

**THE CHALLENGE OF
DIFFUSING SEXUAL ASSAULT
MYTHS AT TRIAL**

*THE USE OF EXPERT TESTIMONY TO EXPLAIN
VICTIM BEHAVIOR*

**Jennifer Long, Director
Christopher Mallios, Attorney
Advisor**

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

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QUESTION

What kinds of victim behavior – during or after the assault – have proven the most challenging to cases in which you have been involved?

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OFFENDER-FOCUSED PROSECUTION

Understanding and explaining victim behavior is a key element of an offender-focused prosecution

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THE CONTEXT OF THE VICTIM

- ◉The victim’s context is defined by:
 - The offender (influence on the truth, relationship, etc.)
 - The culture (barriers, disclosure, access to service, etc.)
 - The self (blame, prior history and experience)
 - The audience

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MOST COMMON REACTIONS JUDGED AS “COUNTERINTUITIVE”

- ◉Earnest resistance
 - Not screaming, not yelling, not shouting “no” during the rape, not fighting back, etc.
- ◉Delayed or piecemeal reporting
- ◉Continued contact with the offender
- ◉Subsequent sexual activity

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EARNEST RESISTANCE

- ◉Not screaming, not yelling, not shouting “no” during the rape, not fighting back, etc.
 - Explanation:
 - ◉Fear, frozen fright, or terror
 - ◉Disbelief that this is happening
 - ◉Belief that it will be worse
 - ◉I will be hurt worse
 - ◉Socialization to passivity

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DELAYED REPORTING

⦿Explanation:

- Not sure it was rape at all
- Fear
- Belief that it will not do any good
- Anger comes later or from another party (e.g., parent) who encourages reporting
- Indirect or encouraged disclosure
- Culture and socialization to systems
- Potential consequences

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CONTINUED CONTACT WITH THE OFFENDER

⦿Explanation:

- Shock or disbelief
- Rush to normalization
- Relationship to offender
- Prior history of assault or abuse
- Attachment, love

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SUBSEQUENT SEXUAL ACTIVITY

⦿Explanation:

- Shock or disbelief
- Rush to normalization
- Relationship to offender
- Prior history of assault or abuse

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VICTIM RESPONSES

- The victim's internal experiences dictate reactions afterwards:
 - Was terrified and/or frozen
 - Was barely conscious
 - Was in great pain

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VICTIM RESPONSES

- Identity of the assailant impacts the victim's behavior:
 - Stranger
 - Brief encounter
 - Acquaintance
 - Trusted one or person of authority

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VICTIM RESPONSES

- Victim's judgment of her behavior influences reaction:
 - I should have...
 - I shouldn't have...
 - Why did I...
 - Why didn't I...

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IMPACT OF MYTHS

- Beliefs about rape influence victim behavior:
 - Rape by a nonstranger.
 - No use of weapon
 - I was drinking, (fill in the blank), so I got what I deserved.

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THE MYTH OF THE BIG "5"

- Penetration
- Severity
- Weapon
- Quantity
- Consistency

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WHAT CAUSES TRAUMA?

- Extreme fear or terror
- Betrayal
- Blitz or surprise assaults
- Blame and shame
- Disastrous disclosures or reports
- Lack of support

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IMPACT OF TRAUMA

- Stress
- Depression
- Fear → Phobias
- Coping mechanisms

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POST TRAUMATIC STRESS DISORDER

Experiencing an extremely traumatic event accompanied by symptoms of increased fear and avoidance of stimuli associated with the trauma.

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EFFECTS OF LONG-TERM TRAUMATIC STRESS

- Anxiety and vigilance, higher with drug-induced rape
- Anger, resentment, and conflict
- Uncertainty about future
- Prolonged mourning of losses
- Diminished problem solving
- Isolation
- Health problems
- Physical and mental exhaustion
- Changed world view

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COMMON COGNITIVE REACTIONS

- Confusion and disorientation
- Recurring dreams and nightmares
- Preoccupation with trauma
- Trouble concentrating
- Memory problems
- Difficulty making decisions
- Questioning spiritual or religious beliefs

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COMMON BEHAVIORAL REACTIONS

- Crying easily
- Anger
- Increased family conflicts
- Avoiding reminders of disaster
- Excessive activity
- Hypervigilance
- Isolation and social withdrawal

