

## Introduction

Consent is often summed up in a simple and direct phrase: “No means no.” If only it were that straightforward in the criminal justice system. Consent is actually one of the most complex aspects of the laws governing criminal sexual conduct. A number of factors come into play: the age of the victim, the voluntary or involuntary use of alcohol or drugs, evidence of force or coercion, mental or physical vulnerability, whether the victim knew the actor – and for how long. This last point is particularly significant because the vast majority of reported sexual assaults involve persons who are familiar to one another. As a result, consent often becomes a central issue to a sexual assault case if the matter is charged and proceeds to trial.

It is realistic to assume that in non-stranger sexual assault cases the defense will vigorously challenge the victim’s assertion that the sexual act occurred without consent. The defense goal is to plant a seed of doubt in the jury’s mind – and, especially in high-profile cases, the broader court of public opinion – about the victim’s truthfulness. The standard for conviction is, after all, “beyond a reasonable doubt” and the defense intends to play upon the still-present societal tendency to mistrust a victim’s experience. This scenario plays out time and again, from the most high profile cases (Kobe Bryant and William Kennedy Smith) to nearly every day in our local courthouses.

In order to articulate an effective prevention message about consent it is absolutely necessary to understand some of the legal nuances underlying this central concept in sexual assault prosecutions. Attorneys and advocates alike not only need to know the law, they also need to address the myths and stereotypes that compete with, and sometimes challenge, the legal analysis of consent. It is also helpful to recognize that sexual assault is the one of the last remaining areas of the law in which consent is still a controversial concept. For example, when a

robbery is met with silence or ambivalence, this reaction is not considered consent; hesitancy to react is understood as an act of self-preservation. There may be a weapon involved or the circumstances indicate a known or unknown threat to personal safety. Likewise, in contract law, passive submission or silence are not considered expressions of acceptance to an offer.<sup>1</sup> It is often helpful to remind others that consent should be understood as a universal concept by providing anecdotes about familiar nonconsensual acts they may more readily understand, i.e. “Just because I lent you \$5 last week doesn’t mean you can go into my wallet without my permission and take \$5 this week.” No matter the situation, it’s the individual’s right to decide how and when to consent. The fact that a sexual act is involved should make no difference to this analysis.

#### Overview of Minnesota Law

According to Minnesota law, consent “means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.”<sup>2</sup> Persons who are mentally incapacitated or physically helpless are unable to consent to a sexual act.<sup>3</sup>

There are several instances under Minnesota law in which consent cannot be a defense, specifically when the victim is under a certain age, the actor is older than the minor victim by a certain number of months, or the actor is in a position of authority over the minor victim or in a significant relationship to the minor victim.<sup>4</sup> A position of authority encompasses a person acting

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<sup>1</sup> Mindlin, Jessica E. and Susan H. Vickers, Eds. in Chief, *Beyond the Criminal Justice System: Using the Law to Help Restore the Lives of Sexual Assault Victims, A Practical Guide for Attorneys and Advocates*, 90 (2007 Victim Rights Law Center).

<sup>2</sup> Minn. Stat. §609.341 subd. 4(a) (2009).

<sup>3</sup> *Id.* at subd. 4(b). *See also* Minn. Stat. §609.341 subds. 7 & 9 (2009).

<sup>4</sup> *See* Minn. Stat. §609.341 subds. 10 & 15 and §§609.342-609.344 (2009).

in the place of the parent with regard to minor's health and welfare (i.e. a teacher or coach) and a significant relationship includes a parent or a relative, or an adult residing in the same household as the victim (who is not married to the victim).<sup>5</sup> Consent is also not a defense when the actor is a psychotherapist from whom the victim is receiving treatment, a member of the clergy from whom the victim is seeking spiritual advice, an employee or a volunteer at a correctional institution where the victim is housed, a special transportation service provider for the victim, or a masseuse or other bodywork provider contracted for services by the victim.<sup>6</sup>

In cases other than those in which consent is not a defense, the victim is not required to provide any corroboration of her testimony to show the absence of consent, however it is a greater challenge to prosecute cases without some sort of substantiating evidence therefore prosecutors not only seek it out but also carefully analyze how it will affect the case outcome.<sup>7</sup> Further, consent may be granted initially and then later withdrawn during the course of sexual activity at which point any further contact or penetration is considered criminal.<sup>8</sup> It also does not matter whether the actor reasonably believed that the victim consented; although the prosecution must ultimately prove non-consent, the actor's state of mind is irrelevant to determining whether or not criminal sexual conduct occurred.<sup>9</sup>

Finally, Minnesota has a "Rape Shield Rule" within its Rules of Evidence.<sup>10</sup> The rule bars admission of evidence of the victim's past sexual conduct unless the court determines its probative value significantly outweighs its prejudicial impact.<sup>11</sup> There are exceptions to the rule, however, when consent is a defense. Evidence of the victim's previous sexual conduct may be

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<sup>5</sup> Minn. Stat. §609.341 subds. 10 & 15.

<sup>6</sup> See Minn. Stat. §609.341 subds. 17-21 and §§609.344-609.345 (2009).

<sup>7</sup> Minn. Stat. §609.341 at subd. 4(c).

<sup>8</sup> *State v. Crims*, 540 N.W.2d. 860, 865 (Minn. App. 1996), *rev. denied*. (Minn. Jan. 23, 1996).

<sup>9</sup> See *State v. Mack*, 1999 WL 672680 at \*4.

