

Addressing Bias in IPSV Cases: Supporting a Victim's Credibility

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Discussion Points

- Rape Myths
- Offender-Focused Investigation
- Trial



Fact Pattern

Ann and John have been in a relationship for 6 years. Over the course of their relationship, John has physically and sexually assaulted Ann. Ann has reported these assaults to a close friend. Ann also sought counseling on several occasions.



Fact Pattern

In 2003, she called 911 and reported that John “choked” her. Ann refused medical treatment. The case was pled to a misdemeanor assault after Ann recanted her report.

Today, Ann calls the police and reports that John raped her over the weekend. She did not seek medical treatment. She also discloses her physical and sexual abuse over the last 6 years.

Victim Behavior

- Juror Myths
- Defining Counterintuitive
 - Other Terms
- Admissibility
- Recommended Practices
- Examples



Dynamics of Domestic Violence

- Victims may be reluctant to testify or refuse to cooperate
- Jurors often do not understand the dynamics of DV and its impact on victims
- Jurors expect victims to be cooperative with prosecution
- Jurors may believe stereotypes about DV



Dynamics of Sexual Assault

- Jurors are not horrified by cases that do not fit their idea of what constitutes rape



Explaining Victim Behavior

- Victims react differently to trauma
- Jury expectation of behavior does not always match actual behavior
- Actual victim behavior may seem counterintuitive to jury




Intimate Partner Violence: Common Expectations

- Leave abuser
- Accurately and immediately report incident
- Fully cooperate in the prosecution of their batterer
- Fearful demeanor



Intimate Partner Violence: Common Reality

- Stay with abuser
 - Minimize abuse/ Self-Blame
 - Fail to report abuser
 - Fail to cooperate with prosecution
 - Request dismissal of charges
 - Recant
 - Testify for abuser
- 

Rape Myths To Overcome

1. Only strangers rape.
2. Rapists always use weapons and cause physical injury.
3. Rape victims behave in a certain way.
4. Women lie about being raped.
5. A man cannot rape his wife.
 1. Perceived as less serious, consequential or less traumatic
6. As the intimacy of the relationship increases the perception of the seriousness or trauma decreases.

Juror Myths & Impact on Verdicts

“Misconceptions regarding battered women abound, making it more likely than not that the average juror will draw from his or her own experience or common myths which may lead to a wholly incorrect conclusion.”

Bechtel v. State, 840 P2d 1 (1992)

Rape Myths

“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 (Sept. 2005)

Juror Myths – Victim Behavior

- Screaming, saying “no,” fighting back
- Prompt complaint
- Full disclosure
- Behavior in the aftermath



Juror Myths

32% of jurors surveyed believed a woman's resistance was a critical factor in determining a rapist's culpability

59% of jurors believed a woman should do everything she could to repel her attacker

GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL
CONSTRUCTION OF SEXUAL ASSAULT (1989)

Juror Myths – Victim Blaming

- Victim Masochism
 - She enjoyed it or wanted it
- Victim Participation
 - She asked for it
 - It happens only to “certain” types of women
- Victim Fabrication
 - She lied or exaggerated

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

Juror Myths & Victim Credibility

To the average juror untutored in the psychological dynamics of domestic violence, the victim's vacillating behavior towards the defendant—in particular her back and forth attempts to end the relationship—might have seemed counterintuitive and might have even suggested her version of events was inherently unreliable and unworthy of belief.”

State v. Goetzendanner, 679 N.E. 2d 240, 243-244 (Mass. App. Ct. 1997)

49% of the men
and 42% of the women
surveyed
believe women cry rape
when it hasn't really happened.

Georgia Opinion Poll (1998) (Random sample: ages 18 to 49)



There are some false allegations.
Approximately 1% to 2%.

(“Rape: Shattering Myths,” The Sunday Oregonian, 1992 found 1.6%)



The FBI reported an 8%
“unfounded” rape allegation
rate from 1995-1997.

