Evidence Issues in Sexual Assault Cases

Advanced Criminal Evidence for Superior Court Judges
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Famous basketball player Danny Defense is charged with raping Cindy Complainant in the co-ed restroom of an upscale nightclub in Charlotte. You are presiding over the trial.

The parties agree on many facts, including that Danny had never met Cindy before the night in question, that Cindy approached Danny and asked him for an autograph, that the two had a drink together, and that they went to the restroom together. The parties also agree that Cindy left the club shortly after the restroom visit, and that she immediately contacted the police. A rape kit was performed at a local hospital, and Danny's pubic hair and semen were recovered. You expect Danny to argue that he and Cindy had consensual sex.

Several evidentiary issues are likely to arise in the trial.

1. Danny wants to introduce evidence that Cindy often went to bars and clubs that professional athletes were known to frequent, and that on at least two prior occasions, she had approached an athlete, conversed with him, and had sex with him within a few hours of meeting him.

   Danny will argue that this evidence is admissible under Rule 412(b)(3) as a distinctive pattern of sexual behavior that tends to prove consent. See generally AOJB at 9. Although one prior incident would not be enough to establish a pattern, two might be, particularly if they were relatively recent. And there would be a pattern even if there were some differences in the details of the encounters, such as the athletes playing different sports, or whether Cindy had been drinking. Assuming that Danny satisfies the procedural requirements of Rule 412 and that the previous encounters were relatively recent, this evidence is probably admissible.

2. Danny also wants to introduce evidence that Cindy was dating, and was in a sexual relationship with, Bob Boyfriend. Danny contends that one of Bob's friends came in the bathroom and saw Cindy and Danny together, and that Cindy fabricated the rape charge to avoid accusations of infidelity from Bob.

   The fact that Cindy and Bob were in a dating relationship is not evidence of Cindy's sexual behavior, so it is not barred by Rule 412, and it is relevant because it suggests a motive for Cindy to lie. Therefore, it is admissible.

   The fact that Cindy and Bob were in a sexual relationship, on the other hand, is evidence of Cindy's sexual behavior, and none of the exceptions in Rule 412 apply. If the fact that Cindy and Bob were in a sexual relationship added much to Cindy's motive to lie, Danny might be able to argue that he has a constitutional right to introduce evidence of the sexual relationship that trumps the strictures of Rule 412. See Olden v. Kentucky, 488 U.S. 227 (1988) (similar facts). But it doesn't appear to add much to the motive that exists because of the dating relationship, so this argument doesn't work and the evidence is inadmissible. See generally AOJB at 12-13.

3. Further, Danny wants to introduce evidence that, five years earlier, Cindy claimed to have been raped by a co-worker. She reported the incident to the police, but no charges were ever filed. The co-worker is prepared to testify that the claim was false, while the officer who investigated the incident would testify that Cindy's story wasn't always consistent.

   The fact that a complainant previously made a false accusation concerning a sexual assault is not evidence of the complainant's sexual behavior, and therefore is outside the scope of Rule 412. AOJB at 6. The key issue therefore becomes whether Danny can show that Cindy's prior accusation was false. (If it was true, it is inadmissible, either under Rule 412 or general relevancy principles.) Case law provides that the mere fact that charges were dropped is not enough the falsity of the underlying accusation, because charges may be dropped for many possible reasons. By analogy, the mere fact that charges were never brought based on Cindy's earlier complaint is likewise insufficient to show that her prior allegations were false. On the other hand, it is sufficient if the defendant can show that charges were "withdrawn" by the complainant after she changed her story several times, or if the person formerly accused by the complainant is willing to testify that the accusations were false. See State v. Ginyard, 122 N.C. App. 25 (1996); State v. Baron, 58 N.C. App. 150 (1982). Since Danny at a minimum satisfies the latter test, this evidence is admissible.

