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Evidence Law - Striking the Right Balance in New Mexico's Rape Shield Law - State v. Johnson

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EVIDENCE LAW—Striking the Right Balance in New Mexico's Rape Shield Law—*State v. Johnson*

I. INTRODUCTION

A prostitute can be the victim of rape. What right, however, does a defendant in a rape prosecution have to introduce extrinsic evidence that his alleged victim had acted as a prostitute on prior occasions? In *State v. Johnson*,[1] the New Mexico Supreme Court held that evidence that the rape victims were prostitutes was inadmissible because the defendant failed to show the relevance of such evidence.[2] Under the New Mexico rape shield law[3] and its corresponding rule of evidence,[4] the admissibility of evidence of a victim's prior sexual conduct is judicially determined *in camera* at a pretrial hearing based on the traditional balancing test: whether the probative value of the evidence outweighs its prejudicial effect.[5] The *Johnson* decision is significant because it addressed the protection afforded rape victims under the statute and provided guidelines for the trial court when determining the admissibility of evidence of the alleged victim's prior sexual conduct. The guidelines reflect the policy behind the enactment of the New Mexico rape shield law as well as the constitutional limits on that protection. This Note examines the historical background of rape shield laws, the *Johnson* court's rationale, and the implications of the decision on a trial court's discretion in determining the admissibility of evidence of past sexual conduct.

II. STATEMENT OF THE CASE[6]

Richard Leonard Johnson (defendant) was accused of rape arising out of several incidents on Central Avenue in Albuquerque.[7] The State alleged that in each case the defendant enticed a woman into his car by telling her he was a police officer, then drove her to a secluded area, and allegedly assaulted and raped her at knifepoint.[8] The defendant argued that the alleged victims were prostitutes who had engaged in consensual sex with him and then falsely accused him of rape because he refused to pay them.[9]

Prior to trial, the defendant filed a motion *in limine* pursuant to Section 30-9-16(C) of the New Mexico Statutes seeking to introduce evidence of the victims' prior sexual conduct. He specifically wanted to "question the women concerning their experiences with prostitution and to introduce extrinsic evidence . . . tending to prove they were prostitutes."[10] In the defendant's motion *in limine* submitted to the trial court, the defendant stated that he "has reason to believe that the alleged

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1. 123 N.M. 640, 944 P.2d 869 (1997).
2. *See id.* at 642, 944 P.2d at 871.
3. *See* N.M. STAT. ANN. § 30-9-16 (Repl. Pamp. 1994).
4. *See* N.M. R. EVID. Rule 11-413.
5. *See* N.M. STAT. ANN. § 30-9-16(A).
6. Unless otherwise noted, the facts are paraphrased from *Johnson*, 123 N.M. at 642-43, 944 P.2d at 871-72.
7. *See* Defendant-Appellant's Brief in Chief at 1, State v. Johnson, 121 N.M. 77, 79, 908 P.2d 770, 772 (Ct. App. 1995) (No. 15,710), *rev'd*, 123 N.M. 640, 944 P.2d 869 (1997).
8. *See* Defendant-Appellant's Brief at 1, *Johnson* (No. 15,710).
9. *See id.* at 3.
10. State v. Johnson, 121 N.M. 77, 79, 908 P.2d 770, 772 (Ct. App. 1995), *rev'd*, 123 N.M. 640, 944 P.2d 869 (1997).

victims in this matter had engaged in sexual conduct prior to the incidents alleged in the indictment, which conduct is material and essential to the defense against those charges . . . ."[11] The State filed an opposing motion to exclude any reference to the victim's sexual conduct "with any person other than the defendant" and "to any alleged illicit sexual activity performed by any victim in this case."[12] During an *in camera* hearing, the trial court heard testimony that each of the victims previously had engaged in acts of prostitution.[13] The trial court asked the defendant why he believed the evidence should be admitted. Defense counsel replied:

> The evidence which we would seek to elicit by questioning first the women themselves and then from other witnesses, as well, is the fact that at least two of the women—one woman is known to the police as a prostitute and, in fact, been arrested as a prostitute. Another woman admitted to the detective investigating the case that she had engaged in prostitution at the time this occurred, was in the habit of, if not gaining her income, at least supplementing it by prostitution. That is essentially the nature of the evidence which we want to go into.[14]

The trial court denied the admission of evidence of the victims' prior sexual conduct.

Although the trial court denied admission of the evidence the defendant sought to introduce, it permitted the defendant to testify at trial about his version of the story. He testified that each of the sexual encounters was an act of prostitution and that the "women reacted negatively" when he refused to pay them.[15] The jury convicted the defendant of false imprisonment and two counts each of aggravated assault and second-degree criminal penetration. The defendant appealed, arguing that the trial court improperly denied the admission of evidence of the victims' prior sexual conduct. Although the defense counsel did not actually use the words "motive to lie" during the *in camera* hearing,[16] the court of appeals, nevertheless, believed that the defense counsel's arguments "that the participants had a difference of opinion as to remuneration for sexual services performed pursuant to their 'contract' were adequate to alert the trial court to the basis for Defendant's proffer."[17] Thus, the court of appeals held that the evidence that the victims were prostitutes was admissible for the purpose of showing a possible motive to fabricate.[18] Furthermore, the court of appeals found that the exclusion of such evidence was a violation to the defendant's constitutional right to confront the

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11. *Johnson*, 123 N.M. at 650, 944 P.2d at 879.

