HIGHER EDUCATION

Dispelling Myths to More Effectively Prosecute Campus Rape

AEquitas: The Prosecutors’ Resource on Violence Against Women

SUPPORT

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AEquitas: The Prosecutors’ Resource on Violence Against Women
OBJECTIVES
◉ Make determinations consistent with facts and research, avoiding common misconceptions.
◉ Focus on the offender and identify predatory behavior.
◉ Collaborate with other allied professionals to enhance victim safety and prosecutions.

911 CALL
◉ This is a recording of a 911 call from a rape case
◉ Identifying information has been redacted
QUESTIONS

◉ What victim behaviors might become an issue at trial in this case?
◉ What arguments will the defense make based on those behaviors?

QUESTIONS
CONT’D

◉ As a result of this call, what investigative steps should occur?
◉ At trial/hearing, would this recording be more helpful to the prosecution or defense?
THE TRUTH ABOUT RAPE

* Most are non-strangers
* Rapists don’t usually use deadly weapons or cause physical injury
* Victims behave in many different ways
* False reports are a small minority of cases
* It is not the victim’s fault
CSI EFFECT

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

Honorable Donald E. Selton, National Institute of Justice http://www.ojp.usdoj.gov/nij/journals/259/csi-effect.html#note1

UNDETECTED RAPISTS

*120 of 1,882 men self-reported sexual acts met legal definitions of rape or attempted rape but were never prosecutor
*97 out of 120 admitted to drug or alcohol-facilitated sexual assault
*76 of the 120 averaged 5.8 rapes each

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

THE UNDETECTED RAPIST

Dr. David Lisak
NONTRADITIONAL WEAPONS

- Premeditation
- Planning
- Betrayal of trust
- Manipulation
- Deceit
- Alcohol

THINGS THAT ARE DIFFERENT FOR SEX OFFENDERS

- Garner trust
- Make suspicions uncomfortable
- Blame others
- Become the victim
- Deny
- Camouflage
- Consensual relationships

OFFENDERS

Create in victims the symptoms later used against them:

- Deception
- Emotional instability
- Memory problems
- Substance abuse
OFFENDER IS COUNTING ON SOCIETY BELIEVING
* She was dressed “provocatively”
* She is promiscuous
* She wants attention
* She’s a gold-digger
* She made it up to “cover” for cheating on her boyfriend
* “Buyer’s remorse”

OVERCOMING MYTHS
Sexual violence is NOT a result of:
● “Low self-esteem”
● One’s own victimization
● “Boys will be boys”
● “Curiosity”
● Sexual identity problems
● Drinking or drugs

OVERCOMING MYTHS
* Masochism
  * Victim did NOT enjoy it or want it
* Participation
  * Victim did NOT ask for it
* Fabrication
  * Victim is NOT lying or exaggerating

Sarah Ben-David & Ofra Schneider, Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance, 53 (5/6) SEX ROLES 385 (Sept. 2005)
REALITY: VICTIMS MAY...
- Freeze during the assault
- Not resist “fiercely”
- Delay reporting
- Disclose partially
- Decide not to cooperate
- Maintain contact with assailant

MYTHS IMPACT VICTIMS TOO
Almost ½ 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.

Fisher, Cullen, & Turner (2000)

DISCLOSURE
- It is difficult
- Sets in motion a daunting process
- Most victims never report to authorities
**COMBATTING THE MYTHS**

- Educate yourself and others
- Speak to allied professionals, including advocates
- Do not let myths and misconceptions impact the case
- Consider the use of experts at trial

**VICTIM-CENTERED**

An approach to achieving justice based on an awareness of the central role victim/survivors play in the process and consideration of their needs throughout the process

**OFFENDER-FOCUSED**

- Acknowledgment that offenders purposefully, knowingly and intentionally target victims whom they believe they can successfully assault
- Keeps the focus on the actions, behaviors, characteristics, and intent of the offender
### CAMPUS ISSUES

- Alcohol-facilitated
- Drug-facilitated
- Privacy issues
- Social media
- Greek life
- Residential life
- Athletics
- Cultural/diversity issues
- Rural campuses (town/gown)
- Title IX
- Clery Act
- Coordination with local law enforcement
- Student honor council
- Experts
- FERPA
- Conflict of interest

#### Campus Relationships

- Victim
- Campus Admin.
- Campus Police Officer
- Victim Advocate
- Professors
- Dean
- Prosecutor
- Local LEO
- Forensic Medical Examiner
ALCOHOL-FACILITATED SEXUAL ASSAULT OR...

WHO NEEDS FORCE WHEN YOU HAVE ALCOHOL

More than 97,000 students between the ages of 18 and 24 are victims of alcohol-related sexual assault or date rape.

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


RESOURCES


PROVING THE CRIME

Tips and Tools to Better Investigate and Build Cases

2-STEP ANALYSIS

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

Can you prove the victim’s allegations?

STEP 1

Is it rape?
STATUTORY CONSTRUCTION

• Force
• Threats
• Coercion
• Physically Incapacitated
• Surreptitious use of alcohol or drugs

STEP 2

Can you prove the rape in a court of law?

