In a recent sexual assault case I was trying, I posed this question to jurors during voir dire: “Is it okay to have a conversation about rape?” Most jurors answered in the affirmative, and the overwhelming reason jurors gave was that people need to talk about sexual assault out in the open, instead of hiding it away or pretending sexual assault does not happen. The next question I asked: “Is it okay to question whether a rape actually occurred?” No jurors raised their hands or wanted to answer the question, and the silence was deafening. Of course, I was trying to ask in a roundabout way whether the jurors could do their civic duty and give my client a fair trial.

I then shifted the discussion to a fairly recent news story involving an alleged sexual assault on the University of Virginia campus of a young woman named Jackie, and a magazine article by Rolling Stone with the woman’s story. The story gave an account that accused members of a fraternity of sexually assaulting Jackie.

The initial Rolling Stone article sparked a series of protests on the University of Virginia campus, with many taking up the rallying cry of Jackie. The President of the University suspended all fraternities on campus. Virginia politicians released statements that they were shocked and troubled by the Rolling Stone report. United States Senator Mark R. Warner stated that he was “deeply troubled” by the Rolling Stone article and that “it’s time that Congress, universities, and law enforcement authorities work together to combat this epidemic.” Facts later came out to put the young woman’s story into question, and also put into question whether Rolling Stone completely and accurately presented an objective news story. Later, the Charlottesville, VA, police released a statement finding that no evidence existed to verify the Rolling Stone article.

The initial reactions to the Rolling Stone article—specifically the reactions from those who assumed it was 100% true, and then the reactions to the later discoveries that the story was inaccurate—left me wondering how and when we should question whether a sexual assault has actually occurred? I cannot answer this question for the average citizen, but I know that there are at least two people who have a duty to question whether a rape occurred: the judicial factfinder and the criminal defense attorney.

As a criminal defense attorney, I know it is my job to fully and accurately investigate allegations of sexual assault against my client and to defend my client against these allegations. But how does a criminal defense attorney conduct a thorough and well-rounded questioning of a sexual assault victim, and what kind of legal limitations will the criminal defense attorney encounter in his or her questioning of a sexual assault case?

Obviously, the criminal defense attorney should do everything he or she can do to zealously represent and advocate for his or her client. An accused person has the right, under the Sixth Amendment to the U.S. Constitution, to confront wit-

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nesses against him. This right includes the opportunity to completely and thoroughly cross-examine witnesses presented by the State, though the right to confrontation may be limited in some instances in a sexual assault case.4

**Sexual Assaults Are a Special Class of Cases**

The criminal defense attorney will discover that sexual assault cases are a special class of cases, and there may be rules in place due to the special circumstances a sexual assault presents.5 The old rule in sexual assault cases in Nebraska was that an alleged victim’s story had to be corroborated. However, under current law, a sexual assault case can be brought in Nebraska on the alleged victim’s story without corroboration.6 Given all these factors, an attorney representing a client accused of a sexual assault has to give more analysis and deeper thought than in any other criminal case when preparing a defense and cross-examination of the alleged victim.

The criminal defense attorney may have to strive for sensitivity when questioning the victim due to the victim’s age. Forty-four percent of sexual assault victims in the U.S. are under the age of 18, while 15 percent of victims are under the age of 12.7 Nearly 30 percent of child victims are between the ages of four and seven.8

Given the fact that a sexual assault allegation can be based upon an alleged victim’s story alone, there is also the chance that an allegation may be false—the issue of how much of a chance is the subject of debate. One study and accompanying graphic that was circulated and tweeted following the *Rolling Stone* story said just two percent of sexual assault reports are false.9 Other research has put the numbers as high as 41 percent.10 Recent studies have found the figure to fluctuate between two and eight percent.11 One thing is for certain: even if there is only a two percent chance my client has been falsely accused of sexual assault, I know I must fight the allegations.

**Nebraska’s Rape Shield Law**

The rule that a defense attorney will often have to deal with in sexual assault cases is Nebraska’s Rape Shield Law. In 2010, the Nebraska Unicameral adopted the full version of the Rape Shield Law modeled after Federal Rule 412.12 Neb. Rev. Stat. § 27-412 tells us that any evidence of the alleged victim’s sexual behavior or sexual predisposition is not relevant, except in certain circumstances, including the following: the sexual history of the victim with the accused to show consent; sexual history of the victim to show an alternative source for physical evidence; or any other evidence which should be admitted to preserve the accused’s constitutional rights.13

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QUESTIONING THE VICTIM’S STORY

