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North Carolina's Evidence Shield Rule in Rape and Sexual Offense Cases

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Rule 412 of the North Carolina Rules of Evidence limits the introduction of evidence of a prosecuting witness's prior sexual behavior in cases of rape and sexual offense or their lesser-included offenses[1] and offenses being tried jointly with any of these offenses. The rule became effective July 1, 1984, replacing a similar provision in North Carolina General Statute § 8-58.6, commonly known as the rape evidence shield law.[2] Before any evidence of the witness's prior sexual behavior may be introduced at trial or a probable cause hearing, a judge must rule on its admissibility at an *in camera* (not open to the public) hearing. This memorandum discusses the rule and appellate cases that have interpreted both the rule and the law it replaces. (For easier reading, the discussion of a case interpreting G.S. § 8-58.6 will refer to the "rule" when the case's analysis of the former law would be the same under the rule.) Rules 403 (discussed below) and 412 are reproduced at the end of this memorandum.

Overview

Evidence must be relevant to be admissible in a court proceeding.[3] Evidence is relevant if it logically tends to prove or disprove a fact in issue.[4] Rule 412 is a special rule that specifically sets out what kind of evidence about the prior sexual behavior of a prosecuting witness is relevant. Nevertheless, even if evidence is relevant under Rule 412, it is not automatically admissible, since Rule 403 allows a judge to exclude relevant

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(Rule references are to the evidence rules in G.S. Chapter 8.)

1. G.S. § 15-144.1(a) provides that an indictment for first-degree forcible rape will support a conviction for second-degree rape, attempted rape, or assault on a female (assuming the victim is a female). G.S. § 15-144.2(a) provides that an indictment for first-degree forcible sexual offense will support a conviction for second-degree sexual offense, attempted sexual offense, and assault (if the victim is a female, it probably would include assault on a female). For an analysis of how to determine when an offense is a lesser-included offense of another, *see* State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982) (court rules that taking indecent liberties with a minor and assault on a female are not lesser-included offenses of first-degree statutory rape).

2. For a discussion about the enactment of the rape evidence shield law and the common law rules of evidence, see Farb, "The New Rape Evidence Law," Administration of Justice Memoranda No. 08/77 (December 1977, Institute of Government, The University of North Carolina at Chapel Hill).

Appellate cases uniformly have rejected all constitutional challenges to the former evidence shield law and Rule 412. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980); State v. Waters, 308 N.C. 348, 302 S.E.2d 188 (1983); State v. Mason, 315 N.C. 724, 340 S.E.2d 430 (1986); State v. Bridwell, 56 N.C. App. 572, 289 S.E.2d 842 (1982); State v. Porter, 48 N.C. App. 565, 269 S.E.2d 266, *disc. review denied* and *appeal dismissed*, 301 N.C. 529, 273 S.E.2d 459 (1980).

3. Rule 402. Irrelevant evidence is inadmissible.

4. Rule 401 defines "relevant evidence" as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

evidence if he finds that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues in a trial, waste of time, and the like.[5]

As noted above, Rule 412 applies to probable cause hearings and trials of rape, sexual offense, their lesser-included offenses, and offenses being tried jointly with any of these offenses. Although Rule 412 does not specifically apply to other kinds of sex offenses, such as crime against nature and indecent liberties (unless these are being tried jointly with a rape or sexual offense), a judge could consider the rule's provisions when he determines whether evidence of the witness's prior sexual behavior is relevant.

Before questioning a prosecuting witness or any other witness about the prosecuting witness's prior sexual behavior, the proponent of such evidence must show at an *in camera* hearing why the evidence is admissible under Rule 412. The judge then decides what evidence, if any, may be offered during the trial. (If a district court probable cause hearing is being conducted, any admissible evidence is not repeated in open court.) If the relevance of sexual-behavior evidence depends on the proponent's later offer of other evidence in the trial, the proponent must offer that evidence[6] at the hearing. For example, if the sexual-behavior evidence would be relevant only if the defendant's defense is consent, the defendant must offer evidence[7] of that defense at the hearing.