Uniform Crime Reports, FBI 1995-1997;
(<http://www.fbi.gov/ucr/ucr.htm>)

Impact of Myths on **Victim** Behavior

- It's only rape if it is a stranger
- It wasn't rape if there was no weapon
- I was drinking, so I deserved it



Impact of Myths on **Victim** Perception

Almost 1/2 of the women who were characterized as victims of a completed rape by the National College Women Sexual Victimization Survey did not consider themselves to be victims of rape

Michael Rand & Callie Rennison, "How Much Violence Against Women Is There?," p. 8 (DOJ, National Institute of Justice, 1997-2002)

Myths: Impact on Victim Credibility

This Court on numerous occasions has recognized that the behavioral characteristics or behavioral patterns of an alleged victim in a sexual abuse case may need to be explained by expert testimony, especially where that behavior would seem to be counterintuitive

U.S. v. Pagel, 45 M.J. 64, 68 (CAAF 1996)

Nearly 6 out of 10 Americans believe that women are more likely to be raped by someone they do not know.

Lifetime Television, *Violence Against Women Study*.

The background of the slide features several concentric, glowing blue circles of varying sizes, resembling ripples in water, scattered across the lower half of the frame.

**In 2002, 69 % of
rapes / sexual assaults were
perpetrated by someone
known to the victim.**

“Crime Victimization, 2002”, National Crime Victimization Survey, DOJ,
Bureau of Justice Statistics (August 2003)

OTHER QUESTIONS

- Prior victimization of or accusation of self, friend, family member
- Prior relationship between victim and defendant



Rapists always use
weapons and cause
physical injury

Corollary: All victims resist.

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

“Injuries from Violent Crime”, National Crime Victimization Survey,
OJP (June 2001)

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

Rape in America: A Report to the Nation, National Victims Center & Crime Victims Research & Treatment Center (April 23, 1992).

MINIMUM AMOUNT OF FORCE



48% of the men and
women surveyed
believe sexual assault
necessarily includes
the use of a gun or other weapon.

Georgia Opinion Poll (1998) (Random sample: ages 18 to 49).

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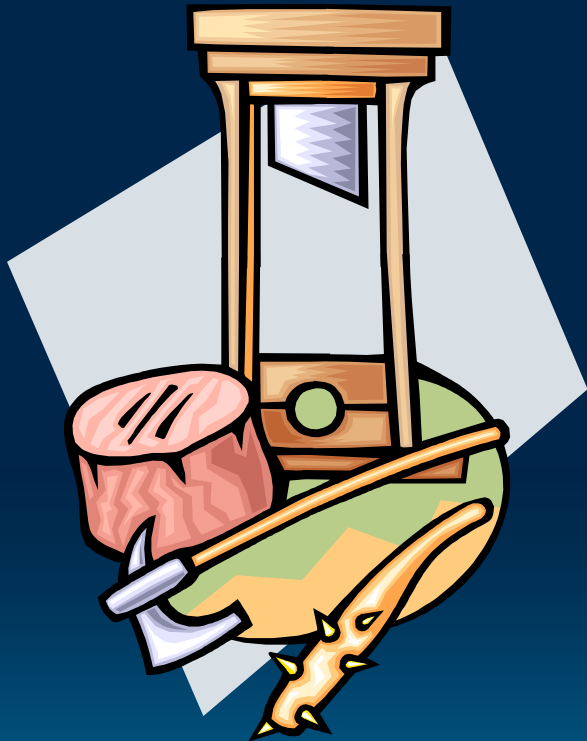
In 2002, only 4 % of rapes / sexual assaults involved a firearm.

In 2002, only 2 % of rapes / sexual assaults involved a knife.

“Crime Victimization, 2002”, National Crime Victimization Survey, DOJ, Bureau of Justice Statistics (August 2003)



WEAPONS OF THE NONSTRANGER RAPIST



- Pre-meditation
- Planning
- Manipulation
- Deceit
- Betrayal of trust
- Relat

“Rape is Not Regret” Analysis

- Type of rape alleged
- Time and circumstances of report
 - Eye and ear witnesses
- Motive to lie
- Predatory behavior on part of defendant



JURORS BELIEVE THAT A “REAL” RAPE VICTIM WILL



- Resist
- Complain promptly
- Be upset at trial



The FBI reported an 8%
“unfounded” rape allegation
rate from 1995-1997.

Uniform Crime Reports, FBI 1995-1997;
(<http://www.fbi.gov/ucr/ucr.htm>)

In 2002, 53.7 % of
rapes / sexual
assaults were reported to
police.

