged in a more detailed colloquy with the defendant.[19] Secondly, the court noted that the trial judge had been under the mistaken belief that there was no choice but to let the defendant waive counsel at that particular stage of the proceeding.[20] However, these issues were not dispositive and did not affect the court's finding that under a totality of the circumstances analysis; defendant Spencer's mid-trial waiver was not defective.[21]

Turning to the defendant's argument that prosecutorial misconduct during the grand jury proceeding justified a dismissal of his indictment, the court held that dismissal of an indictment was a remedy reserved for only the most extreme circumstances.[22] The introduction of evidence to the grand jury that defendant Spencer failed a computerized voice stress analysis test was prejudicial and inappropriate, but not dispositive because other evidence introduced during the proceeding was sufficient to establish probable cause.[23] Ultimately, the conviction and the fact that inadmissible evidence was not introduced during trial warranted affirmation of the indictment.[24]

CONCLUSION

The Rhode Island Supreme Court affirmed the conviction of defendant who waived his right to counsel mid-trial holding that waiver was knowing, intelligent and voluntary based upon a totality of the circumstances analysis. Additionally, defendant's decision to waive counsel in the middle of his trial led credence to the court's finding that his pro se representation was chosen in full light of the possibility of negative consequences. Defendant's appeal was dismissed.

Jill A. Taft

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19. *Id.* at 417-18.
20. *Id.* at 418.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

Criminal Law. *State v. Verrecchia*, 766 A.2d 377 (R.I. 2001). The Rhode Island Supreme Court held that the defendant had established an objectively reasonable expectation of privacy in a leased garage unit by virtue of his status as sole leaseholder and requisite ability to exclude access to the garage area. The supreme court remanded the case to the superior court for a hearing on the merits of the defendant's motion to suppress the guns and other evidence removed from the garage.

FACTS AND TRAVEL

The Defendant, Albert Verrecchia (Verrecchia) was arrested on May 19, 1996, charged with two counts of receiving stolen goods.[1] Verrecchia was a member of a local crime syndicate known as the "Gold Nugget Group" (GNG), and his arrest was the product of a government sting operation.[2] Michael Rossi (Rossi), another GNG member who was allegedly involved in earlier criminal activity with Verrecchia, had been previously arrested and incarcerated for other offenses.[3] In exchange for better treatment, Rossi agreed to assist the police by arranging to have Verrecchia, whom Rossi described as the "custodian of GNG's arsenal," sell some of GNG's stockpiled weapons to an undercover police detective.[4]

Since Rossi was incarcerated, the sting operation devised by the police began with Rossi meeting Verrecchia while in prison and asking him to sell different pieces of the GNG arsenal to a fellow inmate who would soon be released, nicknamed "The Ghost."[5] The individual posing as "The Ghost" was an undercover police detective.[6] After Verrechia agreed to complete this transaction, the government moved into part two of their operation by having the undercover detective telephone Verrecchia and arrange to meet with him to buy GNG weapons.[7] After Verrecchia's meeting with "The Ghost," the police arrested Verrecchia for possessing two stolen guns.[8] Verrecchia was eventually charged with an additional sixty-seven crimes as a result of both Rossi's testimony and the

1. State v. Verrecchia, 766 A.2d 377, 380-81 (R.I. 2001).
2. *Id.*
3. *Id.* at 381.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

evidence seized as a result of the sting operation.[9] At least a portion of this evidence was contained in a rented garage, leased in Verrecchia's name, which the police searched after obtaining a warrant.[10]

After going through seven different defense attorneys,[11] Verrecchia's case finally began on January 12, 1999, and concluded on February 9, 1999, with a guilty verdict found on twenty-nine out of sixty-six counts submitted to the jury.[12] On appeal, Verrecchia's primary argument[13] was that the trial justice erred in denying his motion to suppress the guns and other evidence the police obtained in their search of Verrecchia's rented garage.[14] Specifically, Verrecchia challenged the trial justice's ruling that he had no legitimate expectation of privacy in the leased garage.[15] As a result of the trial justice's determination on this issue, the justice did not reach the merits of Verrecchia's motion to suppress.[16]

ANALYSIS AND HOLDING

In order for a defendant in a criminal proceeding to contest the seizure of evidence as unlawful, the defendant must have "enjoyed

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9. *Id.*

10. *Id.*

11. *Id.* Over the course of approximately thirty months that Verrecchia awaited trial he was represented by as many as seven different attorneys in succession one after another. For "sundry reasons" Verrecchia was unable to maintain a relationship with any of these different attorneys for more than a short period of time. *Id.*

12. *Id.* Although the original indictment included sixty-nine counts against Verrecchia, three counts were dismissed. *Id.* at 381-82, n. 2.

13. Verrecchia also asserted on appeal that the state deprived him of his constitutional right to a speedy trial, that the trial justice abused his discretion by failing to sever a large number of the different counts that Verrecchia faced, and that the trial justice erred in failing to instruct the jury on the affirmative defenses of entrapment and duress. *Id.* at 380-81. The Rhode Island Supreme Court rejected all three of these arguments. *See id.* at 384-86 (concluding that the delay Verrecchia experienced was of his own making through his decision to change counsel multiple times, that no cognizable prejudice to Verrecchia resulted, and holding that Verrecchia's right to a speedy trial was not violated by the state); *see also id.* at 386-87 (holding that the trial justice did not abuse his discretion in declining to hold more than fifty separate trials in this matter); *see also id.* at 387-91 (holding that Verrecchia did not meet the necessary prerequisite burden of proof to be entitled to a jury instruction on the affirmative defenses of either entrapment or duress).

