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## Criminal Procedure—Charge of Rape by Sexual Intercourse Sufficient to Convict of Rape by Deviate Sexual Activity under the Arkansas Rape Statute

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CRIMINAL PROCEDURE — CHARGE OF RAPE BY SEXUAL INTERCOURSE SUFFICIENT TO CONVICT OF RAPE BY DEVIATE SEXUAL ACTIVITY UNDER THE ARKANSAS RAPE STATUTE. *Cokeley v. State*, 288 Ark. 349, 705 S.W.2d 425 (1986), *cert. denied*, 107 S. Ct. 195 (1986).

On July 26, 1984, Dickie Cokeley offered nineteen-year-old Michelle Hawkins a ride home. Rather than taking her home, Cokeley drove to a parking lot and forced Hawkins to engage in sexual intercourse and perform fellatio. On August 10, 1984, Cokeley was charged by information with rape by forcible sexual intercourse. Cokeley was tried for rape in the Circuit Court of Miller County, Arkansas. The State presented evidence at trial relating to both forcible sexual intercourse and forcible deviate sexual activity. Cokeley testified that Hawkins had voluntarily performed fellatio, but that no sexual intercourse had occurred.

The court instructed the jury on both rape by forcible sexual intercourse and rape by deviate sexual activity. Cokeley objected to the instruction regarding deviate sexual activity, but the court overruled his objection. The jury returned a general verdict finding Cokeley guilty of rape and sentenced him to forty years in the Arkansas Department of Corrections.

Cokeley appealed, contending that since the State charged him with only one offense and presented evidence of two offenses, the jury may have convicted him of an offense with which he was not charged, and thus violated his due process rights guaranteed by the fourteenth amendment. The Arkansas Supreme Court upheld the conviction. Expressly overruling its holding in *Clayborn v. State*,<sup>1</sup> the court held that rape under section 41-1803 of the Arkansas Statutes Annotated is one offense with two means of commission. *Cokeley v. State*, 288 Ark. 349, 705 S.W.2d 425 (1986), *cert. denied*, 107 S. Ct. 195 (1986).

At early common law, indictments were considered insufficient if they did not conform strictly to established technicalities.<sup>2</sup> The common law required pleadings to contain a full statement of the facts and the legal theory of the charge to assure that the grand jury understood the indictment.<sup>3</sup> These common law pleading technicalities were also

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1. 278 Ark. 533, 647 S.W.2d 433 (1983).

2. 2 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 256 (1975).

3. 2 W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 19.2(d) (1984).

used by judges to avoid imposing the death penalty for only minor offenses.<sup>4</sup> As criminal laws were codified and the number of capital offenses decreased, these technicalities were not longer deemed necessary and legislative reforms were enacted to liberalize pleading requirements.<sup>5</sup>

This liberalization, however, was limited by the defendant's constitutional right to receive fair notice.<sup>6</sup> The sixth amendment to the United States Constitution provides that a criminal defendant is entitled to be informed of the nature and cause of the accusation against him.<sup>7</sup> In early decisions, the Supreme Court construed this to mean that in all criminal cases the pleadings must clearly and accurately describe the offense charged.<sup>8</sup> The fourteenth amendment,<sup>9</sup> upon passage, extended fair notice requirements to the states.<sup>10</sup>

In *United States v. Simmons*<sup>11</sup> the Supreme Court again analyzed pleading requirements, and stated that the defendant is entitled to a "substantial statement" of the grounds upon which he is charged.<sup>12</sup> However, this may not be carried so far as to defeat the ends of justice.<sup>13</sup> When the particular means used are not substantial elements of the offense, the means do not have to be included in the pleadings.<sup>14</sup> The Court stated that when the offense is purely statutory, it is generally sufficient to charge the offense in the words of the statute.<sup>15</sup> However, an indictment that follows the words of the statute must apprise the defendant with reasonable certainty of the nature of the accusation against him, so as to enable the defendant to prepare a defense and plead judgment as a bar to subsequent prosecution for the same offense.<sup>16</sup> Following the standard it had set forth in *Simmons*,<sup>17</sup> the

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4. *Id.*

5. *Id.*

6. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § III, ch. 15 (2d ed. 1983).

7. U.S. CONST. amend. VI provides: "In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation . . . ."

8. *United States v. Cook*, 84 U.S. (17 Wall.) 168, 174 (1872); *United States v. Mills*, 32 U.S. (7 Pet.) 138, 142 (1833).

9. U.S. CONST. amend. XIV, §1 provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

10. *Cole*, 333 U.S. at 201.

11. 96 U.S. 360 (1877).

