

ALCOHOL-FACILITATED SEXUAL ASSAULT

Who Needs Force When You Have Alcohol?

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

SUPPORT

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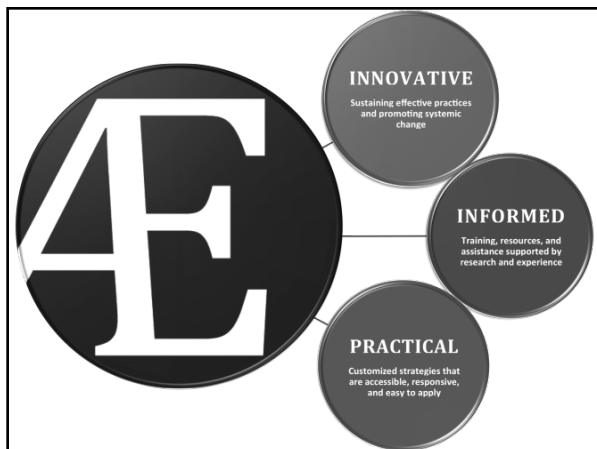
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PRESENTER



Jane Anderson, Attorney Advisor

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AEQUITAS

AVAILABLE 24/7 VIA TELEPHONE AND/OR EMAIL

| TECHNICAL ASSISTANCE | TRAINING | RESOURCES |
|--|---|---|
| <ul style="list-style-type: none"> • Case consultation • Policy review • Legal research • Motions prep • Identification of experts • Peer review | <ul style="list-style-type: none"> • Live • Web-based | <ul style="list-style-type: none"> • Recorded webinars • Model briefs, motions, expert reports, etc... • Sample Voir Dire questions, expert examinations, etc. |

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ACKNOWLEDGMENTS

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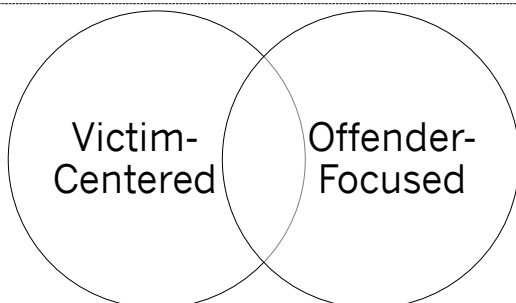
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OBJECTIVES

- Recognize offender behaviors that facilitate sexual assaults
- Analyze cases with an understanding of basic toxicology
- Implement a trauma-informed response to enhance victim safety and participation
- Hold offenders accountable by using pretrial and trial strategies designed to recreate the reality of the crime

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MISSION



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VICTIM-CENTERED

- Victim/survivors are central to the criminal justice system
- Consideration of the victim's safety, privacy, and well-being must be paramount throughout the process
- Recognize that offender caused victimization

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OFFENDER-FOCUSED

- Offenders target victims whom they believe they can successfully exploit
- Myths about sexual assault help offenders avoid accountability
- Keep the focus on the actions and intent of the offender

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Q: What is alcohol-facilitated sexual assault (AFSA)?

A: The victim is too intoxicated to consent due to:

- Surreptitious administration by assailant
- Voluntary use by the victim
- Combination of both

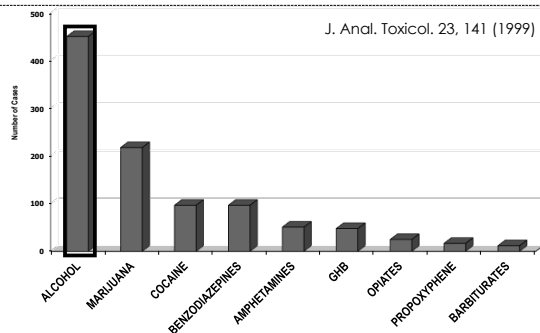
AFSA OR...

Who needs force when you have alcohol?



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PREVALENCE OF DRUGS USED IN SEXUAL ASSAULT CASES



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Conservative estimates of sexual assault prevalence suggest that 25 percent of American women have experienced sexual assault, including rape. Approximately one-half of those cases involve alcohol consumption by the perpetrator, victim, or both.

Alcohol and Sexual Assault, Antonia Abbey, Ph.D., Tina Zawacki, M.A., Philip O. Buck, M.A., A. Monique Clinton, M.A., and Pam McAuslan, Ph.D.

Overall, for the nine schools, victims' use of alcohol and drugs in the hours prior to the incident was more common for rape incidents (63%) than incidents of sexual battery (49%). The percentage of rape incidents that occurred when the victim was using alcohol or drugs ranged from 43% ...to 75% ...

Campus Climate Survey Validation Study Final Technical Report,
Christopher Krebs, Christine Lindquist, Marcus Berzofsky, Bonnie
Shook-Sa, and Kimberly Peterson, RTI International, R&DP-2015:04,
NCJ 249545, January 2016

Victims of drug-facilitated or incapacitated rape were less likely than victims of forcible rape to report to authorities

DEAN KILPATRICK, ET AL, DRUG-FACILITATED, INCAPACITATED AND FORCIBLE
RAPE: A NATIONAL STUDY (2007)

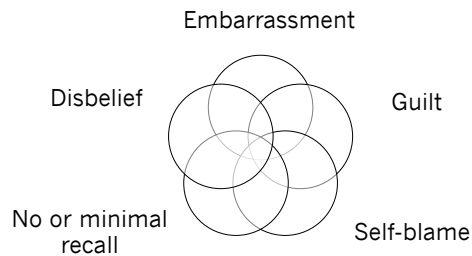
CAVEAT ABOUT STATISTICS

If...sexual assaults are
underreported

Then...any statistics about
sexual assaults are
likely imperfect

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WHY ARE THESE CASES NOT REPORTED?



