



Defending Against the Charge of Rape

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Disclaimer

The content in this book is intended to be general legal information for unrepresented defendants. I do not know the specifics of your case, and this book is not legal advice based upon the particular details of your case. I do not automatically become your attorney just because you are reading this book. If you are already represented by an attorney, then you should listen to him or her. With that out of the way, happy reading!

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Question #1: How much trouble am I in?

As with many sex crime offenses, the greatest penalty of a conviction may not be not the actual potential jail time, but the social stigma it can cause. Imagine that a potential employer does a background check on you, and he or she learns that you were convicted for exposing your genitals! So whether you actually have to serve jail time on it or not, your primary focus should be trying to avoid a conviction altogether.

Depending on the facts of the case, a conviction for this offense could result in jail, placement on the Sex Offense Registry (in some cases), a felony on your record, loss of your marriage, child visitation, employment, immigration status, loss of car or house (in some cases), and many more.

You are about to have to make a very difficult decision – do you have the heart for the battle to come? It will be very tempting to plead guilty rather than go to trial because it's cheaper, quicker, and easier ... but you will be wearing a scarlet letter forevermore.

Question #2: Do I have a good chance at trial?

I can only give general advice here without having read the specific facts in your case, but I can say this – as you read this guide, you will probably be surprised at how many things you would like to present at trial but cannot.

Let me begin by saying that many people may not think you, as a rape defendant, should even be entitled to seek legal information on how to defend against a rape accusation.

These individuals are so uncomfortable with the concept of rape that they do not want to get into the details of ‘whether it happened (or didn’t happen),’ and especially ‘why someone might say that it happened even if it didn’t.’

These people may also think that you are a monster for even suggesting that a rape did not occur and making the accuser undergo a trial, because it could result in the accuser’s integrity, character, and personal lifestyle being drawn into question. Instead, they trust that if

you cooperate completely without question and submit yourself to every mental, physical, and psychological examination in a “search for truth,” that the inevitable obviousness of a rare, rare false accusation will surely come to light, and you will therefore be cleared in that way. To attempt to counter an allegation in any other way would be in poor taste, this group will say.

On one hand, this group ‘sort of’ knows that you have a right to defend yourself, and they ‘sort of’ understand as a distant concept that not every accusation is truthful, but don’t fool yourself into thinking that you and the accuser are on level ground with this group of people.

But if you were to ask this group to acknowledge these deep-seated prejudices, not only would you highly offend them, but they would deny these feelings and thoughts to the end – and they would probably believe the words of denial as they left their mouths, truly feeling that you will be given the same presumption of innocence as any other person who has been accused of a crime.

And the name of this group of people is “the jury.”

The **first** thing you need to understand about the offense of rape is that after you have been accused of rape – regardless of guilt or innocence – you now occupy a special space in hell reserved for child abusers, that dentist who killed Cecil the Lion, and the proverbial snowball. You have a lot of climbing to do, just to get back to ground level and be seen as a human being again. It’s not fair, but it’s there.

Many jurors do not (or cannot) follow the jury instructions, and presume that you are innocent in the same way that they might against a person accused of stealing a handbag from Target. Now I’m not basing this on some actual quantitative data, but I’m telling you what I see in the courtroom. When potential jurors hear that they may be jurors for a rape trial, you can almost hear the air be sucked out of the room and the room gets twenty degrees hotter.

What this means is that you cannot sit back with a “let the State prove it” attitude and rely on the presumption of innocence. You can’t try not to lose, or try for a tie – be in it to win it, or take the best offer that you get if you can’t stomach going all in. You are fighting more than an intellectual battle of guilty versus not guilty – you are fighting a battle for the

hearts and minds of the jury, and that takes a lot more than “Ladies and gentlemen, the State didn’t prove their case today.”

Unless you have an expert witness who can expose the State’s snake oil science, your attorney can catch the accuser in a significant lie (or walk a tender witness through a series of questions showing how they could be mistaken or felt coerced to lie), or basically prove an OJ-level police cover-up, then you will be convicted of rape.

The **second** thing you need to know about rape is that a person can be convicted of rape with very little or even no forensic evidence.