“Crime Victimization, 2002”, National Crime Victimization Survey,
DOJ, Bureau of Justice Statistics (August 2003)

Approximately 25% of the rapes reported were over 24 hours after the assault.

Rape in America: A Report to the Nation, National Victims Center & Crime Victims Research & Treatment Center (April 23, 1992).

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➤ **Throughout the last 10 years, the National Crime Victimization Survey has reported that approximately 30% of rape survivors report the incident to the**

police. Rennison, C. M. (2001). National crime victimization survey, criminal victimization 2000: Changes 1999-2000 with trends 1993-2000, Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics,

NCJ 187

32% of jurors surveyed believed a woman's resistance was a critical factor in determining a rapist's culpability

59% of jurors believed a woman should do everything she could to repel her attacker.

Gary LaFree, Ph.D.,
Rape and Criminal Justice: The Social Construction of Sexual Assault
(1989)



ADDRESS VICTIM'S BEHAVIOR

➤ Must explain

- Behavior during the rape
 - Resistance
- Behavior after the rape
 - Prompt complaint
- Behavior on the witness stand
 - Crying, upset



ATTITUDE

- Victims will often blame themselves for putting themselves in a risky situation. Do not be judgmental!
- Remember:
“An individual’s behavior can play a causal role in his or her victimization *without being at all blameworthy*” (Felson and Burchfield, 2004:855).

NEED FOR CORROBORATION

- *“Starting this fall, university officials will determine in advance of an inquiry whether a complaint is backed by 'sufficient independent corroboration' -- more than one student's word against another's -- including eyewitnesses and physical evidence. If no such corroboration is available, officials may dismiss the complaint and refer students to a lawyer or to a new 'confidential mediation' process to resolve the matter.”*



OFFENDER - FOCUSED INVESTIGATION AND PROSECUTION



Weapons of the Non-Stranger Rapist



- Pre-meditation
- Planning
- Manipulation
- Deceit
- Betrayal of trust
- Power and Control
- Prior Violence/threats
- Relationship
- Acceptance of Rape Myths by Victims
- Acceptance by society

Defining the Issues

➤ It's NOT:

- What did the VICTIM do?

➤ It IS:

- What did the ACCUSED do?

Accused As A Predator

- Focus on the accused as:
 - Predator
 - Manipulator
 - Planner
 - Strategist



YOU May Be An Offender's Best Weapon!!!

Denial and justifications reflect the beliefs, biases, prejudice, and values of the listener.

- Culture
- The offender doesn't need to rape
- The victim/woman brought it on
- Teenagers are less vulnerable
- Alcohol for victims/offenders

Attribution Veronique Valliere, Psy D.

In-Home Offenders

- There is a pervasive idea that in-home offenders are somehow not as dangerous or problematic as “community” offenders. However, they are
 - More experienced
 - More invested
 - Crossing more boundaries
 - Safer
 - Creating more betrayal/family conflict
 - More psychologically/emotionally involved in offending

Attribution Veronique Valliere, Psy D.

Challenging Your World View

- Are you able to accept that these are myths? Why or why not?
- Do you need to see someone as a victim to care for them?
- Are you struggling with a “victim” or “monster” dichotomy with the offender?
- Do you have other biases, beliefs, or ideas you wonder about? Ask the experts!

Attribution Veronique Valliere, Psy D.

Victim Bashing

- Must insure that the focus of the case is the accused and his actions
 - Victim protection motions
 - Rape shield motions
 - Prior bad act motions



Cross Examination

- Cross Examination Begins with Investigation
- Prior criminal history
 - Prior bad acts
 - Registry
- Prior Sexual Hx of this offender
- Prior relationships
 - Why ended
- Overall attitude of this defendant to women/wife/girlfriend
 - Amongst friends, co-workers
 - Tatoos/bumper stickers/mudflaps
- Computer Investigation
 - Websites
 - Pornography
 - MySpace/Blogs

CREDIBILITY

PHYSICAL EVIDENCE

MEDICAL EVIDENCE

HE SAID / SHE SAID

EYE AND EAR WITNESSES

EXPERT TESTIMONY



“Paint” the Reality of the Crime



Main Principle

➤ BE REAL

- Honesty is key!!!
- Explain all “bad facts” – there is power in the truth!!!
- Admit weaknesses but do not apologize for them

Build Your Case-Don't Defend It!