Scope of Rule 412—Admissibility for Other Purposes

Rule 412 provides that unless a prosecuting witness's prior sexual behavior is admissible under one of the four categories in subsection (b)(1) through (b)(4) (discussed below), it is irrelevant and therefore inadmissible under the rule.

What is "sexual behavior"? Rule 412(a) defines "sexual behavior" as the witness's sexual activity other than the sexual act being tried, and the term includes sexual activity that has occurred both before or after that act.[8]

Sexual activity includes not only evidence of actual sexual acts, but also may include indirect evidence of sexual activity, such as a witness's virginity,[9] use of birth control pills,[10] semen stains[11] on her[12] clothing, and evidence about current or prior sex partners.

Evidence admissible for other purposes. Evidence that reveals a witness's prior sexual behavior may be inadmissible under Rule 412 yet still be admissible under other rules of evidence applicable generally to all trials, such as impeaching[13] a witness who has made prior inconsistent statements. For example, in *State v. Younger*,[14] the prosecuting witness in a rape case testified that the defendant forcibly entered her apartment in the early morning hours and then raped her. The defendant

5. An appellate court will not overrule a trial judge's decision to admit or to exclude evidence under Rule 403 unless the judge was clearly wrong. State v. Mason, 315 N.C. 724, 340 S.E.2d 430 (1986); United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983).

6. Rule 412(d) does not allow the proponent of evidence to utilize Rule 104(b), which permits a judge to allow evidence to be introduced subject to a later showing of its relevance. Thus, evidence of the defendant's likely defense must be produced at the hearing [although a defense lawyer's statement at the hearing that his client is relying on the defense of consent and the facts underlying that defense should ordinarily be sufficient; that statement would permit, for example, a judge to determine whether proffered evidence of a victim's prior sexual behavior would be admissible under Rule 412(b)(3)]. Or the judge could await the defendant's presentation of such other evidence at the trial, rule then on the relevance of the proffered evidence of the prosecuting witness's prior sexual activity, and, when appropriate, allow the evidence to be introduced. *See, e.g.*, State v. White, 48 N.C. App. 589, 269 S.E.2d 323 (1980).

7. *Id.*

8. State v. Porter, 48 N.C. App. 565, 269 S.E.2d 266, *disc. review denied* and *appeal dismissed*, 301 N.C. 529, 273 S.E.2d 459 (1980). The court in *Porter* upheld the exclusion of sexual activity that had occurred after the alleged rape.

9. State v. Galloway, 304 N.C. 485, 284 S.E.2d 509 (1981).

10. *Id.*; State v. Bridwell, 56 N.C. App. 572, 289 S.E.2d 842 (1982); State v. Ward, 61 N.C. App. 605, 300 S.E.2d 855, *disc. review denied*, 308 N.C. 680, 304 S.E.2d 760 (1983). A prosecuting witness's use of birth control pills rarely would be relevant, and—even if relevant—such evidence ordinarily could not survive the balancing test under Rule 403. A woman's use of birth control pills has minimal probative value in determining whether she may have consented to have sexual relations with a particular person, and it clearly is unfairly prejudicial to her testimony. *But see* the court's suggestion in *Bridwell* about circumstances in which the use of birth control pills might be admissible—the prosecuting witness tells the defendant that she is using birth control pills, disrobes, and follows him into bed.

11. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980); State v. Langley, 72 N.C. App. 368, 324 S.E.2d 47 (1985).

12. Victims of a rape or sexual offense may be either males or females; however, since they often are females, female references are used throughout this memorandum. For an example of a case involving a male prosecuting witness, see State v. Gilley, 306 N.C. 125, 291 S.E.2d 645 (1982) (question of male prosecuting witness, "Isn't it true, Mr. Simpson, that you are a homosexual?" was subject to the shield rule; the court ruled that the defendant failed to follow the rule's procedures and to make adequate showing of relevance).

