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Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant

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Introduction

Sexual assault cases entail special evidentiary issues. This bulletin addresses two of the most common: (1) the admissibility of evidence about the complainant's sexual history and (2) the admissibility of evidence about prior sexual misconduct by the defendant. The admissibility of evidence about the complainant's sexual history is an issue of relevancy which is usually determined under N.C. R. Evid. 412, the so-called rape shield law (or rape shield rule).[1] Determining the admissibility of evidence about prior sexual misconduct by the defendant requires the application of N.C. R. Evid. 404(b), which governs evidence of prior bad acts, and the application of the balancing test set forth in N.C. R. Evid. 403.

The Complainant's Sexual History

In sexual assault cases questions frequently arise regarding the admissibility of evidence about the complainant's sexual history. Although other rules of evidence are sometimes involved, these questions are normally addressed under Rule 412, which applies both at trial and during pretrial proceedings, such as probable cause hearings. The material below includes the text of the rule, a discussion of its application, and, where appropriate, a discussion of other evidentiary rules and principles that bear on the admissibility of such evidence.

The Text of Rule 412

Rule 412. Rape or sex offense cases; relevance of victim's past behavior.

(a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

(d) Notwithstanding any other provision of law, unless and until the court determines that evidence of sexual behavior is relevant under subdivision (b), no reference to this behavior may be made in the presence of the jury and no evidence of this behavior may be introduced at any time during the trial of:

(1) A charge of rape or a lesser included offense of rape;

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1. The rape shield rule has been addressed in previous bulletins, the most recent of which was published fourteen years ago. *See* Robert L. Farb & Anne S. Kim, *North Carolina's Evidence Shield Rule in Rape and Sex Offense Cases*, Administration of Justice Bulletin No. 94/02, at n.1 (listing prior bulletins).

(2) A charge of a sex offense or a lesser included offense of a sex offense; or
(3) An offense being tried jointly with a charge of rape or a sex offense, or with a lesser included offense of rape or a sex offense.

Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an *in camera* hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the proponent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the *in camera* hearing or at a subsequent *in camera* hearing scheduled for that purpose, shall accept evidence on the issue of whether that condition of fact is fulfilled and shall determine that issue. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

(e) The record of the *in camera* hearing and all evidence relating thereto shall be open to inspection only by the parties, the complainant, their attorneys and the court and its agents, and shall be used only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the *in camera* hearing without the questions being repeated or the evidence being resubmitted in open court.

The History of the Rape Shield Law

Until 1977, no rule or statute specifically governed the admissibility of evidence about the sexual history of the complainant in rape or sex offense cases. Older cases routinely allowed such evidence to be admitted (though often limiting the evidence to the complainant's reputation for sexual activity and excluding evidence of specific prior sexual encounters) on the theory that "unchaste" women were more likely to have consented to sex and were less credible as witnesses.[2] By the 1970s, however, some judges had begun to exclude such evidence under general relevancy principles.[3]

Also in the 1970s, the women's movement made a nationwide push for the enactment of rape shield laws. In 1977 the North Carolina General Assembly responded by enacting former G.S. 8-58.6.[4] The statute forbade, in rape cases, the admission of most evidence regarding a

2. *See, e.g.*, State v. Fortney, 301 N.C. 31, 36 (1980) ("Prior to the enactment of [the rape shield law] it was permissible in this jurisdiction to admit evidence of a prosecuting witness's general reputation for unchastity in a rape trial both to attack her credibility as a witness and to show the likelihood of her consent.").

3. *See, e.g.*, State v. McLean, 294 N.C. 623 (1978) (affirming trial judge's determination, apparently based on general relevancy principles rather than the rape shield law, that whether complainant lived in an "environment of sexual immorality" was not a proper subject for cross-examination).

4. 1977 N.C. Sess. Laws 1171 [ch. 851., s. 1]. *See generally* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 1

complainant's "sexual activity . . . other than the sexual act which is at issue." In 1979 the General Assembly broadened the statute to encompass sex offense prosecutions.[5]

When the evidence rules were enacted in 1984, the statute was included, almost word for word, as Rule 412.[6] The General Assembly repealed G.S. 8-56.6 itself, which had become superfluous.[7] Importantly, Rule 412 was *not* modeled after the federal rape shield rules, Fed. R. Evid. 412 *et seq*. Because the provisions of North Carolina's Rule 412 are quite different than the provisions of the federal rules, federal cases are of limited utility as guides to the proper interpretation of North Carolina's rule.[8]

The constitutionality of the rape shield law was litigated almost immediately and was upheld.[9] Subsequent cases have confirmed the Rule's constitutionality.[10]

Cases in Which Rule 412 Applies

By its terms, Rule 412 applies only to criminal trials. The Rule refers to the "indictment on trial," the "prosecution," and certain specific criminal offenses.[11] Furthermore, Rule 412 applies only when the defendant is charged with "rape or a sex offense, or with a lesser included[12] offense of rape or a sex offense."[13] Although the use of the term "sex offense" rather than "sexual offense" in the Rule creates some ambiguity, "sex offense" in the context of the Rule likely means first- or second-degree sexual offense under G.S. 14-27.4 and G.S. 14-27.5, statutory sexual offense under G.S. 14-27.7A, and sexual offense with a child by an adult under G.S. 14-27.4A.[14] Thus, for example, Rule 412 likely does not apply when the principal charge is sexual activity with a student,

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(2002) (discussing the history of rape shield laws, dating back to Michigan's enactment of the nation's first such law in 1974).

