Published by the
Institute of Government,
The University
of North Carolina
at Chapel Hill

No. 94/02
March 1994
©1994

Administration of Justice Memorandum

Judges, Prosecutors, Appellate and Public Defenders, Police Attorneys, and Subscribers

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

Robert L. Farb and Anne S. Kim

Rule 412 of the North Carolina Rules of Evidence[1] limits the admission of evidence about the prior sexual behavior of a sexual assault victim[2] to four narrow categories of evidence. The rule protects a victim from "unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice,"[3] since details about a victim's prior sexual behavior may often be irrelevant and have little probative value.

This memorandum discusses how appellate cases have applied the rule to various kinds of evidence that defendants have sought to introduce.[4] It first reviews the procedure for introducing evidence, exploring the definition of *sexual behavior*. It then considers the types of evidence allowed under Rule 412 and the four different types of sexual behavior that can be admitted into evidence. The concluding sections discuss the kinds of evidence that do not meet the requirements of Rule 412 but nevertheless may be admissible—for example, a victim's prior accusations of sexual assault and evidence that may show the victim's bias against the defendant or affect the victim's credibility.

Procedure for Introducing Evidence

Rule 412 applies in all trials and probable cause hearings involving rape and sexual offense and their lesser-included offenses, such as attempted rape or sexual offense, and assault or assault on a female.[5] The rule also applies to any offense being tried jointly with these crimes. Before evidence may be offered under Rule 412, a judge must conduct an *in camera* (not open to the public) hearing to determine its relevance and admissibility.[6] A party offering the evidence may request a hearing either before or during trial.

The *in camera* hearing is a prerequisite to the introduction of any evidence about the victim's prior sexual behavior. A defendant seeking to introduce such evidence has the burden of requesting a hearing and establishing its relevance even if the trial judge knows that the defendant wants to introduce such evidence.[7] In *State v. Norris*, the defendant had indicated to the court at the beginning of the trial that he wanted to cross-examine the victim to show that another person was responsible for the alleged rape. The defendant never requested an *in camera* hearing to offer proof of the admissibility of this evidence. The court of appeals rejected the defendant's contention that the trial judge had a responsibility to conduct a hearing *ex mero motu* (on the judge's own motion). Even if the prosecution "opens the door" by first raising the issue of the victim's prior sexual behavior during its direct examination of the victim, the defendant must request a hearing before conducting cross-examination.[8] Nor may a party introduce the evidence based on a later showing of its relevance. The showing of relevance must always come first.[9] For example, suppose a defendant seeks to introduce evidence about the victim's prior sexual behavior because it is relevant to the defense of consent. Before such evidence may be admitted, the defendant must have presented evidence of a consent defense at the *in camera* hearing. It does not appear that a defense lawyer's statement at the hearing that

This publication is issued by the Institute of Government. An issue is distributed to public officials, listed in the upper righthand corner, to whom its subject is of interest. Copies of this publication may not be reproduced without permission of the Institute of Government, except that criminal justice officials may reproduce copies in full, including the letterhead, for use by their own employees. Comments, suggestions for further issues, and additions or changes to the mailing lists should be sent to: Editor, Administration of Justice Memorandum, Institute of Government, CB# 3330 Knapp Building, UNC–CH, Chapel Hill, NC 27599-3330.

the defendant is relying on the defense of consent and setting out the facts underlying that defense would be sufficient to allow a judge to determine, for example, whether proffered evidence of a victim's prior sexual behavior would be admissible under Rule 412(b)(3).[10]

Relationship of Rule 412 to Rule 403

As a preliminary matter, evidence must be relevant to be admissible in a court proceeding.[11] Even if evidence is relevant under Rule 412, however, it is not automatically admissible. Rule 403 allows a judge to exclude relevant evidence if the judge 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.[12]

Definition of *Sexual Behavior*

As discussed in the next section, Rule 412 allows four different types of evidence concerning sexual behavior. First, however, it is necessary to discuss the rule's definition of *sexual behavior*. It defines such behavior as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." Evidence of sexual behavior includes both direct evidence of sexual acts with current and prior partners and indirect evidence such as virginity,[13] use of birth control pills,[14] or semen stains on clothing.[15] The rule includes sexual behavior that occurred both before and after the alleged rape or sexual assault.