13. Although a witness may be impeached by prior inconsistent statements concerning prior sexual activity, as the *Younger* case indicates, a witness (including the defendant) may not be impeached under Rule 608(b) by evidence of prior *acts* (as distinguished from prior inconsistent *statements* about those acts) of sexual misconduct that did not result in a conviction, because such acts do not reflect on a person's credibility. State v. Scott, _____ N.C. _____, 347 S.E.2d 414 (1986); State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986); State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986). However, if evidence of acts of prior sexual behavior is admissible under Rule 412, it need not also be admissible under Rule 608(b) to be introduced at trial.

14. 306 N.C. 692, 295 S.E.2d 453 (1982). Another case involving prior inconsistent statements is State v. Johnson, 66 N.C. App. 444, 311 S.E.2d 50, *disc. review denied*, 310 N.C. 747, 315 S.E.2d 707 (1984).

testified that he knew the prosecuting witness and had been in her apartment previously, and that on this morning she let him in and consented to sexual relations. The trial judge prohibited the defendant from cross-examining the witness about a statement she had made to her examining doctor after the alleged rape, when she had told him that she was sexually active with a boyfriend and had last had sex one month before the alleged rape. The defendant sought to question her about that statement to challenge her credibility because it was inconsistent with her district court testimony (at the probbable cause hearing) that she had had sex on the night of the alleged rape with the defendant's roommate. The North Carolina Supreme Court in *Younger* ruled that the trial judge erred in prohibiting this cross-examination. The court noted that, unlike some distant sexual encounter that has no relevance other than showing that the witness is sexually active, the witness's prior inconsistent statement in this case directly related to the events surrounding the alleged rape. The shield rule was not intended to prevent evidence common to all trials, such as inconsistent statements that in this case "cast a grave doubt" on the witness's credibility. Before a trial judge may admit such evidence, however, he must still hold an *in camera* hearing and also weigh the relevance and probative value of the inconsistent statements against the prejudicial effect of the evidence (under Rule 403).

In *State v. Baron*,[15] the North Carolina Court of Appeals ruled that the shield rule did not preclude evidence that the prosecuting witness falsely accused others of improper sexual advances, since such evidence may impeach her credibility. In another case, *State v. Wrenn*,[16] however, the Supreme Court ruled that the trial judge properly excluded such evidence at trial when the defendant failed to show at the *in camera* hearing that the prior accusations were in fact false.

The Four Categories of Relevant Evidence

Subsections (b)(1) through (b)(4) set out the four categories of relevant evidence about the witness's prior sexual behavior. As discussed above, even if evidence is admissible under one of these subsections, a judge must also consider its admissibility under the balancing test of Rule 403. One also must remember that subdivision (c) provides that sexual-behavior evidence otherwise admissible under subsections (b)(1) through (b)(4) may *not* be proved by reputation or opinion. Admissible evidence may, however, be introduced by offering witnesses to testify about the prior sexual behavior or by questioning the prosecuting witness about it.

Rule 412(b) provides that the sexual behavior of the prosecuting witness is irrelevant to any issue unless that behavior:

> "(1) *Was between the complainant and the defendant"*

This subsection clearly permits evidence of prior sexual behavior between the prosecuting witness and the defendant. For example, a defendant could offer evidence of his prior sexual relations with the witness when he asserts that she consented to the sexual act being tried.

> "(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"*

This subsection allows evidence of the prior sexual behavior of the prosecuting witness when the presence of semen, venereal disease, pregnancy, or damage to sexual organs[17] has been offered to show that sexual intercourse took place. The defendant's purpose in offering this evidence of the prosecuting witness's prior sexual behavior is to show that another person's sexual relations with her may have caused the presence of semen and the like.[18] For example, if the State offers evidence that semen was found in the prosecuting witness shortly after the alleged rape and the defendant denies having any act of sexual intercourse with her, he could offer evidence that she had sexual intercourse with her boyfriend shortly before the alleged rape to explain the presence of the semen.

Note, however, that this subsection ordinarily permits such evidence only when the defendant asserts that he did not have sexual intercourse (or other sexual act) with the prosecuting witness—*not* when his defense is consent—since its purpose is to permit evidence that someone other than the defendant produced the semen

15. 58 N.C. App. 150, 292 S.E.2d 741 (1982).

