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2002 Survey of Rhode Island Law: Cases: Evidence

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Evidence. *Adams v. Uno Restaurants, Inc.*, 794 A.2d 489 (R.I. 2002). Expert medical testimony is not necessary to determine damages for emotional distress when events provide sufficient impact for the jury to conclude the plaintiff has incurred damages. Whether the firing of an employee is pretextual or not is a matter of fact for the jury.

FACTS AND TRAVEL

The plaintiff, Gerald K. Adams, had been employed by the defendant restaurant for several years.[1] On May 20, 1996, while working in the kitchen, plaintiff noticed foul-smelling backup from the floor drains.[2] After going home complaining of illness, the plaintiff called the health department to report the problem.[3] A Department of Health inspector verified the problem and closed the restaurant for the night.[4] Two days later, the plaintiff returned to the restaurant to discuss the incident, but the manager began a shouting match and accused the plaintiff of stealing a shirt from the restaurant.[5] During the shouting match, the plaintiff threatened the manager in front of a number of other employees.[6] Based on company policy, the manager fired the employee immediately for making the threat.[7] The manager called police.[8]

Upon learning of the charges, the plaintiff voluntarily turned himself in to face disorderly conduct charges that were filed and expunged.[9] The plaintiff filed suit under the Whistleblowers' Protection Act, alleging the termination was pretextual for the notification to the health department.[10] At trial, the jury found for the plaintiff and awarded him $7,500[11] even though he provided no expert medical testimony of his mental distress.[12] The trial judge upheld the jury verdict as to liability but set aside the monetary

1. Adams v. Uno Rests., Inc., 794 A.2d 489, 490 (R.I. 2002).
2. *Id.*
3. *Id.*
4. *Id.* at 491.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 492.

damages after a defendant motion for judgment notwithstanding the verdict.[13] Both parties appealed.[14]

BACKGROUND

The Rhode Island Whistleblowers' Protection Act, section 28-50-4(a) of the Rhode Island General Laws, provides "A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within three (3) years after the occurrence of the alleged violation of this chapter."[15]

ANALYSIS AND HOLDING

The general rule is that a plaintiff must offer expert medical evidence to show the relationship between the alleged harm and damage.[16] However, the Rhode Island Supreme Court noted this rule exists because many cases lack objective facts as to damage and the medical testimony is required to establish those facts.[17] In this case, the court concluded that a juror hearing the impact quantified by the pro se plaintiff could reasonably conclude the plaintiff suffered the damage alleged.[18] The court held that because the plaintiff was able to offer objective facts to support his claims of damage; including loss of military security clearance and his difficulties in finding another job, a trial juror could reasonably conclude that the plaintiff had suffered emotional harm.[19] The trial judge, in evaluating the defendant's motion to set aside the jury verdict, erred by not considering the evidence in the light most favorable to the non-moving party (plaintiff).[20] Therefore, the decision to set aside the monetary damages awarded was incorrect.[21] However, the trial judge was correct in upholding the jury verdict as to liability when a reasonable jury could have found the firing

13. *Id.* at 491.
14. *Id.*
15. R.I. GEN. LAWS § 28-50-4(a) (2002).
16. *Adams*, 794 A.2d at 492 (citing Swerdlick v. Koch, 721 A.2d 849, 862-63 (R.I. 1998)).
17. *Id.* at 493.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 494.

was pretextual because the allegations of stealing had come from the discussion about the report to the health department.[22]

CONCLUSION

The court will uphold a jury verdict when objective evidence shows an employer used pretextual reasons for firing an employee who reported an unsafe condition. The court's decision allows plaintiff to recover damages through objective evidence rather than complex medical testimony.

Larry D. White

22. *Id.* at 493.

Evidence. *Bleau v. Wall*, 808 A.2d 637 (R.I. 2002). For newly discovered evidence to justify post-conviction relief, the evidence must be material. Materiality is determined by considering whether, in the absence of the evidence, the defendant received a fair trial. A fair trial is defined as one resulting in a verdict worthy of confidence. A full evidentiary hearing must be held before a conviction may be vacated.