What types of activities are considered sexual behavior? Obviously, sexual intercourse is sexual behavior, as is masturbation.[16] However, sexual behavior does not include conversations about sexual behavior[17] or letters written by the victim in which the victim propositions someone for sex.[18] A victim's prior accusations of rape or sexual assault are discussed under Evidence of Alleged Victim's Prior Accusations, later in this memorandum.

The Four Categories of Relevant Evidence

Rule 412(b) outlines four categories of relevant evidence concerning the victim's prior sexual behavior. Note, however, that the rule provides that such behavior, even if relevant, may *not* be proved by reputation or opinion evidence.[19] Admissible evidence may be introduced by offering witnesses to testify about the prior sexual behavior or by questioning the victim about it.

Conduct between Alleged Victim and Defendant

The first of the four categories of relevant evidence of a victim's prior sexual conduct concerns sexual behavior that "Was between the complainant [the alleged victim] and the defendant [Rule 412 (b)(1)]." Under this subsection, courts may admit evidence of prior sexual activity between the defendant and the victim. Such evidence could support a defense of consent.

Conduct of Nondefendant

The second category of relevant evidence "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 [Rule 412 (b)(2)]." Under this provision, a defendant may introduce evidence to support what is essentially a defense that someone else committed the alleged crime or caused physical injury to the victim or other change in the victim's physical condition. For example, the prosecution in a rape case may offer evidence of the victim's physical condition to show that sexual intercourse had taken place—pregnancy, venereal disease, damage to the victim's genitalia, or the presence of semen in the victim or on her clothing. Under this category of relevant evidence the defendant may attempt to show that someone other than himself or herself was responsible for the victim's condition.[20] For example, the supreme court in *State v. Ollis* ruled that the defendant should have been allowed to question the ten-year-old victim about a second rape that allegedly occurred on the same day as the rape allegedly committed by the defendant—the perpetrator of the second alleged rape, and not the defendant, could have caused the victim's physical injuries.[21] Similarly, the court of appeals in *State v. Wright* ruled that the trial judge should have admitted testimony about the twelve-year-old victim's repeated masturbation.[22] The nature and frequency of the child's masturbation could have explained the chronic irritation of her genital area and exculpated the defendant.

Evidence is not relevant under this provision without a close temporal connection between the defendant's alleged offense and the alleged sexual acts of a third person. For example, the court of appeals ruled in *State v. Holden* that a defendant who was charged with rape could not offer evidence of the victim's molestation by a third person that had occurred two and one-half years before the alleged rape.[23]

Finally, the defendant may not introduce evidence under this provision to support a defense of consent. The supreme court first stated this rule in *State v. Fortney*, when the defendant attempted to prove consent by offering evidence of three different semen stains on the victim's clothing.[24] The court ruled that such evidence was not relevant to the issue of consent. Instead, the evidence indicated only that the victim had had sex with people other than the defendant—which was precisely the kind of evidence that the rule was intended to exclude.

Pattern of Behavior

The third category of relevant evidence concerning a victim's prior sexual behavior "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 [the alleged victim] 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 [Rule 412 (b)(3)]." Under this provision, the defendant may support a defense of consent by offering evidence of the victim's habit or pattern of picking up sexual partners under specific circumstances. For example, suppose that the defendant allegedly raped the victim after meeting her in a bar on a weekend. The defendant may offer evidence that the victim habitually went to bars on weekends and brought a different man home each time, which would tend to show consent—the defendant was one in a series of voluntary encounters that the victim initiated.

Evidence offered under this provision will often be inadmissible because a defendant may have difficulty proving that the victim engaged in a *distinctive pattern* of behavior.[25] For example, the court of appeals ruled in *State v. Rhinehart* that evidence of the victim's consensual sexual intercourse with a boyfriend the night of the alleged rape was inadmissible.[26] It was a single episode,[27] of which the defendant had no knowledge.[28] Similarly, in *State v. Parker*,[29] the defendant attempted to show a pattern of behavior based on the fact that the victim once had had sex at the same place where the alleged rape occurred. According to the defendant, he and the victim had several drinks at a bar before going to the victim's office for sex. A year before the alleged rape, the victim had gone to the same bar with a boyfriend and then gone to the same office to have sex. The court of appeals ruled that the defendant failed to establish a pattern of behavior.