<sup>10</sup> Minnesota Rule of Evidence 412 (2006).

<sup>11</sup> *Id.* at 412(1).

admitted to establish similar sexual conduct to the case at hand (a common scheme or plan) as may evidence of the victim's previous sexual conduct with the actor.<sup>12</sup> If the prosecution wishes to introduce evidence of semen, pregnancy or disease at the time of the incident, or in the case of pregnancy, between the incident and trial, evidence of the victim's previous sexual conduct may be introduced.<sup>13</sup> What evidence may or may not be allowed pursuant to the Rape Shield Rule is typically argued through motions presented to the court prior to the trial, before a jury hears the case, or if the matter comes up during the trial the judge will review evidence in chambers before deciding whether the jury can hear it.<sup>14</sup>

### The Consent Defense

In his groundbreaking study of “undetected rapists,” Dr. David Lisak identified the grooming, stalking and other predatory behaviors used by rapists to target a potential victim, establish a trust relationship and then ultimately trap and assault.<sup>15</sup> These men rarely use force or coercion to achieve their ends; instead they break down victims' boundaries through premeditated activity that includes the use of alcohol (typically, although controlled substances may be employed as well) to render the victim helpless or unconscious, isolation from friends or other potential witnesses who might lead to the victim back to safety, and an awareness – and eventual exploitation – of the victim's vulnerabilities. Although Lisak has focused some of his research on assaults in a fraternity context, there are many other scenarios in which an actor could prey upon a victim's vulnerabilities, such as if the victim is young, naïve, lonely, shy, elderly, marginalized socially or economically, or, as mentioned below, dealing with certain credibility problems.

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<sup>12</sup> *Id.* at 412(1)(A)(i)&(ii).

<sup>13</sup> *Id.* at 412(1)(B).

<sup>14</sup> *Id.* at 412(2)(A)-(D).

<sup>15</sup> Dr. David Lisak is a clinical psychologist on the faculty of the University of Massachusetts – Boston. For further information *see* <http://www.umb.edu/academics/cla/dept/psychology/faculty/lisak.html>.

The prosecution has many challenges to overcome in a consent defense case. It's rare that someone witnesses the actual sexual assault; although there may be people who see the actions leading up to it and their testimony will be necessary to build the prosecution's case. If there was no force used, the sexual assault exam may reveal little in the way of physical injury and the collection of semen is only confirmatory because the actor's identity is known. If the victim was voluntarily partaking in drinking or taking drugs, her judgment will be called into question, and it is likely that her memory of events will be compromised, if not altogether absent. If the actor was engaged in the same activities, his level of intoxication will be used to show that he did not have the capacity to overcome the victim's will. Both the prosecution and defense may call expert witnesses to address issues of alcohol and drug facilitated sexual assault. Toxicology tests might also be used although victims should be aware that these tests can have privacy implications for victims if the victim was using an illegal controlled substance or even taking legal antidepressants or other drugs that the defense may use against the victim.<sup>16</sup>

Another challenge for the prosecution is victim "likeability." If the victim has a criminal record or was engaged in criminal activities (i.e. drug use, underage drinking, prostitution) at the time of the sexual assault her credibility will be scrutinized all the more. She might be considered a "party girl" or "loose" or a lower class than the actor. Perhaps she was having a really good time, wearing revealing clothing, flirting or even making out with the actor or others on the scene prior to the assault. If the assault occurs in a small community, or on a college campus, the issue of reputation tends to heighten further. The jury, already likely operating under a number of myths and stereotypes about sexual assault victims despite the prosecution's best efforts to screen for these issues during *voir dire* (the process of screening potential jurors), may

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<sup>16</sup> Mindlin, *supra* note 1, at 112.

perceive an unsympathetic victim as a person who behaved in a risky manner who got was coming to her. Other common myths include opinions about how a victim of sexual assault should behave, whether the victim fought back, how long the victim took to report the crime, and that false reports are common. A good example of how rape myths and stereotypes play out in a criminal case can be found in the 1988 film “The Accused” starring Jodie Foster.

Despite these and many other hurdles, prosecutors can overcome the consent defense. Success hinges upon a thorough investigation of all of the events leading up to and including the assault, as well as, when appropriate, pretext calls placed by the victim with the aid of law enforcement to lead the actor to admit his behavior (these calls are legal in Minnesota because state law allows taping of telephone conversations so long as one party consents).<sup>17</sup> Evidence of bite marks or bruises, torn or bloody clothing, and crime scene collection may support the victim’s story.<sup>18</sup>

When the prosecutor is able to establish that the actor, not the victim, is the one who is on trial, and is able to show the victim as a whole person, not simply someone raising uncomfortable issues that people are often afraid to confront, there is a better chance to overcome some of the challenges named above. While convincing the jury to convict is certainly an end goal, giving the victim a voice and dignity throughout the process – even when the outcome is not the desired one – is still a significant achievement.

### Conclusion

Understanding the social and legal parameters of consent is necessary, but still more important is the awareness that consent, even if explicitly defined in the law, is often layered with subjective interpretation that is not usually victim-centered. Advocates can prepare victims

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<sup>17</sup> Minn. Stat. §626A.02 subd. 2(c) (2009).

<sup>18</sup> Mindlin, *supra note 1*, at 97.

for this possibility by helping them understand the legal process, providing emotional support during law enforcement and prosecutor interviews, and being present during court. Advocates can also educate the public, and especially youth, about consensual sexual activity – and its legal limits – in order to help prevent future sexual harm.