12. *Id.* at 364.

13. *Id.*

14. *Id.* at 362-63.

15. *Id.* at 362.

16. *Id.*

17. *Id.*

Court held in a subsequent case that a charge following the words of the statute is insufficient if the words themselves do not fully and certainly set forth all the elements of the offense.<sup>18</sup>

In *Hagner v. United States*<sup>19</sup> the Court established a test for certainty in the pleadings.<sup>20</sup> The Court stated that the true test is not whether the pleadings can be made more certain, but whether they contain the elements of the offense, sufficiently apprise the defendant of what he must be prepared to meet, and allow the defendant to plead judgment in bar to subsequent prosecutions for the same offense.<sup>21</sup> When the defects in the pleadings are only formal and nonprejudicial, the defects should be disregarded.<sup>22</sup>

Three years later in *Berger v. United States*,<sup>23</sup> the Court held that pleading defects that affect the defendant's substantial rights are fatal.<sup>24</sup> The defendant's substantial rights are: To be informed of the charges so that he may be able to prepare a defense, to avoid being taken by surprise or being prejudiced by the evidence presented at trial, and to be protected from another prosecution for the same offense.<sup>25</sup>

Supreme Court decisions have clearly established that a defendant may not be charged with one offense and convicted of another.<sup>26</sup> In *Stromberg v. California*<sup>27</sup> the Court held that when a defendant is charged with more than one offense under a particular statute and is convicted by a general verdict, the verdict may not stand if any of the

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18. *United States v. Carll*, 105 U.S. 611, 612 (1881) (complaint held to be defective because it did not allege that the defendant had knowledge that the instrument was forged, where knowledge was an essential element under the statute).

19. 285 U.S. 427 (1932).

20. *Id.* at 431. Although the indictment in *Hagner* did not specifically allege that a letter was delivered by the postal service, the facts alleged created this presumption.

21. *Id.*

22. *Id.* at 432.

23. 295 U.S. 78 (1935).

24. *Id.* at 82 (where defendant was charged with only offense of conspiracy, proof as to two conspiracies was not prejudicial).

25. *Id.*

26. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 96 (1940). In *Thornhill*, the state, following the words of the statute, charged the defendant with loitering, interfering with a lawful business, and picketing. The defendant's conviction was held invalid after the picketing provision of the statute was declared unconstitutional. *See also Stirone v. United States*, 361 U.S. 212 (1960) (Hobbs Act contains two essential elements: interference with interstate commerce and extortion. Conviction was invalid because indictment did not sufficiently charge the defendant with interfering with interstate commerce); *Cole v. Arkansas*, 333 U.S. 196 (1948) (when evidence and instructions at trial pertained to § 2 of the statute, defendant could not be convicted of a separate offense under § 1 of same statute).

27. 283 U.S. 359 (1931).

statutory offenses are declared unconstitutional.<sup>28</sup> This is because it cannot be determined upon which offense the defendant was convicted.<sup>29</sup>

The Court in *Thornhill v. Alabama*,<sup>30</sup> following its holding in *Stromberg*, stated that a court may not go behind the face of a pleading to determine whether the evidence will support a conviction founded upon different or more precise charges.<sup>31</sup> The Court in a later case held that a defendant may not be charged with one offense under a particular section of a statute and be convicted of a separate offense under another section of that statute, even if the evidence will support such a conviction.<sup>32</sup> This is true even in cases in which the state could obtain a valid conviction by drawing the pleadings in general terms and then showing that either offense occurred.<sup>33</sup>

The legality of an amendment to an information in state court is primarily a matter of state law.<sup>34</sup> In 1937, the Arkansas legislature enacted Initiated Act No. 3, which liberalized pleading requirements in Arkansas. The Act provides that the pleadings may be amended as to matters of form so long as the amendment does not change the nature or degree of the crime.<sup>35</sup> The Arkansas Supreme Court has construed the Act and has held that it is designed to simplify procedure and eliminate technical difficulties that in the past have allowed defendants to escape punishment.<sup>36</sup>

Section 22 of the Act also provides that there is no requirement in Arkansas that the information include the act or acts constituting the offense unless the offense cannot be charged without doing so.<sup>37</sup> If a defendant needs further information, he may request a bill of particulars.<sup>38</sup> The Arkansas Supreme Court has interpreted this section to

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28. *Id.* at 367-68.

29. *Id.*

30. 310 U.S. 88 (1940).

31. *Id.* at 96.

32. *Cole v. Arkansas*, 333 U.S. at 196, 201-02 (1948).

33. *Stirone v. United States*, 361 U.S. 212, 218 (1960).