In *State v. Smith*, the court of appeals ruled that the victim's consensual sexual relationships with the defendant's brother and with other people she was dating was inadmissible.[30] These other sexual relationships did not occur in the victim's home (where the alleged offense occurred) and did not closely resemble the offense being tried. Furthermore, the defendant did not show that his knowledge of these relationships would have led him to believe that the victim would consent to sexual intercourse with him.

Only one North Carolina case has ruled that evidence should have been admitted under this provision accepting evidence of a pattern of behavior. In *State v. Shoffner*, the court ruled that the trial judge improperly excluded evidence of the victim's habit (or *modus operandi*, in the court's words) of accosting men in clubs and other public places.[31] According to the excluded testimony, the victim would frequently visit bars, pick up men, and put her hands "every which way on the man's body."[32] Seven witnesses who testified during the trial claimed that she behaved in a similarly aggressive way toward the defendant on the night of the alleged rape. (She allegedly put her hand inside the defendant's pants and suggested an orgy.) The court ruled that the trial judge should have admitted evidence of the victim's behavior on prior occasions because it was so similar to her behavior toward the defendant. The court ruled that the evidence could have supported a defense of consent by suggesting that the victim was the "initiator" and "aggressor" in her encounter with the defendant.[33]

Acts Fantasized or Invented

The fourth and final category of relevant evidence concerning a victim's prior sexual behavior "Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant [the alleged victim] fantasized or invented the act or acts charged [Rule 412(b)(4)]." Evidence will rarely be admissible under this provision because a judge does not have the authority to order the victim to undergo a psychiatric or psychological evaluation.[34] A defendant may be able to obtain admissible evidence if the victim consents to an exam or if she is currently undergoing mental health treatment.[35]

Evidence of Alleged Victim's Prior Accusations

As discussed previously, conversation about sexual activity is not sexual behavior under Rule 412. Consequently, courts in some cases have admitted evidence of the victim's prior accusations of sexual assault. However, not all prior accusations are admissible. The defendant must show that (1) the victim's prior accusations were false and thus tend to impeach the victim's credibility or (2) the accusations indicate that someone other than the defendant was responsible for the alleged sexual assault.

In *State v. Baron*, the court of appeals ruled that the trial judge improperly excluded evidence that the victim had falsely accused a foster parent, a neighbor, and an older brother of improper sexual advances.[36] The court ruled that this evidence was admissible to attack the victim's credibility.

Courts will not, however, admit evidence of prior *true* accusations of sexual assaults (except for a case such as *State v. Maxwell*, discussed below). Such evidence obviously does not tend to impeach the victim's credibility. In *State v. Wrenn*, the supreme court ruled that the trial judge properly excluded evidence of a prior sex offense case in which the victim had been the prosecuting witness.[37] The defendant in that case had pled guilty, which the court noted was proof of the victim's truthfulness.

The defendant bears the burden of offering evidence that demonstrates the falsity of the victim's prior accusations. In *State v. Anthony*, the defense elicited testimony

from the victim during the *in camera* hearing about her prior accusations of sexual misconduct against her father and stepfather.[38] In both cases, the charges had been dismissed. The court, following *Wrenn,* ruled that the defendant had nonetheless failed to show the falsity of the prior accusations—charges can be dropped for a number of reasons unrelated to the truth of the allegations. Absent more conclusive proof of falsehood, the trial judge had properly excluded the evidence as unfairly prejudicial under Rule 403.

In *State v. Maxwell,* the court of appeals ruled that evidence of the victim's prior accusations was improperly excluded.[39] In this case, however, the prior accusation—if true—was relevant in identifying someone other than the defendant as the assailant. The defendant was charged with sexually molesting the victim since she was four years old. The defendant sought to introduce evidence that the victim at age four had accused her uncle of showing her how to masturbate. The court ruled that the trial judge improperly excluded evidence of this prior accusation, because it tended to show who the victim's abuser may have been.