12. *Id.* at 643, 944 P.2d at 872.

13. During the *in camera* hearing, the court heard testimony from the detective who had investigated the case and interviewed the alleged victims. *See Johnson*, 123 N.M. at 643, 944 P.2d at 872. The detective testified that one of the victims, T.A., told him that she was not working as a prostitute when she got into the car with the defendant, although she had engaged in prostitution on occasion in the past. *See id.* The detective also testified that the defendant told him that T.A. had not been working as a prostitute that night. *See id.*

14. *Id.* at 651, 944 P.2d at 880.

15. *See* State v. Johnson, 121 N.M. 77, 82, 908 P.2d 770, 775 (Ct. App. 1995), *rev'd*, 123 N.M. 640, 944 P.2d 869 (1997).

16. *See id.* at 81, 908 P.2d at 774.

17. *Id.* at 80, 908 P.2d at 773.

18. *See id.* at 81, 908 P.2d at 774.

witnesses against him.[19] Therefore, the appeals court reversed and remanded the case for a new trial.[20]

The New Mexico Supreme Court granted certiorari[21] and reversed the court of appeals. After a review of the trial court's *in camera* hearing, the supreme court disagreed with the court of appeals' analysis of the defendant's arguments. The supreme court found that the defendant "never expressed his intention to use the prior sexual conduct evidence to expose the victims' motives to lie or as a basis for a theory of relevance other than propensity."[22] In fact, the court found that the defendant did not show how such evidence would be relevant to anything other than propensity. Therefore, the court held that evidence of prior sexual conduct is inadmissible in this case because the defendant "failed to show (a) that the evidence was material and relevant, and (b) that its probative value equaled or outweighed its inflammatory or prejudicial nature."[23]

III. BACKGROUND

A. The Need for Rape Law Reform

Prior to rape shield legislation, many courts considered a complainant's sexual history relevant to whether the victim consented on the occasion in question.[24] The traditional rules were based on the faulty presumption that a woman with a character of unchastity or promiscuity was more likely to consent on any particular occasion.[25] One commentator described this as the "yes/yes inference."[26] That is, a woman who consented to nonmarital sex on some occasions was more likely to consent on all occasions.[27] Courts also considered prior sexual conduct relevant to impeach a victim's credibility on the premise that an unchaste woman has a tendency to be untruthful.[28]

Under these common law rules, defense lawyers "were permitted great latitude in bringing out intimate details about a victim's life . . . even though that conduct may have at best a tenuous connection to the offense for which the defendant is being tried."[29] Such intrusions into a victim's private life, described by one commentator as "nothing less than character-assassination in open court,"[30] resulted in embarrassment and harassment of the rape victim. This hostility by the legal

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19. *See id.*
20. *See id.* at 82, 908 P.2d at 775.
21. *See* State v. Johnson, 120 N.M. 828, 907 P.2d 1009 (1995).
22. State v. Johnson, 123 N.M. 640, 651, 944 P.2d 869, 880 (1997).
23. *Id.* at 642, 944 P.2d at 871.
24. *See* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 715 (1995); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 783-84 (1986).
25. *See* Fishman, *supra* note 24, at 715.
26. *See id.*
27. *See id.*
28. *See id.*
29. 124 CONG. REC. H34,912 (daily ed. October 10, 1978) (statement of Rep. Mann).
30. Galvin, *supra* note 24, at 794.

system had a significant impact on deterring reports of rape.[31] Consequently, rape law reform has attempted to address the problems of underreporting and protecting the complainant from harassment by restricting the use of the complainant's sexual history.[32]

Although rape shield laws differ from state to state,[33] their primary purpose is to reverse the common law presumption discussed above, thereby denying the admission of evidence of prior sexual conduct aimed solely at the victim's unchaste character. Rape shield legislation generally falls into four categories based on the methods by which they restrict the admissibility of evidence of prior sexual conduct: (1) the Michigan approach; (2) the federal approach; (3) the New Mexico approach; and (4) the California approach.[34] Each approach has been criticized as having inherent problems.[35]

The Michigan approach is considered the most restrictive of the four categories.[36] It prohibits the admissibility of all evidence of prior sexual conduct, unless such evidence falls within specific enumerated exceptions.[37] The specific exceptions vary somewhat from state to state.[38] The most common exception is evidence of the complainant's sexual conduct with the defendant and with third persons only when offered to show that the third person, and not the defendant, may have been the source of semen, physical injury, or pregnancy.[39] Under this approach, judicial discretion is limited because the legislature has predetermined which evidence of prior sexual conduct will be admissible.[40]

Twenty-three states follow the Michigan approach.[41] The Michigan approach has been criticized as being too restrictive because the specific exceptions do not

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31. *See id.* at 796. Other factors contributing to the underreporting of rape include fear of retaliation and protection of family members. *See* Vivian Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 24 (1977).

32. *See* Galvin, *supra* note 24, at 797-98.