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PROVING THE CRIME

Legal Analysis

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2-STEP ANALYSIS

Assuming the victim's version is 100% true, do the allegations constitute rape?

Can you prove the victim's allegations?

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STEP 1

Is it rape?

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INDIANA SEXUAL ASSAULT LAWS

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RAPE (LEVEL 3 FELONY)

IC 35-42-4-1

A person who knowingly or intentionally has sexual intercourse with another person or knowingly or intentionally causes another person to perform or submit to other sexual conduct (as defined in IC 35-31.5-2-221.5) when:

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RAPE (LEVEL 3 FELONY)

IC 35-42-4-1

- 1) the other person is compelled by force or imminent threat of force;
- 2) the other person is unaware that the sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) is occurring; or
- 3) the other person is so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct cannot be given

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UNAWARE

GLOVER v. STATE, 760 N.E.2D 1120, 1124 (IND.CT.APP. 2002)

- Includes sexual intercourse with an individual who has lost consciousness due to inebriation
- Sufficient evidence
 - Defendant admitted to consensual sex
 - Witnesses described level of victim's inebriation
 - Victim testified she did not consent

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SEXUAL INTERCOURSE

IC 35-31.5-2-302

An act that includes any penetration of the female sex organ by the male sex organ

"Penetration, no matter how slight, is an essential element of the crime of rape."

McCormick v. State, 182 Ind. App. 541, 544 (1979)

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OTHER SEXUAL CONDUCT

IC 35-31.5-2-221.5

An act involving:

- 1) a sex organ of one person and the mouth or anus of another person; or
- 2) the penetration of the sex organ or anus of a person by an object.

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RAPE (LEVEL 1 FELONY)

IC 35-42-4-1

Elements of Level 3 Rape plus:

- Is committed by using or threatening to use deadly force; or
- Armed with a deadly weapon; or
- Results in serious bodily injury; or
- Was facilitated by giving the victim a drug without that person's consent or the perpetrator knew the victim had been administered the drug without consent

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SEXUAL BATTERY

IC 35-42-4-8

A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person:

- 1) touches another person when that person is:
 - a) compelled to submit to the touching by force or the imminent threat of force; or
 - b) so mentally disabled or deficient that consent to the touching cannot be given
- 2) touches another person's genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring

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RESISTANCE

GILLIAM v. STATE, 509 N.E.2D 815 (1987)

Rape victim must resist to degree which would indicate that act is against her will, but physical resistance is not required if victim is in fear of bodily harm.

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CONSENT

BRYANT V. STATE, 644 N.E.2D 859, 861 (IND. 1994)

"Because the evidence showed that S.W. was extremely upset afterwards, a reasonable trier of fact could also have concluded beyond a reasonable doubt that S.W. did not consent to Bryant's use of force."

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The law of rape is not a part of the law of contracts. If on Friday you manifest consent to have sex on Saturday, and on Saturday you change your mind but the man forces you to have sex with him anyway, he cannot use your Friday expression to interpose, to a charge of rape, a defense of consent or of reasonable mistake as to consent. You are privileged to change your mind at the last moment.

Tyson v. Trigg, 50 F.3d 436, 448 (7th Cir. 1995)

...BUT HE WAS DRUNK TOO

“So, why wasn’t it just drunk
sex?”
Isn’t his intoxication a defense?

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MENS REA

DUFFY v. STATE, 275 IND. 191, 196 (1981)

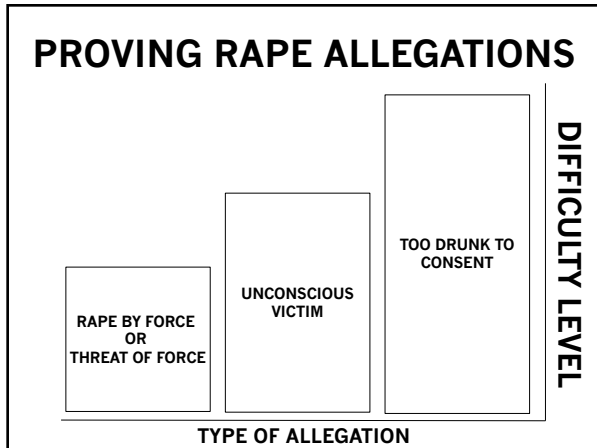
- Rape is a specific intent crime in Indiana
- Intoxication is an affirmative defense and the burden is on the defense to show that, “the accused was so intoxicated as to be incapable of formulating the requisite intent.”
- Question for the fact-finder

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STEP 2

Can you prove the
rape in a court of law?

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LOOK AT THE TOTALITY OF THE CIRCUMSTANCES

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CIRCUMSTANTIAL EVIDENCE

DAVIDSON v. STATE, 580 N.E.2D 238, 242 (IND. 1991)

[T]he factfinder may infer penetration from circumstantial evidence such as the victim's condition soon after the incident.

