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Criminal Procedure - Rape Victim Shield Statute

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CRIMINAL PROCEDURE — RAPE VICTIM SHIELD STATUTE — *State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980).

INTRODUCTION

Recently the Supreme Court of North Carolina considered for the first time the constitutionality of North Carolina's rape victim shield statute, N.C. GEN. STAT. § 8-58.6[1] (hereinafter referred to as

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1. N.C. GEN. STAT. § 8-58.6 (Cum. Supp. 1979) provides: Restrictions on evidence in rape or sex offenses cases. —

(a) As used in this section, 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) 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) No evidence of sexual behavior shall be introduced at any time during the trial of rape or any lesser included offense thereof or a sex offense or any lesser included offense thereof, nor shall any reference to any such behavior be made in the presence of the jury, unless and until the court has determined that such behavior is relevant under subsection (b). 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 when the proponent desired 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 arguments 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.

G. S. 8-58.6, or "the statute"). In *State v. Fortney*,[2] the court upheld the statute as free from constitutional defect. Mr. Justice Carlton, writing for the court, examined the defendant's argument that his constitutional right of confrontation had been violated because the statute prevented him from automatically questioning a prosecuting witness about her prior sexual experiences. The court did not concur. In upholding the statute, the court cited three reasons for rejecting the defendant's contentions: (1) there is no constitutional right to ask a witness irrelevant questions; (2) in its impact and application, G. S. 8-58.6 is primarily procedural and does not alter any of the defendant's substantive rights; and (3) valid policy reasons support the statute. The apparently liberal construction of its language may have weakened the statute's capacity to shield rape victims, but the *Fortney* court's interpretation significantly strengthened the statute's defense against constitutional attack.

THE CASE

Fortney allegedly accosted the complainant, a twenty-three year-old cocktail waitress, as she returned from work to her Raleigh apartment at 2:00 o'clock a.m. Twice he forced her to submit to oral sex and intercourse; initially in her car outside her apartment and subsequently, inside her apartment. The defendant was charged with first degree rape, kidnapping and crime against nature. His defense was consent.[3]

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.

(d) 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.

2. 301 N.C. 31, 269 S.E.2d 110 (1980).

3. *Id.* at 32, 269 S.E.2d at 111. Testimony indicated that after the initial rape in the parking lot, the defendant made the prosecutrix take him to her apartment for coffee. As they entered her apartment, they encountered a mutual friend who joined them in the apartment. The friend remained while Fortney and Ms. Shepard played backgammon. After the friend left, the defendant again performed oral sex on Ms. Shepard and forced her to have intercourse with him.

Before trial the defendant moved for an in camera hearing[4] to determine the admissibility of evidence tending to show that the complainant, Ms. Shepard, had engaged in prior acts of sexual intercourse with third parties. Laboratory analysis of clothing worn by Ms. Shepard the night of the assault disclosed three different blood groupings of semen. Type B, matching the blood type of the defendant, was the only blood group found in her vagina. At the close of the in camera hearing, the trial judge ruled that the evidence of the type O (the victim's blood type) and type A (found on victim's bathrobe) semen stains was inadmissible unless a state's witness "opened the door" while on the witness stand. However, the judge decreed that defense counsel could question Ms. Shepard during the trial regarding her sexual activity with third persons on the night of the crime.[5]

During the trial, another in camera examination was held on the court's own motion. The court reaffirmed its earlier order that the presence of bodily secretions other than blood type B on the victim's clothes was irrelevant and inadmissible. At the close of all the evidence, the jury found the defendant guilty as charged.[6]

The defendant appealed as a matter of right[7] a life sentence for his conviction of first degree rape. The supreme court allowed his motion to bypass the court of appeals for review of the kidnapping and crime against nature convictions.[8] On appeal, the defendant asserted that G.S. 8-58.6 was unconstitutional, both on its face and in its application to him. The court rejected these assertions and upheld the convictions.[9]

BACKGROUND

North Carolina's rape victim shield statute, G. S. 8-58.6, enacted in 1977 and amended in 1979, represents the General Assembly's latest attempt to reduce the agony of trial for the complainant in a rape case.[10] North Carolina is one of at least forty-six jurisdictions in the United States that has adopted a rape victim

4. N.C. GEN. STAT. § 8-58.6(c) (Cum. Supp. 1979) requires such a hearing before any evidence of the complainant's prior sexual behavior may be admitted.

