Tulsa Law Review

Volume 24 | Number 1

Fall 1988

Oklahoma's Rape Shield Statute: Does It Live Up to Its Name

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OKLAHOMA'S RAPE SHIELD STATUTE: DOES IT LIVE UP TO ITS NAME?

I. INTRODUCTION

"And will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?"[1] This oft-quoted remark of Judge Cowen from *People v. Abbot*[2] reflects the common law doctrine that a woman's unchastity bears a direct relationship to her credibility as a rape complainant:[3] a propensity for consenting to sexual behavior in the past creates an inference that there was consent to the intercourse in the present case. Contemporary society, however, is more tolerant of sexual conduct outside of marriage.[4] Because such behavior is no longer viewed as abnormal, it should not be relevant to the rape victim's credibility.[5] In the 1970's, public outcry about rape trials becoming inquisitions into the morality of the rape victim,[6] rather than a focus on the rape in question, resulted in the enactment of "rape shield" statutes by a majority of jurisdictions.[7]

By excluding certain types of evidence, legislators designed these rape shield statutes to defeat the common defensive ploy in rape trials of attacking the credibility of the rape complainant by inquiring into her

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1. People v. Abbot, 19 Wend. 192, 195-96 (N.Y. 1838).

2. 19 Wend. 192 (N.Y. 1838).

3. *See* 1A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 62 (Tillers rev. 1983) [hereinafter WIGMORE].

4. *See* Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 96-102 (1977). One study cited by the author indicated that among the male population, 81% approved of premarital sex for women and 84% approved it for men. *Id.* at 100-01.

5. *Id.* at 96.

6. Representative Holtzman, sponsor of the federal rape shield statute, commented during Congressional hearings on the bill that

> [t]oo often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself.... [R]ape trials [have] become inquisitions into the victim's morality, not trials of the defendant's innocence....

124 CONG. REC. 34, 913 (1978) (statement of Rep. Holtzman).

7. Currently, forty-eight states, the federal government, and the military justice system have enacted statutes which prohibit or restrict the introduction of prior sexual conduct evidence. Utah does not have such a statute, and Arizona allows its court system the discretion to determine admissibility of such evidence. *See* Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 n.3 (1986).

prior sexual history.[8] An unchaste woman was thought to have a character flaw because her consent on prior occasions was viewed as an indicator of her present consent. Therefore, as a defense to rape, consent was inferred by the sexual history of the complainant.[9] The "immorality" of the rape complainant was established through reputation or specific instance evidence.[10] The defense tactic diverted the jury's attention from the issue of rape. Consequently, the successful use of this tactic resulted in numerous acquittals, and rape became one of the most unreported crimes in this country.[11]

In response to this trend, Oklahoma's legislature hurriedly enacted its rape shield statute to prevent prejudice to the complaining witness and to encourage the reporting and prosecution of rape.[12] Oklahoma's statute[13] facially mirrors the rationale of protecting the privacy of rape complainants from undue inquiry. The statute applies equally to prosecutions for rape and assaults with intent to commit rape.[14] It mandates that any evidence of opinion or reputation of the rape complainant's sexual conduct is inadmissible if offered to prove her consent.[15] Furthermore, any evidence as to specific instances of the complainant's sexual history is also inadmissible.[16] The statute does not preclude evidence of

8. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12-14 (1977). "[O]ne gathers that defense counsel not only scrutinize the matter of previous intercourse but also delve into issues like the victim's use of birth control, her attendance (unescorted) at bars, the existence of any illegitimate children, and the number of her prior sexual experiences." *Id.* at 14.

9. *See* Ordover *supra* note 4; Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 545 (1980); Galvin, *supra* note 7.

10. 124 CONG. REC. 34, 913 (1978) (statement of Rep. Holtzman).

11. *See* Berger, *supra* note 8, at 4-6. The author calculated that while 55,000 rapes and attempted rapes were recorded by the FBI in 1974, the actual incidence of rape and attempted rape was closer to 550,000. *Id.* at 5.

12. Representative Bamberger, declaring an emergency, introduced House Bill 1024 as a criminal procedure act designed to make evidence of a complaining witness' previous sexual conduct inadmissible for prosecution of rape and attempted rape. Okla. House Journal at 48 (Jan. 7, 1975).

13. OKLA. STAT. tit. 22, § 750 (1981). The statute provides:

> A. In any prosecution for rape or assault with intent to commit rape, opinion evidence of, reputation evidence of and evidence as to specific instances of the complaining witness' sexual conduct is not admissible on behalf of the defendant in order to prove consent by the complaining witness. Provided that this section shall not apply to evidence of the complaining witness' sexual conduct with or in the presence of the defendant.
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> B. If the prosecutor introduces evidence or testimony relating to the complaining witness' sexual conduct, the defendant may cross-examine the witness giving such testimony and offer relevant evidence or testimony limited specifically to the rebuttal of such evidence or testimony introduced by the prosecutor.

