

## WHEN AND HOW: ADMITTING EXPERT TESTIMONY ON VICTIM BEHAVIOR IN SEXUAL ASSAULT CASES IN PENNSYLVANIA

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### INTRODUCTION

On June 29, 2012, Pennsylvania shed its distinction of being the only state in which expert testimony to explain victim behavior in sexual assault cases was inadmissible by enacting Section 5920 of the Judicial Code, “Expert testimony in certain criminal proceedings.”<sup>2,3</sup> The law, which became effective on August 28, 2012, is a critical tool for prosecutors seeking to provide a context for understanding sexual assault and sexual assault victims, as well as to counter entrenched myths and misperceptions about sexual assault and sexual assault victims.<sup>4</sup> These fallacies have been reinforced for centuries by public discourse, inadequate laws created by misguided and uneducated legislators, and nefarious defense strategies designed to discredit victims through the exploitation of common rape myths.

### THE IMPACT OF MYTHS ON JURORS

The prevalence of sexual violence myths causes the public to search for reasons to doubt, rather than reasons to believe, allegations of sexual assault. At the root of the myths is an almost-immediate reactionary tendency to analyze the assault by scrutinizing the victim’s – rather than the offender’s – actions. This focus on the victim’s behavior both during and after the assault—through the lens of laypersons who generally are inexperienced and uneducated about common victim responses to trauma—generally results in a level of behavioral scrutiny that fuels the doubt.<sup>5</sup> Frequently, the public’s expectations of how victims *should* behave conflict with the way victims *actually* behave. When this occurs, the public perceives a victim’s behavior as counterintuitive, and, therefore, compelling evidence of a lack of credibility.<sup>6</sup> Mental health experts as well as other professionals who work with sexual violence victims, however, understand that behavior viewed as counterintuitive by the public actually represents common victim responses to trauma.

The existence of misperceptions surrounding sexual violence and victims is well-documented<sup>7</sup> and results in a skewed focus on the victim.<sup>8</sup> “Despite considerable research and publications in professional and popular journals concerning rape, such myths continue to persist in common law reasoning.”<sup>9</sup> One “common myth is that rapists are most often strangers [.] who suddenly attack their victims in a dark alley.”<sup>10</sup> Regardless of whether the defendant is a stranger or someone the victim knows, jurors may express victim blame “in several themes: victim masochism (e.g., she enjoyed it or wanted it), victim participation (e.g., she asked for it; it happens only to certain types of women), and victim fabrication (e.g., she lied or exaggerated).”<sup>11</sup>

Recently, British researchers published findings from their studies of mock sexual assault trials. They studied jurors’ reactions to sexual assault victims’ delayed reporting, flat affect on the witness stand, and lack of physical injury.<sup>12</sup> During the trial, victims also heard accurate information about typical rape victim behaviors through expert testimony and jury instructions. Through their analysis of mock juror deliberations, researchers found that many jurors were unshakably committed to the belief that a “normal”<sup>13</sup> response to sexual assault would be to fight back.

Researchers also found that jurors held “strong, but unfounded convictions”<sup>14</sup> that vaginal tissues are easily torn, that pelvic muscles can be “rigidified”<sup>15</sup> at will, and that intercourse without trauma only occurs when a woman is aroused

and that lack of trauma is “wholly inconsistent with rape.”<sup>16</sup> The research also showed that mock jurors believed that delayed reporting indicated that the report was fabricated, although they were receptive to the possibility that there were other reasons why a victim of rape might not report immediately.

The studies provided confirmation that even common victim responses to trauma may undermine a victim’s credibility in jurors’ eyes because jurors perceive the responses as counterintuitive.<sup>17</sup> The resultant misperception of the victim’s credibility often leads to a “not guilty” verdict.

A juror’s substitution of his or her own judgment for the facts of the case can also happen when the juror either has been, or knows, a victim of sexual assault. In these circumstances, it is not uncommon for jurors to condemn victims who do not behave as they or their acquaintances behaved. Jurors become fixated on their expectations of the victim’s behaviors,<sup>18</sup> and if the victim fails to measure up to those expectations, jurors could jump to the conclusion that the victim is incredible and her testimony should not be believed. This inability to process sexual assault and sexual assault victims through an unbiased lens also results in not guilty verdicts.

