

DEFENDANT'S MOTION TO INTRODUCE RAPE SHIELD EVIDENCE

The Defendant, by counsel, in support of this Motion to Introduce Rape Shield Evidence, states the following:

1. The Defendant is charged with the offense(s) of [insert offenses].
2. This matter is currently set for trial on [insert date]. [If the 10 day time limit has passed, set forth reasons pursuant to Ind.R.Evid 412 why there is good cause for delay.]
3. The Defendant wishes to admit at trial evidence that may normally be excludable as evidence of past sexual conduct under Ind.R.Evid. 412 or I.C. 35-37-4-4. Rape Shield Statute concerns must yield to Sixth Amendment right to cross-examination. Steward v. State, 636 N.E.2d 143 (Ind.Ct.App. 1994); Davis v. State, 749 N.E.2d 552 (Ind.Ct.App. 2001); Turney v. State, 759 N.E.2d 671 (Ind.Ct.App. 2001); Saylor v. State, 559 N.E.2d 332 (Ind.Ct.App. 1990).
4. The Defendant wishes to make an offer of proof concerning this evidence, to show its relevancy and the reasons that such evidence should be admitted. The Defendant's offer of proof is set forth with particularity in the Affidavit attached and incorporated herein.
WHEREFORE, the Defendant, by counsel, respectfully requests this Court to grant his Motion to Introduce Rape Shield Evidence, to set a hearing outside the presence of the jury for the purpose of questioning the victim/witness regarding his offer of proof, to find such evidence admissible, to enter an Order delineating the admissibility of the evidence and nature of permissible questioning, and for all other relief just and proper in the premises.

(Signature)

REFERENCES

CASEBANK O.4.c.2

Evid.R. 412 (evidence of past sexual conduct)

IC 35-34-4-4 (rape shield statute)

CASELAW

Michigan v. Lucas, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991) (Sixth Amendment does not prohibit in some cases, exclusion of rape shield evidence resulting from the Defendant's failure to comply with notice Requirement).

Clark v. State, 728 N.E.2d 880 (Ind.Ct.App. 2000) (trial court erred in using Rape Shield law to prohibit his defense from developing facts in support of its theory that the Defendant inserted his finger in victim's vagina to ascertain whether she had been sexually active; State may not apply rule mechanistically to prohibit defense from either offering its version of facts or assuring through cross-examination that trier of fact has satisfactory basis for evaluating truth of witnesses' testimony; rape shield law does not preclude evidence which merely establishes basis for the Defendant's belief as to victim's past sexual conduct because evidence of basis for belief is not same as evidence of actual prior sexual activity by victim), *overruled on other grounds*, D'Paffo v. State, 778 N.E.2d 798, 803 (Ind. 2002).

Zawacki v. State, 753 N.E.2d 100 (Ind.Ct.App. 2001) (in prosecution for sexual misconduct with minor, evidence of letters written by complaining witness to the Defendant's daughter suggesting that they form a lesbian relationship was improperly excluded under Rape Shield Law; the evidence should have been admitted because what was offered did not concern any actual prior sexual activity or conduct of the complaining witness, rather it was intended to impeach the complaining witness' credibility by demonstrating bias, prejudice, or an ulterior motive).

Steward v. State, 636 N.E.2d 143 (Ind.Ct.App. 1994) (trial court erred in denying the Defendant's right to present evidence that the complaining witness accused four others of molesting her around same time as she accused the Defendant because evidence rebutted inference of his guilt from expert testimony that the complaining witness' behavior was consistent with one who had been molested).

Davis v. State, 749 N.E.2d 552 (Ind.Ct.App. 2001) (erroneous exclusion of the complaining witness' prior sexual conduct unfairly bolstered the complaining witness' testimony, inasmuch as inference arises that, because the witness was accurate in stating that sexual contact had occurred, as disclosed by physical examination, she also must have been accurate in stating that the Defendant was perpetrator of charged offenses).

Turney v. State, 759 N.E.2d 671 (Ind.Ct.App. 2001) (Rape Shield Statute concerns must yield to Sixth Amendment right to cross-examination where it is posited that the Defendant was perpetrator and where it is apparent there could have been another possible source for acts of molestation; thus, it was a Brady violation for failure to disclose prior sexual misconduct).

