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EVIDENCE

Rape Shield Statute: Provide Qualified Two-Part Requirement for Admission of Complainant's Past Sexual History

CODE SECTION:	O.C.G.A. § 24-2-3 (amended)
BILL NUMBER:	HB 229
ACT NUMBER:	362
SUMMARY:	The Act amends Georgia's Rape Shield Act by providing that evidence of the complainant's past sexual behavior may be introduced if it directly involved the defendant and could have led him to reasonably believe the complainant consented to sexual intercourse. Evidence of a complainant's sexual history is also admissible if it is highly material to, and substantially supportive of, a conclusion that the defendant reasonably believed that the complainant consented and that justice mandates its admission even though the complainant had no past relations with the accused.
EFFECTIVE DATE:	July 1, 1989

History

Under case law prior to 1976, the defendant in a rape case could introduce reputation or opinion evidence of the complainant's unchastity.¹ This evidence could be used to convince the jury that the complainant consented to the sexual intercourse or to impeach her credibility as a witness.² Specific instances of past sexual conduct were not admissible.³

The General Assembly enacted Georgia's first rape shield statute in 1976.⁴ This statute prohibited the admission of all "evidence relating to the past sexual behavior of the [complainant] . . . *except* as provided in this Code section."⁵ The 1976 statute declared mode of dress, nonchastity, marital history, or reputation for promiscuity generally inadmissible.⁶

1. *See, e.g.,* *Seals v. State*, 114 Ga. 518, 519, 40 S.E. 731, 732 (1901); *Camp v. State*, 3 Ga. 417, 420–21 (1847).

2. *See, e.g.,* *Seals*, 114 Ga. at 519, 40 S.E. at 732; *Camp*, 3 Ga. at 420–21.

3. *See* *Lynn v. State*, 231 Ga. 559, 559, 203 S.E.2d 221, 221–22 (1974).

4. 1976 Ga. Laws 741 (formerly found at O.C.G.A. § 24-2-3 (1982)).

5. *Id.* (emphasis added).

6. *Id.*

As introduced, the 1976 bill would have set up a strict two-part requirement for the introduction of evidence of a complainant's past sexual behavior: first, that it involved the defendant; and second, that it had some tendency to support a consent defense.⁷ Both elements must have been met to permit introduction of this evidence.⁸ The Senate Judiciary Committee struck the word "and" and replaced it with "or."⁹ Proponents of the Act did not react to the change,¹⁰ and the bill passed as amended.¹¹ Hence, the 1976 statute allowed the introduction of evidence of the complainant's past sexual behavior, even if it did not involve the defendant, as long as the defendant made a satisfactory offer of proof, in an *in camera* hearing, that the evidence "supports an inference that the accused could have reasonably believed the complaining witness consented to the conduct complained of in the prosecution."¹²

HB 229 made no attempt to restore the common law exclusion of specific instances of the complainant's past sexual conduct.¹³ Instead, the sponsors sought to regulate the admissibility of such evidence.¹⁴ HB 229 was introduced to change the "or" back to "and" and to restore the strict two-part requirement of the original 1976 proposal: that the past sexual behavior involved the defendant and supported the defendant's reasonable belief that the complainant consented to sexual intercourse.¹⁵

HB 229

HB 229 and SB 100 were identical bills introduced within a day of each other.¹⁶ SB 100 died in the Senate Judiciary Committee after one reading.¹⁷ As introduced, HB 229 struck the word "or" from the 1976 version and substituted the word "and" to provide the two-part

7. Telephone interview with Joseph Drolet, Fulton County Assistant District Attorney (Mar. 17, 1989) [hereinafter Drolet Interview].

8. *Id.*

9. *Id.*

10. *Id.*

11. 1976 Ga. Laws 741 (formerly found at O.C.G.A. § 24-2-3 (1982)). It was not until application of the Act that the proponents discovered the change. Drolet Interview, *supra* note 7.

12. 1976 Ga. Laws 741 (formerly found at O.C.G.A. § 24-2-3(b) (1982)). The Act retains the quoted language. O.C.G.A. § 24-2-3(b) (Supp. 1989).

13. HB 229, as introduced, 1989 Ga. Gen. Assem.

14. *Id.* Representative Mary Margaret Oliver, a cosponsor, favors an absolute ban on evidence of the complainant's past sexual behavior. She believes that such evidence is prejudicial beyond its logical probative value and undermines the important social policy of encouraging the reporting of rape. Telephone interview with Representative Mary Margaret Oliver, House District No. 53 (Mar. 17, 1989) [hereinafter Oliver Interview].

