

Legal Issues in Intimate Partner Sexual Violence Cases//

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Victim Behavior: You Need to Explain it!

“[T]he victim’s behavior will not necessarily undermine his or her credibility if an expert can explain that such patterns of counterintuitive behavior often occur in sexual abuse cases”

U.S. v. Rynning, 47 M.J. 420 (CAAF 1998)

“Counterintuitive” Victim Behavior

- Actions or statements made by victims in the aftermath of an assault which appear to other people as illogical or poor decisions by the victim
- The behaviors are not what the average person would “expect” from a victim
- The counterintuitive responses can cause a trier of fact to question the credibility of the victim’s report

Terri Spahr Nelson, MSSW, LISW, USMC, *Module 7: Expert Witnesses, JUDGE ADVOCATE CURRICULUM ON REPORTING SEXUAL ASSAULT* (2006)

Other Relevant Terms

- Rape Trauma Syndrome
- Post Traumatic Stress Disorder

Rape Trauma Syndrome

- Developed by Burgess and Holstrom (1972) to describe common reactions to rape
 - Based on 600 victim interviews
 - 25% felt symptoms for 6 months
 - 25 % felt symptoms for 2 - 4 years
 - Developed to explain healing / coping stages after rape

Rape Trauma Syndrome

- U.S. v. Carter, 26 M.J. 428, 429 (CMA 1988)
 - Expert may offer evidence that the characteristics demonstrated by the victim led to a diagnosis of rape trauma syndrome

RTS – PROBLEMS

- Not in DSM-IV as a diagnosis
 - Note that it is mentioned as a potential precipitant of PTSD
- Suggests that the victim is ill
- Trying to say victim has a “syndrome” when expert has not evaluated victim
- Many of the symptoms may be caused by other factors

Battered Woman Syndrome

- Developed by Lenore Walker in '70s
- Cycle of violence
- Learned helplessness

BWS – PROBLEMS

- Not in DSM-IV as a diagnosis
 - Note that it is mentioned as a potential precipitant of PTSD
- Suggests that the victim is ill
- Trying to say victim has a “syndrome” when expert has not evaluated victim
- Many of the symptoms may be caused by other factors

Post Traumatic Stress Disorder

- Diagnosis in DSM-IV
- Developed in response to Vietnam veterans' issues
- Can be related to things other than rape

Post Traumatic Stress Disorder

- Symptoms must last for at least 1 month
 - Could be Acute Distress Disorder if lasts less than 1 month
- Must be exposed to traumatic event which involves actual or threatened death or serious injury

PTSD – PROBLEMS

- Victim may not meet diagnostic criteria
- PTSD may not explain all of victim's behaviors (ex. – behaviors at the time of a crime and 1 month after)
- Opens the door to get all of victim's counseling records and to have the victim examined

Introducing Expert Testimony

- Old way
 - Rape Trauma Syndrome
 - Battered Woman Syndrome
 - PTSD
- New way
 - Victim Behavior
 - Victim Responses to Trauma
 - Dynamics of Sexual/Domestic Assault
 - Sexual/Domestic Assault Myths

Recommended Practices

1. Identify the counterintuitive behavior in your case
2. Understand admissibility and applicable law
3. Explain the victim behavior

The Danger Zone

- An expert **CANNOT**:
 - Testify about a particular witness's credibility
 - Cannot be a human lie detector
 - Testify as to whether a rape did or did not happen
 - See U.S .v. Halford, 50 M.J. 402 (CAAF 1999)

Presenting the Testimony

- Describing reactions to rape
 - Are you familiar with different reactions to rape? Can you please explain these reactions to the jury?

Presenting the Testimony

- Delayed report
 - Based upon your experience with rape victims, is it common or uncommon for rape victims to delay in reporting? Why or why not?

Presenting the Testimony

- Continued contact with accused /
“Attempt to return to normalcy”
 - Based upon your experience with rape victims, can you explain why a victim would continue to have contact with the perpetrator?