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BRYANT v. STATE

644 N.E.2D 859 (IND. 1994)

- Force need not be physical, can be inferred by the circumstances
- Actual force can be proved by circumstantial evidence
 - Ripped clothing
 - Bruises
 - Genital injury
 - Victim's demeanor

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OBJECTIVES

- Understand toxicology basics
- Establish victim credibility
- Corroborate
- Document offender's actions

TOXICOLOGY

The Impact of Alcohol and Drugs

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“If recreational drugs were tools, alcohol would be a sledgehammer”

Aaron M. White, *What Happened? Alcohol, Memory Blackouts and the Brain*, 27(2) ALCOHOL RES & G. HEALTH 16 (2003)

BASIC TOXICOLOGY

Alcohol is a central nervous system (CNS) depressant

Impairs cognition and psychomotor skills

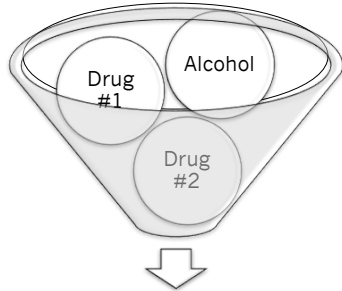
As consumption increases, alcohol progressively impairs bodily functions and abilities

LEVEL OF IMPAIRMENT

Rate of absorption variables

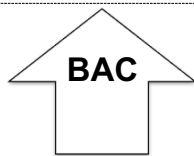
Food
Body size
Amount and type of alcohol
Duration of drinking
Fatigue
Tolerance rates
Combination of alcohol with other drugs

SYNERGISTIC EFFECT

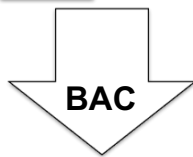


The interaction of two or more substances or other agents to produce a combined effect that is greater than the sum of their separate effects

MUSCLE v. FAT



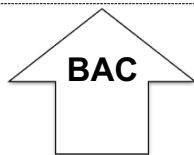
Alcohol will not leave the blood and enter fat



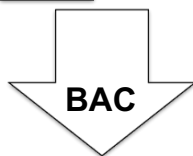
Alcohol will leave the blood and enter muscle

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PRACTICAL APPLICATION

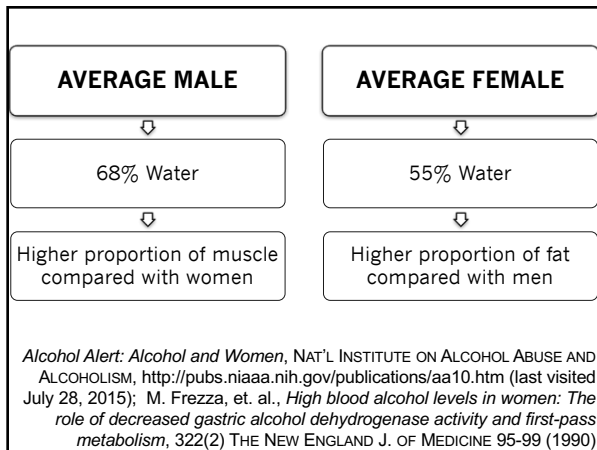


Higher fat content



Higher muscle content

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WHAT IT MEANS

Increased BAC in women for a given quantity of alcohol; e.g.,

- 140 lb. male and 140 lb. female each consume six 12-oz. beers over 2 hours:
 - ◉ Male ~ .14 – .15
 - ◉ Female ~ .18 – .19

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ANOTHER EXAMPLE

190 lb. male and 125 lb. female each consume six 12 oz. beers over 2 hours:

- Male ~ .09 – .11
- Female ~ .19 – .21

Potentially more than double

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| BAC (G/100 ML OF BLOOD OR G/210 L OF BREATH) | STAGE | CLINICAL SYMPTOMS |
|--|-------------|---|
| 0.01 - 0.05 | SUBCLINICAL | BEHAVIOR NEARLY NORMAL BY ORDINARY OBSERVATION |
| 0.03 - 0.12 | EUPHORIA | MILD EUPHORIA, SOCIABILITY, TALKATIVENESS, INCREASED SELF-CONFIDENCE; DECREASED INHIBITIONS; DIMINUTION OF ATTENTION, JUDGMENT AND CONTROL. BEGINNING OF SENSORY-MOTOR IMPAIRMENT; LOSS OF EFFICIENCY IN FINER PERFORMANCE TESTS. |
| 0.09 - 0.25 | EXCITEMENT | EMOTIONAL INSTABILITY; LOSS OF CRITICAL JUDGMENT, IMPAIRMENT OF PERCEPTION, MEMORY AND COMPREHENSION, DECREASED SENSITORY RESPONSE; INCREASED REACTION TIME, REDUCED VISUAL ACUITY; PERIPHERAL VISION AND GLARE RECOVERY; SENSORY-MOTOR INCOORDINATION; IMPAIRED BALANCE, DROWSINESS. |
| 0.18 - 0.30 | CONFUSION | DISORIENTATION, MENTAL CONFUSION; DIZZINESS, EXAGGERATED EMOTIONAL STATES, DISTURBANCES OF VISION AND OF PERCEPTION OF COLOR, FORM, MOTION AND DIMENSIONS. INCREASED PAIN THRESHOLD. INCREASED MUSCULAR INCOORDINATION; STAGGERING GAIT; SLURRED SPEECH, APATHY, LETHARGY. |
| 0.25 - 0.40 | STUPOR | GENERAL INERTIA; APPROACHING LOSS OF MOTOR FUNCTIONS; MARKEDLY DECREASED RESPONSE TO STIMULI; MARKED MUSCULAR INCOORDINATION; INABILITY TO STAND OR WALK; VOMITING; INCONTINENCE; IMPAIRED CONSCIOUSNESS; SLEEP OR STUPOR |
| 0.35 - 0.50 | COMA | COMPLETE UNCONSCIOUSNESS; DEPRESSED OR ABOLISHED REFLEXES; SUBNORMAL BODY TEMPERATURE INCONTINENCE; IMPAIRMENT OF CIRCULATION AND RESPIRATION; POSSIBLE DEATH |
| 0.45 - | DEATH | DEATH FROM RESPIRATORY ARREST |

