

Rape Shield Litigation Issues

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Wisconsin Rape Shield Law

972.11(2)

- The Rape Shield Law is found in Ch. 972 titled “Criminal Trials”
- 972.11 is titled “Evidence and practice: civil rules applicable,” and applies the rules of evidence to criminal cases.
- 972.11 also covers testimony of child witnesses by closed circuit audio-visual, out of state evidence in OWI cases and return of exhibits .

Definitions 972.11(2)(a)

- “Sexual conduct” means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.

Rape Shield Rule 972.11 (2)(b)

- If a defendant is accused of a sexual assault under 940.225 or a sexual assault of a child under Ch 948, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury.

Breaking down the Rule

- If a defendant is accused of a sexual assault under 940.225 or a sexual assault of a child under Ch 948,
- Any evidence is covered
- If it concerns the complaining witness's ...
- Prior sexual conduct, or opinions of the witness's prior sexual conduct
- Shall not be admitted into evidence during the course of the hearing or trial,
- Nor shall any reference to such conduct be made in the presence of the jury – in argument.

Statutory exceptions: 972.11(2)(b)1-3

- Evidence of the complaining witness's past conduct with the defendant.
- Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
- Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

What about Limited Admissibility under 901.06?

- Rape shield rule applies regardless of the purpose the evidence is offered unless it fits within one of the statutory exceptions under 972.11(2)(c)

And what about 971.31(11)?

- 971.31(11) requires that in a sexual assault cases, rape shield exception evidence must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

“Manner of dress” under 972.11

- (d)1. provides that if a defendant is accused of sexual assault under 940.225 or Ch. 948, evidence of the manner of dress of the complaining witness at the time when the crime occurred is admissible only if it is relevant to a contested issue a trial and its probative value substantially outweighs both (1) unfair prejudice and confusion of the jury AND (2) considerations of delay or cumulative evidence.

Pretrial motions

- 972.11(d)2. requires that admissibility of manner of dress evidence be determined upon pretrial motion before it may be admitted at trial.
- 971.31(11) requires that admissibility of rape shield exception evidence be raised in pretrial motion.
- *Practice tip: When in doubt, file pretrial motion seeking admission of sexual conduct evidence.*

The *Pulizzano* test

155 Wis. 2nd 633, 1990

- On its face, 972.11(2) does not violate a defendant's constitutional right to present evidence.
- In circumstances of a particular case, evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it may be constitutionally protected.

Pulizzano criteria required to admit evidence of a child complainant's prior sexual conduct for limited purpose of proving an alternate source of sexual knowledge, by offer of proof showing:

- The prior acts clearly occurred
- Acts closely resembled the present case
- Prior act is clearly relevant to material issue
- Evidence is necessary to defendant's case
- Probative value outweighs prejudicial effect

Cases admitting evidence despite 972.11(2)(b):

- *State v. Pulizzano*, 155 Wis. 2nd 633, (1990). Evidence to show prior source of sexual knowledge.
- *State v. Moats*, 156 Wis. 2nd 74 (1990). Prior sexual assault on child victim.
- *In Interest of Michael R.B.*, 175 Wis. 2nd 713(1993). Child victim's relationship with friend and expert testimony about enlarged hymen.
- *State v. Dodson*, 219 Wis. 2nd 65, (1998). Minor was victim of prior sexual assault.

Cases prohibiting evidence under 972.11(2):

- *In Interest of Michael R.B.*, 175 Wis. 2nd 713(1993). Evidence of prior conduct to explain enlarged hymen of child victim.
- *State v. Dunlap*, 250 Wis 2nd 466 (2002). Child victim prior sexual behavior.
- *State v. St. George*, 252 Wis. 2nd 499 (2002). Child victim prior sexual behavior.

Cases denying admission despite apparent exception to rape shield

- *State v. DeSantis*, 155 Wis. 2nd 774 (1990). Prior untruthful prior allegations excluded on grounds evidence was too “nebulous” and would confuse the jury.
- *State v. Jackson*, Wis. 2nd 646 (1998). Evidence of prior sexual contact of adult victim with defendant. Evidence was barred because it was not material and probative value outweighed by prejudicial effect.

What can we learn from the cases?

- The cases are very fact specific.
- They are usually resolved based on the quality of the offer of proof by the proponent/defendant.
- Any balancing test is biased in favor of the state's interest in the rape shield law to protect victims from irrelevant attacks on their reputation

Does *Pulizzano* limit the constitutional exception to rape shield statute to cases involving child victims to show alternative source of sexual knowledge?

- “The only limitation is your imagination.”
Jim Wirtz

How do you analyze a case for possible use of rape shield evidence?

- What is the accusation?
- What is the defense?
- What is the sexual conduct evidence?
- Is there a statutory exception?
- If so is it material and does it outweigh prejudicial impact?
- Is there a constitutional exception?
- Do the *Pulizzano* criteria apply?

State v. Paul H.

3rd deg. Sexual assault.

- Defendant accused of sexual assault of his best friend's girlfriend.
- Complaint alleged that a consensual encounter turned into a "date rape".
- "Victim" went to hospital for forensic evaluation.

Theory of defense

- The victim had a fight with her boyfriend
- She and another girl asked the defendant to come over and party.
- The victim told the defendant about the fight.
- The victim consented to sexual intercourse.
- The victim accused the defendant to cover her shame and to save face.

Key facts discovered in investigation:

- Defendant told police on phone that he did not have sex with the victim.
- No other statement of the defendant
- Defendant told counsel he used a condom
- Victim told SANE nurse that she did not know if a condom was used.
- Victim claimed she had not had sex with anyone else in last 72 hours.
- Exam shows evidence of vaginal tearing, consistent with recent, unlubricated penetration.

Evidence of 2 contributors of male DNA on stained underwear suggests alternate source of semen

- DA still believes that he must prove that sexual intercourse occurred.
- Problem for defense: Client claimed he used a condom.
- DNA evidence is inconsistent with victim's claim that she did not have recent sex with anyone except assault.
- Additional testing reveals identity of second source of DNA: BOYFRIEND!

Is this an exception to the Rape Shield statute?

- Statutory exception under 2. Evidence of specific instance of sexual conduct showing the source of semen *for use in determining the degree of sexual assault or the extent of the injuries suffered.*
- It explains the vaginal tearing.
- Is it material and does it outweigh the prejudicial effect of such evidence?

5. An order permitting any party to question witnesses about sexual relations between the alleged victim and any other party on or about the day of the alleged offense. Such questioning is not prohibited by any applicable rape-shield law under section 972.11 (2) because it is necessary to explain the existence of physical evidence that suggests sexual intercourse with another male at the time of the alleged assault, and thus is necessary for the defendant to present a defense.

How does the sexual conduct evidence relate to the theory of defense?

- The victim falsely alleged that she did not have sex relations with anyone on the day of the incident.
- She had sex with her boyfriend after the alleged rape.
- A false allegation is made to hide the sexual intercourse with Paul.
- **RESULT:** Court allows admission of DNA evidence and permits limited questioning about source of boyfriend's DNA