Id.

14. *Id.* at (A).

15. *Id.*

16. *Id.*

opinion, reputation, or specific instances if the complainant engaged in sexual conduct with the accused or in the presence of the accused.[17] Additionally, if the prosecutor introduces evidence of the complainant's sexual history, then the defense is permitted to introduce evidence in rebuttal.[18]

The legislature's intent in passing this statute was to deny the defendant the opportunity to inquire into the victim's prior sexual history when it bears little if any relevance to whether the victim was raped in the present case. However, the Oklahoma rape shield statute raises a major concern by excluding from trial evidence which may be constitutionally required under the sixth amendment.[19] All criminal defendants are entitled to bring forth evidence in their defense so that they may have a fair trial.[20] While in theory the Oklahoma rape shield statute balances the privacy concerns of the rape victim against the constitutional concerns of the defendant, in fact the statute is unnecessarily vague and leaves open too many windows through which a defendant might successfully, though incorrectly, introduce evidence of the victim's sexual past.

II. USE OF CHARACTER EVIDENCE PRIOR TO THE RAPE SHIELD STATUTE

Before the Oklahoma legislature amended its definition of statutory rape,[21] Oklahoma case law made hair-splitting distinctions between permissible and impermissible uses of character evidence. In statutory rape cases, consent to sexual intercourse is not in issue; however, the previous chaste and virtuous character of the statutory rape complainant[22] was presumed under the old law and was a material element of the charge. Thus, courts permitted the introduction of specific instance testimony about the victim's prior sexual history to rebut the presumption.[23] Reputation and opinion evidence was not admissible for this purpose.[24]

In forcible rape cases, consent was usually in issue. Defendants

17. *Id.*
18. *Id.* at (B).
19. *See infra* notes 73-115 and accompanying text.
20. *See* Chambers v. Mississippi, 410 U.S. 284, 294 (1973).
21. Act approved June 30, 1981, ch. 325, § 1, 1981 Okla. Sess. Laws 1139, (codified as amended at OKLA. STAT. tit. 22, § 1111 (1981)).
22. "A chaste female is one that has never had sexual intercourse—who yet retains her virginity. A virtuous female is one who has not had sexual intercourse unlawfully—out of wedlock, knowingly and voluntarily." Marshall v. Territory, 2 Okla. Crim. 136, 147-48, 101 P. 139, 143 (1909).
23. *Id.* at 151, 101 P. at 145.
24. *Id.*

could introduce evidence about the rape complainant's reputation, but specific instance testimony about her prior sexual history was not admissible.[25] This restriction comported with the traditional doctrine that specific prior acts should not be admissible to prove conformity by the rape victim.[26] If her sexual history was cast as a character trait, then reputation evidence was admissible to provide an inference of consent in the present case.[27]

A. *Statutory Rape*

Under Oklahoma territorial and state law, a woman below the age of eighteen and above the age of sixteen was presumed to have a chaste and virtuous character.[28] As a material element of the crime charged, courts considered this presumption to be a fact for the jury to determine,[29] and any evidence which tended to rebut the presumption was admissible.[30]

In *Marshall v. Territory*,[31] the defendant was accused of fathering the child of the statutory rape complainant.[32] The court permitted the defendant to introduce evidence that the rape complainant had made visits to the sleeping room of a male acquaintance about nine months prior to the time that her child was born.[33] Evidence was also admitted that she had lost some of her clothing one evening while on a buggy ride with a different young man.[34] The court required the government to satisfy "the jury beyond a reasonable doubt that the female was of this previous chaste and virtuous character."[35] Accordingly, any evidence of compromising situations or suspicious circumstances which detracted from the presumptive character presented a heavy burden for the plaintiff to overcome.

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25. *See* Shapard v. State, 437 P.2d 565 (Okla. 1967), *cert. denied*, 393 U.S. 826 (1968); *see infra* notes 52-54 and accompanying text.

26. *See* Ordover, *supra* note 4, at 96.

27. *Id.*

28. The statute provided in part that "[r]ape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator. . . . [w]here the female is over the age of sixteen years and under the age of eighteen, and of previous chaste and virtuous character." Rev. Laws of Okla. (1910), ch. 23 art. 29 § 2414.

29. Marshall v. Territory, 2 Okla. Crim. 136, 151, 101 P. 139, 145 (1909).

30. *Id.*

31. 2 Okla. Crim. 136, 101 P. 139 (1909).

32. *Id.* at 153-54, 101 P. at 146.

33. *Id.* at 151, 101 P. at 145.

34. *Id.* at 151-52, 101 P. at 145.

35. *Id.* at 152, 101 P. at 145.