34. *United States ex rel. Wojtycha v. Hopkins*, 517 F.2d 420, 425 (3d Cir. 1975).

35. 1937 Ark. Acts No. 3, § 24 (codified at ARK. STAT. ANN. § 43-1024 (1977)). See Leflar, *The Criminal Procedure Reforms of 1936-Twenty Years After*, 11 ARK. L. REV. 117, 130 (1957).

36. *Underwood v. State*, 205 Ark. 864, 866, 171 S.W.2d 304, 305 (1943).

37. 1937 Ark. Initiated Acts No. 3, § 22 (codified at ARK. STAT. ANN. 43-1006 (1977)) provides: "[T]he name of the offense charged in the indictment shall carry with it all such allegations."

38. 1937 Ark. Act No. 3, § 22 (codified at ARK. STAT. ANN. § 43-1024 (1977)) provides that the defendant may file a motion for a bill of particulars. A bill of particulars is a statement of facts apprising the defendant of the specific crime charged. The granting of a bill of particulars is governed by the discretion of the trial court and may be properly denied where the information

mean that the information is sufficient if it does not prejudice the defendant's substantive rights.<sup>39</sup>

Arkansas courts have recently been asked to determine the sufficiency of informations in rape cases after the passage of its new rape statute.<sup>40</sup> In 1976, Arkansas changed its rape statute to include "deviate sexual activity."<sup>41</sup> Under the new statute, rape may be committed by either forcible sexual intercourse or forcible deviate sexual activity.<sup>42</sup> The previous distinction between rape<sup>43</sup> and forcible sodomy<sup>44</sup> is no longer recognized. Rape by deviate sexual activity now warrants the same punishment as rape by sexual intercourse.<sup>45</sup>

In 1981, the Arkansas Supreme Court first decided whether the State may present evidence of deviate sexual activity when the information charges the defendant with rape by sexual intercourse.<sup>46</sup> The court allowed the evidence to be entered, citing section 43-1006 of the Arkansas Statutes Annotated, which allows an information to charge under the title of a statute without alleging the facts.<sup>47</sup>

In contrast, the court later held in *Clayborn v. State*<sup>48</sup> that rape by deviate sexual activity and rape by sexual intercourse are two different crimes.<sup>49</sup> The court determined that when an information charges rape by deviate sexual activity, a jury instruction as to rape by sexual intercourse is a violation of due process within the United States Supreme Court's holding in *Thornhill v. Alabama*.<sup>50</sup> The court reasoned that the two kinds of rape are different offenses since they are not of the same general character.<sup>51</sup> The essential elements differ because rape by forcible sexual intercourse is restricted to heterosexual activity while rape by deviate sexual activity is gender neutral.<sup>52</sup> To support its

itself sets out all of the relevant facts. See Leflar, *supra* note 35, at 130.

39. *Davis v. State*, 196 Ark. 721, 722, 119 S.W.2d 527, 528 (1938).

40. ARK. STAT. ANN. § 41-1803 (1977 & Supp. 1985).

41. ARK. STAT. ANN. § 41-1803 (1977 & Supp. 1985) provides in pertinent part: "Rape. (1) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person: (a) by forcible compulsion . . ."

42. *Id.*

43. ARK. STAT. ANN. § 41-3401 (1977) defines rape as "the carnal knowledge of a female forcibly and against her will."

44. POPE'S DIGEST § 3428 (1937) defined sodomy as a "crime against nature."

45. ARK. STAT. ANN. § 41-1803 (1977 & Supp. 1985).

46. *Browning v. State*, 274 Ark. 13, 16, 621 S.W.2d 688, 689 (1981).

47. *Id.*

48. 278 Ark. 533, 647 S.W.2d 433 (1983).

49. *Id.* at 538-39, 647 S.W.2d at 435-36.

50. *Id.*

51. *Id.*

52. *Id.*

holding, the court relied on the Arkansas rape statute,<sup>53</sup> which defines deviate sexual activity and sexual intercourse separately.<sup>54</sup>

Justice Hickman dissented in *Clayborn*, reasoning that due process does not require the state to specify both means of rape where no prejudice to the defendant will result.<sup>55</sup> He argued that the underlying intent of the Arkansas rape statute is to define and make punishable a physical violation.<sup>56</sup> Justice Hickman stated that it was an outrage to allow defendants to escape punishment on a pleading technicality when the evidence shows that a rape has occurred by either means.<sup>57</sup> He further reasoned that if a defendant needs more specificity, he may request a bill of particulars.<sup>58</sup>

