THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of General Sessions

Honorable Judge Brooks P. Goldsmith

Appellate Case No. 2012-209191
Case No. 2008-GS-484 and 2008-GS-29-206

The State, **Respondent,**

v.

Joseph Bradley Loftin, **Appellant.**

FINAL BRIEF OF APPELLANT

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2. The Trial Court erred in not allowing the Petitioner to inquire into Complainant's prior sexual activity.

STATEMENT OF THE CASE

The Petitioner, Joseph Loftin, was indicted in Lancaster County on October 13, 2011, for one (1) count of Criminal Sexual Conduct (CSC) with a Minor in the 2nd Degree, indictment number 2008-GS-29-494. [CSC Indictment]. A jury tried Petitioner on October 18-20, 2011, before the Honorable Brooks P. Goldsmith. After the jury was unable to announce a unanimous verdict, the trial judge granted Petitioner's motion for a mistrial. Petitioner was then indicted in Lancaster County on February 9, 2012, for one (1) additional count of Lewd Act on a Minor Child (Lewd Act), indictment number 2008-GS-29-206, arising from the same incident. [Lewd Act Indictment]. Petitioner was again tried by a jury February 14-16 and 22, 2012, before the Honorable Brooks P. Goldsmith and found guilty on both counts. Petitioner properly served a Notice of Appeal on February 28, 2012.

FACTS

The Petitioner began dating the Complainant's mother, Virginia Threatt, in or around 2002. (R. p. 130, line 20). Between 2005 and December 2007, Petitioner and Threatt lived together at 1953 Brady Road, Lancaster, South Carolina (the Brady House). (R. p. 137, line 5; R. p. 153, lines. 10-15). Three children also lived in the household: one child belonging to both Petitioner and Threatt and two children belonging only to Threatt. (R. p. 129, line 24- p. 130, line 8). While two of the children were not biologically related to the Petitioner, the Petitioner treated all three of the children as his own. (R. p. 135, lines. 20-25). Indeed, the Complainant viewed Petitioner as a father figure. (R. p. 72, line 13).

In December 2007, Petitioner and Threatt ended their relationship and Petitioner moved out of the Brady House. (R. p. 137, lines 5-7-). On January 4, 2008, the Complainant, Threatt's twelve (12) year old daughter, made a disclosure to her school principal in which she alleged that Petitioner had been sexually abusing her between August 2007, and December 2007. (R. p. 92, lines 3-7-). The Complainant alleged that the first time the Petitioner sexually assaulted her was during a hunting trip in August 2007, in Chester County, South Carolina. (R. p. 77, lines. 6-7-). The Complainant testified, under objection, that herself, the Petitioner, Threatt, and Threatt's other child were hunting in deer stands. (R. p. 78, lines. 3-16). Threatt and the other child were in one deer stand while the Complainant and Petitioner were in another stand, some distance away. Id. The Complainant stated that the Petitioner then had vaginal intercourse with her in the deer stand, with a condom. (Id., lines. 19-24).

The Complainant testified that after the incident in Chester County, the Complainant and Petitioner began a romantic relationship. (R. p. 86, lines 14-19). The Complainant alleged that she and Petitioner had vaginal intercourse in the Brady House every day until December 2007,

when the Petitioner moved out of the household. (R. p. 81, lines 8-12). The Complainant testified that the Petitioner had vaginal intercourse daily with the Complainant in every room in the house, but mostly at night in a pull out couch in the living room. (R. p. 80, lines. 2-3).

Shortly after the Complainant made the allegation in January 2008, she became pregnant and eventually gave birth to a child who was fathered by the Complainant's underage boyfriend, not the Petitioner. (R. p. 57, lines 4-18). Moreover, evidence was introduced during the trial that unidentified male semen was located inside the Brady Home during the execution of a search warrant on January 10, 2008. (R. p. 54, lines. 4-5; R. p. 172, line 22; R. p. 173, line 2; R. p. 260, lines. 2-3). The Petitioner has testified at both trials and denied any inappropriate contact with the Complainant. Petitioner was not charged with the alleged incident in Chester County.

