

Lawyers: It will be difficult to prove O'Connell rape charge

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QUINCY — It will be difficult, if not impossible.

That's what local lawyers said when asked if a statutory rape case can be won against Quincy developer William O'Connell after his 17-year-old accuser was killed in a car crash last week.

The special prosecutor assigned to the O'Connell case by the Norfolk County District Attorney's Office, Andrew Berman, said he is still weighing his options in the wake of the Dec. 18 accident.

Lawyers not involved in the case said there are few options for a prosecutor if an alleged rape victim can't or won't testify at trial.

"It's going to be an incredibly hard, if not impossible case to prove right now," Quincy defense lawyer Robert Harnais said.

Not only does a prosecutor face the burden of proof beyond a reasonable doubt, but in this situation, he or she has to find a way to trump a defendant's constitutional right to face and cross-examine his accuser.

Berman said this right means statements made to investigators by O'Connell's alleged victim, no matter how detailed, can't be used as trial evidence.

"I think the law is clear that I am not permitted to use any prior testimony of the victim, who the defendant has not had the opportunity to cross-examine," Berman said.

Some U.S. Supreme Court decisions open up a few avenues, Stoughton criminal defense lawyer Michael DelSignore said.

"If the victim isn't able to testify, then the only way they could prove the case is if the defendant made any admission, or if the victim made a statement in a state of emergency to somebody else," he said.

By "state of emergency," DelSignore is referring to statements uttered by a victim in an effort to get help. He gave as an example a victim of domestic violence who refuses to testify against her attacker at trial, but stated while trying to get help, shortly after the attack, that she had been beaten. Such statements, DelSignore said, can be used at trial without a victim testifying. But they would not be difficult for a defense lawyer to question and raise doubts about in jurors' minds.

In the O'Connell case, the alleged victim stated her allegations in March 2011 in a formal interview with authorities, called a Sexual Assault Intervention Network (SAIN) interview.

The interview was conducted after the girl's lawyer persuaded her to talk about her interactions with O'Connell roughly two years prior, when she was 14. Thus, it could easily be argued the statements were made explicitly to accuse O'Connell, not in what lawyers call an "excited utterance" in search of help.

"I don't think they'll be able to prove the foundation for anything," DelSignore said of the O'Connell case. "I don't see how they could really go forward with the case without a victim there to say what happened."

Wendy Murphy, a law professor and former prosecutor in Middlesex County who handled child abuse and sex crime cases, said there are ways to proceed with so-called "victimless prosecutions."

"They're not easy, but they can be done," she said. "To proceed without the victim in a case, you have to have something else. The something else in a rape case is often not an eyewitness."

There is an eyewitness in the O'Connell case who is facing charges as O'Connell's co-conspirator. Phyllis Capuano, a 22-year-old from Everett, was indicted on charges of participating in sex crimes with O'Connell and the alleged victim.

Victim testimony is not a factor in the cocaine trafficking charge against O'Connell.

Investigators used the alleged victim's description of O'Connell using drugs in his Marina Bay condominium to obtain a warrant to search it. Investigators say they seized 18 grams of cocaine from a safe in his bedroom closet.

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