Evidence of the Alleged Victim's Lack of Prior Sexual Activity

Rule 412 does not bar a victim from testifying about her *lack* of sexual activity before and after the defendant's alleged attack. In *State v. Stanton,* the supreme court ruled that the trial judge properly permitted the victim to testify that she was not having sexual intercourse with anyone when the alleged rape occurred.[40] The court ruled that this testimony corroborated other evidence of the victim's subsequent pregnancy and abortion.[41] The court ruled that Rule 412 does not prohibit victims from willingly testifying about their lack of sexual activity for this purpose. The court said that "[i]t would strain credulity for this Court to hold that, while a victim may testify to the details of her alleged rape and corroborate that testimony with further testimony concerning her pregnancy and subsequent abortion, she may not testify as to the lack of sexual involvement with anyone except the defendant and thereby fail to fix responsibility for the pregnancy on the defendant."[42]

Under Rule 412, a victim's virginity is just as irrelevant as her prior promiscuity. Therefore a defendant may not question a victim either about her prior sexual activity or the lack thereof. Also, courts have not allowed defendants to impeach testimony implying that the victim was a virgin before the alleged assault. In *State v. Galloway*[43] and in *State v. Autry,*[44] the supreme court upheld the trial judges' refusal to permit questioning about the victims' virginity, despite the defendants' assertions that the victims were lying.[45]

A victim's testimony on direct examination about a lack of prior sexual relationships does not allow defense questioning about prior sexual relationships unless the defendant presents evidence at an *in camera* hearing. In *State v. Degree,* the victim testified—in response to a prosecutor's question—that she had never engaged in sexual intercourse with anyone before the alleged rape.[46] To impeach her testimony, the defendant attempted to ask the victim if she had dated several boys before the alleged rape and if her mother had to chase boys out of her bedroom. The supreme court ruled that the trial judge properly prohibited the defense from asking these questions. Even assuming that the state had "opened the door" to evidence about the victim's prior sexual behavior, the defendant did not request an *in camera* hearing to offer evidence (for example, evidence of the victim's prior inconsistent statements, which are discussed in the next section) to determine its relevance and admissibility.[47]

Relationship of Rule 412 to Bias and Impeachment Evidence

Evidence of the victim's prior sexual conduct, even though inadmissible under Rule 412, may nonetheless be introduced to show that a witness is biased or to impeach a witness's testimony. Bias and impeachment are common to all trials, and Rule 412 is not intended to bar such evidence. In *State v. Younger,* for example, the supreme court ruled that the trial judge improperly barred the cross-examination of the prosecuting witness about her prior sexual conduct.[48] The witness had apparently given inconsistent statements—to her doctor and at the district court probable cause hearing—about her last sexual encounter before the alleged rape. The court ruled that the witness's prior statement to the doctor could have been crucial in determining her credibility, especially since her testimony was central to the state's case.

In some situations, a trial judge may violate a defendant's constitutional rights when excluding evidence. In *Olden v. Kentucky,* the United States Supreme Court ruled that a black defendant's Sixth Amendment right of confrontation entitled him to cross-examine the victim, who was white, about her ongoing affair with her boyfriend, a state's witness who was black.[49] The Court ruled that the excluded evidence could have supported the defendant's theory that the victim had lied about the alleged rape to protect this relationship, because the boyfriend had seen her leaving a car in which the defendant was an occupant soon after the sex crimes had allegedly been committed. A reasonable jury might have received a significantly different impression of the witness's credibility had defense counsel been permitted to pursue this proposed line of cross-examination. The Court also ruled that the defendant's constitutional right to confrontation outweighed any possible unfair prejudice to the victim that might occur in revealing to the jury her interracial relationship with the state's witness.

A defendant must convincingly demonstrate, also in an *in camera* hearing, the relevance of bias or impeachment evidence before it may be introduced. In *State v. Alverson*,[50] the court of appeals ruled that the defendant's "speculation" about the victim's motive for lying was insufficient to permit cross-examination about her sexual relationship with her boyfriend.[51] And even if the evidence is relevant, a court could still properly exclude the evidence as unfairly prejudicial under Rule 403. In *State v. Morrison*, the court of appeals upheld the exclusion of evidence concerning the sexual relationship between the victim and a state's witness.[52] The court ruled that even though the evidence was relevant in showing bias, it was likely to unfairly prejudice the jury. Moreover, since the victim had testified that she had dated the witness, evidence of bias already had been introduced; therefore the trial judge had properly exercised his discretion to limit testimony about the sexual relationship.