To introduce evidence concerning a victim’s sexual behavior, a proponent of the evidence must first give notice through a written motion to the court at least 15 days prior to trial, unless good cause is shown to excuse the notice requirement. (Such as an accused learning of the facts at issue during trial).14 However, given the fact that the Sixth Amendment Right of Confrontation is at issue, the 15 day deadline may not be an absolute bar to use of the evidence.15 If notice is timely given, the court will hold an in camera hearing to determine the admissibility of the evidence.16

The proponent of the evidence first has to determine whether the proposed evidence falls within the scope of the statute. Nebraska’s Rape Shield Law, much like the federal law it was patterned after, “aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process.”17 The law excludes evidence in the form of sexual behavior and sexual predisposition of the victim, the former referring to specific instances of conduct and the latter referring to general reputation or character evidence about the victim.18

The Nebraska Supreme Court very recently clarified the scope of the evidentiary rule, deciding that evidence of an intimate relationship with someone other than the accused does not fall within the statute, even if the jury may potentially infer that the relationship was of a sexual nature.19 This is noteworthy because evidence of a “committed romantic relationship” between adults may lead a jury to infer there was a sexual component to the relationship, but could still provide motive to lie about the occurrence of a sexual assault.20 Further, the exclusion of evidence regarding the romantic relationship with a third party is not harmless error when the State’s case rests largely upon the testimony of the victim.21

If the proposed evidence falls within the scope of the evidentiary rule, the next step is to determine if an exception applies. The first exception is whether the proposed evidence is “offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence.”22 A defendant may have to show a causal connection between the injury or physical evidence and the alleged sexual behavior by the victim which could have been the source of the injury.23 For example, evidence of sexual behavior three or four days prior to a sexual assault being reported would not be admissible if a doctor testifies the injury could have only occurred one day prior to the reporting.24

The second exception to the rule is “evidence of specific instances of sexual behavior of the victim with respect to the accused offered by the accused to prove consent of the victim if it is first established to the court that such behavior is similar to the behavior involved in the case and tends to establish a pattern of behavior of the victim relevant to the issue of consent.”25 The first step in admitting evidence under this exception is the defendant raising the defense of consent.26 A defendant has to then show two separate things: (1) that the prior, consensual, sexual instances are related to the alleged nonconsensual sexual instance; and (2) that the alleged sexual assault was actually consensual.27 In other words, it is not enough to simply show the victim had sex with the defendant on a prior occasion. Rather, the defendant must adduce evidence showing the victim consented to the sexual instance on the date of the alleged sexual assault.28

A defendant may be precluded from presenting consent evidence regarding past sexual behavior of the victim with the defendant if the sexual behavior is too remote in time, if the past sexual behavior is too dissimilar to the alleged sexual assault, or if a certain injury prevents the possibility of consent.29 However, the defendant does not have to show the alleged sexual assault was exactly akin to prior consensual sexual occurrences.30 The evidentiary rule “does not require the defendant to color-match intimate details of those past relations with the act in question in order to show relevancy.”31

The third and final exception to the rule is whether the exclusion of the evidence would “violate the constitutional rights of the accused.”32 The Nebraska Supreme Court has treated this question in the context of whether the prosecution put the sexual behavior or predisposition of the victim at issue, “thus opening the door.” If the prosecution argues that the victim is a lesbian and therefore would not consent to sex with a male, the door has been opened to the defense presenting evidence that the victim has had sexual intercourse with a male before.33 There is no set rule as to when the door has been opened; courts will examine this question on a case-by-case basis.34

Does the Rape Shield Law exclude cross-examination on whether a victim made a prior false accusation of sexual assault? The United States Supreme Court passed the issue back to the states, leaving state supreme courts to interpret their own evidentiary rules on impeachment regarding prior false sexual assault allegations.35 However, the issue may be one for impeachment rules, and may not necessarily fall under the Rape Shield Law. Specifically, if the defense wishes to impeach the credibility of the victim by showing he or she made a prior false accusation, the defense may have to follow the rules on impeaching a witness on a specific instance of conduct for the purpose of attacking credibility.36 If the witness does not remember the false allegation, then the trial court may not allow further questioning on the issue, or the admission into evidence of extrinsic evidence proving the specific instance of conduct.37
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Discovery in Sexual Assault Case

A defense attorney may need extra planning and preparation during the discovery process in a sexual assault case, due to rules and limitations when looking for impeachment material. Some possible impeachment material may have rules in place regarding privacy or privilege restrictions.

