Rule 412. Past Conduct of Victim of Certain Sex Offenses

(1) In a prosecution for acts of criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct, evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in Rule 412. Such evidence can be admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the following circumstances:

(A) When consent of the victim is a defense in the case,

(i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue, relevant and material to the issue of consent;

(ii) evidence of the victim's previous sexual conduct with the accused; or

(B) When the prosecution's case includes evidence of semen, pregnancy or disease at the time of the incident or, in the case of pregnancy, between the time of the incident and trial, evidence of specific instances of the victim's previous sexual conduct, to show the source of the semen, pregnancy or disease.

(2) The accused may not offer evidence described in Rule 412(1) except pursuant to the following procedure:

(A) A motion shall be made by the accused prior to the trial, unless later for good cause shown, setting out with particularity the offer of proof of the evidence that the accused intends to offer, relative to the previous sexual conduct of the victim.

(B) If the court deems the offer of proof sufficient, the court shall order a hearing out of the presence of the jury, if any, and in such hearing shall allow the accused to make a full presentation of the offer of proof.

(C) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the accused regarding the previous sexual conduct of the victim is admissible under the provisions of Rule 412(1) and that its probative value is not substantially outweighed by its inflammatory or prejudicial nature, the court shall make an order stating the extent to which such evidence is admissible. The accused may then offer evidence pursuant to the order of the court.

(D) If new information is discovered after the date of the hearing or during the course of trial, which may make evidence described in Rule 412(1) admissible, the accused may make an offer of proof pursuant to Rule 412(2), and the court shall hold an in camera hearing to determine whether the proposed evidence is admissible by the standards herein.

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment - 1989

The original draft of the rules contained a proposed rule which was intended to preserve the holdings of State v. Zaccardi, 280 Minn. 291, 159 N.W.2d 108 (1968) and State v. Warford, 293 Minn. 339, 200 N.W.2d 301 (1972), cert. denied 410 U.S. 935, 93 S. Ct. 1388, 35 L.Ed.2d 598 (1973). While the Committee was drafting the rules, the Legislature passed an extensive revision of the law relating to sex offenses. Criminal Code of 1963, Minnesota Laws 1975, chapter 374, p. 1244, codified at Minnesota Statutes 1975 Supplement, sections 609.341 to 609.35. Included in the legislation was Minnesota Statutes 1975 Supplement, section 609.347, which contained provisions

relating to evidence, procedure, substantive law and jury instructions. During the public hearings held on the rules, various persons appeared before the committee and a number of written comments were received, all in support of the provisions of Minnesota Statutes 1975 Supplement, section 609.347. As a result, the Committee decided to revise the original proposed evidentiary rule to incorporate the evidentiary and procedural provisions of the statute.

It is the intent of the Committee that subdivisions 1, 2, and 5 of the statute shall not be affected by the rule. Subdivision 1 relates to the weight of evidence; subdivision 2 relates to the substantive law defining the offenses; and subdivision 5 concerns jury instructions. It was the opinion of the Committee that none of these subjects should be incorporated into evidentiary rules. Accordingly, it is the Committee's intent that these subdivisions shall continue in effect after the rules take effect.

Subdivision 3 of the statute relates to admissibility, and subdivision 4 relates to the procedure for determining admissibility. Both of these subjects are properly within the scope of evidentiary rules, and the Committee incorporated their substance into the revised Rule 412. The revised rule contains the substance of the statute's provision that evidence of the victim's previous sexual conduct can only be admitted in limited circumstances and the provision for mandatory notice and hearing before such evidence can be admitted.

The committee made various changes, some of style and some of substance. Among the changes of style are the substitution of the words "accused" for "defendant" and "victim" for "complainant" so as to be consistent with the balance of Rule 404.

Although the Committee agreed in substance with the thrust of the statute, because of the many questions that were created by the language in the statute, the Committee could not recommend the entire statute as drafted. For example, although it appears that the purpose of the statute was to eliminate the unwarranted attack on the victim's character when such evidence does not relate to the issues at trial, the effect of the statute could be the opposite. Subdivision (3)(a) suggests that the victim's past sexual conduct would be admissible to prove "fabrication."

This could have the effect of expanding the use of past sexual conduct to all contested trials, an unwise result that seems inconsistent with sound policy and the purposes of the legislation. The evidentiary rule does not make past conduct admissible to prove fabrication.

The statute did not make it clear that consent and identity of semen, disease, or pregnancy are the only two issues to which evidence of the victim's prior sexual conduct should be admitted. Furthermore, it is not clear from the statute the extent to which prior sexual conduct with the accused is admissible. The evidentiary rule makes it clear that this evidence is only admissible when consent or identity is in issue. Finally, portions of the statute could be subject to constitutional attack on due process or right of confrontation grounds. As a consequence, the Committee redrafted these sections trying to remain true to the overall legislative intent which the Committee endorses.

