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**PREVIEW; *State v. Walker*:
Evidentiary Challenges in Sexual Crimes**

Riley Wavra

Oral arguments are scheduled for Wednesday, August 8, 2018 at 9:30 A.M in the Courtroom of the Montana Supreme Court in Helena, Montana. Quentin M. Rhoades is expected to argue on behalf of the Appellant, Randall Bryce Walker (“Mr. Walker”), while Assistant Attorney General, Michael S. Wellenstein, is expected to argue on behalf of the State of Montana (“State”).

I. INTRODUCTION

This case presents the Court with three distinct evidentiary issues that could expand the evidence available to defendants during the prosecution of sexual crimes. The Court must first determine if the district court properly excluded evidence of Mr. Walker’s psychosexual makeup.¹ Second, the Court must determine whether the district court properly applied Montana’s Rape Shield Statute.² Finally, the Court must determine whether the district court erroneously excluded Mr. Walker’s polygraph-related evidence.³

II. FACTUAL & PROCEDURAL BACKGROUND

The parties agree that on the morning of February 14, 2015, Mr. Walker’s step-daughter, R.W., awoke in her bedroom, entered her parent’s bedroom and climbed into bed next to her stepfather.⁴ Mr. Walker and R.W. were home alone.⁵ R.W. later told a family friend, Hannah Billet, that while in the bed, Mr. Walker sexually abused her.⁶ The incident was reported to the Ravalli County Sheriff’s Office.⁷ Mr. Walker has continually

¹ Appellant’s Principal Brief at 1, *State v. Walker*, https://supremecourtdocket.mt.gov/APP/connector/9/1277/url/321Z246_03W910E6F001MRG.pdf (Mont. Oct. 23, 2017) (No. DA 17-0045).

² *Id.*

³ *Id.*

⁴ *Id.* at 8; Brief of Appellee at 3, *State v. Walker*, https://supremecourtdocket.mt.gov/APP/connector/1/385/url/321Z24V_04E6WYVSR00007M.pdf (Mont. Apr. 27, 2018) (No. DA 17-0045).

⁵ Appellant’s Principal Brief, *supra* note 1, at 7; Brief of Appellee, *supra* note 4, at 3.

⁶ Appellant’s Principal Brief, *supra* note 1, at 6; Brief of Appellee, *supra* note 4, at 5–6.

⁷ Brief of Appellee, *supra* note 4, at 6.

denied that anything sexual happened, and instead asserts that on the morning of February 14, R.W. entered the bed and made sexual advances towards him which he immediately rejected.⁸

The State charged Mr. Walker with incest on April 6, 2015.⁹ On July 22, 2015, Mr. Walker's step-daughter from a former marriage, A.W., accused him of sexually abusing her from ages 7 to 12.¹⁰ The State subsequently amended the original Information, adding an additional charge of incest for Mr. Walker's alleged sexual abuse of A.W. and a count of sexual assault for each episode.¹¹ A jury trial ensued, during which several family members and friends provided testimony in support of either R.W., A.W., or Mr. Walker.¹² No physical evidence including DNA, bodily fluids, or physical manifestations of the alleged abuse was introduced.¹³ On August 19, 2016, Mr. Walker was convicted on all counts and sentenced to four 100-year concurrent sentences.¹⁴

III. SUMMARY OF THE ARGUMENTS

A. Appellant Randall B. Walker

Mr. Walker argues that the district court's exclusion of his expert witness, Dr. Robert Page, was trial error that the prosecution cannot show to be harmless.¹⁵ Dr. Page would have testified that the results of Mr. Walker's psychosexual evaluation showed he was not sexually attracted to children.¹⁶ Mr. Walker argues such evidence is relevant because "knowingly having sexual contact with two different pre-adolescent girls" is an essential element of what the State had to prove.¹⁷ Further, Dr. Page's testimony would make it less probable that Mr. Walker knowingly had sexual contact with the alleged victims.¹⁸ Finally, Mr. Walker contends that the district court incorrectly concluded that such evidence would be used for the improper purpose of bolstering his own credibility, as Dr. Page would only have testified as to his clinical

⁸ *Id.* at 7–8.; Appellant's Principal Brief, *supra* note 1, at 4–5.

⁹ Appellant's Principal Brief, *supra* note 1, at 1.

¹⁰ Brief of Appellee, *supra* note 4, at 11.

¹¹ Appellant's Principal Brief, *supra* note 1, at 1–2.

¹² *Id.* at 4–13; Brief of Appellee, *supra* note 4, at 2–15.

¹³ Appellant's Principal Brief, *supra* note 1, at 4.

¹⁴ *Id.*

¹⁵ *Id.* at 21.

¹⁶ *Id.* at 22.

¹⁷ *Id.* at 23.