- Define the issues in your own way
 - Use theme and arguments to rebut defense but remember it's all about the elements
 - Do NOT let the defense define the panel questions
 - Remember OJ!!!

Prove That She Said No

- How did she say it?
- How did she show it?

NO

The word "NO" is rendered in a large, bold, yellow font with a halftone dot pattern. The letters have a 3D effect with a dark blue shadow. The background is a dark blue gradient with several concentric white and light blue circles representing ripples on water, centered around the base of the letters.

Credibility

- It's not "she said, he said" – It's "the State said, he said"
- Show there is no motive to lie



CREDIBILITY

PROVABILITY

Victim Support

- Work with victim advocates before, during, after, and beyond!!!
- Be respectful to the victim
- Educate the victim
- Fight continuances with all of your ability
 - Defense may ask for them for strategy reasons
 - Victim may perceive that the justice system is unjust

Protect the Victim

- Address attempts to intimidate in court and out of court
 - Motions in limine
 - Victim safety
 - Bail motions
- Allay fears about threats from batterer to retaliate with child welfare and/or criminal allegations

Prepare Victim for Direct

- Instruct the victim “to tell the truth”
- Explain the importance of accuracy
- Address inconsistencies
- Prepare for cross examination

The Victim - Before and After

➤ Before

- Good choices/ good discretion
- Bad choices/ bad discretion

➤ After

- Effects of rape
- Life changes
- Trial process



Direct of Victim

- Must explain nonintuitive behavior and any inconsistencies if victim testifies
 - If victim is reluctant, explain why
- May want to introduce other evidence first to show that victim is credible
- Know the rules of evidence in case you have to impeach her

CORROBORATION BY INTRODUCING SENSORY AND PERIPHERAL DETAILS

- Proves credibility
- Enhances comprehension



**Cross
Examining/Impeaching
Recanting Victim
of Intimate Partner Sexual
Assault**



Explain the Context

- **One day in a relationship history**
 - **Explains victim's non-intuitive behavior**
 - ✓ **Why victims stay**
 - ✓ **Recantation**
 - **Foundation for DV expert**
 - ✓ **Power and control wheel**

➤ **Money**

➤ **Children**

➤ **Gender Roles**

➤ **Isolation**

➤ **Family**

➤ **Religion**

CROSS EXAMINATION OF THE VICTIM

- Prosecutors should use their cross-examination of a recanting victim to demonstrate the victim's motive to lie on the defendant's behalf.
- Prosecutors should recognize the negative effect an unlikable victim has on the outcome of a case
- Humiliating a domestic violence victim during cross-examination may inhibit her from reporting future incidents.

Why Impeach?

- Reinforce your theory of the case
- Impugn testimony damaging your theory of the case
- Ask yourself: *“Why am I asking this question?”*
- If you can’t ANSWER that question, don’t ASK the question!

The “Fed Up” Victim

- **Witness Control**
 - An ounce of Prevention
- **Provide opportunity to “vent”**
 - ✓ Prior to trial
 - Victim advocate
 - Investigator
 - Prosecutor
- **Victim needs to feel heard**
 - ✓ Don't limit to present case
 - ✓ Allow victim to go into history
- **Practice staying on point**
- **Stress importance of demeanor at trial**

The “Coerced” Victim

“Cop told me I had to make a statement”

Distinguish between:

- Victim feeling pressured to write/give a statement
- Victim feeling pressured to write/give a specific statement

The “Minimizing” Victim

“He didn’t really rape me”