BLACKOUTS v. PASS OUTS

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BLACKOUTS

- Periods of memory loss
- No loss of consciousness
- Brain's ability to form long-term memories from short-term memories is destroyed

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WHEN DO BLACKOUTS HAPPEN?

- Not predicted by BAC only
- More likely to suffer the effects of blackout if BAC rises rapidly as opposed to slowly; e.g. shots

Aaron M. White, *What Happened? Alcohol, Memory, Blackouts, and the Brain*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm> (last visited July 14, 2015)

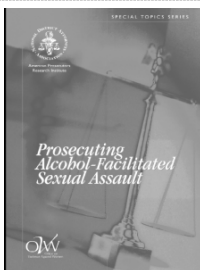
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PASS OUTS

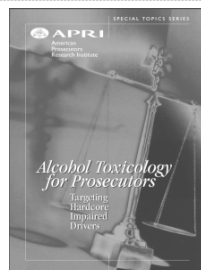
- Alcohol-induced unconsciousness
- Sedation due to CNS depressant effect
- Resembles sedated state associated with surgery
- Can last for hours
- Groggy-sedated feeling can linger for 24 hours

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RESOURCES



http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf

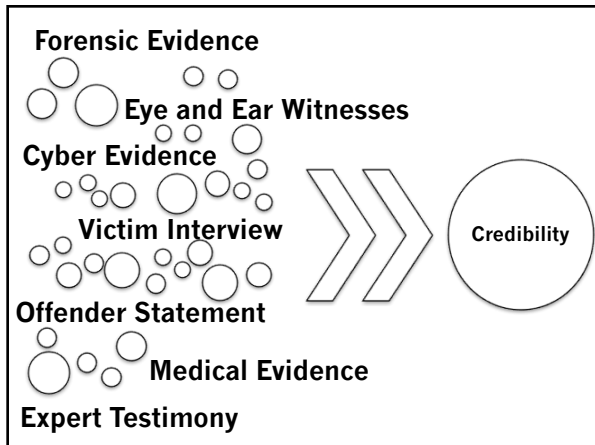


http://www.ndaa.org/pdf/toxicology_final.pdf

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VICTIM CREDIBILITY

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CORROBORATION

POTTER v. STATE, 684 N.E.2D. 1127 (1997)

Rape conviction may rest solely on the victim's uncorroborated testimony

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WITNESSES

- ◉Victim's friends
- ◉Bartenders
- ◉Prompt complaint
- ◉Offender's ex-girlfriends
- ◉Others at party/bar/event
- ◉Cab or Uber driver

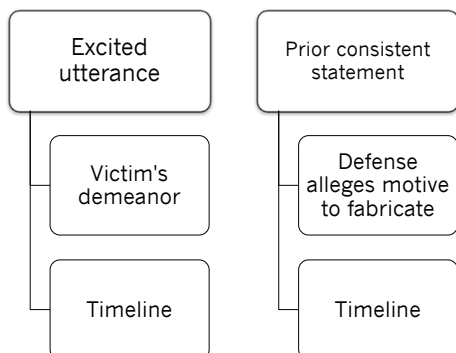
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PROMPT COMPLAINT

- ◉If there is NOT a prompt complaint:
 - Ask victim about what she did following the assault
 - Talk to those with whom she interacted
 - Prosecution may be able to use an expert at trial
- ◉If there IS a prompt complaint:
 - Interview witness

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PROMPT COMPLAINT



EVIDENCE COLLECTION

CRIME SCENE

- Blood
- Hair
- Urine
- Vomit
- Semen
- Sheets
- Clothing
- Condom

OTHER PHYSICAL EVIDENCE

- Surveillance tapes
- Social media, cell phones
- Glasses, punch bowls
- Receipts or credit card charges

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PRETEXTUAL CONTACT

- Check the law
- Plan carefully
- Make sure the victim can handle it
- Chose medium
 - Phone call
 - Text message
 - Message via social media

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OFFENDER INTERVIEW

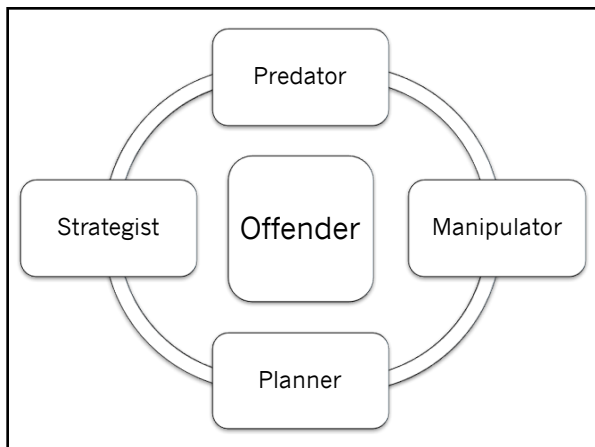
- Always attempt an interview!!
- Get the offender to corroborate specifics of victim's account
- Ask about whether s/he believes the victim was drunk – why or why not?
- Why does s/he think the encounter was consensual?