The court in *Diffey v. State*[36] attempted to shift this burden of persuasion away from the government. Although requiring the government to prove the victim's chaste character beyond a reasonable doubt, the court required such proof only after the defense introduced evidence which showed a lack of chastity.[37] Thus, the court permitted testimony to impeach the credibility of the complainant. A friend of the defendant testified that he had sexual intercourse with the complaining witness prior to the defendant's relationship with her.[38] The court found the defendant guilty, however, ruling that the jury was able to properly weigh the evidence.[39]

This shift in the burden of persuasion did not last long, as the court in *Davis v. State*[40] declined to follow the *Diffey* standard. The government was thereafter required to establish the previous chaste character of the victim at the outset of the trial.[41]

The dichotomy between using specific instance testimony versus reputation testimony is best illustrated by the opinion of the court in *Hast v. Territory*.[42] Here, in hope of disproving the rape complainant's chastity, the defense presented the testimony of several witnesses regarding their specific sexual encounters with the victim.[43] The court believed that the jury was "in a much better position to determine . . . who was telling the truth"[44] by allowing this specific instance evidence to be introduced. However, the *Hast* court was adamant in not allowing the defendant to introduce reputation evidence for the purpose of establishing a previously unchaste character.[45] According to the court, a woman's true character was not always in alliance with her reputation: "The good and pure are often traduced by bad men and women and suffer in reputation by reports invented and circulated through motives having their origin in

36. 10 Okla. Crim. 190, 135 P. 942 (1913).

37. *Id.* at 194, 135 P. at 943.

> The law presumes that the female is chaste and virtuous, and this presumption authorizes the jury to assume at the outset that the prosecutrix was chaste and virtuous. If any evidence is introduced tending to show a want of previous chaste and virtuous character, then the state is required to establish the previous chaste and virtuous character of the prosecutrix beyond a reasonable doubt.

Id.

38. *Id.*

39. *Id.*

40. 17 Okla. Crim. 604, 191 P. 1044 (1920).

41. *Id.* at 613, 191 P. at 1047.

42. 5 Okla. Crim. 162, 114 P. 261 (1911).

43. *Id.* at 180, 114 P. at 269.

44. *Id.* at 181, 114 P. at 269.

45. *Id.* at 168-76, 114 P. at 264-67.

envy, malevolence and hate."[46] Thus, statutory rape complainants enjoyed a presumption of a chaste character, but their sexual privacy was quite open to the public, nonetheless, because of this presumption.

B. *Forcible Rape*

Forcible rape presented a situation where reputation evidence was admissible when the forcible rape complainant's prior sexual history was cast as a character trait.[47] If the rape complainant consented in the past, the theory postulated, consent on the present occasion could be inferred, based on her character.[48] Dean Wigmore strongly advocated using this evidence of unchastity because men needed to be protected from the fabricated charges of "errant girls and young women."[49] In fact, prior to the 1970's, several courts agreed that character for unchastity should be admissible in rape prosecutions.[50] The Federal Rules of Evidence provided the accused with this avenue for admissibility.[51]

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46. *Id.* at 175, 114 P. at 267. (quoting State v. Prizer, 49 Iowa 531, 32 Am. Rep. 155 (1878)).

47. *See* Ordover, *supra* note 4, at 96.

48. "One of these relevant uses is that of the character of a rape-complainant for chastity. The non-consent of the complainant is here a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent . . . ." WIGMORE, *supra* note 3, at § 62 (quoting 1A J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 62 (3d ed. 1940).

49. 3A J. WIGMORE § 924a at 736 (Chadbourne rev. 1970).

50. State v. Kittle, 85 W. Va. 116, 101 S.E. 70 (1919) (former acts of sexual intercourse were admitted to show character); Thompson v. State, 160 Ga. 520, 128 S.E. 756 (1925) (previous "immoral conduct" was admissible); State v. Wulff, 194 Minn. 271, 260 N.W. 515 (1935) (evidence of prior sexual acts was admissible when defense was consent); Patterson v. State, 234 Ala. 342, 175 So. 371, 377 (1937) (where state introduces evidence of a woman's venereal disease, prior adulterous relationships are admissible); State v. Wood, 59 Ariz. 48, 122 P.2d 416, 418 (1942) (any evidence which reasonably tends to show consent is admissible); Packineau v. United States, 202 F.2d 681 (8th Cir. 1953), *rev'd sub. nom.* United States v. Kasto, 584 F.2d 268 (8th Cir. 1978) (error to exclude evidence of unchaste acts); Giles v. State, 229 Md. 370, 183 A.2d 359 (1962) (where consent is in issue, reputation with respect to unchastity is admissible); Crawford v. State, 254 Ark. 253, 492 S.W.2d 900 (1973) (evidence of reputation for unchastity is admissible).