15. Oliver Interview, *supra* note 14; Drolet Interview, *supra* note 7.

16. Final Composite Status Sheet, Mar. 15, 1989.

17. *Id.*

requirement of subsection (b).¹⁸ Some members of the House Judiciary Committee would not accept a rule of evidence which they believed unreasonably impaired the defendant's right to present a defense.¹⁹

The House Judiciary Committee then amended subsection (c)(2) of the bill to give the court discretion to admit evidence which it could not admit under subsection (b).²⁰ Such admission would have required that the court, in an *in camera* hearing, find that the evidence "is so highly material that it will substantially support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of in the prosecution and that the reception of the evidence is in the interest of justice."²¹ The Senate Judiciary Committee offered a substitute, however, which struck the last sixteen words of the House committee amendment, replacing them with: "and that justice mandates the admission of such evidence."²² The Senate committee substitute passed in both chambers.²³

The Act, therefore, restores the strict two-part requirement of the original version of the 1976 bill.²⁴ It may, however, make introduction of the complainant's past sexual behavior more difficult than it was under the 1976 statute when the behavior did not involve the defendant. Whether or not the Act makes such introduction more difficult will depend upon court interpretation of subsection (c)(2), which appears to require a stricter test than subsection (b).²⁵

18. HB 229, as introduced, 1989 Ga. Gen. Assem.

19. Telephone interview with Representative Denmark Groover, Jr., House District No. 99 (Mar. 20, 1989) [hereinafter Groover Interview]. House Judiciary Committee members who are also criminal defense attorneys provided major resistance. Drolet Interview, *supra* note 7.

20. HB 229 (HCA), 1989 Ga. Gen. Assem. The cosponsors fought the House Judiciary Committee amendment until they realized that Representative Denmark Groover, Jr., an influential committee member and criminal defense attorney, was determined to defeat the bill without it. Oliver Interview, *supra* note 14; Groover Interview, *supra* note 19.

21. HB 229 (HCA), 1989 Ga. Gen. Assem.

22. HB 229 (SCS), 1989 Ga. Gen. Assem. The Senate committee substitute was an attempt by proponents to make the language of the House committee amendment more restrictive. Drolet Interview, *supra* note 7. Representative Denmark Groover, Jr. saw the change as a distinction without a difference. Groover Interview, *supra* note 19.

23. O.C.G.A. § 24-2-3 (Supp. 1989).

24. *Id.*

25. Fulton County Assistant District Attorney Joseph Drolet, a supporter of the two-part requirement of subsection (b), interpreted subsection (c)(2) as requiring a pattern of behavior so strikingly similar to the circumstances which gave rise to the rape charge that its relationship to the issue of consent would be deemed compelling. For example, if the defendant observed the complainant soliciting for prostitution, they later met under very similar circumstances, and a rape charge arose from that encounter, a judge might find that the prior solicitation substantially supports a conclusion that the defendant reasonably believed the complainant consented to sexual intercourse. Subsection (b), standing alone, would require exclusion on the ground that the prior solicitation did not directly involve the defendant. Under subsection (c)(2), however, the court may admit the

To be admissible under subsection (b), evidence of the complainant's past sexual conduct which directly involved the accused need only "support an inference that the accused *could have* reasonably believed the complainant consented."²⁶ But if that evidence did not directly involve the accused, subsection (c)(2) conditions introduction of such evidence upon a court's finding substantial support for concluding that the defendant *did* reasonably believe the complainant consented, evidence which is so compelling that justice demands its admission.²⁷

There is a possibility that further changes may be made to Georgia's rape shield law. SB 336 was introduced to revise Georgia's Evidence Code;²⁸ the bill did not pass in 1989.²⁹ If passed during the 1990 session, the revision would admit the victim's past sexual behavior with persons other than the accused as propensity evidence on the issues of consent, false accusation, and misidentification.³⁰ HB 137, another bill held over for the 1990 session, would have authenticated a methodology for performing "DNA fingerprinting."³¹ This bill could make evidence of past sexual behavior irrelevant to the issue of misidentification by allowing prosecutors to introduce results of "DNA fingerprint" analysis as evidence of the source of semen or injury.³²

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evidence. Drolet Interview, *supra* note 7.

In Mr. Drolet's example, exclusion of the evidence under subsection (b) may violate the confrontation clause. U.S. CONST. amend. VI. *See, e.g.,* Davis v. Alaska, 415 U.S. 308, 315-16 (1974); Villafranco v. State, 252 Ga. 188, 195, 313 S.E.2d 469, 474 (1984). In Georgia, the right to conduct a "thorough and sifting" cross-examination is limited only by matters of privilege and the requirement of relevance. Eades v. State, 232 Ga. 735, 737, 208 S.E.2d 791, 793 (1974).

26. O.C.G.A. § 24-2-3(b) (Supp. 1989) (emphasis added).

27. O.C.G.A. § 24-2-3(c)(2) (Supp. 1989).

28. SB 336, as introduced, 1989 Ga. Gen. Assem.

29. Final Composite Status Sheet, Mar. 15, 1989.

30. SB 336, as introduced, 1989 Ga. Gen. Assem.

31. HB 137, as introduced, 1989 Ga. Gen. Assem.

32. *Id.*