33. 48 states have adopted rape shield legislation. *See* Shawn J. Wallach, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 486 n.7 (1997). Arizona and Utah, which have no rape shield statutes, appear to recognize a common law rule that is similar to rape shield legislation which restricts evidence of prior sexual conduct. *See id.*

34. *See* Galvin, *supra* note 24, at 773; Wallach, *supra* note 33, at 490-98.

35. *See* Galvin, *supra* note 24, at 812.

36. *See id.* at 773. The Michigan rape shield statute states:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

MICH. COMP. LAWS ANN. § 750.520j (West 1991).

37. *See* Galvin, *supra* note 24, at 773. In fact, some statutes have been amended, or declared unconstitutional in response to certain factual settings. *See id.* at 773-74.

38. *See* Wallach, *supra* note 33, at 491-92 (discussing the various exceptions that certain states have adopted).

39. *See id.*

40. *See id.* at 490.

41. These jurisdictions include: Alabama, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Virginia, West Virginia and Wisconsin. *See id.* at 521 n.27.

anticipate the full range of factual settings.[42] Certain evidence of prior sexual conduct may be highly relevant and outweigh any prejudicial effect, yet not fall within an exception and thus be inadmissible.

The federal approach is somewhat less restrictive than the Michigan approach.[43] It provides for specific exceptions to the prohibition of admission of evidence of sexual conduct, and then has a "catch all" exception which allows evidence that if excluded would violate a defendant's constitutional rights,[44] or is "relevant and admissible in the interest of justice."[45] The criticism of this approach is that the "catch all" exception gives judges the same amount of discretion as the broad New Mexico style approach and thus undermines the exceptions.[46] Furthermore, the so-called "catch-all" provision lacks guidelines for determining when exclusion of certain evidence will violate a defendant's constitutional rights.[47]

The approach taken by the New Mexico legislature is the least restrictive approach.[48] Under this approach, judges are given broad discretion to determine the admissibility of prior sexual conduct evidence after an *in camera* pretrial hearing, in which the defendant offers proof of the relevance of the prior conduct evidence he is seeking to admit.[49] Unlike the restrictive Michigan approach, there are no enumerated exceptions under the broad New Mexico approach. The determinative factor is whether the probative value of the evidence outweighs its prejudicial effect.[50] This approach has been criticized as over-inclusive because it gives trial

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42. *See* Galvin, *supra* note 24, at 773-74.

43. Jurisdictions following the federal approach include: Connecticut, Hawaii, Illinois, Iowa, New Hampshire, New York, Oregon, Tennessee, Texas and the U.S. Military. *See* Wallach, *supra* note 33, at 521 n.59.

44. *See* FED. R. EVID. 412. The rule provides that evidence of a victim's past sexual conduct or alleged predisposition is generally inadmissible subject to the following exceptions:

> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
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> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

Id.

45. *See, e.g.*, N.Y. CRIM. PROC. LAW § 60.42 (following the federal approach).

46. *See* Wallach, *supra* note 33, at 496.

47. *See id.* at 512; Galvin, *supra* note 24, at 893.

48. *See* Wallach, *supra* note 33, at 493 n.50 (referring to this approach as the New Jersey approach). N.M. STAT. ANN. § 30-9-16(A) (Repl. Pamp. 1994), provides in pertinent part:

> As a matter of substantive right, . . . evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Id.

Other jurisdictions following the New Mexico approach include: Alaska, Arkansas, Idaho, Kansas, New Jersey, New Mexico, Rhode Island, South Dakota and Wyoming. *See* Wallach, *supra* note 33, at 493 n.50.

49. *See* N.M. R. EVID. Rule 11-413(B). The rule provides in pertinent part: "If such evidence is proposed to be offered, the defendant must file a written motion prior to trial. The court shall hear such pretrial motion prior to trial at an in camera hearing to determine whether such evidence is admissible . . . ." *Id.*

50. *See* Galvin, *supra* note 24, at 774. Galvin refers to this approach as the Texas approach, but Texas has since amended its statute. *See* Wallach, *supra* note 33, at 521 n.50. For purposes of this Note, this approach is referred to as the "New Mexico approach."

courts an "unfettered exercise of discretion" without providing the courts with guidance in determining the probative value of prior sexual conduct evidence.[51]

The California approach uses a structured and rather unique method that divides prior conduct evidence into two categories: 1) evidence offered to prove consent; or 2) evidence offered to prove credibility.[52] Evidence falling within each category is generally prohibited, subject to some exceptions.[53] The line between conduct and credibility evidence is not distinct and presents a problem in this approach because evidence that establishes consent would impeach a victim's credibility, and evidence used to attack a victim's credibility may raise the likelihood of consent.[54]

B. The Constitutionality of Rape Shield Laws

Although rape shield laws address strong policy interests in protecting rape victims, there are times when rape shield laws may compromise the defendant's right to a fair trial. The accused in a criminal trial has a fundamental constitutional right to due process; "the right to a fair opportunity to defend against the State's accusations."[55] Essential to due process is the right to call witnesses on one's own behalf and to confront adverse witnesses.[56] However, a defendant's right to present evidence is not absolute or without limitation. The defendant does not have a right to present evidence that is irrelevant or outweighed by prejudicial effect.[57] Furthermore, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[58]

Rape shield laws have been challenged on constitutional grounds because of the restrictions placed on the defendant's use of evidence of the victim's prior sexual conduct.[59] The four different approaches of rape shield statutes discussed above present unique constitutional issues depending on the methods by which they restrict prior conduct evidence.[60] However, it is significant to note that no rape shield statute has been found unconstitutional on its face, although there have been cases where courts have held such statutes unconstitutional as applied to the particular facts of the case.[61]

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51. *See* Galvin, *supra* note 24 at 883.