FACTS AND TRAVEL

Defendant Carlton J. Bleau and Mary Todd[1] played pool at a Central Falls bar until the early morning hours of January 14, 1988.[2] When the bar closed, Mary agreed to give Bleau a ride home.[3] After following his directions onto unfamiliar streets, Mary stopped the car.[4] Bleau then sexually assaulted her and slashed her car tires.[5] At trial in 1993, Mary testified in detail about the sexual assault that occurred in her car and positively identified Bleau as her assailant.[6] In addition, Agent Michael Malone, a senior examiner at the Hair and Fibers Unit of the FBI laboratory, testified that hair found on Mary's clothes and in her car "completely matched" hair from Bleau's head.[7] He also testified that fibers found on the knife allegedly used in the assault microscopically matched fiber samples taken from Mary's jeans.[8] Agent Malone testified that "his lab utilizes a 'microspectral monitor' so sensitive that it can identify a specific dye."[9]

Bleau was convicted of two counts of first-degree sexual assault, one count of second-degree sexual assault, and one count of malicious destruction of property.[10] Bleau was sentenced to two forty-five-year concurrent terms for the first-degree sexual assault charges, an additional ten years for the second-degree sexual as-

1. Mary Todd is an alias chosen to protect the privacy of the actual victim. Bleau v. Wall, 808 A.2d 637, 640 (R.I. 2002).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

sault charge, and a concurrent one-year term for malicious destruction of property.[11] His convictions were affirmed on appeal.[12]

In 1997, a United States Inspector General report suggested that some FBI laboratory practices were questionable.[13] As a result, forensic scientist Steve Robertson was hired to review Agent Malone's findings and testimony in Bleau's case.[14] Though unable to determine whether all of the FBI laboratory tests were properly conducted, Robertson did conclude that Agent Malone's testimony at trial differed dramatically from the FBI laboratory report.[15] Additionally, Robertson found that Agent Malone's testimony regarding the fibers from Mary's clothing was misleading and overstated.[16]

Upon learning of Robertson's report, Bleau filed an application for post-conviction relief.[17] The state requested an evidentiary hearing, but this request was denied.[18] At the post-conviction relief hearing, both parties presented oral arguments, and various parts of the reports from Robertson and the Inspector General regarding Agent Malone were admitted as exhibits, but no witnesses testified, no other evidence was admitted, and no findings of fact were made.[19] Based on these reports, the hearing justice stated that he "simply could not fathom a jury rendering a verdict of guilty" and set aside the verdicts and sentences imposed against Bleau.[20] Afterwards, the state tried to locate the hearing justice to request a stay of the order setting aside Bleau's convictions and sentences, but was unsuccessful.[21] The state then sought an emergency stay from the duty justice of the Rhode Island Supreme Court, which was granted.[22] The next morning the hearing justice denied the state's request for a stay of the order.[23] The hearing justice informed the state that the indictment would remain open

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 642.
20. *Id.* at 641.
21. *Id.*
22. *Id.*
23. *Id.*

and that Bleau would be released if not retried within six months.[24] The state then requested an expedited appeal, which was granted.[25]

BACKGROUND

The standard for analyzing an application for post-conviction relief based on newly discovered evidence is the same as the standard used to analyze whether a new trial should be awarded based on newly discovered evidence.[26] This standard consists of a two-pronged test.[27] The first prong is a four-part inquiry, which:

> requires that the evidence be (1) newly discovered since trial (2) not discoverable prior to trial with the exercise of due diligence (3) not merely cumulative or impeaching, but rather material to the issue upon which it is admissible and (4) of the type which would probably change the verdict at trial.[28]

The second prong requires the hearing justice to determine whether the newly discovered evidence is trustworthy enough to merit relief.[29]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court held that the hearing justice abused his discretion by failing to hold an evidentiary hearing at the post-conviction relief hearing.[30] The court reasoned that Bleau had received his constitutionally guaranteed trial by jury, which had come to a unanimous guilty verdict.[31] His conviction had been appealed and confirmed.[32] The court held that it "[would] not now allow a conviction to be vacated without first conducting an evidentiary hearing to establish that such a result is warranted."[33]

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24. *Id.*
25. *Id.*
26. *Id.* at 642 (citing Brennan v. Vose, 764 A.2d 168, 173 (R.I. 2001) (citing McMaugh v. State, 612 A.2d 725, 731 (R.I. 1992))).
27. *Id.*
28. *Id.* (quoting State v. Hazard, 797 A.2d 448, 463-64 (R.I. 2002) (quoting State v. L'Herueux, 787 A.2d 1202, 1207-08 (R.I. 2002))).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

