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THE NEW RAPE EVIDENCE LAW

by Robert L. Farb

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The 1977 General Assembly enacted a new law, G.S. 8-58.6,[1] effective for rape and any lesser-included offenses[2] committed on or after January 1, 1978, that (1) tries to define what evidence about the complainant's past sexual behavior may be admitted at trial and (2) requires an in-camera hearing before the evidence may be admitted.

This memorandum discusses the changes brought about by this new law and discusses how it will work in practice. The entire law is reproduced on pages 9 and 10.

COMMON LAW RULES OF EVIDENCE IN RAPE CASES

Before a discussion of this new law, the present common law rules of evidence in rape cases need to be understood.[3]

Prior Sexual Acts

When the complainant testifies, the defendant may cross-examine her about prior sexual acts with third persons for the purpose of impeaching her testimony,[4] but he is bound by her answer.[5] Thus he cannot present direct evidence of prior sexual acts. For example, the defendant may ask

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1. N.C. Sess. Laws 1977, Ch. 851. Although the ratified bill set out the law as new G.S. 8-58.1, it will be codified as G.S. 8-58.6.
2. Assault with intent to commit rape and assault on a female.
3. The common law rules also apply to other sexual offenses, such as carnal knowledge of virtuous girls between twelve and sixteen years old (G.S. 14-26). Cf. State v. Bowman, 232 N.C. 374 (1950).
4. State v. Murray, 63 N.C. 31 (1868).
5. State v. Grundler, 251 N.C. 177 (1959), cert. denied, 362 U.S. 911 (1960); State v. Bowman, 232 N.C. 374 (1950); State v. Arnold, 146 N.C.

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the complainant if she had had consensensual sexual intercourse with his friend during the evening when she claimed that the defendant raped her. But whatever her response, he may not present his friend as a witness to testify about his sexual act with her.

The defendant is not bound by the complainant's answer when she is questioned about prior sexual acts with him. He as well as any witnesses to these acts may testify in regard to them.[6]

The common law rules as developed in North Carolina cases do not appear to place any limitation--such as time, place, or circumstance--in regard to the sexual acts that the complainant may be asked about. Thus, if a thirty-year-old single woman is raped when walking across a college campus, she is subject to questioning about all her prior sexual acts no matter how long ago they occurred and despite the fact that the sexual acts may have been with a man with whom she has had an extended personal relationship. As discussed below, G.S. 8-58.6(b)(3) will sharply limit questions concerning prior sexual acts with third persons.

Character Evidence

The general character of the complainant as well as her reputation for the specific character trait of unchastity may be shown for the purpose of attacking her credibility and bearing on the likelihood of consent.[7]

North Carolina has an unusual rule[8] concerning how character evidence may be introduced. A party that offers a character witness may ask him about the general character and reputation of the person in question but may not ask him about the person's reputation for a specific character trait such as unchastity, virtue, or veracity.[9] However, the witness may volunteer testimony about a specific character trait in response to the question about general character.

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602 (1908); State v. Jefferson, 28 N.C. 305 (1846); Note, Specific Acts of Unchastity of Prosecutrix in Rape Prosecutions, 38 N.C.L. REV. 562 (1959-1960).

6. State v. Jefferson, 28 N.C. 305 (1846) (dictum); State v. Grundler, supra note 5 (dictum); State v. Parish, 104 N.C. 679 (1889) (dictum). In Jefferson, the Court indicated that the defendant's witness could testify about prior relations that he witnessed between the complainant and defendant. At that time, a defendant was not a competent witness in a criminal trial; this was changed by N.C. Sess. Laws 1881, Ch. 110 (now G.S. 8-54). The dicta in Parish and Grundler reflect the change.

7. State v. Grundler, supra note 5; State v. Cole, 20 N.C. App. 137 (1973); State v. Daniel, 87 N.C. 507 (1882); State v. Davis, 291 N.C. 1 (1976); State v. Goss, 293 N.C. 147 (1977); State v. Stegmann, 286 N.C. 638 (1975).

8. See Stansbury's NORTH CAROLINA EVIDENCE § 114 (Brandis Rev. 1973).

9. An exception to this rule is proof of a victim's character in homicide or assault cases. State v. Sumner, 130 N.C. 718 (1902).

