

A defendant was charged with sexual assault. At trial, the defendant has called the victim's best friend to testify that the victim stated on the night of the alleged assault that she intended to sleep with the defendant.

Is the best friend's testimony admissible?

- A. No, because evidence of the victim's sexual behavior is inadmissible.
- B. No, because the testimony is hearsay not within any exception.
- C. Yes, because the testimony goes to the issue of consent.
- D. Yes, provided that the testimony's probative value substantially outweighs any harm to the victim.

Explanation:

Under FRE 412, evidence offered to prove (1) that a **victim** engaged in other **sexual behavior** or (2) a victim's **sexual predisposition** is generally **inadmissible** in a criminal proceeding involving **sexual misconduct**. This rule is designed to shield the alleged victim from the embarrassment associated with disclosure of such private information and to prevent the jury from relying on stereotypes during the fact-finding process.

However, there are **exceptions** to this rule. In a **criminal case**, the court may admit: evidence of specific instances of a victim's sexual behavior, if offered to prove that **someone other than the defendant** was the source of semen, injury, or other physical evidence

evidence of specific instances of a victim's sexual behavior **with respect to the defendant**, if offered by the defendant **to prove consent** or if offered by the prosecutor *and/or*

evidence whose exclusion would **violate** the **defendant's constitutional rights**.

An alleged victim's statements of intent to engage in sexual intercourse with the defendant constitute evidence of specific instances of sexual behavior with respect to the defendant. This evidence may be offered by the defendant to prove consent on the occasion in question, so the best friend's testimony is admissible here **(Choice A)**.

(Choice B) One hearsay exception applies to a declarant's **then-existing state of mind**—eg, motive, plan, intent. This exception applies to the victim's statement here—that she intended to sleep with the defendant—so it is also admissible under this exception.

(Choice D) Whether the probative value of evidence of a victim's sexual behavior substantially outweighs harm to the victim is the test used to determine the admissibility of such evidence in *civil* cases. But in this criminal case, the victim's statement is admissible to prove consent without employing this balancing test.

Educational objective:

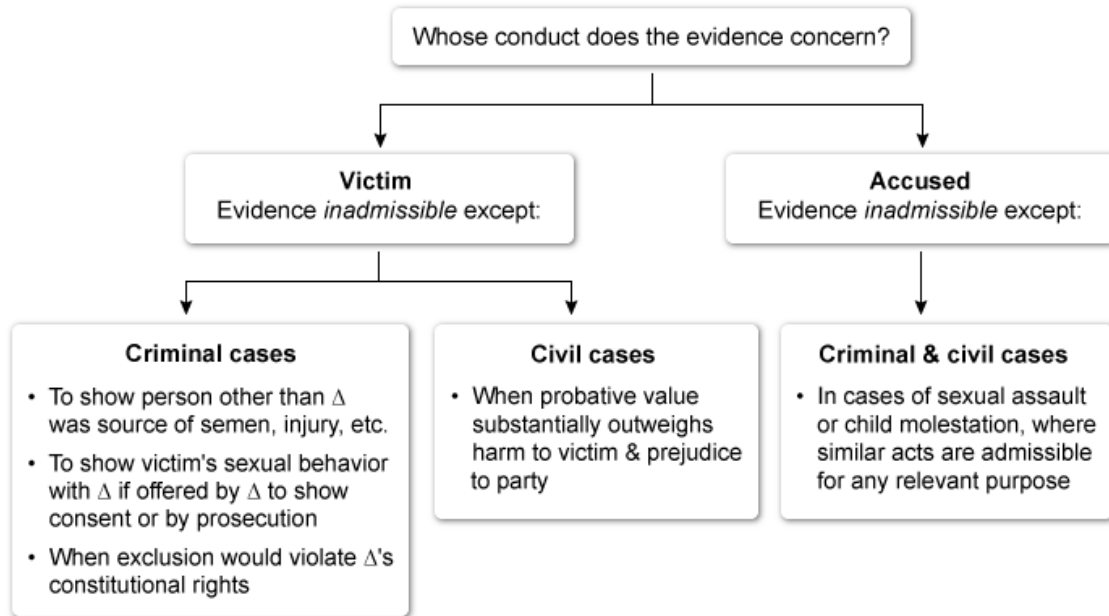
Evidence of a victim's other sexual behavior or predisposition is inadmissible in a criminal case unless (1) the behavior is offered to prove another was the perpetrator, (2) it was with respect to and is offered by the defendant to prove consent or by the prosecutor and/or (3) exclusion would violate the defendant's constitutional rights.

FRE = Federal Rule of Evidence.

References

Fed. R. Evid. 412 (victim's other sexual behavior).

Admissibility of other sexual behavior



Δ = Defendant

©UWorld