52. *See* CAL. EVID. CODE §§ 782, 1103 (West 1995). Jurisdictions following the California approach include: Delaware, Mississippi, Nevada, North Dakota, Oklahoma and Washington. *See* Wallach, *supra* note 33, at 521 n.67.

53. *See* Galvin, *supra* note 24, at 775.

54. *See id.* at 775-76.

55. Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

56. *See id.*

57. *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); State v. Pulizzano, 456 N.W.2d 325, 330 (1990). "It is beyond dispute that a criminal defendant has no constitutional right to present irrelevant, prejudicial evidence in his or her behalf." Galvin, *supra* note 24, at 806.

58. *Van Arsdall*, 475 U.S. at 679.

59. *See* Joel E. Smith, *Annotation: Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experience*, 1 A.L.R.4th 283 (1981).

60. *See* Wallach, *supra* note 33, at 497-514 (discussing constitutional challenges to each of the four different approaches).

61. *See id.* at 498. For example, in *Michigan v. Lucas*, the Supreme Court noted that a legitimate interest may restrict a defendant's right to present relevant testimony as long as such a restriction is neither arbitrary nor

Although the current rape shield laws are likely to be constitutional on their face, the more difficult issue is determining the circumstances under which a state's legitimate interests must yield to a defendant's constitutional rights. In other words, when would prior sexual conduct evidence be sufficiently relevant and critical to a defense, such that it would violate a defendant's constitutional rights if excluded? There are two commonly recognized instances when prior conduct evidence is considered highly relevant:[62] (1) when the prior sexual conduct is between the defendant and the victim;[63] and (2) when the prior conduct evidence is offered to prove that a person other than the defendant was the source of semen, injury or other physical evidence.[64] Sexual conduct evidence that falls within either of these two circumstances is considered to have "far higher probative value and less prejudicial effect than evidence of a general lack of chastity."[65]

Evidence of prior sexual conduct may also be sufficiently relevant if it shows bias or motive to fabricate.[66] The Supreme Court has established that "cross examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand . . . is a constitutionally protected right."[67] In fact, some states include bias as an enumerated exception to the general inadmissibility of prior sexual conduct evidence.[68]

V. RATIONALE

The *Johnson* court found that evidence that the victims were prostitutes was not relevant to the defendant's theory of defense.[69] In reaching this conclusion, the court considered the policies behind the enactment of rape shield legislation and the constitutional limits on accomplishing those policies in order to determine the

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disproportionate to its designed purpose. *See* Michigan v. Lucas, 500 U.S. 145, 149, 151 (1991) (citing Rock v. Arkansas, 483 U.S. 44, 56 (1987)). The Court held that Michigan's rape shield statute, which follows the restrictive enumerated approach, served a legitimate interest of protecting rape victims from "surprise harassment and unnecessary invasions of privacy." *See id.* at 149-50. In *Lucas*, the defendant failed to follow the statutory procedure of providing written notice within ten days of an intent to present evidence of a victim's prior sexual conduct under a statutory exception. *See id.* at 147. The Court found that the notice and hearing requirement was not unconstitutional per se and remanded the case for a determination of whether the statute was constitutional under the circumstances. *See id.* at 153.

62. *See* Galvin, *supra* note 24, at 807.

63. *See, e.g.*, FED. R. EVID. 412 (b)(1)(B) (excepting from general inadmissibility "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution . . .").

64. *See, e.g.*, FED. R. EVID. 412 (b)(1)(A) (excepting from general inadmissibility "evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence . . .").

65. Galvin, *supra* note 24, at 807.

66. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 316 (1974); *see also*, Olden v. Kentucky, 488 U.S. 227 (1988) (holding that preventing a criminal defendant from questioning a witness to show bias violates the defendant's constitutional right to confrontation). The Tenth circuit has also recognized motive to fabricate as a proper subject for examination although the defendant was unable to introduce the victim's motive to fabricate for the first time on appeal. *See* United States v. Nez, 661 F.2d 1203, 1206 (10th Cir. 1981).

67. *Davis*, 415 U.S. at 316. In *Davis*, the Supreme Court held that a state's policy interest in protecting the confidentiality of a juvenile offender's must yield to the defendant's vital constitutional right of cross examination to show bias. *See id.* at 320.

68. *See, e.g.*, OR. R. EVID. 412(2)(b)(A); TEX. R. CRIM. EVID. 412(b)(2)(C).

69. *See* State v. Johnson, 123 N.M. 640, 651, 944 P.2d 869, 880 (1997).

relevance of the evidence that the victims had acted as prostitutes on prior occasions.