51. Under Federal Rule of Evidence 404(a), character evidence is not admissible to prove conformity, but it is admissible to show a character trait of the victim. FED. R. EVID. 404(a) provides in part:

> (a) Character evidence generally. Evidence of a person's character or a trait of [her] character is not admissible for the purpose of proving that [she] acted in conformity therewith on a particular occasion, except:
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> . . . .
>
> (2) Character of victim. Evidence of a pertinent trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same . . . .

Id. Under Federal Rule of Evidence 405 the character of the victim may be proven by reputation or opinion evidence unless it is a material element of the crime charged. FED. R. EVID. 405 states:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

The most influential Oklahoma decision prior to the enactment of the Oklahoma rape shield statute, *Shapard v. State*,[52] conformed in part with this traditional theory by acknowledging that reputation evidence would be admissible if consent were in issue.[53] However, the *Shapard* court's decision was influential because it expressly refuted the doctrine that prior sexual acts made it "more probable that an unchaste woman would assent to such an act than a virtuous woman."[54] Aside from the court's position regarding reputation evidence, according to *Cameron v. State*,[55] Oklahoma's legislature essentially codified the *Shapard* holding as its rape shield statute.[56]

III. OKLAHOMA'S RAPE SHIELD STATUTE

The Oklahoma legislature enacted its rape shield statute[57] on March 4, 1975,[58] only two months after the act was introduced as an emergency bill.[59] The statute excludes reputation and opinion evidence of the rape victim's sexual past to prove consent.[60] The statute also excludes specific instance evidence of the victim's sexual past.[61] Only in three narrow instances may the defendant inquire into specific instances in the victim's past: where there is evidence of the victim's prior sexual conduct with the accused,[62] where the victim's past sexual conduct was in the presence of the accused,[63] or where the prosecution introduces evidence of the victim's past conduct, which the defense is entitled to rebut.[64]

Oklahoma's statute is similar to the rape shield statute passed in

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(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of [her] conduct.

Id.

52. 437 P.2d 565 (Okla. Crim. App. 1967), *cert. denied*, 393 U.S. 826 (1968).

53. In forcible rape cases, if consent was not in issue, then reputation and specific instance testimony were to be excluded. If consent was in issue, then only reputation evidence was admissible. The only time that specific instance testimony was admissible was where the rape complainant had engaged in sexual activity previously with the accused. *Id.* at 600.

54. *Id.* at 601.

55. 561 P.2d 118, 121 (Okla. Crim. App. 1977).

56. For a contrary view of this assertion, *See* Kutner, *Cameron v. State: Does the Oklahoma Rape Evidence Statute Prevent Impeachment of a Complaining Witness for Bias or Motive to Falsify?*, 30 OKLA. L. REV. 905, 920 (1977).

57. OKLA. STAT. tit. 22, § 750 (1985).

58. Okla. House Journal at 367 (Jan. 7, 1975).

59. *See supra* note 12.

60. OKLA. STAT. tit. 22, § 750(A) (1985).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at (B).

California[65] and five other jurisdictions.[66] These laws exclude the use of sexual conduct evidence as to either consent or credibility.[67] The Oklahoma statute prohibits sexual history evidence as it pertains to consent.[68]

The approach adopted by Oklahoma and these other jurisdictions is perplexing because of the close relationship between evidence regarding consent and evidence regarding credibility. In other words, in most instances the rape complainant's testimony establishes the element of nonconsent.[69] Even where Oklahoma excludes evidence designed to show consent, this same evidence may be used to impeach the complainant's credibility.[70] Essentially, any evidence which tends to prove consent will likewise impeach the credibility of the complaining witness. Conversely, evidence which impeaches credibility implies consent.[71] As one author points out, consent and credibility become "functional equivalents" and the use of one at trial can essentially circumvent the exclusionary purpose of the other.[72]

IV. CONSTITUTIONAL CONFLICTS AND OKLAHOMA'S STATUTE

In focusing on the defendant's constitutional rights, Oklahoma's rape shield statute, as an exclusionary provision, raises serious questions concerning the extent to which a criminal rape defendant may be precluded from introducing potentially probative evidence. Under the United States Constitution, all criminal defendants are guaranteed the right to present a full and fair defense.[73] The facial text of the Oklahoma rape shield law, however, coupled with an inadequate index of its legislative intent,[74] is forcing the Oklahoma courts to judicially interpret the

65. CAL. EVID. CODE §§ 782, 1103(b) (West Supp. 1986).

66. Delaware, DEL. CODE ANN. tit. 11, §§ 3508-09 (1979); Mississippi, MISS. CODE ANN. § 97-3-70 (Supp. 1985); Nevada, NEV. REV. STAT. §§ 48.069, 50.090 (1983); North Dakota, N. D. CENT. CODE §§ 12.120-14 to -15 (1985); Washington, WASH. REV. CODE ANN. § 9A.44.020 (Supp. 1986).

67. *See* Galvin, *supra* note 7, at 894.

