Chapter 7: The Sexual Assault of Battered Women: Criminal and Civil Issues

Section 7A: Marital Rape and Sexual Assault

Carol E. Jordan, M.S., Executive Director
Vanessa L. Armstrong, J.D., Legal Counsel
Governor's Office of Child Abuse and Domestic Violence Services
Karen Quinn, J.D., Deputy General Counsel
Kentucky Justice Cabinet

HISTORY OF MARITAL RAPE IN THE LEGAL SYSTEM

The recognition of the crime of marital rape and other spousal sexual assaults in Kentucky is relatively recent, with the marital exclusion not being removed from the Kentucky Penal Code until 1990. Until then, crimes of sexual assault were committed in the context of marriage, but neither the common law nor the Code permitted their prosecution. This legal non-recognition of the existence of such a crime originated from archaic notions extending back to early British jurisprudence, in which the husband and wife were regarded as one legal entity. As stated by Lord Matthew Hale in the seventeenth century, "[b]ut the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." "For Better or for Worse: Marital Rape", 15 Northern Kentucky Law Review 611, 612 (1988).

In accordance with such views, the Kentucky Penal Code explicitly excluded spouses from being prosecuted for sexual assaults committed upon the other. The Code accomplished this exclusion by explicitly exempting spouses from the statutory definitions of the underlying predicate acts of these offenses: deviate sexual intercourse, sexual intercourse, and sexual contact which go to determine the offenses of sodomy, rape, and sexual abuse, respectively. So, for example, the Code defined "sexual intercourse" as being "limited to sexual intercourse between persons not married to each other", and "deviate sexual intercourse" as "any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another."

Such definitions effectively prevented prosecutions of perpetrators for the sexual assaults committed upon spouses, causing the legal system to bring charges -- if any -- of assault or burglary rather than rape. In Smith v. Commonwealth, Ky., 610 S.W.2d 602 (1980), the defendant raped his wife by throwing her on the bed, tearing off her clothes, and forcing a carrot into her vagina and rectum. Given both the limitations caused by his using a foreign object to commit the rape and the relationships between the defendant and the victim, the sole charge the defendant faced from that rape was that of second-degree assault. Similarly, in Matthews v. Commonwealth, Ky., 709 S.W.2d 414 (1986), the defendant broke into the home of his estranged wife, raped her and then shot and killed her. While he faced prosecution on the burglary and murder charges, no charge arose or could have arisen under the statutory definition for rape.

Because of this history of the legal system's long indifference to the crime of marital sexual assault, many victims are often unaware that when they are sexually assaulted by their spouse, a

crime has been committed for which the perpetrator can be held to both criminal and civil liability. Often, they may not conceptualize such attacks as "rape" since they are married to the perpetrator. Attorneys would be well advised, in such circumstances, to refrain from directly questioning clients if their spouse has ever raped them, but rather phrase such inquiries by asking if they have been forced to have sexual relations when they did not wish to do so.

Until the 2000 session of the General Assembly, the legal system still contained procedural obstacles for prosecuting such offenses. While felonies contain no statute of limitations during which they can be brought in Kentucky, the crimes of marital rape or sodomy were an exception to this rule in that they contained an explicit reporting requirement. The reporting requirement must have been met before a criminal prosecution would ensue. The statute provides that prosecution of such cases resulted only if "formally reported to the police within one year after the commission of the offense. Additionally the report must have been signed by the victim of the offense." KRS 500.050(4). However, the 2000 General Assembly repealed this specific paragraph of the statute.

Unfortunately, the bias in the law against marital sexual assaults also had a spill over effect in other areas of the legal system. At one time, in child custody or visitation suits, "no evidence that one has been charged with violation of this statute, if the person charged and the complainant are married or that such a proceeding is pending, or any evidence regarding the circumstances on which such charge is based, shall be admissible into evidence on the issue of custody or visitation, nor shall any weight be given by any court to the existence of such a proceeding or the facts on which such proceeding is based." KRS 510.310. However, that exception was also deleted by the 2000 General Assembly.