In *Johnson*, the defendant's theory of defense was that each sexual encounter was a consensual act of prostitution.[70] The supreme court rejected the court of appeals' reasoning that the defendant's proffer went beyond a theory of consent "to the issue of whether the victims had reason to fabricate the rape to avenge Defendant's failure or refusal to pay them."[71] In doing so, the court put much emphasis on the fact that the defendant never actually used the words "motive to lie" during the *in-camera* pretrial hearing.[72]

In its interpretation of the defendant's theory of defense, the *Johnson* court considered whether evidence of prostitution would be relevant to such a theory. The court interpreted the New Mexico rape shield law as "emphasiz[ing] the general irrelevance of a victim's sexual history," and not as an attempt "to remove relevant evidence from the jury's consideration."[73] Furthermore, evidence of prostitution is highly prejudicial.[74] For example, a jury could easily pass moral judgment on the victim without considering the facts at issue. The *Johnson* court explained that "prejudice" does not refer merely to a prejudicial impact on the rape victim.[75] Rather, it refers to a factfinder's interpretation of the evidence; that is, "whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis."[76]

Prior acts of prostitution may show a propensity to engage in sex for pay. However, the *Johnson* court found that such evidence falls short of showing that the victims had a motive to falsely accuse the defendant of rape because he refused to pay for the act.[77] In addition, the court criticized the dicta in *State v. Romero*[78] that indicated that evidence of prior acts of prostitution would be relevant when the defendant claimed the sexual encounter was itself an act of prostitution.[79] This is because the defendant's guilt or innocence should be determined based on the facts of the particular encounter at issue, not on the victim's propensity or acts in conformity with prior conduct.[80] Thus, the court found that evidence of prior acts of prostitution was not relevant to the defendant's theory of defense.[81]

The court in *Johnson* acknowledged that there are times when prior sexual conduct evidence could be relevant and its exclusion could implicate a defendant's

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70. *See id.* at 650, 944 P.2d at 879.

71. *Id.* at 872.

72. *See* text accompanying *supra* notes 16-17.

73. *Johnson*, 123 N.M. at 647, 944 P.2d at 876 (quoting State v. Crims, 540 N.W.2d 860, 867 (Minn. Ct. App. 1995)).

74. *See* State v. Romero, 94 N.M. 22, 26, 606 P.2d 1116, 1120 (1980).

75. *See* Fishman, *supra* note 24, at 725.

76. *Johnson*, 123 N.M. at 648, 944 P.2d at 877.

77. *See id.* at 651, 944 P.2d at 880.

78. 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980), *overruled by* State v. Johnson, 123 N.M. 640, 944 P.2d 869 (1997).

79. *See Romero*, 94 N.M. at 26, 606 P.2d at 1120.

80. *See Johnson*, 123 N.M. at 650, 944 P.2d at 879. The court cites Rule 11-404(B) of the New Mexico Rules Annotated that makes evidence of other crimes inadmissible "to show action in conformity" although it could be used for other purposes such as showing a motive or intent. *See id.* (quoting N.M. R. EVID. 11-404(B)).

81. *See id.* at 651, 944 P.2d at 880.

constitutional right of confrontation.[82] The court properly noted that a "motive to lie" is a theory of relevance that would implicate a defendant's right of confrontation.[83] Yet, in this case, evidence that the victims had acted as prostitutes on prior occasions with third parties did not have a tendency to show that either victim had a motive to fabricate rape charges against the present defendant.[84]

The *Johnson* court adopted the view held in other jurisdictions that there must be a direct link between the victim's past sexual conduct and her alleged motive to fabricate in order for prior sexual conduct evidence to be admitted under a motive to fabricate theory.[85] The defendant must "specify the issue or issues the evidence is intended to address and demonstrate how the evidence is truly probative on those issues exclusive of the . . . 'yes/yes inference'" prohibited by rape shield laws.[86] This may be accomplished by showing a pattern of behavior comparable to the defendant's theory of defense. For example, the defendant may show that the victim has, on previous occasions, made false accusations of rape in order to extort money.[87] However, evidence that the victims had previously acted as prostitutes would not tend to show that either victim "would retaliate against those who failed to pay her by fabricating false charges."[88]

V. ANALYSIS

Prior to *Johnson*, New Mexico courts had no established guidelines for conducting the rape shield statute's balancing test. Thus, the New Mexico legislative formulation of the statute was subject to the criticism as being overinclusive and giving trial courts "nearly unfettered discretion,"[89] without providing the courts with guidelines in determining the probative value of prior sexual conduct evidence.[90]

The New Mexico rape shield statute and corresponding rule of evidence, prohibits the introduction of evidence of prior sexual conduct "unless, and only to the extent that the court finds that, the evidence is material to the case and that its

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82. *See id.* at 649, 944 P.2d at 878.

83. *See id.*

84. *See id.* at 651, 944 P.2d at 880.