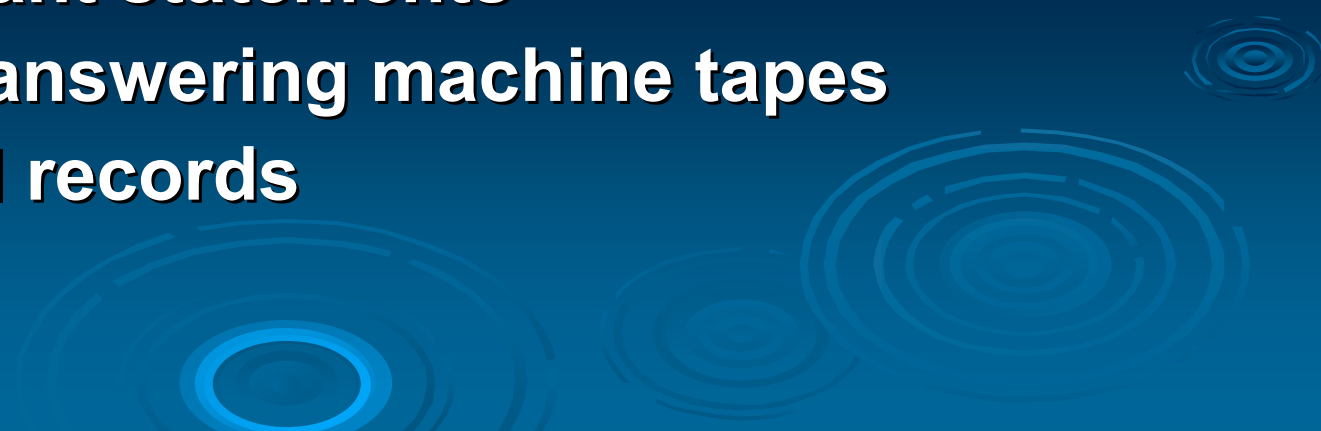
CONTRADICT

- **Confront with prior statement**
 - ✓ Written by victim
 - ✓ Verbal documented by officer
- **Confront with other evidence**
 - ✓ Pictures
 - ✓ Officer observations
 - ✓ Witnesses
 - ✓ Defendant statements

The “Sacrificial” Victim

“I made it all up to get back at him”

Contradict with other evidence

- Photos
 - 911 tapes
 - Other witness statements
 - Defendant statements
 - Phone answering machine tapes
 - Medical records
- 

The “No Memory” Victim

“I don’t recall”

Explore the extent of the memory loss

- Does victim remember any details?
 - Inculpatory
 - Exculpatory
- Any statements after the incident?
 - To family
 - To friends
 - To victim advocate
- Recorded recollection under FRE 803 (5)
- If the victim doesn’t remember what happened then the victim can’t say that it didn’t happen.

The Self-Blaming Victim


“It was my fault for upsetting him”

Focus on the “causal” victim conduct

- Legal defenses
 - ✓ Self-defense
 - ✓ Heat of Passion
- Merely “annoying”
 - ✓ Disempowered to speak up
 - ✓ Subservient role in the relationship



Cross Examining the Defendant



Cross Examining the Defendant

- Must first try to figure out reason for the rape
 - Does defendant think he is entitled to have sex with victim whenever he wants regardless of her desires?
 - Was this an attempt to punish?
 - What did the investigation yield

Cross Examination

- Cross Examination Begins with Investigation
- Prior criminal history
 - Prior bad acts
 - Registry
- Prior Sexual Hx of this offender
- Prior relationships
 - Why ended
- Overall attitude of this defendant to women/wife/girlfriend
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Cross Examining the Defendant

➤ The “set up”

- What did defendant do to set up the situation
 - Lie, trick threaten, get victim drunk
 - May be able to explain victim’s reluctance by showing how she was manipulated by defendant
 - How did he beat her down to the point where he was able to overcome her resistance
 - Over the years, months, preceding days

Cross Examining the Defendant

- Defendant's awareness that victim said no
 - Victim resisted
 - Victim crying after
 - What offender did after i.e. snuggle
 - What victim did after
- If there are injuries – does she always bleed (bruise, need stitches) after intercourse

Cross Examining the Defendant

- Acts that show consciousness of guilt
- Was the rape an attempt to punish the victim?
- What preceded the rape?