16. 316 N.C. 141, 340 S.E.2d 443 (1986). In State v. Brown, 312 N.C. 237, 321 S.E.2d 856 (1984), the court specifically had reserved the question of whether evidence of the prosecuting witness's prior accusation of sexual misconduct is barred by the shield rule.

17. In State v. Ollis, _____ N.C. _____, 348 S.E.2d 777 (1986), the North Carolina Supreme Court ruled that the trial judge erred in prohibiting the defendant from questioning the prosecuting witness about alleged rapes committed by the defendant's adult son to show under subsection (b)(2) that the physical injuries to the witness's vaginal area (as described by a doctor) were caused by his son's acts. The defendant denied committing the acts that constituted the charges being tried—first-degree rape and first-degree sexual offense.

18. State v. Parker, 76 N.C. App. 465, 333 S.E.2d 515, *disc. review denied*, 314 N.C. 673, 336 S.E.2d 404 (1985).

in or inflicted injuries to the prosecuting witness.[19] Of course, the defendant must offer evidence[20] of his defense at the in camera hearing to support the admissibility of evidence under this subsection.

> "(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"*

If the defendant's defense is not consent, evidence of the prosecuting witness's prior sexual behavior is inadmissible under this subsection since it is not relevant to proving that the 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*" (emphasis supplied). The defendant must offer evidence[21] of his defense at the *in camera* hearing to support the admissibility of evidence under this subsection.

Appellate cases have interpreted the scope of this subsection narrowly, noting its requirement that the evidence show a "pattern" of "distinctive" sexual behavior. A one-time prior sexual act is ordinarily not sufficient. For example, in *State v. Parker*,[22] the prosecuting witness testified that she, her employer-lawyer, and the defendant (a client) drank liquor at the lawyer's office and then went to a private club and drank some more. She and the defendant then returned to the office, where the defendant forcibly committed a sexual act on her. The defendant testified that she initiated and consented to whatever sexual contact they had. The defendant attempted to introduce the lawyer's testimony that about one year before this incident, the lawyer and the prosecuting witness had been drinking at the same private club, and they then returned to the office and had sex. The Court of Appeals in *Parker* ruled that the trial judge properly excluded this evidence since it did not reflect a "pattern" of sexual behavior under (b)(3); there was no evidence that the prosecuting witness habitually drank at this private club and returned to the office for sex.

Similarly, the Court of Appeals ruled in *State v. Rhinehart*[23] and *State v. Smith*[24] that evidence that a prosecuting witness has had consensual intercourse on one or more prior occasions in "dating-type circumstances"[25] does not establish a "pattern" of "distinctive" conduct under (b)(3), particularly when the defendant did not know[26] about the prior conduct. In *Rhinehart*, the defendant attempted to offer evidence that the prosecuting witness had had consensual sexual intercourse with her former boyfriend earlier in the evening of the alleged rape and sexual offense. The court ruled this evidence inadmissible because it was merely a single episode; the defendant did not know about it; and it was a dating-type circumstance. In *Smith*, the alleged rape apparently occurred in the home of the prosecuting witness's parents, while the defendant's proferred evidence of the prosecuting witness's prior sexual behavior with others (including the defendant's brother) was of dating-type circumstances that had occurred elsewhere. The court ruled that the evidence was inadmissible.

On the other hand, the Court of Appeals ruled in *State v. Shoffner*[27] that a "pattern" was sufficiently shown so that evidence of prior sexual behavior should have been admitted. The prosecuting witness testified that the two defendants sexually assaulted her in a car after they all had left the defendants' apartment to visit a mutual friend. The defendants asserted that the witness consented. They and others testified that before leav-

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19. State v. Parker, 76 N.C. App. 465, 333 S.E.2d 515, *disc. review denied*, 314 N.C. 673, 336 S.E.2d 404 (1985). In both State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980) and State v. Langley, 72 N.C. App. 368, 324 S.E.2d 47 (1985), the defendants' defenses were consent, and they were properly denied the opportunity to present evidence that semen stains on clothing showed that the prosecuting witnesses may have had sexual intercourse with someone other than the defendants. Whether the evidence is analyzed under subsections (b)(2) or (b)(3), the rulings in both cases are clearly correct.