Public perception also fuels the use of many criminal defense strategies by attorneys who are eager to capitalize on the public’s lack of knowledge and misconceptions about victim behavior. Defense tactics routinely exploit public suspicion of sexual violence victims, arguing that a victim’s behavior is inconsistent with the behavior of a “real” victim. This often is an effective strategy where there are only two witnesses<sup>19</sup> to a sexual assault: the victim and her assailant, a common scenario in sexual violence prosecutions. These types of sexual violence cases are often labeled by defense attorneys (and, unfortunately, the public) as “he said, she said,” and the trials unfold into a focus on the victim’s rather than the defendant’s behavior. The victim’s credibility becomes so inextricably linked with her behavior that, left unexplained to jurors, it becomes the defense’s most effective weapon to negate her testimony.<sup>20</sup>

## RECOMMENDED PRACTICES

In a sexual assault criminal prosecution, there is no predetermined, one-size-fits-all prescription for determining whether to utilize expert testimony, which expert to call, or what questions to ask. The protocols for explaining victim behavior during a criminal prosecution vary based on the laws of a particular jurisdiction and the specific circumstances of each case.<sup>21</sup> Although there are not yet any Pennsylvania state cases that could offer guidance on how to introduce expert testimony on victim behavior in a sexual assault trial, there are general rules, as well as other jurisdictions’ case law, that prosecutors can follow in order to explain victim behavior effectively. A review of cases across the country highlights recommended practices, and Pennsylvania’s statute should be reviewed for parameters of admissibility. Pennsylvania’s statute specifies that:

- (1) In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness’s experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence, that will assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.
- (2) If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.
- (3) The witness’s opinion regarding the credibility of any other witness, including the victim, shall not be admissible.
- (4) A witness qualified by the court as an expert under this section may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony.<sup>22</sup>

Victim advocates; shelter or crisis center directors; social workers, counselors, and therapists; sexual assault nurse examiners (SANEs) and physicians; psychologists and psychiatrists; academics with relevant clinical experience; and law enforcement professionals are some examples of persons who may possess the qualifications and experience that will allow them to be deemed experts in “the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted”<sup>23</sup> in a sexual assault criminal prosecution.

The expert’s testimony should focus on objective observations based on the expert’s experience with, or specialized knowledge about, common reactions of sexual violence victims. It should also focus on the behaviors and issues related to sexual violence that are relevant to the case in which they are testifying. Where relevant and admissible, an expert’s testimony may also include a discussion about myths related to sexual violence. Although experts should be familiar with current research or articles related to victim behavior, the most effective qualification will be an expert’s extensive experience working with or observing sexual violence victims. An expert should also discuss his or her training experiences, which can be relevant to victim behavior as well as the public’s belief in myths about sexual or intimate partner violence. The reliability of this type of testimony, as compared with an expert’s subjective evaluation of a victim, rests squarely on the extent of the expert’s experience as well as his or her ability to articulate the observations and knowledge gained in the course of his experience.

Victim behavior should be addressed generally. Expert testimony that describes victim behavior in terms of a syndrome is *not* recommended. The most significant reasons for this are set forth below.

First, using syndromes and disorders to describe victim behavior risks making jurors believe that the victim suffers from a pathological condition. Not only may it be improper to label a victim as suffering from a pathological syndrome, but it may also further jurors’ deep-seeded beliefs related to victim-blaming by promoting the defense message: “You see?! She *is* crazy! She is not to be believed!” Further, the battle of the experts may lead to misleading and irrelevant testimony on whether the victim’s behavior is consistent with an individual who suffers from a syndrome or disorder, as well as whether her syndrome or behavior was caused by a particular event.