Without expressly overruling *Clayborn*, the Arkansas Supreme Court has declined to follow that holding in its subsequent decisions. In *Austin v. State*<sup>59</sup> the court held that when an information charges both means of rape disjunctively and the evidence supports both means of rape, a jury instruction regarding both may be given.<sup>60</sup> In *Wood v. State*<sup>61</sup> the court held that when the State charges rape by sexual intercourse based on the defendant's confession and the defendant testifies at trial that he raped the victim only by deviate sexual activity, the State may amend the information to include rape by deviate sexual activity.<sup>62</sup> The court stated that such an amendment does not change the nature or degree of the crime.<sup>63</sup>

The court has also allowed similar amendments in prosecutions brought under the Arkansas DWI and theft statutes.<sup>64</sup> Like the rape statute, these statutes contain disjunctive means of committing the offense.<sup>65</sup> In *Yacono v. State*<sup>66</sup> the Arkansas Supreme Court upheld the admission of evidence that was offered to prove a particular means of violating the DWI statute even though that means was not charged in the information. Under the applicable statute, one commits a DWI of-

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53. ARK. STAT. ANN. § 41-1801 (1977 & Supp. 1985).

54. 278 Ark. at 536-37, 647 S.W.2d at 435.

55. *Id.* at 538, 647 S.W.2d at 436 (Hickman, J., dissenting).

56. *Id.*

57. *Id.* at 537-38, 647 S.W.2d at 435.

58. *Id.* at 539, 647 S.W.2d at 436.

59. 287 Ark. 256, 697 S.W.2d 914 (1985).

60. *Id.*

61. 287 Ark. 203, 697 S.W.2d 884 (1985).

62. *Id.* at 204, 697 S.W.2d at 886.

63. *Id.*

64. ARK. STAT. ANN. § 75-2503 (Supp. 1985); ARK. STAT. ANN. § 41-2202 (1977).

65. *See supra* note 64.

66. 285 Ark. 130, 685 S.W.2d 500 (1985).

fense by either operating a vehicle while intoxicated or by operating a vehicle with a blood alcohol content of ten percent or more.<sup>67</sup> In *Yacono* the court held that a person may be charged with one of these means and convicted of the other although the evidentiary requirements for each are different.<sup>68</sup>

Arkansas has expressly consolidated its theft statute to include various means of theft.<sup>69</sup> Violations that were originally separate theft offenses are now considered to be only a means of theft.<sup>70</sup> The statute allows one means to be charged and another to be proved, subject to the power of the court to insure a fair trial and grant relief when the defendant would be prejudiced by lack of fair notice or surprise.<sup>71</sup> The purpose of this consolidation is to prevent a defendant from escaping conviction because of pleading technicalities.<sup>72</sup>

With Justice Hickman speaking for the majority, the court in *Cokeley v. State*<sup>73</sup> expressly overruled its holding in *Clayborn v. State*<sup>74</sup> and held that rape under section 41-1803 of the Arkansas Statutes Annotated is one offense with two means of commission.<sup>75</sup> In reaching its decision, the court cited two previous decisions that allowed an amendment to the information when only one means of rape had been charged.<sup>76</sup> The court relied upon *Wood v. State*<sup>77</sup> to support its holding that such an amendment does not change the nature or degree of the crime.<sup>78</sup> The court cited *Browning v. State*<sup>79</sup> to support its holding that when one means of rape has been charged, a general charge of rape has been made under the statute.<sup>80</sup>

The court also analogized the rape statute to the Arkansas DWI statute,<sup>81</sup> noting that it has construed the DWI statute as one offense with two means of commission.<sup>82</sup> The court looked to its prior holdings

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67. ARK. STAT. ANN. § 75-2503 (Supp. 1985).

68. 285 Ark. at 132, 685 S.W.2d at 501.

69. ARK. STAT. ANN. § 41-2202 (1977).

70. *Id.*

71. *Id.*

72. ARK. STAT. ANN. § 41-2202 (1977) (commentary).

73. 288 Ark. 349, 705 S.W.2d 425 (1986).

74. 278 Ark. 533, 647 S.W.2d 433 (1983).

75. 288 Ark. at 350-51, 705 S.W.2d at 426.

76. *Id.* at 351, 705 S.W.2d at 426.

77. 287 Ark. 203, 697 S.W.2d 884 (1985).

78. 288 Ark. at 351, 705 S.W.2d at 426.

79. 274 Ark. 13, 621 S.W.2d 688 (1981) (when information charges the defendant with rape by sexual intercourse, evidence may be entered to show rape by deviate sexual activity).

80. 288 Ark. at 351, 705 S.W.2d at 426.