MODERN CRIMINAL PROSECUTIONS FOR SPOUSAL SEXUAL ASSAULT

A. State Crimes

1. Specific Sexual Assault Offenses

Criminal prosecution of spousal sexual assault will be based on charges of rape, sodomy, or sexual abuse. Each one of these offenses is committed when a perpetrator 1) commits a sexual act with a victim 2) without her consent. The crime of rape is committed when a defendant engages in "sexual intercourse" with the victim which is defined as intercourse in its "ordinary sense" and includes penetration by a foreign object. KRS 510.010(8). Sodomy is committed when the defendant engages in "deviate sexual intercourse" with the victim, which is defined to mean any act of sexual gratification involving the sex organs of one person and the mouth or anus of another person. KRS 510.010(1). It also includes penetration of the anus of one person by a foreign objection manipulated by another person. Sexual abuse is committed when the perpetrator makes "sexual contact" with the victim, which is defined to mean the touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party. KRS 510.010(7).

Lack of consent constitutes the second, key element in all the above sex offenses. Under the Code, lack of consent results either from "forcible compulsion" used by the perpetrator, or an "incapacity to consent" by the victim. KRS 510.020. In the case of adult victims, incapacity to consent would result from mental retardation, mental illness, mental incapacity, or physical helplessness. Id. Those are all defined terms under the Code, with "mental incapacity" requiring that the victim be administered a controlled or intoxicating substance without her consent, and with "physically helpless" requiring essentially that the victim be unconscious or physically unable to communicate her unwillingness to participate in the sexual act. KRS 510.010.

Much of the law on sexual assault has centered upon the evolving meaning of "forcible compulsion." Neither present statutes nor case law require that a victim physically resist her assailant. In fact, the Code specifically declares "physical resistance on the part of the victim shall not be necessary." KRS 510.010(2). Neither must the assailant use actual physical force: simply placing the victim in a continual state of fear and subject to an environment of emotional, verbal and physical duress is sufficient. See Yarnell v. Commonwealth, Ky., 833 S.W.2d 834 (1992) (appellant was properly convicted of first degree rape and sodomy of his step-children when the children testified that they were afraid of him, when appellant constantly yelled, screamed, and directed obscenity at them, and when children went along with the deviate sexual intercourse only because of their fear of appellant). Rather, "forcible compulsion" is defined as "physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter." KRS 510.010(2). In determining whether a victim submitted because of an implied threat, which placed her in fear, the courts employ a subjective standard (i.e., whether the victim was truly afraid) rather than an objective standard (i.e., whether the average victim would have been afraid). Salsman v. Commonwealth, Ky.App., 565 S.W.2d 638 (1978).

The elements of the crimes of rape, sodomy, and sexual abuse, as committed against adult victims, are as follows:

Offense	Sex Act	Without Consent	Degree of Crime
Rape First Degree	Sexual Intercourse	Forcible compulsion or victim physically helpless	Class B felony, unless victim sustains serious physical injury then it is a Class A felony
Rape Third Degree	Sexual Intercourse	Victim mentally retarded or incapacitated	Class D felony
Sodomy First Degree	Deviate Sexual Intercourse	Forcible compulsion or victim physically helpless	Class B felony, unless victim sustains serious physical injury then it is a

Offense	Sex Act	Without Consent	Degree of Crime
			Class A felony
Sodomy Third Degree	Deviate Sexual Intercourse	Victim mentally retarded or incapacitated	Class D felony
Sexual Abuse First Degree	Sexual Contact	Forcible compulsion or victim physically helpless	Class D felony
Sexual Abuse Second Degree	Sexual Contact	Victim mentally retarded or incapacitated	Class A misdemeanor

In order to meet the statutory definition, "serious physical injury" must be essentially life-threatening: "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." KRS 500.080(15).

2. Other Crimes Committed in the Context of Marital Sexual Assault

Attorneys for victims of domestic violence also need to be aware of other criminal offenses which the perpetrator may simultaneously commit against the victim in addition to that of the sexual assault: commonly, these may be crimes of assault, menacing, stalking and terroristic threatening. See KRS Chapter 508. Although it may not be the most obvious, one of the most common accompanying crimes is that of burglary. In fact, until the Penal Code was amended to permit the prosecution of marital rape, burglary was often the sole charged offense against the perpetrator who broke into the home of his estranged wife to commit a sexual assault against her. See, e.g., Matthews v. Commonwealth, Ky., 709 S.W.2d 414 (1985).