¹⁸ *Id.* at 23–24, 27.

findings without evaluating the truthfulness of either Mr. Walker or the alleged victims.¹⁹

Next, Mr. Walker argues that the district court erroneously excluded testimony about R.W.'s past sexual history, claiming that it mechanically applied Montana's Rape Shield Statute as if it was a *per se* ban on any sexual history of a victim.²⁰ According to Mr. Walker, the district court should have balanced the competing interests of the victim and himself before excluding the evidence.²¹ The proffered evidence involved an incident in which R.W. allegedly touched her step-cousins private parts in a sexual manner.²² Mr. Walker argues that evidence of R.W.'s prior sexual history would have supported his theory that on the morning the alleged abuse occurred, R.W. was acting out in a sexual manner.²³

Finally, Mr. Walker argues that the district court erred in excluding the results of his polygraph examination, which would have been presented in the form of expert testimony by the test's examiner, Dick Stotts.²⁴ Mr. Walker contends that the district court incorrectly enforced a *per se* ban on polygraph evidence rather than treating it as they would any other form of expert witness testimony.²⁵ In support of this contention, Mr. Walker points out that Montana's statutory ban on polygraph evidence was repealed in 1994.²⁶ Therefore, Mr. Walker argues the district court should follow Montana's pattern of admitting even "shaky" expert evidence and let the jury assimilate, assess, and apply the testimony.²⁷

B. Appellee State of Montana

The State asserts that the district court correctly excluded the expert testimony of Dr. Page.²⁸ The State maintains that such testimony would have improperly bolstered Mr. Walker's credibility by indirectly supporting his assertion that he did not

¹⁹ *Id.* at 27; Appellant's Reply Brief at 2, *State v. Walker*, https://supremecourtdocket.mt.gov/APP/connector/1/373/url/321Z25S_053VM7F9W000038.pdf (Mont. May 25, 2018) (No. DA 17-0045).

²⁰ Appellant's Principal Brief, *supra* note 1, at 35-36.

²¹ *Id.* at 36.

²² *Id.* at 37.

²³ *Id.* at 38.

²⁴ *Id.* at 2, 40.

²⁵ *Id.* at 43; Appellant's Reply Brief, *supra* note 19, at 11-12.

²⁶ Appellant's Principal Brief, *supra* note 1, at 42.

²⁷ *Id.* at 46-47.

²⁸ Brief of Appellee, *supra* note 4, at 18-28.

engage in sexual contact with the victims.²⁹ Further, the State asserts that such testimony would have improperly attacked the validity of the victim's allegations that they were sexually abused by Mr. Walker.³⁰

Next, the State contends that the district court properly applied Montana's Rape Shield Statute when it excluded evidence of R.W.'s prior sexual history.³¹ In support, the State argues that the district court's application was not improper because they heard argument from both parties on the evidence's admissibility prior to excluding it.³² That is, the district court did not exclude the evidence on the basis that it was *per se* inadmissible, but rather on the basis of the arguments made by each party.

The State also asserts that Mr. Walker has changed his argument on appeal, now arguing that such evidence would have supported his theory that R.W. was acting out in a sexual manner on the morning in question.³³ The State maintains that Mr. Walker argued below that such evidence was necessary to refute the State's theory that R.W. was sexually aware because of his abuse.³⁴ Lastly, the State maintains that Mr. Walker sought to introduce the evidence for the improper purpose of making "his trial a trial of R.W.'s alleged prior sexual conduct."³⁵

Finally, the State argues that the district court correctly excluded the polygraph-related evidence.³⁶ The State asserts that the Court has consistently held that polygraph evidence is not admissible.³⁷ The State contends that since the Legislature repealed Montana's *per se* ban on polygraph evidence this conclusion has been reached several times.³⁸ Therefore, the State argues that the district court did not rely on a repealed statute, but rather on the longstanding legal principle in Montana that polygraph evidence is inadmissible.³⁹

²⁹ *Id.* at 28.

³⁰ *Id.* at 26.

³¹ *Id.* at 28–38.

³² *Id.* at 34.

³³ *Id.* at 36.

³⁴ *Id.*

³⁵ *Id.* at 38.

³⁶ *Id.* at 38–39.

³⁷ *Id.* at 38.

³⁸ *Id.* at 38–39.

³⁹ *Id.* at 39.

IV. ANALYSIS

A. Psychosexual Evidence

The admissibility of Dr. Page's expert testimony poses a difficult question for the Court. Expert testimony may not be offered *specifically* to bolster the credibility of a party or their claims.⁴⁰ The parties do not dispute this rule, rather they disagree on whether the testimony in question would have done so. This presents to the Court what appears to be a novel question: may expert testimony be offered if it would *inadvertently* bolster the credibility of a party.

