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## State v. Roscoe, 198 A.3d 1232 (R.I. 2019)

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**Constitutional Law.** *State v. Roscoe*, 198 A.3d 1232 (R.I. 2019). The Rhode Island Supreme Court vacated a conviction for murder and first degree sexual assault, holding that out-of-court testimonial statements of deceased declarants were introduced in violation of the defendant’s right to confront adverse witnesses, which is guaranteed by the Sixth Amendment to the United States Constitution and article I, section 10, of the Rhode Island Constitution.

#### FACTS AND TRAVEL

In August 1990, Germaine Mouchon (Mouchon), age eighty-five, was discovered dead and unclothed in her West Warwick apartment.<sup>1</sup> Detective Dennis Bousquet (Bousquet) of the West Warwick Police Department determined that there was no forced entry, and that the apartment was in “relative order,” except for an overturned end table and a woman’s slip lying on the floor.<sup>2</sup> Upon reporting to the scene, medical examiner Francis Garrity, M.D. (Garrity) pronounced Mouchon deceased and performed a “ cursory . . . examination of her body.”<sup>3</sup> Later, at the medical examiner’s facility, Garrity identified injuries to Mouchon’s head and face.<sup>4</sup> At that point, he swabbed Mouchon’s body for DNA.<sup>5</sup> The swabs were preserved in a sealed evidence collection kit.<sup>6</sup> During the autopsy, Garrity identified “indicators of a failing cardiovascular system,” leading him to declare the cause of death to be a “heart attack or a cardiac arrest following a traumatic event[,] namely multiple blunt force injuries about the face, left breast.”<sup>7</sup> Initially, Garrity was

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1. *State v. Roscoe*, 198 A.3d 1232, 1235 (R.I. 2019).
  2. *Id.*
  3. *Id.*
  4. *Id.*
  5. *See id.*
  6. *Id.*
  7. *Id.* (internal quotations omitted).

unable to determine the manner of death.<sup>8</sup> However, after learning that Mouchon's swabs had tested positive for sperm, and further learning from Bousquet that Mouchon was not involved in a romantic relationship, Garrity found homicide to be the manner of death.<sup>9</sup>

The case went cold for some twenty-five years, at which time Mouchon's swabs were retested.<sup>10</sup> The resulting DNA profile matched one David Roscoe, who was indicted on December 16, 2015 for murder and first degree sexual assault, in violation of Rhode Island General Laws sections 11-23-1 and 11-37-2, respectively.<sup>11</sup> He was convicted by a jury on both counts and, after the trial justice denied his motion for new trial, he received two concurrent life sentences.<sup>12</sup>

Subsequently, Roscoe appealed his conviction to the Rhode Island Supreme Court (the Court), arguing that the trial justice erred by:

- (1) failing to order a mistrial after the prosecutor made improper remarks to the jury during his closing argument;
- (2) allowing the medical examiner's manner of death to be presented to the jury; and
- (3) allowing statements of deceased declarants to be admitted into evidence, in violation of the Confrontation Clause of the United States and the Rhode Island Constitutions.<sup>13</sup>

#### ANALYSIS AND HOLDING

##### *A. Prosecutor's Remarks*

The Court began by examining the prosecutor's supposedly "inappropriate, pungent, vulgar, and inaccurate remarks during

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8. *Id.* at 1235–36.

9. *Id.* at 1236.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Roscoe also suggested that his convictions were violative of the prohibition against double jeopardy, but the Court never considered this avenue of attack. *Id.*

the course of his closing argument,”<sup>14</sup> reviewing for clear error on the part of the trial justice.<sup>15</sup>

Roscoe took issue with three comments in particular, which the Court considered in turn.<sup>16</sup> First, the prosecutor had mentioned the rules of hearsay: specifically, he had stated that there were things he “couldn’t say” to the jury.<sup>17</sup> Roscoe averred that this statement insinuated the existence of “incriminating or sinister facts,” thereby inducing “wild speculation by the jury.”<sup>18</sup> The Court dismissed this contention, noting that the statements were not explicit summons to conjecture.<sup>19</sup> Rather, the remarks were made clumsily during an attempt to elucidate sophisticated DNA science.<sup>20</sup> The prosecutor’s language may have been artless, the Court admitted, but it discerned no clear error in the trial justice’s ruling that the utterances fell short of sowing prejudice in the jurors’ minds.<sup>21</sup>