See U.S. v. Peel, 29 M.J. 235 (CMA 1989)

Rule 702

Testimony by Experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

Rule 702 (cont'd)

Testimony by Experts

(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

EXPERTS

- Non-medical experts
- Medical experts



BATTERING AND ITS EFFECTS ON 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

BATTERING AND ITS EFFECTS ON VICTIM BEHAVIOR

Defense will argue that a victim's counterintuitive behavior means:

- a) victim not credible with respect to the original account of the incident or
- b) victim provokes or enjoys her abuse

BATTERING AND ITS EFFECTS ON VICTIM BEHAVIOR

- To overcome defense arguments:
 - Explain with Direct Testimony of Victim
 - Explain with Expert Testimony

BATTERING AND ITS EFFECTS ON VICTIM BEHAVIOR

- Choosing an expert
 - Clinical experience vs. credentials
 - Victim Advocate, Law enforcement, psychologist
 - Expert should NOT be involved with case
 - Consider victim's reaction to use of victim advocate
 - Consider potential anxiety of witness that s/he will not be qualified

EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS ON VICTIM BEHAVIOR

- Admissible?
 - Specific laws of jurisdiction
 - FRE 702-704
 - Expert Qualifications
 - Training
 - Professional experience
 - Clinical experience

The Consent Defense

- Can you overcome the consent defense if the victim does not testify?

Step One: Identify the Behavior

- Talk to the victim
- Review the discovery
- Talk to other witnesses
- Talk to other colleagues
- Work with an expert

Step Two: Admissibility

- Varies by Jurisdiction
- Rules of Evidence
 - Relevance – F.R.E. 401, 402
 - Subject – F.R.E. 702
- *Frye, Daubert & Kumho Tire*
 - Avoiding *Frye & Daubert*?
- Expert Qualifications

Case Law

- U.S. v. Peel, 29 M.J. 235 (CMA 1989)
 - Expert on crisis intervention and rape counseling
 - Talked about delayed report and attempt to “return to normalcy” by having continued contact with accused

What if She Will Not Testify? – Ah Hearsay

- ***Crawford v. Washington***, 124 S. Ct. 1354 (2004)

Davis v. Washington, 126 S.Ct. 2266 (2006)
(consolidated with *Hammon v. Indiana*)

Crawford v Washington

- 6th Amendment Right to Confrontation
- In *Crawford*, the US Supreme Court found that the accused 6th Amendment right to confront the witness against him applies when the prosecution wants to introduce any out of court statements that are testimonial in nature

Crawford Holding

- Testimonial hearsay is admissible ONLY when:
 - Prosecution shows that the declarant is unavailable to testify at trial
 - and**
 - There was a prior opportunity for cross examination

Crawford

- IF VICTIM TESTIFIES...NO CRAWFORD ISSUE

Davis Holding

Statements are NONTESTIMONIAL when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

Davis v. Washington, 126 S.Ct. 2266, 2273

Davis Holding

[Statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 126 S.Ct. 2266, 2273-2274

When are *Crawford/Davis* Not Applicable

- Any case where the declarant testifies
- Civil child Neglect Proceeding
- Any civil proceeding
- Hearsay that are non-testimonial
 - Firmly rooted i.e. for medical treatment
 - Co-conspirator statements
- Hearsay offered by the Defendant
- Dying declarations and business records

What is Testimonial?

- Preliminary Hearing Testimony
- Grand Jury Testimony
- Prior trial Testimony
- Police “Interrogations”
 - Not the way used in *Miranda* sense
 - Structured Police Questioning

What is Testimonial?

- Solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Crawford* at 1364
- Contrasts accuser making formal statement to government agent with person making casual remark to acquaintance.
- Statements directed at government agents that “reasonably objective person should know would be available for use at later trial”

IS STATEMENT TESTIMONIAL?

YES

NO

**NO CRAWFORD
ISSUE**

**WITNESS MUST
TESTIFY**

**WITNESS
UNAVAILABLE
+
PRIOR
OPPORTUNITY
FOR CROSS EXAM**

Forfeiture by Wrongdoing

- FRE 804(b)(6): Hearsay exceptions
- The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
 - A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Forfeiture by Wrongdoing

- Defendant forfeits right to the confrontation clause objection
 - Victim is unavailable to testify due to defendant's wrongdoing
 - Batterer intimidates victim
 - Dynamics of DV

What is “Wrongdoing?”