Second, syndromic testimony will necessarily involve, at a minimum, a personal review of the victim’s counseling and other records, and may even involve interviews with state and defense “experts” that could turn the trial into a side show in which there is an unnecessary focus on the victim’s emotional trauma, rather than the defendant’s criminal behavior. Further, such access to records and interviews may further traumatize the victim and feel like a hurtful invasion of privacy, thus delaying the victim’s healing and recovery from the trauma of rape.

Third, many of the syndromes that have historically been used in prosecutions regarding victim behavior were in fact developed under other studies that may have been geared, for example, to explain the behaviors of a woman who had been battered and committed a crime against her batterer. (In fact, in many jurisdictions, it is still common practice for expert testimony on victim behavior to be introduced as Battered Women Syndrome, Rape Trauma Syndrome, or through a psychological evaluation indicating that the victim’s behavior is consistent with one of these syndromes.) Thus, these syndromes are incongruous with an expert’s ability to appropriately explain victim behavior in sexual assault cases. In addition, testimony on syndromes may be vulnerable to defense attacks that it is unreliable. The goals of explaining victim behavior in sexual violence prosecutions are much different than those used by the defense to excuse or justify criminal behavior of sexual and domestic violence victims. As a result, terms and practices that may be well-suited to the defense are ill-suited when employed by the prosecution.

Further, since experts who use these terms often render a subjective opinion about the victim, either directly or through a hypothetical, their opinions are easily countered by a different expert’s opinion of the same facts.

Fourth, and importantly, the Pennsylvania statute, as is the case with many other jurisdictions' statutes, states that the expert should testify to assist the "trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted."<sup>24</sup> The statute thus tells us that the testimony is not to be a subjective account of *this* victim's behaviors and reactions, but rather focused on general sexual assault dynamics and victim behavior. Further, the statute specifies that opinion testimony regarding the victim's credibility is not permitted.

Because the expert testimony is objective, cross-examination likely will focus on the expert's honesty, i.e., whether he or she is truthfully relating his or her experiences, the breadth of the expert's experience, his or her knowledge of the literature, and any possible bias toward victims of sexual violence.

Common attacks on expert testimony addressing victim behavior can be avoided by focusing expert testimony on an expert's observations, experiences, research, writing, education, training, or review of articles or studies that address: (1) a general discussion of sexual violence; (2) the existence and prevalence of common myths surrounding these types of violence; and (3) common victim responses to trauma or behaviors in these types of cases. By utilizing this method, because the subject of the testimony is objective (facts and observations) rather than subjective (diagnosis and conclusion), it remains effective testimony, which is less vulnerable to attack.

## REMAINING ISSUES

Despite the success and progress reflected in the passage of Section 5920, the myth that victims immediately report their assaults continues to persist in Pennsylvania law. Significantly, Pennsylvania Suggested Standard Jury Instruction 4.13A<sup>25</sup> encourages judges to instruct juries in sexual assault cases that although a victim's failure to promptly report her assault is not conclusive evidence of consent, it should be considered in judging her credibility:

### 4.13A—FAILURE TO MAKE PROMPT COMPLAINT IN CERTAIN SEXUAL OFFENSES

1. Before you may find the defendant guilty of the crime charged in this case, you must be convinced beyond a reasonable doubt that the act charged did in fact occur and that it occurred without [*name of victim*]'s consent.
2. The evidence of [*name of victim*]'s [*failure to complain*] [*delay in making a complaint*] does not necessarily make [*his*] [*her*] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the [*failure to complain*] [*delay in making a complaint*] should be considered in evaluating [*his*] [*her*] testimony and in deciding whether the act occurred [*at all*] [*with or without*] [*his*] [*her*] consent].
3. You must not consider [*name of victim*]'s [*failure to make*] [*delay in making*] a complaint as conclusive evidence that the act did not occur or that it did occur but with [*his*] [*her*] consent. [*name of victim*]'s failure to complain [*at all*] [*promptly*] [*and the nature of any explanation for that failure*] are factors bearing on the believability of [*his*] [*her*] testimony and must be considered by you in light of all the evidence in the case.<sup>26</sup>