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OFFENDER'S ACTIONS



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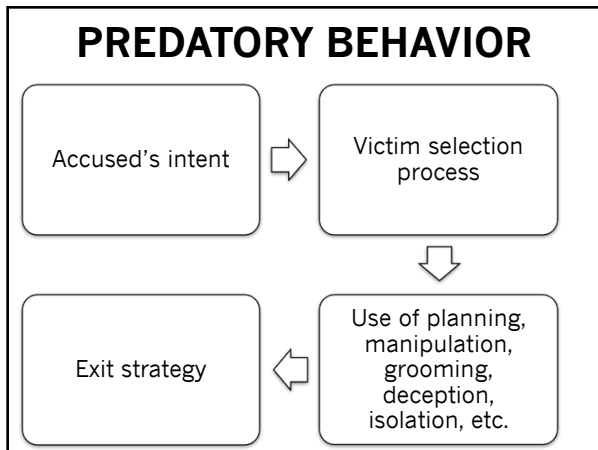
STUDY

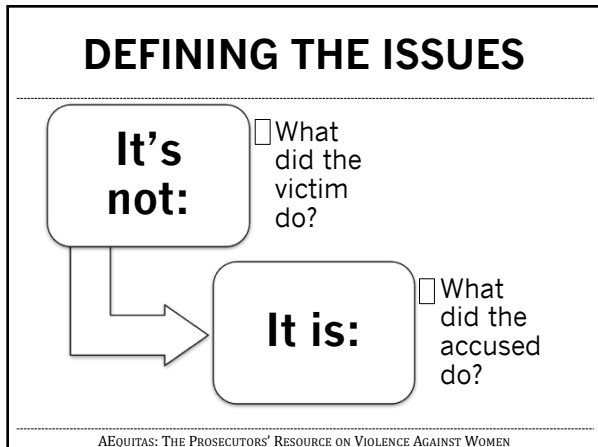
UNIVERSITY OF MASSACHUSETTS

- Surveyed 1,882 college students
- 120 (6.3%) were rapists who accounted for:
 - 439 rapes and attempted rapes
 - 49 sexual assaults
 - 277 acts of sexual abuse of children
- 76 of the 120 were serial rapists

David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists* 17(1) VIOLENCE AND VICTIMS (2002)

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INTERVIEWING THE VICTIM

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“[These] are deeply traumatic crimes that can cause severe damage to survivors’ emotional, spiritual, and psychological well-being [F]ar too many survivors are harmed or retraumatized by insensitive, uninformed, or inadequate community and criminal justice system responses.”

Bea Hanson, Principal Deputy Director, U.S. Department of Justice,
Office on Violence Against Women, July 30, 2014

THE EFFECTS OF TRAUMA

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“Traumatic events are extraordinary, not because they occur rarely but rather because they overwhelm the ordinary human adaptation to life.”

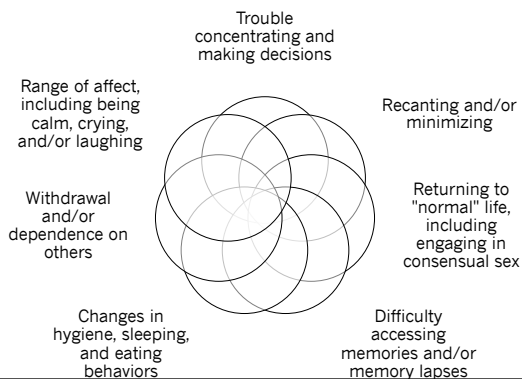
Judith Herman, Center for Nonviolence and Social Justice

EFFECTS OF TRAUMA

- There is no “blueprint” of how trauma impacts an individual
- Cognition and behavior are affected by trauma
- Recognizing some common reactions to trauma can assist us in responding to victims of sexual assault

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COMMON REACTIONS



REMINDER

- Offender inflicted trauma on victim
- Offender is responsible for the victim's reaction to that trauma

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PERCEPTION AND MEMORY

Was she able to perceive what was happening around her?

- Degree of intoxication

What does she remember?

- The day, evening, night?
- The incident?
- Did she blackout or pass out?
- Can anything refresh victim's memory?

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INCONSISTENT MEMORY

- Neurobiology of trauma may cause inconsistencies in statements
- Victim may be embarrassed
- Victim may fear getting in trouble
- Different (types of) interviews by different interviewers

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INTERVIEW



INTERROGATION

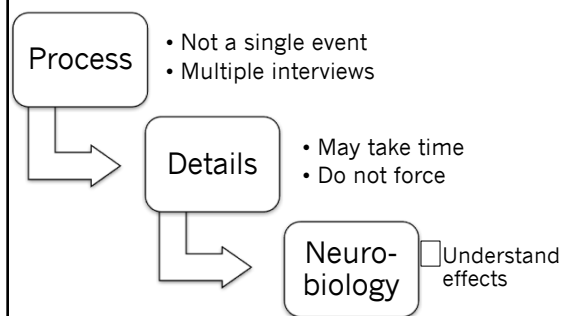


INTERVIEW PREPARATION

- Read reports and witness statements
- Talk to the responding officer
- Review evidence, photos, medical records, etc.
- Listen to 911 tapes
- Check into the offender's history
- Learn about the victim's background

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DIFFERENT APPROACH



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TRAUMATIC MEMORY

...the story can come out in bits and pieces and fits and starts and cycle back over on itself, or, "Oh wait a minute, I remembered this detail." It comes out in a very disorganized way...