One place to look for impeachment material is in a person’s medical or mental health records. There may be two separate evidentiary limitations to obtaining and using a witness’ mental health records: whether the records are relevant and whether they are protected by privilege. The Nebraska Supreme Court, in State v. Trammell, said that in order to obtain privileged information, such as medical records, a defendant must show that there is a reasonable ground to believe that the failure to produce the information is likely to result in a confrontation clause violation. In other words, an accused first has to show why the material is relevant to his or her defense. There has been no definite test laid out to determine relevancy for these specific materials, although the Court has indicated that timing may be a large indicator. Any hospitalization for a mental health issue over ten years before the alleged crime may not be admissible because of its remoteness in time. Records of mental health treatment occurring at the time of the alleged crime should be relevant if the defense can also show the treatment or the underlying condition affected the witness’ perception or credibility.

Another area to inquire into is school records, which may be relevant in a sexual assault or sexual assault on a child case. School records can contain insights from teachers, counselors, or other school officials that observe the witness on a daily basis. School records may also present challenges as to relevancy or may present privacy concerns under federal and state law. School records are protected under State law, and kept private unless the parents of the student consent to the release of the records or the release is pursuant to a court order or lawfully issued subpoena (and the parents have been notified of the order or subpoena).

An alleged victim’s juvenile records may also be relevant, as long as one meets the same steps outlined in Trammell. The defense must first bypass the privacy limitations put in place to keep juvenile court records sealed. Juvenile court records, including medical, psychological, psychiatric and social welfare reports, cannot be released without court order after a showing of good cause or consent by the subject of the information. A showing of good cause can be made by the defendant if specific facts are articulated as to why there is reasonable ground to believe the failure to produce the juvenile court records would impair the defendant’s right to confrontation.
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These grounds cannot be to show simply the witness is lying because he or she has a juvenile record; such a showing would be barred by Evidentiary Rule 609. The defense has to show that the juvenile records will be used for some other specific impeachment purpose, such as showing a motive to lie stemming from a threat by the state to revoke a person’s juvenile probation if the witness does not testify to a certain story.

Somewhat similar in kind to juvenile records are records held by a protective services agency, which should be made available to a trial court for in camera review if the defendant so requests.

Conclusion

Cross-examining the victim in a sexual assault case requires more planning and preparation than any other cross-examination. There are rules in place to limit a cross-examination due to the special nature of these cases, although the rules do not entirely restrict the right to confrontation. If your case is one in which all the State’s evidence rests on the uncorroborated word of one person, then obtaining impeachment material and working within the exceptions of the Rape Shield Law may help you to represent your client.

Endnotes

1 “A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA” Rolling Stone, Issue 1223, December 4, 2014
2 Senator Mark Warner is the United States Senator for Virginia.
3 Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) The Confrontation Clause is applicable to the States through the Fourteenth Amendment to the Constitution.
5 The Nebraska Legislature specifically intended to preserve the dignity of victims of sexual assaults while at the same time preserving the Constitutional rights of the accused. Neb. Rev. Stat. § 28-318
7 U.S. Bureau of Justice, Sex Offenses and Offenders, 1997.
9 The graphic in question was tweeted and retweeted with the hashtag “#IStandWithJackie”, and originally was published by The Enliven Project.
10 This number came from a 1994 report by Professor Eugene Kanin, and is referred to as “The Kanin study.” The study, however, has come under fire for not using research methods to test the reliability of the findings of the study, and also for using a very small sample size.
11 “False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault” By Dr. Kimberly A. Lonsway, Sgt. Joane Archambault (Ret.), Dr. David Lisak. The Voice, Volume 3, Number 1.
12 Neb. Rev. Stat. §27-412, Laws 2009, LB97, §3. The law was previously contained in the criminal code §28-321 before it was moved into the rules of evidence.
15 Johnson at 55.
17 Fed. R. Evid. 412, advisory committee notes on 1994 amendment.
19 Lavalleur at 112.
20 Lavalleur at 114, citing People v. Golden, 140 P.3d 1, 5 (Colo. App. 2005)
21 Lavalleur at 116.
24 Id.
26 This does mean however, that this evidence is inadmissible in crimes where consent is not a defense.
28 Id. at 117.
30 Sanchez-Lahora at 618
31 Id.
34 Johnson at 57.
37 Id. at 699.
39 Id. at 201.
40 Id. at 200.
41 Id. at 201
42 Family Education Rights and Privacy Act, 20 United States Code §1232g; Neb. Rev. Stat. §84-712.05
45 Cisneros at 711.
47 Cisneros at 711.