Notes

1. N.C. GEN. STAT. 8C-1, Rule 412, replaced N.C. GEN. STAT. 8-58.6 in 1984. Hereafter the North Carolina General Statutes will be cited as G.S. G.S. 8-58.6 was similar to the current Rule 412. For a discussion of the original rape shield law, *see* Robert L. Farb, *The New Rape Evidence Law*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 08/77 (The University of North Carolina at Chapel Hill: Institute of Government, Dec. 1987). *See also* Robert L. Farb and Caroline E. Thomson, *North Carolina's Evidence Shield Rule in Rape and Sexual Offense Cases*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 86/04 (The University of North Carolina at Chapel Hill: Institute of Government, Dec. 1986).

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. Birdwell, 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. rev. denied and appeal dismissed*, 301 N.C. 529, 273 S.E.2d 459 (1980).

2. For easier reading, *victim* is often used in this memorandum instead of *alleged victim.*

3. State v. Younger, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982).

4. The appellate courts have not decided whether a defendant may use Rule 412 to prevent the prosecution from introducing evidence of the victim's prior sexual behavior. *See, e.g.*, State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

5. The rule applies to the trial of "rape or any lesser included offense thereof or a *sex offense* or any lesser included offense thereof" emphasis added. It can be argued that the words "sex offense" make the rule applicable to additional sex offenses beside first- and second-degree sexual offense—for example, indecent liberties and crime against nature. Even if the rule does not specifically apply to such offenses, a judge could consider the rule's provisions when the judge determines whether evidence of the victim's prior sexual behavior is relevant. *Cf.* Wilson v. Bellamy, 105 N.C. App. 446, 414 S.E.2d 347 (1992) (court noted Rule 412 in ruling that evidence of plaintiff's prior sexual behavior was irrelevant in her civil lawsuit against fraternity members for committing battery against her).

For lesser offenses of rape and sexual offense set out by statute, see G.S. 15-144.1 (1983) (lesser offenses of first-degree rape include second-degree rape, attempted rape, and assault on a female) and G.S. 15-144.2 (1983) (lesser offenses of first-degree sexual offense include second-degree sexual offense, attempted sexual offense, and assault). Compare these statutory provisions with State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982) (court ruled that assault on a female is not lesser-included offense of first-degree rape; court did not refer to G.S. 15-144.1) and State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988) (similar ruling).

6. In State v. McNeil, 99 N.C. App. 235, 393 S.E.2d 123 (1990), the defendant argued that an *in camera* hearing violated his Sixth Amendment right to a public trial. The court ruled that neither the defendant nor the public has a "constitutionally protected interest in the disclosure of personal information of the victim's past sexual behavior unless it is determined to be relevant to the case being tried." *Id.* at 242, 393 S.E.2d at 127.

7. State v. Norris, 101 N.C. App. 144, 398 S.E.2d 652 (1990), *disc. rev. denied*, 328 N.C. 335, 402 S.E.2d 843 (1991).

8. State v. Degree, 322 N.C. 302, 367 S.E.2d 679 (1988); State v. Fenn, 94 N.C. App. 127, 379 S.E.2d 715, *disc. rev. denied*, 325 N.C. 548, 385 S.E.2d 504 (1989).

9. Rule 412(d) provides that a party may not rely on Rule 104(b), which permits a court to admit evidence based on a later showing of its relevance.

10. *See, e.g.*, State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993) (after victim testified at *in camera* hearing and denied having sexual intercourse with others, defendant did not offer any evidence to contradict her; court ruled that trial judge properly denied defendant opportunity to cross-examine victim about this matter before jury).

The judge could await the defendant's presentation of a consent defense at trial, then rule at an *in camera* hearing on the relevance of the proffered evidence of the victim's prior sexual behavior, 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).

A defendant or other witness who testifies at the *in camera* hearing may be impeached with that testimony at trial (for example, if that testimony is inconsistent with the defendant's trial testimony). State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993).

11. Rule 402. Irrelevant evidence is inadmissible.

12. *See, e.g.*, State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810 (1987), *cert. denied*, 319 N.C. 408, 354 S.E.2d 724 (1987). 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).