PREPARATION

You must devote extra time to these cases

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OBJECTIVES

- Establish victim credibility
- Document offender’s actions
- Corroborate
- Combat common defenses

VICTIM CREDIBILITY

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?
INCONSISTENCIES

- Neurobiology of trauma may cause inconsistencies in statements
- Victim may be embarrassed
- Victim may fear getting in trouble
- Different interviews for different purposes

DETERMINING CREDIBILITY

- Does the victim have any motive to lie?
- Has she been consistent about the sexual assault?
- Does the victim’s demeanor make sense?
- Have you been able to corroborate other details?

USE COMMON SENSE

CORROBORATION

May be more challenging given that there may be a delay between sexual assault & initiation of investigation, but there is always something.
**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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**EVIDENCE COLLECTION**

<table>
<thead>
<tr>
<th>CRIME SCENE</th>
<th>OTHER PHYSICAL EVIDENCE</th>
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</thead>
<tbody>
<tr>
<td>Blood</td>
<td>Surveillance tapes</td>
</tr>
<tr>
<td>Hair</td>
<td>Social media, cell phones</td>
</tr>
<tr>
<td>Urine</td>
<td>Glasses, punch bowls</td>
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<td>Vomit</td>
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<td>Semen</td>
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<td>Clothing</td>
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DEFINING THE ISSUES

It’s not: What did the victim do?

It is: What did the accused do?

PREDATORY BEHAVIOR

Accused’s intent → Victim selection process → Access, planning, manipulation, grooming, deception, isolation, etc. → Exit strategy

OVERCOMING COMMON DEFENSES

Consent

Drunk sex?
WHAT IS CONSENT?

* Intelligent, knowing, and voluntary, not coerced
* Not deemed or construed to mean failure by the alleged victim to offer physical resistance
* Check your state law

LOOK AT THE TOTALITY OF THE CIRCUMSTANCES

PREDATORY BEHAVIOR

* Invited her to the party
* Provided her with drinks or drugs
* Encouraged her to drink more
* Separated her from her friends
* Brought her to his room
* Offered to drive/accompany her home alone
NO MOTIVE TO LIE

Victim disclosure involves
- Telling complete strangers about the most private parts of her life (over and over and over again)
- SANE/SAFE examination
- Potentially admitting to illegal activity
- Deposition
- Cross-examination

Impaired judgment makes a person responsible for the natural consequences of her/his actions – not the illegal consequences of someone else’s actions

PRETEXT PHONE CALLS

- Plan carefully
- Make sure the victim can handle it
- What can you say?
  - Victim has a sexually transmitted disease (STD)
  - I really enjoyed that drug you gave me, what was it?
  - I really enjoyed last night...
Always attempt an interview

Did he know she was drunk?

Why does he think the encounter was consensual (if he does)?

**BUT THE BIGGEST CHALLENGE . . .**

**. . . HE WAS DRUNK TOO**

“So, why wasn’t it just drunk sex?”
Isn’t his intoxication a defense?
NO INTOXICATION DEFENSE: UPHELD

- United State Supreme Court upheld prohibition of defense of voluntary intoxication for specific intent crimes
- Does not violate due process
- Not considered a “fundamental principle of justice”


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)

BLAME v. EXCUSE

<table>
<thead>
<tr>
<th>VICTIM DRINKING</th>
<th>PERPETRATOR DRINKING</th>
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</thead>
</table>
| She deserved it, what did she expect? | Can’t hold him responsible, poor dumb drunk guy?

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FACTORS

* Did victim vomit? Urinate?
* Could victim walk? Talk?
* Did victim have to be helped with physical tasks? Who undressed her?
* Did accused carry victim?
* Was victim conscious?
* Sexual acts and position

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TRIAL

Recreating the reality of the crime

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PROTECT THE VICTIM

* Motions in limine
* Rape shield
* Motions to quash
* Remain offender-focused
  * 404(b) or Williams Rule motions when appropriate
**THEME**

Consistent theme
- Judge and jury
- Pre-trial motions through closing

Examples
- Offender as predator
- Drugs/alcohol as weapon
- “She thought he was a nice guy, until he wasn’t”
- Wolf in sheep’s clothing

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**WITNESSES**

Direct examination of victim
- Honesty is the best policy
- Sensory details to corroborate and paint a picture
- Second and third directs

Cross examination
- Prepare the victim and witnesses

Expert witnesses
- Lack of injury
- Effects of intoxication
- Victim behavior

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**VICTIM CREDIBILITY**

_U.S. V. PAGEL, 45 M.J. 64, 68 (C.A.A.F. 1996)_

“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.”
AVOIDING FRYE OR DAUBERT?
P E O P L E  V. G R A Y , 1 8 7  C A L . A P P . 3 D 2 1 3 , 2 1 7 (1986)

“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”

GOING FORWARD

• Ensure expectations are consistent with facts and research
• Recognize alcohol as a powerful weapon
• Corroborate every possible detail
• Focus on the offender
• Ensure victim safety throughout the process
• Collaborate with other allied professionals

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