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Does state need sexual battery law?

Some say it would protect more victims

BY EVELYN RYAN

The Dominion Post

One local prosecuting attorney believes it's time to revisit the state's sexual assault laws, which were completely revamped by the state Legislature more than 20 years ago.

But others think the addition of a crime called "sexual battery" might help in prosecuting cases where the jury has difficulty determining "forcible compulsion."

Among those is Renee Raikes, who watched in dismay as a Taylor County jury on Feb. 10 found Dr. Rajeeve Winfred not guilty of sexual abuse in the first degree.

Winfred was accused of fondling Raikes' breast during an examination.

She didn't do anything at the time, Raikes said, because she was in the examining room with her two sons. She had brought both in for an examination.

While there, Raikes said she had a sore throat, and Winfred offered to check her out too. But when he went to put his stethoscope under her sweater to listen to her heart, he also fondled her breast, she said.

Winfred was charged under the state's sexual offenses statute. It lists two types of crimes, sexual assault and sexual abuse, with three degrees in each category.

Sexual assault is the more severe of the two, and is often called forcible rape. Sexual abuse is sexual contact without a person's consent, "and the lack of consent results from forcible compulsion," state law says.

But another section of the same law, 61-8B, defines lack of consent further -- to include "if the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct."

That phrase, "forcible compulsion," seems to be a key to the charge.

"That's something I told the victim we would have trouble with," special prosecutor Susan Riffle said. "I'm not saying the jury didn't take their job seriously. But it seems as though juries are real reluctant to convict on sex abuse cases."

Riffle, who is Marion County's prosecutor, said she sees the same thing in sexual offense cases she tries in her home county.

One recent case, where the verdict was not guilty, also centered on forcible compulsion. In that case, the victim was held down by the defendant lying on top of her.

But juries seem to think more is involved to reach the level of "forcible compulsion," she said, adding, "I wonder if juries would attach the same stigma to 'sexual battery'."

Taylor County Prosecutor John Bord, who recused himself from the case, knows what she's talking about.

"This is actually the third case in a row that we haven't been able to get a conviction on," he said. "There are always factors in each case, each case was different."

He has difficulty getting juries to understand what is illegal, especially if the case involves consenting sex between, say, a 20-year-old boy and a 15-year-old girl. By law, a 15-year-old girl can't consent, he said. But under the state's sexual assault law, where is the assault, he questioned.

"It's easy for people who work in the system to say, 'Yes, this is assault,' but it's difficult for John Q. Public to see this as assault when there's consent," he said.

"I think all of those sexual assault laws need revised," Bord said. "We need to revisit them and make some changes." The laws were originally adopted in 1976, with revisions in 1984, and some tweaking later.

Monongalia County Prosecuting Attorney Marcia Ashdown is intimately familiar with the difficulties of the current law. She's dealt with a number of sexual assault and abuse cases here.

It's hard to deal with, "simply because of 'forcible compulsion,' unless you can successfully argue 'lack of consent,'" she said. The law is tricky when you look at definition of "consent."

"I have, for my own use, always interpreted that to be a situation where a person is suddenly grabbed," Ashdown said. "Other circumstances are that it is for the sexual gratification of the grabber and there's no opportunity for resistance or any verbal lack of consent."

She remembers when West Virginia law had a misdemeanor sexual assault charge, a charge no longer around. "It used to be a good negotiating tool," she said.

"We need a new statute, a sexual battery charge. There are times when that would be an appropriate kind of charge. Other states have that kind of charge."

Delegate Barbara Evans Fleischauer, D-Monongalia, a strong advocate of women's rights issues, said she thinks the concept is one worth looking into.

The situation that spurred the discussion, she said, is a serious one.

"I think it is common to react the way (Raikes) did, because it would be so astonishing to have a professional treat you that way. It is an insulting and shocking thing to have happen."

Judy King Smith, director of the Rape and Domestic Violence Information Center, believes that the change in times makes this a logical step to take.

"It would be a natural direction for the law to take now," she said, "because 'forcible compulsion,' if you have to prove that, doesn't allow for many situations that we can imagine would happen."

She pointed to situations where someone thinks they can get away with lewd behavior because the victim would think it would be socially unacceptable to respond.

As for the Taylor County case, Smith said, if Raikes had said, "How dare you!" and slapped him, "she would have had to explain to her children, and to her that was less socially acceptable than enduring the abuse. She didn't want to expose her children to it. People, especially predators, understand that."

Riffle agrees a charge of "sexual battery" is one worth looking into. After all, she noted, the law already has a special "domestic battery" classification, one different from regular battery.

The Legislature made "domestic battery" a crime in 1994. It's also set up crimes of "battery against school employees" (1999) and "battery against athletic officials" (1993).

The state's battery law has been around since 1849, even before West Virginia became a separate state. It was amended in 1860, 1868, 1882, 1923 and lastly in 1978. It includes crimes of malicious or unlawful assault and assault.

Battery is a misdemeanor, carrying a sentence of up to 12 months in jail and up to a $500 fine. The law in part makes it illegal to "unlawfully and intentionally make(s) physical contact of an insulting or provoking nature with the person of another..."

Bord doesn't believe simple "battery" would work as a charge in cases like Raikes'.

"Number 1, when you are looking at a battery, you are looking at an intentional act, you have to prove the act itself is intentional," he said. "You just never know what a jury's going to buy and not going to buy."

Sexual assault statistics

Sexual Assault Charges and Convictions in W.Va.

1995-96

Charges filed: 186

Convictions: 18

Conviction rate: 10%

1996-97

Charges filed: 185

Convictions: 33

Conviction rate: 18%

1997-98

Charges filed: 243

Convictions: 23

Conviction rate: 10%

1998-99

Charges filed: 215

Convictions: 66

Conviction rate: 31%

1999-00

Charges filed: 217

Convictions: 74

Conviction rate: 34%

* Based on fiscal year running July 1-June 30

Source: West Virginia Foundation for Rape Information and Services 2000

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