As explained in the Advisory Committee Note, this jury instruction is based upon a Pennsylvania statute reflecting the belief that a victim's failure to immediately report a sexual assault is relevant to her credibility:

The instruction is derived from Section 3105 of the Crimes Code. It is appropriate where the evidence suggests that an alleged victim, otherwise competent and able to do so, did not promptly report a sexual offense. *While lack of a prompt complaint does not defeat the charge, it may, in an appropriate case, have some evidentiary value in assessing the complainant's credibility as to either the actual occurrence of the offense, or the complainant's consent to the act otherwise constituting it.*<sup>27</sup>

According to Pennsylvania's "prompt complaint" statute:

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant's failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.<sup>28</sup>

Giving the jury a specific legal instruction regarding the manner in which a delayed report to law enforcement should negatively impact its assessment of a victim's credibility is problematic because it gives a judicial imprimatur to the long-discredited myth that rape victims immediately tell someone of their victimization and promptly file police reports. Moreover, this Suggested Standard Jury Instruction clearly conflicts with Section 3106 of the Crimes Code,<sup>29</sup> which states:

The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. *No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.*

(Emphasis added). Notwithstanding this clear statutory language that judges should not give juries special instructions about how to view a sexual assault victim's testimony, Pennsylvania judges routinely violate this law by giving a Suggested Standard Jury Instruction about adverse inferences to victim credibility when the victim did not make a prompt complaint to law enforcement.

## CONCLUSION

Although sexual assault cases may seem challenging to prosecute, Pennsylvania prosecutors have a new weapon in their arsenal. The use of expert witnesses to explain sexual assault dynamics and common victim behaviors can help educate judges and juries, dispel myths, undercut defense strategies, and lay a strong foundation for persuasive, common-sense arguments that can help juries hold offenders accountable. By carefully selecting well-qualified experts and using their testimony to replace rape myths and misconceptions with facts about how sexual assault victims commonly behave, prosecutors can help jurors make better decisions in these cases based on the facts, the law, and an accurate understanding of sexual violence and its impact on victims.

