



Proving the Elements of the Crime of Sexual Assault in Tribal Courts

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The crime of “sexual assault” (also commonly referred to as “rape” or “sexual abuse”) is epidemic across Indian Country. Although the legal definition may differ slightly from jurisdiction to jurisdiction, Tribal prosecutors are generally tasked with proving that a particular Indian defendant engaged in “**non-consensual**” **sexual contact** with a victim on Tribal lands. In all criminal cases involving sexual violence, the burden of proof is on the prosecution to prove each and every element of the crime beyond a reasonable doubt.

Elements of the Crime of Sexual Assault:

Take a look at the Tribal criminal codes in your jurisdiction that prohibit sexual violence. A careful reading of the statute(s) will reveal the “elements of the crime” that the Tribal prosecutor must prove in each and every case to win a conviction.

Generally, a prosecutor must prove the following “elements” of the crime of sexual assault to win a guilty verdict at trial:

Defendant is an “Indian”

- The **defendant** (person accused of committing the crime) **is an Indian**

While federal law contains dozens of different legal definitions of who is an “Indian,” it is well-settled that a

The 3 Most
Common
Defenses to
Sexual Assault
Crimes:

“It Never
Happened”

“Consent”

&

“Someone
Else Did It”

citizen of a federally recognized Tribe (or a person eligible for enrollment in a federally recognized Tribe) can be criminally prosecuted in Tribal court.

“Indian” is a legal term. Under the 1974 United States Supreme Court case *Morton v. Mancari*, a person may be criminally prosecuted in Tribal court as an “Indian” if that person:

- Has some degree of Indian blood from a federally recognized Tribe (Note: First Nations people from Canada or indigenous people from Mexico, Central America, or South America do not qualify as “Indian.”) **and**
- Is recognized by the federal government or by the federally recognized Tribe as an “Indian.”

Tribes can prosecute Indian defendants for sexual assault crimes committed against Indian victims in Indian Country regardless of whether the victim is Indian or non-Indian.

Under the Violence Against Women Act Reauthorization of 2013, Tribes may also prosecute non-Indians for sexual assault committed against an Indian victim provided that the defendant:

- resides in the Indian Country of the Tribe that elected to exercise special domestic violence criminal jurisdiction; or
- is employed in the Indian Country of the Tribe that elected to exercise special domestic violence criminal jurisdiction; and
- has a relationship with the Indian victim as one of the following:
 - spouse
 - former spouse
 - intimate partner
 - former intimate partner
 - person with a child in common
 - person who has cohabited as a spouse or intimate partner
 - person who has or formerly had a dating relationship with the Indian victim

Crime was Committed in “Indian Country”

- The crime was committed in “Indian Country”

In order for a Tribal court to exercise jurisdiction over a criminal case, the crime must have been committed in “Indian Country.” Generally, Tribal courts can hear cases where the crime committed by an Indian defendant (or a non-Indian defendant if the Tribe has elected to exercise special domestic violence jurisdiction under the Violence

Against Women Act Reauthorization of 2013) took place on their reservation or on Trust lands.

The federal statute that defines “Indian Country” for criminal jurisdiction purposes is 18 U.S.C. §1151. “Indian Country” encompasses:

- a.) All lands within the limits of any Indian reservation under United States jurisdiction (including patented lands and rights of way running through Indian reservations)
- b.) Dependent Indian communities (such as a Pueblo) within the borders of the United States
- c.) Indian allotments to which Indian title has not been extinguished (including rights of way through the allotment).

Defendant’s “State of Mind”

- The defendant **intentionally** or **knowingly** engaged in “**sexual contact**” with the victim

The Tribal prosecutor must prove that the defendant intentionally or knowingly had sexual contact with the victim and that such contact was not merely accidental. Here is an example of unintentional sexual contact: If the evidence in the case shows that Billy was pushed against Mary at a crowded gathering and accidentally brushed against her breasts, Billy would not be guilty of intentionally or knowingly having sexual contact with Mary. He accidentally touched Mary and did not intend to touch her when contact was made.

