Workman, C.J., Concurring Opinion, Case No.23537 State of West Virginia v. James Quinn

No. 23537 - State of West Virginia v. James Quinn

Workman, C. J., concurring:

I am deeply concerned that the law enunciated by the majority, if not cautiously and judiciously applied, could have devastating consequences on abused children, and could create substantial unfair prejudice to the State in prosecutions of child sexual abuse. However, I do concur because the majority opinion is soundly reasoned, and comports with the great weight of authority across the country. I feel compelled to write separately, however, to clarify that the "strong probability" test requires a great deal more than an individual's flat denial of having committed the alleged act(s) of abuse coupled with an unsupported allegation of prior false accusations. This is required for several critical reasons. First, as Justice Maynard accurately notes in his dissent, the potential for further victimization of abused children is immense. Any time we permit children to be cross-examined about allegations of prior abuse, the possibility of causing additional trauma to a child is unfortunately an attendant reality to any potential for the disclosure of truth.

Furthermore, and even more disturbing, there is huge potential for diverting the attention of jurors onto side-issues which could result in great unfair prejudice to the prosecution in child sexual cases. Thus, it is incumbent upon the lower courts to require strong and very substantial proof of the falsity of prior accusations before proceeding to permit the admission of such evidence, even if only as to credibility. I am concerned with the trial bench's perception of what is necessary to constitute such a showing of "strong probability." The evidence necessary to establish a strong probability must not be merely credibility evidence (e.g. finding the testimony of one who claims to have been falsely accused more credible than the victim's), but must be strong factual evidence that tends to prove clearly and convincingly the falseness of

the prior accusations. See Little v. State, 413 N.E.2d 639 (Ind. App. 1980) (holding that previous false accusations "must be demonstrably false" before such evidence is admitted); see generally Nancy M. King, Annotation, Impeachment or Cross-Examination of Prosecuting Witness In Sexual Offense Trial By Showing That Similar Charges Were Made Against Other Persons, 71 A.L.R.4th 469, 482-83 § 4[b] (1989 & 1996 Supp.). Otherwise, the purpose of imposing such a standard will have gone up in smoke, and the child victim will be placed on trial.

The preferred type of evidence sufficient to meet the strong probability standard is "evidence from an independent source that the collateral allegation was false." See Commonwealth v. Nichols, 639 N.E.2d 1088, 1089 (Mass. App. 1994); see also Covington v. State, 703 P.2d 436, 442 (Alaska 1985) (adopting rule that defendant must first, out of jury's presence, demonstrate falseness of allegations by showing either the disproof of the charges or the witness' admission of falsity). While it will be a rare case when, like in Nichols, the alleged victim admits to having made false allegations, it is necessary to be cautious in permitting a defendant to use a claim of prior false allegations as a sword to assist in his/her defense without a preliminary showing that such prior false allegations are capable of proof other than through the testimony of the defendant. Because the possibility that a defendant might attempt to use a claim of prior false accusations as a shield is so palpable, we must provide the necessary safeguards against the improper use of this evidence.

When the proffered evidence amounts to an unsworn statement containing "inadmissible hearsay statements," as in People v. Duggan, 645 N.Y.S.2d 158 (N.Y. App. Div. 1996), courts should, as in Duggan, determine such evidence insufficient to probe into such allegations. Id. at 160; see also State v. Kringstad, 353 N.W.2d 302, 311 (N.D. 1984) (finding that "unsubstantiated testimony . . . would not constitute a quantum of evidence sufficient to establish the falsity of the previous charge"). It is imperative that the lower courts take seriously their obligation to require, prior to permitting any cross-examination of a child victim on the issue of prior false accusations, that the evidence proffered is both strong factually, and qualitatively and

quantitatively sufficient to demonstrate the strong probability of the falsity of such accusations. See Howard v. State, 407 S.E.2d 769, 771 (Ga. App. 1991) (upholding trial court's granting of State's motion in limine to prohibit defendant's introduction of false allegations based on failure to demonstrate "reasonable probability" that allegations were false). The use of such evidence should be a very rare exception. Furthermore, a motion to admit such prior false accusation evidence (and the court's ruling thereon) should be made prior to trial, and the State should be entitled to have an adverse determination reviewed by this Court through a writ of prohibition. Although the right to appeal is limited in West Virginia,[(1)] the State may seek a writ of prohibition in a criminal case where it can demonstrate that it was deprived of its right to prosecute the case or deprived of a valid conviction. See Syl. Pt. 5, See State v. Lewis, 188 W. Va. 85, 422 S.E.2d 807 (1992). Such evidence, if wrongfully admitted, would be so unfairly prejudicial to the State that this Court should accept for review and expedite hearing of such extraordinary writs. In any case in which evidence of prior false accusations is admitted, there should be a cautionary instruction given to the jury for the purpose of advising the jury regarding the limited purpose for which such evidence can be considered.

Lastly, the type of evidence permitted by the majority opinion should be much more closely scrutinized in the context of child sexual abuse than in the adult context. The very fact of the existence of prior accusations of sexual assault by a child, in and of itself, has a tendency to cause finders of fact to disbelieve the child in the case before them. Sexual assault of children is so out of the realm of the ordinary human experience of most jurors that it is difficult to perceive that there are children who live in certain sociological milieu where they are repeatedly sexually abused. Yet, most of the sociological literature reflects that "[m]ultiple abuse episodes are very common, occurring in more than half of the cases in nonclinical samples and in 75% of clinical samples of children." John Briere et al., The APSAC Handbook on Child Maltreatment 53 (1996) (citing studies performed by Conte & Schuerman, 1987, Elliott & Briere, 1994). Only through an extremely judicious (and I might add, suspicious) use of prior false accusation testimony will we be able to assure that the legal system doesn't re-abuse children.

1. We have previously urged the Legislature to "expand the statutory opportunity for appeal in West Virginia, including appeals of some interlocutory rulings." State ex rel. Allen v. Bedell, 193 W. Va. 32, 39, 454 S.E.2d 77, 84 (1994) (Cleckley, J., concurring).