

Rape Shield Law

N.C. R. EVID 412

Historical Background

- ▶ Prior to 1977, no statute specifically governed admissibility of evidence about the sexual history of the complainant in rape and sex offense cases.
- ▶ Therefore, it is permissible to admit evidence of the complainant's general reputation for unchastity both to attack her credibility as a witness and to show the likelihood of her consent. State v. Fortney, 301 N.C. 31, 36 (1980).

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;
 - (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. (1983, c. 701, s. 1.)

In Other Words...

North Carolina's rape shield law prohibits the introduction of any evidence about the "sexual behavior of the complainant" other than the sexual acts at issue in the case, unless the evidence falls within one of four exceptions.

The two most commonly raised exceptions are:

- 1) Previous sexual contact between the complainant and the defendant; and
- 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 comes up most frequently when the defendant wants to introduce an alternative explanation for physical evidence of a sexual assault.)

Evidence covered by the rule.

- ▶ Sexual behavior : sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.
- ▶ Sexual behavior includes:
 - ▶ Proof by direct evidence: how many partners she has had; how quickly she became intimate; details of previous encounters
 - ▶ Proof by indirect evidence: non-virginity; use of birth control; semen stains on clothing; history of STDs; history of prostitution.

Evidence not covered by the rule.

- ▶ Sexual behavior does not include:
 - ▶ Conversations regarding sexual activities;
 - ▶ False accusations about sexual assaults;
 - ▶ Evidence that a child victim had been exposed to nudity or pornography (although not barred by the Rule still may not be relevant).

Admissibility

Determining the admissibility of evidence about prior sexual misconduct by the defendant requires application of N.C. R. Evid. 404(b), which both governs prior bad acts and requires application of the balancing test set forth in N.C. R. Evid. 403.

Procedure to Determine Admissibility

- ▶ (c) (1) Motion: If a party intends to offer evidence under Rule 412(b), the party must:
 - ▶ (A) file a motion that specifically describes the evidence and states the purpose of which it is offered;
 - ▶ (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
 - ▶ (C) serve the motion on all parties; and
 - ▶ (D) notify the victim, or, when appropriate, the victim's guardian or representative.
- ▶ (2) Hearing: Before admitting the evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.
- ▶ "Victim" includes and alleged victim.

In Other Words...

Unless and until the court determines the sexual behavior is relevant, no reference to it may be made in the presence of the jury and no evidence of this behavior may be introduced:

- ▶ Proponent (defendant) shall first apply to the court for a determination of the relevance of the sexual behavior;
- ▶ The court conducts an in camera hearing to make the determination. The hearing shall be closed to the public and the record of this proceeding sealed, except as to parties, the complainant, their attorneys the court and its agents.

Manner of Proof

- ▶ If evidence of the complainant's sexual history falls within one of the Rule's exception and is otherwise admissible, the Rule restricts the manner in which the evidence may be introduced.
- ▶ "Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion" N.C. R. Evid. 412(c).
- ▶ If the 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 former partner.

Indirect Evidence

Indirect evidence of sexual behavior such as:

- 1) Evidence of a complainant's nonvirginity;
- 2) Use of birth control;
- 3) The presence of semen stains on her clothing; or
- 4) Her history of sexually transmitted diseases

is also **inadmissible**.

What about evidence of:

- 1) History of prostitution; or
- 2) Previously made false accusations?

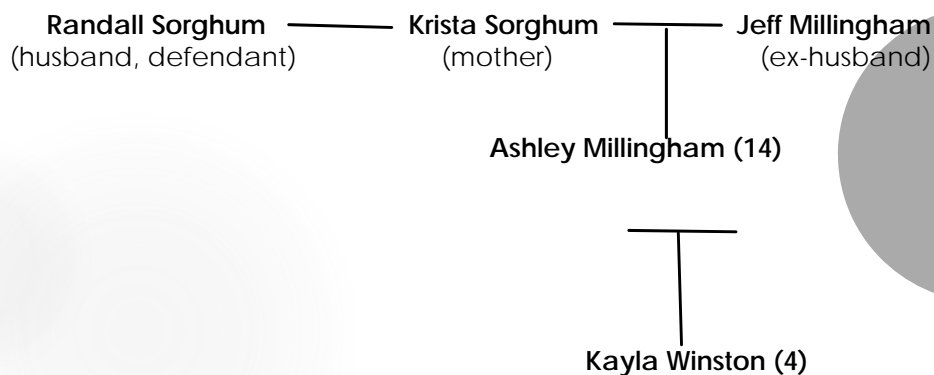
Admissibility of Victim's Behavior

- ▶ Such behavior:
- ▶ (1) evidence of specific instances of sexual behavior offered for the purpose of showing that someone other than the Defendant was the source of semen, injury or other physical evidence. (SODDI)
- ▶ (2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct,
 - (1) If offered by the Defendant to prove consent or
 - (2) If offered by the prosecutor (for any purpose); and
- (3) evidence whose exclusion would violate the Defendant's constitutional rights.

Other Means of Admissibility

- ▶ If proffered evidence is excluded it may be admissible under provisions.
- ▶ Prior inconsistent statements: if the complainant has made statements about her sexual history, then testifies differently in court:
- ▶ Opening the door: If a prosecutor offers evidence that a victim "has always been a good girl" the Defendant is entitled to rebut with evidence of sexual behavior.

Facts



Question

Is the statutory rape of Ashley by her biological father, Jeff Willingham, admissible?
If so, for what purpose?

Question

Is the DNA evidence admissible under Rule 412 (b) (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.

Question

Is evidence of the defendant, Randall Sorghum, sexually assaulting Kayla relevant in the case involving the Ashley?

Question

Can the defendant admit evidence of pornographic computer files and videos in his defense of the charges involving Kayla to show that she acquired knowledge of "sexual matters" by watching pornographic movies with her sister?