The court then reviewed the hearing justice's determination that the newly discovered evidence of Agent Malone's inaccurate testimony was material and would have changed the verdict.[34] The court held that the evidence was immaterial, cumulative, and impeaching and thus did not justify vacating Bleau's convictions or sentences.[35]

The court relied on *Kyles v. Whitley* for the idea that,

> [the] touchstone of materiality is a "reasonable probability" of a different result . . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines the confidence in the outcome of the trial."[36]

In Bleau's case, Agent Malone's testimony only confirmed Bleau's presence in Mary's car, a fact not in issue.[37] The court concluded that "the problem with the hearing justice's conclusion about materiality is the misconception that an FBI agent's inaccurate testimony always is material."[38] In rejecting the trial justice's finding of materiality, the court held that the inquiry should have focused on whether a "nexus existed between Malone's conduct and the outcome of the trial . . . ."[39] Here, Agent Malone's testimony only made it clear that Bleau had been in Mary's car, a fact that had been testified to by other witnesses and was admitted by defense counsel.[40]

Furthermore, the court found that the evidence of Malone's inaccurate testimony served only to impeach Agent Malone's credibility and was cumulative as to Bleau's presence in the car.[41] The new evidence therefore failed the test for post-conviction relief based on newly discovered evidence.[42] The state's appeal of the

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34. *Id.*
35. *Id.* at 644.
36. *Id.* at 643 (quoting Powers v. State, 734 A.2d 508, 514 (R.I. 1999) (quoting Kyles v. Whitley, 514 U.S. 419 (1995))).
37. *Id.*
38. *Id.*
39. *Id.* at 644.
40. *Id.*
41. *Id.*
42. *Id.*

superior court's judgment was sustained and the court remanded the case with instructions to deny and dismiss Bleau's application for post-conviction relief.[43]

CONCLUSION

In order for an application for post-conviction relief to be granted on the basis of newly discovered evidence, that evidence must meet the same test as newly discovered evidence justifying a new trial. This standard requires the evidence be material, non-cumulative and non-impeaching. Where the newly discovered evidence is evidence of an FBI agent's inaccurate testimony, the materiality inquiry must focus on whether a nexus exists between the agent's conduct at or before trial and the outcome of the trial, creating the likelihood of a different outcome or undermining the confidence in the verdict. This determination requires a full evidentiary hearing before a conviction may be vacated on the basis of the newly discovered evidence.

Carolyn P. Medina

43. *Id.* at 645.

Evidence. *Malinowski v. United Parcel Service, Inc.*, 792 A.2d 50 (R.I. 2002). In order for a tachograph recording to be admissible, the party seeking to introduce the recording into evidence must prove the accuracy of the tachograph. Where authentication of evidence is impossible and the theory of the moving party is that there has been some destruction of evidence, which has made authentication impossible, the moving party must provide support for this theory and explicitly state which evidence they believe has been mishandled in order to be entitled to a jury instruction on the doctrine of spoliation. Additionally, the rule of the case doctrine does not prevent a trial justice in a second trial from considering the admissibility of evidence admitted in a previous trial.

FACTS AND TRAVEL

Elaina Malinowski's fourteen-year-old son was struck and killed by a tractor-trailer truck driven by Stephen F. Hogan, an employee of defendant, United Parcel Service, Inc. (UPS).[1] Approximately two years later, Malinowski filed a wrongful death action.[2] The trial resulted in a verdict for UPS.[3] On appeal, the Rhode Island Supreme Court held that the trial court had issued an erroneous jury instruction and granted Malinowski a new trial.[4]

In the second trial, Malinowski sought to introduce evidence regarding the recordings of the truck's tachograph.[5] A tachograph is a recording device, which can be installed in any vehicle, that tracks the vehicle's movement and speed.[6] In a legal context, they are commonly used to prove the speed at which a vehicle was traveling at the time of an accident.[7] The parties agreed that testimony about the patterns of acceleration and deceleration based on the tachograph recordings was admissible.[8] UPS, however, challenged the admissibility of the tachograph's record of the actual