There’s nothing more frustrating than to hear a rape defendant say things like, “They don’t have anything other than the accusation,” as if the State needed more! Banish the thought that the State actually needs forensic (i.e., scientific) proof such as pubic hairs, body fluids, abnormal bruising, or other TV-show flourishes – if the jury believes the accusation, and there is *nothing else* to support it (a he said, she said), then the State can get a conviction if the jury finds the accuser more credible than you.

Even when a man and woman have sexual intercourse, there can be vaginal bruising whether the sex was consensual or not, so even if no rape occurred, the forensic evidence could still be inconclusive.

Yes, it absolutely helps that the State doesn't have any of that evidence (unless they do). But what they do have is an accuser crying on the stand, a jury crying in the box, the accuser's family crying in the pews. It can be very difficult to appeal to the critical thinkers in the room, who decide crucial issues with logic and reason, rather than just "feel sorry" for someone in an unreflective, 'swallow everything they say as truth' manner. Some juries don't understand the burden of proof, the standard of proof, the rules of evidence, courtroom procedure, or jury instructions – they think that a trial is nothing more than figuring out who wears the white hat and who wears the black one. If it's a tie, you lose.

Now, don't turn tail and run, but I do want you to appreciate how serious your situation is.

The **third** thing you need about rape is that no physical injury is required. If an injury occurred, then the charge would be aggravated

rape, so the fact that no physical injury occurred doesn't help reduce it from rape.

The **fourth** thing you need to know about rape is that the “force” element in the statute is nothing more than the force sufficient to accomplish the act, such as holding a person down beforehand. *State v. McKnight*, 900 S.W.2d 36 (Tenn. Crim. App. 1994). The victim doesn't have to be hog-tied for force to exist.

The **fifth** thing you need to know about rape is that you don't have to “finish” the sex act for rape to have occurred. If a person inserted any part of himself (or herself), or even a foreign object such as a finger, stick, bottle, etc., into another person (oral, anal, vaginal) without consent, then a rape has occurred. Prosecutors are fond of saying “penetration, however slight” to remind jurors that any insertion whatsoever is sufficient.

The **sixth** thing you need to know about rape is that consent can be withdrawn as easily as it is given. There is no “irrevocable consent,” so even if a person is initially very excited about having sex and gets you worked up, but then later says “Stop,” and the person does not stop, then a rape has occurred.

Consent also cannot be given by a person who is completely passed out, suffering from a mental defect like dementia, or under age (but see Statutory Rape on that one).

The **seventh** thing you need to know about rape is that it can be accomplished by coercion rather than force.

In a 1994 case, a defendant was convicted for rape and sexual battery because he threatened to tell people that one of his victims was a homosexual if he did not participate. *State v. McKnight*, 900 S.W.2d 36, 1994 Tenn. Crim. App. LEXIS 759 (Tenn. Crim. App. 1994), Tenn. Code Ann. § 39-13-503.

The **eighth** thing you need to know about rape is that it is a completely separate offense from statutory rape – rape is about force or coercion, while statutory rape is about age.

Two recent court decisions distinguished the two in this way: “[s]ince the offense of statutory rape includes an age element whereas the offense of rape does not, and the offense of rape includes the element of force whereas the offense of statutory rape does not, statutory rape was not a lesser

included offense in a prosecution for rape by force or coercion. *State v. Woodcock*, 922 S.W.2d 904, 1995 Tenn. Crim. App. LEXIS 982 (Tenn. Crim. App. 1995). *See also State v. Stokes*, 24 S.W.3d 303, 2000 Tenn. LEXIS 382 (Tenn. 2000).

The **ninth** thing you need to know about rape is that sexual battery cannot be a lesser included offense of attempted rape, because sexual battery requires proof that the sexual contact be “for the purpose of sexual gratification,” which is not required for attempted rape. *State v. Bowles*, 52 S.W.3d 69, 2001 Tenn. LEXIS 586 (Tenn. 2001), review or rehearing denied, *State v. Curry*, -- S.W.3d --, 2001 Tenn. LEXIS 788 (Tenn. Nov. 5, 2001).

The **tenth** thing you need to know about rape is that a person can receive convictions for both rape and incest arising out of the same act, and this does not violate due process under the Tennessee or United States Constitutions because neither offense was "essentially incidental" to the other. *State v. Beauregard*, 32 S.W.3d 681, 2000 Tenn. LEXIS 662 (Tenn. 2000).

Question #3: What facts can make the charge more serious?