85. *See id.* at 650, 944 P.2d at 879. The *Johnson* court cited examples of similar rulings in other jurisdictions: *Washington v. Hudlow*, 659 P.2d 514, 523-24 (Wash. 1983) (holding that evidence of general promiscuity is inadmissible because there was no evidence of conduct comparable to defense theory) and *Winfield v. Virginia*, 301 S.E.2d 15, 21 (Va. 1983) (holding that evidence of the victim's efforts to extort money from others by threats was sufficiently similar to the theory of defense and thus admissible under a motive to fabricate theory, while general reputation evidence of the victim's unchaste character is not admissible). *See Johnson*, 123 N.M. at 650, 944 P.2d at 879.

86. *See Johnson*, 123 N.M. at 650, 944 P.2d at 879 (quoting Fishman, *supra* note 24, at 725). *See also* People v. Williams, 330 N.W.2d 823, 829-31 (Mich. 1982); Minnesota v. Crims, 540 N.W.2d 860, 866, 869 (Minn. Ct. App. 1995); Winfield v. Virginia, 301 S.E.2d 15, 21 (Va. 1983); Washington v. Hudlow, 659 P.2d 514, 523-24 (Wash. 1983); Wisconsin v. Herndon, 426 N.W.2d 347, 355 (Wis. Ct. App. 1988).

87. *See Winfield*, 301 S.E.2d at 21.

88. State v. Johnson, 123 N.M. 640, 651, 944 P.2d , 869, 880 (1997).

89. *Id.* at 647, 944 P.2d at 876.

90. *See supra* Part III for a discussion of the category into which the New Mexico statute falls. For further discussion concerning the criticism of the New Mexico type formulation of a rape shield statute, *see* Galvin, *supra* note 24, at 876.

inflammatory or prejudicial nature does not outweigh its probative value."[91] This language appears to grant trial courts wide discretion in determining the admissibility of a victim's past sexual conduct. However, *Johnson* rejected the characterization that trial courts have "nearly unfettered discretion" and went on to establish guidelines for the trial courts that are lacking in the statute itself.[92] First, the court emphasized the general irrelevance of evidence of prior sexual conduct.[93] Second, the court provided a test for determining when prior sexual conduct evidence is of such relevance that its exclusion may infringe on a defendant's constitutional rights.[94] Third, *Johnson* emphasized the specificity with which a defendant must define his theory of defense when seeking to introduce evidence of prior sexual conduct under the rape shield statute.[95]

A. Relevance of a Rape Victim's Prior Sexual Conduct

Although New Mexico courts have recognized the general irrelevance of a victim's prior sexual history,[96] the New Mexico Supreme Court in *Johnson* limited the extent to which a victim's prior sexual conduct with third parties is relevant.[97] Prior sexual conduct is now deemed irrelevant to the issue of consent on future occasions, even if that conduct involves prostitution because the prior conduct with third parties usually does not implicate the present defendant in any manner.[98] In addition, *Johnson* criticized dicta in *State v. Romero*[99] that evidence of prior acts of prostitution may be relevant to the issue of consent when the defendant alleges that the conduct at issue was an act of prostitution.[100]

In Romero, the defendant sought to introduce evidence that the victim had engaged in prostitution prior to the incident with the defendant. Citing the policy behind the enactment of rape shield legislation, *Romero* found that evidence of prior acts of prostitution was not relevant to the issue of consent because the defendant did not claim that the incident in question was an act of prostitution.[101] However, the court in *Romero* did suggest that "[s]uch information might be relevant if it were contended that the intercourse with the defendant was itself an act of prostitution . . . ."[102]

Evidence of a victim's prior acts of prostitution may be the only evidence a defendant could offer to corroborate his theory of defense, or that the alleged rape

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91. N.M. STAT. ANN. § 30-9-16(A) (Repl. Pamp. 1994). *See also* N.M. R. EVID. Rule 11-413.

92. *See Johnson*, 123 N.M. at 647, 944 P.2d at 876, referring to Professor Galvin's characterization of statutes that follow the broad approach. *See also* Galvin, *supra* note, 23 at 774.

93. *See Johnson*, 123 N.M. at 647, 944 P.2d at 876.

94. *See id.*

95. *See id.* at 651, 944 P.2d at 880.

96. *See* State v. Fish, 101 N.M. 329, 333, 681 P.2d 1106, 1110 (1984) (stating that "[p]rior sexual activity of the victim does not of itself bear on the victim's consent") (citing State v. Romero, 94 N.M. 22, 26, 606 P.2d 1116, 1120 (Ct. App. 1980); State v. Herrera, 92 N.M. 7, 15-16, 582 P.2d 384, 392-93 (Ct. App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978)).

97. *See Johnson*, 123 N.M. at 650, 944 P.2d at 879.

98. *See id.*

99. 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980), overruled by State v. Johnson, 123 N.M. 640, 944 P.2d 869 (1997).

100. See Johnson, 123 N.M. at 650, 944 P.2d at 879.

101. *See Romero*, 94 N.M. at 26, 606 P.2d at 1120.

