**EVIDENCE ESSENTIALS PODCAST**

**RULE 412**

* 1. You asked for episodes dealing with evidence issues
  2. “Evidence Essentials”
  3. Garon Muller helping us with these evidence episodes
  4. Rule 412—the “Rape Shield” statute
  5. When evidence code was rewritten effective 2013, there were several groups who had their hand in the process. One of those groups were prosecutors.
  6. The original 2013 version of Rule 412 did not track the Federal Rules of Evidence.
  7. **Rule 412 has now been rewritten, effective April 18, 2019**
  8. REPEAT-Rule 412 has been rewritten!
     1. *The* new version does not exactly track FRE 412 (close but not exactly) but it is much broader than the former version and has more exceptions to the prohibition of prior sexual behavior of the complaining witness

**THE NEW VERSION OF RULE 412**

1. Applies to prosecutions for:
   1. Rape
   2. Agg Assault with intent to Rape
   3. Sodomy and Agg Sodomy
   4. Statutory Rape and Incest
   5. Child Molestation and Agg Child Molestation
   6. Human Trafficking
   7. Pimping, pandering and keeping place of prostitution
   8. Sexual battery and Agg Sexual Battery
2. In any of those listed cases, past sexual behavior of complaining witness is not admissible (either as direct evidence or on cross-examination of complaining witness ***or other witnesses***) except as allowed in Rule 412
   1. So a party cannot “work around” Rule 412 by asking that other witness about the victim’s prior sexual behavior
3. Only circumstances where such evidence would be admissible:
   1. (1) Evidence of specific instances of a victim's or complaining witness's sexual behavior, **if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence**;
   2. (2) Evidence of specific instances of a victim's or complaining witness's sexual behavior **with respect to the defendant if it supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution**;
   3. (3) Evidence of specific instances of a victim's or complaining witness's sexual behavior **with respect to the defendant or another person if offered by the prosecutor**; and
   4. (4) **Evidence whose exclusion would violate the defendant's constitutional rights**.

**ANALYSIS OF THE NEW RULE 412**

1. Let’s stop here for a moment before we get into the procedural requirements that must be met to have past sexual behavior of the complaining witness to be admissible
2. The prior version of Rule 412 essentially said no evidence of the victim’s prior sexual behavior was admissible except to prove alleged consent
3. The recent decision in *White v. State*, 305 Ga. 111 (2019) says exactly that: “evidence of a complaining witness’s past sexual behavior is only admissible under the Rape Shield Statute if that evidence is relevant to the issue of consent.” *White*, at 114.
4. **BUT,** THE STATUTE WAS CHANGED BY THE LEGISLATURE!
5. So under the latest version of Rule 412:
   1. evidence relating to victim’s prior sexual behavior can be admitted to prove that someone other than the defendant could have been the source of physical or biological evidence
   2. It can also be admitted in an attempt to prove consent
   3. It can be admitted if offered by the prosecutor
   4. And it can be admitted if “exclusion would violate the defendant’s constitutional rights”
6. That last exception is a broad exception that is subject to serious debate.
   1. For example, *State v. Burns*, 306 Ga. 117 (6/10/2019) addressed the issue of whether a defendant has the right to impeach a victim of a sexual crime with evidence that the victim in this case made a prior false allegation against another person
      1. *Burns* overturned a BUNCH of cases that held that prior false allegations of the victim were per se admissible
      2. The Court held that there is no constitutional right (under 6th and 14th Amendments) to impeach a witness with the use of extrinsic evidence of a prior false allegation
      3. So when Rule 412 was rewritten this year, it seems that the decision in *Burns* remains applicable. There is no per se constitutional right to question an alleged victim concerning his/her prior false allegations of sexual assault
      4. If a defendant claims to use the “constitutional rights” exception to introduce prior false allegations, that argument should fail in the face of the *Burns* decision

**PROCEDURAL REQUIREMENTS OF RULE 412**

1. Subsection (c) of Rule 412 provides:

“(c) The procedure for introducing evidence as described in subsection (b) of this Code section shall be as follows:

(1) If a party intends to offer evidence under subsection (b), the party must:

(A) File a motion that specifically describes the evidence and states the purpose for which it is to be offered; and

(B) Do so at least ***three days before trial*** unless the court, for good cause, sets a different date; and

(2) Before admitting the evidence under this Code section, the court shall conduct an ***in camera hearing*** to examine the merits of the motion.”

1. There is a pretrial notice requirement, at least 3 days before trial, and the court must conduct an in camera hearing to examine the merits of the motion
2. As a practice point, I would suggest that the judge conduct the in camera hearing on the record. At least get the facts being alleged on the record.
   1. This is one of those issues where the “bell cannot be un-rung” when in front of the jury. Make sure the evidence that the judge is relying on in making the decision are the actual facts and not merely offers of proof by the lawyers—just my suggestion

**CONCLUSION**

1. We have chosen to make this statutory change known to everyone who listens to the Good Judge-ment Podcast. It is a brand new change which has not yet been litigated in the appellate courts
2. But reliance upon prior cases, even recent cases such as *White*, which holds that the only way the sexual behavior of the victim can be admitted is in an attempt to prove consent, is simply no longer the law.
3. The legislature rewrote the statute following the decision in *White*, and even the 2019 cases were based on the prior version of Rule 412