ARGUMENT

I. The Trial Court erred in ruling that the alleged Chester County incident possessed a sufficiently close amount of similarity to the remaining alleged incidents at the Brady House to constitute common scheme.

While evidentiary rulings by the trial judge are generally given deference, a ruling may be reversed if there was an abuse of discretion. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

Over objection, the trial court admitted testimony regarding the alleged incident of sexual abuse in Chester County. (R. p. 77, lines. 8-18). The trial judge ruled that although the Petitioner had not been charged with the incident in that county, the testimony was admissible as a common scheme under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404, SCRE. Id.

Evidence of other bad acts is not admissible to prove the Defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; *see also* Lyle, 125 S.C. 406, 118 S.E. 803; State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). A showing of a common scheme through bad acts is generally allowed and viewed as relevant because proof of one act is strong proof of the other. Wallace at 433, 118 S.E.2d. at 277. However, "a close degree of similarity or connection between the prior bad act and the crime for which the Defendant is on trial is necessary." State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999) (*citing* State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998).

The Supreme Court of South Carolina has pointed out specific factors to consider when deciding whether an act of child sexual abuse is sufficiently similar to another to constitute a common scheme. Wallace at 433-34, S.E.2d at 278. These factors include: (1) the age of the complainants when the abuse occurred; (2) the relationship between the complainants and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. Id.

This Court had the opportunity to apply these factors in a case that involved allegations of multiple incidences of sexual conduct by one complainant and one Defendant. State v. Taylor, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2011). In that case, the Defendant was accused of abusing a child on two different occasions. Id. at 55-56, S.E.2d at 598. The incidents were nine (9) months apart and the Defendant was the complainant's pastor. Id. at 60, S.E.2d at 601. The incidents occurred at different locations but both were during Church outings. Id. Moreover, both incidents involved nearly identical threats directed at the child. Finally, the type of sexual battery was the same. This Court held that these similarities were sufficient to establish a common scheme. Id. at 55-56, S.E.2d at 598.

The facts presented in this case are meaningfully distinguishable from those in Taylor and do not establish a common scheme. The only similarity between the Chester County incident and the incidents that occurred at the Brady House is that the Complainant was the same age during both incidents. However, consideration of the other factors set fourth in Taylor establishes that there were strong dissimilarities between the first incident in Chester County and the rest of the incidents of alleged abuse.

The relationship between the Petitioner and Complainant is alleged to have changed between the time of the Chester County incident and the incidents at the Brady House. The

Complainant testified that at the time of the Chester County incident, she saw the Petitioner as a father figure. However, according to the Complainant, during the time the rest of the incidents occurred, a romantic relationship between the Complainant and the Petitioner had begun.

Furthermore, the locations of the events were dissimilar. The Chester County incident occurred in a different county, outdoors, and in an area designated for hunting in a tree stand. The rest of the incidents occurred inside the rooms of the Brady House.[1] Moreover, this case is .dissimilar to Taylor because the circumstances involving the locations were different. One happened during a hunting trip while the Brady House incidents allegedly happened inside the Petitioner and Complainant's home on a daily basis. The incidents at the Brady House were not dependent on a trip or event such as hunting.

Moreover, although the Complainant did not testify she was ever threatened, the nature of the alleged coercion differed in these events. The Complainant testified that the Chester County incident happened without any specific coercion or threats. However, she testified during the Brady House incidents that Petitioner made promises to run away with the Complainant to pursue their romantic relationship. (R. p. 85, lines. 22-24).

Finally, the nature of the sexual battery differed between the Chester County incident and the remaining incidents. While both involved vaginal intercourse with a condom, the Brady House incidents also allegedly involved oral sex, use of sexual devices, and unprotected sex. (R. p. 84, lines 12 – R. 85, line 10). This changed the nature of the alleged sexual activities. Merely having vaginal intercourse is itself alone insufficient to establish a common scheme. Accordingly, because the dissimilarities between the Chester County incident and the rest of the

[1] While the Complainant referenced having sexual intercourse with Petitioner in Threatt's car, the location of the event was not elaborated on. R. p. 80, lines 2-3).

incidents at the Brady House are far outweighed by any similarities, a common scheme had not been established.