1. Malinowski v. United Parcel Serv., Inc., 792 A.2d 50, 52 (R.I. 2002).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 53.
6. *Id.*
7. *Id.* (citing Karen Smith Cooney, Comment, *The Evidentiary Use of Tachograph Charts in Civil Litigation*, 92 DICK. L. REV. 483, 483 (1988)).
8. *Id.*

speed of the vehicle by filing a motion in limine.[9] UPS argued that prior to the accident, they had discovered that the tachograph gear apparatus was defective and, therefore, it could not have accurately recorded the vehicle's speed.[10] However, in the time since the accident, while the device was in the possession of UPS, the defective part had been lost or destroyed.[11] In light of the uncertainty regarding the accuracy of the tachograph's speed recording, the trial justice reserved her ruling on UPS's motion to suppress the speed recording and suggested that Malinowski might need to provide expert testimony to show that the missing part was vital to determining the accuracy of the tachograph.[12] Malinowski attempted to elicit this information from the UPS dispatch supervisor, but he was not qualified as an expert witness.[13] As a result, the court excluded evidence of the speed recording based on lack of adequate foundation and accompanying expert testimony regarding the accuracy of the recording.[14] The second trial also resulted in a verdict for the defendants.[15]

After the second trial, Malinowski submitted the tachograph evidence, originally received in 1992, to a second company for analysis after discovering that UPS had erroneously declared that the company that had originally analyzed the evidence was no longer in business.[16] The new report on the tachograph evidence suggested that the evidence was in such poor condition as to suggest that someone had tampered with it.[17] In presenting arguments in support of the motion for a new trial, Malinowski argued that this was newly discovered evidence that merited a third trial.[18] The trial justice denied this request for three reasons.[19] First, the evidence had not been presented in the proper form.[20] Second, had the plaintiff conducted an independent inquiry, instead of simply relying on the representations of opposing counsel, the evidence

9. *Id.*
10. *Id.*
11. *Id.* at 54.
12. *Id.* at 53.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 56.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

could have been discovered earlier.[21] Finally, the "newly discovered" evidence was not material enough to affect the outcome of the trial, since proving the speed of the truck was not essential to a determination of negligence.[22]

BACKGROUND

The doctrine of spoliation provides that "'the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party.'"[23]

The doctrine of the law of the case "states that ordinarily, after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later stage of the suit with the same question in the identical manner should refrain from disturbing the first ruling."[24] This doctrine is a practice that permits "the court to build to its final judgment by cumulative rulings, with reconsideration or review postponed until after judgment is entered."[25]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court held that in order for evidence of a tachograph's recording of speed to be admissible, a foundation establishing the accuracy of the tachograph recording must be laid.[26] The Rhode Island Supreme Court held that it was not an abuse of discretion for the trial justice to exclude the tachograph's speed recording because there was evidence suggesting that the tachograph recordings were inaccurate, and the plaintiff did not put forward a qualified expert to refute this evidence.[27]

In light of Malinowski's inability to authenticate the tachograph recording due to the missing part from the tachograph apparatus, Malinowski argued that the trial justice should have issued

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21. *Id.*
22. *Id.*
23. *Id.* at 54 (quoting State v. Barnes, 777 A.2d 140, 145 (R.I. 2001) (quoting Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 748 (R.I. 2000))).
24. Taveira v. Solomon, 528 A.2d 1105, 1107 (R.I. 1987) (quoting Salvadore v. Major Electric & Supply, Inc., 469 A.2d 353, 355-56 (R.I. 1983)).
25. *Id.* at 1108 (quoting 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404 (1) at 123-24 (2d ed. 1984)).
26. *Malinowski*, 792 A.2d at 54.
27. *Id.*

an instruction to the jury on the doctrine of spoliation.[28] The trial justice denied this request because Malinowski did not explicitly identify specific evidence as the subject of her argument, and did not offer any other evidence in support of her theory of intentional or negligent destruction of relevant evidence.[29] The trial court found that Malinowski had only implied that UPS had mishandled the tachograph with the result that the speed recording could not be authenticated.[30] This was not sufficient to trigger the trial justice's obligation to issue the requested instruction.[31] The supreme court stated that "a trial justice is not obligated to issue an instruction where the requesting party has failed to make clear its argument or present any evidence in support of its theory."[32] The trial justice's refusal to issue the instruction was therefore not an abuse of discretion.[33]