However, recent case law concerning the crime of burglary -- as an accompanying offense to sexual assault or committed in the domestic violence context -- has made the prosecution of such crimes complex. The Code provides that a perpetrator commits burglary when "with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling." KRS 511.030 (burglary second degree, raised to first degree in KRS 511.020 if the offender is armed with a deadly weapon, causes physical injury, or uses a dangerous instrument). Previously, the case law in this context had been quite clear: when an estranged husband violated a domestic violence protective order and broke into the home of his estranged wife, he committed the crime of burglary. In McCarthy v. Commonwealth, Ky., 867 S.W.2d 469 (1993), for example, the defendant, in violation of the protective order she had received against him, went to the home of his estranged wife, sought entry which she denied, and then proceeded to kick down the door and enter the house, assaulting his wife once inside. The trial court convicted the appellant of first-degree burglary as well as fourth degree assault. When the appellant appealed the burglary conviction, the Supreme Court emphatically rejected it, stating:

> *We continue to reject the position that there is any absolute right on the part of one spouse to be with the other against the other's wishes, giving a right to break*

into the home of the other with the intent to commit a crime. Burglary is an invasion of the possessory property right of another and extends to a spouse.

*****

While appellant contends he went to the house to confer with his wife and not with the intent to commit an assault, he may be convicted of the crime of burglary providing the jury finds that he knowingly entered the building with intent to commit a crime or that he remained unlawfully in the building with intent to commit a crime. Therefore, even if one believes that appellant did not have the requisite intent as he entered the house, one could surely believe he subsequently formed the intent necessary to be guilty of the crime of burglary. McCarthy, 867 S.W.2d at 471.

However, two recent Kentucky Supreme Court cases have left the meaning of burglary committed in the sexual assault/domestic violence context somewhat unclear. In Hedges v. Commonwealth, Ky., 937 S.W.2d 703 (1997), the victim was estranged from her husband and had obtained a domestic violence protective order against him which prohibited him from committing acts of violence against the victim or to damage the couple's property. It did not, however, contain a "no contact" provision. The appellant went to the victim's apartment seeking access on the alleged basis that he needed to use the telephone. She granted him permission to enter. When appellant discovered another man in his wife's bedroom he became enraged and began smashing a fish tank, a microwave oven, and a vase -- all of which was property owned jointly by the appellant and the victim. The Supreme Court reversed the burglary conviction. It held that in order to constitute the crime of burglary, the defendant must have held the "specific intent at the time of breaking and entry, or remaining ... to commit any crime." 937 S.W.2d at 705-06. The "mere" violation of a domestic violence protective order without the intent to commit an independent crime does not support a burglary conviction. Id. The Court distinguished the case from McCarthy opining that McCarthy involved a case where an EPO specifically prohibited the husband from contacting his wife, and notwithstanding the existence of the EPO, McCarthy went to his wife's home, broke down the door after she *denied* him entry to the house and assaulted her. Unlike the case in McCarthy, the appellant here was given permission to enter the home and his wife never withdrew that privilege.

Furthermore, the Court stated that even if the defendant did enter the apartment with the intent to commit a crime, the burglary statute further requires that the defendant either knowingly enter or unlawfully remain in the apartment, and that he then commit an independent crime satisfying the elements of the burglary offense, after his permission to be on the property had been withdrawn. Since no evidence was cited to show that the defendant knew his permission to be in the apartment had been withdrawn at the time he destroyed the property, he was entitled to a directed verdict. In summarizing its ruling, the Court stated:

To prevent any misunderstanding, it is important to say what this case does not hold. We do not hold or suggest that if one is lawfully admitted to the premises of

another, he thereafter has carte blanche to engage in criminal conduct. Not at all. If a lawfully admitted person commits assault, or theft, or any other crimes, he may be prosecuted for those crimes. At common law, burglary was the unlawful entry into the dwelling of another in the nighttime with the intent to commit a crime therein. Because of the life- threatening nature of such an act, the crime of burglary was punished more severely than mere theft. Modern statutes, which proscribe burglary, are without many of the common law elements, however, this does not turn every criminal act committed on the property into a burglary. At a minimum, before there is a burglary, there must be a prior intent to commit a crime; intent which was not proven, here.

