Application of the Rape Shield Rule

Advanced Criminal Evidence for Superior Court Judges
May 2015

Famous basketball player Danny Defense is charged with raping Cindy Complainant in the parking lot behind an upscale nightclub in Charlotte. You are presiding over the trial.

The parties agree on many facts, including that Cindy saw Danny in the club that night; that she approached Danny and asked him for an autograph; that the two had a drink together; and that they went outside together. There are no third-party witnesses to what happened in the parking lot. Cindy left the area shortly after she went outside with Danny, and immediately contacted the police. A rape kit was performed at a local hospital, and pubic hair and semen were recovered and analyzed; the DNA contained therein is consistent with Danny's. Danny's defense is that he and Cindy had consensual sex and that Cindy is claiming rape to cover up her infidelity to her boyfriend and/or in order to extort money from Danny.

Several evidentiary issues arise:

1. Danny is prepared to testify that he and Cindy went to the same high school in Fayetteville, North Carolina; that they were not close friends but ran in similar social circles; that at a party after their senior prom, he and Cindy "made out" but did not have sex; and that he has not seen Cindy since he graduated from high school seven years ago. Does this evidence fall within an exception to the rape shield rule?

   Yes. It falls under the exception in Rule 412(b)(1) for sexual behavior between the defendant and the complainant. Nothing in the rule limits sexual activity or behavior to intercourse. Cf. State v. Everidge, 702 So. 2d 680 (La. 1997) (ruling that a trial court improperly excluded evidence that the complainant hugged and kissed the defendant hours before the alleged rape, and noting that "[p]ast sexual behavior is not limited to sexual intercourse").

   However, the fact that the prior activity did not involve intercourse, and the fact that it took place a long time before the events at issue in the trial, tend to reduce the relevance of the prior activity to whether Cindy consented on the night in question. So, although this evidence is not barred by Rule 412, it might be subject to exclusion under Rule 403.

2. Danny wants to call Cindy's then-boyfriend, Bob, to testify that he and Cindy had sex the day before the night in question. Assuming that Danny follows the required procedures regarding an in camera hearing and the like, should this evidence be admitted under an exception to the rape shield rule?

   No. If Danny were denying sexual contact with Cindy, this evidence would be admissible. It would fall within the exception in Rule 412(b)(2) for specific instances of behavior that show that the acts in question were not committed by the defendant, because it would provide an alternate explanation for the semen and pubic hair that were recovered from Cindy. State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (2014). However, Danny is not denying that he had sex with Cindy. There is no issue in this case regarding whether Danny committed the acts. He admits that he did, leaving only the question of

whether Cindy consented to them. The evidence regarding Bob should therefore be excluded. See generally State v. Harris, 360 N.C. 145 (2005).

3. For this question, assume that Danny's defense is not consent, but rather that he did not have any sexual contact with Cindy. Assume further that he has been allowed to introduce evidence about Cindy's sex with Bob the day before he saw Cindy at the nightclub. Should he also be allowed to introduce evidence that Cindy had sex with a neighbor the day before she had sex with Bob?

   Probably not. Under this scenario, the evidence about Bob is admissible under the exception in Rule 412(b)(2) for specific instances of behavior that show that the acts in question were not committed by the defendant, because it provides an alternate explanation for the semen and pubic hair that were recovered from Cindy. But once a viable alternate source for the physical evidence has been established, introducing evidence of other possible sources adds little probative value and risks embarrassing or humiliating the complainant. State v. Khouri, 214 N.C. App. 389 (2011) (once the defendant had established that another man might be responsible for the victim's pregnancy, evidence of a third sexual partner was properly excluded).

4. Back to the consent defense. Danny wants to call two professional football players who also live in Charlotte. Quincy Quarterback is prepared to testify that he often saw Cindy at clubs that were popular with professional athletes; that Cindy approached him in such a club about a year earlier; and that she performed oral sex on him in his car within a few hours of meeting him. Lenny Linebacker is prepared to testify that Cindy approached him in a bar about two years ago, and that the two had sex in a bathroom at the bar that night. Does this evidence fall within an exception to the rape shield rule?