Experts

- Non-medical experts
- Medical experts



MYTH -

Rape victims have assumed
the risk of being raped



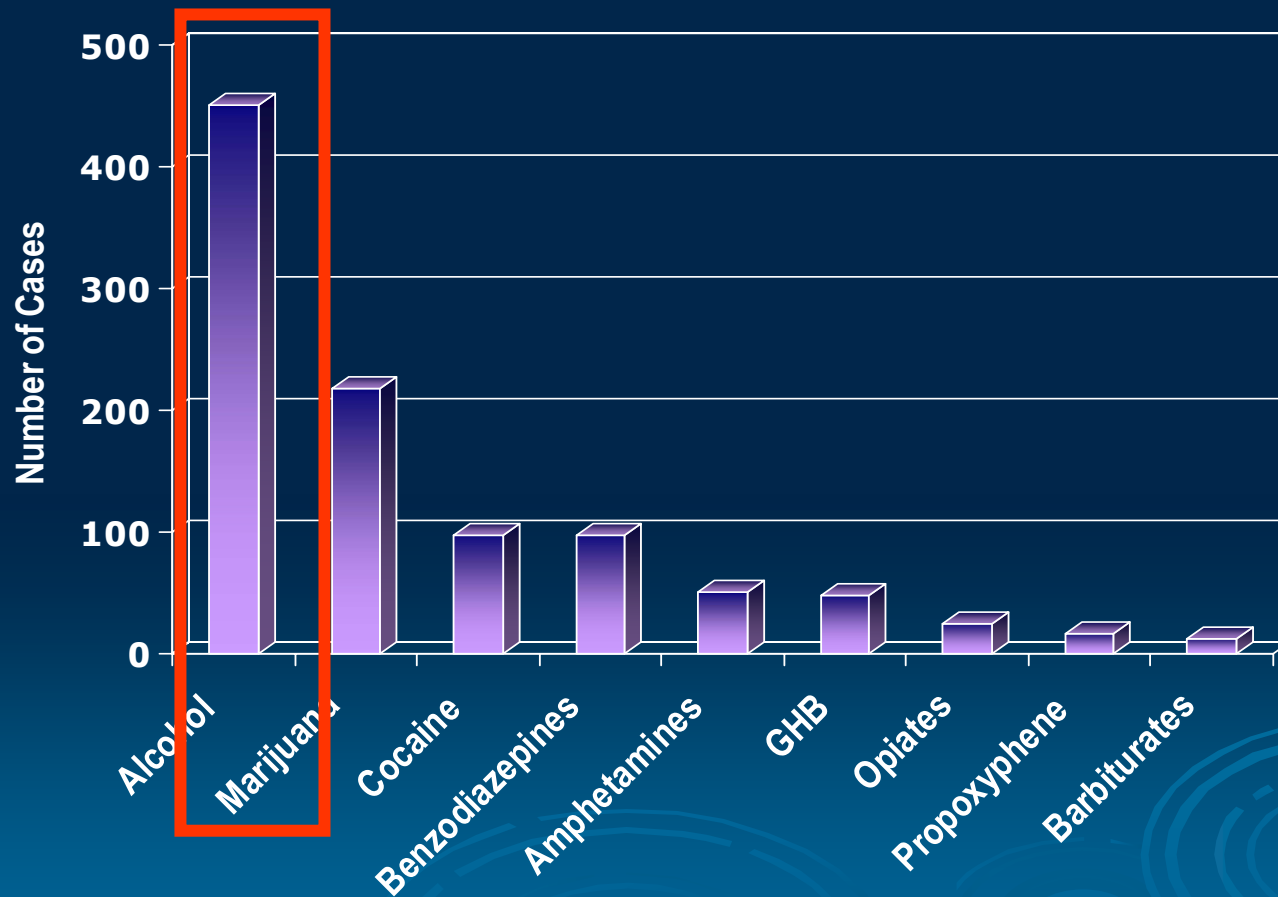
WHO NEEDS
FORCE WHEN
YOU HAVE
ALCOHOL???

The background is a solid blue color with several concentric, light blue circular ripples scattered across it, resembling water droplets or a ripple effect.

MOST PREVALENT TYPE OF Drug Facilitated Rape?




Prevalence of Drugs Used in Alleged Cases of Sexual Assault



STATISTICS

- In a recent study of more than 2,000 sexual assaults in CA:
 - 63% of the urine specimens contained alcohol
 - 30% contained marijuana
 - GHB and Rohypnol accounted for less than 3%

3 STEPS

1. Assuming the victim's version is 100% true, do the allegations constitute rape?
 2. Can you prove the victim's allegations?
 3. It's rape and you can prove it – now prove it!!!
- 

BUT HE WAS DRUNK, TOO

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



The Reality

- Approximately 50% of all sexual assaults are committed by a man who has been drinking.

