

INTIMATE PARTNER SEXUAL ABUSE: ADJUDICATING THIS HIDDEN DIMENSION OF DOMESTIC VIOLENCE CASES

Criminal Case Study

State v. Ben Nelson

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Judges**

Intimate Partner Sexual Abuse:

CRIMINAL CASE STUDY

STATE V. BEN NELSON

Background: Defendant, Ben Nelson, and his wife, Vicki Taylor Nelson, were married eleven years ago. They have a six-year-old daughter, Sierra. On April 1st, Ms. Nelson filed for divorce. She is seeking custody of their daughter, support and exclusive use of the marital home. On April 15th, after talking to a counselor at the local shelter for battered women, Ms. Nelson reported to the police that her husband raped and sodomized her on March 17th. She told the police that her husband had been physically and sexually violent towards her for many years, that he was becoming more violent, and that “she just couldn’t take it any more because she really thinks he was going to kill her.”

The defendant has been charged with sexual assault [**Note to the Presenter:** If your state statute uses different terminology, such as “sexual battery,” conform this to your state’s statutory language].

Prosecutor’s Statement of the Case: On the night in question, March 17th, the defendant demanded that his wife have oral and anal intercourse with him. He also insisted that he wanted to videotape their sexual activity. The victim refused, telling her husband that she was exhausted from taking care of their sick child. When she said no, the defendant forced her into the bedroom, ripped off her clothing and pushed her onto the bed. He kept telling her that she better “get into it” and that if she didn’t, “she knew exactly what would happen.” He then forced his penis into her mouth and her anus. While she cried and begged him to stop, he forced his penis into her vagina as well.

Based on past experience, the victim knew that if she didn’t do what her husband demanded, she was at great risk of being seriously injured. In the past, when she didn’t acquiesce to his sexual demands, he had beaten her severely and taken his anger out on their child, hitting the child and verbally abusing her. He had forced his wife to do humiliating and degrading acts in the past when she said “no” to him. He had also taken photos of her while he forced her to perform “degrading and embarrassing sexual acts.” He threatened to post these photographs on the Internet, and to send them to her family and co-workers, if she didn’t comply. He used the photos on many occasions to get her to do what he wanted.

Defendant has a history of violence against his wife. Two years ago, she obtained a domestic violence protection order against him, which he violated on several occasions. She was terrified for her life on March 17th and worried about what would happen to their child if she resisted the defendant or failed to comply with his demands.

Ms. Nelson left her husband on April 1st, trying to find safety for herself and her child. After she received support and counseling, she had the courage to come forward and report to the police that Mr. Nelson brutally raped her on March 17th.

Defense Attorney's Statement of the Case: Mr. Nelson is an upstanding member of the community who has struggled for years trying to keep his family together under the most difficult circumstances. His wife is extremely erratic and vindictive. When she doesn't get her way, she makes all sorts of crazy accusations, only to back down later. She would run to the court in the past, seeking a domestic violence injunction, only to go back to the judge begging for him to allow the couple to resume contact once she was over her temper tantrum. She would call the police, claiming to be a victim of violence, to manipulate Mr. Nelson into doing what she wanted.

Ms. Nelson has very "unconventional" sexual appetites. The couple had a very active and "non-traditional" sex life. Ms. Nelson made sexually explicit videotapes of herself in the past and has posed for numerous photos performing the acts the couple engaged in on March 17th. The couple did have sex on March 17th, but it was entirely consensual.

Ms. Nelson filed for divorce on April 1st, seeking full custody of their daughter and financial support for both of them. It was only after talking to her divorce lawyer and the counselors at the local shelter, that she made these false allegations of rape against her husband. She is a vindictive woman, making these false allegations to gain sympathy and a financial advantage in the divorce. She is also trying to prevent Mr. Nelson from having contact with his precious daughter by making these trumped-up, crazy allegations.

Exercise 1: Rape Shield

[Note to the Presenter: These exercises were prepared with the Federal Rules of Evidence. Please substitute your state's Rules of Evidence when you present this program.]

Background: The defendant has filed a motion, pursuant to **F.R.E. 412 (b) (B)** to introduce a video and photographs of his wife. The evidence the defendant seeks to introduce includes: (1) an undated video of the wife in which she sings and dances, models various dresses, takes a shower, and sunbathes without any clothing. Many of her poses are of a sexual nature and are sexually explicit, as are her comments on the video; and (2) photographs showing the defendant and his wife engaging in acts of "sodomy, oral and conventional sex." One of the photographs depicts the wife engaging in an act of "anal manipulation with a dildo." The photos are very sexually explicit.

