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RECENT DEVELOPMENT

STATE V. BABY: A WOMAN MAY WITHDRAW CONSENT FOR SEXUAL INTERCOURSE AFTER PENETRATION, AND CONTINUATION OF SEXUAL INTERCOURSE AFTER WITHDRAWAL OF CONSENT THROUGH FORCE OR THREAT OF FORCE CONSTITUTES RAPE.

By: Katlyn Hood

The Court of Appeals of Maryland held that first-degree rape includes vaginal intercourse that continues with force or threat of force after the victim withdraws initial consent post-penetration. *State v. Baby*, 404 Md. 220, 946 A.2d 463 (2008). More specifically, the court rejected Maryland case law that suggested that if a woman consents prior to penetration and withdraws the consent following penetration, there is no rape. *Baby*, 404 Md. at 238, 946 A.2d at 473.

On December 13, 2003, J.L. was in the backseat of her car with Maouloud Baby (“Baby”), whom she had met at the local McDonald’s restaurant. Baby told J.L. that he wanted to have sexual intercourse with her. J.L. agreed, so long as he stopped when she told him. Baby then attempted to have intercourse with J.L., but she told him it hurt and said “stop” as she sat up. Baby did not stop and continued to have intercourse with J.L. as she tried to push Baby off with her knees.

Baby was charged in the Circuit Court for Montgomery County with first-degree rape and other sexual offenses. During jury deliberations, the jury asked the trial judge whether the withdrawal of consent after penetration constituted rape. The judge replied by restating the original jury instructions. The jury found Baby guilty of first-degree rape. Baby appealed to the Court of Special Appeals of Maryland, which reversed, holding that if a woman consents to intercourse and then withdraws the consent after penetration, there is no rape. The Court of Appeals of Maryland granted the State’s petition for writ of certiorari.

The Court of Appeals of Maryland addressed whether a woman, who initially consents to sexual intercourse, withdraws that consent after penetration, and then is forced to continue sexual intercourse, is a victim of rape. *Baby*, 404 Md. at 237, 946 A.2d at 473. Baby urged

the court to rely on language used in prior Maryland case law, which suggested that a woman's post-penetration withdrawal of consent does not constitute rape. *Baby*, 404 Md. at 244, 946 A.2d at 477 (citing *Battle v. State*, 287 Md. 675, 684, 414 A.2d 1266, 1270 (1980)). The court rejected *Baby*'s argument, finding that the language from *Battle*, which *Baby* relied on, was mere dicta. *Baby*, 404 Md. at 246, 946 A.2d at 478. Therefore, it was not persuasive in whether post-penetration withdrawal of consent is rape in the present case. *Id.*

The court also considered the historical roots of virginity and the concept of penetration in relation to the crime of rape and the issue of consent. *Id.* at 247, 946 A.2d at 479. Essential to this discussion is the fact that English common law was based on the Old Testament and the belief that rape was complete upon penetration. *Id.* at 248, 946 A.2d at 479. The damage to the father's and the husband's interest in the woman's reproductive abilities was complete at the moment of penetration. *Id.* It was this belief that led to the idea that a woman was "de-flowered" upon penetration, and if consent was given prior to penetration and then withdrawn, there was no rape. *Id.* However, by the 13th century, the reference to virginity or the status of the victim was removed from English law. *Id.* at 251, 946 A.2d at 481.

By the time Maryland adopted the English common law in 1639, penetration did not complete the harm, and a virgin was not the only possible victim of rape. *Id.* at 248-49, 946 A.2d at 479-80. The issue of post-penetration withdrawal of consent arose infrequently in American case law. *Id.* at 253, 946 A.2d at 482. The cases in American history suggest that consent has to be withdrawn prior to penetration to constitute rape. *Id.* at 254, 946 A.2d at 483. While that rule was not explicitly stated, the courts did not focus directly on the point at which consent was withdrawn. *Id.* at 255, 946 A.2d at 483 (citing *State v. McCaffrey*, 19 N.W. 331 (1884); *State v. Cunningham*, 12 S.W. 376 (1889)).

The Court of Appeals of Maryland also considered other jurisdiction's holdings on post-penetration withdrawal of consent. *Baby*, 404 Md. at 255, 946 A.2d at 483. The court found that only one state held that the withdrawal of consent after penetration was not rape. *Baby*, 404 Md. at 255, 946 A.2d at 483 (citing *State v. Way*, 254 S.E.2d 760 (N.C.1979)). The court did not find the Supreme Court of North Carolina's holding persuasive because it did not provide any further analysis beyond its holding or cite to any authority as a basis for its reasoning. *Baby*, 404 Md. at 255, 946 A.2d at 484.

All other jurisdictions addressing this issue held that if sexual intercourse continues through force or threat of force after withdrawal of consent, it is rape. *Id.* at 256, 946 A.2d at 484. The Supreme Judicial Court of Maine held that it is rape if intercourse is continued after withdrawal of consent when the woman originally consented because she was forced or threatened with force. *Id.* at 256, 946 A.2d at 484 (citing *State v. Robinson*, 496 A.2d 1067 (Me. 1985)). The high court explained that the important element was not only the withdrawal of consent, but more importantly, the continuation of intercourse through force. *Baby*, 404 Md. at 256, 946 A.2d at 484 (citing *Robinson*, 496 A.2d at 1070). Other jurisdictions agreed that if sexual intercourse continues through force or threat of force after the withdrawal of consent, such conduct constitutes rape. *Baby*, 404 Md. at 256, 946 A.2d at 484. The Court of Appeals of Maryland found the holdings of these jurisdictions persuasive in reaching its holding in the present case. *Id.* at 259, 946 A.2d at 486.

The court concluded that if sexual intercourse was deemed to end at the moment of penetration, it would lead to illogical results not considered by the drafters of the rape statutes. *Id.* The Maryland rape statute, like those of other jurisdictions, punishes penetration, which continues after the withdrawal of consent. *Id.* Based on the above analysis, the court found no case law that supported the holding that initial penetration completes the act of sexual intercourse. *Id.* Therefore, the court held that forcing a woman to continue sexual intercourse after she withdraws her consent is rape. *Id.* at 260, 946 A.2d at 486.

The Court of Appeals of Maryland's holding expands Maryland first-degree rape law. Now, rape occurs not only when intercourse is forced upon a person in the absence of consent, but also when a victim withdraws consent after penetration. Maryland practitioners, when trying a case that concerns rape, will now not only have to consider whether there was original consent prior to sexual intercourse, but also whether that consent continued throughout the sexual encounter or was withdrawn after penetration. If the victim withdraws original consent after penetration and sexual intercourse continues through force or threat of force, under Maryland law, rape has been committed.