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**Victim's
Resilience**



**Absence
of Trauma**

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RISK / RESILIENCY

- Severity/life-threatening experience
 - Proximity
 - Responsibility
 - Past mental health
 - Culture
 - Age
- Duration
 - Predictability
 - Past experience
 - Social support/help/advocacy
 - Provide victims with support they need without taking away opportunities to regain control (empowerment)

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**GOOD TARGET
FOR
PREDATOR**



**GOOD WITNESS
FOR
PROSECUTION**



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)

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CRIMINAL JUSTICE SYSTEM

Beliefs → Response

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IMPACT OF MYTHS



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IMPACT OF MYTHS

- Evaluation/charging
- Medical examination
- Support
- Trial
- Disposition

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FACT PATTERN

•How would this case be charged in your jurisdiction?

- a) Charged with rape
- b) Charged with misdemeanor sexual assault crime
- c) Charged with assault crime, but not sexual assault
- d) No arrest

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FACT PATTERN

•Would you expect this victim to seek medical treatment?

•Do you think a SANE's expectation of a victim's behavior may impact the treatment she receives?

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FACT PATTERN

•Do you think the response a victim receives to her initial disclosure(s) impacts:

- Her decision to seek support / counseling?
- The type of support she receives?

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TRIAL



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VOIR DIRE

- What behaviors would you like to address in voir dire?
- What questions do you think would reveal juror bias?

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RESOURCE

Educating Juries in Sexual Assault Cases: Using Voir Dire to Eliminate Jury Bias

www.aequitasresource.org/library

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OPENING

- Should the prosecutor address the victim's behavior in his/her opening?
- How can the prosecutor address this behavior without putting the focus on the victim?

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DIRECT EXAMINATION

- Should prosecutors address victim behavior through their direct examination of the victim?
- What are the pros and cons of asking victims to explain their behaviors?

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EXPLAINING BEHAVIOR

"[T]he 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)

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CAVEATS

- Experts are not always necessary or effective
- Behavior may not be the proper subject of expert testimony
- All experts are not created equal

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VICTIM BEHAVIOR

- May be addressed
 - By the victim
 - Through an argument
 - Through an expert
 - Through a combination

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USING AN EXPERT TO EXPLAIN VICTIM BEHAVIOR AT TRIAL

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PURPOSE

- Provides jurors with specialized information about a range of victim behavior
- Provides a proper context in which to evaluate a victim's behavior

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PURPOSE

- Not trying to match victim behavior to a "typical" or "real" victim
- Not using an expert to opine on the victim's reasons for a specific behavior

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TERMS

- Victim behavior
- Victim responses to trauma
- Post Traumatic Stress Disorder (PTSD)
- Acute Stress Disorder (ASD)

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PTSD – POTENTIAL ISSUES

- ◉Victim may not meet diagnostic criteria
- ◉PTSD may not explain all of victim's behaviors (e.g. 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

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ASD – POTENTIAL ISSUES

- ◉Victim may not meet diagnostic criteria
- ◉ASD may not explain all of victim's behaviors (e.g. behaviors may not occur within 4 weeks of traumatic event)
- ◉Opens the door to get all of victim's counseling records and to have the victim examined

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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

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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 establish that the victim has a “syndrome” when expert has not evaluated victim
- ◉ Many of the symptoms may be caused by other factors

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INTRODUCING EXPERT TESTIMONY

- ◉ Identify the behavior that you think will cause a jury to disbelieve the victim
- ◉ Decide whether to call an expert
 - Admissible?
 - Available?
 - Pros and cons
- ◉ Explain the behavior

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IDENTIFY THE BEHAVIOR

- ◉ Talk to the victim
- ◉ Review the discovery
- ◉ Listen to the defense
- ◉ Listen to your colleagues and other allied professionals
- ◉ Talk to other witnesses
- ◉ Work with an expert

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QUESTION

•Is expert testimony explaining victim behavior admissible in your jurisdiction?