68. OKLA. STAT. tit. 22, § 750(A) (1985).

69. *See* Galvin, *supra* note 7, at 775-76. The author correctly points out that legislation designed like Oklahoma's is flawed. "Sexual conduct does not neatly break down into 'consent' or 'credibility' uses." *Id.*

70. The Oklahoma rape shield statute only provides that reputation, opinion, or specific instance testimony "is not admissible on behalf of the defendant *in order to prove consent* by the complaining witness." OKLA. STAT. tit. 22, § 750 (1985) (emphasis added).

71. *See* Galvin, *supra* note 7, at 775-76.

72. *Id.*

73. U.S. CONST. amend. VI.

74. Very little of the discussions surrounding the passage of Oklahoma legislation was recorded at the time of the enactment of the rape shield statute.

statute's breadth.[75] The categorical ban on reputation and specific instance evidence to prove consent does not address whether this same evidence may be used to impeach credibility.[76] While the statute enables the defendant to rebut sexual conduct evidence introduced by the prosecution, there is no mention whether the accused may also use this evidence to prove bias or ulterior motive on the part of the complainant.[77]

The sixth amendment of the United States Constitution provides that every defendant in a criminal prosecution has the right "to be confronted with the witnesses against him"[78] and "to have compulsory process for obtaining Witnesses in his favor."[79] All criminal rape defendants, therefore, have the right to confront, by way of cross-examination, any adverse witnesses against them[80] as well as to bring forth evidence in their defense through the compulsory process clause.[81]

Cross-examination, once called the "greatest legal engine ever discovered for the discovery of the truth,"[82] is perhaps the most important right guaranteed by the confrontation clause.[83] The United States Supreme Court has acknowledged, however, that the right to cross-examine is not an absolute right, and it may be subordinate to other legitimate interests in the criminal process.[84] There is not a right, for example, to cross-examine on an irrelevant issue[85] or to posit questions designed merely to annoy or harass the witness.[86]

The Supreme Court has also recognized that the right of criminal defendants to bring forth witnesses in their defense is a "basic ingredient of due process of law,"[87] which "stands on no lesser footing than other

75. *See* Cameron v. State, 561 P.2d 118 (Okla. Crim. App. 1977).

76. *See supra* notes 69-72 and accompanying text.

77. Several of the rape shield statutes enacted by other states do not specifically address this point; however, even among these statutes the draftsmanship and legislative histories indicate concern about this issue. In the federal rape shield statute, for example, courts have used the catchall provision "where constitutionally required" to introduce testimony regarding bias. FED. R. EVID. 412. Similarly, in California, the legislative history surrounding the credibility provision of that state's rape shield statute also indicates a concern by the legislature about the use of biased testimony. *See* Galvin, *supra* note 7, at 895.

78. U.S. CONST. amend. VI.

79. *Id.*

80. Mattox v. United States, 156 U.S. 237, 248-49 (1895).

81. Washington v. Texas, 388 U.S. 14, 18 (1967).

82. California v. Green, 399 U.S. 149, 158 (1970).

83. Douglas v. Alabama, 380 U.S. 415, 418 (1965).

84. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

85. Jenkins v. Moore, 395 F. Supp. 1336 (E.D. Tenn. 1975), *aff'd*, 513 F.2d 631 (6th Cir. 1975).

86. Alford v. United States, 282 U.S. 687, 694 (1931).

87. Washington v. Texas, 388 U.S. 14, 18 (1967).

Sixth Amendment rights."[88] Yet, like the confrontation clause, the compulsory process clause must accommodate the important state interest of furthering the truth determining process.[89]

Two United States Supreme Court cases illustrate that certain state exclusionary rules must yield to the constitutional guarantees of criminal defendants.[90] In *Chambers v. Mississippi*,[91] the Court held that, when a state evidentiary rule denies or significantly diminishes the right of confrontation, the ultimate integrity of the fact finding process is called into question, and the competing interest must be closely examined.[92] The defendant in *Chambers* was charged with murder[93] and sought to cross-examine his own witness,[94] but Mississippi's common law "voucher" rule precluded parties from impeaching their own witnesses.[95] Additionally, the defendant wanted to present witnesses in his defense; however, their testimony was based upon hearsay, and the Mississippi courts would not allow their testimony at trial.[96] The *Chambers* Court balanced the state's interests in applying the evidentiary rules "mechanistically" against the accused's sixth amendment guarantees and found the balance in favor of the accused.[97]

In *Davis v. Alaska*,[98] the Court also applied a balancing test which weighed the state's interest in protecting the confidentiality of prior juvenile records against the accused's need to impeach the credibility of an adverse witness.[99] The defendant in *Davis* was accused of stealing a safe from an Anchorage bar.[100] At trial, the prosecution presented a witness

88. *Id.*

89. Davis v. Alaska, 415 U.S. 308, 315-318 (1974).

90. Chambers v. Mississippi, 410 U.S. 284 (1973); Davis v. Alaska, 415 U.S. 308 (1974).

91. 410 U.S. 284 (1973).