What this opinion does hold is that misconduct or criminal conduct does not become burglary solely by reason of commission of the act on the property of another. To hold otherwise would be to distort the crime of burglary into meaninglessness. Consequently, it would have been clearly unreasonable for a jury to have found appellant guilty of burglary under the set of facts in this case. Thus, the Court of Appeals and the Fayette Circuit Court erred in ruling that there was sufficient evidence to overrule appellant's motion for a directed verdict and, accordingly, the judgments of both courts should be reversed.
Hedges, 937 S.W.2d at 707.

Similarly, in Robey v. Commonwealth, Ky., 943 S.W.2d 616, 620 (1997), where the appellant entered the acquaintance/victim's apartment late at night and raped her while wearing a ski mask and holding a knife to her throat, the Court held that the appellant had not committed burglary. Earlier that evening, the victim had invited the appellant to spend the night on a couch in her apartment. The appellant had declined. However, the victim informed him that she would leave her door unlocked. She placed a pillow and blanket on the couch should he change his mind and decide to accept her offer. Later that evening, he returned to her apartment and raped her. The Court ruled this did not meet the requirements of burglary because:

The evidence introduced indicated that Robey entered the apartment with permission and thereafter entered the victim's bedroom and raped her. There was no evidence to indicate that his privilege to be in the apartment had been withdrawn prior to the time he committed the independent criminal act. Robey immediately left the premises and removed no property belonging to the victim. We must therefore conclude that the elements required to constitute the offense of burglary in the first degree were not met. Robey, 943 S.W.2d at 620.

The Hedges/Robey line of decisions may have blurred somewhat the contours of the prosecution of burglary cases committed in the sexual assault/domestic violence. Victims of such crimes would be well advised to clearly state their non-assent to perpetrators' entry upon or subsequent remaining upon their property. Clearly an implicit withdrawal of a license to remain no longer seems sufficient.

B. Federal Crimes

When Congress passed the Violence Against Women Act ("VAWA") in 1994, it created new federal crimes to address violence against women. Three federal statutes address the crimes of interstate domestic violence, interstate violation of a protection order and interstate stalking. See 18 U.S.C. § 2261 (which prohibits traveling in interstate or foreign commerce or entering or leaving Indian territory to commit a crime of domestic violence); 18 U.S.C. § 2262 (which prohibits traveling in interstate or foreign commerce or entering or leaving Indian territory to violate a protection order); and 18 U.S.C. § 2261A (which prohibits traveling in interstate or foreign commerce or entering or leaving Indian territory in order to stalk any person).

1. Interstate Domestic Violence

The legislation prohibits 1) traveling in interstate or foreign commerce or entering or leaving Indian country 2) with the intent to kill, injure, harass, or intimidate a spouse or intimate partner and 3) who in the course of or as a result of such travel, commits or attempts to commit a crime of violence against that spouse or intimate partner. 18 U.S.C. § 2261(a)(1).

The legislation also prohibits causing a spouse or intimate partner 1) to-travel in interstate or foreign commerce or to enter or leave Indian country 2) by force, coercion, duress, or fraud and 3) who in the course or as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse or intimate partner. 18 U.S.C. § 2261(a)(2). This part of the legislation is geared towards the perpetrator who forces his victim to flee the state.

The law protects anyone who is a spouse or intimate partner of the perpetrator. It defines "spouse or intimate partner" to include "a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse." 18 U.S.C. § 2266(7)(A)(i). The law also goes on to include "any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides." 18 U.S.C.§ 2266(7)(B).

Interstate Violation of a Protection Order

The legislation forbids 1) traveling in interstate or foreign commerce or entering or leaving Indian country 2) with the intent to engage in conduct that violates the part of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and 3) subsequently engages in such conduct. 18 U.S.C. § 2262(a)(1).

The statute also prohibits 1) causing another person to travel in interstate or foreign commerce or enter or leave Indian country; 2) by force, coercion, duress, or fraud, and 3) in the course of, as a result of, or to facilitate such conduct or travel engages in conduct

that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued. 18 U.S.C. § 2262(a)(2).

The legislation protects "any person." The legislation includes "any injunction or other order" issued for the purpose of protecting the victim from violence, threats, harassment, contact, or communication, or physical proximity to another person. Both temporary orders (EPO's) and final orders (DVO's) are included.