- a) Yes
- b) No
- c) I don't know

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ADMISSIBILITY



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STATE v. ORDWAY

619 A.2D 819, R.I.,1992

- “The trial justice must determine that the testimony is relevant and will be helpful to the jury. *State v. Correia*, 600 A.2d 279 (R.I.1991).
- Our law ensures that a witness qualified as an expert in a particular field will aid the jury in understanding complex issues; . . .”

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CASE LAW

- Defense counsel represented that victim's delayed report would be subject of attack at trial
- Defense cross-examined rape victim regarding her delayed disclosure
- Defense stressed its significance in closing argument
- Expert testimony admitted because: "The lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior which social scientists have observed from studying rape victims."

People v. Hampton, 746 P.2d 947, 951-952 (abrogated on other grounds by People v. Shreck, 22 P.3d 68, 90 (Colo. 2001))

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F.R.E. 401 RELEVANCE

- Juror's beliefs in myths recognized in legal and social science literature
- Subject matter is beyond the ken and understanding of jurors
- Left unaddressed, jurors may be without proper context to judge victim behavior

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F.R.E. 702 TESTIMONY BY EXPERT

- Beyond the common ken and understanding of the average panel member
- Reliable

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F.R.E. 702 TESTIMONY BY EXPERT

- Scientific, technical or other specialized knowledge
- Assist the trier of fact to understand the evidence or to determine a fact in issue
- Qualified expert

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CRITERIA

- Whether the theory or technique is:
 - Tested.
 - Subjected to peer review or has been published.
 - Generally accepted in the relevant scientific community.
- The existence and maintenance of standards controlling the technique's operation.

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RELIABILITY

- U.S. v. Houser*, 36 M.J. 392 (CMA 1993)
- Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
 - (Scientific knowledge)
- Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)
 - (Technical and other specialized knowledge)
- U.S. v. Quintanilla*, 56 M.J. 85 (2001)

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PROS AND CONS

- Victim considerations
- Purpose
- Availability
- Cost
- Necessary
- Effective
- Available expert

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AVOIDING FRYE OR DAUBERT?

“Evidence concerning battered women syndrome should not be held to the Kelly-Frye standard for new scientific evidence when the evidence is offered as an opinion to educate the jury about common misperceptions concerning victim’s behavior”

People v. Gray, 187 Cal. App. 3d 213, 217 (1986)

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AVOIDING FRYE OR DAUBERT?

“Expert testimony need not satisfy the Frye test in cases where the jury is in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert’s assertions based on his skill or knowledge”

State v. Borelli, 629 A.2d 1110, 1111 (1993)

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QUALIFICATIONS

- Clinical experience
- Direct victim service
- Education
- Knowledge of relevant articles
- Authorship of articles
- Prior qualification
- One or more

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CHOOSING THE MOST EFFECTIVE EXPERT

- Academic or “credentialed”
- Anecdotal (in the field)
- Combination

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PREPARING THE EXPERT TO TESTIFY

- Qualifications
 - Possible challenges
 - Don't stipulate to qualifications
- Subject
 - Not an “expert in counterintuitive behavior”
 - Possible areas of qualification
 - Generally no diagnosis

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QUESTION

What types of expert have you worked with to explain victim behavior in a sexual assault case?

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POSSIBLE EXPERTS

- Victim advocate
- Forensic psychiatrist/psychologist
- Director of a shelter
- Law enforcement
- Sexual Assault Nurse Examiner (SANE)
- Emergency room doctor
- Scholar

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OBJECTIONS AND PROBLEM AREAS

- Overcoming common objections
- Avoiding the danger zone

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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)

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PRESENTING THE TESTIMONY

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

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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?

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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)

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CROSS OF DEFENDANT

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CLOSING

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CONTEXT=FAIRNESS



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Jennifer Gentile Long
Director

2001 S Street NW, Suite 500
Washington, DC 20009

P: (202) 558-0029
C: (202) 596-4223
F: (202) 393-1918

jlong@aequitasresource.org
www.AEquitasResource.org



ÆQUITAS
THE PROSECUTORS' RESOURCE
ON VIOLENCE AGAINST WOMEN

Christopher Mallios
Attorney Advisor

2001 S Street NW, Suite 500
Washington, DC 20009

P: (202) 596-4230
F: (202) 393-1918

cmallios@aequitasresource.org
www.AEquitasResource.org