Defense Attorney's Argument: The defense attorney argues that the video and photos are relevant to show that the defendant and his wife engaged in consensual oral and anal intercourse during their marriage. The evidence is crucial to rebut the allegations against him that he forced his wife to engage in deviate sexual acts. The photos were taken approximately six months before the date in question. Furthermore, the video and the photos are **"evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct...to prove consent" (F.R.E. 412 (b) (B))**. The video and photos show the wife's openness to an "alternative life style" and demonstrate that she is open to "more than a conservative, traditional sexual relationship."

Prosecutor's Argument: The prosecutor argues that the video and the photographs should be excluded. **The Video:** Although the wife admits she made the video, it was made many years before the events in question, it does not depict conduct of the kind complained of and has no relevance to the issue of whether she consented on the night in question. The defendant has not shown that the video is relevant or material to any issue in the case. **The Photos:** The wife also acknowledges that she is depicted in the photographs, taken six months before the night of the rapes, but she did not consent to the sexual acts shown or to being photographed by her husband in these circumstances. These acts were not consensual and, therefore, are inadmissible under our state's rape shield statute. Furthermore, any evidence of prior sexual activity must directly pertain to the act upon which the prosecution is based. There is no such connection here. Finally, the court must find that, even if there was any probative value, which there is not, the inflammatory and prejudicial nature of the evidence far outweighs any possible probative value **(F.R.E. 403)**. The defendant is only trying to further embarrass and humiliate his wife and to improperly inflame and prejudice the jury against her.

Rape Shield Exercise Discussion Questions

1. The defense attorney argues that the photos are admissible to prove consent. The prosecutor argues that the photos are inadmissible because the alleged victim did not consent to the sexual acts shown or being photographed by her husband (**F.R.E. 412 (B) (b)**). How would you determine whether the conduct depicted in the photos was “consensual”? How would you rule on that argument?

2. The prosecution argues that the photos are more prejudicial than probative (**F.R.E. 403**). How would you rule on that argument?

3. Is the video relevant and material to the issues at hand?

4. Would you admit the video? Why or why not?

5. Would you admit the photos? Why or why not?

6. If you would admit any of the evidence, would you put any limitations on its use?

Exercise 2: Jury Selection

Background: The prosecutor and the defense attorney want expanded *voir dire* in this case because so few marital rape cases are brought to trial. The prosecutor wants to explore the potential jurors' attitudes about marital rape and other relevant issues, such as delayed reporting and the fact that the wife did not report earlier sexual assaults. The defense attorney wants to ask the potential jurors questions about their attitudes toward "unconventional sexual practices" and the fact that his wife has filed for divorce and is seeking custody of their daughter, among other things. The prosecutor also wants you to use a written questionnaire to ask potential jurors about their prior experiences with sexual abuse. If potential jurors answer that they or members of their family have either been the victim of a sexual assault or accused of sexual assault, the prosecutor wants individual *voir dire* for those jurors, to protect their privacy. In addition, the prosecutor wants to have one of her victim/witness staff members present to offer support to any potential juror who discloses prior sexual victimization.

Discussion Questions:

1. What are the essential questions the prosecutor should ask?
2. What are the essential questions the defense attorney should ask?
3. If they don't inquire into these areas, would you ask the questions?
4. Would you agree to the prosecutor's request for a written questionnaire and individual *voir dire* for questions about potential jurors' prior sexual victimization or perpetration? Why or why not?
5. Would you agree to the prosecutor's request to have a victim/witness staff member present to provide support to any potential juror or discloses prior sexual victimization? Why or why not?

Exercise 3: Sentencing

Background: The defendant was convicted by a jury of second-degree sexual assault [If your state statute uses different terminology, such as “sexual battery,” conform this to your state’s statutory language].

Prosecutor’s Argument: The State is asking the Court to send the defendant to prison. The State also requests that the Court impose more than the lowest permissible prison sentence, based on the egregious circumstances in this case. Marital rape is the most serious violation of trust. If you can’t trust your own husband, who can you trust? Ms. Nelson suffers from serious posttraumatic stress disorder from the years of abuse her own husband inflicted on her. She repeatedly asked him to stop as he was forcibly raping her on March 17th. He had inflicted serious physical and psychological injuries on his wife in the past, and she was terrified he would kill her if she didn’t acquiesce that night. This crime was part of the defendant’s ongoing course of criminal conduct against his wife. She was forced to seek a domestic violence injunction in the past, which the defendant repeatedly violated. He is a dangerous man. His sexual abuse of his wife and his violations of the domestic violence injunction are both predictors of his future level of dangerousness. Their daughter, Sierra, has been extremely traumatized by Mr. Nelson’s actions as well. Although the defendant claims to be a good father and claims to be concerned about her welfare, it is important to remember that he has just been convicted of raping Sierra’s mother.