The rule prohibiting questions about specific character traits does not apply to cross-examination, or to re-direct examination when specific traits have been brought out on cross-examination.[10]

As discussed below, this new law will apparently exclude evidence concerning the specific character traits of unchastity and virtue while still allowing evidence concerning general character and specific traits that do not involve sexual behavior.

RULES OF EVIDENCE IN RAPE CASES UNDER NEW LAW

The new law provides that the complainant's sexual behavior (defined as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial") is irrelevant in any trial for rape or any lesser-included offenses unless the behavior falls within one of four enumerated subdivisions, G.S. 8-58.6(b) (1)-(4).

The law is silent on how the admissible evidence may be presented. Is the proponent of the evidence limited to questioning the witness, or may he also present direct evidence (for example, calling witnesses to testify about the complainant's sexual behavior)? The general rule of statutory construction is to construe a statute with reference to the common law in existence at the time of its enactment.[11] In addition, legislative intent may be determined by an act's legislative history.[12]

This new law developed from a report to the 1977 General Assembly prepared by the Legislative Research Commission Committee Studying the Problems of Sexual Assault. The Committee held meetings; took testimony from rape victims, medical personnel, and criminal justice officials; and published its findings in its report. One finding was that "[p]erhaps the main reason many rape cases are not prosecuted . . . is that the victim, as prosecuting witness, is subject to being cross-examined by defense counsel about her prior sexual activity with the defendant, questions about prior sexual activity with anyone."[13]

The Committee's report set forth proposed legislation that both dealt with the scope of inquiry into sexual behavior evidence and completely rewrote the sexual assault laws. The proposed legislation was introduced in both houses (S 84, H 195) of the General Assembly. Senate Bill 84 emerged late in the session in the form of a committee substitute stripped of the proposed sexual assault revisions, containing only a revised version of the section dealing with sexual behavior evidence. It passed both houses without amendment and became law.

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10. State v. Hairston, 121 N.C. 579 (1897); State v. Daniel, 87 N.C. 507 (1882).

11. Kearney v. Vann, 154 N.C. 312 (1911).

12. Milk Commission v. Food Stores, 270 N.C. 323 (1967).

13. Legislative Research Commission, Report to the 1977 General Assembly of North Carolina--Sexual Assault 40 (1977) (hereinafter cited as Report).

One significant difference between original Senate Bill 84 and the committee substitute was that the original bill dealt with the issue of method of proof; it required the proponent to prove admissible evidence by specific acts (by direct evidence as well by cross-examination) and prohibited character evidence concerning sexual behavior.[14] The fact that this provision was deleted when the section was rewritten--thus leaving the law silent on this issue--may perhaps indicate that common law methods of proof were intended to control. In any event, the silence requires that the new law be construed with reference to the common law methods of proof.[15]

The Four Subdivisions of Admissible Evidence

With this background in mind, each of the four subdivisions will be discussed in order to determine what evidence falls within it and how the admissible evidence may be proved.

G.S. 8-58.6(b)(1): *"[sexual behavior] between the complainant and the defendant."* This subdivision allows questions of the complainant about any prior sexual activity between her and the defendant. Since at common law the defendant was not bound by her answer, he should be allowed to present his and other witnesses' testimony concerning prior sexual activity between them.

G.S. 8-58.6(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."* The most common use of this subdivision would be to allow questions of the complainant about prior sexual activity when evidence of the presence of semen, venereal disease, pregnancy, or damage to sexual organs, etc., has been offered to corroborate her testimony that sexual intercourse took place. The purpose of the questioning is to show that another person's sexual relations with the complainant may have caused the corroborating physical evidence.

There is apparently no North Carolina case deciding whether the defendant is bound by the complainant's answer when she is questioned for the purpose set forth in this subdivision. Since the purpose of this inquiry does not bear on a collateral matter, such as her character, but instead tends to show that the defendant did not commit the act charged, he should not be bound by her answer and should be allowed to present direct evidence of the prior sexual act.

For example, if the prosecution offers a doctor's testimony that he found semen in the complainant shortly after the alleged rape, the defendant may in good faith ask her whether she had sexual intercourse with her boyfriend shortly before the rape. The defendant is not bound by her answer and may present evidence (such as the boyfriend) to show that the prior sexual act may have caused the presence of the semen.

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14. Proposed G.S. 14-21.6(a) in Senate Bill 84 provided that "... [w]henever such sexual behavior is relevant, it shall be proved only by otherwise admissible evidence of specific acts and not by opinion or by evidence of reputation or character." See also Report, *supra* note 13 at 96-97.

