



# Out of the Shadows

North Carolina Conference of District Attorneys

May 2009 Volume 4, Issue 3

## How to Contact the Child Abuse Resource Prosecutor

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## Upcoming Trainings

### National:

#### *Investigation and Prosecution of Child Fatalities and Physical Abuse*

Sponsor: APRI

Dates: June 1-5, 2009

Location: National Harbor, MD

#### *Unsafe Havens I: Prosecuting Online Crimes Against Children*

Sponsor: APRI

Dates: July 27-31, 2009

Location: Chicago, IL

For more information, please visit [www.ndaa.org](http://www.ndaa.org) or contact Laura Parker at 919.890.1500

## Child Sexual Abuse Resource Manual

We have additional copies of the Child Abuse Resource Manual for prosecutors available. If your office is in need of extra copies, please contact Laura Parker at [Laura.E.Parker@nccourts.org](mailto:Laura.E.Parker@nccourts.org) or at 919.890.1500.

## RECENT COURT DECISIONS ON THE RAPE SHIELD RULE

*By: Laura Parker, Child Abuse Resource Prosecutor*

This February, the North Carolina Court of Appeals decided two separate cases regarding G.S. 8C-1, Rule 412, known as the Rape Shield Rule, demonstrating the Court's continued diligence in protecting the privacy of alleged victims of sexual offenses. The rule prohibits the introduction of evidence concerning the sexual activity of a complainant in a sexual offense case unless the evidence falls within one of the four exceptions:

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

- (1) Was between the complainant and the defendant; or
- (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
- (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
- (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

Both *State v. Cook*, 672 S.E.2d 25 (Feb. 3, 2009), and *State v. Adu*, 672 S.E.2d 84 (Feb. 3, 2009), address the admissibility of evidence under the (b)(2) exception, specifically reviewing proposed evidence that the complainants' injuries had been inflicted through sexual activity with another person. In *Cook*, the defendant, who was the complainant's step-father, sought to introduce evidence that the complainant had engaged in sexual intercourse with another boy ("C.T.") during the same week that the defendant was accused of engaging in various sexual offenses with her, as well as evidence that the complainant had been digitally penetrated by her boyfriend. The defendant sought to introduce this evidence as an alternative explanation for two scars to the complainant's hymen that appeared to the examining physician to be healing lacerations. In *Adu*, the defendant, also the complainant's step-father, sought to introduce evidence that the complainant had been sexually abused by her grandfather as an alternative explanation for the notch or healed tear to her hymen. In both cases the Court found the offer of proof provided by the defendant to be insufficient.

In *Cook*, the defendant asked the complainant on cross-examination whether she had sex with "C.T." and she replied "No." *Cook*, at 30. Defense counsel represented to the trial court that C.T. was available to testify later in the week. However, defense counsel failed to call C.T. to testify either at the in camera hearing on the proposed evidence during the State's case or during the defense's case. The Court further discussed that C.T.'s testimony would have been irrelevant even if properly offered by the defense, because the medical testimony established that the scarring to the complainant's vagina had occurred "at least a month or more" prior to the examination, indicating that the injuries could not have been sustained during sexual intercourse with C.T. *Cook*, at 30. The Court has previously held that there must be some "temporal connection between the dates of the alleged offense and the evidence pointing to another perpetrator." *State v. Holden*, 106 N.C. App. 244, 247, 416 S.E. 2d. 415, 417, appeal dismissed and disc. review denied, 332 N.C. 669, 424 S.E.2d 413 (1992). Regarding the evidence of the complainant's activity with her boyfriend, while the complainant testified during the in camera hearing that her boyfriend had inserted his finger in her vagina, defendant failed to present evidence that this penetration could have caused the internal scarring attributed to the charged offenses. Defense counsel elicited testimony from the examining physician that the complainant's scarring could have been caused by digital penetration if "enough force was applied and it was done long enough." *Cook*, at 31. However, defendant did not renew his request to introduce the proposed evidence after the physician's testimony, nor did the defendant ever present evidence regarding the force used or the duration of the penetration by the complainant's boyfriend.

In *Adu*, the defendant sought to introduce evidence that the complainant had been sexually abused by her maternal grandfather during the time that the grandfather had been living with the defendant, his wife (the complainant's mother), and the complainant.

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## ***RECENT COURT DECISIONS ON THE RAPE SHIELD RULE (CONT.)***

During the in camera hearing, the complainant's mother, wife of the defendant and daughter of the grandfather in question, testified that the complainant had told her that she did not want to visit her grandfather after he had moved out of their home because he had kissed her and "stuck his tongue in [her] mouth." *Adu*, at 86. She also testified that during the time the grandfather was living with them, she had found a stain on the complainant's underwear as well as the grandfather's underwear that she attributed to the complainant starting her period and the grandfather having a boil on his buttocks. *Id.* The defendant testified during the in camera hearing that his wife, the complainant's mother, confronted the grandfather after finding the blood in the underwear and kicked him out of the house because "he had raped" the complainant. *Id.* In addition, the defendant also presented evidence of the complainant's interview in which she stated "[w]hat happened to me [with Defendant] is something similar to what happened...with my grandfather." *Id.* While the defendant argued that the injuries to the complainant's vagina were caused by the fondling committed by the grandfather, the Court found the evidence of the blood in the underwear and the introduced statements by the complainant to be insufficient evidence of penetration by the grandfather, and therefore insufficient evidence that the injuries were a result of the grandfather's conduct instead of conduct by the defendant, *Id.* at 87.