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

14. *Id.*

15. 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).

16. State v. Wright, 98 N.C. App. 658, 392 S.E.2d 125 (1990).

17. State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371, *disc. rev. denied*, 301 N.C. 104 (1980). The court ruled in *Smith* that a conversation between the victim and defendant about the victim's sexual problems was not sexual behavior under Rule 412(b)(1),

which permits evidence of prior sexual contact between the victim and defendant.

18. State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853, *disc. rev. denied*, 333 N.C. 793, 431 S.E.2d 28 (1993). The court ruled in *Guthrie* that the trial judge should have admitted evidence of a letter that the victim admitted she voluntarily wrote and in which she asked a friend to have sex with her. The letter was similar to letters that she had written to the defendant, although the victim testified that the defendant dictated the letters to her. The court ruled that the letter to her friend was not sexual behavior within Rule 412 and was admissible to impeach her credibility, since her voluntarily writing a letter to another person that was similar to the letters she wrote to the defendant provides an inference that she may have written the letters to the defendant voluntarily.

19. Rule 412(c).

20. That someone else may also include the victim. In State v. Baron, 58 N.C. App. 150, 292 S.E.2d 741 (1982), the court ruled that the trial judge should have admitted evidence of the victim's prior use of tampons. That evidence could have explained the medical finding of an opening in the victim's hymen.

21. 318 N.C. 370, 348 S.E.2d 777 (1986).

22. 98 N.C. App. 658, 392 S.E.2d 125 (1990).

23. 106 N.C. App. 244, 416 S.E.2d 415, *disc. rev. denied and appeal dismissed*, 332 N.C. 669, 424 S.E.2d 413 (1992). The court in *Holden* ruled that evidence that someone else may have molested the victim in 1986 was irrelevant to show that the defendant did not abuse her in 1989.

24. 301 N.C. 31, 269 S.E.2d 110 (1980). *See also* State v. Langley, 72 N.C. App. 368, 324 S.E.2d 47 (1985) (similar ruling).

25. The following cases, which are not discussed in the text, also have upheld the exclusion of evidence under this provision: State v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906 (1994) (victim's ongoing consensual sexual relationship with another was not a pattern of sexual behavior closely resembling the crimes being tried); State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988) (defendant was properly denied attempt to cross-examine victim about incident in which she was allegedly "making out" with a defense witness); State v. Younger, 306 N.C. 692, 295 S.E.2d 453 (1982) (evidence of victim's sexual intercourse with defendant's roommate one week after alleged rape was inadmissible); State v. White, 48 N.C. App. 589, 269 S.E.2d 323 (1980) (although similar, evidence of sexual behavior with another was not "so distinctive and so closely resembling" defendant's version); State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980) (inference of sexual activity with others, without more, is inadmissible).

26. 68 N.C. App. 615, 316 S.E.2d 118 (1984).

27. There may be circumstances when a pattern of the victim's distinctive sexual behavior may be admissible even though the behavior occurred on dates—for example, when the defendant is accused of raping the victim during a date, he asserts that she consented, and he sufficiently shows that her prior sexual behavior during dates qualifies under this provision.

28. Rule 412 (b)(3) does not *require*, as a condition of admissiblity, that the defendant had known, before the alleged rape or sexual offense, about the victim's prior sexual behavior. 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, as it was in the *Rhinehart* case.

29. 76 N.C. App. 465, 333 S.E.2d 515, *disc. rev. denied*, 314 N.C. 673, 336 S.E.2d 404 (1985).

30. 45 N.C. App. 501, 263 S.E.2d 371, *disc. rev. denied*, 301 N.C. 104 (1980).

31. 62 N.C. App. 245, 302 S.E.2d 830 (1983).

32. *Id.* at 247, 302 S.E.2d at 832.

33. *Id.* at 248, 302 S.E.2d at 833. However, the court upheld the exclusion of other evidence concerning the victim's affairs with several men (such as the fact that she had been caught in a hotel room with a Mr. Lynn, or the fact that a Mr. Faust had had sex with her).