State v. Walton, 715 N.E.2d 824 (Ind, 1999) (common law exceptions to Rape Shield Rule permitting introduction of evidence of prior false accusations of rape survived adoption of Ind.R.Evid.; exception provides that evidence of a prior false accusation of rape is admissible if either: 1) complaining witness had admitted that prior accusation was false; or 2) her prior accusation was "demonstrably false.").

Graham v. State, 736 N.E.2d 822 (Ind.Ct.App. 2000) (notice-and-hearing requirement of Ind. Evidence Rule 412(b) applies to common-law Rape Shield Rule exception allowing evidence of prior false rape allegations; here the Defendant's failure to file written notice at least ten days prior to trial was fatal to his attempt to introduce evidence of prior false allegations).

Johnson v. State, 6 N.E.3d 491 (Ind.Ct.App. 2014) (Defendant waived appellate review of trial court's exclusion of victim's sexual history with Defendant because he did not file a pretrial notice of his intent to introduce rape shield evidence. Defendant must submit a written motion that includes a description of the evidence at least ten days before trial in order to offer evidence of past sexual conduct during the trial).

Wood v. State, 534 N.E.2d 1146 (Ind.Ct.App. 1989) (trial court erred in excluding evidence that someone other than the Defendant molested child victim).

Fugett v. State, 812 N.E.2d 846 (Ind.Ct.App. 2004) (although complaining witness's (CW) mother's testimony that CW accused a man of touching her breast and that accusation was contradicted by other evidence, Defendant failed to show that CW made a prior allegation or that she disavowed a prior allegation, or that the allegation was demonstrably false).

McVey v. State, 863 N.E.2d 434 (Ind.Ct.App. 2007) (trial court did not error by refusing to allow Defendant, under Rape Shield Law in a child molesting trial, to cross-examine victim about her prior sexual history, even though Defendant argued that another man had been charged with molesting victim).

Conrad v. State, 938 N.E.2d 852 (Ind.Ct.App.2010) (trial court did not err in excluding evidence CW was "making out" with another man (Nagle) shortly before Defendant himself became involved with her. Defendant did not claim that Nagle, not he, assaulted CW, nor did he seek the shelter of any other exception to Rule 412. Rather, Defendant claimed that CW consented to sexual activity with him and he would have used excluded evidence to impeach CW's credibility and memory).

Redding v. State, 844 N.E.2d 1067 (Ind.Ct.App. 2006) (in child molesting prosecution, trial court erred in preventing Defendant from introducing evidence regarding a prior molestation of complaining witness; Defendant should have been allowed to rebut the inference that he caused the child's injuries).

Saylor v. State, 559 N.E.2d 332 (Ind.Ct.App. 1990) (the use of the Rape Shield Act to bar evidence that victim had been molested two years prior to meeting Defendant violated Defendant's Sixth Amendment confrontation right and denied him due process of law).

PRACTICE POINTERS:

1. The statute requires an affidavit setting forth the offer of proof to accompany this motion, and in many cases an accompanying memorandum of law might be important and persuasive. While the rule does not mention an affidavit, it should still be included until interpretation of the rule can be accomplished.
2. An Order setting the hearing date should be provided with this motion.
3. Although I.C. 35-37-4-4(b) has not been repealed, I.R.E. 412 deals with exactly the same provisions. It contains one additional reason for admission of evidence (for impeachment purposes); relaxes the time limitations for filing; mandates a hearing whenever a motion is filed; and provides for an instruction whenever the State concedes the victim's pregnancy is not due to the Defendant. The rules take precedence whenever there is a conflict between a rule and an evidentiary statute. However, not everything in the statute conflicts with the rule, so it would be best to follow the statute to the extent possible.
4. Although the statute and rule set forth specific enumerated grounds for the admission of normally proscribed evidence, the Defendant's constitutional right to present exculpatory evidence may require the admission of other types of evidence in certain circumstances. See, e.g., Saylor v. State, 559 N.E.2d 332 (Ind.Ct.App. 1990); Tague v. Richards, 3 F.3d 1133 (7th Cir. 1993). See above case law for additional authority.
5. To preserve error in exclusion of evidence under the rape shield law, the excluded evidence should be offered at trial. Shaffer v. State, 443 N.E.2d 838, 840 (Ind. 1983).