The tachograph speed recording had been admitted into evidence in the first trial.[34] Though not an issue raised by either party, the supreme court noted that the law of the case doctrine did not prevent the trial justice from considering the admissibility of the evidence in the second trial.[35] The court held that an evidentiary foundation established in a prior trial is not thereby automatically established in subsequent trials.[36]

Finally, in considering Malinowski's request for a new trial based on newly discovered evidence, the court upheld the lower court's reasoning and denial of a new trial.[37]

CONCLUSION

In *Malinowski v. United Parcel Service, Inc.*, the Rhode Island Supreme Court held that a foundation for accuracy of a tachograph recording must be laid prior to its admission into evidence. The court also held that in order to trigger the obligation of a trial justice to give a jury instruction on the doctrine of spoliation, the re-

28. *Id.*
29. *Id.*
30. *Id.* at 55.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 54.
35. *Id.* at 54 n.4.
36. *Id.*
37. *Id.* at 57.

questing party must clearly make its argument and explicitly demonstrate the specific evidence to which the doctrine applies. Additionally, the rule of the case doctrine does not prevent consideration of foundation and admissibility of evidence by a justice in a second trial, even when the evidence was admitted pursuant to a finding of adequate foundation in a previous trial. Finally, the discovery of new evidence only merits the grant of a new trial if that evidence is properly presented to the court, could not have been discovered earlier by reasonable diligence, and is material enough to affect the outcome of the trial.

Carolyn P. Medina

Evidence. *Morra v. Harrop*, 791 A.2d 472 (R.I. 2002). When an expert has testified with some degree of certainty, his testimony is admissible regardless of his terminology. Where the striking of evidence from the record will obviously prove fatal to a party's case, it is reversible error for the court to deny a reasonable continuance to the adversely affected party. A continuing objection may not be used to strike, from a trial, evidence that has previously been unconditionally admitted.

FACTS AND TRAVEL

After an attempt at suicide by overdose, plaintiff's father, William Morra, was admitted to Butler Hospital under the care of the defendant, Doctor Harrop on May 17, 1993.[1] Throughout the ten-day stay at the hospital, the patient continued to exhibit suicidal tendencies and was kept under close supervision by order of Doctor Harrop.[2] After a meeting with Mr. Morra's family members on May 27, 1993, discussing Mr. Morra's discharge scheduled for May 28, 1993 and a positive change in Mr. Morra's attitude, Doctor Harrop changed his orders by granting Mr. Morra grounds privileges at 2:30 p.m.[3] At 4 p.m. Mr. Morra was declared missing, and at 7 p.m. May 27, 1993, Mr. Morra's body was found lying face down in the Seekonk River.[4]

The plaintiff sued Doctor Harrop, alleging negligent care and treatment.[5] At trial, plaintiff presented the testimony of Doctor Sharp as an expert witness in the field of psychiatry.[6] Doctor Sharp testified that Mr. Morra had died by drowning and that Doctor Harrop was negligent in his care because he deviated from the standard of care that is commonly practiced by others in the field.[7] The defense contested the issue of causation relative to the way Mr. Morra died, and at a hearing outside the presence of the jury, Doctor Sharp testified that it was his opinion the patient had committed suicide.[8] Subsequently, the defendant "was allowed a con-

1. Morra v. Harrop, 791 A.2d 472, 472 (R.I. 2002).
2. *Id.*
3. *Id.* at 475.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

tinuing objection to any testimony relating to the manner of death."[9]

The trial court admitted Doctor Sharp's statement that the circumstances led him to conclude that the "only possibility was suicide by drowning" and the testimony became part of the plaintiff's case-in-chief.[10] However, two days later, and pursuant to the standing objection, the court granted the defendant's motion to strike all of Doctor Sharp's testimony based on his use of the term "possibility."[11] Furthermore, the trial court refused to allow the surprised plaintiff a continuance to achieve any clarification.[12] The lack of Doctor Sharp's testimony then resulted in a summary judgment in favor of the defendant.[13]

ANALYSIS AND HOLDING

In analyzing the admissibility of expert testimony, the Rhode Island Supreme Court explained that there are no "magic words"[14] required of an expert, nor are there words that are forbidden.[15] In medical negligence cases, an expert's testimony is admissible if the expert has testified with a reasonable amount of certainty.[16] Furthermore, the court held that Doctor Sharp's testimony was particularly adequate because he concluded that suicide was the "only possibility," not just one of other possibilities.[17] In fact, the court noted that the doctor expressly excluded any of the other possible explanations for Mr. Morra's death.[18] Therefore, the court held that striking the doctor's testimony in its entirety was an abuse of discretion.[19]

