

Defending the Charge of Rape

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It is often said, "the charge of rape is easily made, but almost impossible to defend". This is most certainly a true statement. We often hear in the news about some woman, home alone in her apartment. Someone brakes in, wearing a ski mask, and rapes her. While this is the common image of a "rape", in my experience, very often the alleged "rapist" is a boyfriend, neighbor, or fellow partygoer. A sexual contact occurs. The next thing the young man knows, he's behind bars, with \$150,000.00 bail, facing rape charges. Three days later, five if he gets arrested on a Friday, the judge asks him if he can afford a lawyer.

At first, he probably thinks he did nothing wrong, justice will prevail, and this "will all be cleared up in a few days" when the girl "comes to her senses, and tells the truth".

A few days later, he is at his "pre-pre", pre-preliminary hearing, when he discovers the ugly truth about his dilemma. He's told by the public defender that if he pleads guilty now, He'll "only" get a two year prison sentence, three or four years parole, and have to register as a sex offender for the rest of his life. If he fights, it only gets worse.

Every case is different. Young men are often overly aggressive when their hormones are flowing. Our society often ignores the fact that young women are often sexually aggressive as well. Many circumstances occur where a hasty accusation cannot be retracted. In one case, a man was having an affair. He decided to go back with his wife. His angry girlfriend accused him of rape after he announced his decision, immediately after they had sex. She later realized the gravity of the charge. She tried to tell the police it was a mistake. The police then threatened to prosecute her if she changed her story. I have heard variations on this theme many times.

Other situations occur where a girl makes an accusation because she doesn't want to tell her parents she decided to have sex. Young women on the verge of adulthood, often lie to their parents to get out of the house to party with their friends. When the party turns to sex. It is easy to tell one more lie before the gravity of the accusation becomes apparent.

Russell, was (and as of this writing still is) only 19 years old. In August 1999, he went to a party with a friend. The parents of the boy giving the party were out of town. Several other boys and girls came, all teenagers, some over, others under 18. About midnight, only Russell, three other boys, and a 17-year-old girl, Laura (not her real name) were left. Laura had lied to her mother, saying she planned to spend the night with a girl friend. Her plan, in fact, was to meet another boy for sex at the party, which she did.

Earlier in the evening, Laura had followed Russell into the bathroom. The boy she had sex with earlier, left while they were in the bathroom. When they came out, she said:

"Your friend tried to rape me". They all sat around, and joked about sex. Russell said he would pay a dollar, and threw a dollar on the floor. She said it would cost one hundred dollars. He got up and whispered in her ear. She followed him into the bedroom. (Later she would tell the police he had forced her into the bedroom.) A few minutes later, she said "no, no, no". She said she yelled it. Others remembered it differently.

She said he forced her to have sex. Exercising his right not to testify on my advice, he said nothing. He did not testify.

I need to make a few remarks about the law. A person accused of rape can no longer offer evidence about the promiscuity of the "victim". He can no longer have a psychological examination of the "victim" ordered by the court. There is no longer any requirement that a person accusing another of rape have any evidence other than just her word. The old expression "its just her word against mine", simply doesn't work anymore.

Female Nurse Practitioners often serve as "experts" for the prosecution. In my view, at least, they simply do not have neither the skill, nor the objectivity to serve in that capacity. In Russell's case, I was able to refute the claims of the Nurse by having the pictures she took analyzed by a doctor. In another case, the pictures taken by another nurse conveniently "didn't come out".

The prosecution put on their evidence. I cross examined their witnesses, and put on the testimony of an Emergency Room doctor, based in Sacramento, Thomas Long, M.D. Doctor Long was able to see in the photographs the so-called "abrasions" were merely tissues, naturally engorged with blood, after intercourse. He was also able to show that the "lacerations" she "saw" was a combination of scar tissue from the much earlier, naturally broken hymen, and abrasions from her blue jeans, from walking a long distance, with no underwear in blue jeans, after not washing after sex. The jury found Russell **"NOT GUILTY"**. At the end of this article, I have attached the transcript of the final arguments offered by the prosecutor, and myself.

I have attached the transcript for several reasons. First it illustrates how much differently the prosecutor and I perceived the evidence. It shows the complexity of defending such a seemingly simple set of facts. It illustrates the importance of the medical experts. It illustrates the need to thoroughly organize, and coherently present the evidence to the jury. It illustrates the fact that an important witness that has lied can be discredited, by showing the jury her lies. Finally it illustrates my belief that in most cases a defendant should not testify. I believe testimony by Russell in this case would have been harmful, and might have lost the case.

I tell my defendant clients that it is usually not to their advantage to testify. In general, we evaluate the people we talk to for veracity, as we speak to them. Juries do the same as they listen. We look for motive to lie. We look for nervousness. A person accused of a

crime has a tremendous motive to lie, since his freedom is at stake. For the same reason, he will almost certainly be nervous while testifying. Add to these factors innocent, inadvertent misstatements, and a jury will believe that even the most honest person is lying.

A defendant has another small benefit by not testifying, in that there is a jury instruction that states clearly that he is not to be criticized for exercising his constitutional right not to testify. (US Constitution, Fifth Amendment). I also like to tell the jury the reasons a defendant shouldn't testify, that I've just mentioned.

I believe the law has gone way overboard in protecting the "victim". I believe that Russell, could very easily have been one more young man convicted, and branded for life as a violent sex offender, solely on the basis of a self serving careless lie, of a young lady who thoughtlessly made an accusation to save herself from punishment from her own parents for lying to them about her plans that evening. I believe many others, hundreds, maybe thousands of others have been falsely convicted, under the new "witness protection" laws, and the zeal of prosecutors, and medical "experts", sometimes selected for their "special interest" in this field.

The only possible way of dealing with this or other similar circumstances, is to select an attorney with a proven track record, and give him the financial resources required to properly prepare and defend the case.

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