20. See note 6 *supra*.

21. See note 6 *supra*.

22. 76 N.C. App. 465, 333 S.E.2d 515, *disc. review denied*, 314 N.C. 673, 336 S.E.2d 404 (1985). Other cases that have rejected evidence of prior sexual behavior are State v. Younger, 306 N.C. 692, 295 S.E.2d 453 (1982); State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980); State v. White, 48 N.C. App. 589, 269 S.E.2d 323 (1980).

23. 68 N.C. App. 615, 316 S.E.2d 118 (1984).

24. 45 N.C. App. 501, 263 S.E.2d 371, *disc. review denied*, 301 N.C. 104 (1980).

25. Of course, there may be circumstances when a pattern of distinctive sexual behavior of the prosecuting witness may be admissible under subsection (b)(3) even though the behavior occurred on dates—for example, when the defendant is accused of raping the prosecuting witness during a date, he asserts that she consented, and he sufficiently shows that her prior sexual behavior during dates qualifies under the subsection.

26. The subsection does not *require*, as a condition of admissibility, that the defendant know (before the alleged rape or sexual offense) about the prior sexual behavior of the prosecuting witness. Note the word "or" between the words "charged" and "behaved." The defendant's knowledge may, however, be a factor in determining whether the evidence should be admissible.

27. 62 N.C. App. 245, 302 S.E.2d 830 (1983).

ing the apartment, the witness unzipped the pants of one defendant, fondled his genitals, and asked those present if they wanted to have an orgy. The court ruled that the trial judge erred[28] in not allowing the defendants to present the following evidence of the witness's prior sexual behavior: (a) the witness often danced with men at a club while feeling their bodies; (b) a year and one-half before the alleged crimes, the witness tried to seduce an older brother of one defendant and got in his car and had sexual intercourse with him; (c) a Mr. Pennix had seen the witness sitting on a crate in the Circle Inn with two men standing in front of her, one of whom was zipping his pants. The court ruled that this evidence showed that the prosecuting witness's *modus operandi* was to accost men sexually and was the same pattern of sexual behavior that occurred just before the alleged sexual offenses. Therefore, the evidence of her prior sexual behavior conformed to the defendants' version of what happened during the alleged sex offenses. [However, regarding the evidence recited in (c) above, the *Shoffner* case appears to adopt a more expansive view of the admissibility of evidence under the subsection than the other appellate cases.]

"(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"*

This subsection rarely can be used since a trial judge has neither statutory nor inherent authority[29] to order a prosecuting witness to undergo a mental examination. Admissible evidence might be available if the witness voluntarily had submitted to an examination or was undergoing treatment.[30]

28. The court ruled that the judge did not err in excluding the following evidence: (a) during the same month of the alleged crimes, one defendant saw the prosecuting witness go to his bedroom with one of his brothers; (b) several months before the alleged crimes, the prosecuting witness told a Mr. Faust that she had been caught at some hotel with a Mr. Lynn; and (c) that Mr. Faust had had sexual intercourse with the prosecuting witness. The court apparently rejected this evidence because it *only* showed that the prosecuting witness may have had prior sexual relations—it noted that "even the most promiscuous among us can be raped."

29. State v. Clontz, 305 N.C. 116, 286 S.E.2d 793 (1982).

30. Of course, the evidence would not be available unless a judge overrode the psychiatrist or psychologist privileges in G.S. § 8-53 and G.S. § 8-53.3 respectively. For a case concerning the admissibility of an expert's opinion whether a witness had a mental condition that would cause her to fabricate a story about a sexual assault, see State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986). However, the court's opinion in *Heath* did not discuss the interrelationship of Rule 412(b)(4) with Rules 405(a), 608(a), and 702. *But see* the dissenting opinion's discussion in the Court of Appeals decision in the *Heath* case, 77 N.C. App. 264, 335 S.E.2d 350 (1985).

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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.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.