92. *Id.* at 295.

93. *Id.* at 285-88. In this case, a southern Mississippi policeman was attempting to execute a warrant for the arrest of a youth. A hostile crowd tried to free the youth, and, during the commotion, the officer was mortally wounded by gunfire. Before he died, the officer managed to shoot into an alleyway, striking the defendant. There was conflicting testimony as to whether the defendant actually shot the policeman. Before trial, a witness who was later called by the defendant to testify, signed a confession indicating that he, and not the defendant, killed the policeman. This confession was later denied before trial. *Id.*

94. *Id.* at 295.

95. According to the Court, the voucher rule was a vestige of English trial practice where " 'oath-takers' . . . were called to stand behind a particular party's position in any controversy." *Id.* at 296. While a party calling a witness ordinarily "vouches for his credibility," the defendant in *Chambers* was calling an adverse witness essential to his defense. *Id.* at 295-97.

96. *Id.* at 298.

97. *Id.* at 302.

98. 415 U.S. 308 (1974).

99. *Id.* at 309-11.

100. *Id.* at 309-10.

who had a prior juvenile record and who was on probation.[101] The defense counsel wanted the juvenile record to be brought out—not to impeach the witness for truthfulness, but to ascertain whether the potential for bias or prejudice existed.[102] The defense counsel was attempting to show that the witness testified out of fear that his probationary status would otherwise be jeopardized.[103]

Two Alaska statutes precluded admitting this evidence,[104] and the trial court convicted the defendant based upon the witness' testimony.[105] The Alaska Supreme Court affirmed, holding that the defense counsel had ample opportunity to adequately cross-examine the witness for bias or motive.[106] The United States Supreme Court overruled, holding that a "[s]tate's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[107]

While criminal defendants are limited in bringing forth evidence in their defense, the issue for Oklahoma's statute is the extent to which it may preclude a defendant from bringing forth any relevant evidence. Certainly, relevant evidence is not admissible when its probative value is outweighed by its prejudicial effect.[108] The poor draftsmanship of Oklahoma's rape shield statute, however, exposes the act to numerous constitutional infirmities. These infirmities present an opportunity for a persuasive litigant to defeat the statute's legislative intent.

Cameron v. State,[109] a forcible rape case, was the first reported case to consider the constitutionality of the Oklahoma rape shield statute. The defendant in *Cameron* claimed that his opportunity to fully cross-

101. *Id.* at 310-11.
102. *Id.* at 311.
103. *Id.*
104. The Court quoted the Alaska Rule of Children's Procedure 23 which provided that "[n]o adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate." *Id.* at 311 n.1. The Court also quoted ALASKA STAT. § 47.10.080(g) (1971) which provided in part: "The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . . ." *Id.*
105. Davis v. Alaska, 415 U.S. 308, 314 (1974).
106. *Id.* at 314-15.
107. *Id.* at 320.
108. FED. R. EVID. 401 states: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* FED. R. EVID. 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*
109. 561 P.2d 118 (Okla. Crim. App. 1977).

examine was impermissibly precluded by application of the statute.[110] At trial, defense counsel wanted to cross-examine the complainant about a prior period of sexual intimacy with a third party who was not her husband.[111] The defense counsel believed that the anger and jealousy of the complainant's husband resulting from that prior instance motivated her to charge the defendant with rape in this instance.[112]

The court referred to its holding in *Shapard*[113] and determined that the cross-examination was merely designed "to embarrass and humiliate the prosecutrix and discredit her in the eyes of the jury."[114] The court upheld the statute's constitutionality and ruled that no evidence establishing consent between the complainant and the defendant had been presented.[115]

V. UNDECIDED AREAS

While Oklahoma's rape shield statute survived constitutional challenge in *Cameron*, there is reason to believe that other areas of inquiry into the sexual history of the complainant may be allowed by the courts. Unless the statute is redrafted to incorporate adequate procedural safeguards, Oklahoma courts will have to determine, without guidance from the legislature, the admissibility of several areas of prior sexual history: whether the defendant had a reasonable belief that the complainant was consenting based on his knowledge of her sexual history,[116] determining the source of injury to the complainant,[117] and use of post traumatic stress disorders by the prosecution.[118]

A. *Defendant's Reasonable Belief of Consent*

In *Doe v. United States*,[119] the Fourth Circuit Court of Appeals recognized a judicial exception to the federal rape shield statute, reasonable

110. *Id.* at 121.
111. *Id.*
112. *Id.*
113. Shapard v. State, 437 P.2d 565 (Okla. Crim. App. 1967). The *Cameron* Court stated that:
> such cross-examination had no real probative value . . . its continued use could frustrate the ends of justice in that victims of rape . . . would be subject to the most searching examination of their prior sexual activities . . . . [They] would neither report forcible rape committed against them, nor testify in a prosecution against their attacker.