Because the event in Chester County was not similar to the remaining events at the Brady House, the trial judge erred in allowing testimony regarding Chester County.

II. The Trial Court erred in not allowing Petitioner to inquire about the Complainant's prior sexual activity after the State introduced a pregnancy test and medical testimony into evidence.

Complainants of sexual abuse are protected from inquiries into their previous sexual conduct by S.C. Code Ann. § 16-3-659.1 (herewithin Rape Shield Statute):

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.
>
> (2) If the defendant proposes to offer evidence described in subsection (1), the defendant, prior to presenting his defense shall file a written motion and offer of proof. The court shall order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, the judge may order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1).

S.C. Code Ann. § 16-3-659.1 (Supp. 1994).

Petitioner filed a pretrial motion, as required by the Rape Shield Statute, requesting permission to question the Complainant about specific instances of prior sexual conduct. [Motion to Allow Evidence]. The sexual conduct in question included instances of the Complainant leaving the Brady House at night and without permission to meet with an underage boyfriend. (Id.; R. p. 54, lines 1-4). The boyfriend is the father of the Complainant's child with which she became pregnant shortly after making the allegations against the Petitioner. [Motion to Allow Evidence]; (R. p. 57, lines 4-5). Moreover, unidentified male semen was discovered at the Brady House at the time of the disclosure indicating that other sexual activity had occurred in the household. (R. p. 54, line 5; R. p. 260, lines. 1-3). Petitioner requested to inquire about any sexual activity the Complainant may have been engaged in before the January 2008 disclosure. [Motion to Allow Evidence]. Petitioner's basis for the inquiry was not to attack the Complainant's character but for the purposes of impeachment, Petitioner's right to a fair trial, and the Petitioner's right to confront witnesses. (Id.; R. p. 54, lines. 18-21; R. p. 57, lines. 10-17).

The judge denied the motion as to the CSC with a Minor indictment stating that it was irrelevant evidence and also did not fall within any exception in the Rape Shield Statute. (R. p. 58, lines. 1-4). He also stated that although the Rape Shield Statute did not apply to the Lewd Act, he would not allow inquiry into the Complainant's sexual activities as to that indictment as it was irrelevant. (R. p. 59, lines. 18-24). However, the State relied on two material pieces of evidence during the trial where inquiry into the Complainant's previous sexual conduct would have been relevant and not barred by the Rape Shield Statute.

The first is a pregnancy test kit that the Petitioner allegedly bought for the Complainant in November of 2007. The Complainant testified that the Petitioner bought her a pregnancy test

kit from a local store because of Petitioner's fear that he may have impregnated the Complainant. (R. p. 88, lines. 13-18). The Complainant stated that after the pregnancy test gave a negative result, she was instructed by the Petitioner to throw it in the woods behind the Brady House. (R. p. 88, line 19 - R. p. 89, line 24). During the trial, the State introduced into evidence the pregnancy test found in the woods and receipts from the local store where it was bought. (R. p. 95, lines. 12-16; R. p. 206, lines. 19-22).

The second piece of material evidence introduced by the State was the expert testimony of Shaunese Singleton, M.D. Dr. Singleton testified that after the Complainant made the disclosure about the sexual abuse, Dr. Singleton gave the Complainant a medical exam on January 9, 2008. (R. p. 281, line 9). Dr. Singleton testified that during the exam, she found a deep cleft and slightly irregular hymen. (R. p. 282, line 5 – R. p. 283, line 3). Moreover, Dr. Singleton testified that the deep cleft found was large and indicative of a sexual assault. (R. p. 283, lines 6-22). Dr. Singleton indicated that the vaginal penetration required to cause this injury in a child would not be consistent with masturbation or the insertion of a tampon. (R. p. 283, line. 22 – R. p. 284, line 2). Moreover, on cross-examination, Dr. Singleton indicated that other things besides vaginal penetration could cause the injury but "typically those type of injuries are found in those people that are in motor type vehicle accidents or velocity high volume type incidents." (R. p. 287, lines. 2-5).

a. Petitioner should have been allowed to inquire into the Complainant's sexual activities under the Alternative Explanation Theory.