Also of note in the *Cook* case is the Court's review of the trial court's exclusion of evidence of a prior allegation by the complainant that she had been raped, which she later admitted had been consensual sex. While the trial court concluded that the evidence was not barred by Rule 412, the evidence was excluded under a Rule 403 determination that "its probative value is substantially outweighed by the dangers of undue prejudice, and also by the danger of confusion of the issues and mislead[ing] the jury." *Cook*, at 32. Reviewing the exclusion for an abuse of discretion, the Court held that the trial court's conclusion was not "manifestly unreasonable." *Id.* The Court considered the fact that if the defendant's witness had been allowed to testify, she would have indicated that the complainant admitted to sexual intercourse with her boyfriend, but falsely claimed it was consensual. *Id.* Thus, in the prior allegation, the complainant was covering up consensual sex with her boyfriend, while in the current case, she was alleged to have been lying about intercourse with her step-father. *Id.* The Court also considered the potential confusion that may have resulted from the temporal sequence of the events. Even though the relationship with her boyfriend occurred a year after the allegations were made against her step-father, the jury may have mistakenly believed the evidence was an alternative explanation for the complainant's scarring. *Id.*

Both *Adu* and *Cook* demonstrate the Court's continued dedication to the rule's requirement that the sexual behavior to which the proposed evidence relates be relevant, as well as the fact that the defendant bears the burden of "establish[ing] the basis of admissibility of such evidence" before it may be admitted. *Cook*, at 30, citing G.S. 8C-1, Rule 412(d).

## ***CLOSED CIRCUIT TELEVISION TECHNOLOGY FOR THE COURTROOM***

The Conference of District Attorneys has received a number of inquiries regarding the use of closed circuit television in the courtroom. The Administrative Office of the Courts has closed circuit television technology available for prosecutors to use during criminal hearings involving child victims or witnesses. This equipment allows the child to testify outside the presence of the defendant, either by the child testifying in the courtroom with the defendant observing from outside of the courtroom using the closed circuit television, or by the child testifying outside of the courtroom with courtroom personnel, the jury, and the defendant observing from inside the courtroom using the closed circuit television. In order to reserve this equipment for use in your jurisdiction, contact Mike Unruh of the Court Services Division at 919.890.1353 or Jason Fitts, also of the Court Services Division, at 919.890.1351. For a thorough discussion of the case law surrounding the use of closed circuit television in a criminal setting, consult pages 9-12 of the UNC School of Government Administration of Law Bulletin, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, written by Jessica Smith (2008). For a sample motion to use closed circuit television for a child witness's testimony, please contact the Child Abuse Resource Prosecutor, Laura Parker at [Laura.E.Parker@nccourts.org](mailto:Laura.E.Parker@nccourts.org) or at 919.890.1500.

## ***CHILD ABUSE AWARENESS MONTH***

This past April, North Carolina observed Child Abuse Awareness Month. Data released from the Department of Health and Human Services reveals that in North Carolina for fiscal year 2007-2008, 21,399 children were confirmed as victims of child abuse or neglect by a parent, guardian, custodian, or caretaker, or found to be in need of services.<sup>1</sup> These confirmations were the result of 120,535 children who were reported as being abused or neglected.<sup>2</sup> Of these reports, 35,013 children were served through an investigative assessment, used in all cases of physical and sexual abuse.<sup>3</sup> Twenty-five children died as a result of child abuse homicide in 2007 in North Carolina, a decrease from the thirty-four children who died at the hands of their caregivers in 2006.<sup>4</sup>

<sup>1</sup>Prevent Child Abuse North Carolina, [www.preventchildabusenc.org](http://www.preventchildabusenc.org), *Prevent Child Abuse Month Packet* (available April 7, 2009), citing The NC Department of Human Resources, Division of Social Services, Central Registry Reports on Child Abuse, Neglect, and Dependency.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>Prevent Child Abuse North Carolina, [www.preventchildabusenc.org](http://www.preventchildabusenc.org), *Prevent Child Abuse Month Packet* (available April 7, 2008), citing NC Child Fatality Prevention Team; Prevent Child Abuse North Carolina, [www.preventchildabusenc.org](http://www.preventchildabusenc.org), *Prevent Child Abuse Month Packet* (available April 7, 2009), citing NC Child Fatality Prevention Team.

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