5. 1979 N.C. Sess. Laws 727 [ch. 682, s. 8].

6. 1983 N.C. Sess. Laws 670–71 [ch. 701, s. 1].

7. *See* 1984 N.C. Sess. Laws 206 [ch. 1037, s. 2].

8. Among the significant differences between the state and federal rules are (1) that the state rule applies only to criminal cases while the federal rule applies, in a weaker form, in civil cases as well; (2) that the federal rule covers evidence of "sexual predisposition" as well as evidence of sexual behavior; and (3) that when a defendant seeks to introduce evidence of a complainant's sexual behavior under an exception to the rule, the federal rule requires a written motion at least fourteen days before trial while the state rule allows an oral motion during trial. *Compare* N.C. R. Evid. 412 *with* Fed. R. Evid. 412 *et seq.*

9. State v. Fortney, 301 N.C. 31 (1980) (holding that the rape shield law did not violate the defendant's Confrontation Clause rights, because there is no right to confront a witness with irrelevant questions).

10. *See*, *e.g.*, State v. Waters, 308 N.C. 348 (1983) (rejecting equal protection and due process challenges).

11. By contrast, the federal rape shield rule and the rape shield rules of a few states apply in both civil and criminal trials. *See*, *e.g.*, Fed. R. Evid. 412; National District Attorneys Association, *Rape Shield Statutes*, www.ndaa.org/pdf/ncpca_statute_rape_shield_laws_june_06.pdf (collecting state statutes).

12. Note that not all the offenses listed in the short-form indictment statutes, G.S. 15-144.1 (rape) and G.S. 15-144.2 (sexual offense), are lesser-included offenses of rape or sexual offense. *See*, *e.g.*, State v. Herring, 322 N.C. 733 (1988) (holding that assault on a female, although listed in G.S. 15-144.1, is not a lesser-included offense of rape).

13. N.C. R. Evid. 412(d)(3).

14. "Sex offense" is the phrase used in G.S. 15-144.2 to describe the crimes that are called "sexual offenses" in the statutes listed in the text.

G.S. 14-27.7(b), or indecent liberties, G.S. 14-202.1, as these offenses are not lesser-included offenses of rape or sexual offense.[15]

Notwithstanding the above, however, the court of appeals has recently held that "it is permissible for a trial judge in a civil case to use Rule 412 as a basis for excluding irrelevant evidence about a plaintiff's prior sexual behavior."[16] The quoted language seems to fall short of *requiring* the application of Rule 412 in civil cases, but because the court of appeals has previously held that Rule 412 may be used as a guide in such cases,[17] whether or not the Rule technically applies may be immaterial. Presumably the Rule may also be used as a guide in criminal cases that fall outside the literal terms of the Rule. In summary, while rulings in civil cases and in criminal cases that fall outside the scope of the Rule should probably be grounded in Rules 401 and 403 in addition to, or instead of, Rule 412, the sexual history of the plaintiff or complainant in such cases is still, under most circumstances, irrelevant and subject to exclusion.

Evidence to Which Rule 412 Applies

Subject to the exceptions discussed below, Rule 412 requires the exclusion of any evidence regarding the "sexual behavior" of the complainant, meaning "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial."[18] Thus evidence about how many partners the complainant has had, how quickly the complainant became intimate with previous partners, or the details of the complainant's prior sexual encounters, is generally inadmissible. Indirect evidence of sexual behavior, such as evidence of a complainant's nonvirginity, her[19] use of birth control,[20] the presence of semen stains on her clothing,[21] or her history

15. However, there are at least two unpublished North Carolina Court of Appeals opinions that seem to endorse the application of Rule 412 in indecent liberties cases. *See* State v. Coley, 2003 WL 22480053 (N.C. Ct. App. Nov. 4, 2003); State v. Conklin, 2002 WL 31895034 (N.C. Ct. App. Dec. 31, 2002). *Cf.* State v. Taylor, 2006 WL 851757 (N.C. Ct. App. April 4, 2006) (similar).

16. *In re* K.W., ___ N.C. App. ___, ___, 666 S.E.2d 490, 493 (2008).

17. Wilson v. Bellamy, 105 N.C. App. 446 (1992). *Wilson* was a civil suit in which the plaintiff alleged that she was gang raped while she was intoxicated at a fraternity party. Some of the defendants admitted some degree of sexual contact with the plaintiff but contended that the contact was consensual. The trial judge permitted the defense to cross-examine the plaintiff about the age at which she became sexually active, and on appeal the defense argued that her prior sexual activity showed that she likely consented to the sexual activity on the night in question. The court of appeals disagreed, stating that while its "research reveals that, to date, Rule 412 has only been applied in criminal cases . . . the logic . . . behind the law . . . is of similar import in the civil arena." *Id.* at 460.