Defendant Engaged in Prohibited Sexual Conduct

All crimes of sexual violence contain specific definitions of the prohibited conduct that constitutes “sexual contact.” Often, the potential sentence is enhanced or greater for crimes involving sexual intercourse or oral-genital contact than for crimes involving over the clothes touching. When the victim is a minor, enhanced penalties are also usually available.

The most common definitions of prohibited sexual contact under Tribal sexual violence codes preclude:

- Contact, touching, or penetration of a victim’s vulva or vagina by a penis, finger, mouth, or foreign object.
- Contact, touching, or penetration of a victim’s anus by a penis, finger, mouth, or foreign object.

- Oral contact with a victim's vulva, vagina, or anus.
- Contact or touching of a victim's breast by a finger, hand, mouth, or foreign object.

It is important to remember that sexual assault or rape is not limited to penile-vaginal penetration. Perpetrators of sexual assault often use foreign objects in the commission of the crime. Foreign objects commonly include firearms, tools, and bottles.

Victims of sexual assault do not need to be unclothed during the assault. Over-the-clothes contact with a victim's breast, vagina, or anus may also constitute sexual assault under the laws of many jurisdictions.

The Sexual Contact was Non-Consensual

- The **victim did not** (or could not legally) **consent** to the "sexual contact"

"Consent" is a legal term. A person must possess the "legal capacity" to consent to the sexual contact at the time of the sexual contact. It is important to recognize that a woman who is intoxicated or who has severe cognitive disabilities (developmentally disabled, an elder with dementia, etc.) may not have the legal capacity to consent to the sexual contact. Minors do not have the legal capacity to consent to sexual contact in many jurisdictions. The age of consent for minors (those persons under 18 years of age) varies from jurisdiction to jurisdiction.

A woman may withdraw her consent from the sexual contact at any time. Any continued, non-consensual sexual contact constitutes the crime of sexual assault. However, as a practical matter, cases where the victim initially consented to the sexual contact and then later withdrew that consent are quite difficult to win at trial. It can be similarly challenging for a prosecutor to win a conviction at trial in cases where the victim consented to some, but not all, of the sexual contact

Sexual assault can be accomplished by the use of force, by the threat of force, by coercion, or by fraud (e.g. posing as a medical doctor). It is important to note that a victim is not required to fight or resist her attacker. Under the laws of most jurisdictions, a conviction for sexual assault can be secured if there is sufficient evidence that sexual contact occurred and that the contact was non-consensual.

Proving Lack of Consent

Introduction of birth certificates, testimony from witnesses, passports, tribal ID cards, and other documents can assist a tribal prosecutor in proving, beyond a reasonable doubt, that a victim is below the age where she can legally consent to sexual contact. Cognitive disabilities will often require the testimony of medical and/or expert witnesses and the introduction of medical records at trial.

Although the majority of sexual assaults do not result in physical injury, the presence of cuts, bruises, abrasions, scratches, and other physical injuries tend to illustrate that the victim did not consent to the sexual contact. Ripped or bloody clothing, missing buttons, stretched out elastic waistbands, and other evidence collected from the victim can be introduced in to evidence to prove lack of consent.

Careful crime scene investigation at the location of the assault can also reveal numerous items of evidence that can be helpful at trial. Damage to doors or windows indicating forced entry, any evidence of a struggle, telephones that have been ripped from a wall, recordings from surveillance cameras or cellphones, and restraints or ligatures can all bolster the prosecution's assertions that the sexual contact was not consensual.

Intoxication and/or evidence that the victim was unconscious because of the consumption of alcohol or substances can also be used to support lack of consent. However, Tribal prosecutors should approach this evidence and testimony very carefully. Evidence of voluntary intoxication frequently requires "educating" and "sensitizing" the trier of fact (the judge or jury) during voir dire and/or in motions filed before the court. It is crucial that the victim not be blamed for the crime because of her intoxication and that responsibility be rightfully assigned to the perpetrator.

