

New Cases on the Rape Shield Law

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The Court of Appeals decided two rape shield cases this month -- *State v. Cook* and *State v. Adu* -- and *Cook*, in particular, is a good illustration of how protective our courts are of the privacy of alleged victims of sexual assaults.

North Carolina's rape shield law, N.C. R. Evid. 412, prohibits the introduction of any evidence about "sexual behavior of the complainant" other than the sexual acts at issue in the case unless the evidence falls within one of four exceptions. By far the most commonly invoked exceptions are (1) for previous sexual contact between the complainant and the defendant, and (2) for "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 latter exception, by its terms, seems potentially broad enough to swallow the rule, but in practice it comes up most frequently when the defendant wants to introduce an alternate explanation for physical evidence of a sexual assault.

For example, in *Cook*, a stepfather was charged with raping his stepdaughter, and a physician testified for the state that the complainant's hymen had scarring consistent with past penetration. The defendant sought to introduce evidence that the complainant had sex with a boyfriend as an alternate explanation for the scarring. Plainly, that evidence falls within the scope of the rape shield rule, but the defendant argued that it also fell within the scope of the second exception.

The trial court didn't admit the evidence, and the Court of Appeals affirmed, in a case that has at least two important lessons for counsel in sexual assault cases. First, Rule 412 requires the proponent of other-sexual-behavior evidence to make an *in camera* offer of proof to establish the admissibility of the evidence. In *Cook*, defense counsel made an offer of proof by examining the complainant, who denied having had sex with her boyfriend, and by proffering that the boyfriend would testify otherwise. The Court of Appeals ruled that this was not a sufficient offer of proof: the complainant denied having had sex, and counsel's mere proffer of the boyfriend's testimony was insufficient. Thus, defense counsel should be sure to call their witnesses at the *in camera* hearing, and prosecutors should pounce if they do not. Second, the Court of Appeals held that even if the proffer were adequate, the evidence would have been inadmissible because the boyfriend would have testified that he and the complainant had sex a week before the state's doctor examined the complainant, but the doctor testified that the scarring was at least a month old. The lesson here is to scrutinize the evidence at issue, since evidence that seems on its face to fall within the exception may not be relevant on closer examination.

The court's reasoning on the Rule 412 issue is pretty unimpeachable, but there was another issue in *Cook* that may be a little less clear-cut. The trial court excluded evidence that the complainant had falsely accused someone else of raping her. This isn't a Rule 412 issue, since making accusations isn't sexual behavior. Rather, it's a Rule 401/403 balancing issue, and the Court of Appeals agreed with the trial judge that the false accusations were sufficiently different in content and context that admitting evidence about them would be more prejudicial than probative. Since this post is already too long, I'll spare you the details, but I'm not sure the court's reasoning on this point is as strong, and I wonder whether the result would have been different in a closer case. If I were a juror, I'd think evidence that the complainant has a history of making false accusations would be pretty probative. Maybe others feel differently -- if so, post a comment.