The statute recognized three situations in which previous sexual conduct of the victim would be relevant and admissible. The first of these occurs when consent is in issue. Prior sexual conduct is offered in order to give rise to an inference that the victim acted in conformity with that past conduct on a particular occasion. In the case of a victim of a sex offense, this is only relevant to prove that the victim consented to the act. If consent is not a defense, as, for example, the accused denies he was involved in the incident, evidence of the victim's past conduct is not relevant. This type of evidence is treated in Rule 412(1). The rule recognizes the same two categories of such evidence recognized by the statute: evidence tending to show a common scheme or plan (subsection (A)(i)); and evidence of conduct involving both the accused and the victim (subsection (A)(ii)). As in the statute, the rule allows only these two categories of past sexual conduct to be admitted to prove consent.

The second situation in which evidence of the victim's previous sexual conduct can be admitted under both the statute and the rule occurs when the prosecution has offered evidence concerning semen, pregnancy or disease, to show either that the offense occurred or that the accused committed it. In this case the accused may offer evidence of the victim's specific sexual activity to rebut the inferences raised by the prosecution's evidence. Rule 412(1)(B). In this situation consent is not material, and the rule admits such evidence without requiring consent to be a defense.

The third situation in which the statute admitted evidence of previous sexual conduct occurs when the victim testifies specifically concerning such sexual conduct - or more probably, lack of sexual conduct - on direct examination. The statute allowed evidence of previous sexual conduct to impeach the victim's testimony. Minnesota Statutes 1975 Supplement, section 609.347, subdivision 3, paragraph (d). This provision was not incorporated in the rule because the Committee is of the opinion that the accused might not know whether the victim was going to testify about lack of sexual conduct until the victim had actually completed direct examination. To impose the notice and hearing requirement does not seem to be fair in such a case. Moreover, the prosecution and victim can obviate such impeaching testimony by avoiding general statements about the victim's sexual activity on direct examination. For these reasons subdivision 3, paragraph (d), of the statute is not incorporated in the rule. The Committee has not attempted to codify rules about circumstances under which prosecution evidence of this nature opens the door to rebuttal evidence by the defense.

The Committee deleted the language, "Evidence of such conduct engaged in more than one year prior to the date of alleged offense is inadmissible," from subdivision 3, paragraph (a), of the statute. Obviously, the longer time lapse between the past conduct and the date of the alleged consent, the less probative the evidence becomes. However, there might be situations in which the victim engaged in a common scheme or plan which began more than a year before the offense and which might be relevant. The year limitation is arbitrary and may be unconstitutional. A sufficient safeguard is contained in the requirement that the probative value must not be substantially outweighed by the inflammatory and prejudicial nature of the evidence. This standard of admissibility has been altered slightly from the statutory language to conform with the general standard of admissibility found in Rule 403. The change was necessary so that it would not appear that the accused had to meet a more stringent test of admissibility when proving a defense, than did the prosecutor in proving the accused's guilt.

With the respect to the procedural portions of the rule, the Committee deleted the language "to the fact of consent" from subdivision 4, paragraph (c), of the statute. The required finding is that the evidence be "admissible as prescribed by this rule." Under both the statute and the rule, certain evidence of previous sexual conduct - that concerning the source of semen, pregnancy or disease - is admissible whether or not consent is a defense.

The Committee deleted the language "and prescribing the nature of the questions to be permitted at trial," also from subdivision 4, paragraph (c), of the statute. A court order stating the extent to which the evidence is admissible is a sufficient safeguard, especially when considered with the restrictive language, "nor shall any reference to such conduct be made in the presence of the jury," taken from the statute and incorporated in Rule 412(1). Prescribing the nature of the questions to be asked by counsel is a marked and unnecessary departure from the adversary system and may be unconstitutional.

In rare cases, the due process clause, the right to confront accusers, or the right to present evidence will require admission of evidence not specifically described in Rule 412. See State v. Benedict, 397 N.W.2d 337, 341 (Minn. 1986); State v. Caswell, 320 N.W.2d 417, 419 (Minn. 1982).

Committee Comment - 2006

The amendment is intended to clarify the reach of the rape shield rule. The amendment provides a general description of the types of cases in which this rule is applicable. The rule is drafted broadly enough to incorporate offers of evidence against alleged victims in prosecutions brought under the new sexual predator laws. See, e.g., Minnesota Statutes 2005 Supplement, section 609.3453, (criminal sexual predatory conduct). The language in the amendment can accommodate future statutory changes without requiring that the rule be amended. Similar language is also included in the amendment to Rule 404. The rape shield rule should be applicable in all cases where the accused is offering evidence of the past sexual conduct of the alleged victim.