5. 301 N.C. at 33, 269 S.E.2d at 111.

6. *Id.* at 34, 269 S.E.2d at 111.

7. N.C. GEN. STAT. § 7A-27(a) (1969).

8. N.C. GEN. STAT. § 7A-31 (1969).

9. 301 N.C. at 44, 269 S.E.2d at 117.

10. *See* N.C. GEN. STAT. § 15-166 (1978) which authorizes a trial judge to exclude all bystanders during the taking of the complainant's testimony.

shield statute.[11] These laws vary greatly in design but all seek to protect the prosecutrix from unwarranted inquiry by defense counsel into her personal life. The widespread enactment of shield statutes results, at least in part, from the growing impact of the feminist movement. Another factor contributing to the adoption of such laws is the prevailing perception that rape is a highly underreported crime.[12] Regardless of how many rapes go unreported, the ever increasing number that is reported[13] certainly justifies North Carolina's enactment of G. S. 8-58.6 as part of its attempt to cope with a growing problem.

The enacted statute has three principal provisions:

1) G. S. 8-58.6(b) states the presumption that the sexual behavior of the complainant is irrelevant to *any* issue in the prosecution (emphasis added).[14]

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11. Tanford and Bocchino, *Rape Victim Shield Laws and The Sixth Amendment,* 128 U. PA. L. REV. 544 (1980).

12. *Id.* at 547 n. 13; *See also* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,* 77 COL. L. REV. 1, 5 (1977). These authorities report that estimates of the actual incidence of rape vary from three and one-half to twenty times the reported figure.

13. The FBI estimates that from 1978 to 1979 the incidence of forcible rape increased 13% nationwide and 11% in North Carolina. The national incidence of forcible rape has doubled since 1970. FBI UNIFORM CRIME REPORTS, *Crime in the United States 1979,* 44, 37 (1980).

14. Worthy of note is the statute's use of the term "any issue." In the past, "the use of evidence of prior sexual conduct presumably showing the likelihood of consent on the occasion in question actually . . . was used to impeach the complainant's credibility." *See* Annot., 94 A.L.R.3d 257, 265 (1979). However even before the passage of the rape victim shield statute, the North Carolina Supreme Court recognized in *State v. Davis,* 291 N.C. 1, 229 S.E.2d 285 (1976) that there is no real distinction between the issue of credibility and the issue of consent when the gravamen of the prosecution's case is the complainant's testimony that she did not consent to intercourse with the defendant on the occasion in question.

In reality, the use of evidence regarding the victim's prior sexual behavior almost always goes to her credibility—even in cases where the issue is ostensibly her consent. Beneath the often-quoted sentiment that one can "more readily infer assent in the practised (sic) Messalina, in loose attire, than in the reserved and virtuous Lucretia" is the assumption that a Messalina is far more likely to lie than a Lucretia. *People v. Abbot,* 19 Wend. 192, 195-196 (N.Y. 1838). Artful defense attorneys have utilized such assumptions, together with the confusion of the issues of credibility and consent, to the great advantage of rape defendants.

The order by the *Fortney* trial court that allowed defense counsel to question Ms. Shepard at trial concerning her sexual activity with third persons on the night of the crime illustrates the problem. Although the supreme court never discussed the order, it appears improper under our statute. Such questioning does

2) G. S. 8-58.6(b)(1) through (4) describe the recognized exceptions to the presumption against relevance.
3) G. S. 8-58.6(c) establishes the procedures by which potential evidence is evaluated as to its admissiblity.

Although the constitutionality of the rape victim shield statute was considered for the first time in *State v. Fortney*,[15] North Carolina's appellate courts had applied the statute on two prior occasions. In *State v. Milano*,[16] the supreme court upheld the trial court's refusal of defendant's request that he be allowed to question the prosecutrix further about an abortion she had several years before the rape. The court deemed it unnecessary "to rule on defendant's argument that G. S. 8-58.6 unconstitutionally limits a defendant's right to confront the witnesses against him."[17]

In a later decision, *State v. Smith*,[18] the North Carolina Court of Appeals did not decide the constitutional issue of confrontation. In that prosecution the defendant was convicted of the rape of his sister-in-law in her parents' home. Evidence of sexual activity between the complainant and other third persons was held inadmissible under G. S. 8-58.6(b)(3).[19] Because the defendant did not show how the proffered evidence would lead him to believe that the complainant consented to intercourse with him, he failed to carry his burden as defined by subsection (c) of the statute.