Rape is a Class B felony. The range of punishment for a Class B felony is “not less than eight (8) nor more than thirty (30) years. In addition, the jury may assess a fine not to exceed twenty-five thousand dollars (\$25,000).” Tenn. Code Ann. § 40-35-111.

There are three heightened versions of Rape with additional elements and greater punishments, which include:

Aggravated rape: If the defendant (1) is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon; (2) The defendant causes bodily injury to the victim; (3) The defendant is aided or abetted by one or more other persons and either uses force or coercion or the defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

Aggravated rape is a Class A felony. The range of punishment for a Class A misdemeanor is "not less than fifteen (15) nor more than sixty (60) years. In addition, the jury may assess a fine not to exceed fifty thousand dollars (\$50,000)." Tenn. Code Ann. § 40-35-111.

Rape of a child: If the victim is more than three (3) years of age but less than thirteen years of age. Rape of a child is a Class A felony, but the statute for this offense specifically states that a person convicted of a violation of this section shall be punished as a Range II offender (15 to 25 years) or may, if appropriate, be within Range III (25 to 40 years).

A person convicted of rape of a child can also never be released from community supervision and may be monitored by GSP for the rest of his or her life. Tenn. Code Ann. §§ 39-13-522; 40-39-302.

Aggravated rape of a child: If the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is three (3) years of age or less. A person convicted of this offense shall be punished as a

Range III offender (25 to 40 years). Tenn. Code Ann. § 39-13-531.

Question #4: Could this charge put me on the Sex Offender Registry?

Rape, Aggravated Rape, Rape of a child, and Aggravated Rape of a child will all place a criminal defendant onto the Sex Offender Registry as a Violent Sexual Offender. Tenn. Code Ann. § 40-39-202.

Question #5: Can I get a diversion on this offense?

If you've done some research online (perhaps on my website, which is located at MemphisDiversion.com), then you know that judicial diversion is a wonderful program that allows individuals with little to no criminal background to enter a guilty plea in a manner that avoids future jail time and the eventual expunction of the criminal charge upon the successful completion of a probationary period. Tenn. Code Ann. § 40-35-313.

After the criminal defendant enters a guilty plea, the sentence is suspended and the charge would show on a criminal background check as a pending offense (not a conviction). If the criminal defendant is successful, he or she has achieved the same result as winning at trial.

Rape, Aggravated Rape, Rape of a child, and Aggravated Rape of a child are ineligible for diversion.

Question #6: What defenses are unavailable?

The most obvious defense is that the alleged offense never happened. This may be the case when both the defendant and the accuser drank or took drugs on the alleged night.

There is also a potential defense regarding the elements above, i.e., was forced or coercion used, or did penetration occur.

The most common defense is that consent was given and never revoked, and that the alleged victim has now changed his or her mind *after* the sex act, because a parent disapproved, a boyfriend or girlfriend learned of the infidelity, or the person became remorseful and wants to remove his or her own guilt. Rather than own up to his or her own active participation at the time, the accuser is now saying that the act was accomplished by fraud or coercion, so as to make the accuser blameless and non-complicit.

With Rape of a child and Aggravated Rape of a child, the issue is often whether the child understands the difference between a truth and a lie, whether other individuals are using the child as a pawn in a bitter custody or divorce dispute, whether the child is trying to 'please' the person asking the questions because the child does not fully understand the investigation process, or whether the child's memory has been "tainted" by repeated exposure to police or social worker questioning, to the point where the child is now remembering suggestions that were placed in his or her head, rather than from actual memory.

Question #7: What is the Rape Shield Law and how will it affect the case?

The Rape Shield law is a rule of evidence that determines the admissibility of the alleged

victim's sexual behavior when a defendant is charged with certain sexual offenses. See Tennessee Rule of Evidence 412.

Generally speaking, reputation testimony, opinion testimony, and specific instances of a victim's sexual behavior are all 'shielded,' or inadmissible from court proceedings. This means that the jury will not be able to hear any of this information regarding the victim's sexual behavior. The rule makes a distinction between evidence of sexual activity between the alleged victim and the defendant and evidence of sexual activity between the alleged victim and other sexual partners.