Defendant’s Statement: Your Honor, I am sorry that my family has broken up over this situation. I never intended to harm my wife; I always loved my wife and tried to keep our marriage together, no matter what she did or how she acted. I don’t want my daughter to grow up knowing that her father went to prison. I am worried about who will take care of my daughter if I am not around. I am going to my therapist now and am learning about how toxic my relationship was with my wife.

Defense Attorney’s Statement: While we respect the legal process, we disagree with the jury’s conviction of my client. This whole experience has been extremely difficult for him. He has strong ties in the community, no prior criminal record and a solid work history. He has been the sole support for his family. He is concerned about what will happen to them if he goes to prison. He is a perfect candidate for community supervision and he will successfully follow the conditions of his probation. Mr. Nelson asks this Court to impose a sentence of probation, combined with anger management classes, parenting classes and continued counseling with his private therapist. The extenuating and mitigating circumstances in this case warrant the Court’s compassion and leniency.

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Intimate Partner Sexual Abuse:

DISCUSSION GUIDE FOR FACULTY

STATE V. BEN NELSON

Exercise 1: Rape Shield

Q1.

The defense attorney argues that the photos are admissible to prove consent. The prosecutor argues that the photos are inadmissible because the alleged victim did not consent to the sexual acts shown or being photographed by her husband (F.R.E. 412 (B) (b)) How would you determine whether the conduct depicted in the photos was “consensual”? How would you rule on that argument?

Does it matter whether the conduct in the photos was “consensual” or not? These photos were taken six months before the alleged assault and therefore are not relevant to consent on the night in question.

Q2.

The prosecution argues that the photos are more prejudicial than probative (F.R.E. 403). How would you rule on that argument?

The photos are sexually explicit and show the wife engaging in an act of “anal manipulation with a dildo.” Admitting these photographs would be more prejudicial than probative because of their explicit nature and because photographs taken six months before the events complained of do not prove or disprove consent on the night in question.

In a decision excluding evidence of a victim’s past sexual conduct with the defendant a Michigan court observed:

“[I]ntroducing evidence of a victim’s past sexual conduct presents a great danger of offending and inflaming those jurors who may find such conduct alien to their own experience and morals. Especially where the prior conduct involves consent to deviant activity, offender [sic]jurors may be unable to comprehend how such a person could be raped.” *Southward v. Warren*, 2009 WL 6040728 at *14.

Q3.

Is the video relevant and material to the issues at hand?

The video is not relevant because it was taken six months prior to the night in question and thus does not inform the question of consent on the night in question.

Q4.

Would you admit the video? Why or why not?

Q5.

Would you admit the photos? Why or why not?

Q6.

If you would admit any of the evidence, would you put any limitations on its use?

In *Jones v. State*, 348 Ark. 619, 74 S.W. 3d 663 (2002) the defendant in a marital rape prosecution sought to introduce photographs of his estranged wife masturbating and engaging with him in oral and anal sex and anal sex with a dildo. He claimed that these photographs were essential "to refute the allegations against him that he forced the victim to engage in deviate sexual acts." The prosecutor argued that the photographs were not relevant to the victim's consent on the night of the rape. The judge held an *in camera* hearing and ruled that the photographs would be admissible if the victim denied engaging in the acts in question, but otherwise not, even if she claimed that she had done so unwillingly. The victim acknowledged engaging in all the acts depicted but claimed that it was without consent. In affirming the defendant's conviction, the Arkansas Supreme Court noted, in words generally applicable to consideration of rape shield issues:

"The purpose of our rape-shield statute...is to shield victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt.... The rape-shield statute prohibits admission of evidence of a victim's prior sexual conduct, unless such conduct pertains to the act upon which the prosecution is based.... Prior acts of sexual conduct are not within themselves evidence of consent in a subsequent sexual act; there must be some additional evidence connecting such prior acts to the alleged consent in the present case before the prior acts become relevant.... However, even such relevant evidence is not admissible unless the trial court, in an *in camera* hearing, makes a written determination that the probative value of the evidence outweighs its inflammatory or prejudicial nature.... The trial court is vested with a great deal of discretion in ruling whether the victim's prior sexual conduct is relevant." 348 Ark. 619, at 628, citations omitted.

Exercise 2: Jury Selection

Q1.

What are the essential questions the prosecutor should ask?

It is essential to identify and excuse any potential juror who does not believe that there is such a thing as marital rape, who believes that under religious law a wife may not refuse to have sex with her husband, or who believes that forced sex between husband and wife is not harmful because they are used to having consensual sex with each other.