While many Tribes maintain their own rules of evidence and procedure, others have adopted the Federal Rules of Evidence for use in their tribal courts. Rule 404(b) allows prosecutors to introduce evidence to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Under this evidentiary rule, evidence that the perpetrator stalked the victim before committing a sexual assault may be strong, admissible evidence of the perpetrator's motive, intent, preparation and plan. This evidence also tends to prove that the victim did not consent to the sexual contact. Testimony from witnesses that the perpetrator routinely drove by or circled a victim's home, parked outside of her office (with no valid purpose) for hours, left hundreds of voice or text messages on a victim's phone, sent unwanted or inappropriate gifts, and evidence of other common stalking behavior can greatly enhance the prosecution's case.

Evidence of a perpetrator's previously committed sexual assaults may also be admissible under Rule 404(b). Prior sexual assaults committed by the defendant (whether charged or uncharged) may be admissible to prove absence of mistake, lack of accident, preparation and plan. Generally, notice must be given to defense counsel that the prosecution intends to introduce 404(b) evidence at trial.

Overcoming Defenses

The three most common defenses to the crime of sexual assault are:

- “It Never Happened”
- Consent
- “Someone Else Did It” (aka Misidentification)

Commonly, a perpetrator will initially provide a statement to law enforcement denying any sexual contact with the victim. His story may change to “consent” if evidence later appears (such as DNA, recordings, or witness testimony) tending to prove that the defendant did engage in sexual contact with the victim. This discrepancy can be argued before the trier of fact (the judge or jury) in tribal court to prove that the contact was indeed non-consensual.

Confrontation or “Pretext” phone calls to a suspect can also be used in some jurisdictions to foreclose a consent, misidentification, or “It Never Happened” defense. (Consult your Attorney General or Tribal Attorney to ascertain the admissibility and legality of these calls.) Under carefully monitored and recorded circumstances (arranged by law enforcement), a victim can place a phone call to the suspect and “confront” him on the sexual assault (e.g. ask the suspect questions about the sexual assault). While these calls can produce admissions or statements against interest by the suspect, there are significant safety concerns for victims who undertake this course of action. The emotional health of the victim must also be fully respected before, during and after any such call is made. Calls should be terminated immediately if the victim exhibits signs of tremendous stress or requests that the call be terminated.

Apologies made by a suspect during a pretext call may not, in and of themselves, rise to the level of an admission. If possible, brief the victim before the call is made about the types of statements typically made by a suspect that may qualify as an admission of guilt. Statements such as “I didn’t mean to force you, but I got carried away” have more weight than statements such as “I’m sorry you are hurt.” Coordinating some system of communication for use with the victim during the phone call (such as a pad of paper and markers to pass back and forth) can also enable an officer to provide ongoing input and guidance for the questioning. Testing and verifying that the recording device is working properly and maintaining the chain of custody of the recording are important and should never be overlooked.

Witness testimony placing the defendant in the general vicinity of the victim around the time of the sexual assault and addressing any stalking like or preparatory behavior (e.g. the defendant purchasing or plying the victim with alcohol, the defendant physically isolating the victim from friends prior to the sexual assault, etc.) can also be helpful in overcoming the most common defenses. The importance of the victim’s testimony should never be overlooked. Prior to the advent of DNA evidence, prosecutors routinely won convictions for sexual assaults solely using the testimony of victims and corroborating physical and testimonial evidence.

Closing Arguments

Before resting the case, Tribal prosecutors should ensure that they have addressed each and every element of the crime and that they have moved to admit all introduced evidence. Closing is the time to tie together all of the “pieces of the puzzle” for the trier of fact. Remind the judge and/or jury of each element of the crime and of the supporting testimony and other evidence that proves each element. A demonstrative device (such as a poster board or PowerPoint) can also be a very effective tool to illustrate that the prosecuting jurisdiction has indeed proven each and every element of the case beyond a reasonable doubt and that a conviction is warranted.