Cameron, 561 P.2d at 121-22.
114. *Id.* at 121.
115. *Id.* at 122.
116. *See infra* notes 119-30 and accompanying text.
117. *See infra* notes 131-43 and accompanying text.
118. *See infra* notes 144-53 and accompanying text.
119. 666 F.2d 43 (4th Cir. 1981).

belief of consent.[120] When evidence is offered solely for the purpose of establishing the accused's state of mind, it is admissible, subject to the general relevancy provisions of the Federal Rules of Evidence.[121] The *Doe* court held that prior telephone conversations between the defendant and complainant were relevant to determine the intent of the defendant.[122] Additionally, a love letter written to another man and shown to the defendant, as well as the testimony of other men with whom the defendant conversed, were admitted as relevant corroborative evidence.[123]

This evidence tended to establish the defendant's knowledge of the complainant's sexual history, which the court determined should be admitted to determine whether the defendant could reasonably believe that the complainant was consenting.[124] According to the court, congressional intent to specifically exclude such evidence when offered solely for the state of mind of the defendant was not apparent from review of the legislative history of the federal statute.[125]

The *Doe* opinion has been criticized as circumventing the true intent of the federal statute,[126] which was designed to prevent introduction of such highly prejudicial and inflammatory evidence against the complainant.[127] In considering this type of case under Oklahoma's statute, a two-fold distinction between the federal statute and Oklahoma's statute creates a definite possibility of this strategy of defense being successful in Oklahoma. First, a detailed legislative history of the the federal statute contradicts the *Doe* holding.[128] Second, the federal statute requires an in camera hearing before trial to determine the relevancy of prior sexual history.[129] Oklahoma's statute leaves this consideration to the discretion

120. Federal Rule of Evidence 412 provides that reputation or opinion evidence of the prior sexual history of the complainant is inadmissible. Additionally, specific instance testimony is also inadmissible, subject to three narrow exceptions: the source of semen or injury; where the victim has engaged in sexual activity in the past with the defendant; and, where admission of the testimony is constitutionally required. The federal statute explicitly mandates a procedure for notice of the use of such testimony and requires the trial court to view the proposed evidence in an in camera proceeding to make an admissibility determination. FED. R. EVID. 412.

121. *Doe*, 666 F.2d at 48.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Spector & Foster, *Rule 412 and the Doe Case: The Fourth Circuit Turns Back the Clock*, 35 OKLA L. REV. 87, 96 (1982).

127. *See supra* note 6.

128. *See* Spector & Foster, *supra* note 126, at 96-97. *See also Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976); 124 CONG. REC. 34,912-13 (1978); 124 CONG. REC. 36,255-57 (1978).

129. FED. R. EVID. 412(c)(2).

of the trial court.[130]

B. *Source of Injury*

The federal rape shield statute expressly permits the use of specific instance testimony as it relates to the prior sexual history of the complainant where there is a question as to the source of semen or injury.[131] This provision allows the defendant to bring out the fact that the prosecutrix had engaged in prior sexual activity before the alleged rape. Thus, the presence of semen or vaginal injury could not be conclusive evidence of a rape. The absence of a similar provision in the Oklahoma statute is cause for speculation by the courts. Oklahoma's restricted admission of evidence only to instances where it relates to sexual conduct with or in the presence of the accused, or where the prosecution introduces such evidence,[132] could mean that all other such evidence is inadmissible.

Clearly, such a prohibition would infringe upon an innocent defendant's opportunity to vindicate himself. Oklahoma courts in the past have permitted the introduction of such evidence for this very reason. In *Self v. State*,[133] the prosecution introduced evidence that the complainant's hymen was torn as a result of being raped.[134] The court then ruled that the defendant had the right to show that the prosecutrix had relations with another man at about the same time as the defendant.[135] This evidence would have accounted for her condition at the time of the alleged rape.[136] Arguably, by opening the door with such evidence, the prosecution enabled the defendant to offer rebuttal evidence under the third exception to the Oklahoma statute,[137] but, once again, without a clearer mandate from the Oklahoma legislature, the extent to which such evidence must be excluded or is required to be admitted is not certain.

An example of this point is the determination by the court in *Heavener v. State*[138] to exclude such evidence. The defendant in *Heavener* was convicted of repeatedly raping and sodomizing a woman over a seven hour period.[139] The complainant testified that she was not

130. OKLA. STAT. tit. 22, § 750 (1981).
131. FED. R. EVID. 412(b)(2)(A).
132. *See supra* note 13 and accompanying text.
133. 62 Okla. Crim. 208, 70 P.2d 1083 (1937).
134. *Id.* at 213, 70 P.2d at 1086.
135. *Id.* at 229, 70 P.2d at 1093.
136. *Id.*
137. The third exception permits the defendant to rebut evidence of the complainant's sexual history when the prosecution introduces such evidence first. OKLA. STAT. tit. 22, § 750(B) (1981).
138. 706 P.2d 905 (Okla. Crim. App. 1985).
139. *Id.* at 907.