- Letters encouraging victim not to testify
 - State v. Hallum, 606 NW2d 651 (Iowa 2000)
- Significant influence, including ‘influence and control’
 - Steele v. Taylor, 684 F2d 1193 (6th Cir. 1982)
- Knowledge, complicity, planning or in any other way
 - People v. Pappalardo, 152 Misc 2d 364 (NY1991)

What is “Wrongdoing”?

- Evidence of past relationship relevant, but may not be enough by itself.
 - United States v. Montague, 421 F3d 1099 (10th Cir. 2005)

Forfeiture Hearings

- Burden of Proof
 - Preponderance of Evidence: FRE 104(b)
 - But varies depending on the jurisdiction!
 - Procedure: FRE 804(b)(6)
(recommended in *Davis v. Washington*)
 - *United States v. Huddleson*, 485 U.S. 681 (1988)

Forfeiture Hearings

■ Evidence

- Hearsay may be considered
- History of abuse
- Prior charges filed and withdrawn
- Testimony from bond hearing, prior cases
- Evidence from police, former prosecutor, family, etc., about victim's fear of defendant and prior cases
- Anything to show what he did to prevent / discourage her from testifying

Forfeiture by Wrongdoing

- *People v. Vasquez*, No. 04VA0729
(Colorado Court of Appeals,
November 30, 2006)

Best Practices-Victim Support

- Be proactive in encouraging victim cooperation
- Provide victim with resources and services that make her feel safe and secure
- Fight continuances
- Protect her on the stand
- Use Rape Shield Laws if applicable

CHARGING DECISIONS

“The primary responsibility of prosecution is to see that justice is accomplished.”

- §1.1 NDAA National Prosecution Standards, 2nd Ed., 1991

CHARGING DECISIONS

- Must overcome the tendency to overlook the crime and the crime's elements in favor of blaming the victim

CHARGING DECISIONS

- **BE AGGRESSIVE
WITHIN ETHICAL
BOUNDARIES!**

Hawaii

- **§ 707-730. Sexual assault in the first degree**
- **(1) A person commits the offense of sexual assault in the first degree if:**
 - (a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion**

- **§ 707-731. Sexual assault in the second degree**
- **(1) A person commits the offense of sexual assault in the second degree if**
- **(a) The person knowingly subjects another person to an act of sexual penetration by compulsion;**

Defnitions

- "Strong compulsion" means the use of or attempt to use one or more of the following to overcome a person:
 - (1) A threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped;
 - (2) A dangerous instrument; or
 - (3) Physical force

- "Compulsion" means absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss

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

PREPARATION FOR DIRECT

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

THE VICTIM

- Personalize the victim
 - Jury must understand who she is in order to understand her choices and behavior
 - Introduce the victim to the jury with sufficient foundation questions



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

Rape Shield

- DIVISION 4. COURTS AND JUDICIAL PROCEEDINGS TITLE 33 Evidence CHAPTER 626 Hawaii Rules of Evidence ARTICLE IV. Relevancy and Its Limits
- **Rule 412. Sexual offense and sexual harassment cases; relevance of victim's past behavior.**

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

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**

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!

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**

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 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

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 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?

Themes

- **** Research indicates that jurors process testimony and evidence by composing a story which allows them to make sense of what they are hearing.**
Pennington & Hastie, A Cognitive Theory of Juror Decision Making, 13 Cardozo Law Review 519-57 (1991)

STORY FACTS--THEME

- A THEME HELPS ***FIT*** THE WHOLE STORY TOGETHER:
 - ***Grab Trier of Fact Attention at the Beginning***--(Something concrete and personal to relate to)
 - ***Provide Central Unifying Thread Through the Core***--(Something to organize their thoughts around)
 - ***Emotionally Compelling Ending***--(A Personal reason to this husband/boyfriend responsible at end...lead to closing

Theme and Theory

- Have a theme for the case that weaves together the otherwise difficult to understand or believe facts
- Start in Voir Dire and Use throughout Case
 - Theme needs to use weaknesses as strengths
 - Intimacy of
 - This is HIS WIFE...the master of the castle

References

- http://www.lafasa.org/Publications/la_stats.cfm

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CALL US!



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