18. N.C. R. Evid. 412(a).

19. Because the majority of complainants in sexual assault cases are female and the vast majority of defendants are male, this bulletin often uses feminine pronouns to refer to complainants and masculine pronouns to refer to defendants. Of course the evidentiary rules are the same regardless of the sexes of the individuals involved. This bulletin also refers to efforts by the "defendant" to introduce evidence of the complainant's prior sexual behavior while Rule 412 uses the more general term "proponent." This bulletin uses the term "defendant" because it is easier to follow and because, in virtually all cases, it will in fact be the defendant who seeks to introduce such evidence.

20. State v. Galloway, 304 N.C. 485, 489–91 (1981).

21. State v. Fortney, 301 N.C. 31, 43–44 (1980).

of sexually transmitted diseases,[22] are also inadmissible. Similarly a complainant's history of prostitution appears to be presumptively inadmissible.[23]

On the other hand, evidence that the complainant previously made false accusations of sexual assault is not covered by the Rule; the making of such accusations is not "sexual behavior."[24] At least one case has held that evidence that the complainant propositioned a third party for sex is not evidence of sexual behavior.[25] Also, evidence that a child complainant may have been exposed to adult nudity is not evidence of the child's sexual behavior.[26] Finally, evidence of a complainant's lack of prior sexual activity is not precluded by the Rule, though if the State chooses to introduce such evidence, it might permit the defense to introduce evidence to the contrary that would otherwise be inadmissible.[27]

The Rule limits not only what may be proved but also how it may be proved. If evidence about the complainant's sexual history falls within one of the Rule's exceptions and is otherwise admissible, the Rule nonetheless restricts the manner in which such evidence may be adduced. Specifically, "[s]exual behavior otherwise admissible under this rule may not be proved by reputation or opinion."[28] Thus if evidence about the complainant's sexual history is permitted, it must be introduced through the testimony of someone with appropriate knowledge such as the complainant herself, a confidante, or a former partner.

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22. State v. McCray, 2007 WL 2828884 (N.C. Ct. App. Oct. 2, 2007) (unpublished).

23. However, such evidence might be relevant if the defendant contended that he and the complainant engaged in sex for money. In such a case, the evidence might fit under the exception for a distinctive pattern of sexual behavior. *See generally infra* p. 9.

24. *See, e.g.*, State v. Thompson, 139 N.C. App. 299, 309 (2000); State v. Baron, 58 N.C. App. 150, 153–54 (1982). However, if a complainant has made prior accusations that are true, evidence of such accusations is normally inadmissible. Even if not barred by Rule 412, such evidence does not tend to impeach the complainant and is therefore irrelevant. State v. Wrenn, 316 N.C. 141 (1982). Thus, the defendant must establish that the prior accusations were false before evidence of the accusations may be admitted. If a complainant has made prior accusations, the truth or falsity of which are unknown, evidence of the accusations is inadmissible and irrelevant. *In re* K.W., ___ N.C. App. ___, ___, 666 S.E.2d 490, 494 (2008). The mere fact that charges arising out of the prior accusations were dismissed is insufficient to show that the accusations were false. State v. Anthony, 89 N.C. App. 93, 97 (1988).

25. State v. Guthrie, 110 N.C. App. 91, 93–94 (1993) (evidence that the complainant wrote a letter to a school friend asking for sex was evidence of "language," not sexual behavior). Some courts in other jurisdictions have treated sexual propositions as sexual behavior. *See, e.g.*, State v. DeNoyer, 541 N.W.2d 725 (S.D. 1995) (complainant's offer to perform oral sex on a friend was properly excluded under the rape shield rule). Whether or not sexual propositions are sexual behavior, evidence of such propositions will likely often be subject to exclusion under Rules 401 and 403.

26. State v. Yearwood, 147 N.C. App. 662 (2001) (holding that, although such evidence is not barred by Rule 412, it was nonetheless inadmissible because it was not relevant given the overwhelming evidence that the complainant had been sexually assaulted and was not traumatized merely as a result of prior exposure to adult nudity).

27. This issue is discussed more fully *infra* pp. 11–12.

28. N.C. R. Evid. 412(c).

The Four Exceptions Under Rule 412

1. Evidence of sexual activity "between the complainant and the defendant"

Such evidence is admissible because "prior consent from a complainant to the defendant on trial is relevant to the complainant's subsequent consent to that defendant."[29] Thus such evidence should be admitted only if the defense is consent. For example, if the defendant denies that any sexual activity took place, the sexual history between the complainant and the defendant is irrelevant.[30] Furthermore, when multiple defendants are charged with an offense, evidence of the complainant's prior sexual history with one of the defendants is admissible only as to that defendant. Thus if the defendants are tried separately, evidence of the complainant's prior sexual history with defendant A is not admissible in defendant B's trial. If the defendants are tried jointly, evidence of the complainant's prior sexual history with defendant A should be admitted subject to a limiting instruction that it is to be considered only in relation to defendant A.[31]