Interview with Dr. Rebecca Campbell, NAT'L INSTITUTE OF JUSTICE (Jun. 18, 2012), <http://nij.ncjrs.gov/multimedia/video-campbell.htm>

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MULTIPLE INTERVIEWS

INITIAL

- Build rapport
- Establish general facts of the case
- Identify evidentiary leads
- Talk about safety plan and witness intimidation
- Plan for follow-up meeting

FOLLOW-UP

- Follow-up on initial interview
- Gather more detailed information about assault

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RAPPORT BUILDING

Establish trust

- Provide victim with some control over the interview
- Be truthful, but not discouraging
- Don't make promises you can't keep
- Acknowledge trauma

Get to know the victim

- Talk to victim about their lives – before and after the assault
- Let them know you care

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INTERVIEWING BASICS

- Don't interrupt
- Refrain from excessive note taking
- Avoid judgmental questions – or ones that could be *heard* as being judgmental
- Recreate the reality of the crime

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KEY WORDS

AVOID ASKING:

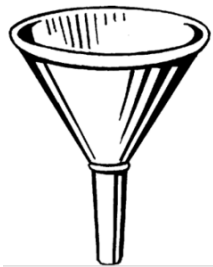
- *Why* didn't you...?
- *Why* did you...?

DO ASK:

- Are you *able* to tell me...?
- What are you *able* to tell me about...?

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FUNNEL APPROACH



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OPEN QUESTIONS

Invite victim to volunteer as much information as possible

- How did the night start?
- What was the party like?
- What are you able to tell me about what happened once you were alone?

Be careful not to interrupt the victim

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CLOSED QUESTIONS

Narrow and seek a one or two-word answer

- When you left your house, was it dark outside?
- Did you pay for the drinks?
- Do you remember anyone taking photos at the party?

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FOLLOW-UP QUESTIONS

Used to clarify a response to an open question

- When you say that he gave you a funny look, can you describe that a little more?
- You said that there was a “tussle” – what do you mean by that?

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LEADING QUESTIONS

Suggest an answer in the questions and are used to confirm facts that logically flow from the victim's responses

- You drank the shot he bought you?
- Your friend was not there at that point?

Use sparingly

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SUMMARY

List the facts and feelings you have learned in the interview and invite the victim to elaborate or explain anything that was misunderstood or omitted

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DETAILS

- An open-ended, narrative approach that elicits sensory details can allow a victim to describe the assault in her/his own words
- Pay attention to small details that victim focuses on – they may turn out to be very important
- What the victim smelled, felt, or heard can help us gather corroborating evidence

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RECREATE THE REALITY

Sensory and emotional memories

Were you able to hear the party going on downstairs?

Are you able to remember what you smelled when you were in the room?

When x was on top of you, were you able to see anything?

What could you feel while you were on the couch?

COLLABORATING WITH ALLIED PROFESSIONALS

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TRUE COLLABORATION

- Provides victim with holistic support, including safety planning
- Demonstrates systematic engagement
- Improves communication
- Identifies gaps
- Enhances participation
- Educates each partner about each others' roles and expertise
- Encourages mutual respect

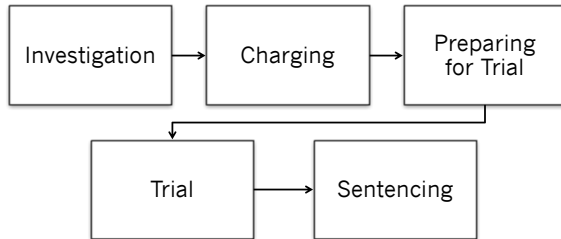
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BENEFIT TO PROSECUTOR

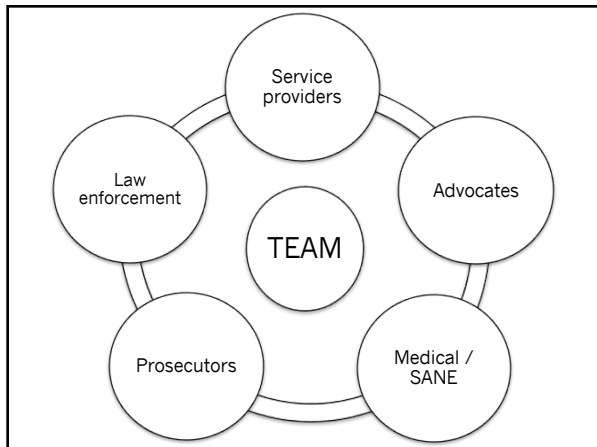
- Recognize impact of trauma on victim behavior
- Sharpens focus on offender
- Collection and analysis of evidence
- Enhances interviewing skills
- Compelling evidence and connection with jury

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EDUCATION



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PARTICIPATION

- | | |
|--|---|
| <ul style="list-style-type: none"> • Be present • Listen • Learn distinct roles • Accept criticism • Identify gaps and challenges | <ul style="list-style-type: none"> • Analyze successes • Educate others • Share appropriate information • Encourage input • Commit to sustainability |
|--|---|