While the Rape Shield Statute lists certain exceptions allowing inquiry into a Complainant's sexual activities, South Carolina's appellate courts have carved out exceptions to the statute that are not included in the statute's text. *See* State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989) (Evidence offered for a purpose other than to attack the complainant's

morality); State v. Lang, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991) (Impeachment); State v. Grovenstein, 340 S.C. 210, 530 S.E.2d 406 (2000) (Alternative source of a child complainant's sexual knowledge).

The South Carolina Supreme Court has considered whether evidence showing that the complainant engaged in sexual conduct with another man is admissible. Finley at 198, S.E.2d at 88-89. In that case, the Defendant contended "that he did not physically assault the complainant; that they argued over her sexual activity with the neighbor, and that the complainant falsely accused him of attempted criminal sexual conduct out of anger and fear that he would publicly disclose information of her sexual activity." Id. at 198, S.E. 2d at 89. The Court held that the trial court erred in excluding the evidence. Id. at 200, S.E.2d at 90. The Court stated that:

> The unique facts of this controversy, coupled with the appellant's right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness. Since the proffered evidence is essential to a full and fair determination of appellant's guilt and was offered for purposes other than to attack the complainant's character by revelation of her sexual activity with a third party, we conclude that such evidence does not come within the purview of the Rape Shield Statute.

Id.

Secondly, this Court stated in Lang that evidence relating to a complainant's sexual orientation was admissible for the purposes of impeachment. Lang, at 300, S.E.2d at 677. This court went on to state that Finley stood for the proposition that "the Rape Shield Statute did not bar evidence of a victim's sexual conduct if the evidence was offered for a purpose other than to attack the victim's morality." Lang at 301, S.E.2d at 678.

Finally, this Court carved out a third exception to the Rape Shield Statute for the purposes of showing an alternative source of a child complainant's sexual knowledge.

Grovenstein at 219, S.E.2d at 411. This Court agreed with the majority of other jurisdictions that inquiries into a complainant's sexual experiences are admissible if the purpose is to give an alternative source for a complainant's sexual knowledge other than the alleged acts that the Defendant is on trial for. Id. This Court stated that "in light of the Finley and Lang decisions, we hold that evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct." Id. Specifically, the evidence is "relevant to rebut the inference that a child victim could not describe the sexual acts unless the defendant had committed the alleged acts."

Accordingly, the appellate courts in South Carolina have created exceptions to the Rape Shield Statute outside of what the text of the statute permits. These exceptions are required to allow the Defendant, among other things, to have a fair trial, to confront witnesses, and to present a full defense. Because this case presents similar unique facts to the previously mentioned South Carolina cases, an exception here is warranted.

i. Alternative Explanation Theory as to Dr. Singleton's Testimony

Inquiry into the Complainant's prior sexual activities should have been permitted to rebut the implication created by Dr. Singleton's testimony. Dr. Singleton's testimony amounted to an expert opinion that the Complainant had been vaginally penetrated during a sexual act. Dr. Singleton indicated that she could not verify that a penis had penetrated the Complainant, but that, ordinarily, the only other cause would have been high velocity trauma. Indeed, during closing arguments, the Solicitor stated that other than penetration by a penis, "[t]he only thing [Dr. Singleton] could really compare [the injury] to was the type of injury a person might receive if they're in a violent car accident, some type of high impact situation, that's the only thing she compared that type of damage to a hymen to if I remember her testimony correctly." (R. p. 378,

lines. 17-22). Accordingly, the inference made to the jury is that someone had vaginally penetrated the Complainant. Moreover, like in Grovenstein, because of the young age of the Complainant, the jury was left to infer that she was not engaging in sexual conduct with a person other than the Petitioner. Accordingly, the jury had to assume that Petitioner would have been the only person that could have committed the abuse.

Petitioner should have been permitted to inquire into whether the Complainant was indeed sexually active with another person prior to the giving of the medical exam by Dr. Singleton. If it were shown that the Complainant was sexually active with another person, there would have been an alternative explanation, other than the allegations against the Petitioner, which would explain the results of the exam. This type of inquiry was essential to providing the Petitioner his right to a fair trial, a full defense, and to confront the witnesses against him.