Why does it exist? This rule was put into effect because some defendants might introduce this evidence in an attempt to shame the victim or make the victim's morality the central issue in the case. Additionally, the rule may make more victims hesitant to report sexual offenses for fear that their personal sex lives will become public. One can certainly understand that a rape victim who has had multiple sexual partners in his or her personal life should not fear that such information would be made public during the rape trial.

when it has nothing to do whether or not a rape occurred.

Does it go too far? While this rule achieves positive social aims, some people feel that the rule goes too far when it denies the jury from being able to hear whether the victim has made false accusations in the past, as this might certainly be relevant in determining whether the alleged victim is making a false claim in the present case. Other people do not believe that the rule goes too far and believe that it should be even more expansive.

When does it apply? This rule applies not only to the actual trial, but also to the preliminary hearing, depositions, and other proceedings. This rule applies when a defendant is accused of certain sexual offenses, as listed below. In the few exceptions where evidence of the victim's sexual behavior is admissible, there are additional conditions that must be met. The defense attorney must comply with a pre-trial procedure if this testimony is to be admitted, wherein the court can determine whether the evidence will be used for a permissible purpose.

Tennessee Rule of Evidence 412: Sex Offense Cases; Relevance of Victim’s Sexual Behavior.

“Notwithstanding any other provision of law, in a criminal trial, preliminary hearing, deposition, or other proceeding in which a person is accused of ... 39-13-506 [statutory rape] ..., or the attempt to commit any such offense, the following rules apply:

(a) Definition of sexual behavior. In this rule “sexual behavior” means sexual activity of the alleged victim other than the sexual act at issue in the case.

(b) Reputation or opinion. Reputation or opinion evidence of the sexual behavior of an alleged victim of such offense is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this Rule and required by the Tennessee or United States Constitution.

(c) Specific instances of conduct. Evidence of specific instances of a victim’s sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:

(1) Required by the Tennessee or United States Constitution, or

(2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim’s sexual

behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

(3) If the sexual behavior was with the accused, on the issue of consent, or

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented."

Question #8: Could law enforcement seize my house or car over this?

Yes. If a criminal defendant was found to have committed a sexual battery against a minor, the real or personal property is subject to judicial forfeiture. The offense must be committed against a person under eighteen (18) years of age on or after July 1, 2006. Tenn. Code Ann. § 39-13-530.

Rape Statutes

Tenn. Code Ann. § 39-13-503. Rape.

(a) Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances:

(1) Force or coercion is used to accomplish the act;

(2) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent;

(3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or

(4) The sexual penetration is accomplished by fraud.

(b) Rape is a Class B felony.

Tenn. Code Ann. § 39-13-502. Aggravated rape.

(a) Aggravated rape is unlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

(1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon;

(2) The defendant causes bodily injury to the victim;

(3) The defendant is aided or abetted by one (1) or more other persons; and

(A) Force or coercion is used to accomplish the act; or

(B) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(b) Aggravated rape is a Class A felony.

Tenn. Code Ann. § 39-13-522. Rape of a child.

(a) Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a

victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age.

(b)

(1) Rape of a child is a Class A felony.

(2)(A) Notwithstanding title 40, chapter 35, a person convicted of a violation of this section shall be punished as a Range II offender; however, the sentence imposed upon such person may, if appropriate, be within Range III but in no case shall it be lower than Range II.

(B) Section 39-13-525(a) shall not apply to a person sentenced under this subdivision (b)(2).

(C) Notwithstanding any law to the contrary, the board of parole may require, as a mandatory condition of supervision for any person convicted under this section, that the person be enrolled in a satellite-based monitoring program for the full extent of the person's term of supervision consistent with the requirements of § 40-39-302.

Tenn. Code Ann. § 39-13-531. Aggravated rape of a child.

(a) Aggravated rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is three (3) years of age or less.

(b) Aggravated rape of a child is a Class A felony and shall be sentenced within Range III, as set forth in title 40, chapter 35.

Notes

Booking and processing date: _____

Court date: _____

Court division: _____

Potential favorable witnesses: _____

Questions for the attorney: _____

Special Offer

If you found this consumer guide to be helpful and would like to read more, please contact me using the information below to request my book, 10 Mistakes that Can Sabotage Your Criminal Case.

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About the Author

J. Jeffrey Lee is one of only five Certified Criminal Trial Specialists in Memphis, Tennessee. He has been certified as a Criminal Trial Specialist by the Tennessee Commission on C.L.E. and Specialization and Certified as a Criminal Trial Specialist by the National Board of Trial Advocacy.