15. *Cf.* Kearney v. Vann, *supra* note 11.

Note that this subdivision applies only when the defendant claims that he did not have sexual intercourse with the complainant--not when his defense is consent. The words "acts or acts charged were not committed by the defendant" refer to the "act" or "acts" of sexual intercourse, not the crime of rape. If the latter interpretation were adopted, it could be argued that all prior sexual acts of the complainant could be introduced into evidence on the ground that they tend to show through impeachment or bearing on the issue of consent that the crime of rape was not committed. This interpretation would make the other subdivisions superfluous, and therefore is not reasonable when the entire statute is read.

How will the judge know that the defense is not consent so that evidence may be admissible under this subdivision? If the defendant wishes to use this line of questioning, he should be required to state his defense at the in-camera hearing that must be held before questions are asked or evidence introduced.

G.S. 8-58.6(b)(3): "*evidence of a pattern of 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.*" What kind of evidence meets the restrictive guidelines of this subdivision? As a preliminary matter, the defendant must offer[16] his version of the sexual act on trial at the in-camera hearing so that the judge may determine whether the proposed questions of the complainant are proper. Of course, if the defense is something other than consent, questions are not proper since they would not be relevant to "[tending] to prove that such complainant consented to the act or acts charged" (emphasis supplied).

What if the defendant's version is that the complainant met him at a bar and invited him to her apartment, where they had sexual intercourse? If the defendant has information that she previously had met men at bars and invited them to her apartment for sexual purposes, this conduct would meet the relevancy test of this subdivision and could properly be subject to defense questioning. On the other hand, prior sexual acts that merely resulted from dating situations would clearly be inadmissible, since that is not a "pattern of behavior so distinctive and so resembling the defendant's version. . . ."

What if the defendant's version is that the complainant consented to sexual intercourse after he came to her apartment looking for her roommate? The only relevant questions would be directed to sexual acts that resulted from men who came to her apartment or other abode to look for her roommate or were there for some other purpose--such as a television repairman. And the requirement of a "pattern" of sexual behavior indicates that more than one instance of the prior sexual behavior is necessary before the evidence is admissible.

As discussed earlier, common law rules provide that the defendant is bound by the complainant's answer when she is questioned about prior sexual

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16. The offer of proof could consist of a statement of defense counsel or presentation of evidence.

activity with third persons. In light of the common law rules, the concern about rape victims that gave birth to this law,[17] and the tenuous relevance of sexual activity with third persons to the issue of consensual relations with the defendant,[18] it appears that the most appropriate interpretation of this subdivision is that the defendant is bound by her answer and may not present direct evidence concerning these prior sexual acts. But when the defendant is on trial for first-degree rape of a female under the age of twelve, he must be allowed to present direct evidence of the complainant's prior consensual sexual intercourse with others. Such proof would be a complete defense to the charge since the prosecution must prove that the girl was virtuous at the time of the sexual act.

The words at the end of the subdivision, "behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented," merely recognizes that a defense may be based on a reasonable mistake of fact on the issue of consent.[19]

G.S. 8-58.6(b)(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 subdivision will probably rarely be used since a prosecutor would very seldom proceed to trial knowing that the defense will present expert psychiatric or psychological testimony showing that the victim fantasized the sexual act charged.

No provision in this law or any other existing law[20] gives the defendant the right to compel the complainant to undergo examination by a defense expert who would testify to evidence permitted by this subdivision. However, a court may have inherent authority, based on a strong showing of relelvance and need, to order the examination.[21] Naturally, a court must be careful not to order an examination that may have been requested for the purpose of intimidating the complainant into not testifying.

Character Evidence Under the New Law

It appears that under the new law a witness may not offer testimony concerning the complainant's reputation for the specific character traits of

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17. See Report, supra note 13 at 35-42.

18. For two well-reasoned opinions dealing with the relevance of sexual activity with third persons to the issue of consent, see McLean v. United States, 377 A.2d 74 (D.C. Ct. App. 1977); People v. Thompson, 257 N.W.2d 268 (Mich. Ct. App. 1977).

19. Cf. State v. Powell, 141 N.C. 780 (1906). Although Powell involved selling intoxicating liquor, there is no reason why the defense of a reasonable mistake of fact would not apply to the issue of consent in a rape case.