Other jurisdictions have recognized similar exceptions to their Rape Shield Statutes. North Carolina recognized this exception in a case closely resembling the facts here. State v. Wright, 98 N.C.App. 658 (Ct. App. 1990). In that case, the eleven (11) year old complainant made an allegation of sexual abuse and was evaluated by a physician. Id. at 659. The "[p]hysician testified that during a pelvic examination of prosecutrix, she again found chronic internal and external irritation of prosecutrix's vagina and decreased muscle tone for a child of prosecutrix's age." Id. The "[p]hysician's testimony was that repeated acts of intercourse, penetration or masturbation could create the degree of irritation that prosecutrix suffered." Id. at 662. The trial court excluded testimony that the Grandmother "observed prosecutrix masturbate with a washcloth and with her fingers on several occasions." Id. The court reversed the trial court's decision to limit testimony regarding the complainant's sexual activities that could have offered an alternative explanation for her injuries. Id.

The Fourth Circuit Court of Appeals has also recognized an exception to a Rape Shield Statute regarding medical results, Barbe v. McBride, 521 F.3d 443 (4th Cir. 2008). In that case the complainant alleged sexual abuse up until the age of twelve (12). Id. at 446. During trial, a physician testified that the young complainant's psychological profile matched that of a complainant of sexual abuse. Id. The Fourth Circuit stated that evidence that other men had abused the complainant should have been admitted as an alternative explanation to the physician's findings. Id. at 460. The court continued:

> When the state circuit court barred Barbe from questioning the prosecution's expert concerning J.M.'s abuse by others, its Rape Shield Ruling undercut and effectively scuttled his defense on the J.M. offenses. The jury was thus left with only one permissible inference – that J.M.'s psychological profile resulted from her abuse by Barbe, and that Barbe, consequently, was guilty of having abused J.M.

Id.

North Dakota also recognizes the alternative source exception. State v. Reinart, 440 N.W.2d 503 (1989). A physician testified that during a medical examination of a fourteen (14) year old complainant, he found physical evidence of sexual abuse. Id. at 504-505. The court found it was not harmless error for the trial court to deny cross-examination about the young complainant's sexual experiences after the physician testified and stated sexual abuse had occurred. Id. at 506. The court found that the ruling violated the Defendant's right to confront witnesses when it did not allow him to show an alternative source explaining the results of the examination. Id. at 506-07.

Because the State introduced medical evidence showing the Complainant in this case had been sexually abused, the Petitioner should have been permitted to introduce evidence to show

an alternative source explaining the results of the examination. Accordingly, the trial judge erred in excluding this evidence.

ii. Alternative Explanation Theory as to the Pregnancy Test

Inquiry into the Complainant's prior sexual activities should have been permitted to rebut the implication created by the pregnancy test evidence. The State did not attempt to show that the Petitioner had actually impregnated the Complainant. (R. p. 55, line 24 – R. p. 56, line 2). Indeed, the pregnancy test was negative. (R. p. 88, line. 19). However, the jury was left to prejudicially infer that the Complainant would have only taken the test because there was a possibility of her being pregnant. Moreover, like in Grovenstein, because of the Complainant's young age, the jury was left to infer that the Complainant was not having sex with anyone other than the Petitioner. Indeed, during closing arguments, the Solicitor hit this point when she stated, "There is one suspect in this case, that's Mr. Loftin. He's the only person accused, he's the only person charged, he is the only person [the Complainant] has accused of committing – that she's accused of violating her sexually in that residence on Brady Road." (R. p. 382, lines. 6-10). Accordingly, the jury was left to infer that the only reason that the Complainant would use a pregnancy test is because of the Petitioner and his fear that he had impregnated the Complainant.

However, inquiry into the Complainant's sexual activities around the time of the pregnancy test may have shown the jury that there was an alternative source that caused the Complainant to be concerned about being pregnant. This type of inquiry was, again, essential to providing the Petitioner his right to a fair trial, a full defense, and to confront the witnesses against him.