## ENDNOTES

- 1 Jennifer Long is the Director of and Viktoria Kristiansson and Christopher Mallios are Attorney Advisors at AEquitas: The Prosecutors' Resource on Violence Against Women. The authors would like to thank Charlie Whitman, Associate Attorney Advisor at AEquitas, for her contributions. This article has been adapted from JENNIFER G. LONG, NAT'L DISTRICT ATT'Y'S ASSOC., INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR (2007), [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf).
- 2 42 PA. CONS. STAT. ANN. § 5920 (West 2012).
- 3 This statute applies to criminal prosecutions for sexual assault (criminal proceedings for an offense for which registration is required under 42 PA. CONS. STAT. ANN. § 9799.11 (West 2013) et seq. (relating to registration of sexual offenders) and for an offense under title 18, chapter 31 of the Pennsylvania Criminal Code (relating to sexual offenses)). The statute is silent regarding the admission of this expert testimony in prosecutions for intimate partner violence. Nevertheless, such testimony should be admissible in a prosecution for intimate partner sexual assault.
- 4 This new law applies to cases in which criminal charges were filed after August 28, 2012. The date of the commission of the offense is not relevant to determine applicability of the law. It therefore applies to cases in which the criminal conduct occurred before August 28, 2012 if criminal charges were filed after that date.
- 5 See, e.g., *Commonwealth v. Goetzendanner*, 679 N.E.2d 240, 243-44 (Mass. App. Ct. 1997); Cynthia Lynn Barnes, *Admissibility of Expert Testimony Concerning Domestic Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior*, 57 A.L.R.5th 315 (Oct. 2005); Gregory G. Sarno, *Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome*, 42 A.L.R.4th 879 (July 2005).
- 6 See *U.S. v. Rynning*, 47 M.J. 420, 422 (CAAF 1998) (noting that without expert testimony, a victim's counterintuitive behavior often undermines her credibility); see also Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 235 (1992) (stating "studies document the findings that most people maintain misinformation about domestic abuse, which is detrimental to their evaluation of the battering victim's credibility").
- 7 See Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review*, 18 PSYCHOL. WOMEN Q. 133 (1994); see also Mary Dodge & Edith Greene, *Juror and Expert Conceptions of Battered Women*, 6 VIOLENCE & VICTIMS 271 (1991).
- 8 See Laura E. Boesch, Bruce D. Sales, & Mary P. Koss, *Rape Trauma Experts in the Courtroom*, 4 PSYCHOL. PUB. POL'Y & L. 414, (stating "[t]his focus on the victim is not surprising because U.S. Society has a long history of holding persistent and harmful myths about rape and those who are victimized by it").
- 9 Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53(5/6) SEX ROLES 385 (Sept. 2005). For a discussion of rape myth acceptance, see also 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) (citing Martha Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOCIAL PSYCHOL. 217-230 (1980) (describing rape myth acceptance (RMA) as "the amount of stereotypic ideas people have about rape, such as that women falsely accuse men of rape, rape is not harmful, women want or enjoy rape, or women cause or deserve rape by inappropriate or risky behavior").
- 10 BEN-DAVID, *supra* note 8, at 386.
- 11 *Id.*; see also LONSWAY, *supra* note 6, at 135 (addressing the myth that only certain types of victims are raped as well as the belief in the number of false claims).
- 12 The two journal articles introduced by the State were written by British researchers Drs. Louise Ellison and Vanessa Munro. See Louise Ellison & Vanessa E. Munro, *Turning Mirrors into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 BRIT. J. CRIMINOLOGY 363 (2009); and Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 BRIT. J. CRIMINOLOGY 202 (2009).
- 13 *State v. Obeta*, 796 N.W.2d 282, 285 (2011).
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 Terri Spahr Nelson, *Module 7: Expert Witnesses*, Judge Advocate Curriculum on Reporting Sexual Assault (2006).
- 18 See, e.g., BOWMAN, *supra* note 5, at 242 (discussing expectations of victim behavior in a battering circumstance); see also Ben-David, *supra* note 8 (discussing expectations of defendant behavior).
- 19 This term includes "eye" or "ear" witnesses to the actual assault. It does not cover any individuals who may have observed the victim or defendant prior to or following the assault or any relevant witnesses related to forensic evidence.
- 20 See *Rynning*, 47 M.J. at 422 (stating "the 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") (citation omitted) (quoting *U.S. v. Pagel*, 45 M.J. 64, 68 (CAAF 1996)).
- 21 Expert testimony offered by the prosecution to explain victim behavior is not admissible in all fifty states. Therefore, it is imperative for prosecutors to consult the law in their particular jurisdictions before seeking to introduce this type of evidence. In addition, prosecutors should refer to *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S.

137 (1999); see also Kenneth Winchester Gaines, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM. J. TRIAL ADVOC. 227 (1996-1997); BARNES, *supra* note 4; SARNO, *supra* note 4.

22 42 PA. CONS. STAT. ANN. § 5920(b)(1) (West 2012).

23 *Id.*

24 *Id.*

25 Pa. SSJI (Crim.) 4.13A (2012) (“Failure to Make Prompt Complaint in Certain Sexual Offenses”).

26 *Id.*

27 *Id.* (emphasis added).

28 18 PA. CONS. STAT. ANN. § 3105 (West 2013).

29 18 PA. CONS. STAT. ANN. § 3106 (West 2013). This jury instruction is also incongruous with Pennsylvania Suggested Standard Jury Instruction 4.13B, which states: “The testimony of [*name of victim*] standing alone, if believed by you, is sufficient proof upon which to find the defendant guilty in this case. The testimony of the victim in a case such as this need not be supported by other evidence to sustain a conviction. Thus you may find the defendant guilty if the testimony of [*name of victim*] convinces you beyond a reasonable doubt that the defendant is guilty.” Pa. SSJI (Crim.) 4.13B (2005) (“Conviction Based on Victim’s Uncorroborated Testimony in Sexual Offenses--General”).

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