102. *Id.*

was consensual sex for pay.[103] Under such circumstances, evidence of the victim's prior acts of prostitution would seem to be relevant to the defendant's credibility, and it would also cast doubt on the victim's credibility.[104] However, *Johnson* found that evidence that the victim was a prostitute would not be relevant even if a defendant argued that the intercourse on the occasion at issue was an act of prostitution. While prostitution may show a pattern of consensual sexual conduct, evidence of prior acts of prostitution is irrelevant to consent unless the circumstances surrounding the alleged sexual assault are similar to the prostitution.[105] Otherwise, such evidence would tend to establish consent based on the common law "yes/yes" inference.[106] That is, because the victim acted as a prostitute on prior occasions, she was likely to have consented to sex on the occasion in question. Nevertheless, even prostitutes might not consent to sex with every man on every occasion. It is thus "intolerable to suggest that because the victim is a prostitute, she automatically is assumed to have consented with anyone at any time."[107] The court in *Johnson* specified that the evidence must be relevant beyond the "yes/yes" inference in order to ensure that the defendant's guilt or innocence is established based on the particular encounter for which the defendant is charged.[108] Therefore, evidence of prior sexual conduct with third parties is generally considered irrelevant to the issue of consent with the present defendant.

Johnson clarified the necessary considerations for determining the prejudicial impact of evidence of prior sexual conduct. The proper test, according to the court, is whether the "introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis."[109] Thus, the focus should be on the prejudicial impact to the truth-finding process, and not on its potential psychological effect on the victim.[110]

After *Johnson*, the guidelines for determining relevance and prejudicial impact now presume that evidence of prior sexual conduct with third parties is generally irrelevant. This, therefore, narrows the scope of a judge's discretion. Even when evidence of prior sexual conduct may have some relevance, that relevance will likely be outweighed by its prejudicial impact to the truth-finding process. In addition, these guidelines support the policy behind the enactment of the New Mexico rape shield law. By emphasizing the irrelevance of prior sexual conduct evidence to the present charges, courts shield the jury from hearing evidence that

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103. *See* State v. Johnson, 121 N.M. 77, 82, 908 P.2d 770, 775 (Ct. App. 1995), *rev'd*, 123 N.M. 640, 944 P.2d 869 (1997). Although the defendant in *Johnson* was permitted to testify that the encounter was an act of prostitution, his testimony was inherently suspect. *See id.*

104. *See generally* John Gibeaut, *Shield a Prosecution Sword*, A.B.A. J. 36 (Dec. 1997) (noting that the debate over rape shield laws raises the question of whether barring sexual conduct evidence would violate a defendant's constitutional right of confrontation by prohibiting evidence that would cast doubt on the accuser's credibility).

105. David Huxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1237 (1985).

106. *See* Fishman, *supra* note 24, at 715.

107. United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991), *cert. denied*, 502 U.S. 1105 (1992). *See also* Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997).

108. State v. Johnson, 123 N.M. 640, 650, 944 P.2d 869, 879 (1997).

109. *Id.* at 648, 944 P.2d at 877 (quoting Fishman, *supra* note 24, at 726).

110. *See* Fishman, *supra* note 24, at 726.

could have a highly prejudicial impact or that could cause the jury to decide a case on an improper basis. Furthermore, these factors prevent the victim from being put on trial, and protect the victim from unnecessary harassment and invasions of privacy. Accordingly, removing some of these obstacles may encourage more victims to report sex crimes.

B. The Johnson Guidelines Consider the Constitutional Limits of the Rape Shield Law

Although prior conduct evidence is generally inadmissible to prove consent, *Johnson* properly noted that such evidence might be used for other purposes, such as to prove intent, bias, or motive to fabricate.[111] As such, *Johnson* implicitly adopted and incorporated Rule 412(b)(1)(C) of the Federal Rules of Evidence into the New Mexico rape shield law.[112] Rule 412(b)(1)(C) requires the admission of "evidence the exclusion of which would violate the constitutional rights of the defendant."[113] Thus, this constitutional limitation provides the outer limit of a trial court's discretion when applying the balancing test of the New Mexico rape shield statute.

Johnson also suggested that the trial courts use a five-prong test, referred to as the *Herndon* test,[114] to determine when a defendant's right of confrontation is implicated.[115] Under the *Herndon* test, evidence of prior sexual conduct is admitted only if:

> (1) there is a clear showing that the complainant committed the prior acts;
> (2) the circumstances of the prior acts closely resemble those of the present case;
> (3) the prior act is clearly relevant to a material issue, such as identity, intent, or bias;
> (4) the evidence is necessary to the prosecution's case; and
> (5) the probative value of the evidence outweighs its prejudicial effect.[116]

The purpose of the *Herndon* test is to determine whether the prior sexual acts are clearly similar to the conduct at issue to establish its relevance, exclusive of the prohibited "yes/yes" inference.[117] This framework serves to effectuate the rape shield's policy of eliminating character evidence while recognizing the constitutional limitations of achieving those objectives when the evidence is used

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111. *See id.* at 647, 649, 944 P.2d at 876, 878.

112. *See id.* at 648, 944 P.2d at 877. The *Johnson* court stated that "[w]e conclude that Federal Rule of Evidence 412, which specifically provides that evidence is admissible if its exclusion would violate the constitutional rights of the defendant, states *expressly* what our rule must be construed to require *implicitly*." *Id.* (emphasis added).