   You get extra credit if you considered whether this evidence is excluded by Rule 608(b), which says that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence." There's no North Carolina appellate case right on point, but Baron suggests that evidence of prior false accusations should be admitted. (If not admissible under the evidence rules, such evidence may be so critical that its admission is required by the Constitution.)

4. Finally, Danny wants to introduce evidence that, the day after Danny allegedly raped her, Cindy was in another club, dancing with a man she had just met there.

   This is not evidence of Cindy's sexual behavior, so it is not covered by Rule 412. It is subject to the usual Rule 401/Rule403 analysis, and is admissible if you find it is inconsistent with Cindy having just been raped and therefore probative.

   What if Danny had evidence that Cindy had sex with someone the next day? This would be evidence of sexual behavior and it would not fall within any of the exceptions in Rule 412, so it would seem to be inadmissible. But it may be unconstitutional to deny Danny this valuable impeachment evidence. See State v. Horrocks, 747 A.2d 25 (Conn. Ct. App. 2000) (Confrontation Clause trumps rape shield law; defendant should have been allowed to introduce evidence that complainant had "wild sex" with the LEO investigating rape allegation the night of the alleged rape).

5. Meanwhile, the state wants to introduce evidence that Danny attended a party the year before the incident with Cindy; that he met Valerie Victim at the party; that he and Valerie had a drink together; and that he led her into a guest bedroom and raped her.

   This is, of course, a Rule 404(b) question. The state will argue that the evidence is offered for a proper purpose, namely, to show that Danny had a common plan of meeting women in social settings, drinking

with them, and taking them to a secluded area to assault them. It might also argue that the evidence is relevant to show Danny's intent. The case law suggests that the state should prevail on this argument. See generally AOJB at 13. You should also consider Rule 403, under which the key considerations are the similarity and recency of the defendant's prior misconduct. Here, the conduct is relatively similar and quite recent, so the evidence should be admitted. Note that if Danny was convicted in connection with the prior incident, the fact of conviction is probably not admissible, unless Danny testifies and it comes in for impeachment.

6. The state also wants to introduce evidence that ten years earlier, when Danny was a high school student, he molested his eight-year-old niece in his living room while babysitting her.

   This is also a 404(b) question. The first step is to determine whether there is a proper purpose for this evidence. The state may argue that it tends to show Danny's ongoing plan to engage in sexual assaults, or that he didn't make a mistake regarding consent since he'd engaged in non-consensual activity before. Assuming arguendo that the state can clear this hurdle – and the case law in this area is fairly permissive, so it probably can – this evidence is nonetheless likely inadmissible, because it probably fails the balancing test of Rule 403. The facts of the prior incident are quite different from the facts of Danny's encounter with Cindy, and the prior incident was a relatively long time ago. Cf. State v. Ray, __ N.C. App. __, 678 S.E.2d 378 (2009).

7. In rebuttal, the state wants to have Cindy testify that she is a lesbian and is not sexually interested in men. The state claims that this evidence tends to undercut Danny's claim of consent.

   The admissibility of this evidence is unsettled. The key question is whether evidence of sexual orientation is evidence of sexual behavior. Some cases say so, on the theory that orientation implies behavior. If this is correct, then Rule 412 likely prohibits the introduction of such evidence, and the fact that the state is the proponent of the evidence is immaterial. See, e.g., People v. Kemblowski, 559 N.E.2d 247 (Ill. Ct. App. 1990) (fact that victim was a lesbian not admissible under rape shield law).

   Alternatively, one could argue that having a sexual orientation doesn't require one to engage in sexual activity. On this view, evidence of sexual orientation would fall outside the scope of Rule 412, and it would probably be relevant and admissible in this case, where Danny is expected to relay on consent. Of course, if this evidence is admitted, it likely will open the door to evidence of prior heterosexual activity by Cindy. See State v. Lessley, 601 N.W. 2d 521 (Neb. 1999) (complainant testified that she was a lesbian; male defendant who claimed consent should have been allowed to introduce evidence of victim's encounters with men).