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FACEBOOK AND MY SPACE

By Jay Howell

Two important issues affecting victims of crimes were considered and discussed in a recent Florida Appellate Court decision. One issue concerns whether or not the crime victim should be allowed to testify to the jury about how the crime has affected their life. Victims often ask why such testimony is almost always excluded from consideration by the jury. Instead, the trial judge often instructs the state attorney to only illicit information about the commission of the crime itself and not information on how the crime has changed the life of the victim.

A second issue concerns the use of photographs and dialogue posted on so-called "personal websites" in locations such as MySpace and Facebook. Recently, prosecutors have been confronted with the challenge of embarrassing information which the victim may have posted on a personal website. Should the photographs and dialogue be considered by the criminal trial jury?

In a recent Florida case, the defendant was charged, and ultimately convicted, of forcing non-consensual sex on the victim. The defendant admitted the sexual

encounter, but defended the charge on a theory that the victim consented to it. During the cross examination of the adult victim by the attorney for the defendant, the victim began to cry. The attorney for the defendant asked her why she was crying, and she responded:

“Because it hurts me. Every single morning, when I have to wake up in the morning I don’t be around men no more. I don’t talk to nobody no more. It just screwed me up so bad and emotionally. I can’t sleep in the bedroom without my door being locked and no one else being home.”

The defense attorney approached the bench and sought permission from the trial judge to admit photos and images copied from the victim’s “MySpace” web page. The pictures showed the victim at a male strip club posing with male dancers. In the pictures, the dancers were touching the victim and below was a dialogue caption indicating that the victim regarded the experience at the club as a “happy moment”.

The prosecutor objected to the evidence on two grounds. First, because the information and images had not been previously disclosed to the State. Second, because there was no indication of when the pictures had been taken or when they had been posted on the personal website. The trial court sustained the State’s objection and did not allow the photographs into evidence before the jury.

The Court ultimately ruled that because the defense attorney failed to lay a proper predicate for admission of the evidence, or to demonstrate its relevance there was no error in disallowing the evidence. The appellate court noted that the defendant might ultimately be entitled to relief based upon his attorney’s failure to secure admission of the evidence, nonetheless, his conviction would not be overturned.

The Court noted that if the photographs were taken and posted before victim's sexual encounter with the defendant, they obviously would not have been relevant to impeach her emotionally charged description of the trauma caused by her encounter with the defendant. The Court went on to say that if the victim posted the photographs after her encounter with the defendant, the evidence would have been relevant to impeach her testimony regarding the impact of the encounter on her life. Because her attorney did not indicate that she had any way to establish when the photographs were taken or posted, the trial judge ruled correctly. Additionally, it may have been significant to the appeals court that the information concerning the impact on the victim was actually elicited by the questions of the defense attorney.

The court decision is *Green v. The State of Florida* and was decided by the Fifth District Court of Appeals on March 11, 2011.