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PRETRIAL LITIGATION

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TOPICS

- ☐ Rape shield
- ☐ Victim privacy
- ☐ Admissible statements
- ☐ Prior bad act evidence

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MOTIONS *IN LIMINE*

- Preview evidence for judge
- Brief complex legal issues
- Establish evidence that will and will not be admitted at trial
- Requires thoughtful consideration of case well in advance of trial date

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RAPE SHIELD

IC 35-37-4-4

Specific/ opinion/ reputation
evidence of victim's/witness'
previous sexual behavior is not
admissible

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RAPE SHIELD EXCEPTIONS

IC 35-37-4-4

1. Evidence of a person's past sexual conduct with the defendant
2. Evidence that shows that someone other than the defendant committed the charged act
3. Evidence that the defendant did not cause the victim's pregnancy at the time of trial

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ADVISOR COMMITTEE NOTES

FRE 412

"The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process."

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PROTECTIVE ORDERS

Protect identity of victim

Use initials

Redact any "identifying information"

Guard against disclosure of privileged information

Counseling records

SANE photographs

Privacy concerns of victims and witnesses

Facebook

Cell phones

ADMIT STATEMENTS

NON-HEARSAY

- Not for the truth of the matter asserted
- Verbal acts
- Prior consistent statements when offered to rebut an implied charge of fabrication

HEARSAY EXCEPTIONS

- Statements for medical treatment
- Excited utterances
- Then-existing mental, emotional, or physical condition
- Present sense impression

Is a *Crawford* analysis necessary?

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NASH v. STATE

754 N.E.2D 1021, 1024 (IND. CT. APP. 2001)

- Statements to SANE are admissible as hearsay exception
- Includes statements as to the identify of the offender
- Necessary for the treatment of victim
- Inherently trustworthy

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OTHER BAD ACT EVIDENCE






IND. R. EVID. 404

- Requires diligent, thorough investigation into offender's background; not just criminal history
- Must be for a purpose other than propensity; e.g., common scheme or plan, lack of mistake
- Subsequent acts are also admissible under rule
 - Witness intimidation
 - Tampering with witnesses or evidence

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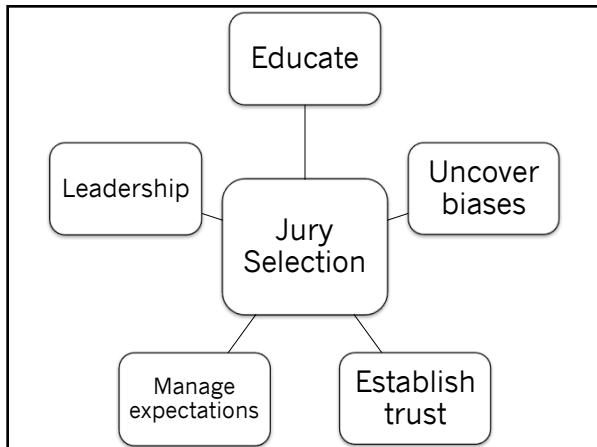
TRIAL STRATEGIES

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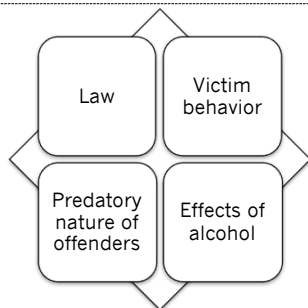
| | |
|---|-------------------------------|
|  | Voir dire |
|  | Opening and closing |
|  | Direct examination of victim |
|  | Cross-examination of offender |
|  | Expert testimony |

GETTING THE MOST OUT OF *VOIR DIRE*

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EDUCATE



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UNCOVER BIASES

Will the juror be able to “get” ...

- Traumatic events impact victim behavior
- Consent
- Victim is not on trial
- Popular media portrayal of rapists is not consistent with reality

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MANAGE EXPECTATIONS

- ◉ Victim may not have immediately reported the assault
- ◉ Offender may be likeable
- ◉ Victim may have consented to some of the activity
- ◉ Offender may not have used violence

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THE ART OF PERSUASION

**Opening Statements and
Closing Arguments**

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PRACTICE TIPS

- Craft closing argument first
- Use opening to reinforce offender-focused theme and preempt defense arguments
- Explain corroborating evidence
- Dispel “he said, she said”
- Spotlight predatory behavior of defendant
- Explain corroboration = credibility

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OFFENDER-FOCUSED THEMES

**PREYING ON
THE MOST
VULNERABLE**

**WOLF IN
SHEEP'S
CLOTHING**

**SETTING A
TRAP**

**FRIEND
BECOMES A
STRANGER**

**USING A
SWORD AS A
SHIELD**

**ALCOHOL AS
A WEAPON**

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WITNESS EXAMINATIONS

**Direct, Cross, and
Redirect**

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INVESTIGATORS

- ◉ Ask about demeanor of witness at each point of interaction
- ◉ Use as a “pseudo” expert
 - Why did you talk to the victim multiple times?
 - Why did you put the victim in touch with the service provider?
- ◉ Acknowledge mistakes and misperceptions

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DIRECT OF VICTIM

- ◉ Introduce victim
- ◉ Start with questions about what happened well before the assault and continue to well after
- ◉ Confront challenging aspects of case head on
- ◉ Recreate the reality of the crime

