***R v Fleming* [2011] SASCFC 41 (10 May 2011) – Supreme Court of South Australia (Full Court)**

'Evidence' – 'Evidence of domestic violence inadvertently led' – 'Persistent sexual exploitation' – 'Propensity evidence' – 'Sexual and reproductive abuse'

Charge/s: Persistent sexual exploitation.

Appeal type: Appeal against conviction.

Facts: The appellant was convicted by a jury of persistent exploitation of a five-and-a-half-year-old girl. The prosecution alleged that the appellant had been in a relationship with the girl's mother and that he committed at least more than one act of sexual exploitation. At trial, evidence was inadvertently admitted that the complainant was seeing a domestic violence counsellor. Further evidence about the appellant's aggressive and sometimes violent behaviour was also put before the Court. Following a question from the jury during deliberations, the judge directed the jury to ignore all of the evidence relating to the domestic violence counsellor and the appellant's aggressive behaviour because it was not relevant to whether the appellant had committed the offences.

Issue/s: Whether the judge should have discharged the jury after the evidence of alleged domestic violence by the appellant was inadvertently led. Alternatively, whether the directions given by the trial judge when he refused to discharge the jury were inadequate.

Decision and Reasoning: David J (Kourakis J and Sulan J concurring) dismissed the appeal. David J firstly noted at [23] that, 'in cases involving allegations of sexual impropriety in domestic situations evidence of extraneous violence is often allowed for many reasons. Such evidence is often relevant to the question of the relationship between the parties or providing a reason or reasons as to why an alleged victim may not complain.' This did not apply in this case, as the prosecution did not seek to introduce the evidence. Rather, it came out inadvertently. While David J was concerned that the judge's direction could have given the jury an impression that there was some 'sinister impermissible material' (see at [31]) that had not been introduced, his directions regarding the irrelevance of the evidence were clear and he correctly warned against propensity reasoning. As such, while the situation was not ideal, it did not amount to a miscarriage of justice.