He has attended the Tennessee Criminal Defense College on numerous occasions, along with the renowned National Criminal Defense College in Macon, Georgia. He was recently inducted into The National Trial Lawyers Top 100 Trial Lawyers. He has also been selected as a 2015 Mid-South Rising Star by Super Lawyers. However, the distinction that gives J. Jeffrey Lee the greatest pleasure is the Client's Choice award from AVVO, and the "10 Best" Client Satisfaction Award from the American Institute of Criminal Law Attorneys, because that means that his clients are pleased with the representation he provides. He is a member of TACDL (Tennessee Association of Criminal Defense Lawyers) and NACDL (National Association of Criminal Defense Lawyers).

Mr. Lee began as an Assistant Public Defender in the 25th Judicial District of Tennessee (Lauderdale, Tipton, Fayette, Hardeman, and McNairy Counties). His responsibilities included representing the indigent accused in General Sessions Court, Circuit Court, and the Court of Criminal Appeals. He performed a variety of matters, including preliminary hearings, suppression hearings, jury and bench trials, appeals, revocation hearings, and post-conviction hearings.

After working as a public defender, he formed his own law practice and he has recently narrowed and focused his practice in the area of serious felonies and sex crimes in an effort to serve an underrepresented and marginalized group of defendants who desperately need a first-rate defense.

The Law Office of J. Jeffrey Lee primarily serves the greater Memphis area. If you or someone you love needs legal representation, please contact the author.

Testimonials

“Mr. Lee was an astounding criminal defense lawyer for my needs. He was professional, prompt, available, dependable, and reliable. He kept me informed and responsive throughout the court dates and situations. He was able to deliver better results than I imagined! Thank you for your dedicated service!”

— Mrs. M Y

“Very Good Person to be around and make you feel comfortable, very knowledgeable and professional. I would definitely use his services again if needed and would recommend him to future clients.”

— Kandice

“I actually got his contact information from a close friend of mine and he had suggested Jeff right off the bat. The first time talking to Jeff he knew exactly what needed to be done for this court date to go smoothly and well in my favor. His knowledge and calm collective way of handling my case was exactly what I was

looking for. Thanks again Jeff I really appreciate your help!”

— Kris

“This attorney provides services that are of a high caliber. He has handled two different cases for me over the past couple of years. He kept me informed of each step involved with this case. Additionally, he explained the worst case outcome and the best case outcome. Thanks to his tenacity, we came out with the best case outcome! I recommended him to several people during the course of my legal case.”

— Federal Crime Client

“Mr. Lee impressed me from the moment I retained him...actually before I gave him any payment at all!! He was accessible throughout my entire legal issue. He not only got my case dismissed, he helped me get my case expunged. I never even had the chance to be nervous that he would not show up on time. He always showed up early and was extremely prompt with all of my paperwork. I trust Mr. Lee and am very comfortable and confident to recommend him to anyone facing any type of

legal issue. I am also happy to say that I found a friend in Jeff and did not feel like just another client. :-)"

— Anonymous

"Jeff took good care of my case. Right from the onset he told me I could get a diversion, and that is what eventually happened. He took care of paperwork effectively, met me promptly at court appointments, and helped me out in court when the judge was pondering why a higher-level offence wasn't issued. He knows what he's doing, and if he didn't know something I would trust him to become knowledgeable in order to help a client."

— Aaron

"Mr. Lee helped me make the best of a very stressful situation. I was simultaneously facing college graduation and jail time (not that they are related.) I was on the fence between being on top of the world and losing it all. Mr. Lee pushed me back towards the former I would definitely hire him again!"

— Adam

Awards



CLIENT SATISFACTION AWARD

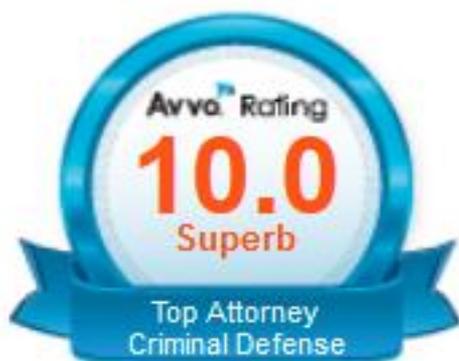
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Still have questions?

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