

Intimate Partner Sexual Abuse:

DISCUSSION GUIDE FOR FACULTY

STATE V. BEN NELSON

Exercise 1: Rape Shield

Q1.

The defense attorney argues that the photos are admissible to prove consent. The prosecutor argues that the photos are inadmissible because the alleged victim did not consent to the sexual acts shown or being photographed by her husband (F.R.E. 412 (B) (b)). How would you determine whether the conduct depicted in the photos was “consensual”? How would you rule on that argument?

Does it matter whether the conduct in the photos was “consensual” or not? These photos were taken six months before the alleged assault and therefore are not relevant to consent on the night in question.

Q2.

The prosecution argues that the photos are more prejudicial than probative (F.R.E. 403). How would you rule on that argument?

The photos are sexually explicit and show the wife engaging in an act of “anal manipulation with a dildo.” Admitting these photographs would be more prejudicial than probative because of their explicit nature and because photographs taken six months before the events complained of do not prove or disprove consent on the night in question.

In a decision excluding evidence of a victim’s past sexual conduct with the defendant a Michigan court observed:

“[I]ntroducing evidence of a victim’s past sexual conduct presents a great danger of offending and inflaming those jurors who may find such conduct alien to their own experience and morals. Especially where the prior conduct involves consent to deviant activity, offender [sic]jurors may be unable to comprehend how such a person could be raped.” *Southward v. Warren*, 2009 WL 6040728 at *14.

Q3.

Is the video relevant and material to the issues at hand?

The video is not relevant because it was taken six months prior to the night in question and thus does not inform the question of consent on the night in question.

Q4.

Would you admit the video? Why or why not?

Q5.

Would you admit the photos? Why or why not?

Q6.

If you would admit any of the evidence, would you put any limitations on its use?

In *Jones v. State*, 348 Ark. 619, 74 S.W. 3d 663 (2002) the defendant in a marital rape prosecution sought to introduce photographs of his estranged wife masturbating and engaging with him in oral and anal sex and anal sex with a dildo. He claimed that these photographs were essential "to refute the allegations against him that he forced the victim to engage in deviate sexual acts." The prosecutor argued that the photographs were not relevant to the victim's consent on the night of the rape. The judge held an *in camera* hearing and ruled that the photographs would be admissible if the victim denied engaging in the acts in question, but otherwise not, even if she claimed that she had done so unwillingly. The victim acknowledged engaging in all the acts depicted but claimed that it was without consent. In affirming the defendant's conviction, the Arkansas Supreme Court noted, in words generally applicable to consideration of rape shield issues:

"The purpose of our rape-shield statute...is to shield victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt.... The rape-shield statute prohibits admission of evidence of a victim's prior sexual conduct, unless such conduct pertains to the act upon which the prosecution is based.... Prior acts of sexual conduct are not within themselves evidence of consent in a subsequent sexual act; there must be some additional evidence connecting such prior acts to the alleged consent in the present case before the prior acts become relevant.... However, even such relevant evidence is not admissible unless the trial court, in an *in camera* hearing, makes a written determination that the probative value of the evidence outweighs its inflammatory or prejudicial nature.... The trial court is vested with a great deal of discretion in ruling whether the victim's prior sexual conduct is relevant." 348 Ark. 619, at 628, citations omitted.

Exercise 2: Jury Selection

Q1.

What are the essential questions the prosecutor should ask?

It is essential to identify and excuse any potential juror who does not believe that there is such a thing as marital rape, who believes that under religious law a wife may not refuse to have sex with her husband, or who believes that forced sex between husband and wife is not harmful because they are used to having consensual sex with each other.

How the court rules in the Rape Shield Law hearing will also determine the need for certain questions. With respect to the photographs, the fact that Ms. Nelson acquiesced to her husband's sexual demands -- even though she claims she did so out of fear of his violence -- could create bias against her by potential jurors who find unconventional sexual activity so distasteful that a woman who engages in it under any circumstances, and allows herself to be filmed doing so would be deemed "unrapable," per the case quoted in answer to Q.2 in the Rape Shield Law exercise.