113. FED. R. EVID. 412.

114. *See* State v. Herndon, 426 N.W.2d 347 (Wis. Ct. App. 1988), *overruled by* State v. Pulizzano, 456 N.W.2d 325 (Wis. 1990). *Pulizano* overruled *Herndon* only to the extent that *Herndon* declared the Wisconsin rape shield statute unconstitutional on its face. *See Pulizzano*, 456 N.W.2d at 330.

115. *See Johnson*, 123 N.M. at 649, 944 P.2d at 878. *See also Pulizzano*, 456 N.W.2d at 335; *Herndon*, 426 N.W.2d at 360.

116. *See Herndon*, 426 N.W.2d at 360.

117. *See* Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 94 (1977). *See also Herndon*, 426 N.W.2d at 360.

to show intent, bias, or motive. The first element of the *Herndon* test excludes general reputation evidence by requiring a clear showing that the complainant engaged in the prior sexual conduct.[118] The second and third elements exclude any confusing and prejudicial evidence while permitting evidence that shows a clearly similar pattern, or modus operandi.[119] The fourth element requires the court to consider the "merits of the consent defense itself" to determine if the prior conduct evidence is critical to that defense.[120] This element would also aid in eliminating fraudulent claims under the intent, bias, or motive theories.[121] Finally, the fifth element requires the evidence to be truly probative and eliminate questioning designed to harass the victim or arouse the jury's sentiments against her.[122]

Johnson noted that the *Herndon* test is only a framework for the trial court's exercise of discretion.[123] The guidelines provide a method for determining when the exclusion of evidence of a victim's prior sexual conduct would infringe on a defendant's constitutional right of confrontation. A general claim that the evidence will show bias, intent, or motive to fabricate is not sufficient.[124] The court must identify how the evidence supports the defendant's theory of defense beyond the mere allegations of the victim's general unchastity. Thus, *Johnson* narrows the scope of a judge's discretion by defining the constitutional limits of that discretion.

C. *Identifying the Defendant's Theory of Defense*

Johnson reflects the rationale behind the enactment of rape shield legislation. However, the court may have put too much significance in the defendant's failure to use the words "motive to lie" when identifying the defendant's theory of defense. For a defendant facing possible jail time and the stigma of a rape conviction, fairness would seem to require more leniency when interpreting a defendant's theory of defense. Even if the court in *Johnson* had accepted the defendant's theory of defense that the victims had a motive to lie, it likely would have reached the same conclusion. After all, the court held that prior acts of prostitution alone are not a sufficient showing of a motive to fabricate.[125] Therefore, the court's emphasis on the specific "motive to lie" language in identifying a theory of defense narrows the trial judge's discretion in interpreting a defendant's arguments during an *in camera* hearing. Furthermore, it requires that a defendant be very precise when seeking to introduce evidence under the rape shield statute.

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118. *See* Ordover, *supra* note 117, at 113-14.
119. *See id.* at 114.
120. *See id.*
121. *See id.* For example, in cases where it is clearly demonstrated that the defendant used "overwhelming force" against the victim, prior conduct evidence would be excluded. *See id.* at 114, n.136.
122. *See id.* at 114.
123. *See* State v. Johnson, 123 N.M. 640, 649, 944 P.2d 869, 878 (1997).
124. *See id.* at 650, 944 P.2d at 879.
125. *See id.*

VI. IMPLICATIONS

As *Johnson* demonstrates, the New Mexico rape shield law balancing test is not as straight forward to apply as the typical Rule 403[126] balancing test, especially when considering the constitutional issues it raises as applied to certain factual settings. The *Johnson* decision is significant because it will aid judges in determining the admissibility of prior sexual conduct, help to prevent arbitrary decisions, and ensure that the rape shield statute serves the purposes it was designed to serve. First, the guidelines articulated in *Johnson* emphasize the general irrelevance of prior sexual conduct evidence. Second, they protect the victim from undue harassment, which in turn promotes effective reporting. Third, the guidelines help to prevent a jury from being misled or confused by collateral issues and deciding a case on an improper basis. Fourth, the guidelines lay out an effective framework for determining when the rape shield law will infringe upon a defendant's constitutional right to introduce evidence that might otherwise be inadmissible under the New Mexico statute. Finally, *Johnson* emphasizes the importance of clearly stating a theory of defense when a defendant in a rape prosecution seeks to introduce evidence of a victim's prior sexual conduct.

VII. CONCLUSION

The *Johnson* decision emphasizes that a victim's prior sexual conduct with third parties is generally inadmissible under the New Mexico rape shield statute, even when it includes evidence that a victim had previously acted as a prostitute. This is because such evidence is considered irrelevant or is outweighed by its highly prejudicial impact on the truth-finding process. A defendant does not have a constitutional right to introduce evidence that is irrelevant. On the other hand, if a defendant can establish that the evidence is clearly relevant to the victim's intent, bias, or motive to fabricate, the defendant may have a constitutional right to introduce that evidence. However, the defendant must be able to prove that the evidence would be relevant beyond establishing consent based on the victim's general unchastity. Moreover, the defendant must clearly state his theory of defense beyond consent. Once a trial court knows the relevance of particular evidence, it can properly determine the probative value of that evidence and weigh it against the prejudicial effect as proscribed by the New Mexico rape shield statute.

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126. FED. R. EVID. 403.