Even if a defendant is entitled to introduce evidence of the complainant's prior sexual history with him, it does not follow that every detail of that sexual history must be admitted. The evidence may be limited to that which is relevant to the consent issue; superfluous details of the sexual activity that serve no purpose but to embarrass or humiliate the complainant may be excluded.[32]

Where the defendant is charged with a single sexual assault, the complainant may testify that the defendant committed similar, uncharged assaults on her without running afoul of Rule 412, as such evidence is admissible under this exception.[33]

2. Evidence of "specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant"

This exception allows the defendant to present evidence that someone else committed the sexual assault in question.[34] It also allows the defendant to present evidence of sexual behavior by the complainant that tends to explain physical evidence in the case.[35] For example, in *State v. Ollis*,[36] the complainant claimed that on the same day that she was raped by the defendant she was also raped by the defendant's son. The trial judge did not allow the defense to cross-examine the complainant about the latter event, but the North Carolina Supreme Court held that the cross-examination should have been allowed under this exception "in order to show that the physical

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29. State v. Ginyard, 122 N.C. App. 25, 31–32 (1996).

30. State v. Harris, 189 N.C. App. 49 (2008).

31. *See Ginyard*, 122 N.C. App. at 31.

32. State v. Jenkins, 115 N.C. App. 520, 526–27 (1994).

33. State v. Spaugh, 321 N.C. 550 (1988) (affirming the trial court's decision to admit such evidence and finding that any error in failing to conduct an *in camera* hearing prior to admitting the evidence was harmless).

34. Generally, evidence of a third party's guilt is admissible in criminal cases only if it (1) creates more than an inference of conjecture of the third party's guilt and (2) is inconsistent with the guilt of the defendant. *See, e.g.*, State v. Floyd, 143 N.C. App. 128 (2001).

35. *See, e.g.*, State v. Fortney, 301 N.C. 31, 40 (1980) ("This exception is clearly intended, inter alia, to allow evidence showing the source of sperm, injuries, or pregnancy to be someone or something other than the defendant.")

36. 318 N.C. 370 (1986).

findings described by the physician who examined the victim were the result of [the other alleged rape]."[37]

Before ruling, the trial judge must consider whether there is sufficient evidence of the prior sexual activity,[38] and whether the prior sexual activity has the potential to explain the specific physical evidence at issue. In *State v. Harris*,[39] a rape case in which the complainant manifested cervical swelling and vaginal and anal tears, the defendant sought to introduce evidence of the complainant's sexual activity with her boyfriend on the same day as the charged offense. The complainant indicated that she had engaged in consensual heavy petting with her boyfriend and that he had "not quite" put his penis in her vagina. The trial court excluded the evidence and the North Carolina Supreme Court affirmed, finding that the prior activity did not involve penetration and was not forced and so could not explain the physical injuries suffered by the complainant.[40]

Finally, in cases involving sexual assaults against children, defendants might attempt to introduce evidence of other sexual activity by the complainants on the grounds that the other sexual activity provides an explanation for the complainants' knowledge of sexual matters. North Carolina's appellate courts have generally rejected such attempts absent a specific "opening of the door" by the State.[41] However, when such evidence is excluded, the State may not argue to the jury that the fact that the complainant knows about sexual matters is evidence of guilt.[42]

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37. *Id.* at 374; *see also* State v. Wright, 98 N.C. App. 658 (1990) (error to exclude evidence that complainant frequently masturbated, including using a washcloth, as such evidence could have explained complainant's genital irritation).

38. For example, in *State v. Adu*, ___ N.C. App. ___, ___, 672 S.E.2d 84, 87–88 (2009), the defendant was charged with raping his stepdaughter. The victim's hymen was damaged but the defendant claimed that the damage was due to the victim's grandfather having penetrated her. The trial court excluded evidence about the grandfather because, although there was substantial evidence the grandfather had abused the victim, there was insufficient evidence to show penetration. The victim denied penetration and had a reasonable explanation for the only physical evidence: blood on her underwear (which she attributed to menstruation) and on her grandfather's underwear (which she attributed to a boil on his buttocks). The court of appeals affirmed.

39. 360 N.C. 145 (2005).

40. *See also* State v. Holden, 106 N.C. App. 244 (1992) (evidence of sexual assault over two years prior to charged offense properly excluded as lack of temporal connection meant that prior assault could not explain the injuries associated with the charged offense); State v. Kandies, 342 N.C. 419 (1996) (similar).

41. *See*, *e.g.*, State v. Trogden, 135 N.C. App. 85, 87–90 (1999) (evidence of child complainant's prior sexual activity inadmissible but the court adds the following confusing limitation on its holding: "[S]ince [the complainant] testified at trial that defendant showed him how to perform sexual acts, defense counsel was not prohibited from cross-examining [him] concerning the way in which he learned to do such acts, so long as the cross-examination did not refer to specific acts."); State v. Bass, 121 N.C. App. 306, 310 (1996). Most courts in other jurisdictions have held that evidence of prior sexual activity may be introduced, in appropriate cases, to explain a child's knowledge of sexual matters and if the evidence is sufficiently probative, exclusion of the evidence may raise constitutional concerns. *See generally* Danny R. Veillux, Annotation, *Admissibility of Evidence That Juvenile Prosecuting Witness in Sex Offense Case Had Prior Sexual Experience for Purposes of Showing Alternative Source of Child's Ability to Describe Sex Acts*, 83 A.L.R. 4th 65 (1991); *infra* p. 12 (discussing constitutional concerns generally).