Second, Roscoe argued that the prosecutor had misled the jury by falsely attributing words to Garrity, the medical examiner.<sup>22</sup> On redirect, the prosecutor had posed a hypothetical to Garrity as to how an individual with heart trouble might react to a violent attack on her person.<sup>23</sup> Garrity had answered that such an individual’s life would be at risk; that she might “suffer[] a cardiac arrest as a result of the stress, the panic, and the pain.”<sup>24</sup> However, in his closing, the prosecutor neglected the hypothetical context of Garrity’s answer, asserting that the medical examiner had stated that “the pain, the panic, the anxiety of the sexual assault pushed *this woman* over the edge.”<sup>25</sup> However, the Court concluded that the trial justice was correct in determining that the prosecutor’s statement did not constitute “blatant misrepresentation,” but

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14. *Id.*

15. *Id.* at 1237 (quoting *State v. Dubois*, 36 A.3d 191, 197 (R.I. 2012)).

16. *See id.* at 1237–40.

17. *Id.* at 1236.

18. *Id.* (quoting *Commonwealth v. Bolden*, 323 A.2d 797, 799 (Pa. Super. 1974)).

19. *See id.* at 1238.

20. *Id.* at 1237–38.

21. *See id.* at 1238.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* (internal quotations omitted) (emphasis added).

rather “a fair inference” from Garrity’s testimony.<sup>26</sup> The Court also noted that the trial justice had provided adequate “cautionary instruction” concerning the non-evidentiary nature of the prosecutor’s words.<sup>27</sup>

Third, Roscoe objected to the prosecutor’s accusation that the defense had labeled Mouchon a “slut” and “whore.”<sup>28</sup> Roscoe maintained that his counsel had said no such thing, but had merely suggested that it was not beyond the realm of possibility that the victim and defendant enjoyed voluntary intercourse, despite their great age difference.<sup>29</sup> The Court condemned the prosecutor’s “coarse and vulgar verbiage” as “unacceptable,” and affirmed that his remarks were “untethered to the record.”<sup>30</sup> Yet the Court also acknowledged that it had previously held that such inappropriate remarks are not always grounds for vacating a conviction, finding that they sometimes amount to little more than “harmless error . . . in the face of ‘overwhelming evidence of the defendant’s guilt’ and adequate cautionary instructions.”<sup>31</sup> Ultimately, the Court refrained from deciding whether the comments were so egregious as to necessitate that Roscoe’s conviction be vacated, since it reached the same conclusion on different grounds.<sup>32</sup>

#### *B. Medical Examiner’s Testimony*

The Court next considered Roscoe’s argument that Garrity’s testimony concerning the manner of Mouchon’s death had been wrongly admitted into evidence. Specifically, Roscoe asserted that the testimony of a medical examiner should not rely on “anecdotal history and the results of the police investigation.”<sup>33</sup> In essence, Roscoe argued that Garrity’s pronouncement of homicide hinged on his knowledge that sperm had been found in Mouchon’s body, combined with witness statements that she had not been engaged in a romantic relationship.<sup>34</sup> In other words, Garrity, though

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26. *Id.*

27. *Id.* at 1239.

28. *See id.*

29. *Id.*

30. *Id.* at 1239–40.

31. *Id.* at 1240 (quoting *State v. Simpson*, 658 A.2d 522, 528 (R.I. 1995)).