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not seem to qualify under any of the exceptions listed in subsection (b) of the statute. Apparently the trial court fell prey to the same confusion relating to consent and credibility and the same assumptions that have long bedeviled rape trials. Such an occurrence raises doubt as to the ability of the statute to truly shield rape victims at trial.

15. 301 N.C. 31, 269 S.E.2d 110.

16. 297 N.C. 485, 256 S.E.2d 154 (1979).

17. *Id.* at 497, 256 S.E.2d at 161. The court gave two reasons why it was unnecessary to address the constitutional question. First, the discretion of the trial judge would prevail unless the defendant could show that the verdict was improperly influenced by the trial court's limit on cross-examination. Secondly, the record did not disclose whether the complainant had ever answered the question; therefore, the supreme court could not tell if the defendant had been prejudiced by the reply.

18. 45 N.C. App. 501, 263 S.E.2d 371 (1980).

19. N.C. GEN. STAT. § 8-58.6(b)(3) (Cum. Supp. 1979) provides: "The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such 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 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."

Thus far, *Milano, Smith* and *Fortney* are the only North Carolina appellate decisions applying and construing G. S. 8-58.6. However, the *Fortney* court's upholding of the rape victim shield statute typifies the judicial reception to rape shield statutes nationwide. Persistent questions as to their constitutionality notwithstanding, these laws have been widely adopted[20] and upheld.[21] To date, the United States Supreme Court has refused to consider the constitutionality of the rape shield laws.[22]

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20. Tanford and Bocchino, *supra* note 11, at 591-602.

21. *See* People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978); State v. Dawson, 392 So.2d 445 (La. 1980); State v. Gardner, 59 Ohio St. 2d 14, 391 N.E.2d 337 (1979); State v. McCoy, 274 S.C. 70, 261 S.E.2d 159 (1979); State v. Green, _ W.Va. _, 260 S.E.2d 257 (1979).

22. *See, e.g.,* Minnesota v. Hill, 309 Minn. 206, 244 N.W.2d 728 (1976), *cert. denied* 429 U.S. 1065 (1977). The Supreme Court of Minnesota did not reach the constitutional issue of confrontation in upholding the application of Minnesota's rape shield law to the defendant. The defendant contended that the statute violated his right to confront the witnesses against him.

Although the United States Supreme Court has thus far refused to consider whether rape shield statutes violate the right of confrontation, it found a juvenile shield statute violative of the right of confrontation in *Davis v. Alaska,* 415 U.S. 308 (1974). In *Davis,* Green, a juvenile on juvenile court probation, was an important state witness in defendant's burglary prosecution. Before trial, the prosecutor sought a protective order barring cross-examination regarding Green's juvenile record. The defense opposed the protective order, intending to show that Green was biased by the fear that his probation would be revoked if he did not testify for the prosecution. Relying on a juvenile shield law designed to protect the confidentiality of juvenile court records, the trial court granted the protective order. The Supreme Court, per Chief Justice Burger, reversed. The Court concluded that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender." 415 U.S. at 319.

Were the Court to consider a rape victim shield statute, one could expect the state's interest in protecting rape victims to be balanced against the defendant's right of confrontation. The dissent in *Davis* may explain why the Supreme Court has refused to examine any of the rape victim shield laws for sixth amendment flaws. Justice White criticized the majority for:

> second-guessing the state courts and in effect inviting federal review of every ruling of a state trial judge who believes cross-examination has gone far enough. I would not undertake this task, if for no other reason than that I have little faith in our ability in fact-bound cases and on a cold record, to improve on the judgment of trial judges and of the state appellate courts who agree with them.

415 U.S. at 321. Perhaps Justice White's perspective, in the minority in *Davis,* represents the majority's view on rape victim shield statutes.

ANALYSIS

On appeal, Fortney argued that G. S. 8-58.6 was unconstitutional on its face and in its application to him. Specifically, the defendant asserted that his constitutional right to confront the witnesses against him[23] was impermissibly compromised because the statute forbade his automatically questioning the prosecuting witness about her prior sexual experience. The court disagreed.