Mr. Walker maintains that Dr. Page's testimony would not have included direct commentary on anyone's credibility.⁴¹ Nonetheless, such testimony would have bolstered Mr. Walker's claim that he did not engage in sexual contact with R.W. or A.W., albeit not directly. The policy behind excluding such evidence is that it would improperly invade the province of the jury by "placing a stamp of scientific legitimacy on a victim's allegations, or by dismissing the validity of the allegations."⁴² This remains a compelling basis for exclusion. Because the proposed testimony would have eroded the credibility of R.W. and A.W.'s allegations that they were sexually abused while simultaneously bolstering Mr. Walker's own claim of innocence, the Court will likely affirm the district court's ruling.

B. Montana's Rape Shield Statute

The Court will likely hold that the district court properly applied Montana's Rape Shield Statute. Both parties correctly note that Montana's Rape Shield Statute cannot be applied mechanistically.⁴³ Rather, courts must balance the defendant's right to present a defense with the victim's right to protection under the statute.⁴⁴ Speculative or unsupported statements of a victim's prior sexual history are not enough to tip the scales in

⁴⁰ State v. Bailey, 87 P.3d 1032, 1039 (Mont. 2004) (emphasis added).

⁴¹ Appellant's Principle Brief, *supra* note 1, at 21, 24.

⁴² Benjamin v. Torgerson, 985 P.2d 734, 740 (Mont. 1999) (internal citations omitted).

⁴³ Brief of Appellee, *supra* note 4, at 32; Appellant's Principle Brief, *supra* note 1, at 36; State v. Colburn, 366 P.3d 258, 263 (Mont. 2016).

⁴⁴ Colburn, 336 P.3d at 263 (citing State v. Lindberg, 196 P.3d 1252, 1264 (Mont. 2008)).

favor of admissibility.⁴⁵ Further, Montana’s Rape Shield Statute enumerates its exceptions, providing that evidence of past sexual conduct of the victim is only admissible if it: (1) involves sexual conduct with the alleged offender; or (2) is offered to “show the origin of semen, pregnancy, or disease that is at issue in the prosecution.”⁴⁶

The evidence Mr. Walker sought to have admitted was an unsupported secondhand account of the incident.⁴⁷ This stands in contrast to *Colburn*, where the Court concluded that the proposed prior sexual history evidence was neither speculative nor unsupported as the victim’s father was convicted on charges stemming from the abuse.⁴⁸ Further, the district court heard argument for and against the admission of the evidence prior to excluding it.⁴⁹ That is not an improper application. Additionally, the evidence does not fit into either of the statutorily enumerated exceptions to the inadmissibility of prior sexual history evidence in Montana. Finally, if the State is correct in its assertion that Mr. Walker has changed his argument in favor of admission on appeal, then the Court will not consider it.⁵⁰ It is unlikely that the Court will overturn the district court’s ruling.

C. Polygraph Evidence

The Court will likely affirm the district court’s exclusion of polygraph-related evidence. The Montana Supreme Court has resisted the use of polygraph evidence in any Montana court proceeding, long after the repeal of Montana’s *per se* statutory ban in 1994.⁵¹ While Mr. Walker correctly notes that Montana no longer has a *per se* statutory ban on polygraph-related evidence, the Court has strongly adhered to the legal principle that such evidence is inadmissible in Montana. These subsequent decisions

⁴⁵ *State v. Awbery*, 367 P.3d 346, 350 (Mont. 2016); *Lindberg*, 196 P.3d at 1264 (Mont. 2008); *State v. Johnson*, 958 P.2d 1182, 1186 (Mont. 1998); *State v. Rhyne*, 833 P.2d 1112, 1118 (Mont. 1992); *State v. Laird*, 732 P.2d 417, 420 (Mont. 1987).

⁴⁶ MONT. CODE ANN. § 45–5–511(2).

⁴⁷ Brief of Appellee, *supra* note 4, at 37; Appellant’s Principle Brief, *supra* note 1, at 37.

⁴⁸ 336 P.3d at 263.

⁴⁹ Brief of Appellee, *supra* note 4, at 34.

⁵⁰ *State v. Henderson*, 877 P.2d 1013, 1016 (Mont. 1994) (holding that it is axiomatic that a party may not advance a novel argument on appeal).

⁵¹ *State v. Hameline*, 188 P.3d 1052, 1056 (Mont. 2008); *In re N.V.*, 87 P.3d 510, 514 (Mont. 2004); *State v. DuBray*, 77 P.3d 247, 263 (Mont. 2003); *State v. Anderson*, 977 P.2d 315, 317 (Mont. 1999); *In re Marriage of Njos*, 889 P.2d 1192, 1197 (Mont. 1995).

have been rendered without reliance on the now-repealed statute. The Court is unlikely to deviate from their prior decisions in this case.

V. CONCLUSION

The Court will likely affirm all three of the district court's evidentiary rulings. Dr. Page's testimony would have improperly bolstered the credibility of Mr. Walker while attacking the validity of the victims' allegations. The district court properly applied Montana's Rape Shield Statute, and the proffered evidence does not meet any of the enumerated exceptions to Montana's ban on such evidence. Finally, Montana's jurisprudence suggests the Court will affirm the exclusion of the polygraph-related evidence.