

MCL 750.520j: Keeping the Past From Haunting Your Case

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History

- Rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho' never so innocent".
 - Sir Matthew Hale, Lord Chief Justice of England (1609-1676)

History

- The statement, known as the 'Hale warning', was often read in charges to the juries in rape cases throughout the common law world up until the 1980s.
- This statement epitomized the suspicion with which the testimony of rape complainants has been received, from Hale's time up to the late twentieth century.

Michigan History

- “The bad reputation of a prosecuting witness above the age of consent for chastity prior to the date of the offense charged, the show that the intercourse may have been consented to, **is relevant.**
– *People v Ryno*, 148 Mich 137 (1907)

Michigan History

- Chief Justice Cooley in another context, expressed the sentiment at the time that “[t]he probability that a woman who conducts herself properly will be frequently assaulted is very small....” *Derwin v. Parsons*, 52 Mich. 425, 427, 18 N.W. 200 (1884).

Michigan History

- April 1, 1975
- MCL 750.520j
- Michigan’s Rape Shield Statute takes effect

Reason for Act

- Encourage reporting of sexual assault without fear of inquisition of sexual morals or past
- Protecting the victim's privacy
- Protect victims from undue harassment
- Bar evidence that may distract and inflame jurors when only limited probative worth
- Prevent acquittals based on prejudice
- Furthers the truth determining function of the courts

MCL 750.520j

- Sec. 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
 - (a) Evidence of the victim's past sexual conduct with the actor.
 - (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

MRE 404(a) (3)

- *Character of alleged victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;

Evidence of the victim's past sexual conduct with the actor

- Evidence of alleged prior sexual conduct between the defendant and victim, occurring a week before the crime, was admissible in the CSC case; the evidence was relevant to whether the assault occurred and to whether what occurred were "consensual preliminaries to sexual activity as described by the defendant."

» *People v Perkins*, 424 Mich 302 (1986)

Admissible?

- Evidence that children were previously molested and that offender was convicted and that those allegations were similar in nature to the allegations against the current defendant?
- *People v Morse*, 231 Mich App 424 (1998), the court said the Rape Shield Statute would not preclude the introduction to show children's age-inappropriate sexual knowledge was not learned from defendant.

Admissible?

- But see *People v Arenda*, 416 Mich 1 (1982) where the court did not allow evidence of conduct between the boy and another person where there was no evidence that such a thing had happened.

Admissible?

- What about if have a 15-16 year old victim who advised interviewers of other offenders in her past and the defendant tries to introduce it?
- *People v Craig*, 2009 WL 562989 (unpublished) (March 5, 2009) court said that evidence would be precluded.

Source or Origin of Semen, Pregnancy or Disease

- Would evidence that there was DNA evidence of semen from a man other than the defendant 14 hours after the alleged assault be admissible?
- *People v Command*, 2006 WL 1237093 (2006), reversed on other grounds 477 Mich 894 (2006), said yes.

Excluded

- Evidence of complainants reputation for homosexuality to impeach credibility and to show consent (between two prisoners) was determined by the MSC to be not relevant to truthfulness and evidence of complainant's reputation for homosexual unchastity is not relevant to consent.
» *People v Hackett*, 421 Mich 338 (1984)

Excluded

- Evidence that the complainant was a topless dancer and had been seen with prostitutes was excluded as it was more prejudicial than probative of the claim that the sexual encounter between the complainant and the defendant had been sexual.

» *People v Powell*, 201 Mich app 516 (1993), cert denied, 513 US 969 (1994)

Excluded

- Woman's previous consent to sexual relations with others is not relevant to establish that she consented to intercourse with the defendant.

» *People v Makela* 147 Mich App 674 (1985)

Our Scenario

- Would evidence of the victim's suggestive photos and statements on social networking sites be admissible?
- Are they conduct?

Excluded

- Evidence that the defendant observed the victim in a bar (they were not there together) lift her shirt and expose her breasts to two men and that she allowed one of the two men to fondle her breast.

» *People v Wilhelm*, 190 Mich App 574 (1991)

Conduct

- Would a victim's statement's of her sexual dissatisfaction at home due to the physical condition of her husband be conduct which is barred by the Rape Shield Statute?
- *People v Hackett*, 421 Mich 338 (1984) says no....such statements are not conduct.

Prior Allegations of Sexual Assault

- Are they admissible?
- What factor's come into play?
- Prior allegation vs. prior false allegation?
- What makes a prior allegation false?
- Are they governed by MCL 750.520j?
 - MRE 404b?
 - MRE 403?
 - MRE 608?

Prior Allegations

- Are prior sexual assaults “sexual conduct” that are precluded under Rape Shield?
- Even the Michigan Supremes can’t agree!
- *People v Parks*, 483 Mich 1040 (2009)
- Young/Corrigan vs. Markman smack down in order denying an application for leave

Prior Allegations

- Issues raised in Parks...
 - What is conduct?
 - Does it include voluntary or involuntary conduct?
 - Are defendant’s 6th amendment confrontation rights violated?
 - No authoritative answer....stay tuned

Prior False Allegations

- Are they governed by Rape Shield?
- Any other statutes apply?
- MRE 608:
 - *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Prior False Allegations

- If MRE 608 applies, not Rape Shield, how do we protect victims if no requirement for notice, in camera hearing etc?
- *People v Jackson*, 475 Mich 909
 - Ct should see if Defendant has good faith basis to present evidence of an alleged prior false accusation
 - If basis, is the evidence for credibility or proper purpose under MRE 404(b)
 - If credibility, follow MRE 608...no extrinsic evidence
 - If proper under MRE 404(b) can use extrinsic evidence

Conclusion

- Even 35 years later, the idea that rape victims should be encouraged to report and prosecute rapes without fear that private, potentially embarrassing, incidents from their past will become the centerpiece of the ensuing trial, should be true.
- Yet, it is not...
- *Gagne v Booker*, ___ F 3rd ___ (C.A. 6th, Feb 23, 2010)

Conclusion

"If you always watch the demons behind you, then you will never see the angels ahead"

Anonymous...

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