



THE DEFENSE OF CONSENT IN CRIMINAL SEXUAL CONDUCT CASES

Consent is one of the more complex aspects of the law governing criminal sexual conduct. The defense of consent relies upon the still-present societal tendency to mistrust and challenge the veracity of a victim's experience.

What is consent?

See Minn. Stat. §609.341 subd. 4(a)–(b).

According to Minnesota law, consent “means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.” Persons who are mentally incapacitated or physically helpless cannot legally consent to a sexual act. In addition, persons under the age of consent (16) cannot legally consent to a sexual act.

Mentally Incapacitated: See §609.341 subd. 7.

Physically Helpless: See §609.341 subd. 9

- A person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.
- A person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.

Why is the issue of consent important to sexual assault cases?

Because the vast majority of reported sexual assaults involve persons who are familiar to one another (non-strangers), consent often becomes a central and contentious issue to sexual assault cases that proceed to trial. In non-stranger sexual assault cases, the defense will vigorously challenge the victim's assertion that the sexual act occurred without consent.

Is the defense allowed in all cases? See §609.341 et seq.

No. Under Minnesota law, there are several instances in which consent *cannot* be a defense, even if the complainant actually consented*:

- When the victim is under a certain **age** or when the actor is older than the minor victim by a certain number of months.
- When the actor is older than the victim by a certain number of months and in a **position of authority** over the minor victim. “Position of authority” includes any person acting in the place of the parent or charged with regard to a minor's health, welfare, or supervision. Examples include a teacher or coach.*
- When the actor is in a **significant relationship** to the minor victim. “Significant relationship” includes a parent/guardian, a relative, or an adult residing in the same household as the victim (who is not married to the victim).
- **Certain Employment:** When the actor is a psychotherapist from whom the victim is receiving treatment, a member of the clergy from whom the victim is seeking spiritual advice, an employee or a volunteer at a correctional institution where the victim is housed, a special transportation service provider for the victim, or a masseuse or other bodywork provider contracted for services by the victim.

*Note that a mistake of age defense is also not available in most of these situations. Mistake of age can be a defense when the actor is within a certain number of years compared to the victim's age.

Does the victim have to prove lack of consent? See §609.341 subd. 4(c).

No. In cases other than those in which consent is not a defense, the victim is not required to provide any corroboration of her testimony to show the absence of consent. Note, however, that because of common myths and stereotypes that compete with the legal analysis of consent in sexual assault cases, it can be more challenging to prosecute cases without some sort of substantiating evidence. There are specific training efforts to work toward “belief based” or “offender-focused” investigations that encourage the response system to seek corroboration of the victim’s accounts for purposes of further support (but not as a litmus-test for “proof”).

At what point is consent determined?

Because consent indicates a present agreement, consent must exist at the actual time of the sexual activity. This means that consent may be granted initially and then later withdrawn during the course of sexual activity, at which point any further contact or penetration is considered criminal.

Can the actor be mistaken as to the victim’s consent?

No. The actor’s state of mind is irrelevant to determining whether or not criminal sexual conduct occurred. It does not matter whether the actor reasonably believed that the victim consented.

Can the victim’s past sexual conduct be admitted as evidence to show consent? See Minnesota Rules of Evidence 412

Sometimes. Even though Minnesota has a “Rape Shield Rule” barring admission of evidence of the victim’s past sexual conduct, such evidence may be admitted when the court determines its probative value outweighs its prejudicial impact. This is particularly common when consent is used as a defense if the defendant wants to show the victim has exhibited similar sexual conduct to the case at hand, or that the victim has had previous sexual conduct with the defendant. Also, if the prosecution wishes to introduce evidence of semen, pregnancy or disease at the time of the incident, or between the incident and trial, evidence of the victim’s previous sexual conduct may be introduced.

What stereotypes and myths about consent might hinder a prosecution from overcoming a consent defense?

The prosecution has many challenges to overcome in a consent defense case. Studies indicate that perpetrators often exploit a victim’s vulnerabilities (i.e. age, loneliness, credibility), making it difficult to find actual proof that the victim did not consent. Some factors that may present challenges for prosecutors are: lack of witnesses, lack of physical injury, the victim’s use of drugs or alcohol, the victim’s criminal record or engagement in criminal activities at the time of the sexual assault, the victim’s activities prior to the sexual assault, or the common myth that victims often make false reports. Studies indicate people still believe myths about victim behavior.

Can we overcome the challenges of a consent defense case?

See Expert Testimony: Explaining the Minnesota Supreme Court’s Decision in *State v. Obeta* Fact Sheet for more information on responding to these myths by using expert testimony.

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