Q2.

What are the essential questions the defense attorney should ask?

The defense argues that Ms. Nelson has "unconventional" sexual appetites and that her husband was simply gratifying them in a mutually consensual relationship. The defense would want to know if there are potential jurors who find "unconventional" sexual activities so distasteful that they would not believe that any woman would willingly engage in them.

Q3.

If they don't inquire into these areas, would you ask the questions?

In your court system, do judges ever question criminal case jurors or is this all done by the lawyers? Is this a function of statewide court culture or individual judges' choice?

Wisconsin Judge Jeffrey Kremers often presents on jury selection in adult victim sexual assault cases. He asks judges whether, in a case where a juror's possible race bias is an important issue, they would ask questions about this if the lawyers failed to do so. Many judges say yes. He then asks why, if they would ask questions about possible bias in those situations, they would not do so in cases involving sex bias.

Q4.

Would you agree to the prosecutor's request for a written questionnaire and individual *voir dire* for questions about potential jurors' prior sexual victimization or perpetration? Why or why not?

With respect to prior victimization, having to disclose child sexual abuse or adult sexual assault is extremely painful for the victim. For many it will be the first time they have ever disclosed to anyone. Requiring victims to disclose in public adds unnecessarily to the trauma of disclosure.

With respect to perpetration, unless this information comes out in response to questions about prior convictions, this is very difficult information to elicit. It is more likely that a prospective juror will respond honestly to questions about accusations if the question is posed in a relatively private questionnaire. If there was no formal accusation it is highly unlikely that the individual will perceive himself as having been a perpetrator, no matter how the question is asked.

Q5.

Would you agree to the prosecutor's request to have a victim/witness staff member present to provide support to any potential juror or discloses prior sexual victimization? Why or why not?

Because it is traumatic to disclose prior sexual victimization, the court should consider how it can minimize the impact of the requirement for disclosure. The court could have a victim/witness staff member present or could advise jurors who disclose that support is available from either the victim/witness advocates in the prosecutor's office or from a community-based rape crisis center. The court should be able to provide specific information about where the community-based support is located and have the contact information.

Exercise 3: Sentencing

Q1.

Would you order a pre-sentence investigation in this case? Why or why not?

Pre-sentence investigations to develop detailed information about the offender's sexual offense history is key to determining an appropriate sentence, the offender's amenability to treatment (psychopaths are not treatable), whether any term of probation after or instead of incarceration is appropriate, and the appropriate conditions of probation.

In a jurisdiction where there are limited or no resources for PSIs, the court may want to consider working with the probation department to publicize the cost/benefit analysis of not having accurate pre-sentence information about sex offenders and explore how to develop the necessary resources.

Q2.

What circumstances in this case support a sentence longer than guidelines for this crime in your state? [Note to the Presenter: Adapt this question to the sentencing guidelines for your state.]

This was a brutal assault that does not warrant lenient sentencing. Moreover, the fact that the victim and defendant were married underscores the gravity of the crime. Marital rape causes severe harm. The fact that the parties had consensual sex in the past does not mitigate the harm. Rather, the betrayal of trust in this most intimate relationship is devastating.

Note the quotation shown on an early Power Point slide from Evan Stark's *Coercive Control*:

"[M]arital rape...should be treated differently and more severely than similar crimes committed by strangers. As a result of its unique relation to personal life, sexual assault is far more likely to be repeated when it is committed by partners and almost always occurs amid other forms of violence, intimidation, and control. The level of unfreedom, subordination, dependence, and betrayal associated with marital rape has no counterpart in public life."

- Professor Evan Stark, *COERCIVE CONTROL* (2007), at 388.

Q3.

What circumstances in this case support a sentence shorter than guidelines for this crime in your state? [Note to the Presenter: Adapt this question to the sentencing guidelines for your state.]

None.

Q4.

What sentence would you impose here?

This discussion will depend on your state's sentencing guidelines and the extent of judicial discretion allowable.

There should be a term of incarceration per the guidelines and Question 2.

If there was a PSI, it would inform the sentence and any consideration of conditions of probation after incarceration.