42. State v. Bass, 121 N.C. App. 306, 313–14 (1996).

3. Evidence of a distinctive pattern of sexual behavior that tends to prove consent

Like the exception for sexual activity between the complainant and the defendant, this exception is relevant only if the defendant claims that the complainant consented (or that the defendant reasonably believed that the complainant consented).[43] If the defendant seeks to show that he reasonably believed that the complainant consented based on a pattern of sexual behavior, he must show that he was aware of this pattern. However, if he seeks to show that the complainant *actually* consented, he need not establish that he was aware of the pattern.[44]

In order to show a pattern of sexual behavior, the defendant must show more than a few isolated instances of such behavior.[45] However, the prior instances need not be completely identical to the defendant's version of the alleged encounter. In *State v. Shoffner*,[46] the court of appeals held that evidence that the complainant would often seduce men at nightclubs by putting her hands all over them and that she seduced a man by getting into his car wearing a nightgown and no underwear should have been admitted to show a pattern of sexual aggression similar to the defendants' version of the charged offense, which was that the complainant invited the defendants to have an orgy. Likewise, evidence that a complainant traded sex for crack cocaine "is evidence of distinctive sexual behavior," presumably even if the details of the exchanges differ somewhat.[47] Evidence of prostitution generally should be treated in the same manner.

4. Evidence of "sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged"

This exception has not been the subject of much case law and it will likely remain so. North Carolina's appellate courts generally have held that judges lack the authority to order mental health examinations of witnesses.[48] Thus it will be a rare case in which the defense is able to muster evidence of a kind that is likely to fall within this exception.

Procedure Under Rule 412

Subsections (d) and (e) of Rule 412 set out the procedure for determining the admissibility of evidence that a defendant contends falls within one of the Rule's exceptions. Specifically, the Rule mandates that a defendant may not present any evidence of the complainant's sexual behavior unless he has first "appl[ied] to the court for a determination" of the relevance of such evidence.[49] The defendant may move for such a determination either prior to or during the trial, but

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43. State v. Harris, 189 N.C. App. 49 (2008).

44. State v. Ginyard, 122 N.C. App. at 32.

45. *Id.* at 32–33 (holding that the defendant failed to show a pattern of the complainant exchanging sex for drugs where the defendant's evidence showed only one such incident prior to the charged offense); State v. Rhinehart, 68 N.C. App. 615, 617 (1984) (holding that the defendant failed to show a pattern of the complainant offering to drive men home from bars and then having sex with them where the defendant's evidence consisted of one instance when the complainant drove her ex-boyfriend home from a bar and had sex with him).

46. 62 N.C. App. 245 (1983).

47. State v. Ginyard, 122 N.C. App. 25, 33 (1996); *cf.* State v. Fletcher, 125 N.C. App. 505 (1997) (suggesting, though not holding, that evidence that a complainant routinely traded sex for crack cocaine would be admissible under this exception).

48. *See, e.g.*, State v. Liles, 324 N.C. 529, 534 (1989) ("This Court has previously held that trial judges do not have discretionary power to compel an unwilling witness to submit to a psychiatric examination.").

49. N.C. R. Evid. 412(d).

if the defendant fails to move for such a determination, it is not error to exclude any evidence the defendant seeks to introduce regarding the complainant's sexual history.[50]

In response to such an application, the trial judge must conduct a recorded *in camera* hearing at which the defendant may make an offer of proof. Generally, defense counsel will do so by examining or cross-examining a witness; a mere proffer by defense counsel regarding a witness's expected testimony is insufficient.[51] The trial judge may limit the examination appropriately. For example, the judge might preclude inquiry into the manner in which the charged offense was committed, as such evidence does not relate to sexual activity "other than the sexual act which is at issue" in the case and, therefore, is not subject to analysis under Rule 412.[52] The judge must also hear any argument of counsel, including any counsel for the complainant, on the issue.[53] If the defendant fails to offer evidence of sexual behavior by the complainant that is admissible under Rule 412, he should be prohibited from asking any questions regarding the complainant's sexual behavior.[54]

If any issue of conditional relevance arises, the judge must not admit the evidence subject to later proof of a necessary fact, but rather must determine during the hearing whether there is sufficient evidence of the necessary fact to merit the admission of the evidence of sexual behavior.[55] For example, if the defendant seeks to introduce evidence of a pattern of behavior under the pattern of behavior exception in Rule 412(b)(3), the court must hear not only the evidence of the pattern, but also the evidence of the defendant's version of the alleged encounter; the court may not admit the pattern evidence conditionally, subject to a later showing that the defendant's version of events lines up with the pattern.