"emotionally involved" with any other men at the time of the rape, although medical evidence indicated that she had had sexual relations one week prior to the incident.[140] While the appellate court agreed that such evidence was irrelevant and designed to merely annoy or harass the witness,[141] the court's decision to hold the evidence inadmissible is not based upon the statutory prohibition as much as it is on previous case law. The court specifically cited *Cameron v. State*,[142] a case with an opinion based more on judicial creation than statutory interpretation.[143]

C. *Post Traumatic Stress Disorder*

Similar to circumstances where the determination of the source of injury is in issue, where the prosecution "opens the door" by introducing evidence that the rape victim was a virgin before the alleged rape, is the question surrounding the use of a post traumatic stress disorder by the prosecution. One such disorder is called Rape Trauma Syndrome,[144] and its admissibility at trial is a sharply divided issue among state courts.[145] These state courts are wrestling with whether this type of evidence invades the province of the jury[146] or if it is even the type of evidence that is scientifically accepted.[147]

The question in Oklahoma is not whether such evidence is admissible, but rather, if it is admissible, does Oklahoma's rape shield statute preclude inquiry into the victim's prior sexual history when it may form a basis for diagnosis? Does the use of Rape Trauma Syndrome by the prosecution "open the door" for the defense to rebut this testimony? This problem centers on the issue of consent.

Courts which have allowed expert testimony on Rape Trauma Syndrome have been careful to limit its use.[148] In *State v. Bressman*,[149] the court would not allow the expert to testify that the complainant, in the

140. *Id.* at 908.

141. *Id.*

142. 561 P.2d 118 (Okla. Crim. App. 1977).

143. *See supra* notes 109-115 and accompanying text.

144. Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCH. 981 (1974).

145. *Compare* People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291 (1984)(error to admit rape trauma counselor's testimony on Rape Trauma Syndrome) *with* State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982)(psychiatrist's testimony that victim was suffering from Rape Trauma Syndrome relevant and did not invade the province of the jury).

146. *See* State v. Marks, 231 Kan. 645, —, 647 P.2d 1292, 1299 (1982).

147. *See* State v. Black, 109 Wash. 2d 336, 745 P.2d 12 (1987).

148. *See* State v. Bressman, 236 Kan. 296, 689 P.2d 901 (1984).

149. *Id.*

expert's opinion, had been raped.[150] Other courts have restricted the testimony to comparing the symptoms of Rape Trauma Syndrome with the symptoms of the victim.[151]

The potential for prejudice to the defendant is a relevant concern if a post traumatic stress disorder is used by the prosecution to corroborate the victim's contention of non-consent. In Oklahoma, the rape shield statute precludes inquiry into the past sexual history of the complainant where consent is in issue.[152] Thus, cross-examination of the expert witness may be limited by the statute, although the testimony of the expert would be admissible. To avoid such a problem, Oklahoma's statute should incorporate an in camera procedural provision[153] which would mandate a pretrial determination of the extent of the expert's testimony. This would prevent any spur of the moment determinations at trial, and would help preserve the defendant's sixth amendment rights.

VI. CONCLUSION

Oklahoma's rape shield statute was passed to preclude from trial the use of damaging prior sexual history evidence. This evidence was damaging to the victim because it altered the focus of the trial from determining the guilt or innocence of the accused into an inquisition into her morality. For the most part, Oklahoma courts have adhered to the spirit of this statute; however, the inadequate draftsmanship of the statute has the potential to force Oklahoma courts to judicially fashion exceptions to guarantee the defendant's sixth amendment rights.

Specifically, the statute does not address how the courts should handle cases in which the defendant asserts a reasonable belief of consent based upon his knowledge of the victim's prior sexual history. Additionally, there are no provisions which guide the courts when the defendant claims bias or prejudicial motive by the complaining witness. Finally, if a post traumatic stress disorder is introduced by the prosecution to corroborate the victim's non-consent, the Oklahoma statute stands as an exclusionary mandate, even though such testimony may be based upon the prior sexual history of the complainant. If the Oklahoma legislature wishes to protect the privacy of rape victims, then the statute should be

150. *Id.* at —, 689 P.2d at 907-08.

151. *See* People v. Hampton, 746 P.2d 947, 951-52 (Colo. 1987).

152. OKLA. STAT. tit. 22, § 750 (1981).

153. *See* FED. R. EVID. 412(c)(2).

redrafted to incorporate procedural in camera hearings and more clearly delineate areas to be precluded from inquiry.

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