34. State v. Liles, 324 N.C. 529, 379 S.E.2d 821 (1989); State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988); State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988); State v. Clontz, 305 N.C. 116, 286 S.E.2d 793 (1982); State v. Looney, 294 N.C. 1, 240 S.E.2d 612 (1978). In State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989), the court ruled that a trial judge, on defendant's motion, may order a *physical* examination of the victim *if* the defendant shows that (1) the examination would be probative; (2) the examination is necessary for the defendant's preparation of a defense; and (3) the victim or the victim's guardian consents to the examination.

35. Communications between psychiatrists or psychologists and their clients are normally privileged. However, under both G.S. 8-53 and 8-53.3, a judge may compel disclosure if it is "necessary to a proper administration of justice." For a discussion of Rule 412(b)(4), see the majority and dissenting opinions in State v. Heath, 77 N.C. App. 264, 335 S.E.2d 350 (1985), *reversed*, 316 N.C. 337, 341 S.E.2d 565 (1986). The dissenting opinion in the court of appeals opinion appears to state the correct view of the provision.

36. 58 N.C. App. 150, 292 S.E.2d 741 (1982). In State v. Durham, 74 N.C. App. 159, 327 S.E.2d 920 (1985), the court of appeals ruled that the following defense evidence should have been admitted—the child victim had accused her father of committing a sexual act against her that was similar to the act charged against the defendant. The accusations against the defendant and her father had both occurred when the child had awoken after nightmares. The evidence was relevant to impeach the victim's credibility.

In State v. McCarroll, 109 N.C. App. 574, 428 S.E.2d 229, *disc. rev. and writ of supersedeas allowed*, 333 N.C. 794, 430 S.E.2d 426 (1993), the court of appeals ruled that the trial judge violated the defendant's Sixth Amendment right of confrontation by refusing to permit cross-examination about an alleged victim's possibly false prior accusations of sexual activity by her brother with her (her brother was a state's witness, not a defendant). The North Carolina Supreme Court has granted the state's petition to review and to stay the court's opinion, however.

37. 316 N.C. 141, 340 S.E.2d 443 (1982).

38. 89 N.C. App. 93, 365 S.E.2d 195 (1988)

39. 96 N.C. App. 19, 384 S.E.2d 553 (1989), *disc. rev. denied*, 326 N.C. 53, 389 S.E.2d 83 (1990).

40. 319 N.C. 180, 353 S.E.2d 385 (1987).

41. The court also ruled that admitting evidence of the pregnancy and abortion was not unduly prejudicial under Rule 403; it tended to prove penetration, which is an element of rape.

42. *Stanton* at 187, 353 S.E.2d at 390.

43. 304 N.C. 485, 284 S.E.2d 509 (1981).

44. 321 N.C. 392, 364 S.E.2d 341 (1988).

45. Also, the supreme court found in both cases that neither victim actually testified that she was a virgin. In *Galloway*, the implication of the victim's virginity came from the testimony of the

examining physician, who stated that he had done a "virginal" pelvic exam after the assault. The court ruled that the doctor never testified that the victim had actually been a virgin. In *Autry*, the victim testified that she had told the defendant she was a virgin. The court ruled that the victim testified only to what she *said*, and not to what she actually *was*. Therefore, the victim never asserted that she was actually a virgin.

46. 322 N.C. 302, 367 S.E.2d 679 (1988).

47. *See also* State v. Fenn, 94 N.C. App. 127, 379 S.E.2d 715, *disc. rev. denied*, 325 N.C. 548, 385 S.E.2d 504 (1989).

48. 306 N.C. 692, 295 S.E.2d 453 (1982). *See also* State v. Johnson, 66 N.C. App. 444, 311 S.E.2d 50 (1984), *disc. rev. denied*, 310 N.C. 747, 315 S.E.2d 707 (1984) (trial judge improperly excluded evidence of the victim's prior inconsistent statements to her doctor).

49. 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988).

50. 91 N.C. App. 577, 372 S.E.2d 729 (1988).

51. The defendant "speculated" that the victim was motivated to accuse him of rape because she was pregnant by her boyfriend.

52. 84 N.C. App. 41, 351 S.E.2d 810, *cert. denied*, 319 N.C. 408, 354 S.E.2d 724 (1987).

The Institute of Government of The University of North Carolina at Chapel Hill has printed a total of 1,155 copies of this public document at a cost of $386.46, or $0.33 per copy. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs.

♾ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.