81. ARK. STAT. ANN. § 75-2503 (Supp. 1985).

82. 288 Ark. at 352, 705 S.W.2d at 426.

indicating that a charge under one subsection of the DWI statute is adequate to charge all subsections even though the evidentiary requirements of the subsections differ.<sup>83</sup>

The court in *Cokeley* found no prejudice or surprise to the defendant because the evidence, including the testimony of the defendant, supported a finding of rape by both means and because the defendant failed to file a motion for a bill of particulars.<sup>84</sup>

Justice Dudley dissented, contending that the two kinds of rape are separate crimes because they are not of the same general character.<sup>85</sup> He asserted that rape by deviate sexual activity is a gender neutral crime<sup>86</sup> while rape by sexual intercourse is restricted to heterosexual conduct.<sup>87</sup> Therefore, Justice Dudley reasoned that the elements of rape by sexual intercourse do not contain all the elements of rape by deviate sexual activity.<sup>88</sup>

The court in *Cokeley*, in accord with its other post-*Clayborn* decisions,<sup>89</sup> construed the Arkansas rape statute as one offense with two means of commission.<sup>90</sup> The court has finally clarified its position on the proper construction of the rape statute.<sup>91</sup> There are two essential elements of rape in Arkansas: sexual contact and forcible compulsion.<sup>92</sup> Therefore, the state may plead one means of rape and prove the other.<sup>93</sup> This clarity, however, is clouded by dictum in a subsequent case, *Tarry v. State*.<sup>94</sup> In *Tarry* the court stated that if both means of rape occur in the same episode, the court may impose separate sentences for each means because the two acts of rape are of a "different nature."<sup>95</sup> Although the court expressly stated that rape is one offense with two means of commission,<sup>96</sup> the different nature language is

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83. 285 Ark. at 132, 685 S.W.2d at 501.

84. 288 Ark. at 353, 705 S.W.2d at 427.

85. 288 Ark. at 353-54, 705 S.W.2d at 427 (Dudley, J., dissenting).

86. *Id.* at 353-54, 705 S.W.2d at 427.

87. *Id.* at 354, 705 S.W.2d at 427.

88. *Id.*

89. *Austin v. State*, 287 Ark. 256, 697 S.W.2d 914 (1985); *Wood v. State*, 287 Ark. 203, 697 S.W.2d 884 (1985).

90. 288 Ark. at 351, 705 S.W.2d at 426.

91. *Id.*

92. *Id.*

93. *Id.* at 352-53, 705 S.W.2d at 427.

94. 289 Ark. 193, 710 S.W.2d 202 (1986). In *Tarry*, the defendant raped the victim by deviate sexual activity and left the room. The defendant soon returned and raped the victim by sexual intercourse. The court imposed two consecutive sentences, holding that the crime was not continuous because it was separated in point of time.

95. *Id.* at 195, 710 S.W.2d at 203.

96. *Id.*

more in line with the reasoning used in *Clayborn*. In *Cokeley* the decision that the two means of rape are one offense was based upon the premise that they do not differ in "nature" or degree.<sup>97</sup>

The court in *Cokeley* decided that due process is not violated if a defendant is charged with one means of rape and convicted of another, since both means constitute only one offense.<sup>98</sup> This decision may run contrary to the intent of the legislature in passing the rape statute. The legislature expressly provided in the Arkansas theft statute<sup>99</sup> that it was consolidating several previously separate offenses into one offense and that a defendant could henceforth be charged with one means and convicted of another.<sup>100</sup> The Arkansas rape statute gives no such notice.<sup>101</sup> The court in *Cokeley* did not address the issue of whether the legislature must expressly consolidate separate offenses to ensure that a defendant has sufficient notice that the previously separate offenses are now one offense. Arguably, since the legislature used express consolidation in the theft statute, it would have done the same if it had intended to combine the two rape offenses into one.

In *Cokeley* the court overlooked the State's narrow information because there was enough evidence to support a conviction of either means of rape and because the defendant could have requested a bill of particulars.<sup>102</sup> However, it is questionable whether a defendant would be put on notice to ask for a bill of particulars when the information specifically charges only one means of the offense. If the court required the pleadings to accuse both means disjunctively, the defendant would have more notice to ask for a bill of particulars. This requirement would take little effort on the part of the prosecuting attorney and would ensure that notice is given.

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97. 288 Ark. at 351, 705 S.W.2d at 426.

98. *Id.*

99. ARK. STAT. ANN. § 41-2202 (1977).

100. *Id.* (commentary).

101. ARK. STAT. ANN. § 41-1803 (1977).

102. 288 Ark. at 353, 705 S.W.2d at 427.