How the court rules in the Rape Shield Law hearing will also determine the need for certain questions. With respect to the photographs, the fact that Ms. Nelson acquiesced to her husband's sexual demands -- even though she claims she did so out of fear of his violence -- could create bias against her by potential jurors who find unconventional sexual activity so distasteful that a woman who engages in it under any circumstances, and allows herself to be filmed doing so would be deemed "unrapable," per the case quoted in answer to Q.2 in the Rape Shield Law exercise.

Q2.

What are the essential questions the defense attorney should ask?

The defense argues that Ms. Nelson has "unconventional" sexual appetites and that her husband was simply gratifying them in a mutually consensual relationship. The defense would want to know if there are potential jurors who find "unconventional" sexual activities so distasteful that they would not believe that any woman would willingly engage in them.

Q3.

If they don't inquire into these areas, would you ask the questions?

In your court system, do judges ever question criminal case jurors or is this all done by the lawyers? Is this a function of statewide court culture or individual judges' choice?

Wisconsin Judge Jeffrey Kremers often presents on jury selection in adult victim sexual assault cases. He asks judges whether, in a case where a juror's possible race bias is an important issue, they would ask questions about this if the lawyers failed to do so. Many judges say yes. He then asks why, if they would ask questions about possible bias in those situations, they would not do so in cases involving sex bias.

Q4.

Would you agree to the prosecutor's request for a written questionnaire and individual *voir dire* for questions about potential jurors' prior sexual victimization or perpetration? Why or why not?

With respect to prior victimization, having to disclose child sexual abuse or adult sexual assault is extremely painful for the victim. For many it will be the first time they have ever disclosed to anyone. Requiring victims to disclose in public adds unnecessarily to the trauma of disclosure.

With respect to perpetration, unless this information comes out in response to questions about prior convictions, this is very difficult information to elicit. It is more likely that a prospective juror will respond honestly to questions about accusations if the question is posed in a relatively private questionnaire. If there was no formal accusation it is highly unlikely that the individual will perceive himself as having been a perpetrator, no matter how the question is asked.

Q5.

Would you agree to the prosecutor's request to have a victim/witness staff member present to provide support to any potential juror or discloses prior sexual victimization? Why or why not?

Because it is traumatic to disclose prior sexual victimization, the court should consider how it can minimize the impact of the requirement for disclosure. The court could have a victim/witness staff member present or could advise jurors who disclose that support is available from either the victim/witness advocates in the prosecutor's office or from a community-based rape crisis center. The court should be able to provide specific information about where the community-based support is located and have the contact information.

Exercise 3: Sentencing

Q1.

Would you order a pre-sentence investigation in this case? Why or why not?

Pre-sentence investigations to develop detailed information about the offender's sexual offense history is key to determining an appropriate sentence, the offender's amenability to treatment (psychopaths are not treatable), whether any term of probation after or instead of incarceration is appropriate, and the appropriate conditions of probation.

In a jurisdiction where there are limited or no resources for PSIs, the court may want to consider working with the probation department to publicize the cost/benefit analysis of not having accurate pre-sentence information about sex offenders and explore how to develop the necessary resources.

Q2.

What circumstances in this case support a sentence longer than guidelines for this crime in your state? [Note to the Presenter: Adapt this question to the sentencing guidelines for your state.]

This was a brutal assault that does not warrant lenient sentencing. Moreover, the fact that the victim and defendant were married underscores the gravity of the crime. Marital rape causes severe harm. The fact that the parties had consensual sex in the past does not mitigate the harm. Rather, the betrayal of trust in this most intimate relationship is devastating.

Note the quotation shown on an early Power Point slide from Evan Stark's *Coercive Control*:

"[M]arital rape...should be treated differently and more severely than similar crimes committed by strangers. As a result of its unique relation to personal life, sexual assault is far more likely to be repeated when it is committed by partners and almost always occurs amid other forms of violence, intimidation, and control. The level of unfreedom, subordination, dependence, and betrayal associated with marital rape has no counterpart in public life."

- Professor Evan Stark, *COERCIVE CONTROL* (2007), at 388.

Q3.

What circumstances in this case support a sentence shorter than guidelines for this crime in your state? [Note to the Presenter: Adapt this question to the sentencing guidelines for your state.]

None.

Q4.

What sentence would you impose here?

This discussion will depend on your state's sentencing guidelines and the extent of judicial discretion allowable.

There should be a term of incarceration per the guidelines and Question 2.

If there was a PSI, it would inform the sentence and any consideration of conditions of probation after incarceration.