While South Carolina and no other jurisdictions have considered this unique set of facts, allowing an exception would fall clearly within South Carolina law. To be clear, this inquiry into the Complainant's sexual activities around the time of the pregnancy test is being offered for a purpose other than to attack the Complainant's morality. *See* Finley, at 200, S.E.2d at 90; Lang, at 301, S.E.2d at 678. Moreover, it is offered to rebut an inference caused specifically because of the child's age. See Grovenstein, at 219, S.E.2d at 411. Its sole purpose is to show an alternative reason as to why the young Complainant would be using a pregnancy test.

Because the State introduced evidence showing there was concern about the Complainant being pregnant, the Petitioner should have been permitted to introduce evidence to show an alternative source explaining the reason for that concern. Accordingly, the trial court erred in excluding this evidence.

b. Petitioner should have been allowed to inquire into the Complainant's sexual activities under the Rape Shield Statute's exception regarding source of pregnancy.

When questions of statutory construction arise, they are to be answered as a matter of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). Furthermore, "all rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." Sumter Police Dep't v. Blue Mazda Truck, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). "It is well settled . . . that statutes should be construed that no word, clause, sentence, provision, or part shall be rendered surplusage, or superfluous." Abraham v. Palmetto Unified Sch. Dist. No. 1,

343 S.C. 36, 538 S.E.2d 656, 662 (Ct. App. 2000) (citing Matter of Decker, 322 S.C. 215, 417 S.E.2d 462 (1995)).

In the instant case, the trial judge also refused inquiry into the Complainant's sexual activities prior to January 2007, finding the inquiry did not fall within the textual exceptions contained in the Rape Shield Statute. (R. p. 58, lines. 1-4). The Rape Shield Statute provides, "evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of . . . pregnancy . . . is admissible . . ." SC Code Ann. § 16-3-659.1. The Rape Shield Statute requires this evidence to be relevant to a material fact or issue and its inflammatory or prejudicial nature not outweigh its probative value. Id.

Neither Petitioner nor the Solicitor introduced evidence that the Complainant's pregnancy test prior to January of 2007 came back positive. (R. p. 55, line 24 – R. p. 56, line 2). Indeed, the Complainant was not pregnant during that time. (R. p. 88, line 19). However, after the State introduced the November pregnancy test as evidence, Petitioner should have been allowed to inquire about the Complainant's prior sexual activity.

The Rape Shield Statute allows evidence that is relevant to a material fact or issue concerning source of pregnancy. Because the Complainant was not pregnant at the time the pregnancy test was used, there is no issue concerning the source of pregnancy. However, the Legislature clearly intended the statute to cover evidence that concerned pregnancy in general. Here, the issue is what caused the need for the pregnancy test. Accordingly, inquiry into the possible sources of a pregnancy at that time would be highly probative and clearly within the intent of the Rape Shield Statute.

While the text of the Rape Shield Statute does not specifically address this issue, the Legislature could not have foreseen an issue concerning this unique set of facts. Indeed, a failed

pregnancy test is usually highly irrelevant in proving sexual contact or lack thereof. However, here, further inquiry into why the Complainant felt it was necessary to use the pregnancy test at that time was highly relevant. If the Petitioner could have presented an alternative reason for why the Complainant would have used a pregnancy test at that time, the jury would not have been left to infer that the allegations against the Petitioner were true. Moreover, its probative value is of equal weight to any prejudicial effect.

Accordingly, because there was evidence in this trial concerning the use of a pregnancy test and that evidence was relevant to a material fact, the trial judge erred in excluding evidence of the Complainant's prior sexual activities.

CONCLUSION

Giving the jury an alternative source for the State's evidence would have prevented the Petitioner from being the only person that could have created that evidence. Because the trial court erred in prohibiting Petitioner from inquiring about the Complainant's sexual activities prior to the January 2008, disclosure, Petitioner's conviction should be reversed. Furthermore, because the trial court erred in ruling evidence of sexual conduct in a separate county admissible as a common scheme, Petitioner's conviction should be reversed.

Respectfully submitted,

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