Abbey et al. (2004)

- In a nationwide survey of college students, 68% of sexual assaults involved alcohol consumption by the offender.

Fisher et al. (2003)

PREDATOR VS. JUST SOME DRUNK GUY

- Is there any evidence defendant selected victim because he knew she would be an easy target?
- Did he use force?
- Did she say no?

PREDATOR VS. JUST SOME DRUNK GUY

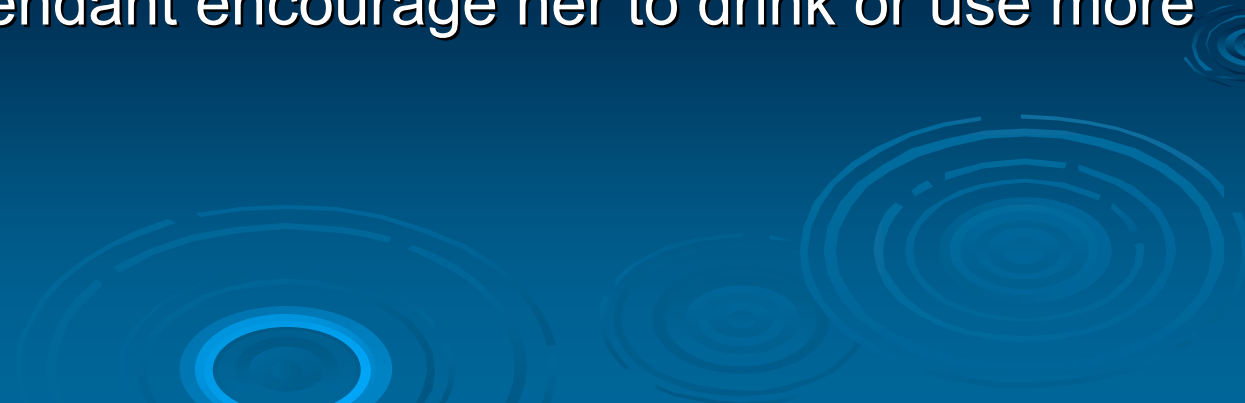
- Is there any evidence defendant selected victim because he knew she would be an easy target?
- Did he use force?
- Did she say no?

PREDATOR VS. JUST SOME DRUNK GUY

- Is there any evidence of grooming?
- Is there a power dynamic where the victim is worried because he/she is under age?
- Did defendant isolate the victim?
- Did defendant prey on victim's vulnerabilities?
- Did defendant do anything to wear down the victim's resistance?

PERCEPTION AT THE TIME OF THE INCIDENT

➤ Degree of intoxication

- Were her motor skills impaired?
 - Was she able to perceive what was happening around her?
 - Who gave her the drinks or drugs?
 - Was it the defendant?
 - Did defendant encourage her to drink or use more drugs?
- 

MEMORY AFTER THE INCIDENT

- What does she remember about the incident?
- Did she black out or pass out?
- Where did she go that night?

MEMORY AFTER THE INCIDENT

- Can anything refresh victim's memory?
 - Physical or medical evidence
 - Statements from other witnesses
 - Photographs, videotapes, 911 tape



CORROBORATION

- Victim may not report or may delay in reporting
 - Evidence collection issues
 - Credibility issues



CORROBORATION

➤ Witnesses

- Does she remember if anyone else was present?
- Who did she first tell?
- Who saw her first after the incident?

CORROBORATION

- Witnesses to ingestion, incident
 - What did they see, hear?
 - Interview bartenders and waiters
 - How much did victim have to drink?
 - Did she appear to be drunk or high?
- Fresh complaint witnesses
- Friends of the victim
- Friends of the suspect
- Look for ex-wives, girlfriends, other victims

EVIDENCE COLLECTION

➤ Must find corroborating physical or medical evidence

- Are there surveillance tapes?
- Videotapes?
- Tape recordings?
- Photographs?
- Injuries?
- Evidence of victim's presence
 - Blood, hair, urine, vomit, clothing



THE DEFENDANT

- Always attempt an interview
 - Did defendant know victim was drunk?
 - How much did she drink?
 - What signs of intoxication did she exhibit?
 - Who purchased alcohol?
 - Who provided the alcohol?
 - Why does defendant think the encounter was consensual (if he does)?