1. Interstate Stalking

The legislation prohibits 1) traveling in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or entering or leaving Indian country 2) with the intent to kill, injure, harass, or intimidate another person and 3) in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family of that person, or the spouse or intimate partner of that person;

or

Who 1) with intent to kill or injure a person in another state or tribal jurisdiction, or within the special maritime and territorial jurisdiction of the U.S. or place such person in said territories in reasonable fear of death of or serious bodily injury to 2) any person, or member of the immediate family of that person, or spouse or intimate partner of that person; and 3) uses the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places such person in reasonable fear of death or serious bodily injury. 18 U.S.C.§. 2261A.

Attorneys representing women who are victims of interstate domestic violence and stalking should note that the federal restitution provisions for victims are, at the present moment, more comprehensive than what is typically involved in prosecutions of state crimes. For any of the above statutory offenses, the court is required to order that the defendant pay the victim the full amount of her losses. 18 U.S.C. § 2264. Restitution is to include any cost to the victim for medical services (including psychological counseling), physical and occupational therapy, necessary transportation, temporary housing, child care expenses, lost income, attorneys fees, costs incurred in obtaining a protection order, and any other losses suffered by the victim from the offense. Issuance of the order is mandatory, and the court shall not decline to issue the order because of the economic circumstances of the defendant or because the victim has received compensation from any other source.

III. EVIDENTIARY RULES

Marital Privilege -- KRE 504

The marital privilege does not apply in proceedings where one spouse is charged with wrongful conduct against the person or property of the other. KRE 504(c)(2); Dawson v. Commonwealth, Ky.App., 867 S.W.2d 493 (1993).

Rape Shield Law

a) **State and Federal Criminal Proceedings** – KRE 412 and FRE 412 generally prohibit introduction of victim's sexual history. Reputation and opinion evidence is never admissible. Specific acts of past sexual behavior are admissible only if they are a) past acts of sexual behavior offered by the accused upon the issue of whether the accused was the source of semen or injury, b) past sexual behavior with the accused offered by the accused to show victim's consent, or c) any other evidence directly pertaining to the offense (KRE 412) or whose exclusion would violate the constitutional rights of the defendant (FRE 412).

b) **State and Federal civil cases**
State -- no such exclusion.

Federal -- Evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if the alleged victim has placed it in controversy. FRE 412(b)(2).

Mental Health Records

Two types of privileges exist under the evidentiary rules to protect mental health records and testimony of mental health providers concerning confidential communications. Both privileges belong to the client/patient and must be asserted by her in order to protect it. The counselor-client privilege at KRE 506 is the weaker privilege, generally excluding the disclosure of confidential communications unless the client is asserting her physical, mental, or emotional condition as an element of the claim or defense. A judge may also order the disclosure if s/he finds the communication is relevant to an essential issue in the case, there are no available means to obtain it, and the need for the information outweighs the need to protect it. Included within the definition of "counselor" in the rule are sexual assault counselors who meet their training requirements, certified art therapists, certified marriage and family therapists, victim advocates except those in the Commonwealth or county attorney's offices, and fee-based pastoral counselors.

The second privilege, the psychotherapist-patient privilege at KRE 507, is the stronger privilege. That privilege protects confidential communications unless the patient is asserting her mental condition as an element of a claim or defense, the proceedings involve those to hospitalize the patient for mental illness, or the court has ordered a mental examination and the patient has been informed that communications would not be privileged. Included within the definition of psychotherapist are psychiatrists, licensed clinical social workers, and registered nurses practicing psychiatric or mental health nursing.

Attorneys representing victims of domestic violence should familiarize themselves thoroughly with the specific provisions and definitions of KRE 506 and 507. Their strength and scope are presently unclear under Kentucky law, see, e.g., Eldred v.

Commonwealth, Ky., 906 S.W.2d 694 (1995). However, in Jaffee v. Redmond, 116 S.Ct. 1923 (1996), the United States Supreme Court recognized an absolute federal psychotherapist privilege protecting both the statements made by the patient to the psychotherapist and the notes taken by the psychotherapist during counseling sessions. In doing so, the Court explicitly rejected making such records subject to a balancing test (evidentiary need for disclosure versus patient's interest in privacy), holding such would:

> *eviscerate the effectiveness of the privilege. As we explained in Upjohn, if the purpose of the privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to certain but result in widely varying applications by the court, is little better than no privilege at all.*

Jaffee, 116 S.Ct. at 1932.