While it agreed that the right of confrontation entitled the defendant to confront and cross-examine the witnesses against him, the court cited *Chambers v. Mississippi*[24] for the proposition that the right of confrontation "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[25] One interest that the right of confrontation may have to accommodate is a court's "duty to protect a witness 'from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.' "[26]

Recognizing the tension between the defendant's right of confrontation and the prosecutrix's need for protection, the court sought to resolve this tension so as to define the proper scope of cross-examination in rape cases. Mr. Justice Carlton recalled that even prior to the effective date of the rape victim shield statute the court had been reluctant "to apply blindly the *per se* rule that any previous sexual behavior of a rape victim is relevant. . . ."[27] In fact, the statute constituted "nothing more than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims."[28] According to the court, the statute was a legislative echo of the judiciary's rejection of the notion that all sexual behavior has intrinsic relevance. The courts had previously required that any evidence sought on cross-examination about the prosecutrix be relevant to the issues in the case and the determination of the relevance of proffered evidence resided primarily in the discretion of the trial judge.[29] G. S. 8-58.6 seeks to restrict that discretion.

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23. U.S. CONST. amend. VI; N.C. CONST. art. I, § 23.

24. 410 U.S. 285, 295 (1980).

25. 301 N.C. at 36, 269 S.E.2d at 113.

26. *Id.* at 36, 269 S.E.2d at 113 (quoting Alford v. United States, 282 U.S. 687, 694 (1931)).

27. State v. McLean, 294 N.C. 623, 242 S.E.2d 814 (1978).

28. 301 N.C. at 37, 269 S.E.2d at 113.

29. 294 N.C. at 632, 242 S.E.2d at 820.

The court rejected a *per se* rule of relevance concerning the prior sexual behavior of the complainant for a number of reasons. First, evidence of a woman's prior sexual behavior with a third person is no longer regarded by most authorities as probative of her willingness to consent to intercourse with the defendant.[30] Secondly, such evidence has little probative value and is highly prejudicial to the state's case. Thirdly, the introduction of such evidence distracts the jury by focusing attention on the victim's personal life rather than on the guilt or innocence of the accused. Finally, the court reasoned: "If sexual experiences outside marriage render one woman less truthful than her virgin sister,[31] then sexual experience outside marriage would be an issue at any trial where a woman was a witness. This is plainly not the case."[32]

The court interpreted G. S. 8-58.6 as properly rejecting the *per se* rule and limiting cross-examination; however, it cautioned that the statute did not totally exclude evidence of prior sexual behavior. Mr. Justice Carlton analogized the statute to judge-made rules of evidence and declared that G. S. 8-58.6 "codifies primarily procedural rules and thus does not unduly impinge upon the defendant's substantive right to confront his accusing witness."[33] The court examined the exceptions to the rule of irrelevance contained in subsection (b) and characterized them as "ample safeguards to insure that relevant evidence is not excluded."[34] "These exceptions," Justice Carlton declared, "define those times when the prior sexual behavior of a complainant is relevant to issues raised in a rape trial and are not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes."[35]

Finally, in examining subsection (c), the court discovered an additional safeguard:

> Nor does the statute stop with definitions. If any question arises concerning evidence of a victim's prior sexual history, that question may be presented at an in camera hearing where opposing counsel may present evidence, cross-examine witnesses and generally attempt to discern the relevance of proffered testimony in the

30. 301 N.C. at 38, 269 S.E.2d at 114 (citing Annot., 94 A.L.R.3d 257 (1979) and the cases collected therein).

31. This is an underlying assumption of the *per se* rule.

32. 301 N.C. at 40, 269 S.E.2d at 115.

33. *Id.* at 40, 269 S.E.2d at 115.

34. Id. at 41, 269 S.E.2d at 115.

35. *Id.* at 42, 269 S.E.2d at 116.

crucible of an adversarial proceeding away from the jury.[36]

This construction seems to broaden the statute beyond the intentions of the General Assembly. The legislature apparently envisioned the admission of only that evidence which could satisfy one of the stated exceptions of subsection (b). The first sentence of subsection (c) requires that "[n]o evidence of sexual behavior shall be introduced . . . unless and until the court has determined that such behavior is relevant under subsection (b)."[37] However, the court seems to imply that subsection (c) does more than evaluate the admissibility of evidence under the criteria of subsection (b). Mr. Justice Carlton's statement that "if *any* question arises concerning evidence of a victim's prior sexual history"[38] (emphasis added) then the procedures of subsection (c) are available to test its relevance, appears to expand the exceptions to the rule of non-relevance beyond those listed in subsection (b).