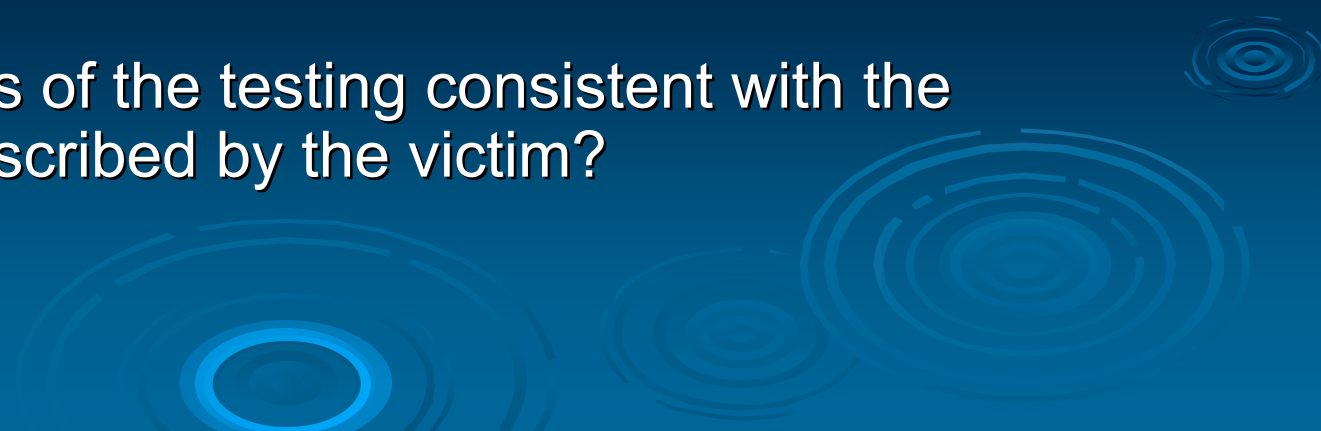
EXPERT TESTIMONY

- May need to call an expert
 - Inability to consent
 - Ability to perceive
 - Ability to remember
- Can call emergency doctor, SANE, pharmacologist, toxicologist

EXPERT TESTIMONY

- May be better for rebuttal
- May be difficult to do without BAC
- Forensic toxicologist must have an adequate background in pharmacology
- Make sure they testify in “Plain English”

PHARMACOLOGIST

- Is it possible to regain consciousness while still under the influence of the drug or alcohol?
 - If consciousness is regained, is it possible for the victim to physically resist the attack or will they still be sedated?
 - What symptoms are experienced as drugs or alcohol wear off?
 - What is known about the effects of alcohol or drugs on memory?
 - Are the results of the testing consistent with the symptoms described by the victim?
- 

Juror Myths – The Research

- Bettina Frese, Miguel Moya, & Jesús L. Megía, ***Social Perception of Rape: How Rape Myth Acceptance Modulated the Influence of Situational Factors***, 19(2) J. INTERPERSONAL VIOL. 145 (Feb. 2004)
- Kimberly A. Lonsway & L. F. Fitzgerald, ***Rape Myths in Review***, 18 PSYCHOL. WOMEN Q. 133, 135 (1994)

Juror Myths – The Research

- Zoe D. Peterson & Charlene. L. Muehlenhard, ***Was it Rape? The Function of Women's Rape Myth Acceptance and Definitions of Sex in Labeling Their Own Experiences***, 51(3/4) SEX ROLES 129-144 (Aug. 2004)
- Sarah Ben-David & Ofra Schneider, ***Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance***, 53(5/6) SEX ROLES 385 (Sept. 2005)

Juror Myths – The Research

- Gregory G. Sarno, *Admissibility at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome*, 42 A.L.R. 4th 879 (July 2005)
- Catharine M. Gamper, *Perceived Social Competence and Rape Myth Endorsement*, 25 DEVIANT BEHAVIOR 133-150 (2004)
- J. Gray, *Rape Myth Beliefs and Prejudiced Instructions: Effects on Decisions of Guilt in a Case of Date Rape*, 11 LEGAL & CRIM. PSYCHOL. 75-80 (2006)

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