14. *Id.* at 380-81.

15. *Id.*

16. *Id.*

a reasonable expectation of privacy in the premises or property that was the subject of the search."[17] In this proceeding, Verrecchia had the burden of proving that his alleged expectation of privacy was such that society would be prepared to recognize that expectation of privacy as objectively reasonable.[18] The Rhode Island Supreme Court identified several factors that it has historically considered in determining whether an asserted personal privacy expectation is objectively reasonable.[19] These factors each relate to the amount of control a person exerts over the area searched and the exclusivity of that control.

The supreme court agreed with the trial justice that Verrecchia was the legal tenant of the garage compartment in question, having rented it from its owner at a fee of $200 per month four years before the police searched the garage.[20] The evidence showed that Verrecchia had paid his rent each month in either cash or services, and that Verrecchia was in possession of the only known key to the garage.[21] The rented garage had two possible means of entry, a side door which could be opened with Verrecchia's key, and large front doors. The trial justice found that while Verrecchia established that he possessed the only key to the side door, the record was silent as to possible access into the garage space through the front doors.[22] As a result, the trial justice inferred that the owners of the garage were able to enter the garage through these front doors and, by virtue of this means of entry,

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17. *Id.* at 382 (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978); State v. Wright, 558 A.2d 946, 948 (R.I. 1989)).

18. *Id.* (citing California v. Greenwood, 486 U.S. 35, 39 (1988); State v. Briggs, 756 A.2d 731, 741 (R.I. 2000)).

19. In determining whether an asserted right of privacy is objectively reasonable, the Rhode Island Supreme Court has considered "whether the suspect possessed or owned the area searched or the property seized; his or her prior use of the area searched or the property seized; the person's ability to control or exclude others' use of the property; and the person's legitimate presence in the area searched." *Id.* at 382 (citing *Briggs*, 756 A.2d at 741; State v. Pena Lora, 746 A.2d 113, 118-19 (R.I. 2000); *Wright*, 558 A.2d at 949).

20. *Id.* at 382.

21. The owner of the garage testified that Verrecchia possessed the only key to the garage, and that the owner had not retained a set of keys when he rented the compartment. Further, the owner testified that since he had rented the space to Verrecchia he had not entered the garage at all, except on one occasion in Verrecchia's presence to examine water damage. *Id.* In addition, the supreme court noted that the property owner later testified that he did not possess keys to the large front doors of the garage, and that, in fact, no such keys existed. *Id.* at 383.

22. *Id.* at 382.

control access to the garage.[23] Through this inference, the trial justice determined that the garage owners retained the ability to facilitate or exclude access to the garage, and that Verrecchia did not truly "posse[ss] the ability to exclude others from entering through the front doors."[24] In light of this conclusion, the trial justice held that Verrecchia did not possess an objectively reasonable expectation of privacy with respect to the garage, and as a result could not contest the seizure of property contained within the structure.[25]

The supreme court disagreed with the trial justice's conclusion on this issue. The supreme court noted that as a commercial tenant in good standing, Verrecchia had a possessory interest in the garage that would enable him to exclude others from the garage during his tenancy, including the owners of the structure.[26] Further, the supreme court stated that if the property owners had attempted to enter Verrecchia's rented garage during his tenancy, Verrecchia could have either enjoined them from using the property or ousted them as trespassers.[27] The court noted that Verrecchia's legal ability to exclude trespassers applied not only to the property owners, but anyone else who might attempt to enter Verrecchia's property during his tenancy.[28]

As a result, the Rhode Island Supreme Court held that Verrecchia had established an objectively reasonable expectation of privacy in the leased garage.[29] This expectation of privacy was not undermined by the fact that Verrecchia admitted making four copies of his set of garage keys and distributing them to four different individuals.[30] Because Verrecchia retained control over the garage as a sole tenant, and did not share his tenancy with the other key holders, he could terminate their access to the garage at any time. The supreme court emphasized that "'an individual need not maintain absolute personal control (exclusive use) over an area to support his expectation of privacy'—as long as that individual retains

23. *Id.* at 382-83.
24. *Id.* at 383.
25. *Id.*
26. *Id.* (citing 42 Am. Jur. 2d *Landlord and Tenant*, § 485 at 402 (1985)).
27. *Id.*
28. *Id.*
29. *Id.* at 384.
30. *Id.*

some ability to control or exclude others from using the area."[31] The supreme court held that Verrecchia retained sufficient control over the garage to meet his burden of establishing an objectively reasonable expectation of privacy therein.[32]

CONCLUSION

In *State v. Verrecchia*, the Rhode Island Supreme Court held that the defendant had established an objectively reasonable expectation of privacy in a leased garage unit, thereby enabling the defendant's pre-trial motion to suppress evidence confiscated from this garage to be heard on the merits. The supreme court remanded the case to the superior court for a hearing on Verrecchia's motion to suppress the guns and other evidence removed from the garage.[33]

Lucy H. Holmes

31. *Id.* (quoting United States v. Horowitz, 806 F.2d 1222, 1226 (4th Cir. 1986)).
32. *Id.*
33. *Id.*