20. G.S. 7A-451 provides a judge with authority to reimburse an expert witness who testifies for an indigent defendant, but the appointment of the expert rests within his sound discretion. State v. Tatum, 291 N.C. 73 (1976).

21. See Farb, Overview of Criminal Discovery in North Carolina, ADMINISTRATION OF JUSTICE MEMORANDA No. 7/76 (Institute of Government, September 17, 1976). In State v. Hardy, 293 N.C. 105 (1977), the Supreme Court did not reach the question whether a judge has the inherent power to order pretrial discovery in the absence of a statute prohibiting discovery.

virtue or unchastity. Those traits apparently are "sexual behavior" as defined in the law, and they do not fall within any of the four subdivisions of relevant evidence.

Of course, testimony on the complainant's general character as well as her reputation for specific traits such as veracity would still be admissible, just as with any other witness.[22] But because a direct examiner may not ask the character witness about specific traits, there may be some danger that the witness may volunteer inadmissible evidence concerning the specific traits of virtue or unchastity. Therefore, as a matter of caution, a trial judge should hold an in-camera hearing when a party offers a character witness concerning the complainant, so that he may inform the witness that testimony about these specific traits may not be given.

Other Witnesses' Sexual Behavior

Since the new law applies only to the complainant's sexual behavior, the common law rules would still apparently apply to the prior sexual behavior of other witnesses at trial (for example, witnesses who testify--in order to show intent, common plan, or identity--about rapes committed upon them by the defendant).[23]

THE IN-CAMERA HEARING

Before any questions are asked of any witness concerning the complainant's sexual behavior, the judge must hold an in-camera hearing at which counsel for the complainant, if she has counsel, as well as the prosecutor and defense counsel may argue about the admissibility of the evidence. The law applies to questions asked by both prosecutor and defense counsel. Thus, if the prosecutor plans to ask the complainant about her prior sexual behavior in order to defuse expected cross-examination, an in-camera hearing must be held.

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22. A rape complainant should be treated in the same manner as any other witness (other than the defendant) when this character evidence is introduced. That is, the evidence should bear only on her credibility and not also on the issue of consent, as the common law now provides. Two recent cases, State v. Davis, 291 N.C. 1 (1976), and State v. Goss, 293 N.C. 147 (1977), have held that the failure to instruct the jury that the evidence also bears on the issue of consent is not prejudicial error. Our courts should recognize the unfair discrimination against rape complainants and hold that character evidence bears only on credibility, particularly since under the new law evidence concerning the specific traits of virtue and unchastity is inadmissible.

23. For cases that recognize the use of this kind of witness testimony, see State v. McClain, 282 N.C. 357 (1972); State v. Arnold, 284 N.C. 41 (1973).

After the hearing, the judge must enter an order setting forth what evidence is admissible and the nature of the questions that may be asked. The proponent of the evidence may, but is not required to, move for the hearing before the trial. The record of the hearing must be preserved for possible appellate review.

At a felony probable cause hearing in district court, the evidence is not repeated in open court after the hearing. The judge simply takes cognizance of the admissible evidence in determining probable cause. Although not clear, the law apparently does not require that the in-camera hearing in district court be recorded.[24]

CONSTITUTIONALITY OF G.S. 8-58.6

This memorandum will not attempt to assess the constitutionality of this new law. However, for recent decisions upholding the constitutionality of the Michigan rape evidence statute that prohibits any reference to sexual activity with third persons, see People v. Thompson, 257 N.W.2d 268 (Mich. Ct. App. 1977) and People v. Dawsey, 257 N.W.2d 236 (Mich. Ct. App. 1977) (but states that a serious constitutional question is raised if the defendant is prohibited from offering evidence concerning the complainant's reputation for chastity).

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24. Recordation and transcription are for possible appellate review. This purpose is appropriately served by recording the in-camera hearing at trial, not at the probable cause hearing.

ARTICLE 7A.

Restrictions on Evidence in Rape Cases.

§ 8-58.6. Restrictions on evidence in rape cases.--(a) As used in this section, 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) 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) No evidence of sexual behavior shall be introduced at any time during the trial of a charge of rape or any lesser included offense thereof, nor shall any reference to any such behavior be made in the presence of the jury, unless and until the court has determined that such behavior is relevant under subsection (b). 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 desired 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 arguments 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. 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.

(d) 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.

[Chapter 851 (S 84) effective for rape and lesser-included offenses committed on and after January 1, 1978]

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