Furthermore, the court characterized the rape shield law as "nothing more than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims."[39] This characterization implies that any evidence admissible before the passage of the shield statute would still be admissible. However, the very enactment of the statute suggests that the General Assembly was dissatisfied with the case law in this area and wanted to restrict the admissibility of sexual behavior evidence. Thus it is doubtful that the General Assembly regarded the shield statute as "a mere codification."

Whatever the legislative objective, the court's broad interpretation fortified the statute against constitutional attack. Even if excluded by the exceptions of subsection (b), relevant evidence more probative than prejudicial apparently will be admitted under subsection (c). Therefore, no violation of the Constitution arises inasmuch as the right of confrontation entitles a defendant to confront the witnesses against him, but only if that evidence is shown to be both relevant and more probative than prejudicial. Although strengthened against constitutional attack, the statute probably has been weakened concomitantly as a shield for rape victims. Under the *Fortney* construction of G. S. 8-58.6, irrelevant as well as relevant evidence of prior sexual behavior should be more read-

36. *Id.*
37. N.C. GEN. STAT. § 8-58.6(c) (Cum. Supp. 1979).
38. 301 N.C. at 42, 269 S.E.2d at 116.
39. *Id.* at 37, 269 S.E.2d at 113.

ily admitted.

In addition to determining that in "its impact and application, this statute is primarily procedural and does not alter any of defendant's substantive rights,"[40] the court found valid policy reasons for pronouncing G. S. 8-58.6 constitutionally fit. "Rape is one of the most underreported crimes . . . . Part of the reluctance of victims to report and prosecute rape stems from their feeling that the legal system harasses and humiliates them."[41] The court reiterated the United States Supreme Court's holding in *Alford v. United States*[42] that the right of confrontation did not include unnecessary witness harassment and humiliation. The statute, *Fortney* declared, simply codified that holding.[43]

Having decided that the statute itself was constitutional, the North Carolina Supreme Court examined the defendant's contention that the shield law had been unconstitutionally applied to him but found no merit in his claim. Defendant's evidence of three different semen stains on the victim's clothing was not probative of the victim's consent to intercourse. The court felt the evidence merely raised a weak inference that Ms. Shepard:

> had sex with two individuals other than the defendant at some time prior to the night of the rape (footnote omitted). Without a showing of more, this is precisely the kind of evidence the statute was designed to keep out because it is irrelevant and tends to prejudice the jury, while causing social harm by discouraging rape victims from reporting and prosecuting the crime.[44]

Thus, the court concluded that G. S. 8-58.6 "is constitutional both on its face and in its application to the facts *sub judice*."[45]

CONCLUSION

State v. Fortney pronounced G. S. 8-58.6 constitutionally sound. As construed by the court, the shield statute did not impermissibly compromise the defendant's right of confrontation; it "merely contains and channels long-held tenets of relevance by providing a statutory definition of that relevance and by providing a procedure to test that definition within the context of any partic-

40. *Id.* at 36, 269 S.E.2d at 112.
41. *Id.* at 42, 269 S.E.2d at 116.
42. 282 U.S. 687 (1931).
43. 301 N.C. at 43, 269 S.E.2d at 116.
44. *Id.* at 43-44, 269 S.E.2d at 117.
45. *Id.* at 44, 269 S.E.2d at 117.

ular case."[46] Although its "tenets of relevance" are not new, North Carolina's rape victim shield statute evidences an evolution in society's attitude toward rape. At one time, the fear of unfabricated rape charges—the fear that rape "is an accusation easily to be made . . . and harder to be defended . . ."[47]—dominated our evidentiary rules pertaining to the admissibility of prior sexual behavior. Today that fear is tempered by greater concern for the well-being of the victims of rape.

The dilemma confronting rape victim shield statutes, according to one commentator, "is to chart a course between inflexible legislative rule and untrammeled judicial discretion."[48] The future of North Carolina's rape victim shield statute is uncertain. After *Fortney* there appears to be some danger that it will flounder in the shoal waters of excessive judicial discretion. If the statute is to succeed, the court must take care that the "exception" of G. S. 8-58.6(c) does not swallow the rule.

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46. Id. at 42, 269 S.E.2d at 116.

47. 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634 (1st American ed. Philadelphia 1847) (1st ed. London 1736). This statement is derived from the writings of Sir Matthew Hale, Lord Chief Justice of the King's Bench. It has often been quoted in special cautionary jury charges in rape cases. *See* Berger, *supra* note 12, at 10.

48. Berger, *supra* note 12, at 69.