

Overcoming the Consent Defense: Prosecuting the Known Offender¹

Several misconceptions surround sexual violence, including the notion that the offender is a stranger who overpowers the victim by using a deadly weapon or physical force. When the offender is someone the victim knows, the defense team exploits this fact (along with other myths and misconceptions at trial) to suggest that (1) what happened was not a crime and (2) the victim gave consent to any alleged act. The prosecution faces the challenge of demonstrating that explicit violence is seldom necessary in such cases. Instead, the offender uses planning, manipulation, and exploitation to commit the crime, employing tactics such as taking advantage of the victim's trust or vulnerabilities (e.g., through intoxication).

Addressing the Consent Defense in Cold Cases

The consent defense further complicates cold cases. A case may have gone “cold” because the offender initially cast the rape as a consensual act, and the challenges associated with proving the case could not be overcome. Additionally, the offender's admission that the sexual act occurred may have led to a decision not to test the sexual assault kit (SAK), resulting in the failure to identify a potential serial rapist through the Combined DNA Index System (CODIS). Occasionally, the belated testing of a previously unsubmitted SAK will work in the prosecution's favor. When an offender has denied (either at the time of the original report or upon being interviewed after the case is reopened) engaging in sexual activity with the victim, the SAK test results that indicate penetration occurred will assist in preventing an attempt to assert a belated consent defense.

Consent is defined in the applicable statutes and case law.² Even when consent is not explicitly asserted as a defense, consent remains an issue that must be addressed when a jury could conceivably consider it. Reports and statements from the victim and witnesses, including the offender and defense witnesses, may provide evidence that the victim's verbal and nonverbal behaviors were inconsistent with consent. In addition, there are some jurisdictions that recognize the invalidity of an expression of consent induced by coercion, fraud, or intoxication.³

Covering the Offender's Past

Overcoming the consent defense requires you to identify and introduce evidence of the offender's conduct and history, the victim's words or responses to trauma, and other circumstances that cumulatively prove the victim did not consent. Take a victim-centered, offender-focused approach by investigating the offender's history to determine if the offender has engaged in similar conduct toward other victims. While such prior acts are not admissible to show bad character, they could be offered into evidence under the jurisdiction's equivalent of Federal Rule of Evidence 404(b) to prove the offender's motive, intent, preparation, plan, knowledge, or absence of mistake in the current case.⁴ Such prior acts and victims can be identified by

- ◆ using the offender's criminal history,
- ◆ searching for CODIS hits,
- ◆ interviewing previous victim(s) or other witnesses (including the offender's family and friends), or
- ◆ reviewing posts on the offender's social media accounts.

Focusing on the offender's conduct exposes the offender's predatory behavior, which demeans the consent defense.

Knowing the Defense's Tactics

The defense will likely attempt to discredit the victim in multiple ways. For example, the defense may call into question the victim's memory or perception of events (especially if alcohol was involved); the defense may also challenge the victim's credibility directly by asserting a motive to lie or by portraying the victim as later regretting a voluntary act. A victim's expressions of self-blame may be highlighted as evidence that the offender was not responsible, or that the incident was consensual. The defense may question the victim about prior consensual sex with the offender; this evidence is usually admissible under rape shield statutes.⁵

Other defense tactics include attempts to impugn the victim's character, making the jury unsympathetic to the victim. Such efforts may include attempts to introduce evidence of the victim's sexual history (which violates rape shield statutes) or to introduce other irrelevant and prejudicial evidence. If there has been prior consensual sex between the victim and offender, the defense may attempt to minimize the evidence of force in the present case by trivializing any injury or by characterizing injury as an accidental byproduct of "rough consensual sex."

Responding to the Defense

If the defense team's strategy relies on improper evidence, then motions *in limine* may be filed to exclude such evidence. Other forms of victim-blaming can be effectively countered at trial with good witness preparation and carefully planned arguments. For example, a victim's emotional testimony about the invasive experience of the SAK exam and interview with the responding officer can powerfully support the argument that the victim would not choose to undergo such an ordeal based on having second thoughts about a consensual encounter. If the jury might have difficulty understanding the victim's behavior during or after the assault, an expert in victim response to sexual assault trauma can testify about the range of behavioral responses to assault.⁶

Preparing for Trial

A well-prepared argument should demonstrate that the only reasonable basis for the victim's disclosure is because of a non-consensual act. When preparing for the case, recount each step the victim had to endure for the case to be presented to the jury, and remind jurors how long the victim has persisted in the quest for justice. Also highlight the evidence inconsistent with consent. Such evidence may consist of the victim's unresponsiveness or incoherence in an alcohol-facilitated assault case; physical evidence of injury, if applicable; the context or setting of the act; evidence of coercion, manipulation, or exploitation on the offender's part; and admissions or provable lies by the offender.

Addressing Previous Consensual Encounters

There's more to this topic than preparing to counter tactics from the defense team. In cases in which the parties had a previous relationship or consensual encounter(s), remind the jury that consent (by its nature) is something that is not given forever and under all circumstances. Emphasize the fact that people in relationships or people who have allowed sexual contact once or multiple times continue to retain the right to control access to their bodies. Therefore, saying "yes" on a prior occasion, or even on several occasions, does not mean that the victim consented on *this* occasion. Finally, while it is never proper for you to express a personal belief in the victim's truthfulness, it is important to always project confidence in the victim's veracity and the reality of the harm suffered.

References:

1. This article is largely adopted from Section 4.2-D-1 of the Model Response to Sexual Violence for Prosecutors (RSVP): An Invitation to Lead, AEquitas, Justice Management Institute & Urban Institute (2017), available at www.aequitasresource.org/library.cfm. See also, Webinar Recording by Chris Mallios, Overcoming the Consent Defense Identifying, Investigating, and Prosecuting the Non-Stranger Rapist, available at <http://www.aequitasresource.org/trainingDetail.cfm?id=107> (recorded on April 18, 2014).
2. Absence of consent is an element of certain sexual assault offenses in some jurisdictions; in other jurisdictions, consent is an affirmative defense that must be raised by the defense and disproved by the state. The defense may be codified as part of the criminal code pertaining to sex crimes or may be codified in general provisions applicable to the code as a whole. Contact AEquitas for additional information on consent laws across the United States.
3. For example, see Long, J., Whitman-Barr, C., & Kristiansson, V. *Alcohol- and Drug-Facilitated Sexual Assault: A survey of the Law*, Statutes in Review (August 2016), available at www.aequitasresource.org.
4. Identification of additional victims could, of course, result in additional charges.
5. For example, see Flowe, H. D., Ebbesen, E. B., & Putcha-Bhagavatula, A. (2007). Rape shield laws and sexual behavior evidence: Effects of consent level and women's sexual history on rape allegations. *Law and Human Behavior*, 31(2), 159–175. doi:10.1007/s10979-006-9050-z
6. For example, see Long, J. *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorney's Association (2007); Ellison, L., & Munro, V. (2009). *Complainant Credibility & General Expert Witness Testimony in Rape Trials: Exploring and Influencing Mock Juror Perceptions*, University of Nottingham & University of Leeds; Ellison, L., & Munro, V. (2008). Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility. *The British Journal of Criminology*, 49(2), 202–219. doi:<https://doi.org/10.1093/bjc/azn077>

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