Additionally, the court found that the trial judge's denial of a continuance compounded the mistake and constituted reversible error.[20] The court explained that the plaintiff had reasonably re-

9. *Id.*
10. *Id.* at 476.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 477 (quoting Gallucci v. Humbyrd, 709 A.2d 1059, 1066 (R.I. 1998)).
15. *Id.* (citing Sweet v. Hemingway Transp., Inc., 333 A.2d 411, 415 (R.I. 1975)).
16. *Id.* (citing State v. Lima, 546 A.2d 770, 773 (R.I. 1988)).
17. *Id.*
18. *Id.*
19. *Id.* at 478.
20. *Id.*

lied on Doctor Sharp's testimony when it was unconditionally admitted into evidence and since striking it was fatal to the plaintiff's case-in-chief, a reasonable continuance was warranted.[21]

Finally, the court clarified the use of continuing objections at trial.[22] The court explained that the device is useful in facilitating more orderly trials and preserving objections for appeal, but it is misused when applied to strike evidence already admitted at trial.[23]

CONCLUSION

The Rhode Island Supreme Court held that expert testimony is admissible in a medical negligence case if it is based on the expert's reasonable certainty. Word choice is not important so long as the expert's certainty is clear to the fact finder. The court also held that it is reversible error to deny a reasonable continuance when striking of evidence from the record will obviously prove fatal to a party's case. Furthermore, a continuing objection may not be used to strike evidence that has already been unconditionally admitted.

Johnna Tierney

21. *Id.*
22. *Id.* at 478-79.
23. *Id.*

Evidence. *State v. Boillard*, 789 A.2d 881 (R.I. 2002). The Rhode Island Supreme Court held that the prosecutor's use of the word "repressed" and explanations of child witnesses' testimony during closing argument were proper. The court also held that the trial justice may allow leading questions to be asked of distraught child witnesses on direct examination.

FACTS AND TRAVEL

The defendant was convicted of five counts of first-degree child molestation against his former girlfriend's daughter, Jane; one count of first-degree and one count of second-degree child molestation against his former girlfriend's son, Henry; and one count of assault with a dangerous weapon against Henry.[1] The crimes took place between 1987 and 1992.[2] The defendant's motion for a new trial was denied.[3]

During the trial, Jane testified that when she was six or seven years old she saw the defendant's daughter, Ruth, performing fellatio on the defendant in the bathroom.[4] Jane testified that she talked to Ruth afterwards and asked Ruth if it happened all the time, and that Ruth said, "[O]nly when I see my Dad."[5] At trial, Ruth denied ever having sexual contact with her father and ever having had such a conversation with Jane.[6] During closing argument, the prosecutor explained the inconsistency between Ruth's and Jane's testimony by arguing that Jane saw the same thing that had repeatedly happened to her when she was four and five years old and that Ruth may be repressing her memory.[7] At this time, defense counsel objected and was overruled.[8] The prosecutor continued by arguing that Ruth may be lying because the defendant is her father.[9] The prosecutor argued that the jury had to put the witnesses' answers in the context of the questions they were being asked.[10] The prosecutor also explained that a skilled cross-

1. State v. Boillard, 789 A.2d 881, 882 (R.I. 2002).
2. *Id.* at 883.
3. *Id.*
4. *Id.* at 884.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

examiner will wear a child witness out to the point where the child witness will say anything to get off the stand.[11] Defense counsel objected again on the basis that the prosecutor was introducing facts not in evidence.[12] The trial justice overruled the objection.[13]

The defendant also made objections to three leading questions asked to Henry during the prosecutor's direct examination.[14] The trial justice overruled all the objections.[15] The prosecutor asked Henry to describe the alleged sexual molestation.[16] Henry was reluctant and embarrassed to answer the questions.[17] The prosecutor pressed Henry by asking successively leading questions to force him to answer.[18]