32. *Id.*

33. *Id.*

34. *See id.* at 1241.

offered as a medical expert, testified based on facts extraneous to his technical and scientific expertise.<sup>35</sup>

However, the Court concluded for two reasons that the trial justice had not erred: first, it was understandable for the medical examiner to account for the decedent's personal history; second, Garrity had not relied "solely or primarily" on witness testimony.<sup>36</sup> Drawing on the jurisprudence of other states,<sup>37</sup> the Court declared that it is permissible for medical examiners to "supplement their medical findings with other information . . . so long as they do not rely solely or primarily on such information."<sup>38</sup>

### *C. Violations of the Confrontation Clause*

Finally, the Court took up Roscoe's claim that his right to confront adverse witnesses had been violated by Bousquet's testimony that he had asked Mouchon's friends and family about her romantic status, which testimony was also referenced by the prosecutor in closing.<sup>39</sup> The right to confront adverse witnesses is enshrined in the Sixth Amendment to the United States Constitution and article I, section 10, of the Rhode Island Constitution.<sup>40</sup> Because of the constitutional character of this claim, the Court reviewed the trial justice's ruling de novo.<sup>41</sup> Additionally, the Court applied harmless-error analysis.<sup>42</sup>

The Court noted that sexual intercourse had very likely occurred between Roscoe and Mouchon, considering that the

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35. *See id.* at 1240–41.

36. *Id.* at 1241.

37. In particular, the Court leaned on *South Carolina v. Commander*, 721 S.E.2d 413 (S.C. 2011).

38. *Roscoe*, 198 A.3d at 1243. The Court thus distinguished *Roscoe* from *State v. Castore*, 435 A.2d 321 (R.I. 1981), where a physician made a determination of child abuse based *solely* on anecdotal history as related by the patient-complainant. *See id.* at 1241–42.

39. *Id.* at 1244–45. The witnesses had died in the intervening years. *Id.* at 1245. As for Bousquet, he was retired when the trial took place. *Id.* at 1244, n.8.

40. *Id.* at 1244.

41. *Id.* (quoting *State v. Moten*, 64 A.3d 1232, 1238 (R.I. 2013)).

42. *Id.* at 1245 (citing *State v. Albanese*, 970 A.2d 1215, 1222 (R.I. 2009)). In essence, the Court asked: even if "the damaging potential of . . . cross-examination were fully realized," was the error still "harmless beyond a reasonable doubt?" *Id.* (quoting *Albanese*, 970 A.2d at 1222).

former's sperm was recovered from the latter's person.<sup>43</sup> The major question was whether this intercourse had been consensual.<sup>44</sup> On direct, Bousquet testified that he had asked three individuals close to Mouchon about her relationship status, although the detective did not relay these individuals' responses.<sup>45</sup> In his closing argument, the prosecutor referenced Bousquet's testimony, adding: "Don't you think [the police] would have followed up?"<sup>46</sup>

The Court concluded that the statements of the three unavailable witnesses offered by way of Bousquet were "testimonial," that is, they were meant to "establish or prove past events potentially relevant to later criminal prosecution."<sup>47</sup> Although Bousquet did not expressly convey the words of the three witnesses, "the jury was left with the unavoidable implication that each of these individuals had told the police they did not believe Mrs. Mouchon was in a relationship."<sup>48</sup> This impression was "reinforced" in the prosecutor's closing argument.<sup>49</sup> The Confrontation Clause pertains where, as here, the jury can surmise the "contents of untested out-of-court testimonial statements."<sup>50</sup>

The State argued in response that, even if the jury gleaned the contents of the unavailable witnesses's statements from Bousquet's testimony, Roscoe was not "directly implicate[d]" thereby.<sup>51</sup> After all, even if the jury gathered that Mouchon was not in a relationship with Roscoe, there was no need to conclude on that basis that Roscoe sexually assaulted Mouchon.<sup>52</sup> The Court was not convinced, noting that the statements of the unavailable witnesses were offered to prove Roscoe's guilt.<sup>53</sup> Therefore, the Court found that the trial justice erred, insofar as he effectively admitted, via

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1246 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)) (internal quotations omitted).

48. *Id.*

49. *Id.*

50. *Id.* (citing *United States v. Meises*, 645 F.3d 5, 21 (1st Cir. 2011); *United States v. Kizee*, 877 F.3d 650, 657 (5th Cir. 1972)).