The record of the *in camera* hearing shall be available only to the parties, the complainant, their attorneys, and the appellate courts.[56] If the *in camera* hearing takes place during a probable cause hearing, the judge may rely on the contents of the hearing in determining probable cause

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50. State v. Norris, 101 N.C. App. 144, 150 (1990) (finding no plain error in excluding cross-examination of complainant regarding prior sexual conduct based on defendant's failure to move for determination of relevance).

51. State v. Cook, ___ N.C. App. ___, ___, 672 S.E.2d 25, 30 (2009). Whether the offer of proof may be made by the submission of an affidavit is an issue not addressed in any of the reported cases. While in some circumstances this may be proper, *see generally* N.C. R. Evid. 104(a) cmt. (noting that preliminary questions concerning the admissibility of evidence may often be resolved by the consideration of affidavits), Rule 412's requirement of an *in camera* hearing suggests that live testimony should be the normal method of proof. *Cf. In re* Custody of Griffin, 6 N.C. App. 375 (1969) (concluding that whether affidavits are an appropriate method of proof depends on whether the need for a speedy proceeding outweighs the shortcomings of affidavits).

52. State v. Mason, 315 N.C. 724, 729 (1986). However, a defendant seeking to introduce evidence under the pattern-of-behavior exception might be entitled to examine the complainant about facts underlying the charged offense that are consistent with the pattern.

53. Rule 412 does not provide unrepresented complainants the right to be heard nor does it provide the complainant with a right to counsel. Prosecutors and judges should therefore be alert to the interests of unrepresented complainants.

54. *Cook*, ___ N.C. App. at ___, 672 S.E.2d at 30; State v. Hammett, 182 N.C. App. 316 (2007) (during *in camera* hearing, complainant denied having had sex with a third party, and defendant failed to call the third party to testify otherwise).

55. N.C. R. Evid. 412(d).

56. N.C. R. Evid. 412(e).

without requiring the parties to repeat the evidence in open court.[57] A witness's testimony at the *in camera* hearing may be used to impeach the witness if he or she testifies differently at trial.[58]

Special Cases

There are a few circumstances under which evidence that would otherwise be excluded by Rule 412 is admissible.

Prior inconsistent statements

When a complainant has made prior statements regarding her sexual activity that are inconsistent with her trial testimony, these statements are the proper subject of impeachment notwithstanding Rule 412.[59] However, when a complainant has made multiple out-of-court statements about her sexual history that are inconsistent with one another, but does not testify regarding that part of her sexual history, the court probably should not permit cross-examination regarding the prior statements.[60]

Opening the door

Sometimes the State will ask a complainant whether she has ever had sex with anyone other than the defendant, or whether she had sex with anyone other than the defendant near the time of the charged offense. For example, if a complainant becomes pregnant or contracts a sexually transmitted disease after the charged offense, the State may elicit such testimony in order to prove that intercourse occurred. Such testimony is admissible and does not violate Rule 412.[61] However, in such circumstances, the defense may argue that the State has "opened the door" to the introduction of evidence about the complainant's sexual history for purposes of impeachment. This is so, although it does not mean that the defendant may embark on a fishing expedition by

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57. *Id.*

58. State v. Najewicz, 112 N.C. App. 280 (1993).

59. *In re* K.W., ___ N.C. App. ___, 666 S.E.2d 490 (2008) (where complainant testified that she was a virgin prior to the alleged sexual assault, defendant should have been permitted to impeach her testimony with her MySpace page on which she stated that she was not a virgin); State v. Younger, 306 N.C. 692 (1982) (where complainant testified that she had sex with her boyfriend the same night that the alleged rape took place but she had previously told an examining physician that she had last had sex about a month before the alleged rape, the defense was entitled to impeach her with the prior inconsistent statement).

60. State v. Taylor, 2006 WL 851757 (N.C. Ct. App. April 4, 2006) (unpublished). In *Taylor*, the complainant told a defense attorney that she was pregnant but denied the pregnancy to the prosecutor. The pregnancy, if indeed there was one, was not caused by the defendant and was not directly relevant to the trial. The defendant argued that he should have been permitted to cross-examine the complainant about the pregnancy, presumably as a specific instance of conduct relevant to truthfulness under Rule 608(b), but the trial court did not permit the cross-examination and the court of appeals agreed, at least in part because the cross-examination would have involved the complainant's sexual behavior.

61. State v. Stanton, 319 N.C. 180 (1987). At least when the complainant is deceased, the State may also introduce evidence of the complainant's sexual behavior to rebut a defendant's claim of consent. For example, when a defendant charged with rape and murder claimed that the decedent came on to him, performed oral sex on him, and had consensual intercourse with him, it was proper for the decedent's husband to testify to the decedent's aversion to oral sex. The decedent could not be subjected to embarrassing cross-examination, and a contrary rule would allow the defendant to use Rule 412 to evade damaging evidence. State v. Sexton, 336 N.C. 321 (1994).

cross-examining the complainant about whatever details of her sexual history come to mind. Instead, the defendant should request an *in camera* hearing, at which he must show that he has evidence that impeaches the complainant's testimony. If the defendant has such evidence, it should probably be admitted.[62]