Analysis and Holding

On appeal, the defendant argued that the trial justice erred in overruling his objections to the prosecution's statements during closing argument.[19] The Rhode Island Supreme Court held that a prosecutor is given considerable latitude during closing arguments, so long as the statements pertain only to the evidence presented or reasonable inferences that could be made from that evidence.[20] The court noted that the prosecutor's explanations of Jane's, Ruth's and Henry's testimony were within the array of reasonable inferences that could be drawn from the evidence.[21] The statements were not totally extraneous to the issues in the case nor were they intended to inflame the passions of the jury.[22] The statements were the kind intended to rehabilitate the state's witnesses and suggest rationales the jury could use to reconcile the conflicting testimony.[23] The court also noted that although the word "repressed" has its roots in psychology, the word has made its way into ordinary usage so that the average juror would under-

11. *Id.* at 884-85.
12. *Id.* at 885.
13. *Id.*
14. *Id.* at 886.
15. *Id.*
16. *Id.* at 887 n.3.
17. *Id.* at 887.
18. *Id.* at 887 n.3.
19. *Id.* at 883.
20. *Id.* at 885.
21. *Id.* at 885-86.
22. *Id.*
23. *Id.* at 886.

stand the word.[24] The court drew a comparison to the word "depressed," in that the average person knows the meaning of the word even though it has a clinical definition as well.[25] Thus, the prosecutor's one-time use of the word did not require an evidentiary foundation.[26]

The court next turned to the issue of the prosecution's use of leading questions to elicit the testimony of one of its own witnesses.[27] The court stated that leading questions are those that suggest the desired answer and that the danger of allowing leading questions is that the witness will testify according to the answer the questioner wants rather than from the witness's actual memory.[28] Although leading questions are generally prohibited on direct examination, they are allowed to guide the testimony of a hostile or forgetful witness, or an emotionally distraught child witness that is reluctant to testify.[29] The court noted that Henry was clearly reluctant to testify about events that happened when he was less than ten-years-old, and that Henry was only sixteen-years-old at the time of his testimony.[30] The court also noted that the questions the prosecutor chose were not suggestive of the answer, but designed to guide Henry's testimony to the events in question.[31] The court concluded that the trial justice had not abused his discretion in allowing the leading questions.[32]

CONCLUSION

Explanations of child witnesses' testimony, during closing argument, of denials and inconsistent statements made by the child witnesses may be proper, so long as the inferences made can be supported by the evidence. Clinical words, such as "repressed," that have gained ordinary use do not have to be supported by an evidentiary foundation before being used in closing argument. The trial justice may allow leading questions to be asked of distraught child witnesses on direct examination, so long as the leading ques-

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 886-87.
28. *Id.* at 887.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

tions are designed to guide the witnesses' testimony and not to suggest the answer.

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Evidence. *State v. Torres*, 787 A.2d 1214 (R.I. 2002). In a trial for assault with a dangerous weapon in a dwelling with intent to commit murder, evidence of prior threats is both relevant and admissible to prove malice, premeditation, and motive. Out of court statements made during, or while still under, the stress of a startling event are admissible under the excited utterance exception to the hearsay rule.

FACTS AND TRAVEL

Although she survived, Amalie Santiago was shot in the head in her apartment in the early morning hours of May 11, 1993 with her three children present.[1] The children's father and defendant in this case, Julio Torres, was arrested seven years later in Ponce, Puerto Rico, by United States Marshals from the Federal Fugitive Task Force, for shooting Santiago.[2] The following facts leading up to the night of the shooting are relevant.

During Spring 1993, Amalie, the defendant's girlfriend at the time, decided that her relationship with the defendant should end.[3] Shortly thereafter, to the dismay of the defendant, Amalie began dating Valter Sousa.[4] One day in early May, Torres encountered Amalie and Valter in the parking lot of a Burger King restaurant, where an argument ensued.[5] Valter walked away to avoid confrontation, but Torres, nonetheless, moved toward Valter.[6] Fearing imminent attack by the defendant, Valter "got in his face" and pushed the defendant away.[7] Torres threatened that Valter would pay for what he had done.[8]

Two nights before the shooting, Amalie visited her cousin Brenda Carrasco, encountering an enraged Torres, who called out to Brenda, "tell your cousin [Amalie] to tell me the truth. Tell her if she don't tell me that I'm going to do something big and no one will ever know. No one's going to be able to get me."[9]