   Probably so. The question is whether this evidence is admissible under Rule 412(b)(3) as a distinctive pattern of sexual behavior that tends to prove consent. Although one prior incident would not be enough to establish a pattern, two might be, especially given that they were relatively recent. The similarities here include (1) the profession of the men involved, (2) the setting of each meeting, (3) the rapid progress from the initial meeting to sexual activity, and (4) the location of the sexual activity. The similarities here are stronger than those found sufficient in State v. Shoffner, 62 N.C. App. 245 (1983) (finding a pattern where the complainant had a history of seducing men at nightclubs).

5. For this question, assume that none of the evidence about Cindy's recent sexual activity with Bob Boyfriend, discussed above, is offered in the case. Danny still wants to (1) call Bob to testify that he and Cindy were dating exclusively and were in a sexual relationship at the time of Cindy's encounter with Danny, and (2) call a bartender from the club who is prepared to testify that one of Bob's friends was at the club on the night in question and saw Cindy and Danny together. Danny asserts that this evidence will support his theory that Cindy fabricated the rape charge in part to avoid accusations of infidelity from Bob. Is the evidence admissible?

   Some is and some isn't. The fact that Cindy and Bob were in a <u>dating</u> relationship is not evidence of Cindy's sexual behavior, so it is not barred by Rule 412. When combined with the bartender's testimony, the evidence is relevant because it suggests a motive for Cindy to lie. Therefore, it is admissible. The fact that Cindy and Bob were in a <u>sexual</u> 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 something 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.

6. 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 was adamant about the rape but that no charges were filed because the investigation did not turn up any corroborating evidence. May Danny introduce evidence about Cindy's previous accusation?

   Yes. If a complainant previously made a false accusation concerning a sexual assault, that is not sexual behavior and therefore is outside the scope of Rule 412. On the other hand, if the accusation is truthful, then evidence about the accusation is evidence about the complainant's sexual behavior and is barred by Rule 412. Therefore, this question boils down to whether Danny can make a sufficient showing that Cindy's prior accusation was false. The mere fact that charges were not brought or were dropped is not enough to establish the falsity of the underlying accusation. But 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). The testimony from the co-worker satisfies the latter test, so 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.)

7. For this question, assume that the evidence about Cindy's previous claim of rape is admissible. Must Danny request an in camera hearing before introducing this evidence? Or does it fall outside the procedures required by Rule 412 because it does not involve evidence of Cindy's sexual conduct?

   Although it may not be obvious from the face of Rule 412, Danny must request an in camera hearing. State v. Okawara, __ N.C. App. __, 733 S.E.2d 576 (2012). At such a hearing, you must determine whether Danny's evidence that the prior allegation was false is sufficient to allow Danny to introduce the evidence.

8. Danny wants to introduce evidence that, the day after Danny allegedly raped her, Cindy was in another club, dancing closely with a man she had just met there. Is this evidence excluded by Rule 412?

   No. This is not evidence of Cindy's sexual behavior, so it is not covered by Rule 412.

   This evidence is, of course, subject to the usual Rule 401/403 analysis. It is admissible if you find that Cindy's behavior is inconsistent with, or tends to cast doubt upon, her claim of having been raped.

Note that if Danny had evidence that Cindy had sex with someone the next day, this evidence would not fall within any of the exceptions in Rule 412, and would seem to be inadmissible. But it may be unconstitutional to exclude such evidence. See State v. Horrocks, 747 A.2d 25 (Conn. Ct. App. 2000) (ruling that the defendant should have been allowed to introduce evidence that complainant had "wild sex" with the officer investigating her rape allegation on the night of the alleged rape, because such evidence cast serious doubt on the veracity of her claim of rape).

9. 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. Is it admissible?

   Unclear. 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) (ruling that the fact that the victim was a lesbian was not admissible under the state's rape shield law).

   Alternatively, one could argue that having a sexual orientation does not imply 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 to rebut Danny's claim of consent. Of course, admitting this evidence would 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).