Exceptions required by the United States Constitution

Generally speaking, Rule 412 does not violate the United States Constitution. For example, although it may limit the scope of the defendant's cross-examination of the complainant, it has been held not to violate the Confrontation Clause of the Sixth Amendment.[63] In rare circumstances, however, evidence that would otherwise be excluded by Rule 412 may be admissible in order to preserve the defendant's Sixth Amendment rights to confrontation and to present a defense. For instance, if the State calls an expert witness who testifies that the complainant suffers from post-traumatic stress disorder, which is consistent with being the victim of a sexual assault, the defendant may be entitled to present evidence of other sexual assaults suffered by the complainant in order to provide an alternative explanation for the diagnosis.[64] Likewise, if a child is sexually active, someone with knowledge of the sexual activity threatens to disclose it to the child's parent, and the child subsequently accuses that person of a sexual assault, the accused might be entitled to present at least some evidence of the child's behavior, together with the accused's threatened disclosure of the behavior, in order to show that the child had a motive to make false accusations.[65]

Whether the United States Constitution entitles a defendant to introduce evidence that would otherwise be excluded by Rule 412 is a determination that must be made case by case.[66] In some circumstances, trial judges may be able to fashion compromises that preserve the interests of both sides. For example, where a defendant contends that a complainant has falsely accused him of rape rather than admit to her partner that she had consensual sex with the defendant,

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62. *See generally* State v. Degree, 322 N.C. 302 (1988) (the complainant, who became pregnant, testified that she hadn't had sex with anyone but the defendant; defense counsel was properly precluded from undertaking a fishing expedition about other possible partners but "[h]ad defendant possessed evidence of the victim's sexual behavior which he contended was relevant for impeachment purposes, he could have requested an *in camera* hearing to determine its relevancy and admissibility); State v. Fenn, 94 N.C. App. 127 (1989) (following *Degree*).

63. *See*, *e.g.*, State v. Fortney, 301 N.C. 31 (1980).

64. Barbe v. McBride, 521 F.3d 443 (4th Cir. 2008) (granting federal habeas relief after such evidence was excluded by a state court).

65. *Compare* State v. Jalo, 557 P.2d 1359 (Or. Ct. App. 1976) (defendant entitled to introduce evidence of ten-year-old complainant's sexual activity where defendant contended that complainant accused him of rape only after he threatened to report her activity to her parents), *with* State v. Rogers, 642 A.2d 932 (N.H. 1994) (similar facts; defendant entitled to ask complainant whether he had threatened to report her sexual activity to her mother but not entitled to explore details of the sexual activity).

66. *Barbe*, 521 F.3d at 449 ("[A] state court cannot impose a per se rule for disallowing evidence under a rape shield law; rather, it must determine, on a case-by-case basis, whether the exclusionary rule is arbitrary or disproportionate to the State's legitimate interests." (internal quotation marks and citations omitted)). *See generally* Michigan v. Lucas, 500 U.S. 145 (1991) (suggesting that whether a state rule of procedure or evidence may trump a defendant's right to present relevant evidence in support of his defense is a decision that must be made case by case). For a collection of fact patterns under which this issue has arisen, see 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5387 (1980 & Supp. 2009).

the defendant is entitled to introduce evidence of the relationship between the complainant and her partner.[67] However, it is likely sufficient to allow the defendant to establish that the complainant and her partner are or were in a dating relationship; the sexual details of the relationship may, and should, be excluded.[68]

The Defendant's Prior Sexual Misconduct

The above discussion is intended to clarify the law governing a defendant's efforts to introduce evidence about a complainant's sexual history. The State's efforts to introduce evidence about a defendant's history of sexual misconduct, by contrast, are regulated not by Rule 412 but by Rule 404(b). The text of the rule is as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

The first sentence of Rule 404(b) seems to create a rule of inadmissibility subject to limited exceptions, but North Carolina's appellate courts have repeatedly held that the Rule "is a general rule of inclusion of such evidence, subject to an exception if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged."[69] The proper purposes listed in the Rule are "neither exclusive nor exhaustive."[70]

The North Carolina Supreme Court "has been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b), such as establishing the defendant's identity as the perpetrator of the crime charged."[71] Indeed, a leading commentator has suggested that sex offenses are virtually *sui generis* as to Rule 404(b).[72] Even a cursory review of recent cases shows that evidence of prior sexual misconduct is regularly found to be relevant to one or more proper purposes.

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67. *See, e.g.*, Olden v. Kentucky, 488 U.S. 227 (1988). In *Olden*, the complainant accused the defendant of rape after the complainant's boyfriend saw the complainant exiting a vehicle associated with the defendant. The defendant sought to introduce evidence about the complainant's relationship with her boyfriend, including the fact that at the time of trial she was living with him. The trial judge refused to allow the evidence, not under Kentucky's rape shield rule but rather based on the judge's determination that evidence that the complainant was cohabiting would prejudice the jury against her, especially because she was white and her boyfriend was black. The Supreme Court held that the defendant had a Sixth Amendment right to introduce the evidence; presumably the Court's reasoning would apply equally to a similar case where the trial judge's ruling was grounded in a rape shield rule.