51. *Id.* at 1247.

52. *Id.*

53. *Id.*

Bousquet's testimony, the testimony of the three unavailable witnesses, whom the defendant was unable to confront.<sup>54</sup>

Lastly, the Court determined that the trial justice's error was not harmless beyond a reasonable doubt.<sup>55</sup> Given the State's burden to prove the nonconsensual nature of the sexual contact between Mouchon and Roscoe—and given the absence of defensive hand wounds, vaginal injuries, and signs of forced entry—much hinged on whether a romantic relationship existed between victim and defendant.<sup>56</sup> Since evidence of that relationship turned on the testimonial statements of the unavailable witnesses, the Court could not conclude that, had the witnesses been cross-examined, no reasonable jury would have acquitted.<sup>57</sup>

#### *D. Holding and Concurrences*

The Court held that the “introduction of out-of-court statements of deceased declarants” violated Roscoe's right to confront adverse witnesses under the Sixth Amendment to the United States Constitution and article I, section 10, of the Rhode Island Constitution.<sup>58</sup> Thus, the Court vacated his conviction and ordered a new trial.<sup>59</sup>

Chief Justice Suttell concurred, adding that the trial justice abused his discretion by failing to grant a mistrial because of the prosecutor's accusation that the defense had called Mouchon a “slut” and “whore.”<sup>60</sup> Such remarks were not only “inflammatory,” but also “false.”<sup>61</sup> Justice Robinson also concurred, reckoning that reversal could be granted based on the “very inappropriate language and baseless animadversions in the prosecutor's closing argument.”<sup>62</sup>

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54. *Id.*

55. *Id.*

56. *See id.*

57. *See id.* (quoting *State v. Albanese*, 970 A.2d 1215, 1222 (R.I. 2009)).

58. *Id.* at 1248.

59. *Id.*

60. *Id.* (Suttell, J., concurring).

61. *Id.*

62. *Id.* (Robinson, J., concurring).

## COMMENTARY

The Court's opinion is persuasive on all points save the prosecutor's hearsay remarks. The Court acknowledged that hearsay references are egregious because they suggest ominous and incriminatory facts, thereby tempting jurors' imaginations to run amok.<sup>63</sup> However, in the instant case, the Court excused such insinuations, finding their danger mitigated by their context.<sup>64</sup> Yet poison is poison whether drunk from chalice or mug. The prosecutor intimated hidden evidence; he thereby invited conjecture. Although "the ruling of the trial justice . . . [should] not be disturbed on appeal unless clearly wrong,"<sup>65</sup> the trial justice here admitted that the "[c]ourt's ears went up' at the mention of hearsay."<sup>66</sup> Arguably, this reflex indicated recognition of a serious transgression by the prosecutor. Given the prosecutor's other blameworthy behavior, the Court could reasonably have interpreted his hearsay allusions as calculated encouragements to the jury to traffic in fantasy rather than fact. The Court's ruling on this matter may ultimately be correct. However, at very least, its analysis evinces a surprising insensitivity to the peril to justice occasioned by the prosecutor's remarks. It is axiomatic that a defendant in a criminal case should have fair opportunity to confront evidence offered against him. Allusions to unseen, unspecified evidence make mockery of due process by raising the specter of damning facts that the defendant cannot firmly grasp and squarely challenge.

## CONCLUSION

The Rhode Island Supreme Court held that the prosecutor's use of out-of-court testimonial statements of deceased declarants violated the defendant's right to confront adverse witnesses, as guaranteed by the Sixth Amendment to the United States Constitution and article I, section 10, of the Rhode Island Constitution. The Court therefore vacated the defendant's

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63. *See id.* at 1237 (majority opinion).

64. *Id.* at 1238.

65. *Id.* (citing *State v. Dubois*, 36 A.3d 191, 197 (R.I. 2012)).

66. *Id.*

conviction for murder and first degree sexual assault and ordered a new trial.

Philip Primeau