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1. State v. Torres, 787 A.2d 1214, 1216 (R.I. 2002).
2. *Id.* at 1219.
3. *Id.* at 1217.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

Finally, at around 3:30 a.m. on May 11, Amalie's parents, who lived downstairs, heard a loud noise, entered their daughter's apartment, and found her in a pool of blood with her five-year-old daughter standing over her crying.[10] When asked what had happened, the child responded, "Daddy did it."[11] A police officer who arrived shortly thereafter asked the children what had happened, and one child responded that she saw her father take a gun and "kill[ ] my mommy[.]"[12]

Before his trial for assault with a dangerous weapon in a dwelling with intent to commit murder, Torres filed several motions in limine to exclude evidence regarding the defendant's encounter with Amalie and Valter at the Burger King restaurant, the threatening remarks made to Brenda, and the statements the children made at the scene of the shooting.[13] The trial court denied the motions, but reserved redetermination of admissibility until the evidence was offered at trial.[14] At trial, the judge admitted the evidence.[15] Torres was convicted; he appealed.[16]

ANALYSIS AND HOLDING

First, a trial judge may reconsider a prior motion in limine without committing error per se.[17] The issue, therefore, is whether the evidence challenged by Torres was properly admissible at trial and, if not, whether its admission resulted in sufficient prejudice to warrant reversal of his conviction.[18] On appeal, however, the reviewing court will not second-guess a trial judge's decision as to the relevancy of evidence unless there is a finding that such a decision evinces both an abuse of discretion, and prejudice to the rights of the accused.[19]

As for the prior threats made by the defendant to both Brenda and Valter, the court held that rule 404(b) of the Rhode Island Rules of Evidence, excludes prior threats only when they are both

10. *Id.* at 1218.
11. *Id.*
12. *Id.* at 1219.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 1220.
18. *Id.*
19. *Id.* (citing State v. Gomes, 764 A.2d 125, 136 (R.I. 2002)).

irrelevant and prejudicial.[20] Absent such a showing, evidence of a prior threat is admissible because it is relevant to whether the defendant acted with malice or premeditation.[21] Furthermore, although not an essential element, motive is nonetheless probative, and, therefore, prior threats may be introduced to prove motive so long as they do not lead to collateral matters or jury speculation.[22] Given that, the court held that the trial judge did not abuse his discretion in either initially denying the motion in limine or later admitting the evidence at trial.[23]

In regard to the statements made by the children, the court responded to the defendant's contention that such statements were impermissible hearsay by referencing the well-established excited utterance exception to the hearsay rule.[24] The court explained that out of court statements made during the time of a startling event may be admitted as long as the declarant made the statement as an "instinctive outpouring" and while the declarant "was still laboring under the stress of [the] experience."[25] Since the decision of whether a particular statement falls within the exception is within the trial judge's discretion, a reviewing court will not overturn such a determination unless clearly wrong.[26] Here, the court found the trial judge's decision that the statements, "Daddy did it," and "he killed my mommy," fell within the excited utterance exception and was not clearly wrong, since the statements were made only three to five minutes after the shooting.[27] Therefore, the court affirmed their admissibility.[28]

CONCLUSION

Prior threats made by a defendant accused of attempted murder are admissible at trial if they are both relevant and non-prejudicial. Prior threats are relevant to show malice, premeditation,

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20. *Id.* at 1221 (quoting *Gomes*, 764 A.2d at 136).
21. *Id.* (citing State v. Bibee, 559 A.2d 618, 620-22 (R.I. 1989) (quoting State v. Pule, 453 A.2d 1095, 1098 (R.I. 1982))).
22. *Id.* (citing *Bibee*, 559 A.2d at 620-22 (quoting *Pule*, 453 A.2d at 1098)).
23. *Id.*
24. *Id.* at 1222.
25. *Id.* (quoting State v. Krukue, 726 A.2d 458, 462 (R.I. 1999)).
26. *Id.* (citing State v. Medina 767 A.2d 655, 658 (R.I. 2001) (quoting *Krukue*, 726 A.2d at 462)).
27. *Id.* at 1222-23.
28. *Id.* at 1223.

and motive, and are admitted if they neither lead to jury speculation, nor open up collateral matters. Finally, hearsay statements made while the declarant was laboring under the stress of a startling event are admissible under the excited utterance exception to the hearsay rule.

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