68. *See, e.g.*, State v. Harrell, 2005 WL 88947 (N.C. Ct. App. Jan. 15, 2005) (unpublished) ("[W]e note the trial court did not preclude defendant from examining [the complainant] about her dating relationship" with her boyfriend; trial court properly excluded evidence of the complainant's *sexual* relationship with her boyfriend).

69. State v. West, 103 N.C. App. 1, 9 (1991).

70. State v. Morgan, 315 N.C. 626, 637 n.2 (1986).

71. State v. Cotton, 318 N.C. 663, 666 (1987).

72. 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence 288 (6th ed. 2004).

The analysis does not end with the showing of a proper purpose, however. Even if the prior acts are offered for a proper purpose, if the prior acts are dissimilar to the charged offense, or are too remote in time, evidence of the prior acts should still be excluded. Cases sometimes suggest that this analysis is required by Rule 404(b), but it is better understood as an application of the balancing test of Rule 403.[73] In practice this process has been applied liberally in favor of admitting evidence of prior sexual misconduct in sexual assault cases.

As to similarity, North Carolina's appellate courts have held that similarities need not be "bizarre or uncanny," but must simply "tend to support a reasonable inference" that the same person committed both acts.[74] Thus in *State v. Bowman*,[75] where the defendant was charged with allowing his friends to use his apartment to have sex with underage girls, the State was permitted to introduce evidence that the defendant groped a teenage male during a golf lesson years earlier. Despite the differences between the two fact patterns, the court of appeals found the evidence sufficiently similar because the victims in both instances were teenagers and both incidents were "sexually related."[76] And in *State v. Quinn*,[77] the State was allowed to introduce evidence that the defendant had viewed pornography on his home computer in a prosecution for kidnapping and having sex with a thirteen-year-old girl he met on the internet.[78] Of course there is a limit to the courts' willingness to find sufficient similarity. In *State v. Ray*,[79] the court of appeals held that it was improper, during a defendant's trial on charges of having digitally penetrated a seven-year-old girl at a party, to admit evidence that the defendant assaulted his adult ex-girlfriend with a gun fifteen years earlier.

As to remoteness in time, in *State v. Penland*,[80] the North Carolina Supreme Court held that a ten-year time gap was not long enough to require the exclusion of evidence regarding the defendant's prior deviant sexual activity. Many cases have allowed even older evidence[81] and a smaller number have required the exclusion of more recent evidence.[82] When evidence of prior bad acts is offered to show a common scheme or plan, temporal proximity must be scrutinized more closely. Temporal proximity is less critical when such evidence is offered to show "intent,

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73. *See, e.g.*, State v. Boyd, 321 N.C. 574, 577 (1988).

74. State v. Simpson, ___ N.C. App. ___, ___, 653 S.E.2d 249, 253 (2007) (internal quotation marks and citations omitted).

75. 188 N.C. App. 635 (2008).

76. *Id.* at 640.

77. 166 N.C. App. 733, 736–37 (2004).

78. *But cf.* State v. Bush, 164 N.C. App. 254, 261–62 (2004) (error to admit evidence that the defendant possessed pornography absent evidence that he used it to entice the complainant into sexual activity or some other connection to the offense).

79. ___ N.C. App. ___, ___ S.E.2d ___, 2009 WL 1981395 (N.C. Ct. App. July 7, 2009).

80. 343 N.C. 634, 652–54 (1996).

81. *See, e.g.*, State v. Dyson, 165 N.C. App. 648, 655–56 (2004) (evidence of misconduct eleven years earlier properly admitted); State v. Patterson, 149 N.C. App. 354 (2002) (evidence of misconduct ten to fifteen years earlier properly admitted); State v. Love, 152 N.C. App. 608, 613–14 (2002) (twenty-six-year time gap did not require exclusion given the striking degree of similarity). *But see* State v. Delsanto, 172 N.C. App. 42, 50–51 (2005) (holding that evidence of prior sexual misconduct twenty-three years earlier was too remote in time to be admitted).

82. *See, e.g.*, State v. Jones, 322 N.C. 585 (1988) (evidence of similar conduct seven years before the charged offenses too remote).

motive, knowledge, or lack of accident."[83] Furthermore, when a defendant has little opportunity to engage in misconduct between the time of the prior bad act and the time of the charged offense (for example, due to incarceration or lack of access to a victim), this should be taken into account in the temporal calculus.[84]

Finally, questions sometimes arise regarding how to prove prior bad acts that resulted in a criminal conviction, that is, should the State introduce the underlying facts, the conviction itself, or both? The most recent appellate case law indicates that the State should introduce *only* the underlying facts and not the conviction unless the defendant testifies and the conviction becomes admissible for impeachment under Rule 609.[85]

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83. State v. Hipps, 348 N.C. 377, 405 (1988); *see also Dyson*, 165 N.C. App. at 655–56; *Delsanto*, 172 N.C. App. at 50–51.

84. *See, e.g.*, State v. Chavis, 141 N.C. App. 553, 564 (2000); State v. Jacob, 113 N.C. App. 605, 611 (1994).

85. State v. Badgett, 361 N.C. 234, 247 (2007).