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ANTICIPATE CROSS-EXAM

- ◉ Identify possible topics
- ◉ Demonstrate vulnerability and offender causation
 - Use of drugs or alcohol
 - Delayed disclosure
 - Trauma/ alcohol/ memory

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CROSS-EXAMINATION

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OFFENDER TESTIMONY

Offenders

- Rely on us to buy into myths about sexual assault
- May have gotten away with their behavior before
- Want to tell their side of the story

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STRATEGIES

- Get agreement on as many aspects of the case as possible
- Point out that they were aware of the victims' intoxication
- Play along with the offender's narrative when appropriate

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EXPERT TESTIMONY

**Is it admissible?
How do I introduce it?**

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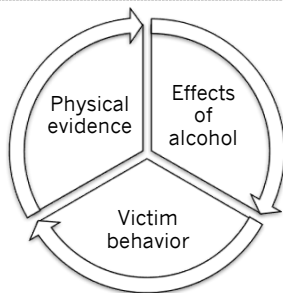
EXPERT TESTIMONY

IND. R. EVID. 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

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AREAS OF EXPERTISE



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EFFECTS OF ALCOHOL

| EVIDENCE | TESTIFYING WITNESS |
|---|--|
| <ul style="list-style-type: none"> • Blood-alcohol content (BAC) of victim and/or offender • Synergistic effect of alcohol and drugs • Disparate effect of alcohol on men v. women • Blackout v. pass out | <ul style="list-style-type: none"> • Doctor • Nurse • SANE • Law enforcement • Toxicologist |

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CSI EFFECT

Based on our findings, jurors were more likely to find a defendant guilty than not guilty even without scientific evidence *if the victim or other witnesses testified, except in the case of rape.*

Honorable Donald E. Selton, *The 'CSI Effect': Does It Really Exist?*, NATIONAL INSTITUTE OF JUSTICE
<http://www.ojp.usdoj.gov/nij/journals/259/csi-effect.htm#note1>

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67% of rape victims reported no physical injuries in addition to the rape. Only 6% sustained severe physical injuries.

Office of Justice Programs, National Crime Victimization Survey, Injuries from Violent Crime (June 2001)

Over 70% of rape victims reported no physical injuries in addition to the rape. Only 4% sustained serious physical injuries.

Crime Victims Research & Treatment Center, National Victims Center, Rape in America (Apr. 23, 1992)

SEXUAL ASSAULT NURSE EXAMINER (SANE)

- Incapacitated patients are statistically significantly less likely to have genital and non-genital trauma than patients who were not incapacitated at the time of the assault
- Most common non-genital injury = bruising to the arms and legs

ANDRE ROSAY & TARA HENRY, FINAL REPORT: ALASKA SEXUAL ASSAULT NURSE EXAMINER STUDY (Oct. 2008)

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PHYSICAL EVIDENCE

| EVIDENCE | TESTIFYING WITNESS |
|--|--|
| <ul style="list-style-type: none"> • Injuries or lack of • SANE examination • Victim demeanor | <ul style="list-style-type: none"> • Doctor • Nurse • SANE • Fire/Rescue |

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EXPLAINING VICTIM BEHAVIOR

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“Despite considerable research and publications in professional and popular journals concerning rape, such myths continue to persist in common law reasoning”

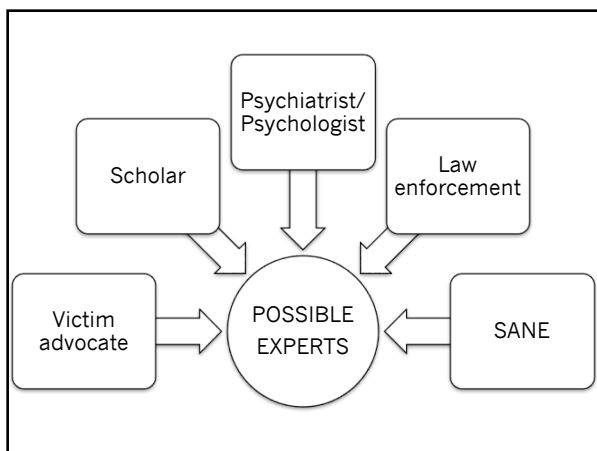
Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 (5/6) *SEX ROLES* 385 (2005)

SIMMONS v. STATE

504 N.E.2D 575, 579 (IND. 1987)

- Allowed testimony from psychiatric social workers about “rape trauma syndrome”
- This is outdated language, but the precedent is strong for expert testimony about victim reactions to trauma
- Analogous case law exists in DV context, e.g., *Odom v. State*, 711 N.E.2d 71 (Ind. Ct. App. 1999)

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AVOID THE DANGER ZONE

An expert CANNOT:

- Testify about a particular witness's credibility
- Be a human lie detector
- Testify as to whether an assault did or did not happen

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EXPERT TESTIMONY

Juror expectations

We have to meet expectations or explain why not

Victim credibility

Jurors need context within which to analyze victim's behavior

Myths

Left unexplained, jurors may base assessment of credibility on myth

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GOING FORWARD

- Maintain focus on offender throughout investigation and trial
- Consider effects of alcohol when charging and presenting case
- Collaborate with allied professionals to enhance victim safety and privacy and educate judges and juries about victim responses to trauma
- Conduct interviews and direct examination focusing on sensory details to recreate the reality of the crime

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